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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

TUOLUMNE COUNTY CITIZENS FOR RESPONSIBLE GROWTH, INC., Plaintiff and Appellant, v. CITY OF SONORA et al., Defendants and Respondents; CALIFORNIA GOLD DEVELOPMENT CORP. et al., Real Parties in Interest and Respondents.	F051508 (Super. Ct. No. CV51552) **OPINION**

APPEAL from a judgment of the Superior Court of Tuolumne County. James A. Boscoe, Judge.

Law Office of J. William Yeates, J. William Yeates, Keith G. Wagner and Jason R. Flanders for Plaintiff and Appellant.

No appearance for Defendants and Respondents.

Sheppard, Mullin, Richter & Hampton, Philip F. Atkins-Pattenson, Arthur J. Friedman and Ella Foley-Gannon for Real Parties in Interest and Respondents.

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*Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts II.-VII. of DISCUSSION.

This appeal concerns a proposal to construct a home improvement center in the City of Sonora. A local citizens' organization challenged the approval of the project and the adoption of a mitigated negative declaration by alleging violations of the California Environmental Quality Act (CEQA)[1] and local ordinances. The superior court denied the organization's petition for a writ of mandate.

The organization appealed, arguing that the whole of the action constituting a single CEQA project was segmented when the realignment of an adjacent road was not treated as part of the home improvement center project. This case is similar to *Plan for Arcadia, Inc. v. City Council of Arcadia* (1974) 42 Cal.App.3d 712 (*Plan for Arcadia*), where the court found that the construction of (i) a shopping center, (ii) a parking lot, and (iii) improvements to an adjacent street were all part of a single CEQA project. Following the opinion in that case, we conclude as a matter of law that the construction of the home improvement center and the realignment of the road constitute a single CEQA project. As a result, the combined activity should have been analyzed in the same initial environmental study.

Therefore, judgment is reversed and the matter remanded for the issuance of a writ of mandate.

FACTS AND PROCEEDINGS

Parties

Plaintiff and appellant Tuolumne County Citizens for Responsible Growth, Inc. (Responsible Growth) alleged that it is a nonprofit public benefit corporation organized under California law and that its mission includes protecting the greater Sonora, California area's rural quality of life by, among other things, seeking the enforcement of environmental protection laws.

[1]Public Resources Code section 21000 et seq.

Defendants and respondents City of Sonora, the City Council of the City of Sonora, and the Planning Commission of the City of Sonora (collectively, City) approved the project application for the proposed home improvement center.

Respondents and real parties in interest are: (1) California Gold Development Corp., the entity that applied to City for approval of the project (sometimes referred to as applicant); (2) Ray A. Sanguinetti Land Co., L.P.; (3) Sonora Developers, LLC; and (4) Lowe's HIW, Inc., a Washington corporation. For purposes of this opinion, we will refer to the real parties in interest collectively as Lowe's.

Project

In December 2004, Lowe's submitted to City design review, site plan review, and landscape review applications for a new Lowe's home improvement center.

The site for the proposed Lowe's home improvement center is 10.74 acres of land located to the west of Old Wards Ferry Road and south of the Sierra Railroad tracks. A Wal-Mart Store is located on the eastern side of Old Wards Ferry Road. The "approved project is to include the construction of a 111,196 square foot building (94,000 square feet of merchandising area), and 27,720 square foot garden center, along with associated parking areas, driveways, landscaping, and off-site street improvements, as illustrated in the revised site plan submitted on May 16, 2005 …."[2]

The initial study indicated the site would be accessed by two driveways connected to Old Wards Ferry Road, "one on the north end of the site near the Sierra Railroad tracks, and one on the south end, adjacent to the State Highway 108 right-of-way, to primarily serve truck traffic needs."

The initial study also stated that "Old Wards Ferry Road will be realigned across the adjacent parcel to the north to create a four way intersection with Sanguinetti and Greenley Roads, in accordance with local and regional street and road improvements

[2]This description of the project is from an attachment to a memorandum the community development director prepared for the June 30, 2005, special meeting of City's planning commission.

previously identified by the City [of Sonora] and the Tuolumne County Transportation Commission." Moving a portion of Old Wards Ferry Road to the west, so that it aligns with Greenley Road and creates a four-way intersection at Sanguinetti Road, would require that Old Wards Ferry Road cross the Sierra Railroad to the west of the existing crossing.

On March 11, 2005, City published a notice of intent to adopt a mitigated negative declaration that stated a 20-day public review period began on March 14, 2005, and ended on April 3, 2005. City circulated a proposed initial study, mitigated negative declaration, and mitigation monitoring and reporting plan.

After receiving comments from the public and additional information from Lowe's, City revised the mitigated negative declaration. City determined that recirculation of the final mitigated negative declaration was not necessary.

At its June 30, 2005, special meeting, the planning commission of City approved the application for design and site plan review submitted for the home improvement center project and adopted the mitigated negative declaration. The approval was subject to a number of conditions, some of which concerned Old Wards Ferry Road. One of the conditions required an encroachment plan, approved by the city engineer, for access to and from the site using Old Wards Ferry Road. Condition No. 4 provided:

> "In addition to the encroachment plan to Old Wards Ferry Road, and associated improvements, the following street and road improvements shall also be completed prior to the commencement of business operations by Lowe's: [¶] … Realignment of the intersection of Old Wards Ferry/Sanguinetti/Greenley Roads, along with relocation of the Sierra Railroad crossing of Old Wards Ferry Road to P[ublic Utility Commission] standards. [¶] … Signalization at the intersection of Old Wards Ferry/Sanguinetti/Greenley Roads, linked to the signal at Mono Way/Greenley Road. [¶] … An offer of dedication of right-of-way across the north side of the project site related to the City's study of an alternative east-west route. [¶] … A financial contribution to the County of Tuolumne of twelve percent (12%) of costs for restriping, signing and widening associated with the Mono Way/Sanguinetti Loop intersection."

On July 11, 2005, Responsible Growth appealed the planning commission's approval of the home improvement center project to the city council. The city council held a special meeting on July 20, 2005, to consider the appeal. The matter was continued to July 28, 2005. On that date, the city council denied Responsible Growth's appeal, adopted the revised mitigated negative declaration, and approved the home improvement center project.

City filed a notice of determination on August 1, 2005. Later that month, Responsible Growth filed a petition for writ of mandate that alleged the approval of the project for the construction of a Lowe's home improvement center violated CEQA and local ordinances.

On May 1, 2006, the superior court held a hearing on the petition for writ of mandate. In August 2006, the superior court signed and filed a 26-page statement of decision that denied the petition in all respects. Judgment in favor of City and Lowe's was filed on August 24, 2006. Responsible Growth filed a timely notice of appeal in October 2006.

Requests for Judicial Notice

Responsible Growth's first motion requesting judicial notice, filed on February 27, 2007, includes four documents: exhibits 1 through 4. Exhibit 1 is chapter 17.42 of the Sonora Municipal Code, titled "Parking and Loading." (See part VII.A., *post*.) Exhibits 2 through 4 are documents related to the realignment of a portion of Old Wards Ferry Road.

Lowe's joint motion for judicial notice filed on April 9, 2007, includes eight documents: exhibits A through H. Exhibit C is chapter 17.42 of the Sonora Municipal Code, which also is exhibit 1 in Responsible Growth's motion.

Responsible Growth's opposition was filed on April 17, 2007, and does not oppose judicial notice of exhibits A through G, but does oppose judicial notice of exhibit

H, a resolution of the Tuolumne County Transportation Council, which did not exist at the time City approved Lowe's proposed project.[3]

We grant Responsible Growth's first motion requesting judicial notice and Lowe's joint motion for judicial notice so that we have a better picture of the issues that will confront the superior court on remand. Responsible Growth's second motion requesting judicial notice filed on July 12, 2007, is denied.

DISCUSSION

I. Scope of the Project

A. Contentions of the parties

The parties disagree over whether the proposed home improvement center and the realignment of Old Wards Ferry Road are part of a single "project" for purposes of CEQA. (See Pub. Resources Code, § 21065 [definition of "project"]; Cal. Code Regs., tit. 14, § 15378, subd. (a) [same].)[4] Responsible Growth contends the two endeavors are part of the whole of a single CEQA project, and City thus violated CEQA by finding it was unnecessary to consider the realignment of Old Wards Ferry Road in the mitigated negative declaration prepared for the home improvement center project.

Lowe's disagrees. It contends that (1) City properly evaluated the whole of the home improvement center project and (2) substantial evidence shows that the road realignment project was a long-standing, separate City project. Furthermore, according to Lowe's, City's determination does not mean environmental review of the road realignment project has been avoided because that project is undergoing a separate CEQA review.

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[3]The superior court took judicial notice of this resolution and, as a result, it already was part of the appellate record.

[4]Further references to California Code of Regulations, title 14, section 15000 et seq. shall be to the Guidelines.

B. Statutory and regulatory provisions that define "project"

CEQA requires public agencies to undertake an environmental review of proposed projects that require their discretionary approval. (Pub. Resources Code, § 21080, subd. (a).) Consequently, the determination of the scope of the project is an important step in complying with the mandates of CEQA.

CEQA broadly defines a "project" as "an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and … [¶] … [¶] … that involves the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies." (Pub. Resources Code, § 21065.)

The statutory definition is augmented by the Guidelines, which define a "project" as "*the whole of an action*, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment …." (Guidelines, § 15378, subd. (a), italics added; see Remy et al., Guide to the Cal. Environmental Quality Act (CEQA) (10th ed. 1999) pp. 75-77 (Remy) ["whole of an action" requirement].) "The term 'project' refers to the activity which is being approved and which may be subject to several discretionary approvals by governmental agencies. The term 'project' does not mean each separate governmental approval." (Guidelines, § 15378, subd. (c).)

The scope of the environmental review conducted for the initial study must include the entire project. Specifically, "[a]ll phases of project planning, implementation, and operation must be considered in the initial study of the project." (Guidelines, § 15063, subd. (a)(1).)

C. Policies that influence the definition of a project

The California Supreme Court has considered how to interpret the word "project" and concluded that CEQA is "to be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." (*Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 259,

disapproved of on other grounds in *Kowis v. Howard* (1992) 3 Cal.4th 888, 896-897.) Based on this guidance from the California Supreme Court and the policies identified by the Legislature in Public Resources Code sections 21000 and 21001, the Court of Appeal has given the term "project" a broad interpretation and application to maximize protection of the environment. (*Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, 1189; see *Friends of the Sierra Railroad v. Tuolumne Park & Recreation Dist.* (2007) 147 Cal.App.4th 643, 653 [this court stated "CEQA's conception of a project is broad"].) This broad interpretation ensures that "the requirements of CEQA 'cannot be avoided by chopping up proposed projects into bite-size pieces' which, when taken individually, may have no significant adverse effect on the environment ([*Plan for Arcadia, Inc., supra*,] 42 Cal.App.3d 712, 726) …." (*Lake County Energy Council v. County of Lake* (1977) 70 Cal.App.3d 851, 854.)

D. Question of fact or question of law

A fundamental dispute between the parties is whether City's decision about the scope of the home improvement center project is reviewed as a question of fact or as a question of law. Lowe's argues that the question is factual in nature and, thus, reviewed under the substantial evidence standard.

It is well-established that "[w]hether an activity is a project is an issue of law that can be decided on undisputed data in the record on appeal. [Citation.]" (*Muzzy Ranch Co. v. Solano County Airport Land Use Com.* (2007) 41 Cal.4th 372, 382; see *Friends of the Sierra Railroad v. Tuolumne Park & Recreation Dist., supra*, 147 Cal.App.4th at p. 653.) That proposition, however, does not answer a preliminary question.

Before the question whether an *activity* is a *project* can be addressed, the question concerning which acts to include and exclude from the scope of the *activity* must be answered.[5] Which acts, that is, constitute the "whole of an action" for purposes of

[5]We have italicized words in this sentence to emphasize that they are statutory terms. (See Pub. Resources Code, § 21065.)

determining the scope of a potential project? (Guidelines, § 15378, subd. (a) [term "project" encompasses "whole of an action" affecting environment].)

A number of published decisions have stated that the question whether an activity is a project is one of law subject to independent review by an appellate court. (E.g., *Association for a Cleaner Environment v. Yosemite Community College Dist.* (2004) 116 Cal.App.4th 629, 637 (*ACE*); *Black Property Owners Assn. v. City of Berkeley* (1994) 22 Cal.App.4th 974, 984 ["[w]hether a particular activity constitutes a project in the first instance is a question of law"].)

In contrast, it appears that no published opinion has yet addressed explicitly the question whether a determination of the scope of an activity is reviewed as either a question of law or a question of fact. This court has, however, ruled by implication that the question is one of law. (*ACE, supra,* 116 Cal.App.4th at pp. 637-638.)

In *ACE*, we addressed "what actions should be considered as part of the potential [CEQA] project" in a case involving the closure of a community college's shooting range. (*ACE, supra,* 116 Cal.App.4th at p. 638.) We determined that the closure and removal of the shooting range, the cleanup activity, and the transfer of the operations previously conducted there to other facilities were all part of a single, coordinated endeavor undertaken by the community college. (*Id*. at p. 639.) As a result, we concluded that those acts were part of "the whole of an action" by the community college for purposes of Guidelines section 15378. (*ACE*, *supra*, at pp. 638-639.) We reached this conclusion based on an independent review of the evidence in the record. We did not apply the substantial evidence test to the agency's determination or otherwise defer to its determination. (See *id*. at pp. 637-639.)

Accordingly, absent contrary authority, we take the same approach taken in *ACE* and conclude that the question concerning which acts constitute the "whole of an action" for purposes of Guidelines section 15378 is a question of law that appellate courts independently decide based on the undisputed facts in the record.

E. Undisputed facts in the record

Lowe's has not argued explicitly that there are insufficient undisputed facts in the record for this court to determine the scope of the whole of its action as a matter of law. Nevertheless, we will treat such an argument as implicit in Lowe's position that a question of fact was resolved by City.

F. Scope of the home improvement center project

The parties approach the scope of the home improvement center project from different perspectives. Responsible Growth emphasizes the "whole of an action" language in Guidelines section 15378 and the connections between the home improvement center project and the road realignment. In contrast, Lowe's emphasizes the age and historical independence of the plan to realign Old Wards Ferry Road.

1. Case law concerning building projects and adjacent roadwork

We begin by comparing the facts of this case to the facts of a case with significant similarities—*Plan for Arcadia, Inc., supra*, 42 Cal.App.3d 712, where the Court of Appeal addressed whether the construction of a shopping center, a parking lot, and improvements to an adjacent street were all part of a single CEQA project. The court stated it was clear "that the shopping center and parking lot projects together with the widening of the southern portion of Baldwin Avenue are related to each other and that in assessing their environmental impact they should be regarded as a single project under [CEQA]." (*Plan for Arcadia, supra*, 42 Cal.App.3d at p. 726.) In contrast, the court also determined that the widening of the northern portion of Baldwin Avenue was a separate CEQA project. (*Id*. at pp. 724-725.) Consequently, in this case, we examine whether the road realignment is more like the widening of the northern portion of Baldwin Avenue or the widening of the southern portion.

In the 1960's, the City of Arcadia determined that the completion of the Foothill Freeway would cause Baldwin Avenue to receive more traffic and that, eventually, it would need to be improved to safely accommodate the increased traffic. (*Plan for Arcadia, supra*, 42 Cal.App.3d at p. 720.) In 1970, the developer applied for a zoning

change to allow the construction of a major regional shopping center, Fashion Park. (*Id*. at p. 718.) The city's voters approved the zoning change in April 1971. "When the Fashion Park applications were under consideration the city determined that additional traffic generated by the shopping center could be accommodated by the widening [of Baldwin Avenue] already requested because of the freeway." (*Id*. at p. 720.) The city saved itself part of the cost of widening the avenue by requiring the developer to commit itself to paying for widening the portion adjacent to the shopping center—that is, the southern portion. (*Ibid*.) In March 1972, the city council included the widening of the northern portion in a six-year capital improvement plan and subsequently conducted a separate environmental review of that part of the widening of Baldwin Avenue. (*Id*. at pp. 720-721.)

In *Plan for Arcadia*, the Court of Appeal referenced two facts to support the conclusion that the widening of the northern portion of Baldwin Avenue was not part of the project that included building the shopping center and parking lot and widening the southern portion of Baldwin Avenue. First, the city had determined long before the application for the zoning change that the completion of the freeway would require the widening of Baldwin Avenue. Second, the widening of the northern portion was a municipal capital improvement project, not a private project. (*Plan for Arcadia*, *supra*, 42 Cal.App.3d at p. 724.)

In contrast to these two facts, the widening of the southern portion of Baldwin Avenue "was a condition of the Fashion Park development …." (*Plan for Arcadia*, *supra*, 42 Cal.App.3d at p. 723, fn. 5.) Also, the developer had committed to paying for it. (*Id*. at p. 720.) Consequently, the court concluded that the building of the shopping center and parking lot and the widening of the southern portion of Baldwin Avenue were "related to each other" and "should be regarded as a single project" under CEQA. (*Plan for Arcadia*, *supra*, at p. 726.)

The realignment of Old Wards Ferry Road is similar to the widening of the southern portion of Baldwin Avenue in two important ways. First, the approval of the

home improvement center project is conditioned upon completion of the road realignment. Second, Lowe's has committed to funding and completing the road realignment.[6] These two similarities are more significant than the one similarity between the realignment of Old Wards Ferry Road and the widening of the northern portion of Baldwin Avenue—the long-existing plan for the work. Consequently, there is a strong connection between the road realignment and the completion of the proposed home improvement center. It follows that our decision will be consistent with *Plan for Arcadia* only if we conclude that the home improvement center project and the road realignment are part of a single CEQA project. (Cf. *Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151 [acts related to development of shopping center were single project; use of two negative declarations overturned on appeal].)

2. Application of general principles

Before following the result reached in *Plan for Arcadia*, we test that result by applying some of the general principles used to determine whether a particular act is part of the activity that constitutes a CEQA project.

One way to evaluate which acts are part of a project is to examine how closely related the acts are to the overall objective of the project. The relationship between the particular act and the remainder of the project is sufficiently close when the proposed physical act is among the "various steps which taken together obtain an objective." (Robie et al., Cal. Civil Practice–Environmental Litigation (2007) § 8.7.)

In this case, Lowe's objective is to open and operate a home improvement center in Sonora. The commencement of business operations at the site is conditioned upon the completion of the realignment of Old Wards Ferry Road. As a result, the road realignment is a step that Lowe's must take to achieve its objective. In this regard, we

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[6]These facts are undisputed and, together with the other undisputed facts, allow us to determine the scope of the project as a matter of law.

note that Lowe's has cited no case or other authority for the proposition that a condition or mitigation measure is not part of the project to which it is attached.

In addition, the road realignment and the proposed home improvement center are related in (1) time, (2) physical location and (3) the entity undertaking the action. As to timing, the road alignment must be completed before business operations at the home improvement center may begin. With respect to the physical location, the activities are next to one another. Furthermore, the realignment of the road will be undertaken by the project proponents,[7] which also will be making other changes to Old Wards Ferry Road. When two acts are closely connected in time and location, the potential for related physical changes to the environment in that location is greater than otherwise. Thus, the need for a single review of the environmental impact of the two acts is greater. Also, when the same entity undertakes both matters, it increases the likelihood that the matters are related—that is, are part of a larger whole.

In summary, the various connections between the road realignment and the proposed home improvement center compel us to conclude that they are related acts that constitute a single CEQA project.

3. Separate and independent

City has long recognized the advantages of aligning Old Wards Ferry Road with Greenley Road so that a four-way intersection is created at Sanguinetti Road. City's community development director testified at the July 28, 2005, city council hearing that "it has been a separate and distinct project for over twenty years, as far as it relates to the City." He further testified that the realignment is shown in the 1984 general plan circulation element and in City's redevelopment plan as a regional road improvement.

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[7]Lowe's appellate brief states that the only connection between the home improvement center project and the road realignment "arises from the fact that the developer agreed to construct this longstanding road realignment project, once it is approved by the City and the PUC [California Public Utilities Commission], in lieu of paying the City's traffic mitigation fees for the [home improvement center] Project." Therefore, the parties do not dispute who will do the physical work associated with the road realignment.

Also, "this intersection and roadway realignment has been part of our local road program under the traffic impact fee program for quite sometime …."

Lowe's contends the foregoing testimony is part of the substantial evidence that supports City's finding that the road realignment is separate and independent from the home improvement center project.[8] Lowe's presents three arguments to support this position.

First, Lowe's contends the developer only sought approval to construct the Lowe's facility and did not seek approval of the road realignment. The Guidelines, however, establish that the need for separate approvals does not sever all of the connections between the two acts. (See Guidelines, § 15378, subd. (c) [separate governmental approvals do not create separate projects].) The acts remained connected, notwithstanding the separate approvals, because the road realignment is a condition that must be completed by the developer of the home improvement center before that center may commence business.

Second, Lowe's argues the road realignment is separate because it is not necessitated by the home improvement center project. Lowe's asserts the need for the road realignment was caused by regional traffic conditions and cumulative impacts associated with growth and development throughout Sonora. Case law requires that the term "project" be given a broad interpretation and application. We reject the position that a CEQA project excludes an activity *that actually will be undertaken* if the need for that activity was not fully attributable to the project as originally proposed. The "necessitated by" test is best applied in cases that consider whether a potential future action is sufficiently certain to occur to justify its inclusion in the scope of the activity that might constitute a CEQA project. (See *Friends of the Sierra Railroad v. Tuolumne Park & Recreation Dist.*, *supra*, 147 Cal.App.4th at p. 659.) When the situation involves action

[8]Consistent with our earlier decisions regarding the role of an appellate court in ascertaining the scope of a project, we conclude that the issues of separateness and independence present issues that can be determined as a matter of law from the undisputed facts of this case.

that actually will be taken to complete the project as proposed, the "necessitated by" test is a far too narrow standard for determining the scope of the project. For example, it is contrary to the broader "related to" language used by the Court of Appeal in *Plan for Arcadia*, *supra*, 42 Cal.App.3d at page 726, and the "whole of an action" language used in Guidelines section 15378. Also, it is inconsistent with the inquiry into whether the act is a step taken towards the achievement of an objective—that is, whether the act is part of a coordinated endeavor. (See *ACE*, *supra*, 116 Cal.App.4th at p. 639 [series of acts all part of single, coordinated endeavor].)

Third, Lowe's contends that the home improvement center project and the road realignment "are not integral," because they could "be implemented independently of each other." Based on this contention, Lowe's concludes that the two undertakings are not part of a single CEQA project. We reject this argument for two reasons.

First, Lowe's has misstated how the concept of integral parts is used to determine the scope of a CEQA project. We accept the following as an accurate statement of law: "Courts have considered separate activities as one CEQA project and required them to be reviewed together where … both activities are integral parts of the same project. (*No Oil, Inc. v. City of Los Angeles* (1987) 196 Cal.App.3d 223.)" (*Sierra Club v. West Side Irrigation Dist.* (2005) 128 Cal.App.4th 690, 698 (*West Side Irrigation*).) Thus, when one activity is an integral part of another activity, the combined activities are within the scope of the same CEQA project. Lowe's goes astray, however, by inverting this principle. The idea that all integral activities are part of the same CEQA project does not establish that *only* integral activities are part of the same CEQA project.[9]

Second, we disagree with Lowe's definition of the term "integral." According to Lowe's appellate brief, acts "are not integral" if they "can be implemented independently of each other." Lowe's definition appears to be taken from language used by the Court

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[9]Stated more generally, Lowe's error in logic was treating a sufficient condition as a necessary condition.

of Appeal in *West Side Irrigation Dist., supra*, 128 Cal.App.4th 690. In that case, a city entered into agreements for the assignment of water rights with two different districts. The court concluded the agreements were not part of the same CEQA project and supported its conclusion by stating:

> "The initial studies stated the assignments were not interrelated and *could be implemented independently of each other*. Neither was contingent on the other. The assignments involve separate water rights; they transfer different amounts of water; and they occur under separately negotiated agreements that contain different terms from each other." (*West Side Irrigation, supra*, 128 Cal.App.4th at pp. 699-700, italics added.)

Lowe's reliance on the italicized language has many flaws. The sentence containing the italicized language, for example, does not purport to define the term "integral." That term is defined as "of, relating to, or serving to form a whole : essential to completeness …." (Webster's 3d New Internat. Dict. (1986) p. 1173.) Based on this definition's reference to "a whole," we conclude that the question whether an activity is an "integral" part of a CEQA project merely restates the question whether that activity is part of the "whole of an action" for purposes of Guidelines section 15378, subdivision (a).[10]

Another flaw in using the italicized language to define "integral" is the phrase "could be." This phrase, it seems to us, places too much importance on theoretical possibilities at the expense of what actually is happening. In other words, the possibility that two acts could be taken independently of each other is not as important as whether they actually will be implemented independently of each other.

Theoretical independence is not a good reason for segmenting the environmental analysis of the two matters. Doing so runs the risk that some environmental impacts produced by the way the two matters combine or interact might not be analyzed in the separate environmental reviews. Furthermore, if the two matters are analyzed in

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[10] An implication of this conclusion is that the courts have not used the term "integral" to narrow, by judicial fiat, the Guidelines' definition of the term "project."

sequence (which was the situation here) and the combined or interactive environmental effects are not fully recognized until the review of the second matter, the opportunity to implement effective mitigation measures as part of the first matter may be lost. This could result in mitigation measures being adopted in the second matter that are less effective than what would have been adopted if the matters had been analyzed as a single project.

An additional flaw in using the phrase "could be implemented independently of each other" as a complete definition of the term "integral" is that the sentence from which it was taken mentioned a second factor—whether the activities were "interrelated." (*West Side Irrigation*, *supra*, 128 Cal.App.4th at p. 699; cf. *Plan for Arcadia*, *supra*, 42 Cal.App.3d at p. 726 [using "related to" to describe activity that was part of CEQA project].) Similarly, the paragraph containing the italicized language mentioned additional factors relevant to the court's decision. The court explicitly recognized that the implementation of one assignment was not contingent upon the implementation of the other. (*West Side Irrigation*, *supra*, at p. 699.)

In summary, we recognize that it was theoretically possible that the home improvement center project could have been completed without the completion of the road realignment. Nevertheless, that project cannot be completed and opened legally without the completion of the road realignment. Their independence was brought to an end when the road realignment was added as a condition to the approval of the home improvement center project. (See *Plan for Arcadia*, *supra*, 42 Cal.App.3d at p. 726 [referencing factual and legal separateness of widening northern portion of Baldwin Avenue].) At that point in time, the independent existence of the two actions ceased for purposes of CEQA and the road realignment became "a contemplated future part of" completing the home improvement center. (*West Side Irrigation Dist.*, *supra*, 128 Cal.App.4th at p. 699.)

4. Conclusion

The undisputed facts in the record show that the realignment of Old Wards Ferry Road and the home improvement center project are part of the whole of the action to be undertaken by Lowe's. Stated otherwise, the home improvement center project is dependent upon, not independent of, the road realignment because the opening of the home improvement center was conditioned upon the completion of the road realignment. Therefore, we conclude the two acts are part of a single project for purposes of CEQA. City violated CEQA by treating them as separate projects subject to separate environmental reviews.

On remand, City and Lowe's must comply with the following requirement: "All phases of project planning, implementation, and operation must be considered in the initial study of the project." (Guidelines, § 15063, subd. (a)(1).)

II. Review by Responsible and Trustee Agencies*

A. Contentions of the Parties

Responsible Growth asserts that City violated CEQA by not providing proper notice to responsible and trustee agencies. Specifically, Responsible Growth contends that City was required to (1) send copies of the draft mitigated negative declaration to the State Clearinghouse for distribution to state agencies and (2) adopt a public review period of not less than 30 days. Responsible Growth further asserts that the PUC and the California Department of Fish and Game (Fish and Game) are agencies that should have been notified.

Lowe's contends that there is no substantial evidence in the record that supports the determination that the PUC is a responsible agency or that Fish and Game is a trustee

*See footnote, *ante*, page 1.

agency. Lowe's position is premised on its view that the home improvement center project does not include the realignment of Old Wards Ferry Road.[11]

B. The PUC Is a Responsible Agency

For purposes of CEQA, a responsible agency is a public agency that has discretionary approval power over some part of the project. (Pub. Resources Code, § 21069 ["responsible agency" defined]; Guidelines, § 15381 [same]; *Delta Wetlands Properties v. County of San Joaquin* (2004) 121 Cal.App.4th 128, 145.)

Earlier we determined that the scope of the CEQA project includes the realignment of Old Wards Ferry Road. That realignment will require that the crossing of the Sierra Railroad be moved. Moving the crossing requires approval from the PUC. It follows that the PUC is a responsible agency for purposes of the CEQA project presented in this case.

Consequently, City violated CEQA by not submitting the proposed mitigated negative declaration to the State Clearinghouse in accordance with Public Resources Code section 21082.1, subdivision (c) and Guidelines section 15073. In addition, City violated CEQA by not adopting a public review period of at least 30 days in accordance with Guidelines sections 15073, subdivision (a), and 15105, subdivision (b).

C. Fish and Game Is a Trustee Agency

Public Resources Code section 21070 defines a "trustee agency" as a state agency having jurisdiction by law over natural resources affected by the project. (See Guidelines, § 15386 ["trustee agency" defined].) The concept of a trustee agency includes Fish and Game with regard to California's fish and wildlife species. (Guidelines, § 15386, subd. (a).)

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[11]Lowe's appellate brief acknowledges that the road realignment includes the relocation of the Sierra Railroad crossing on Old Wards Ferry Road and that PUC approval of the relocation is required.

The most convincing facts relied upon by Responsible Growth to support its argument that Fish and Game is a trustee agency are set forth in three documents that are the subject of Responsible Growth's first motion requesting judicial notice.

This case is being remanded on other grounds. Therefore, the issue whether Fish and Game is a trustee agency must be decided by this court now or by the superior court on remand. To promote judicial efficiency, we will take judicial notice of the documents and decide the issue now.

Exhibit 2 to Responsible Growth's first motion requesting judicial notice is a November 15, 2005, City memorandum regarding the Old Wards Ferry Road realignment and attached report and maps. Exhibit 3 is City's November 10, 2006, notice of intent to adopt the mitigated negative declaration regarding the road realignment. Exhibit 4 is a December 11, 2006, letter from Fish and Game to City regarding the road realignment project.

These documents show that Fish and Game was provided with the proposed mitigated negative declaration for the road realignment and that Fish and Game offered comments to the road realignment project as both a trustee agency and a responsible agency.

Based on these documents, we conclude that the "project" involved in this appeal—that is, the home improvement center project, which includes the road realignment—is broad enough that Fish and Game is a trustee agency that should have been given notice

D. Remedy

City's adoption of the mitigated negative declaration and its approval of the project must be set aside. (*Fall River Wild Trout Foundation v. County of Shasta* (1999) 70 Cal.App.4th 482, 493.) On remand, if another mitigated negative declaration is prepared, it must be submitted to the State Clearinghouse (which will distribute it to the PUC and Fish and Game) and there must be at least a 30-day comment period.

III. Urban or Suburban Decay*

Philip G. King, the Chair of the Economics Department at San Francisco State University, provided City with a four-page memorandum dated June 19, 2005. That memorandum stated his opinion that "there is a serious and significant possibility that the commercial space created by this proposed plan would create urban decay in the downtown as well as in other areas in the City of Sonora and lead to a less healthy business climate in the City." (Boldface omitted.)

Responsible Growth argues that Professor King's opinion is substantial evidence that supports a fair argument that the proposed project may have a significant environmental effect and, therefore, City violated CEQA by not preparing an environmental impact report (EIR).

A. Fair Argument Standard

The parties agree that this court should apply the fair argument standard to determine whether City was required to prepare an EIR instead of a mitigated negative declaration. (See *Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4th 1112, 1123; *Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 150-151 [applying fair argument standard, Ct. App., 5th Dist. voided adoption of negative declaration and mandated preparation of EIR].)

Under the fair argument standard, "we independently 'review the record and determine whether there is substantial evidence in support of a fair argument [the proposed project] may have a significant environmental impact, while giving [the lead agency] the benefit of a doubt on any legitimate, disputed issues of credibility.'" (*Stanislaus Audubon Society, Inc. v. County of Stanislaus, supra*, 33 Cal.App.4th at p. 151, quoting *Quail Botanical Gardens Foundation, Inc. v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1603; see Pub. Resources Code, § 21151.) Whether the fair argument

*See footnote, *ante*, page 1.

standard has been met in a particular case presents the appellate court with a question of law that is decided independent of the ruling of the superior court. (*Stanislaus Audubon Society, Inc.*, *supra*, at p. 151.)

In this case, the controversy over whether the record contains substantial evidence that supports a fair argument about potential urban or suburban decay centers on the opinion of an expert and whether there was a legitimate dispute about the expert's credibility.

B. Expert opinions and credibility findings

We have stated previously that, where a lead agency makes credibility findings to support its decision to adopt a negative declaration, two conditions must be satisfied for the credibility findings to withstanding scrutiny on appeal. (*County Sanitation Dist. No. 2 v. County of Kern* (2005) 127 Cal.App.4th 1544, 1597.) First, the lead agency's credibility findings must be expressed in the administrative record. (*Ibid*.; see *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 934-935.) Second, the record must show that there were "legitimate, disputed issues of credibility." (*County Sanitation Dist. No. 2 v. County of Kern*, *supra*, at p. 1597.)

The first condition has been satisfied in this case. City explicitly found "that the information submitted by [Professor] King does not constitute credible evidence to support a fair argument …." Accordingly, the controversy presented on appeal is whether the second condition was satisfied. In other words, was there a legitimate dispute about the credibility of Professor King's opinions?

An expert's credibility may be attacked on a variety of grounds. Here, City determined Professor King's opinions about potential urban decay were not credible because they were not supported by facts. Lowe's reiterates that ground on appeal. Lowe's does not contend that the opinions of Professor King lack credibility because (1)

he is not a qualified expert, (2) he is not a truthful person,[12] or (3) he is an expert whose opinions can be rejected solely on the basis of his interest in the matter.

Lowe's credibility argument requires the application of the statutory provisions that state "[s]ubstantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts" and does not include "unsubstantiated opinion or narrative, [or] evidence that is clearly inaccurate or erroneous …." (Pub. Resources Code, § 21082.2, subd. (c); Guidelines, § 15064, subd. (f)(5); see Pub. Resources Code, § 21080, subd. (e)(1) & (2); Guidelines, § 15384, subds. (a) & (b).) Consequently, we must resolve whether the opinions offered by Professor King about urban decay are "unsubstantiated opinion" or, alternatively, "supported by facts" as those phrases are used in CEQA.

Principles developed in case law aid the application of these statutory provisions. For instance, Lowe's argues that an inquiry into the factual support for Professor King's opinions should be informed by the general principle that "contrary evidence is considered in assessing the weight of the evidence supporting the asserted environmental impact" when applying the fair argument standard. (*Stanislaus Audubon Society, Inc. v. County of Stanislaus*, *supra*, 33 Cal.App.4th at p. 151; see Pub. Resources Code, § 21080, subd. (c)(2) [authorizes use of mitigated negative declarations where "there is no substantial evidence, *in light of the whole record* before the lead agency, that the project, as revised, may have a significant effect on the environment" (italics added)].)

The requirement that the whole record must be considered does not negate the principle that, if substantial evidence establishes a reasonable possibility of a significant

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[12]In *Bowman v. City of Berkeley* (2004) 122 Cal.App.4th 572, staff reported that the assertion made in an e-mail by a local resident with a doctorate degree and with experience in overseeing toxic waste sites was not credible because the individual had made misrepresentations in other proceedings before the city. (*Id*. at p. 582.) This experience with prior unreliable testimony of a witness provided a sufficient basis for the city to conclude the assertions made in the e-mail were not credible. (Cf. CACI No. 107 ["if you decide that a witness has deliberately testified untruthfully about something important, you may choose not to believe anything that witness said"].)

environmental impact, then the existence of contrary substantial evidence in the administrative record does not justify failing to prepare an EIR. (*County Sanitation Dist. No. 2 v. County of Kern, supra*, 127 Cal.App.4th at p. 1580; see *Pocket Protectors v. City of Sacramento, supra*, 124 Cal.App.4th at p. 935 [reviewing court may not weigh some substantial evidence against other substantial evidence].)

Another aspect of the fair argument standard concerns the role of inferences. Guidelines section 15384, subdivision (a) states that a fair argument is based on relevant information and "reasonable inferences." The range of inferences that are reasonable is affected by the information that is present in the administrative record as well as the information that is absent. For instance, deficiencies in a record may enlarge the scope of fair argument by lending plausibility to a wider range of inferences. (*County Sanitation Dist. No. 2 v. County of Kern*, *supra*, 127 Cal.App.4th at p. 1597.) A necessary corollary of the foregoing principle is that a detailed investigation into a potential environmental impact may narrow the scope of fair argument by eliminating inferences that would have been plausible had the information in the record been less developed. In this case, Lowe's contends that Professor King drew inferences from generalized facts that are not reasonable when considered in light of specific information in the record.

C. Analysis of Professor King's opinion

Professor King's ultimate opinion about the potential of the proposed project to cause urban decay is a prediction of linked causes and effects. The first step in Professor King's analysis forecasted or predicted the volume of sales the proposed project would achieve. The second step forecasted that sales at the proposed store would cause existing business in Sonora and the surrounding area to lose a certain amount of sales volume. The third step predicted that the lost sales volume for existing businesses would cause some of them to close and the space they occupied to become vacant. In particular, Professor King estimated "that 176,000 square feet of retail space would be displaced …." The fourth step involved the prediction that the vacant space would not be

filled by other retail. The fifth step predicted the vacated space would deteriorate physically and cause urban decay.

We review the steps in this chain of cause and effect to determine if the record adequately supports each link.

1. Sales per square foot

The consultant hired by Lowe's, CB Richard Ellis Consulting/Sedway Group (hereafter Sedway Group), estimated the proposed Lowe's store would generate $216 of sales per square foot. Sedway Group's May 12, 2005, report described the choice of this estimate as follows:

> "Information provided to [Sedway Group] indicates that Lowe's anticipates stabilized store sales of $30 million in Sonora. This reflects an estimated store sales volume of $216 per square foot. In 2003, Lowe's performance nationwide averaged $283 per square foot, roughly equivalent to about $295 in 2005 dollars. This suggests that Lowe's anticipates that the Sonora store will perform moderately below the national average for all stores. For a less urbanized location like Sonora, [Sedway Group] believes this is a low, but reasonable assumption." (Fn. omitted.)

Professor King's June 19, 2005, memorandum addressed Sedway Group's use of the $216 estimate and concluded a higher figure was more appropriate:

> "Sedway provides no analysis of the market area or incomes to justify [use of the $216 per square foot estimate]. In the absence of such data, it is my professional opinion that one should assume that the Lowe's will sell at the national average. Further, my own preliminary analysis of the market using data from Claritas (the best source of data for the area) indicates that an assumption that sales will be at the national average is more appropriate, particularly for this type of analysis. This would imply that the Lowe's would sell approximately $39-$40 million, not the $30 million that Sedway claims."

Neither the Claritas data nor the details of Professor King's preliminary analysis were included in the record.

Lowe's contends Professor King's use of Lowe's national average sales per square foot was "unsubstantiated" and, therefore, the conclusions he reached using the national average are not credible. We reject this contention and conclude that the use of Lowe's

2003 national average of sales per square foot was reasonable based on the information in the record.[13]

First, the $283 sales figure was Lowe's national average. Consequently, it is a fair starting point.

Second, the information about sales volume per square foot was controlled by Lowe's and it provided the consultant with its own estimate of store sales from the Sonora location. The record does not show that Sedway Group performed an independent analysis to generate an estimate. It appears Sedway Group calculated the $216 per square foot by dividing Lowe's estimate of store sales by the proposed store's square footage.

Third, the only rationale offered by Sedway Group to support Lowe's sales estimate was that Sonora was a less urbanized location, apparently when compared to the average Lowe's store. Whether Lowe's actually used that characteristic in producing its estimate is not revealed in the record.

Fourth, the consultant stated its belief that Lowe's estimate was "a low, but reasonable assumption." This statement necessarily implied that there was a *range* of reasonable estimates for the volume of sales the proposed Lowe's store would generate. The information contained in the record, however, is insufficient to peg the upper limit of this range.

Fifth, Professor King's memorandum reflects that he did perform a preliminary analysis of the market in Sonora using data from Claritas.

For purposes of applying the fair argument standard, which is a low threshold, we conclude that Professor King's use of Lowe's 2003 national average of sales per square foot was reasonable for purposes of estimating the sales of the proposed store. The fact that it was the national average, the estimate by Lowe's was on the low side of the range

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[13]Our conclusion is the same regardless of whether the sales estimate used by Professor King is characterized as "reasonable assumptions predicated upon facts" or an "expert opinion supported by facts." (Pub. Resources Code, § 21082.2, subd. (c).)

of reasonable estimates, and Professor King did an analysis, albeit, preliminary, of the market and identified the source of the data he used are enough support. Viewed from the opposite perspective, the record does not contain sufficient information to eliminate Professor King's sales estimate from the range of reasonable estimates.

2. Displaced retail space

Professor King stated the opinion that the proposed store would displace approximately 176,000 square feet of existing retail space and that the displacement would have a devastating impact on a town as small as Sonora. His estimate included 140,000 square feet for building materials, 22,000 square feet for home furnishings and appliances, and 14,000 square feet for general merchandise sales.

Sedway Group estimated that $16.7 million of the proposed store's annual sales would be in the building materials category. Professor King stated that "Sedway's analysis indicates $16 million in sales for building materials will be displaced. Assuming $216 in sales per square ft (which Sedway assumes), this will displace 140,000 square feet."

On its face, the 140,000-square foot estimate does not make sense when compared to the size of the proposed store. The proposed store will total 138,916 square feet—94,000 square feet of merchandising area, 27,720 square feet of garden center, and 17,196 square feet of building space not used for merchandise. Thus, the 140,000-square foot prediction seemed questionable because it exceeded the size of the proposed store and it only concerned a sales category that constituted about 55 percent of the proposed store's estimated sales. Consequently, we examined Professor King's math. The two figures that Professor King mentioned as leading to his 140,000-square foot conclusion—$16 million in sales and $216 in sales per square foot—do not provide a mathematical explanation for the conclusion: $16 million divided by $216 per square foot equals 74,074 square feet.

Thus, Professor King's conclusion that 140,000 square feet of retail space currently devoted to the sale of building materials will be displaced by the proposed store

is an opinion that is not supported by the facts in the record or, apparently, the method he used to derive the figure. Instead, the information provided shows he made a math error. The estimate should have been approximately 74,000 square feet, which would have reduced Professor King's estimate of the total displaced retail space to 110,000 square feet (62.5 percent of the 176,000-square foot estimate).

The ultimate opinion provided by Professor King about urban decay cannot be regarded as substantial evidence because it was based on an erroneous calculation of displaced retail space. In short, the error means that the opinion regarding urban decay was "unsubstantiated" rather than "supported by facts" for purposes of Public Resources Code section 21082.2, subdivision (c).

Based on this conclusion, we need not address the other purported deficiencies in the opinions submitted by Professor King—such as the failure to consider the absence of a history of urban decay in Sonora since shopping centers began to be built there in the 1960's or the failure to identify a particular area or neighborhood where the predicted decay would occur.

IV. Traffic Impacts*

A. Background

The city engineer reviewed the application for the home improvement center project; met with representatives of Tuolumne County (County), staff of the county traffic commission, and the developer; and devised the scope of the project traffic study. A traffic impact analysis dated February 4, 2005, was prepared by kdANDERSON Transportation Engineers (KD Anderson).

The proposed initial study and mitigated negative declaration identified the increase in traffic caused by the project as a potentially significant impact that could be reduced to less than significant with mitigation. The mitigation measures

*See footnote, *ante*, page 1.

> "include signalization at the intersection of Old Wards Ferry/Sanguinetti/Greenley Roads, linked to the signal at Mono Way/Greenley Road; an offer of dedication of right-of-way across the north side of the project site related to the City's study of an alternative east-west route; and a financial contribution to the County of twelve percent (12%) of costs for restriping, signing, and widening associated with the Mono Way/Sanguinetti Loop intersection."

The proposed initial study concluded that the mitigation measures would reduce the impacts to less than significant.

The proposed initial study also stated that "[b]ased upon the [KD Anderson] report, level of service standards as adopted by the City and County will not be exceeded. Therefore, the impact is considered to be less than significant."

Responsible Growth hired Daniel T. Smith, Jr., P.E., as a traffic expert. Mr. Smith reviewed the KD Anderson traffic impact analysis and provided comments on it and the project. In particular, Mr. Smith submitted a letter dated June 30, 2005, and testified at the city council hearing on July 20, 2005, that the home improvement center project might have a significant adverse effect on traffic in City.

KD Anderson responded to the criticisms and concerns raised in Mr. Smith's letter by sending the city engineer a five-page letter dated July 13, 2005.

Prior to the July 20, 2005, city council hearing, the city engineer provided the city council with a detailed memorandum that responded to the points raised in Mr. Smith's letter. The city engineer also testified at the city council meeting.

After the hearing, the city council adopted a number of findings concerning the home improvement center project, including the following: "The report [of Mr. Smith] fails to provide any data documenting traffic impacts resulting from the project. Further, Mr. Smith's report makes erroneous assumptions and misinterprets data presented. The City therefore finds that the information submitted by Mr. Smith is not credible, and does

not constitute substantial evidence supporting a fair argument that the project may have a significant traffic impact."[14]

B. Contentions of the parties

Responsible Growth argues that Mr. Smith's opinion constituted substantial evidence supporting a fair argument that the project may have a significant adverse effect on the environment.

Lowe's does not challenge Mr. Smith's expertise. Instead, Lowe's argues that City properly found that Mr. Smith's opinion and information were not credible or reliable and did not constitute substantial evidence of a significant unmitigated traffic impact.

We will address six specific points raised in Mr. Smith's June 30, 2005, letter and reiterated in Responsible Growth's opening brief.

C. Specific topics of dispute

1. Baseline traffic counts

Mr. Smith's letter asserts that the traffic impact analysis used an inappropriate baseline traffic count when it relied on counts taken during January 2005. Mr. Smith asserted that the January counts understated actual conditions because "January tends to be a low month, both for retail traffic and for general traffic." Mr. Smith's letter stated that he used California Department of Transportation statistics for average daily traffic counts on nearby segments of State Highways 49 and 108 that showed peak months ranged 7 to 9 percent higher than the annual average daily traffic count. Based on these statistics, Mr. Smith argued that (1) the January 2005 counts should have been increased by 7 to 9 percent and (2) such an increase would have changed the predicted level of service from D range to E range, which he regarded as a significant change.

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[14]This statement satisfies the requirement that the lead agency express its credibility findings in the administrative record. (*County Sanitation Dist. No. 2 v. County of Kern, supra*, 127 Cal.App.4th at p. 1597; see *Pocket Protectors v. City of Sacramento, supra,* 124 Cal.App.4th at pp. 934-935.)

The city engineer criticized Mr. Smith's analysis because it was based on *average daily* traffic for *highways* instead of the *peak p.m. hour* for *local streets*. The peak p.m. traffic count was used to analyze a worst case scenario. In the city engineer's experience, the peak p.m. weekday traffic is fairly steady throughout the year.

In effect, Lowe's argues that it was not reasonable for Mr. Smith to assume that the peak p.m. hour traffic count would vary like the average daily traffic. We address this argument by considering whether Mr. Smith's assumption was a "reasonable assumption[] predicated upon facts …." (Pub. Resources Code, § 21082.2, subd. (c).)

The record contains no evidence that supports the assumption that the amount of traffic at the peak p.m. hour varies from month-to-month like the average daily traffic. Instead, the record contains the explanation of the city engineer of why such an assumption is unreasonable. Thus, the record does not contain facts showing that it was reasonable for Mr. Smith to assume the variation in the two different traffic counts would be similar. It follows that Mr. Smith's opinion that City used an inappropriate baseline traffic count does not constitute substantial evidence supporting a fair argument.

2. Queuing and stacking

Responsible Growth contends that the traffic impact analysis (1) failed to properly account for queuing and stacking at a number of critical intersections, and (2) reached an illogical conclusion in forecasting 2020 traffic.

The absence of a particular topic from the traffic impact analysis prepared by KD Anderson does not necessarily mean that the initial study and mitigated negative declaration are defective. Matters not discussed in the traffic impact analysis can be dealt with elsewhere in the administrative record. (See *Leonoff v. Monterey County Bd. of Supervisors* (1990) 222 Cal.App.3d 1337, 1347-1348 [if initial study is inadequate, inadequacy may be cured by additional information in record and considered by agency].)

In this case, Mr. Smith's criticism regarding queuing and stacking were addressed in KD Anderson's July 13, 2005, letter to the city engineer and in the city engineer's

July 19, 2005, memorandum to the city council. Both of these documents are part of the administrative record. Therefore, the record shows that City did in fact consider queuing and stacking of traffic at intersections near the project site. Consequently, City did not violate CEQA by failing to consider the issue.

With respect to Mr. Smith's claim that certain 2020 traffic projections were illogical, the city engineer's July 19, 2005, memorandum to the city council explained how Mr. Smith had misinterpreted the traffic impact analysis and the data in its appendix. Neither Mr. Smith nor Responsible Growth has contended that this is incorrect. We conclude that an opinion based on misinterpreted data is an unsubstantiated opinion for purposes of Public Resources Code section 21082.2, subdivision (c). Consequently, Mr. Smith's opinion regarding the 2020 traffic projections does not constitute substantial evidence supporting a fair argument.

3. Lowe's and Wal-Mart's access from Old Wards Ferry Road

The initial configuration of access to the home improvement center project did not place the northern driveway for the project directly across the street from the driveway to the Wal-Mart Store. The final configuration did. The final configuration was developed after KD Anderson had prepared its traffic impact analysis.

Mr. Smith criticized the traffic impact analysis because it analyzed the driveways to the Wal-Mart Store and the project as though they were independent intersections. He also stated that there was no evidence the final configuration was analyzed as to its level of service or queue stacking. Furthermore, he raised a safety concern about the 120 feet of separation between the intersection limit and the railroad grade crossing.

KD Anderson addressed all of these criticisms and concerns in its July 13, 2005, letter to the city engineer. Furthermore, the July 19, 2005, memorandum of the city engineer to the city council states that the relocation of the Old Wards Ferry Road accesses to the home improvement center project and the Wal-Mart Store was done within the environmental review process.

Accordingly, Mr. Smith's criticism of the traffic impact analysis does not establish a CEQA violation. The discussion of the final configuration of the driveways need not be set forth in the traffic impact analysis or even the initial study itself. It is sufficient that the discussion and rationale is set forth in the administrative record. (See *Leonoff v. Monterey County Bd. of Supervisors*, *supra*, 222 Cal.App.3d at pp. 1347-1348 [if initial study is inadequate, inadequacy may be cured by additional information in record and considered by agency].)

4. Updated County traffic model

Responsible Growth argues that the traffic impact analysis relied on a County traffic model that was obsolete by the time City approved the project. Mr. Smith's June 30, 2005, letter stated that the "traffic analysis should be redone considering the updated County traffic model information now available and any CEQA findings should be deferred until the new information can be considered."

The July 13, 2005, letter of KD Anderson to the city engineer addressed this comment by stating:

> "When the traffic study was prepared Tuolumne County was in the process of preparing a new regional travel demand forecasting model. However, when work on this study was in process that model was not available. This issue was discussed at the time with Tuolumne County and City of Sonora staff, and it was determined by the County that the best information available at the time was data from the prior version of the regional travel demand forecasting model."

In addition, the July 19, 2005, memorandum of the city engineer stated: "We have verified with the County in regard to the Updated Traffic Model and have found the Updated Traffic Model is still not available and may not be available for some time."

We consider these arguments as they relate to the two potential remedies sought by Responsible Growth—namely, the preparation of an EIR or the preparation of a new initial study.

First, the failure to delay the adoption of the mitigated negative declaration until a traffic analysis using the new forecasting model was available does not create substantial

evidence supporting a fair argument that the project will cause changes in traffic that may have a significant adverse impact on the environment. Therefore, on the record presented, we will not direct the completion of an EIR on remand.

Second, we conclude that the mitigated negative declaration and corresponding initial study were not defective based on the failure to use the new forecasting model. CEQA allows projects to be analyzed based on the information available at the time and does not require that projects be delayed. (Cf. Pub. Resources Code, § 21166 [effect of new information on approved EIR].) Whether that model should be used for any traffic analysis conducted on remand is an issue that must be addressed in the first instance by the lead agency.

5. Partial contribution of funds

Mr. Smith's letter asserted that the traffic impact analysis improperly considered Lowe's financial contribution to mitigation measures when there was no assurance that the mitigation measures would be implemented. More specifically, Responsible Growth argues that requiring Lowe's to pay only 12 percent of the cost of improvements to the Mono Way/Sanguinetti Loop intersection does not mitigate the project's impacts because there is no evidence of plans to fund the remainder of the cost or to actually implement the intersection improvement.

Lowe's argues that reliance on the implementation of the mitigation measure was appropriate. Lowe's also argues the issue is moot based on action taken after the adoption of the mitigated negative declaration to fund the mitigation measure. To support its mootness argument, Lowe's asked this court to take judicial notice of a resolution of the Tuolumne County Transportation Council that was adopted after City approved the home improvement center project.

Assuming for the sake of argument that this alleged violation of CEQA had been established, it does not necessarily require the preparation of an EIR. (*Silveira v. Las Gallinas Valley Sanitation Dist.* (1997) 54 Cal.App.4th 980, 992 ["inadequate initial study does not automatically make an EIR necessary"].) In some situations, the

appropriate remedy is the completion of an adequate initial study. In this case, the circumstances relevant to an analysis of traffic impacts have changed a great deal since the original initial study was prepared in 2005. As a result of the changes, we conclude the more prudent course of action is to allow the new circumstances to be addressed in the initial study that will be prepared on remand.[15]

6. Local thresholds of significance

Mr. Smith's June 30, 2005, letter asserted that there was no evidence that "City has ever adopted significance criteria for traffic impacts based on prevailing community values." He argued that such thresholds of significance are necessary so that the determination of significance is not left to the applicant's traffic consultant and City staff.

Mr. Smith's position about the need for local thresholds of significance reflects his opinion about what the law requires. We are aware of no CEQA provision, Guideline, or case law that requires local agencies to adopt thresholds of significance for traffic impacts. Indeed, the Guidelines go only so far as to *encourage* public agencies to develop and publish thresholds of significance. (Guidelines, § 15064.7, subd. (a).)[16] We cannot interpret the word "encouraged" to mean "required." Doing so would violate Public Resources Code section 21083.1, which provides:

> "It is the intent of the Legislature that courts, consistent with generally accepted rules of statutory interpretation, shall not interpret this division[, i.e., CEQA,] or the state guidelines adopted pursuant to [Public Resources Code] Section 21083 in a manner which imposes procedural or substantive requirements beyond those explicitly stated in this division or in the state guidelines."

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[15]We also conclude that Public Resources Code section 21005, subdivision (c) does not require this court to expressly decide if City violated CEQA by relying on the future implementation of the mitigation measures. Our determination about what City should have done in 2005 would provide little assistance to City in determining how to proceed with the information that will be available on remand.

[16]The first sentence of this provision states: "Each public agency is encouraged to develop and publish thresholds of significance that the agency uses in the determination of the significance of environmental effects."

Accordingly, we reject the position that City could not make findings of significance regarding the home improvement center project until local thresholds of significance had been adopted.

V. Mitigation Measures*

Responsible Growth argues that some mitigation measures were improper because (1) they do not clearly mitigate the identified impacts to less than significant levels or (2) they defer the formulation of the actual mitigation measures until after project approval. Responsible Growth relies on three cases to support its argument. (*Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359 (*Gentry*) [one of several conditions in mitigated negative declaration improperly deferred formulation of the mitigation]; *Sacramento Old City Assn. v. City Council* (1991) 229 Cal.App.3d 1011 (*Sacramento*) [mitigation measures in EIR upheld]; *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296 [condition requiring applicant to adopt mitigation measures recommended in a future study violated CEQA by improperly deferring environmental assessment and mitigation].)

We will rely most heavily on *Gentry*, the most recent of the two cases that involved a mitigated negative declaration. In contrast, *Sacramento* involved an environmental impact report and, as a result, imposed more detailed requirements than used by the court in *Gentry* to test the mitigation measures adopted in the mitigated negative declaration.

The requirements used in *Gentry* are illustrated by the following discussion of a mitigation condition concerning drainage:

> "For example, condition 34 provides that McMillin 'shall protect downstream properties from damages caused by alteration of the drainage patterns …. Protection shall be provided by constructing adequate drainage facilities including enlarging existing facilities and/or by securing a drainage easement.… The Protection shall be as approved by the Engineering Department.' These conditions meet the requirements of

*See footnote, *ante*, page 1.

> *Sacramento*, in that the City recognized the significance of the potential environmental effects, committed itself to mitigating their impact, and articulated specific performance criteria." (*Gentry*, *supra*, 36 Cal.App.4th at p. 1395.)

In accordance with the analysis adopted in *Gentry*, we consider whether City (1) committed itself to mitigating the impact of potential environmental effects that might be significant and (2) articulated specific performance criteria.

In addition, because this matter will be remanded on other grounds, we need not consider Responsible Growth's argument that not enough information about the mitigation measures was disclosed early enough in the review process. On remand, information about the mitigation measures and conditions will be available for disclosure to the public at earlier stages of the environmental review process. Any determination we make about the timing of the disclosures made in 2005 will be of little assistance on how the environmental review process should proceed on remand.

A. Lighting and Glare

Part I.d. of the initial study narrative states:

> "Redevelopment of the site from [*sic*] to the proposed use will result in a new source of nighttime lighting that some may consider to be an environmental impact. A comprehensive lighting plan will be required as part of the site development improvement plans, which will include provisions for shielding of light fixtures to keep light focused on site, and an examination of reduction of lighting on the building and in parking lots around the site during the late-night hours, while still providing security. With mitigation, the impact is reduced to less than significant."

Responsible Growth argues that this mitigation measure is deferred mitigation that does not comply with the case law requirements set forth in *Sacramento* and *Gentry* because City (1) failed to recognize the significance of the impact in any quantifiable or measurable way and (2) did not set specific performance criteria for the mitigation measure to meet.

First, we reject the contention that City must recognize the significance of the potential impact in a quantifiable or measurable way. In *Gentry*, condition 34 did not

identify in a quantifiable or measurable way the potential damages to downstream property that changes in the drainage pattern might cause. (*Gentry*, *supra*, 36 Cal.App.4th at p. 1395.) Accordingly, it is enough that City recognized the potential for nighttime lighting on the project site to potentially impact the environment.

Second, the mitigation measures imposed, which included a lighting plan with provisions for shielding light fixtures to keep light focused on site, contained sufficiently specific performance criteria. The measure itself is specific—the shielding of light fixtures. The performance criteria was to keep the light focused on site. If anything, this performance criteria is more specific than the performance criteria for condition 34 in *Gentry*, which concerned the construction of adequate drainage facilities by enlarging existing facilities or securing drainage easements, or both. (*Gentry*, *supra*, 36 Cal.App.4th at p. 1395.) The performance criteria stated in condition 34 for the new drainage facilities were that they should "'protect downstream properties from damages caused by alteration of the drainage patterns ….'" (*Ibid*.) By comparison, the performance criteria for the lighting plan were stated with at least as much specificity and therefore satisfy the requirements of *Gentry*.

In addition, there is not sufficient evidence in the record to support a fair argument that the nighttime lighting, as mitigated, may have a potentially significant adverse impact on the environment.

B. Aesthetics and Landscaping

The proposed mitigated negative declaration included a preliminary landscape plan. The one-page document contains a diagram of the proposed site that shows the location of the building, parking lot, trees, plants, and retaining walls. The document also includes general landscape notes and a preliminary plant material list.

Part I.c. of the initial study narrative addressed the proposed landscaping and its relationship to aesthetic impacts as follows:

> "The applicant has proposed design features which serve as mitigation. These include implementation of a comprehensive landscape plan, and

> design features incorporated into the building to compliment [*sic*] features found in the adjacent Sonora Crossroads project. Additional mitigation proposed by this study to be incorporated as project conditions includes increased landscaping adjacent to the Sierra Railroad to provide for better screening from the route of the railroad; increased landscaping on and adjacent to the retaining wall next to the Sonora Bypass for better screening of the wall and building structures from the highway; increased landscape and hardscape materials along the north and west sides of the building."

The conditions of approval adopted by the city council on July 28, 2005, provide further details about the proposed additional mitigation referenced in the initial study. Condition 2.f required a final landscape plan, which would "receive a focused review by the City Planning Commission prior to its submission to the City Parks, Beautification and Recreation Committee." Condition 2.f also set forth seven items that were to be included in the landscaping. We will not recite all seven here but provide the following as an example: "Increased landscaping on and adjacent to the retaining wall next to the Sonora Bypass for better screening of the wall and building structures from the highway." Other items required additional screening along the Sierra Railroad, along the rear of the building, and near an outside storage area.

The visual impacts of the project also were addressed by the city council in its finding 5.(a)(iv), which stated in part:

> "The City has reviewed and considered information related to potential visual impacts created by the project. While the visual character of the site and surrounding area will be changed, this does not equate to an adverse visual impact. Implementation of the project will improve the project site. Further, mitigation measures to reduce any potentially significant impacts have been adopted."

Did the landscaping conditions imposed by the city council improperly defer the formulation of the mitigation measures? We conclude that when the conditions are considered in light of the preliminary landscaping plan, the mitigation measures and the related performance criteria easily are more specific than that contained in condition 34 in *Gentry*. According, the formulation of the landscaping mitigation measures have not been improperly deferred. (*Gentry, supra,* 36 Cal.App.4th at p. 1396.)

Furthermore, the record does not contain sufficient evidence to support a fair argument that the visual changes to the site, as mitigated by the landscaping measures, may have a potentially significant adverse impact on the environment.[17]

C. Erosion and Grading

Part VI.b. of the initial study narrative states:

> "As with most construction projects, grading operations will result in short-term environmental concerns related to water erosion of exposed soils. To mitigate, a comprehensive erosion and sediment control plan will be required to be prepared and submitted as part of the site development improvement plans. This plan will address water erosion concerns and best management practices for earthwork conducted between October 1 to May 1 of any construction year. Review and approval of the plan to be by the Building/Public Works Inspector, in consultation with the City Engineer."

The mitigation monitoring and reporting plan addressed water erosion of exposed soils with the following mitigation measure. "Preparation of a comprehensive engineered grading plan, which will minimize grading and clearing through limitation to developed area (building, parking, landscape, slopes) for the project identified by the site plan. Incorporate NPDES permit requirements for best management practices."[18] The city engineer was to review the plan and monitor the site.

Responsible Growth challenges the mitigation measure for water erosion by asserting that the mitigated negative declaration failed to explain whether the commitment to minimize grading and clearing would clearly mitigate erosion impacts to less than significant levels. We conclude that such an explanation is not required by CEQA. First, *Gentry* discussed grading plans and erosion control measures and did not

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[17]The project site is located in City's redevelopment project area. A consultant described the site as "visibly blighted, characterized by older, dilapidated structures, including an approximately 50-year-old slaughterhouse." The site contains five metal buildings built from 1972 to 1992. Photographs included in the record show graffiti painted on at least one building.

[18]"NPDES" stands for National Pollutant Discharge Elimination System. (*County Sanitation Dist. No. 2 v. County of Kern, supra*, 127 Cal.App.4th at p. 1562, fn. 18.) The NPDES permit program was created by the federal Clean Water Act. (33 U.S.C.A. § 1342.)

require those plans and measures to be explained in such detail. (*Gentry*, *supra*, 36 Cal.App.4th at pp. 1395-1396.) Second, the mitigation measure does explain how the clearing and grading will be minimized—it will be limited to the areas to be developed that are identified by the site map. That explanation is specific enough.

Responsible Growth also challenges the mitigation measure for water erosion by asserting that there "are no articulated performance standards for the future grading plan to meet …." Responsible Growth failed to mention that the grading plan is required to incorporate NPDES permit requirements for best management practices. Thus, we conclude that the grading plan in this case, like the grading plan in *Gentry*, has sufficiently specific performance criteria. As to the review of the plan and monitoring by the city engineer, those aspects of a mitigation measure specifically were approved by the court in *Gentry*. (*Gentry*, *supra*, 36 Cal.App.4th at pp. 1395-1396.)

Accordingly, we conclude that the mitigation measure for erosion does not violate CEQA. Furthermore, the record does not support a fair argument that potential erosion may have an environmentally significant adverse impact.

D. Sediment and Parking Lot Runoff

Responsible Growth also challenges the mitigation measure for sediment control that requires "frequent sweeping and cleaning of parking area." Responsible Growth asserts that "[n]o performance criteria were articulated at the time of project approval to demonstrate that this sweeping and cleaning program will in fact mitigate sediment (or chemical) runoff."

Part VIII.a. of the initial study narrative states in part: "Longer term concerns include oil or petroleum residues collected from parking areas. The most effective mitigation for this will be frequent sweeping and cleaning of the parking area to keep the collection of residues to a minimum."

The mitigation monitoring and reporting plan addressed compliance by requiring (1) the entire erosion and sediment control plan to be submitted to the city engineer and building inspector for review and approval and (2) the "owner to provide documentation

(contract, letter of agreement) to Community Development Director verifying manner by which cleaning and sweeping of parking lot is to occur."

As with the other mitigation discussed earlier, we conclude that the mitigation measure concerning sediment and parking lot cleaning was disclosed adequately and was sufficiently specific to comply with the requirements set forth in *Gentry* for mitigated negative declarations. Furthermore, the record does not support a fair argument that runoff from the parking lot may have a potentially significant impact on the environment.

E. Noise

Part IX.d. of the initial study narrative addresses the noise impact from the proposed project's construction as follows:

> "There will be construction period impacts due to equipment operation that can be mitigated through construction time limits imposed pursuant to the provisions of the Sonora Municipal Code Section 8.20.040, as adopted by the City Council in 2004; proper muffling of equipment; and prompt response to complaints made. Past implementation of these standard conditions have indicated the ability to mitigate to a level less than significant."

Responsible Growth challenges this mitigation measure because the hours during which construction may take place is not specified and because responding to complaints is an after-the-fact remedy that will not undo noise impacts.

We conclude that the mitigation measures for noise are at least as specific as condition 34 approved in *Gentry* and, therefore, are not improper deferred mitigation. Also, the prompt response requirement cannot be viewed in isolation. If it were the only condition to address noise, the situation might call for a different result. Where, however, other conditions exist, they must be viewed together. Prompt response simply is a way of ensuring that excessive noise, if it exists, does not continue unnecessarily, and striking it from the noise mitigation measures would not improve the mitigation achieved.

F. Traffic

The mitigation monitoring and reporting plan stated that one of the mitigation measures required the applicant to contribute to the County of Tuolumne 12 percent of

the cost to restripe, sign, and widen the intersection of Mono Way and Sanguinetti Road. Responsible Growth challenges this mitigation measure by asserting that (1) there is no evidence in the administrative record that the measure actually will be implemented, (2) the superior court erred by considering extra-record evidence about the implementation of this measure, and (3) it is unclear how the funding of 12 percent will clearly mitigate the proposed project traffic impact to less than significant levels.

The circumstances relating to this mitigation measure appear to have changed significantly since the mitigated negative declaration was circulated. For example, a resolution of the Tuolumne County Transportation Council, which is exhibit H to Lowe's joint motion for judicial notice filed on April 9, 2007, addresses funding for the implementation of changes to the intersection of Mono Way and Sanguinetti Road. Furthermore, additional changes are possible before another initial study is presented for public review and comment on remand.

Consequently, we will not address whether the mitigation measure complied with CEQA under the circumstances that existed at the time of its adoption. Doing so would provide little useful guidance to the parties on remand because those circumstances no longer exist. (See part IV.C.5., *ante*.)

G. Storm Water Drainage

Item VIII.e. of the environmental checklist included in the initial study asks whether the proposed project would create or contribute runoff water that would exceed the capacity of existing or planned stormwater drainage systems. City checked the "no impact" box in response to this item. Elsewhere, the initial study stated that "the drainage pattern affecting the site is already established by surface and below ground storm drain systems" and that "the project will improve existing, on-site drainage structures which tie into offsite structures that have been determined to be a sufficient capacity."

Part XVI.c. of the initial study narrative states:

> "The project will result in an increase to surface water flows, leading into the existing storm water system. A private engineering analysis of that system for the applicant has identified certain improvements necessary in the existing system to accommodate the added flow. Completion of a comprehensive drainage plan for approval by the City Engineer within review of site development improvement plans will be required. While minor expansion of identified facilities may be necessary to accommodate the flows, the impact of the expansion is considered to be less than significant."

Finally, condition 2.c. in the conditions of approval adopted by City requires an engineered drainage plan, "approved by the City Engineer, which will include on- and off-site drainage measures necessary to accommodate the increased flows created by the project."

When compared to condition 34 and the drainage requirements discussed in *Gentry*, the drainage mitigation measure in this case is sufficiently specific. The means for accomplishing the performance criteria is described—a minor expansion of identified facilities. Also, the performance criteria—accommodation of the increased flows—by which the means employed are to be assessed is at least as specific as the criteria considered and approved in *Gentry*.

VI. Recirculation*

On remand, the initial study must be redone to include the whole of the project. Accordingly, whether the mitigated negative declaration should have been recirculated is a moot issue.

VII. Parking Ordinance*

A. Judicial Notice

As stated earlier, this court will take judicial notice of (1) chapter 17.42 of the Sonora Municipal Code, titled "Parking and Loading" and (2) chapter 17.32, titled "Design Review/ Historic Zone."[19]

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*See footnote, *ante*, page 1.

B. Relevant Provisions of Chapter 17.42

Section 17.42.010 provides that no structure shall be constructed unless parking spaces are permanently provided and maintained in accordance with chapter 17.42. The number of parking spaces required for a building used for retail sales is specified by section 17.42.060(A). That provision requires one parking stall for every 200 gross square feet of floor area. Section 17.42.020 sets forth an exception to the required number of parking spaces:

> "Unless a conditional use permit, variance, or *zoning condition* is granted *under the provisions of this code*, all … new buildings … which increase the need for parking in the 'parking and business improvement area' … shall provide additional parking in accordance with the provisions of the ordinance establishing the 'parking and business improvement area.'" (Italics added.)

The exception is explained in part by section 17.42.080. That provision specifies the circumstances in which City "may grant a conditional use permit or variance, as the occasion may require, to authorize a specific exception to any regulation of this chapter …." Section 17.42.080(D) states that whenever a variance is granted, the applicant must pay a fee of $1,500 for each parking space that is required by the ordinance but not furnished.

Section 17.42.080 does not address the circumstances that must exist before a "zoning condition" may be granted to reduce the number of parking spaces required for a new building. Furthermore, no other provision of chapter 17.42 addresses the use of a "zoning condition." In a brief filed with the superior court, counsel for Lowe's acknowledged that "'zoning condition' is not a defined term in the City's zoning ordinance …."

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[19] All references in part VII. of this opinion to sections and chapters are to the Sonora Municipal Code unless otherwise stated.

C. City's Interpretation and Application of Its Municipal Code

Plans for the proposed project provided for a total of 460 parking spaces. Responsible Growth contends that, based on a total of 138,916 square feet and the ratio of one parking space per 200 gross square feet, the proposed project should have had a total of 695 parking spaces. City addressed the parking space issue with the following finding:

> "The City has fully considered and determined that the project complies with all parking and loading requirements. The parking and loading requirements for the City of Sonora are established by Chapter 17.42 of the Sonora Municipal Code, which allows an alternative parking standard as a zoning condition of the design review/historic zone review. The City finds that using the ITE [Institute of Transportation Engineers] manual to establish parking demand was appropriate."

A further explanation of City's reliance on the "zoning condition" is provided in a staff report prepared by City's community development director for the city council's July 20, 2005, meeting. That report discussed the requirements of chapter 17.42 and the reference to a "zoning condition" in section 17.42.020. It stated that the site was within a design review zone and, therefore, a design review of the project was conducted under the provisions of chapter 17.32. Section 17.32.070 lists various matters that the design review committee must consider when reviewing the plans for a structure that is located outside the historic downtown area. Among the matters that must be considered is the "size, location and arrangements of on-site parking and paved areas and their lighting." (§ 17.32.020(E).)

In exercising its authority to consider on-site parking for the proposed project, the design review committee[20] decided to use the ITE Parking Generation manual to establish an estimate for the parking demand the proposed project would generate. The manual estimated that on a Saturday a store of this type would generate a need for 3.29 parking spaces per 1,000 square feet. This standard was used as an alternative to the

[20]The planning commission is designated as the design review committee. (§ 17.32.040.)

parking space formula set forth in section 17.42.060(A). The planning commission's approval of the proposed project was conditioned upon the project providing the amount of parking calculated by using the ITE manual.

D. Contentions of the Parties

Responsible Growth argues that City had no authority to impose a "zoning condition" waiving requirements of its parking ordinance because the Sonora Municipal Code does not define the term "zoning condition" or contain any provisions governing the issuance of such a condition. Under Responsible Growth's interpretation of the ordinance, such provisions must exist before a "zoning condition [can be] granted under the provisions of this code …." (§ 17.42.020.)

In contrast, Lowe's argues that a specific definition and other provisions are not necessary for City to grant a zoning condition. In Lowe's view, the proper inquiry is whether City's interpretation of its own ordinance is clearly erroneous.

E. Standard of Review

It is a fundamental rule of law "that interpretation of the meaning and scope of a local ordinance is, in the first instance, committed to the local agency. Under well-established law, an agency's view of the meaning and scope of its own ordinance is entitled to great weight unless it is clearly erroneous or unauthorized. [Citations.]" (*Friends of Davis v. City of Davis* (2000) 83 Cal.App.4th 1004, 1015.)

F. Interpretation of the Ordinance

In this case, the parking space requirements set forth in section 17.42.060 are applicable to the proposed project unless a "zoning condition [wa]s granted under the provisions of this code …." (§ 17.42.020.)

Responsible Growth argues that the phrase "under the provisions of this code" means that there must be some enabling provisions that address "zoning conditions."[21]

[21]In one version of its argument, Responsible Growth interprets the phrase "under the provisions of this code" to mean only the provisions in chapter 17.42. We reject this interpretation and conclude the term "this code" refers to the entire Sonora Municipal Code.

To support this argument, Responsible Growth points out that the alternatives to a zoning condition—a conditional use permit or a variance—are the subject of an enabling provision. Specifically, section 17.42.080 describes how these alternatives are implemented.

We recognize that Responsible Growth has presented a reasonable interpretation of the parking ordinance. Our inquiry, however, does not end there. If City also has adopted a reasonable interpretation (i.e., one that is not clearly erroneous or unauthorized), then City's interpretation must prevail.[22] (See *Friends of Davis v. City of Davis*, *supra*, 83 Cal.App.4th at p. 1015.)

City's interpretation of chapter 17.42 and the Sonora Municipal Code is based on the following facts. First, the project site is located in a design review zone as that term is used in chapter 17.32. Second, the plans for a new building in a design review zone must be approved by the design review committee. Third, the design committee's approval of a plan may be "subject to specified changes, additions or conditions." (§ 17.32.090.) Fourth, the conditions of approval extend to parking because section 17.32.070(E) specifically authorizes the design review committee to consider parking as part of its review of plans. Fifth, in this case the parking conditions were imposed on the proposed project pursuant to the authority granted in chapter 17.32. From these facts, City concludes that the parking conditions it imposed was a "zoning condition" granted under the provisions of chapter 17.32. City asserts that it made sense to modify the word "condition" with the word "zoning" because the authority for imposing the condition existed due to the fact that the building was in a design review "zone."

We conclude that, while this interpretation is somewhat strained, it is within the realm of reason. In other words, it is not clearly erroneous.

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[22]When language in a statute, regulation or ordinance is susceptible to more than one reasonable interpretation, the language is ambiguous. (*Coburn v. Sievert* (2005) 133 Cal.App.4th 1483, 1495.) Here, the term "zoning condition" is ambiguous on its face. (See *ibid.* [facial and latent ambiguities].)

Furthermore, City's interpretation, *as applied*, has not produced an arbitrary or capricious result. City's argument that its application of the parking ordinance is reasonable is supported by the fact that the amount of parking required is tailored to the needs of the particular project. In this sense, the parking requirements imposed on the project are less arbitrary than what would have been imposed using the ratio in section 17.42.060(A). Had the ratio specified by section 17.42.060(A) been applied, an unnecessarily large parking lot would have been built with additional negative impacts.

In summary, we conclude that City did not violated the requirements of its own parking ordinance.

DISPOSITION

The judgment is reversed. The matter is remanded to the superior court with directions to vacate its order denying the petition for writ of mandate and to enter a new order that (1) denies the seventh cause of action and (2) grants the petition for writ of mandate and compels City to (a) complete an environmental evaluation of the entire CEQA project and (b) generate appropriate environmental review documents.[23]

Costs on appeal are awarded to Responsible Growth.

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DAWSON, J.

WE CONCUR:

_____
VARTABEDIAN, Acting P.J.

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HARRIS, J.

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[23]We do not presume the appropriate documents will be (1) an initial study and related mitigation negative declaration or (2) an initial study and EIR.

In addition, our disposition of this appeal should not be construed to require City to exercise its lawful discretion in a particular way. (Pub. Resources Code, § 21168.9, subd. (c).)