SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

RUTH ANN KELLY HAMMARGREN,

Petitioner,

vs.

CITY OF BERKELEY,

Respondent,

HSR BERKELEY INVESTMENTS, LLC, HILL STREET REALTY, LLC, JOSEPH PENNER and RHOADES PLANNING GROUP,

Real Parties in Interest.

JAMES E. HENDRY,

Petitioner,

vs.

CITY OF BERKELEY,

Respondent,

HSR BERKELEY INVESTMENTS, LLC and RHOADES PLANNING GROUP, INC.,

Real Parties in Interest.

Case No. RG16-799959

(Consolidated with Case No. RG16-80041)

ORDER DENYING PETITIONS FOR WRIT OF MANDATE

The merits hearing on the consolidated Petitions for Writ of Mandate came regularly before the court on August 26, 2016, Judge Frank Roesch presiding. Petitioner Ruth Ann Kelly Hammargren appeared on her own behalf. Petitioner James Hendry appeared on his own behalf. Respondent the City of Berkeley appeared by its counsel, Zach Cowan, Esq. Real parties in interest appeared by their counsel Christopher Rheinheimer, Esq. and Andrew Bassak, Esq. The court has carefully considered the pleadings and briefs of the parties including the referenced portions of the Administrative Record and has considered the arguments of petitioners, respondent, and real parties, and, good cause appearing, DENIES both petitions. The court's reasoning follows.

Background

These consolidated actions challenge the Berkeley City Council's discretionary approval of a mixed-use construction project with approximately 302 apartments, 10,000 square feet of retail space, a 20,000 square foot movie theater and 170 auto parking spaces in downtown Berkeley ("project"), and the City of Berkeley's ("City's) certification of an an Environmental Impact Report ("EIR") prepared for the project. The project is located within the Downtown Area as identified in the City's Downtown Area Plan ("DAP") which was adopted in 2012 and which serves as the guiding document for future development of downtown Berkeley, including this project.

The first of the two consolidated petitions was filed by Ruth Ann Kelly Hammargren (hereafter, "Ms. Hammargren") on January 13, 2016. Ms. Hammargren's petition asserts thirteen causes of action most of which arise under the California Environmental Quality Act, Public Resources Code sections 21000, et seq. ("CEQA"). Ms. Hammargren also asserts a cause of action for breach of a local ordinance (Berkeley Municipal Code ["BMC"] 23E.68), another for

breach of a state statute (Public Resources Code § 2690, et seq.), another for violation of a federal statutes (the Fair Housing Act, 42 U.S.C. § 3601, et seq.), and a cause of action alleging the violation of the U.S. Secretary of Interior Standards for Rehabilitation of Historic Properties. Those claims are based on the same facts as her CEQA claims.

The second Petition was filed by James Hendry (hereafter, "Mr. Hendry") on January 14, 2016. Mr. Hendry's petition asserts causes of action 1 through 13 and 15-16 (with no "14th" cause of action). All of the causes of action alleged in Mr. Hendry's Petition arise under CEQA.

In their opening briefs, the petitioners assert a combined total of fifteen challenges to the City's approvals. What follows is a summary of the arguments put forward by Ms. Hammargren:

1. The City omitted to study the impacts on nearby public schools;
2. The City exempted itself from studying impacts to nearby schools by improperly designating the project as an "infill" project
3. The EIR failed to disclose and evaluate seismic hazards.
4. The project violates a Berkeley ordinance mandating a building height of no more than 180 feet.
5. The City rejected an environmentally superior alternative without substantial evidence that the alternative was financially infeasible.
6. The project is improperly categorized as an "infill project" because it fails to provide affordable housing units.
7. The City failed to consider or adopt findings required by CEQA.
8. The City failed to conduct a "mandatory" study of sewer capacity.
9. The City improperly mischaracterized the historic status of the "1957 addition to the [historic landmark] Shattuck Hotel" and thus avoided the application of "the correct City Ordinances, Municipal Code, Policy and Secretary of the Interior Standards for treatment of additions."

The following are the arguments advanced Mr. Hendry in his opening brief:

1. The City relied on evidence it knew to be erroneous in the evaluation of the project and

the project alternatives

2. The City violated CEQA by making "post hoc" rationalizations to support their conclusions.

3. The City engaged in post hoc rationalizations by revising the Statement of Findings and Overriding Considerations at a point in time later than the City Counsel vote to certify the EIR.

4. The analysis of public transit in the EIR is insufficient to satisfy CEQA for several reasons: 1) improper baseline, 2) project not accurately described, 3) incorrect modeling, 4) deficient analysis, and 5) the threshold of significance used is not supported by substantial evidence.

5. The Statement of Overriding Considerations related to public transit is not supported by substantial evidence.

6. The EIR failed to include an analysis of the environmental consequences of the city allocating a portion of the "community benefit" fees paid by the developer to an existing tenant who has relocated.

7. The city cannot rely on the "Infill EIR" process to evaluate and justify projects that would demolish historic structures.

The City and Real Party submitted a joint Opposition Brief asserting the following:

1. The project was properly analyzed as an "Infill" project under PRC §21094.5 and CEQA Guidelines § 15183.3, and that the EIR has satisfied all the requirements of the "infill EIR" process.

2. There is no evaluation of the project's specific impact on public transit because none is required as public transit impacts in the downtown area were addressed in the Downtown Area Plan EIR, a planning level decision EIR.

3. The EIR adequately considered impacts on nearby schools as part of the infill EIR process.

4. Seismic impacts were addressed in the infill EIR process.

5. Project impacts on the sewer system were considered in the EIR.

6. The City properly rejected the environmentally superior alternatives for a number of reasons in addition to the economic feasibility basis argued by the petitioners.

7. The CEQA findings were not created as a post hoc rationalization of the City Council's approval.

8. The project does not exceed the City of Berkeley building height limit.

9. The tenant's relocation has no environmental impact and is an event that was finalized over six months prior to the project approval.

10. The 1959 Hinks Building addition has been determined to not be subject to landmark protection by the Berkeley Landmark Preservation Commission and that even without such a determination the City made the requisite findings to demolish it as a part of the project

11. The Administrative Record contains substantial evidence to support each Statement of Overriding Considerations.

Discussion

1. *Standard of Review*

In legal challenges brought under CEQA, judicial review is governed by California Public Resource Code (hereafter, "PRC") sections 21168 and 21168.5. CEQA determinations are reviewed under the "prejudicial abuse of discretion" standard in which a reviewing court is limited to determining whether "the agency has not proceeded in a manner required by law or the decision is not supported by substantial evidence." (PRC § 21168.5.) Each of these separate grounds has different standards for determining whether there has been error.

In reviewing claims that an agency failed to proceed in the manner required by law, the court must "determine de novo whether the agency has employed the correct procedures, 'scrupulously enforc[ing] all legislatively mandated CEQA requirements." (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435.) An agency's certification of an EIR is presumed correct under this test and challengers bear the burden of proving otherwise. (*Sierra Club v. County of Orange* (2008) 163 Cal.App.4th 523, 530.)

The court reviews an agency's factual determinations to determine whether they are

supported by substantial evidence. (PRC § 21168.5; *Vineyard, supra*, 40 Cal.4th at 435.) Substantial evidence means "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." (Cal. Code Regs., Title 14 (hereafter, "Guidelines") § 15384(a).) During this inquiry, the court must give substantial deference to the agency's determinations by resolving all reasonable doubts in the agency's favor. (*Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 393.) The environmental document must be presumed adequate and the challenger bears the burden of proving that the agency's factual determinations are legally inadequate. (*Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1266.)

2. *Ms. Hammargren's Claims*

The first issue raised in the Hammargren Petition is City's alleged failure to notify and meet with Berkeley High School or City College officials before certification of the project EIR. The court is referred to Guidelines section 15186 as authority to establish such a requirement.

Section 15186 of the Guidelines provides, in subpart (b) as follows:

> Before certifying an EIR or adopting a negative declaration for a project located within one-fourth mile of a school [that] involves the construction or alteration of a facility that might reasonably be anticipated to emit hazardous air emissions, or that would handle an extremely hazardous substance…that may impose a health or safety hazard to persons who would attend or would be employed at the school, the lead agency must do both of the following: (1) Consult with the affected school district or districts regarding the potential impact on the school; and (2) Notify the affected school district or districts of the project, in writing, not less than 30 days prior to approval or certification of the negative declaration or EIR.

While petitioner cites to the requirements of the guideline, she does not explain how the project implicates Guidelines section 15186. She does not argue that the project might reasonably be anticipated to emit hazardous air emissions or that there are "extremely hazardous substances"

that will be handled at the project. Nor does petitioner identify any place in the Administrative Record from which the court could conclude that it can be reasonably anticipated that the project will emit hazardous air emissions or that extremely hazardous substances will be handled at the project. For this reason alone, the argument that City failed in its duty to comply with Guidelines section 15186 is unavailing. (*Jacobson v. County of Los Angeles* (1977) 69 Cal.App. 3d 374, 388 [it is the petitioner's burden to show an abuse of discretion].)

Ms. Hammargren also argues that impacts on nearby schools were not studied due to "the City erroneously exempting itself from studying the school impacts by improperly designating the school (sic) [should read "project"] as infill already covered by the Downtown Plan EIR." (Hammargren Opening Brf. p. 9:14-16.)

The CEQA process utilized by the City in this matter was the process described in PRC section 21094.5 for infill projects that satisfy the statutory requirements. PRC Section 21094.5(a)(1) provides: "If an environmental impact report was certified for a planning level decision of a city or county, the application of this division to the approval of an infill project shall be limited to the effects on the environment that (A) are specific to the project or to the project site and were not addressed as significant effects in the prior environmental impact report or (B) substantial new information shows the effects will be more significant than described in the prior environmental impact report...."

PRC Section 21094.5 further provides, at subpart (a)(2), that "[a]n effect of a project upon the environment shall not be considered a specific effect of the project or a significant effect that was not considered significant in a prior environmental impact report, or an effect that is more significant than was described in the prior environmental impact report if uniformly applicable development policies or standards adopted by the city, county, or the lead agency,

would apply to the project and the lead agency makes a finding, based upon substantial evidence, that the development policies or standards will substantially mitigate that effect."

In this case, the City used the EIR that was previously certified for the City's Downtown Area Plan – the DAP EIR – as the planning-level EIR, and made determinations regarding environmental effects of this project by reference to the same effects that had been previously studied in the DAP EIR. This was what the Legislature intended when it promulgated PRC section 21094.5 if the project is properly classified as an "infill project" within the meaning of the statute. The applicability of PRC section 21094.5 to the project is a quasi-judicial determination that must be based on substantial evidence in the administrative record. (*Bixby v. Pierno* (1971) 4 Cal. 3d 130, 149 n.22; *San Franciscans Upholding the Downtown Plan v. City and County of San Francisco* (2002) 102 Cal. App. 4th 656, 674.)

Ms. Hammargren's argument contains two components. First, she asserts that the project does not meet the definition of an "infill project" and second, even if an "infill project", she asserts there are significant impacts on Berkeley High School and Berkeley City College that were not addressed in the DAP EIR, requiring the City to address these impacts in the EIR for this project.

As to the first component, PRC section 21094.5(e) provides the definition of "infill project" and section 21094.5(c) defines the conditions required of an "infill project" before the abbreviated EIR requirements in section 21094.5(a) may be used. There is no dispute that the project consists of a combination of residential and retail/commercial uses and that the project is located on an urban site that has previously been developed. This clearly meets the section 21094.5(e) definition of an infill project.

As to the second component, Ms. Hammargren is simply mistaken that the DAP EIR did

not analyze impacts on Berkeley High School or Berkeley City College. The DAP EIR at page 3-1 describes the "Downtown Area" as "bounded on the north by Hearst Avenue, on the east by Oxford Street/Fulton Street, on the south by Dwight Way, and on the west by Martin Luther King, Jr. way." Berkeley High School and Berkeley City College are within this geographic area and the DAP EIR analyzed noise (Chapter 4K) traffic (Chapter 4O) sewage (Chapter 4P) air quality (Chapter 4C) Parking (Chapter 4O, pp. 4-254 through 4-260) in the entire geographic Downtown area.

Ms. Hammargren's suggestion that separate "school studies" were required is unsupported by any authority, and it is clear that the DAP EIR evaluated the entire DAP geographical area which included Berkeley High School and Berkeley City College. It follows that the project EIR properly relied on the DAP EIR in the application of PRC § 21094.5(a)(1).

Ms. Hammargren next asserts that the EIR for the project failed to disclose and evaluate the seismic hazard existing on a portion of the project site. Although the issue of liquefaction was raised in testimony and written comments during the public hearing process, Ms. Hammargren asserts that the EIR simply ignored the issue and made findings of a less than significant environmental impact. This issue is a quasi-judicial determination by City and the court therefore applies the substantial evidence standard in its review of the issues. (*San Franciscans Upholding the Downtown Plan, supra*, 102 Cal. App. 4th at 674.)

Ms. Hammargren is factually incorrect in her assertion that the issue of seismic impacts was ignored. The EIR does disclose a seismic hazard relating to liquefaction of fill soil along the underground portion of Strawberry Creek. The EIR reports that all fill soils will be removed from the site during excavation and that such removal will eliminate potential seismic hazards. (See AR 1:1442-1444.) It follows that the City's finding that any potential impact relating to seismic

concerns is less than significant is supported by substantial evidence in the record.

Ms. Hammargren next argument is that the project exceeds the BMC height limit in the Downtown Area and violates the City of Berkeley Municipal Code and that the voter-passed Measure R allows for no proposed building to be higher than 180 feet.

There is no dispute that the project is designed and approved at a height of 180 feet, plus a five-foot parapet, plus mechanical constructs on top of the 180–foot roof.

This issue must be determined by reference to BMC section 23 E.68.070 which defines how buildings heights are to be measured in the City of Berkeley. It provides, in relevant part, "in the case of a roof with parapet walls, building height shall be measured to the roof and parapets may exceed the height limits by up to five (5) feet as of right." (BMC § 23E.68.070.A [Table 23E.68.070], emphasis added.) Thus the project height of 180 feet plus a five foot high parapet complies with zoning requirements and, additionally, mechanical constructs may exceed that maximum building height under BMC 23E.04.020.C. Accordingly, the project does not violate the height limitations of the BMC (and in fact appears to have been carefully designed to be within the City's height restrictions).

The next issue raised by Ms. Hammargren relates to the City's decision to reject the "preservation alternative" as an environmentally-superior alterative. Ms. Hammargren argues that the City's determination of financial infeasibility is not supported by substantial evidence. She points to a financial "pro forma" memorandum prepared by the project applicant and submitted to the City in July of 2015. That document indicated an "Estimated Cost" of land at $40M when the actual cost to purchase the site is $19.5M and the entire site will not be used for the project.

The record of findings indicates that financial feasibility was only one of several findings that supported City's rejection of the Preservation Alternative. (See AR 1:760-761.) Even

assuming, counterfactually, that financial feasibility was the sole reason City rejected this alternative, the July 2015 pro forma to which Ms. Hammargren refers was not the only information on which the City based its determination of financial infeasibility. (See, e.g., AR: 1-760-761 [Preservation Alternative failed to meet several project objectives].)

Considering the additional information that was provided to the City Council and the discussion of the "error" in the "Estimated Cost" of land found in the July 2015 memorandum at the meeting of the City Council on December 8, 2015, and considering the determinations (which are not challenged herein) that several important project objectives are best achieved by the project as approved, the only conclusion that can be reached is that there exists substantial evidence in the record to support the City's finding of rejection of the Preservation Alternative. Even if financial feasibility was the only basis to reject the alternative, the full discussion of the pro forma and the facts submitted to the City Council at the December 8 meeting provide more than enough substantial evidence to support the City's finding.

Ms. Hammargren's next argument is that the project is not properly classified as an "infill project" because it fails to provide any affordable housing units in addition to market-rate housing. Ms. Hammargren cites no authority for the proposition that a residential project may not be built unless it includes low income housing or that the building of market rate housing alone is a violation of CEQA or any other state statute or section of the municipal code. Her argument therefore lacks merit. (*Jacobson v. County of Los Angeles* (1977) 69 Cal.App. 3d 374, 388 [the petitioner bears the burden to show an abuse of discretion].)

Ms. Hammargren next contends that City never adopted the findings required by CEQA relating to impacts, mitigation measures, alternatives and overriding considerations when it approved the project and the EIR. (Hammargren Br. at 13:4-12.) Factually speaking, the record

does not support this claim. The "findings" were part of the resolution in the agenda packet and the motion was to adopt the resolution in the agenda packet.

Ms. Hammargren next argues that the City failed to conduct a "mandatory" study of sewer capacity. (Hammargren Opening Brf. p. 13:28.) Her argument raises three separate points.

First, Ms. Hammargren argues that the EIR does not contain any site-specific analysis of the project's sewage impact. This is incorrect.

The DAP EIR states the following:

> As individual development projects are proposed in the Downtown Area, each project will be subject to site specific analysis by the City of Berkeley to determine whether the development proposed would exceed the capacity of the sanitary sewer conveyance system that directly serves the project. In the event that existing sanity sewer modeling demonstrates that sanitary sewer conveyance system capacity would be exceeded by the proposed project, then the project proponents and the City shall enter into negotiations to determine the financial contribution required from the project proponents to enable the City to expand sanitary sewer conveyance capacity as necessary to accommodate the project as proposed. ¶ Effective implementation of this mitigation measure would reduce potential development-related impacts to the existing sanitary conveyance system to a level that is **less than significant.** (AR 3:685 at p. 4-334.)

The EIR does, in fact, address the requirement imposed on the project by the DAP EIR on pages AR: 1-1514-1515. The EIR states:

> As discussed above, the DAP EIR requires that individual developments proposed in the Downtown Area undergo site-specific analysis of the capacity of the sanitary sewer lines that would convey wastewater from the project site. Based on the conceptual utilities plan for the project, a new sanitary sewer line eight inches in diameter would be constructed on site leading to an existing 12-inch sewer main under Allston Way. In compliance with Mitigation Measure UTIL-1 from the DAP EIR, the City of Berkeley Department of Public Works was consulted to ascertain the project's site-specific impact on sanitary sewer lines. City staff responded that existing sewer lines adjacent to the project site would have adequate capacity to serve the site and that the installation of a connection to an existing sewer line would not generate any significant environmental impacts. (Aikenhead, personal communications, May 2, 2014.)

The facts to which the EIR refers clearly provide substantial evidence to support the finding that

there is no significant environmental impact on the subject of the sanitary sewer conveyance system from the project.

Second, Ms. Hammargren argues that the EIR fails to address the environmental concern that EBMUD's Main Wastewater Treatment Plant capacity may be compromised in wet weather. This argument involves a different assessment because it is not an issue that is measured by substantial evidence of underlying facts. Rather, this was a subject that was evaluated in the DAP EIR (pp. 4-329 to 4-335) with the following: "With an available capacity of 88 MGD, the EBMUD treatment plant would be able to accommodate increased wastewater flow coming from the Downtown Area following development anticipated under the DAP. (DAP EIR, AR: 3-685 at p. 4-433.)

Ms. Hammargren's second argument is unavailing because the project is an "infill project" within the Downtown Area Plan and the DAP EIR previously assessed any potential impact from the development of projects such as the instant project.

And third, on the subject of sewage, Ms. Hammargren contends that the EIR has no cumulative impact assessment regarding either Berkeley High School or regarding inadequate treatment capacity by EBMUD. But this argument, whichever it is, is unavailing as these were subjects were also previously assessed in the DAP EIR.

The next issue raised by Ms. Hammargren concerns the demolition of the addition to the existing Hinks Building in 1957 (or 1959). Whatever year it was constructed, Ms. Hammargren's argument is that in 1989, the entire building, including additions, was designated a historical landmark by the City of Berkeley and therefore may not be demolished.

The analysis of this issue involves BMC 3.24.260(C)(2) and whether the City has complied with its own ordinances. The BMC permits the demolition of historical landmarked

buildings and BMC 3.24.260(C)(2) sets forth the findings required prior to any such demolition.

In this case, City made findings (at AR: 1-185-186) which satisfy BMC section 3.24.260(C)(2). Such findings entirely undercut Ms. Hammergren's argument that the Hinks Building is a historical landmark that may not be demolished. The City has complied with the requirements under its ordinance to demolish a landmarked building and Ms. Hammargren has made no argument that such findings were not properly made.

3. *Mr. Hendry's Claims*

Mr. Hendry first argues that City relied on "evidence it knew to be erroneous" in its determination to reject two project alternatives, the "Preservation Alternative" and the "Contextual Design Alternative." The same argument was raised in Ms. Hammargren's Petition with respect to the Preservation Alternative and the same analysis applies to both alternatives that Mr. Hendry asserts were improperly rejected.

Mr. Hendry claims that the financial pro forma dated June 28, 2015 containing a large "cost of land" discrepancy renders the EIR, as approved by City, "so fundamentally and basically inadequate and conclusory that a meaningful public review and comment were preluded." However, the record is clear that the City Councilmembers were well aware of the correct land "cost" and the financial feasibility of the project and of the alternatives by December 8, 2015 when they approved the project.[1]

In any event, as indicated above, there is substantial evidence to support a finding of financial infeasibility of the alternatives and, independent of that, there were a number of other factual bases to reject the alternatives which alone would have been sufficient to meet the

1 Indeed, Mr. Hendry attached 35 pages from the Administrative Record demonstrating that his perspective of the "erroneous" land cost was among the things considered by the City Council in its consideration of, *inter alia*, the financial feasibility of the studied project alternatives.

substantial evidence test to support rejection of the alternatives.

Mr. Hendry's second argument is that the City's Statement of Findings and Overriding Considerations were created "post hoc" at a time after the City Council's approvals. Mr. Hendry appears to be factually incorrect in his premise that the City Counsel Meeting Agenda did not contain the findings he asserts were not written until some date later than the meeting at which the city approved the EIR and the findings. (See also the above discussion regarding Ms. Hammargren's argument that the City failed to adopt findings.)

Mr. Hendry's third argument challenges the quality of the data used in the EIR regarding any environmental impact related to public transit asserting that the analysis was "incorrectly modeled."

The EIR found that "it is not anticipated that the project will have a significant adverse impact on the existing and future transit routes serving Downtown Berkeley. In addition, dense mixed-use development in the transit-rich and heavy pedestrian traffic area was envisioned in the DAP and analyzed in the DAP EIR. Therefore, impacts would be less than significant and would be within those identified in the DAP EIR for the Downtown Area Plan as a whole." (AR: 1-1510.)

Mr. Hendry does not assert that the City improperly applied the conclusions regarding public transit found in the DAP EIR to this infill project in the downtown area of Berkeley. Absent evidence that would remove the subject of public transit from the operation of PRC section 21094.5, Mr. Hendry's challenge to the DAP EIR's data or modeling relating to public transit impacts is unavailing.

Mr. Hendry's next argument is that City's "incorrect modeling of public transit demand" resulted in the erroneous conclusion that the project is "transit friendly" and since that conclusion

is cited as an overriding consideration, the EIR's Statement of Overriding Considerations is not supported by substantial evidence in the record.

The first flaw in this argument is that the "transit friendly" component of this project is a minor part of one of eleven separate and distinct identified "benefits" upon which the statement of overriding considerations is based. The second flaw is that the record is full of evidence to support the notion that the project is "transit friendly." (See, e.g., AR: 1-156 [sustainability features of the project include the provision of AC Transit passes for each residential household and every commercial employee].) This, too, is an argument that lacks merit.

Mr. Hendry next argues that an allocation of $250,000 (an extraction from the developer for community benefits purposes) to the Habitot Children's Museum ("Habitot") to assist with their relocation to a new site is part of the project and thus the EIR should have evaluated the environmental impact of the museum's move to a different facility.

It is clear that Habitot had made arrangements to relocate to Adeline St. and Alcatraz Ave. at least six months prior to the approval of this project and that the City approved the lease of a City-owned parking lot at Adeline and Alcatraz to Habitot in May of 2015. (See, e.g., Mr. Hendry's Opening Brf. at p. 14:14-18, pointing to the June 9, 2015 action by the City Council to approve the Habitot lease at Alcatraz and Adeline.)

The City Council, in its resolution of December 8, 2015, included the allocation of $250,000 to Habitot. The Staff Report for the December 8, 2015 meeting, at AR:1-4853 and 4854, advised the City Council that there were no significant environmental consequences arising from any potential uses of the community benefit funds. The Staff Report, at that place in the report did not specifically identify a gift of money to Habitot as a potential community benefit, but did identify the gift of funds later in the report at AR:1-4876.

Mr. Hendry now wishes to take issue with that information, but he has not identified any evidence in the record that could support a contrary finding. Mr. Hendry points to AR pages 1-1963 and 1-1964, but that citation is to a portion of the traffic and parking study for the project which reflects a reduction of auto trips in the downtown area as the result of the relocation of Habitot. Mr. Hendry does not point the court to any relevant evidence in the Administrative Record from which one could conclude that there was a possibility of a significant impact to the environment as a consequence of the gift of money to Habitot. The court is therefore compelled to find that City's determinations regarding the parking lot lease or the community benefits extraction do not violate any requirement imposed by CEQA.

Mr. Hendry's final argument is that "[t]he FEIR Did Not Address Compliance with State Planning Standards." Mr. Hendry relies on PRC section 21094.5.5(b)(2) but his argument is based on a fundamentally flawed understanding of that section. Section 21094.5.5(b)(2) requires the Office of Planning and Research to certify and adopt guidelines regarding implementation of section 21094.5. It creates no requirement pertaining to the contents of an EIR. The argument that the FEIR is flawed for not having complied with section 21094.5.5 or with "State Planning Standards" is without merit.

Conclusion

For the reasons set forth above, Petitioners have not shown that City of Berkeley abused its discretion in approving the project. The consolidated petitions are therefore DENIED. City of shall prepare and submit a proposed judgment as to each writ petition within 10 days.

IT IS SO ORDERED.

Date: October 19, 2016

Frank Roesch
Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA
COUNTY OF ALAMEDA

Case Number: RG16-799959
Case name: Hammargren vs City of Berkeley

ORDER

DECLARATION OF SERVICE BY MAIL

I certify that I am not a party to this cause and that a true and correct copy of the foregoing document, **ORDER** was mailed first class, postage prepaid, in a sealed envelope, addressed as shown at the bottom of this document, and that the mailing of the foregoing and execution of this certificate occurred at 1221 Oak Street, Oakland, California.

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 19, 2016

Executive Officer/Clerk of the Superior Court
By Param Bir, Deputy Clerk

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