

The Pocket Protectors
Islands at Riverlake Appeal

January 2006

BRANDT-HAWLEY LAW GROUP

Environment/Preservation

Chauvet House PO Box 1659

Glen Ellen, California 95442

January 9, 2006

Legal Assistants

Sara Hews

Shannen Jones

Law Clerk

Rachel Howlett

Susan Brandt-Hawley
Paige J. Swartley

Hand-Delivered

Mayor Heather Fargo and
Members of the City Council
Sacramento City Hall
730 I Street, Suite 321
Sacramento, CA 95814

re: Islands at Riverlake Project
Appeal of EIR Certification and Project Approval

Dear Honorable Mayor Fargo and Councilmembers,

Our client, the public interest Pocket Protectors group, has appealed the Planning Commission's certification of the EIR for the Islands at Riverlake project along with its project approvals. In our opinion, the EIR is inadequate, incomplete, and does not make a good faith effort at full disclosure, violating basic mandates of the California Environmental Quality Act. Please grant the Pocket Protectors' appeal of the EIR certification, overturn approval of the project, and require the preparation of an adequate EIR prior to further consideration of the project and feasible mitigations and alternatives.

Because this matter is complex and involves a lengthy published opinion of the Third District Court of Appeal in *The Pocket Protectors v. City of Sacramento* (2005) 124 Cal.App.4th 903, and because review of the environmental issues is admittedly somewhat tedious, I have separated this letter's discussion of environmental and legal issues into distinct segments attached as exhibits to this letter. One of the exhibits includes some of the important paragraphs from the appellate decision that should be of great interest to you. I hope this format with exhibits will make the Councilmembers' review of this important project as smooth as possible. This submission is intended to supplement the certified administrative record dating from 1979 that is part of the record before you, as submitted to the Sacramento Superior Court and the Court of Appeal, all subsequent Islands project-related materials in City files and in those of the Sycamore Environmental Consultants who prepared the EIR "for" the City, the report and testimony of Amy Skewes-Cox on behalf of the Pocket Protectors, the EIR comment letters, and the transcript of recent proceedings before the Planning Commission.

in that case was prepared by the County, with input from the applicant's consultant's draft responses to comments. Here, Sycamore Consultants, under direct contract with Regis Homes, prepared the Final EIR as well as the Draft EIR. While Sycamore consulted with City staff, the process goes beyond any reasonable measure of objectivity in environmental review, and violates the mandate of Public Resources Code section 21082.1 that an EIR "shall be prepared directly by, or under contract to, a public agency." No case has gone as far as the County has allowed Regis Homes to go in this case in terms of controlling the EIR preparation. Again, this is further explained in the exhibits.

On top of all this, the treatment afforded concerned citizens before the Planning Commission was, in a word, appalling. If any of you had been there, I believe that you would agree that the City's interests were not well-represented. In a packed room, all but a few of the speakers opposed the Islands project as proposed — and, as you know, the double-rowed "mini-mansion" design *has not changed in design* since the last time it came before you in August 2003 — and they were treated with great disrespect by the acting Planning Commission Chair, "Red" Banes. Over the last twenty years and more, I have appeared at hundreds of land use hearings around the state, and I cannot recall another hearing at which a hearing body, and particularly its acting Chair, belittled and discouraged public participation to such an extreme degree. I urge you to review the transcript, although as noted by one of the speakers, the transcript does not show the tone of the hearing, including Chair Banes' undisguised sarcasm as polite and well-spoken citizens came forward with concerns or critiques of the project or the EIR. Repeatedly, "Thank you" was delivered sarcastically by Chair Banes as "*Thank* you." Further, when speakers raised points that sounded troublesome, the Chair (often joined by Commissioner Boyd) would turn to staff to immediately discount the comment. Unfortunately, the City staff was unable to provide video or audio recordings of the meeting. Finally, when one speaker gravely objected to the Chair's overt hostility, the room erupted in applause. When I later told Joe Cerullo that I believed the bizarre conduct of the hearing violated the due process rights of the concerned public, he reported back to me that Chair Banes had been ill. That does not excuse her extraordinary rudeness nor cure the due process problem.

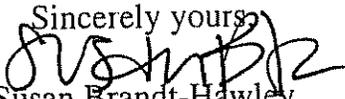
As another introductory point, I would like to repeat what I respectfully said to the Planning Commission — although Chair Banes indicated that the Commission had its own lawyers and did not want my input. Please keep in mind that Bill Heartman and Regis Homes *have no right to build the Islands at Riverlake project as proposed*. As you know, CEQA and due process require that this Council consider this project in a fresh light and without consideration of the time that has gone by to secure adequate environmental review. Importantly, the grading and utility work that have occurred on the site were specifically done by choice and at the applicant's own risk and cannot be considered as equitable grounds to grant a permit.

reported concern as someone deeply involved with the community and the planning of Riverlake is in seeing this last parcel developed in an environmentally sensitive manner consistent with the long-planned LPPT PUD. I believe that members of the Council who know Mr. Parker know this to be true.

Finally, the reason that it has taken until now for this letter to be produced is that the City failed to provide this office with many documents that are relevant to the EIR process, and so we have had to make requests under the Public Records Act for documents that have proved critical in piecing together the exhibits to this letter. As you know, we asked the City Council for a continuance of the Islands project appeal hearing for this reason. Unfortunately, we still have not received responsive documents that we are entitled to under the law. The City mailed its last group of documents to this office postmarked December 19, 2005, by regular mail, and they were received here on December 21, 2006. I was out of the office between that date and the new year, both on business in southern California and for the holidays. Then, last week on January 4, 2006, we received from Regis Homes' attorney Sabrina Teller an additional packet of emails and documents in further response to our Public Records Act request. Some of the documents that we have received from the City and Ms. Teller were used in preparation of this letter, and are attached in the exhibits.

In sum, as I hope you will agree after your review of the attached material, this EIR process has failed, in significant part due to the City's reluctance to assert control and allow fair access and accountability. It is not too late; I respectfully ask that after you take a hard look at the information given that you will act to require a revised EIR to be developed in a fair process to which all concerned parties have equal access. The Pocket Protectors want to work with the City, in an EIR process that could be either hands-on or hands-off during the drafting, as you choose, but inherently equal and fair and applying objective criteria. If that happens, the Pocket Protectors are confident that the significant environmental problems with the Islands at Riverlake project as currently proposed will emerge, and a project alternative that incorporates townhouses as anticipated for this long narrow site on the greenbelt will be seen as feasible. On the other hand, if impacts are fairly assessed in the EIR and a supportable determination is made that there are no feasible alternatives, the Pocket Protectors will accept the decision of this Council.

Thank you very much for your consideration.

Sincerely yours,

Susan Brandt-Hawley

cc: Samuel Jackson and Joe Cerullo
Tina Thomas and Sabrina Teller

The Pocket Protectors

Islands at Riverlake Appeal

January 2006
Sacramento City Council



**APPELLATE OPINION
EXCERPTS**

**APPELLATE TRANSCRIPT
EXCERPTS**

AESTHETIC IMPACTS

TRAFFIC IMPACTS

LAND USE IMPACTS

ALTERNATIVE ANALYSIS

**EIR PROCESS
OBJECTIONS**

APPELLATE OPINION EXCERPTS

Neighbors Relied on the PUD

“Before the current project was proposed, the City Council had approved two unconsummated plans to develop the site. The first, submitted in 1987, would have constructed 155 clustered townhouse units; the second, submitted in 1994, would have constructed 167 clustered townhouse units.” (*Id.* at 909.) Public comments noted that “[n]eighbors had bought homes or land near the project site in reliance on the approved PUD, including its plan for cluster homes fronting Pocket Road, and the Development Agreement for this site, which was still in force.” (*Id.* at 914.) “By the time the current project was proposed, the surrounding area was fully developed with housing. All the housing types called for in the PUD and its Development Guidelines had been built, except for townhouses.” (*Id.* at 909.) “[N]eighbors familiar with the site and with the PUD, some of whom had moved to the neighborhood in reliance on the promise that the PUD would control its development. . .” (*Id.* at 932.)

Project is Inconsistent with the PUD

“The LPPT PUD governs the development of the project site. This is why Regis had to apply for and obtain a Special Permit to develop detached single-family dwellings on the site: as we have shown, the PUD’s drafters intended the site for a different type of housing (‘townhouse and similar development’).” (*Id.* at 929-930.)

“[I]n adopting the PUD the City Council found that it ‘meets the purposes and criteria stated in City Zoning Ordinance Sections 8A and 8B in that the PUD facilitates a variety of housing types and site plans, accessible open ‘green spaces,’ recreation areas and other features of substantial benefit to a viable and balanced community. [¶] ... [¶] ... [T]he PUD [e]nsures that development will be well-designed, and that non-residential uses will be adequately buffered from residential uses by landscaping and setbacks.” This statement confirms that in adopting the PUD the City Council sought to avoid or mitigate the environmental effects that might arise from unplanned development.” (*Id.* at 930.)

“In addition to their general objectives, the PUD’s Development Guidelines specifically stress the importance of landscaping. In a section headed, ‘*Landscape Requirements (Excluding Single Family Residential)*,’ the Guidelines state: ‘The role of landscaping as a common element to unify the overall PUD cannot be overstated.’ They go on to prescribe specific rules, including 25 percent landscape coverage for any project within the PUD and a minimum 25-foot landscaped

setback for all public road frontages. These conditions apply to the project site: the PUD designates only sites zoned R-1 as 'single family' residential, not sites zoned R-1A and reserved for townhouses, such as the project site." (*Id.* at 930.)

"According to the initial study for The Islands at Riverlake prepared by City planning staff, '[h]ousing projects similar to townhouses include cluster and row housing.' In other words, the term '[t]ownhouse (or similar development)' in the LPPT PUD did not mean detached single-family housing." (*Id.* at 909, n.2.)

"[T]he project conflicts with the objectives of the PUD. Not only did the PUD require 'townhouses and similar development' for the site, but the site's unusually narrow shape dictated that only such housing could be built at the desired density without violating the PUD's objectives." (*Id.* at 931.)

"In April 2001 a staffer informed Regis that the project 'does not fulfill the intent of the LPPT PUD Townhouse land-use designation insofar as it does not incorporate the landscaping and open space concepts embraced by the remainder of the LPPT PUD.' (In other words, Regis's plan to construct as many large detached houses as possible side by side on minimal lots violated the PUD's intent to preserve greenery and open space while building out the site.) Staff also pointed out the "canyon" effect of putting so many houses of similar scale so close together along the whole length of the site. n19 [Regis notes that it adopted some of staff's suggestions for ameliorating this effect, such as varying the heights and facades of adjacent houses. However, the fundamental plan to pack as many houses as possible on lots as small as possible along both sides of a long straight private street did not change. Thus, substantial evidence exists to support a fair argument that "canyoning" is still a feature of the approved project.] Staff recommended mitigating this effect by, among other things, planting one shade tree per 30 lineal feet of street frontage, but the approved project did not include this mitigating measure. Nor could it have done so: after every possible adjustment had been made to increase the setbacks, they remained too small to permit large shade trees." (*Id.* at 931.)

Senior Planner Tom Pace "testified that the setback issue was troubling, but given the project's design the problem could not be significantly alleviated. Regis wanted to create a 'single family detached appearance from the ... public street' while maintaining 'something close to the approved density.' The only way to achieve this end within the 'very narrow strip' of developable land between the greenbelt and the existing homes (only 120 feet altogether) was to group houses in two tiers with a 'common driveway' in between (much narrower than the standard 41-foot-wide city street). n7 [Pace noted that the previously approved project had also included a 25-foot-wide private street, but conceded that houses would have been built on only one side of that street.] . . . Pace acknowledged the site was

narrow because the PUD had designated it for development with a single tier of townhouses or ‘manor houses’ (three or four attached units designed to look like one large house).” (*Id.* at 916.)

“ . . . City planner Pace told the Planning Commission that the project's setback problem could not be solved perfectly because the only way to develop the ‘very narrow strip’ available with single-family housing at ‘something close to the approved density’ was to double-tier rows of houses along a narrow private street. (Bill Heartman, speaking for Regis, testified to the same effect.) Pace also told the City Council of an inevitable ‘trade off’ between providing a sidewalk, providing standard-length driveways, and providing generous rear yard setbacks. The site's physical properties did not cause these problems. What caused them was Regis's plan to build a type of housing that the site could not easily accommodate at the proposed density.” (*Id.* at 931.)

“Furthermore, the Planning Commission expressly found that the first version of the project did not comply with the policies and objectives of the PUD, which had anticipated "attached townhouse-style housing" for the site. (See *Stanislaus Audubon Society [Inc. v. County of Stanislaus]* (1995)] 33 Cal.App.4th at p. 155 [planning commissioner's fact-based opinions, stemming from commission’s experience in planning and development, are substantial evidence for a fair argument].) Based on the site's configuration as determined by the PUD, the Planning Commission also found more broadly that the project failed to comply with ‘sound principles of land use’ (impliedly including the objectives of the PUD) due to inadequate setbacks and front yards, insufficient possibilities for landscaping as a result, excessive massing of houses along the interior drive, and encroachment on neighboring owners' privacy, inter alia. (Even after the project was modified to increase setbacks, two City Councilmembers still found them inadequate for essentially the same reasons.)” (*Id.* at 931-932.)

“The developer and the City executed a Development Agreement for the original proposed project, which was extended until August 25, 2002, for the second proposed project. The Development Agreement stated in part: ‘If Developer wishes to develop as single family residential one or more portions of the project zoned R-1A or for multifamily use, it may do so, in which case the portion or portions shall be rezoned R-1’” (*Id.* at 909.) “We recognize the Development Agreement has expired. Nevertheless, it tends to show that the City Council's findings of fact as to zoning are arguably inconsistent with the PUD and the City Council's original directives for developing the site.” (*Id.* at 933, n.21.)

“Regis asserts its project fits within the PUD’s townhouse designation because a dictionary gives an alternate definition of ‘townhouse’ as ‘a house in a compact planned group in a town.’ But even if the PUD had incorporated this

definition (which Regis does not show), it would not mean that an entire development of detached houses is a townhouse development. It is clear that this is not what the drafters of the PUD, or the City Council in approving the PUD, had in mind.” (*Id.* at 936.)

“Regis asserts its project is within the PUD's approved density for the site. This fact does not advance Regis's argument. Maximum density is only one of the PUD's conditions for development of R-1A sites.” (*Id.* at 936.)

Planning Commission Chairman Waste “opposed the project for several reasons: (1) ‘[I]t's a bad land use where it's proposed. . . . this is a project that would be phenomenal in so many places across this town that are legitimate in-fill candidates and . . . I would welcome it in any one of probably 35 places that I could think of around town. . . . I would not add this location as a 36.’” (*Id.* at 917-918.)

“It is true that the MND found the project consistent with the PUD. However, its findings are devoid of reasoning and evidence. After observing that the PUD identified the project site for townhouse development, the MND merely states: ‘The approvals for the 1993 townhouse project expired and the City is considering the development of single-family homes in place of the townhouse concept.’ It asserts measures will be taken to ensure that the project conforms to ‘the minimum design standards set in the LPPT PUD Development Guidelines,’ but does not explain how this can be done without building the type of housing the Guidelines mandate for the site. In short, the MND does not support its finding of consistency with the PUD, but simply accepts the City's decision to disregard the PUD as a *fait accompli*.” *Id.* at 932.)

“The City Council approved detached single-family housing on the project site partly because R-1A zoning *generally* permits detached housing as a ‘Single-family Alternative’ housing type. But as the Planning Commission and City staff pointed out, the PUD specifically designates sites zoned R-1A *within the PUD* for townhouse or other clustered housing development. Furthermore, the Development Agreement for the prior unbuilt project, which the Council presumably executed with the PUD's objectives in mind, stated that a rezoning to R-1 would be required to build ‘single family residential’ housing on the site. n21 [We recognize the Development Agreement has expired. Nevertheless, it tends to show that the City Council's findings of fact as to zoning are arguably inconsistent with the PUD and the City Council's original directives for developing the site.]” (*Id.* at 933.)

“[The] proposed mile-long project facially conflicts with a PUD established by the City to mitigate the possible environmental effects of uncontrolled

development, and has the potential to cause an immediate adverse environmental impact to hundreds of nearby residents.” (*Id.* at 936.)

“It may be, as Regis told the City Council, that a developer could not now make money by building the kind of housing on this site which the PUD intended for it. However, this possibility does not justify skirting CEQA by ignoring the PUD’s intent or finding consistency with the PUD where there is none.” (*Id.* at 936.)

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

| | | |
|-----------------------------|---|-------------|
| THE POCKET PROTECTORS, an |) | |
| unincorporated association; |) | |
| |) | |
| Plaintiff and Appellant, |) | |
| |) | |
| vs. |) | No. C046247 |
| |) | |
| CITY OF SACRAMENTO and |) | |
| SACRAMENTO CITY COUNCIL; |) | |
| |) | |
| Defendants and Respondents, |) | |
| |) | |
| REGIS HOMES OF NORTHERN |) | |
| CALIFORNIA, INC., et al., |) | |
| |) | |
| Real Parties in Interest. |) | |
| |) | |

TRANSCRIPTION OF THE AUDIOTAPE OF THE
COURT OF APPEAL ARGUMENT
Held on Monday, November 22, 2004

1 APPEARANCES:

2

3 For the Appellant The Pocket Protectors:

4 Brandt-Hawley Law Group
5 Attorneys at Law
6 P.O. Box 1659
7 Glen Ellen, California 95442
8 BY: SUSAN BRANDT-HAWLEY, ESQ.

7

8 For the Respondents City of Sacramento:

9 City of Sacramento
10 Senior Deputy City Attorney
11 980 Ninth Street, Tenth Floor
12 Sacramento, California 95814
13 BY: JOSEPH P. CERULLO, ESQ.

12

13 For Real Parties Regis Homes:

14 Remy, Thomas, Moose and Manley
15 Attorneys at Law
16 455 Capitol Mall, Suite 210
17 Sacramento, California 95814
18 BY: SABRINA V. TELLER, ESQ.
19 TINA A. THOMAS, ESQ.

17

18 Transcribed By:

19 Michelle Barbante, CSR
20 License No. 12601

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Verbatim ■

1 that the court allows -- excuse me, that CEQA allows for
2 basically a two-stepped approach to adopting a mitigated
3 negative declaration. That two-stepped approach allows
4 the agency to first look at the record to determine and
5 ascertain whether or not there's a fair argument, and then
6 second, to adopt a finding that says that the project will
7 not have an environmental impact, and that's exactly what
8 the city did here. And I believe that it is in both the
9 statute and in the regulation that they're both consistent
10 with regard to that two-step process. Turning now --

11 JUSTICE 1: Let me ask you a little bit about
12 the --

13 MS. THOMAS: Sure.

14 JUSTICE 1: -- the question about aesthetic
15 impacts.

16 MS. THOMAS: Sure.

17 JUSTICE 1: The statute, the guideline, and case
18 law all say that aesthetic impacts are properly considered
19 under CEQA.

20 MS. THOMAS: Correct.

21 JUSTICE 1: Okay. And let me -- let me just
22 read you this, some language from the California Supreme
23 Court, okay? And I'm going to quote now. "The foremost
24 principle under CEQA is that the Legislature intended the
25 act 'to be interpreted in such manner as to afford the

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1 fullest possible protection to the environment within the
2 reasonable scope of the statutory language,'" quoting from
3 Friends of Mammoth. Continuing, "More than a decade ago,
4 we observed that, 'It is, of course, too late to argue for
5 a grudging miserly reading of CEQA.'" So the injunction
6 from the Supreme Court is to read CEQA as broadly as the
7 statutory language will permit. And in that circumstance,
8 why isn't an urban aesthetic impact cognizable under CEQA?
9 Why shouldn't we construe CEQA broadly in line with the
10 injunction of the Supreme Court to consider urban
11 aesthetic impacts?

12 MS. THOMAS: Well, Your Honor, I believe it is
13 the California Environmental Quality Act. It has nothing
14 to do with personal likes and dislikes, personal tastes,
15 gut feelings. Those kinds of things just aren't within
16 the realm of CEQA. They can't be analyzed within the
17 context of CEQA.

18 JUSTICE 1: Have you ever been to Carmel?

19 MS. THOMAS: A long time ago.

20 JUSTICE 1: Have you ever been to Caramel?

21 MS. THOMAS: A long time ago.

22 JUSTICE 1: Carmel is a charming little village
23 by the sea.

24 MS. THOMAS: Correct.

25 JUSTICE 1: Let's assume a broker came along and

Verbatim ■

1 wanted to put two Quonset huts in the middle of Carmel.
2 Do you think that would be excluded from cognizance under
3 CEQA?

4 MS. THOMAS: I think in that --

5 JUSTICE 1: Because it was in a residential
6 neighborhood, in a town?

7 MS. THOMAS: Well, it's a little hard to answer
8 that kind of question about what kind of use is because
9 the way zoning codes and general plans and community plans
10 are established are based on zoning codes that set forth
11 height limitations, setback limitations -- those kinds of
12 things. Here we're not asking for any exceptions to any
13 of those types of aesthetics. We're asking -- the only
14 the only thing we're asking for that varies from the code
15 is to reduce the street size, so it's a little bit
16 different than talking about Quonset huts in the middle of
17 Carmel, because we're not asking to deviate from anything.

18 JUSTICE 1: Well, you're proposing a project
19 that would create a corridor nearly a mile long of houses
20 that are utterly different design than houses in the other
21 part of the pocket, and certainly the Pocket Protectors
22 adduced evidence for the planning commission before the
23 board that was aesthetically unacceptable because of the
24 incongruence of that design and because of the lack of
25 setbacks, etc., that you heard the appellant articulate in

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1 opening argument. And I just want to know is it your
2 position that is category outside CEQA, and if so, how can
3 it be given our injunction to read CEQA broadly?

4 MS. THOMAS: Well, I don't think it's
5 categorically outside of -- out of CEQA. I believe that
6 the court has to read the Bowman case and look at the
7 circumstances that were applied in the Bowman case, and
8 the circumstances that were applied in the Bowman case
9 exist here. Is it the built environment? If you look at
10 an aerial, which aerials are in the record, you'll see
11 that it's all single-family dwellings out there. This is
12 an extension of that same type of development, albeit
13 slightly more compact.

14 The second thing you'll see in the record is
15 that the existing homes in that area, many of them are
16 less -- are less of a setback than what we're proposing.
17 They have a five foot setback in many locations in the
18 pocket area, so this is not dramatically different than
19 what exists on the ground, so that's one thing. And the
20 second circumstance is --

21 JUSTICE 1: Well, you know, there was evidence
22 adduced before the planning commission and the board,
23 including from architect Roger McCardle, that this was
24 substantially different.

25 MS. THOMAS: Well, we do not believe it's

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1 substantially different, and --

2 JUSTICE 1: Well, but I mean -- I mean, isn't
3 the basic rule that one reason that you have an EIR is to
4 examine and solve and to some extent adjudicate these
5 differences of opinions that come up with respect to
6 environmental impacts?

7 MS. THOMAS: And I think that to the extent that
8 there are differences of opinion about legitimate
9 environmental issues and in the contest of scenic or
10 aesthetic issues, I think we're always -- the cases have
11 always talked about blocking scenic views, blocking scenic
12 vistas, development on virgin hillsides. They've never
13 talked about these gut feelings, these likes, these
14 personal tastes. And how could you possibly analyze --

15 JUSTICE 1: But -- but you say these are gut
16 feelings, but, I mean, city planners every day take into
17 consideration aesthetic urban impacts when they plan
18 cities and plan communities, and these are --

19 MS. THOMAS: Correct.

20 JUSTICE 1: -- these are, other than gut
21 feelings, and there's nothing in the -- there's nothing in
22 the CEQA statutes or in the CEQA guidelines to exclude
23 urban aesthetic impacts from the purview of CEQA. And I'm
24 just suggesting to you it's hard to reach that conclusion
25 when you have an injunction from the California Supreme

Verbatim [®]

1 Court repeatedly uttered that CEQA is to be interpreted as
2 broadly as possible.

3 MS. THOMAS: Well, I will say here, Your Honor,
4 that the planners did in fact review this. There was a
5 formalized design review process. It went through the
6 subdivision review committee with an emphasis on
7 aesthetics. It was found to be consistent with the City's
8 overall residential design guideline for single-family
9 homes, so they made that determination as to that dispute
10 between the two. Again, I just don't think you can get
11 into a situation where EIRs are analyzing personal likes
12 and dislikes.

13 And let me give you an example that I think
14 about a lot. Residential neighborhood, existing church,
15 church needs to expand. The new church wants to -- the
16 church wants to do something fairly modern and bold. The
17 neighbors want a brick church with a steeple. You can't
18 analyze that in an environmental impact report. You can
19 do that in the context of design review, you can do that
20 in public areas, but you can't measure that against a
21 threshold of significance. You can't mitigate it because
22 it's personal taste. You can't analyze it from a
23 cumulative perspective --

24 JUSTICE 1: Oh, I think I would disagree with
25 you that you couldn't analyze that in terms of its

Verbatim ■

1 environmental impact. And clearly one important function
2 of an EIR, very important function, all the way from no
3 oil further, is to allow citizens of the community to
4 participate in the development process where environmental
5 issues are at stake, in this case, and on their
6 480-something people who signed the petition about this
7 project. So this case is kind of an exemplar case with
8 respect to the function of an EIR allowing the community
9 to comment on the environmental effects of a project
10 affecting their community.

11 MS. THOMAS: Well, starting from the point that
12 serious controversy in and of itself does not compel an
13 EIR and as to what could you gain from an EIR? I believe
14 that you can put the alternatives, different alternatives
15 that can be looked at, but you can do that in the context
16 of design review in the 30-plus hearings that occurred
17 here. You don't need a formalized document to do that.
18 And I believe that the threshold, so to speak, the split
19 between what's significant in terms of aesthetics and
20 what's not significant in terms of aesthetics, is drawn in
21 Appendix G quite clearly. It says scenic vistas, scenic
22 views, and those are exactly what the case law -- how the
23 case law has evolved over the years, if you have
24 Sequoyah Hills looking at a virgin hillside. You have
25 Ocean View looking at a reservoir and a hillside. You

Verbatim ■

1 have Quail Gardens looking at the Pacific Ocean. But we
2 get in -- if we get into a situation --

3 JUSTICE 1: Going back to my hypo about Carmel
4 with the Quonset huts in the middle of Carmel, that's off
5 limits to CEQA review?

6 MS. THOMAS: Well, again, Your Honor, it depends
7 on whether or not that the zoning code that is applicable,
8 whether or not what the guidelines are in there, because
9 there may be, for example, a requirement of height
10 restrictions and setbacks. There may even be residential
11 design guidelines, as the city of Sacramento has here, and
12 as the staff found that they were consistent with that.
13 So my guess is Quonset huts in Carmel would probably not
14 be allowed, because there probably are design guidelines,
15 there probably are height restrictions, there probably are
16 restrictions on the types of materials you can use.

17 JUSTICE 2: So your position is that this would
18 not be -- you know, evaluating the Quonset huts would not
19 be done within a calculus involving aesthetic
20 consideration?

21 MS. THOMAS: That would probably fall under
22 some -- yes, exactly. That would fall under some other
23 consistency --

24 JUSTICE 2: You're saying that, such in a --
25 factoring in aesthetics, then you maintain is limited to

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1 these examples involving vistas and views?

2 MS. THOMAS: Correct. Correct.

3 JUSTICE 2: So in the setting of, you know, you
4 use the hypothetical of a modern church in the middle of a
5 conventional residential area. Would your hypothetical
6 extend to, you know, the placing of such a modern
7 structure in the middle of a historic area?

8 MS. THOMAS: Yes, I think that you could
9 definitely do that. So long as, for example, I think that
10 there may be an issue if the church was of such a size
11 that it blocked historic views, that may be a different
12 issue. But here we don't have those types of situations.
13 We have basically, as I said, personal likes and dislikes
14 and things along those lines. But as to the landscaping,
15 for example, we started off with 500 trees here, we took
16 out 24, none of which were Heritage Oaks, and we're adding
17 300, so landscaping is not an issue.

18 In terms of actual lot coverage in this area,
19 48 percent of the property will be covered. So there's
20 50 percent open space, which, as the record reflects, is
21 equal to or greater than what is normally included in a
22 subdivision. Now while the design may be different, and
23 it may be something that some people really like, it may
24 be -- it is clearly something that a lot of people don't
25 like, but because 480 people signed a petition does not

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1 propel it into an EIR.

2 JUSTICE 1: How about when a licensed architect
3 and planner comes along and gives a professional opinion
4 that this design is a very, very bad design and
5 aesthetically unacceptable?

6 MS. THOMAS: Well, I think that you had the same
7 situation in Bowman where you had an architect testify.
8 Both -- that's one of the interesting similarities between
9 Bowman and here.

10 JUSTICE 1: Bowman -- you know, Bowman is a case
11 where there was a single structure, and the question was
12 whether it was going to be three stories or four stories
13 tall. You know, that was the issue, are we going to have
14 three stories or four stories on this building in an
15 industrial area of a city? And they said, "No, it's a
16 significant environmental effect." And perhaps that makes
17 sense. I mean, you know, one calc and one story of a
18 building in an industrial area may have a significant
19 impact on the environment. But to take the position
20 categorically that urban aesthetics impacts are out of
21 bounds of CEQA is to take the position, it seems to me, to
22 reverse the deference that we give to CEQA review and to
23 really run afoul of the Supreme Court's command to give
24 CEQA broad construction consistent with its language. To
25 take urban aesthetic effects off the table, I don't see

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1 how that works with CEQA.

2 MS. THOMAS: Well, I submit to you --

3 JUSTICE 2: Pardon me.

4 MS. BRANDT-HAWLEY: Excuse me.

5 JUSTICE 2: Let me interrupt here for
6 clarification. I got the impression that you were not
7 suggesting that aesthetic effects not be taken out of the
8 calculus, but rather that they be limited to these vista
9 and view situations that are established in the case law;
10 is that your position?

11 MS. THOMAS: That is my position that there are
12 issues that are just in Appendix G can be quantified, can
13 be decided that these are significant or potentially
14 significant aesthetics impacts. And then there's a whole
15 other series of things that, like I said, are just
16 personal likes and dislikes. And the fact that just one
17 architect doesn't like the design doesn't mean that
18 there's 99 others that do like the design.

19 JUSTICE 2: Where in the statute are we to turn
20 to anchor this analysis that you would have us follow
21 limiting aesthetic considerations to vistas and views? I
22 mean, just on the face of it?

23 MS. THOMAS: Sure.

24 JUSTICE 2: Just that language is troubling to
25 me in terms of working with, are we talking about a half

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1 mile? A quarter a mile? Fifty feet?

2 MS. THOMAS: Well, that's what the --

3 JUSTICE 2: A hillside? A flat view?

4 MS. THOMAS: Well, unfortunately CEQA probably
5 doesn't give us a whole lot of guidance on this, but it
6 is -- what CEQA is meant to analyze is potentially
7 significant environmental impacts and where does it fall
8 from the environment to something that's just a very
9 personal like and dislike. I don't know as if you can do
10 a bright line except to say that there are issues such as
11 in Appendix G that say, "Does it have a substantial
12 adverse effect on a scenic vista?" That's what the
13 Quail Gardens case analyzed. They said, "You're building
14 a subdivision, it's blocking public views, it's blocking
15 public views from a public park."

16 JUSTICE 2: Okay.

17 MS. BRANDT-HAWLEY: That kind of situation.

18 JUSTICE 2: Let's stop here. Why can't a fair
19 argument be made that this particular development is
20 analogous to that. We're not talking about one four-story
21 building in the middle of Berkeley. Here we're talking
22 about a mile, you know, a mile-long corridor, you know,
23 which has variously been described as a canyon. Why
24 doesn't that fall within a fair argument concerning
25 matters of views and vistas as you've described?

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1 Once again, I believe this project, while it's a
2 bit different than what's already there in the pocket
3 area, it's not dramatically different. It's single-family
4 dwellings with limited setback on both the already built
5 areas and the to be built areas, with an emphasis on
6 landscaping. Again, we're ending up with about 300 net
7 increase in trees, a 48 percent coverage equal to or
8 greater than what is normally done in a subdivision. The
9 problem is that this is an area that has been open for
10 awhile. It's an infill, and when people live in an area,
11 change from the unbuilt to the built, people have gut
12 feelings and gut reactions to it.

13 JUSTICE 3: Counsel, how is this an infill?

14 MS. THOMAS: Excuse me? I'm sorry.

15 JUSTICE 3: How is this an infill? This isn't a
16 situation where there's development going on over a period
17 of decades and no one knew about this or there was a
18 variety of owners. This particular strip was included and
19 it was actually planned many, many years ago, and the idea
20 that it's infill is a remarkable suggestion on your part.
21 And I found it remarkable in the dispute in the record
22 about that, because it is totally -- it's kind of like the
23 argument that you proposed on defining townhouses.

24 Well, there's a different way of defining it if
25 you look at the dictionary, but the word "townhouse" has a

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1 characteristic and traditional definition in planning, and
2 to look at the dictionary now and have it applied in a
3 different way is what you're suggesting. And the same as
4 to call this infill is rather remarkable. Before you sit
5 down, and you're over your time, I'd like to ask you just
6 a couple of clarifications --

7 MS. THOMAS: Sure.

8 JUSTICE 3: -- of the record that is a little
9 confusing to me.

10 MS. THOMAS: Sure.

11 JUSTICE 3: Was the original PUD and was the
12 original plan calling for townhouses to make it housing on
13 one side or both side of the street?

14 MS. THOMAS: The original proposal -- are you
15 talking about specific plan or the PUD?

16 JUSTICE 3: Either. Wasn't the original plan to
17 have townhouses on one side?

18 MS. THOMAS: No, I believe for both sides it was
19 townhouses, and it was described as cluster and row
20 housing.

21 JUSTICE 3: So there was never a plan to have
22 housing only on one side of the street?

23 MS. THOMAS: No. So it was always described
24 as --

25 JUSTICE 3: What was the width of the street

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1 MS. THOMAS: Correct.

2 JUSTICE 3: And before that, at some point it
3 was more than 25?

4 MS. THOMAS: (No audible response.)

5 JUSTICE 3: Why don't I change it. Has it never
6 been more than 25?

7 MS. THOMAS: Not to my knowledge, Your Honor.

8 JUSTICE 3: Okay.

9 MS. BRANDT-HAWLEY: Here. Go ahead.

10 JUSTICE 3: The standard is 41 or 42 feet?

11 MS. THOMAS: Yes, that's correct.

12 JUSTICE 3: And with sidewalks on both sides?

13 MS. THOMAS: That's correct.

14 JUSTICE 3: And with certain standards of
15 landscaping -- large trees, driveways, you can park on
16 public city street parking and so on. This is described,
17 as Justice Davis pointed out, as canyoning and tunneling
18 with mini mansions or monopoly-style housing crammed into
19 a space. Regardless of what fraction of the overall
20 property you cram it into, that creates this constricted
21 impact, and you're suggesting that has nothing to do with
22 aesthetics within -- aesthetics within CEQA?

23 MS. THOMAS: Yes, Your Honor.

24 JUSTICE 3: Because that is not a vista of
25 the --

Verbatim 

1 MS. THOMAS: Absolutely. I do believe that. I
2 believe that when you're looking at -- and let me go back
3 to your original question of infill housing. This is an
4 area that has been proposed for development from the
5 outset, from the time the specific plan was initially
6 drafted in 19 -- what? -- 79 I believe it was. So this
7 is an area that --

8 JUSTICE 3: Was the word "infill" ever used?

9 MS. THOMAS: By councilmembers, yes.

10 JUSTICE 3: No. Was it ever used in any of the
11 documents that are formally filed in this case prior to
12 this particular conflict?

13 MS. THOMAS: I don't believe so, Your Honor.

14 JUSTICE 3: Here's my specific question about
15 the record that's very confusing to me. Having gone -- I
16 believe the record will reflect, when you go back to your
17 office and look at it, that the street was somewhere
18 substantially greater than 25 feet at one point, moved to
19 25 feet, and then to 21. At the point it was moved to 25
20 that I'm aware of, and maybe this is what you can help me
21 with, was that the first city council meeting on this, and
22 there was a reflection in the record of that proceeding
23 that the fire department had approved this as a street
24 they could deal with.

25 I'm having trouble finding that as this thing

Verbatim ■

1 migrated down and the problems with parking on your
2 driveway and parking in front of your house and the
3 removal of the large trees and the planning of the
4 ornamental trees and the setback from five feet in the
5 back to something else and all the other things that have
6 gone on. Could you direct my attention to where in the
7 record it says the fire department has approved the
8 21 feet as something it can live with in terms of getting
9 in and out of there? Maybe your colleague is helping you
10 out.

11 MS. THOMAS: Yeah. That's, I believe, in the
12 resolution at 2931.

13 JUSTICE 3: Where is the evidence in the record
14 to indicate --

15 MS. THOMAS: Probably the best evidence in the
16 record is when we had the garbage trucks, the city
17 staff --

18 JUSTICE 3: Has the fire department ever
19 testified or is anything in the record to reflect that the
20 fire department has now approved this narrower street of
21 21 feet as being safe for the community?

22 MS. THOMAS: I believe that the resolution says
23 that. And then in terms of the record, I think you have
24 to go to the section that shows the 20-foot pavement
25 standard with the pictures.

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1 JUSTICE 3: When you say the resolution, you're
2 talking about the city council mitigated negative
3 declaration?

4 MS. THOMAS: The adoption of the project,
5 correct.

6 JUSTICE 3: Okay. But where in the record is
7 there any evidence to suggest that the fire department has
8 approved this and that the evidence establishes that in
9 fact it is safe, both for the people in there and the
10 surrounding community? If the fire department can't get
11 in there, then it's not limited to this canyoned and
12 tunneled set of households that are very close to the
13 other households, then it becomes a factor of
14 consideration for all of them. I'm not trying to say it
15 isn't in the record. I'm saying I've had trouble finding
16 it. So other than describing the resolution, you can't
17 help me further, I take it?

18 MS. THOMAS: As I said, the only thing I'm aware
19 of at this precise moment in time is that there was a
20 situation where the staff set up a street pavement width
21 of 20, and they put garbage cans on both sides and showed
22 that a garbage truck, which I think is roughly the size of
23 the front end of a fire truck, could pass with a car. I
24 think that's the one thing I could remember right
25 off-hand. There may be additional things, but that can be

Verbatim ■

1 found in terms of -- that's at 2529. It's a series of
2 pictures that shows that that's the case.

3 JUSTICE 3: Is it your suggestion that a fire
4 truck and a garbage truck are similar in width. I think
5 it's fair to say that fire trucks are considerably longer
6 and some of them are multi-parted, like big rigs. Is
7 there any evidence, other than the garbage can, that
8 you're suggesting is an informative metaphor?

9 MS. THOMAS: The only other thing I can suggest,
10 Your Honor, is that a general course of events, as a city
11 approves a project, it circulates that project description
12 revised or otherwise, to almost all of its departments.
13 You know, I think the absence of the fire department
14 speaking may be one issue, but let me just see real
15 quickly here. Okay. So in that setup I talked about with
16 regard to the pavement width that they did the mock setup
17 on the street width.

18 JUSTICE 3: With the garbage can trucks?

19 MS. THOMAS: Yes, with the garbage can trucks.
20 Basically there's a colloquy between the staff and the
21 applicant where they're talking about the setup, and
22 they're saying that they had the fire department and the
23 public works department there, and that they had
24 cooperation from the public works department and fire
25 department to reduce the private drive from 25 to --

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1 25 feet. That can be found at 2758.

2 JUSTICE 3: What was the size? I just have
3 two more questions.

4 MS. THOMAS: Twenty-two. So it's one foot --

5 JUSTICE 3: From twenty-five to twenty-two. Now
6 it's one foot smaller?

7 MS. THOMAS: Correct.

8 JUSTICE 3: But in terms of that, when you say
9 "the applicant," you're talking about Regis?

10 MS. THOMAS: Correct.

11 JUSTICE 3: So this was not a city experiment;
12 that was a Regis presentation?

13 MS. THOMAS: That experiment was done with the
14 city staff and with Regis to see what kind of street
15 widths would be appropriate. And again, you're talking
16 about -- and this -- by the way, I do want to correct one
17 thing on this tunneling/canyoning effect. That was a
18 statement that was made when the application was first
19 submitted by Regis, first submitted.

20 Over time, staff withdrew that and never used
21 those words again because the applicant held these
22 30 public hearings and agreed to make substantial changes,
23 Your Honor, to the plan, including varying the heights,
24 varying the setbacks, increasing the setbacks to 10 feet
25 from the homes -- 12 from the homes and 10 from the

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1 garage, and making these significant changes, you know,
2 through this design review process that was informal to
3 some degree, but very formal in the context of its
4 subdivision review committee, which is the entity that
5 contains it's -- the subdivision review committee has
6 members on it, such as the public works department, the
7 solid waste division, the fire department, police
8 department. Those are the people who look at that final
9 plan and say thumbs up or thumbs down. And it went
10 through the subdivision review committee, and it was
11 certified as being able to move forward and to be in -- it
12 was consistent with all of the guidelines, zoning,
13 regulations, etc., of the City, with the exception, the
14 one single exception of the street width.

15 JUSTICE 1: Okay. I'll tell you what. You are
16 12 minutes over your time at this point. I'm going to
17 give your co-counsel two minutes to make his argument, but
18 we're really going to have to move on.

19 MS. THOMAS: Yes. Thank you very much.

20 MR. CERULLO: Good morning. May it please the
21 Court. My name is Joseph Cerullo from the Sacramento City
22 Attorney's Office, appearing on behalf of the city of
23 Sacramento. I'll just address one point. It's the issue
24 that the court brought up on its own and requested
25 supplemental briefing on, whether or not the findings that

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1 the city made on June 17th, that there was no substantial
2 evidence that the project will cause a significant affect
3 on the environment indicates that the City failed to
4 follow the fair argument standard or fair argument test
5 which requires a preparation of an EIR if there is any
6 substantial evidence in the record that supports a fair
7 argument that the project may cause a significant affect
8 on the environment.

9 Two things I would like to say. First, this is
10 an issue that the Pocket Protectors has never raised. It
11 didn't raise it in the planning commission --

12 JUSTICE 1: We understand that. We -- I mean,
13 it's just something the court went out for supplemental
14 briefing on.

15 MR. CERULLO: Yes, Your Honor.

16 JUSTICE 1: It's just the court's question about
17 that.

18 MR. CERULLO: Okay.

19 JUSTICE 1: And then we certainly have the
20 responses to that as you heard me indicate in my questions
21 to Ms. Brandt-Hawley. So we do -- we really read the
22 responses, and then we -- and we understand them.

23 MR. CERULLO: Okay, Your Honor. Then the other
24 point I would like to make is that there is nothing that I
25 am aware of in either the CEQA statute or the CEQA

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1 guidelines that requires an express statement that there's
2 no substantial evidence in the record that there may be a
3 significant affect on the environment. The only express
4 finding or determination that's required is the one that
5 the City made here. You'll find that in public
6 resources --

7 JUSTICE 1: You would acknowledge, however, that
8 the California Supreme Court enunciated standard, and
9 indeed as reflected in other statutes in CEQA, is whether
10 the project may have a significant impact on the
11 environment for preparation of an EIR.

12 MR. CERULLO: Absolutely, Your Honor.

13 JUSTICE 1: And don't you think it's different
14 when the city makes a finding, not that it may have, but
15 that it will not have?

16 MR. CERULLO: It's different, but what is
17 required before the City can make the finding that is
18 called for under Section 21080(c) of the Public Resources
19 Code or under the Guidelines 15074. Before that finding
20 can be made, the city has to make an intermediate
21 determination, if you will. It does not have to be made
22 expressly, but a determination that there is no
23 substantial evidence in the record to support a fair
24 argument that there may be a significant affect on the
25 environment.

Verbatim ■

1 JUSTICE 1: Okay. I'll tell you what. Your
2 time is up, and we have those arguments in mind. And your
3 papers were well prepared, and we've read them on this
4 issue.

5 MR. CERULLO: Thank you very much.

6 JUSTICE 1: Thank you very much. Okay,
7 Ms. Brandt-Hawley. You have eight minutes.

8 MS. BRANDT-HAWLEY: Thank you, Your Honor.
9 Well, first of all the court --

10 JUSTICE 2: Before you get rolling, I'd like to
11 address one position that Attorney Thomas took toward the
12 conclusion of her argument, and that is she maintained
13 that the record will show that staff implicitly retreated
14 from their earlier suggestion that there was a canyoning
15 or tunneling effect presented by the design here. Do you
16 concur with her position with regard to what the staff
17 subsequently did after making that that --

18 MS. BRANDT-HAWLEY: Well, Your Honor, the
19 canyoning effect discussion was very early in the process
20 from the staff's point of view. It was then reiterated by
21 members of the community, including, at the very final
22 hearing, before the city council, AR102769 I believe is the
23 last or the next to the last hearing, where the president
24 of the Riverlake Community Association again discussed the
25 canyoning effect. The staff did not come forward and say,

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1 "We're not any longer worried about the canyoning effect."
2 I'm not aware of any time where that word was used again
3 by staff. It was repeatedly used by others within the
4 record.

5 They did take some of the houses that were they
6 were -- there were more two-story houses at the earlier
7 iterations, and by the end there were some two stories and
8 some one story, but the canyoning effect in terms of wide
9 shallow lots and houses in a line remained the same. And
10 so the concept of a canyon effect has not changed
11 throughout this process.

12 While counsel talks about the various iterations
13 of the project, they were all very similar. It was
14 tweaking of how wide is the road, and do you have a
15 five-foot or a six-foot backyard setback -- that kind of
16 thing. And there were some reduced sized homes as well,
17 some of them were reduced, but the basic concept here has
18 stayed the same. The double road, mini mansion on a
19 substandard street on this long lot that was always
20 planned for clustered housing.

21 JUSTICE 1: Ms. Brandt-Hawley, Ms. Thomas argues
22 that if you get into this area of urban aesthetics as
23 reflected in this project, we're just going to be dealing
24 with matters of personal aesthetic tastes, and what's the
25 point of having CEQA review of matters that have no

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1 grounding and objective fact that are simply matters of
2 personal aesthetics. What's your response to that?

3 MS. BRANDT-HAWLEY: Well, I was struck also,
4 Your Honor, by Ms. Thomas's presentation when the number
5 of times when she said, "I believe. I believe it's just
6 likes and dislikes. I believe that there won't be
7 significant impacts." On the appellant's side, there's
8 not been any discussion of what we believe. We have stuck
9 to specific environmental issues, like open space
10 landscaping, the need to have in the pocket specific plan.
11 The early PUD that every 30 feet there should be a shade
12 tree, and now the City Arborist says these lots are just
13 too small. You won't have large shade trees. The
14 specifics about setbacks, street widths -- the confusion
15 there is that there is not a one track that's CEQA,
16 another track that's design review. If design review is a
17 discretionary process, it's subject to CEQA as well.

18 There's some huge development projects where for
19 various reasons regarding -- relating to zoning and other
20 things. Design review is the discretionary decision, the
21 hook that brings CEQA. There's many projects for which
22 this CEQA process informs design review, and an EIR is
23 done for the design review process. It's a great process,
24 but it doesn't substitute for CEQA. And in fact you'll
25 note in the Bowman case they didn't say so, because that

Verbatim ■

1 court originally, before we had argument there, thought
2 that design review and CEQA were just totally separate.
3 And there are some cases that talk about design review and
4 not CEQA, but those are generally cases in which a project
5 is exempted from CEQA.

6 Here we clearly have a project subject to CEQA,
7 and any discretionary decision of a public agency that has
8 potential environmental impacts has to follow the rules as
9 laid out for the last 30 years in CEQA, and this is the
10 same for --

11 Another thing I was struck by was a statement
12 that perhaps this court should rule was the suggestion
13 that I heard that the built environment is not part of
14 what's covered by CEQA. There is nothing in the statute
15 that even suggests such a thing. And in fact, the
16 Public Resources Code provides for built environment
17 architectural issues to be covered, and there's a new CEQA
18 guideline that addresses architectural issues in the
19 context of a historic resources. But implicitly the built
20 environment where we all live is the environment. It's
21 the built environment. And as I mentioned at the onset of
22 argument, 21001 of the Public Resources Code specifically
23 calls out aesthetics. And if you look at Appendix G, it
24 doesn't just talk about scenic vistas. There's
25 four different sections on aesthetics.

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1 JUSTICE 1: And which one of those sections do
2 you think supports what you want to do in this case?

3 MS. BRANDT-HAWLEY: C. C is the only one we've
4 relied on, Your Honor.

5 JUSTICE 1: And this is Appendix what?

6 MS. BRANDT-HAWLEY: G.

7 JUSTICE 1: Appendix G to what?

8 MS. BRANDT-HAWLEY: To the CEQA guidelines.

9 JUSTICE 1: Okay.

10 MS. BRANDT-HAWLEY: We've attached to our brief
11 and to the record. And the question is, would the project
12 substantially degrade the existing visual character of
13 the -- or quality of the site and its surrounding? That's
14 a separate category. The other category we rely on is in
15 the land use section, which is section nine, which would
16 the project conflict with any applicable land use plan or
17 regulation of an agency adopted to mitigated environmental
18 effect. In this case, we have the 1985 PUD that calls, as
19 the court has suggested, for townhouses, and there is a
20 common understanding of what that means, and clustered
21 housing.

22 And as I mentioned at the outset of the argument
23 the staff, in the record, gives us a statement that this
24 project does not fulfill the intent of the original
25 planned unit development for this odd constrained site,

Verbatim ■

1 because it does not incorporate landscaping in open space
2 concepts. These aren't vague, gut level likes and
3 dislikes. There's been no discussion at all on the record
4 about the architecture of these mini mansions. You might
5 have noted there's a, I think, like a Norman-style, next
6 to a Craftsman-style, next to some other kind of
7 architectural style. They're these small little mansions
8 that have four-sided architecture. And there were a few
9 off-hand comments about the banal nature of the
10 architecture. But it's not part of our fair argument in
11 this case.

12 We're not talking about likes and dislikes.
13 We're talking about very specific, concrete, measurable
14 issues, such as how much landscaping, how much setback,
15 how much green belt, how much shade and those sorts of
16 questions. So they are measurable, they are being
17 measured around the state in EIRs all the time. You have
18 computer system drawings, you have ways to measure light
19 and shade, and you have ways to measure the adequacy of
20 landscaping. And the key here is that this particular
21 site has been planned for clustered housing with
22 significant open space and requires a certain amount of
23 landscaping that is unable to be provided by this project.
24 So I think there is no question that the -- the evidence
25 is there to support the fair argument.

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AESTHETIC IMPACTS

The EIR identifies environmental impacts in the area of aesthetics but finds each of them to be less than significant in import. As discussed below, the EIR's conclusions on this key issue are conclusory, unsupported, and inconsistent with the findings of the appellate opinion and with the aesthetic standards provided in the EIR itself. The Pocket Protectors and other area residents could not have been clearer over the last four years in expressing their concerns about the aesthetic impacts of the Islands project at the gateway to the Pocket along the greenbelt. The Islands project simply does not fit on the constrained site that was designed for townhouses. The EIR's failure to consider and mitigate such impacts has not served the interests of the City or of the concerned public.

The lack of evidence to refute the significance of the aesthetic impacts identified by the EIR is discussed below, although the compelling amount of material in the record regarding aesthetic impacts cannot be fairly repeated here or even fully summarized. An overarching problem with the aesthetics analysis is the assumption that project revisions have somehow fully mitigated aesthetic effects, including the "canyoning" or "tunnel" effect of the mini-mansion layout on the narrow mile-long Pocket Road parcels. In fact, as the EIR and City staff agree, no material project revisions have occurred since the Islands project was initially approved in 2003 and was thereafter reviewed in court.

The Court of Appeal has ruled that

Regis notes that it adopted some of staff's suggestions for ameliorating this [canyoning] effect, such as varying the heights and facades of adjacent houses. *However, the fundamental plan to pack as many houses as possible on lots as small as possible along both sides of a long straight private street did not change.* Thus, substantial evidence exists to support a fair argument that 'canyoning' is still a feature of the approved project.

(Appellate opinion at 931, n.19, italics added.)

The EIR now states that because the Islands project includes some one-story as well as two-story homes, the potential canyoning/ tunnel problem is cured. This is a wholly unsupported conclusion. The "fundamental plan to pack as many houses as possible on lots as small as possible along both sides of a long straight private street" — the language of the Court of Appeal — has not changed since 2003. The canyoning problem has not magically gone away, and no mitigation has even been proposed in the EIR although suggested by the Pocket Protectors, as discussed below. As pointed out by Alan Hockenson at the September 15th Planning Commission hearing,

Now three weeks ago, staff said that, really there were no changes in the project from before. And [in my EIR comments] in essence, I said, "What mitigation is

there that's new?" And the response I got back is, well, "the mitigation isn't different." Well, if the project hasn't changed and the mitigation isn't different, in essence, we have the same situation we had three years ago, and nothing has changed. . . This document [EIR] was very difficult to review. My opinion of it is it was scrubbed clean of any kind of data that could be used to point at impacts.

(Planning Commission transcript at 120.)

Another overarching problem with the EIR's review of aesthetics is its confusion about the consideration and application of "subjective" versus "objective" criteria when evaluating the project, and the EIR's irrelevant reliance on the fact that other projects have been approved on the site or in the LPPT PUD.

The Final EIR concludes that "the purpose of the EIR is to evaluate the impact of the proposed project on the visual environment, not on the subjective merits of the design." (FEIR at 18.) The appellate opinion, however, notes that aesthetics are subject to EIR review even to the extent they may be considered subjective:

Regis asserts: 'It is difficult to imagine how' the proposed project 'could create the kind of objectively significant aesthetic impacts contemplated by Appendix G.' Appendix G does not speak of "*objectively* significant impacts."

(Appellate opinion at 938.)

The EIR in fact provides quantifiable objective criteria to be used in assessing aesthetic impacts, labeled "standards of significance" in bulleted fashion. (DEIR at 133-134.) The criteria provide in relevant part that an aesthetic impact *is to be considered significant* for the Islands project if it may:

- Obstruct a significant view or viewshed in a location that is visible from a public gathering or viewing area;
- Shade a recognized public gathering place (e.g., park) or locate residences/child care centers in complete shade;
- Create a demonstrable negative aesthetic effect as measured by the following criteria, among others:
 - The minimum setback requirements set forth in the applicable City Codes or the LPPT PUD Development Guidelines for this site or the average setbacks of surrounding properties;
 - The minimum landscaping and lot coverage requirements set forth in the applicable City Codes or the LPPT PUD Development Guidelines;
 - The maximum density allowable for the site as set by the applicable City Codes or LPPT PUD Development Guidelines;

- The City of Sacramento Single-Family Residential Design Principles (adopted 9/2000; Resolution No. CC2000-523).
- Create a monolithic façade so as to result in a “tunnel” or “canyon” appearance.

While these criteria are adopted by the EIR as standards to apply to determine significance of aesthetic impacts, the EIR fails to apply them and oddly professes that there are no objective criteria with which to measure aesthetic impacts of the Islands project. As noted by planner Amy Skewes-Cox, if a criterion established by the EIR is not going to be applied by the EIR to assess significant visual impacts, “then why is this criterion even used in the list of criteria?” (FEIR Comment letter #1, 1-44.) One may well keep this question in mind for the following discussion of all aesthetic impacts.

Using these criteria, six significant aesthetic impacts of the Islands project are addressed below:

1. AES-1 Impact: *The Islands at Riverlake project proposes building setbacks in an R-1A zone that are less than the standard setbacks for R-1 development and also proposes lot coverages that exceed the standard lot coverage for R-1 development. Project opponents have made a “fair argument” that the proposed setbacks may result in a demonstrable negative aesthetic effect. (DEIR at 134.)*

This first EIR-identified aesthetic impact concedes that the Islands project does not meet applicable standards for minimum yard requirements and building setbacks, and exceeds maximum lot coverages. The Draft EIR dismisses these impacts as insignificant for two reasons, claiming that: (1) there are no “quantifiable aesthetic values to setbacks” in the City’s zoning code and development guidelines, so whether setbacks create adverse aesthetic impacts is subjective; and (2) previous projects with similar site constraints were approved by the Planning Commission. (DEIR at 135.)

These conclusions are puzzlingly wrong.

Under AES-1, the EIR thus explains how its enumerated objective standards as to setbacks and lot coverages have not been met by the Islands project. It then concludes that aesthetic impacts are somehow based on purely subjective standards that may be discounted. This makes no sense, and one may query whether these sections were drafted by different authors: perhaps one section by Sycamore Consultants and the conclusion by Regis Homes’ attorneys?

Regarding the admission that the R-1A setback requirement cannot be met, the EIR ineffectively argues that the Islands homes’ rear yard setbacks meet or exceed the setbacks for a project previously approved for the site as well “other single-family alternative (R-1A) development in the LPPT PUD.” Since the environmental impacts of

the Islands project must be independently assessed based on the current administrative record and appellate opinion, it is irrelevant that different projects may have been previously approved without EIR review; further, the EIR does not explain the circumstances of the previously approved project and whether it included townhouses.

Similarly, to argue that the Islands homes' rear yard setbacks will meet or exceed the setbacks established for "other single-family alternative (R-1A) development in the LPPT PUD" is irrelevant. The use of the term "single-family alternative" is an invention of the applicant and EIR drafters to *de facto* amend the PUD guideline definitions in order to shoehorn the project into this site — R-1A zoning is properly defined within the LPPT PUD as simply "Townhouse and Related Development." The appellate opinion determined that the project is not in compliance with the PUD definitions — the City's belated contortions to change the guideline's definition to fit the proposed project are unavailing. (See Exhibits 1 and 4, Appellate opinion excerpts and Land Use.)

As noted long ago by City staff, the townhomes always envisioned for the Pocket Road gateway "didn't require a very deep site . . . or a very great amount of depth to the lots because a single tier of homes were anticipated at that initial stage. And that has always been the plan for this property and that's why the property was left with this particular shape and configuration." (AR7:1853.) Staff described the site as "two long narrow strips of land along Pocket Road, which are designed to accommodate cluster housing . . ." (AR9:2430.)

In all fairness, the EIR conclusions must be based on the EIR's own criteria to evaluate significant aesthetic impacts. Under AES-1, the Islands project's attenuated setbacks and excessive lot coverages create a significant aesthetic impact. The setbacks do not meet "the minimum setback requirements set forth in the applicable City Codes or the LPPT PUD Development Guidelines for this site or the average setbacks of surrounding properties." (DEIR at 134.) The EIR's conclusion that the small setbacks create no significant aesthetic impacts is contrary to the EIR's own standards of significance and is unsupported and unlawful. (*See, e.g., Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099.) These significant aesthetic impacts also result in related land use impacts, including **LAN-11 Impact:** *Constructing houses with the proposed mass/bulk could be incompatible with existing land use or planned growth in the vicinity or with existing long-term uses on adjacent properties* (DEIR at 104-111) and **LAN-12 Impact:** *Providing less than R-1 standard 15-ft rear yard set backs could cause the proposed project to be incompatible with long-term uses on adjacent properties.* (DEIR at 111-115.)

2. AES-2 Impact: *The Islands at Riverlake project proposes lot sizes that are less than the minimum size required for the R-1 zone in the City Zoning Code and proposes floor plans that exceed the R-1 standard lot coverage. Project opponents have made a "fair argument" that the lot sizes and coverage proposed for the*

Islands at Riverlake project may result in a demonstrable negative aesthetic effect. (DEIR at 136.)

The Draft EIR concedes that the project lot sizes are less than the City's minimum requirements and that its floor plans result in greater-than-allowed lot coverage. (DEIR at 136.) The R-1 zone requirements apply because the City's zoning code states that the maximum lot coverage and minimum lot area requirements in the R-1A zone are the same as specified for R-1. As with AES-1, the EIR oddly claims that there is no "qualitative aesthetic relationship to the minimum lot coverage requirements." (DEIR at 137.) However, the EIR's own standards of significance dictate a finding of significant impact if the project would not meet the "lot coverage requirements set forth in the applicable city codes or the LPPT PUD Development Guidelines." (DEIR at 134.) The project admittedly does not meet the lot sizes provided for in the City Zoning Code. This is a significant aesthetic impact requiring mitigation and the EIR's conclusion to the contrary is unsupported.

The EIR further contends that lot sizes for the Islands project have been necessarily reduced to accommodate the density required for the site. (DEIR at 137.) That, of course does not mean that there will be no significant aesthetic impact. Further, the reason that the Islands project's lot sizes are smaller is because the long narrow site along Pocket Road has always been intended for clustered townhouses, not single-family residences. When the Islands single-family detached residences are proposed to be wedged into a site designed for clustered townhouses, too-small lots are created. *Clustered townhouse development at the same density does not present the same problem.* Further, while the EIR repeatedly tries to argue that because previous projects were approved for the site or that other R-1A developments have been approved in Riverlake with similar setbacks, such claims are irrelevant to the conceded fact that the Islands project "proposes lot sizes that are less than the minimum size required for the R-1 zone in the City Zoning Code and proposes floor plans that exceed the R-1 standard lot coverage," which results in a significant aesthetic impact under application of the EIR's own criterion of significance. (DEIR at 137.) The EIR's contrary conclusion is unsupported.

3. AES-3 Impact: *Project opponents have made a "fair argument" that the Islands at Riverlake project may have a demonstrable negative aesthetic effect if it conflicts with the City's Single-Family Residential Design Principles.* (DEIR at 138.)

The EIR preparers, including Regis Homes' counsel, prepared the significance standards listed above to provide a framework to assess the aesthetic impacts of the Islands project. In a February 2005 email to City planner Lezley Buford (attached) Regis Homes' attorney Sabrina Teller recommended that the significance criteria be added to the EIR to apply objective standards to the "subjective, design related comments we are

sure to receive from the Pocket Protectors.” She suggested that the EIR adopt language for standards of significance such that, “[a]esthetic, design related impacts are significant only if the proposed project, viewed as a whole, is inconsistent with the City’s September 2, 2000 Single-Family Residential Design Principles.” The EIR preparers proceeded to do so. (DEIR at 133-134.)

CEQA Guideline section 15064.7 subdivision (a) states that agencies may identify criteria to be used in determining the significance of environmental effects of projects under their review. Subdivision (b) requires that such thresholds of significance “to be adopted for general use as part of the lead agency’s environmental review process must be adopted by ordinance, resolution, rule, or regulation, and developed through a public review process and be supported by substantial evidence.”

However, the Single-Family Residential Design Principles were not established for the purposes of evaluation of aesthetic impacts under CEQA. A project may be consistent with the Design Principles and still result in environmental impacts. Similarly, a project’s consistency with general plans and other area policies must be discussed in the EIR, but consistency does not ensure that no significant impacts will result.

The EIR’s aesthetic standards of significance provide as a criterion that the project must meet the standards set under the Single-Family Residential Design Principles. (DEIR:134.) The EIR provides that “demonstrable negative aesthetic effect” would result from conflict with the Design Principles and thus sets forth “the project’s consistency with each of these principles and the guidelines/design approaches recommended to achieve these principles.” (DEIR:138, italics added.)

The very first category of the Design Principles, “General Architecture,” *encourages* “manipulation of building elements and massing to avoid visual monotony with particular emphasis on long streets” and *discourages* “excessive repetition of identical floor plans and elevations throughout a neighborhood or subdivision with little differentiation.” (DEIR:138.) This is directly relevant to the problematic “canyoning” effect, discussed further below. As professional planner Amy Skewes-Cox stated in her EIR comments and in testimony at the Planning Commission hearing in September 2005, “not only are the project lots smaller, but they are of a uniform, repetitive size in a development that traditionally has had quite a bit of variation, making it one of the more interesting developments of the city.” (9/15/05 Planning Commission transcript at 73.) Further, “mitigation measures could easily have been included that would have suggested more variation in lot size and building coverage to be compatible with existing surroundings. Alternatively, the Pocket Protectors’ recommendation to include attached units with various setbacks and more land for open space and landscaping would have mitigated this cookie-cutter approach to design.” (*Id.* at 74.)

Rather than acknowledge or address in any way the canyoning problem as it

relates to the recommendations of the key General Architecture section of the Design Principles, the EIR simply states in a conclusory way that the Islands project incorporates *most* of the recommendations for General Architecture. (DEIR:138.) Incorporating “most of the recommendations” does not fully meet the EIR criterion and is inconsistent with the EIR’s later statement that “the project is consistent with all of the guidelines” of the Design Principles.

The Design Principles’ requirement for varied setbacks and lot widths is also unmet. (DEIR at 141.) The EIR indicates the need for varied front setbacks and “*curvilinear or angled streets.*” (*Ibid.*, italics added.) Remarkably, the EIR finds this guideline to be met although the Islands project includes zero setbacks for houses fronting on the Pocket Road greenbelt and includes new straight and narrow mile-long streets! No discussion at all is provided in this section regarding the blatantly unmet recommendations of the setback/lot width guideline.

The Landscaping/Sidewalks Design Principles are also unmet. The small yard sizes preclude the planting of large trees, as was underscored by the City arborist at the public hearing before this Council in 2003. The project provides insufficient space for planting of trees, resulting in aesthetic impacts and lack of adequate shade. (AR9:2421.11.) The City arborist confirmed that the project configuration results in lots that are “not sufficient for the long-term viability of larger shade trees.” (*Id.* at 2541.) While the project does require the planting of trees, it does not meet LPPT PUD requirements, and even Regis has acknowledged that “we may not get a tree canopy as large as we all would like . . .” (AR9:2467.) In light of the landscaping deficiencies — which are aesthetic project impacts — Regis previously urged that the three feet of new lot space gained from narrowing the private street from 25 to 22 feet should be used “to increase front yard setbacks to improve the private drive streetscape.” (*Ibid.*) The planning department and this Council preferred, however, to add the extra feet to the rear of the homes to allow a slightly greater buffer from adjacent residents. (*Ibid.*) That is how the current design has remained.

And yet again, the EIR sets out a significance criterion yet does not fairly apply it.

4. AES-4 Impact: *Project opponents have made a “fair argument” that the density and intensity of the detached units in the Islands at Riverlake project may result in a demonstrable negative aesthetic effect as compared to previously approved attached-unit projects.* (DEIR at 143.)

The EIR allows that the project uses smaller than typical lots to achieve the required density but “[b]ecause the project is consistent with the City’s goals and policies encouraging denser residential infill development and is consistent with objective City criteria governing maximum density, any aesthetic impact associated with the project’s density is therefore considered less than significant.” (DEIR at 143-144.) This conclusion

does not follow the premise. The fact that project density may be desirable and consistent with City policy does not impact the required analysis of whether the project's *method of achieving density* may result in significant aesthetic impacts. Both the previously approved projects and the Pocket Protectors' suggested clustered townhome alternative can provide the same site density without the aesthetic impacts of the Islands mini-mansion project, as they allow greater greenbelt protection, shade trees, and open space. The EIR fails to address this criterion 4 at all, and its conclusion is unsupported.

5. AES-5 Impact: *Project opponents have made a "fair argument" that the Islands at Riverlake project could have a demonstrable negative aesthetic effect if it would obstruct a significant view or viewshed in a location that is visible from a public gathering or viewing area. (DEIR at 144.)*

The EIR states in conclusory fashion that the Islands project would have a less than significant impact on views from Pocket Road. (FEIR:18.) The EIR states that "[t]he City has consistently determined that the development of the project site with single- and two-story residential units would not have a significant impact on the visual environment" and relies on previously approved projects that included one- and two-story homes and landscaping. (FEIR:18.) It is unknown whether those previous projects complied with the PUD's landscaping and shade trees requirements and, as planner Amy Skewes-Cox explained, "[t]he issue is not to compare this project to other projects . . . but to look at the project's impacts by itself." (FEIR: Comment Letter #1.)

As noted above, one of the standards for significant aesthetic impacts spelled out in the EIR provides that the Islands project would be considered to have a significant aesthetic effect if it created "a monolithic façade so as to result in a 'tunnel' or 'canyon' appearance." (DEIR:134.) Concerns about canyoning have been expressed for years, based on the fact that "[t]hese new houses are so close together and so close to Pocket Road that they will not be 'lost' behind the 'green belt' landscaping but will become the prominent visual structure when driving or walking along Pocket Road." (AR7:1194.) A resident noted that intrusion into the greenbelt will create a "very sterile" aesthetic as had been observed in a similar development off Orchard Way, and "will reduce the quality and beauty of the view along Pocket Road." (AR7:1195; *see* 1217.03.) City staff also noted early on that an adverse visual "canyon effect" occurs when building massing is similar for long expanses "as is the case with the project as proposed." (AR4:982.) The City Long Range Planning Team described the adverse visual tunnel or "canyoning effect" of wide houses on small lots. (AR4:997.) Architect Roger McCardle presented his professional opinion agreeing with City concerns about the tunnel and canyoning effects of the project, and decried the City's failure to follow its own long range planning team's recommendations that were "consistent with good planning principles and common sense." (AR4:1034; *see* entire McCardle letter at 1033-1037.)

Yet the Draft EIR's sole discussion of canyoning states that

Some project opponents have expressed the view that passersby looking down the length of the interior street of the project will experience a “canyoning” or “tunneling” effect, due to the narrower width of the private street and the reduced front setbacks of the proposed lot plans. The City has no established, objective or quantifiable criteria by which to measure this subjective effect. As discussed above, however, the project has been determined to be consistent with the quantifiable criteria for density, setbacks, lot coverage, landscaping requirements, and building heights and styles. The City Fire, Public Works, and Transportation Departments considered the width of the private street and determined that the narrower width would not pose any significant public safety risks or traffic hazards. The length of the interior street will be interrupted by periodic wider, “hammerhead” turnouts and concrete “islands” which will minimize the potential adverse visual effect that a long, uninterrupted stretch might otherwise create. Shade trees will be planted in the mini-parks proposed throughout the development and in the yards facing the interior street. In consideration of all of these factors, the potential “canyoning” or “tunneling” effect is determined to be less than significant from a CEQA perspective.

(DEIR:145.) There is no discussion of canyoning in the Final EIR, save for a response to a comment by Amy Skewes-Cox, in which the EIR claims in conclusory fashion that “the City considers [the canyoning effect] to be less than significant” and that project changes in 2003 to include a mix of one-story and two-story homes in the straight double-row configurations has “minimize[d] this potential effect.” (FEIR Response 1-53.) This discussion does not provide substantial evidence to support a conclusion that the visual canyoning effect that would result from construction of the Islands mini-mansions is a less than significant aesthetic impact. It was the City’s own long-range planner who recommended that mitigation was needed to address the “canyoning” effects of the project; the planner has not come forward to suggest that the effect has been rectified.

Further, whether or not the reduced street width may or may not pose health and safety concerns is irrelevant to aesthetic impacts. (DEIR:145.) And as discussed above, the project is in fact inconsistent with guidelines regarding density, setbacks, and lot coverage. The EIR also obfuscates when it suggests that the canyoning effects were solely the concern of “some project opponents.” (*Ibid.*) It was the City’s long-range planning staff that first raised the issue, and the appellate opinion found substantial evidence to support a fair argument that “canyoning” is a feature of the approved project and discussed the aesthetic effect several times. (Opinion at 920, 923, 931, 937.) The Court referenced the

... extensive evidence offered by The Pocket Protectors and other area residents, including that of professional architect and planner Roger McCardle, based on their personal observations, as to the potential aesthetic impacts of the proposed

project. We need only reiterate the specific concerns they expressed: the ‘tunneling’ or ‘canyoning’ effect of long double rows of houses flanking a narrow private street, the insufficient use of shade trees and other landscaping, the possibility of intrusions into the greenbelt along Pocket Road, and the overall degradation of the existing visual character of the site from the excessive massing of housing with insufficient front, rear, and side yard setbacks. These observations — *which pertain even to the revised project approved by the City Council, not merely to its initial version as Regis suggests* — suffice to raise the potential of a significant aesthetic impact from the proposed project.

Regis notes that it adopted some of staff’s suggestions for ameliorating this effect, [“canyoning”] such as varying the heights and facades of adjacent houses. *However, the fundamental plan to pack as many houses as possible on lots as small as possible along both sides of a long straight private street did not change. Thus, substantial evidence exists to support a fair argument that “canyoning” is still a feature of the approved project.*

(Opinion at 931, 937, italics added.) No substantive changes have been made to the project that would change the Court’s conclusion that the “canyoning” effects are still a feature of the project, as “the project has not changed from the previous Islands project.” (See email from Kimberly Kaufmann-Brisby, July 12, 2005.)

The appellate opinion states further that

Roger McCardle commented that the April 2001 recommendations of the City’s long-range planner to mitigate the ‘tunnel or canyoning effect of wide houses on small lots’ and to ‘break up ... the visual monotony’ of long rows of driveways had not been heeded. Furthermore, it would be difficult to get adequate landscaping into the project, especially with a sidewalk; the proposed houses had a footprint 40 percent larger than the buildings previously planned for the site.

(Opinion at 920.)

Planner Skewes-Cox has also explained that mitigation measures that could reduce the project’s canyoning effect, such as increasing setbacks to some units to break up the linear uniformity, new landscaping where walkways are proposed, limits on exterior lights, and setback of upper stories to break up the “wall” effect, have not been imposed. Skewes-Cox noted the EIR’s failure to include visual impact analysis and the necessary development of workable mitigation measures such as “1) reduced home sizes to allow increased setbacks; 2) required landscaped screenings; 3) variations in setbacks for 2nd floors; and 4) use of high windows . . .” (EIR Comment letter #1, 1-48.)

Regarding the lack of visual simulations in the EIR, as noted by Skewes-Cox and other commentors, since aesthetic issues are of such particular importance and public concern, the failure to provide simulations to address the canyoning issue is a critical EIR shortcoming in evaluating the aesthetic impacts of the project. (*Id.* at 1-39.)

The canyoning or tunnel aesthetics of the Islands project's double lines of mini-mansions, recognized by the appellate opinion, have not altered in design since 2003 and therefore must be acknowledged as significant aesthetic impacts for which mitigation and alternatives should be considered. As discussed above, the EIR's odd insistence that there are no established objective or quantifiable criteria by which to measure aesthetic effects is refuted by the EIR's list of standards of significance which enumerate the objective criteria to be utilized in reviewing the potential impacts of the project — *specifically including* the possible creation of "a monolithic façade so as to result in a 'tunnel' or 'canyon' appearance." (DEIR at 134.) The EIR fails to address this issue in a good faith manner that supports a conclusion of no significant impact.

6. AES-6 Impact: *Project opponents have made a "fair argument" that the Islands at Riverlake project proposal to construct houses and plant trees could have demonstrable negative aesthetic effects if they excessively shade the linear parkway, locate existing adjacent residences in complete shade, or incorporate landscaping that is incompatible with the existing character of the neighborhood.* (DEIR at 145.)

As already explained above and throughout the record, the reduced yard setbacks allow insufficient space to plant shade trees as required by the PUD. Commentors, including Planning Commissioner Valencia, have pointed out that there is insufficient space to plant shade trees and avoid the utilities easements in the front yard considering the drastically reduced setbacks. (Planning Commission hearing at 146-147, 169.) The homes fronting on Pocket Road have zero setbacks from the greenbelt and have no room to plant shade trees.

The EIR discussion of AES-6 notes the recently adopted requirement of the Riverlake Community Association for five 15-gallon trees per home, with at least one 15-gallon shade tree from an approved list to be located in the front yard. (DEIR at 146.) The EIR notes that the "the back yards of the abutting houses appear to comply with the requirement." It is unclear if this applies to the Islands project or to the homes across the back fence. The EIR then states that the Islands project would allow planting the requisite 1 to 2.5 shade trees "in the front yards of the existing interior lots." (*Ibid.*) It is not explained how this would be accomplished, and the front yards of homes fronting Pocket Road are studiously ignored.

Similarly, the EIR does not explain how it will be possible to plant four shade trees per backyard, noting only that it would be “the homeowners responsibility.” (DEIR at 146.) Assuming that this can even occur in the very small yards — contrary to the opinion of the City arborist, referenced above — if four shade trees per backyard are indeed successfully planted and grow to the projected height of up to 80 feet, the EIR fails to consider the potential shade impacts. The EIR states that the average height of shade trees would be 34 feet higher than the Islands’ single-story homes and 25 feet higher than the two-story homes. (DEIR at 146.) Homeowners are not required to plant “average height” trees but could plant trees that grow up to 80 feet. Regardless, the EIR is inadequate for considering the extent of shade impacts. The EIR’s excuse is that the shade impacts are not from the houses themselves, but from shade trees being required by the Riverlake Community Association. While this is true, and the PUD also requires shade trees, this cannot be considered unrelated to the Islands project design. In a clustered townhouse project, the additional setbacks not only allow the planting of viable shade trees but sufficient space between buildings to avoid shading beyond that desirable. The EIR has failed to adequately assess viability of compliance with landscaping requirements for the Island site and the potential shade impacts of such compliance; further, its conclusion that the actual landscaping that could be accomplished is not incompatible with the existing character of Riverlake and would not cause shade impacts is wholly unsupported.

* * *

The Court of Appeal’s ruling includes a finding that “the proposed mile-long project facially conflicts with a PUD established by the City to mitigate the possible environmental effects . . . and has the potential to cause an immediate adverse environmental impact to hundreds of nearby residents.” (Appellate opinion at 936.) Applying the EIR’s own significance criteria, these impacts include significant aesthetic impacts. The EIR fails to include a good faith analysis of aesthetic impacts, fails to consider feasible mitigations and alternatives, and its conclusions as to insignificance of aesthetic impacts are unsupported. The EIR should now be revised to fairly consider and mitigate aesthetic impacts.

From: "Sabrina Teller" <STeller@rtmmlaw.com>
To: "Lezley Buford" <LBuford@cityofsacramento.org>, "Andrew Bayne" <Andrew.Bayne@SycamoreEnv.com>
Date: 2/9/05 2:33PM
Subject: Islands at Riverlake admin draft IS

Tina reminded me that she and Tom Pace had previously discussed adding an evaluation of the project's consistency with the City's Single-Family Residential Design Principles to the aesthetics section of the EIR, to try and apply some objective standard to the subjective, design-related comments we are sure to receive from the Pocket Protectors. Therefore, I recommend adding the following (or something similar) sentence to the initial study's "Standards of Significance" section (p. 77): "Aesthetic, design-related impacts are significant only if the proposed project, viewed as a whole, is inconsistent with the City's September 7, 2000, Single-Family Residential Design Principles." We would also need to include a short discussion in the impacts evaluation section regarding the project's consistency with the SFRDP. The fact that the City already found the same design consistent previously should also be noted.

Let me know if you have any questions. Thanks.

Sabrina V. Teller
Remy, Thomas, Moose & Manley, LLP
455 Capitol Mall, Suite 210
Sacramento, CA 95814
(916) 443-2745
(916) 443-9017 (fax)
steller@rtmmlaw.com <mailto:steller@rtmmlaw.com>

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CC: "Bill Heartman" <BHeartman@srgnc.com>, "Tina Thomas" <TThomas@rtmmlaw.com>

From: Luis Sanchez
To: Gary Stonehouse; Kimberly Kaufmann-Brisby; Lezley Buford; Tom Pace
Date: 5/12/05 4:51PM
Subject: Re: Islands at Riverlake environmental/ aesthetics issues

ok, I'll talk to the architect a bit, and await further developments, thanks..

>>> Lezley Buford 05/12/05 4:29 PM >>>
Hi,

Sorry for the disconnect but here is the situation. I did not want to meet until we had an opportunity to review the aesthetic section of the admin draft EIR. We have not received to document (thought you all knew that for some reason!). The document is undergoing significant review and revisions by the applicant's attorney's and the City Attorney's office. Let's wait to see how the issue was handled so we don't direct anything contrary to the ADEIR conclusions.

Ellie

Lezley E. Buford, AICP
Manager, Environmental Planning Services
1231 I Street, Suite 300
Sacramento, CA 95814
tele: 916 808-5935 fax: 916 264-7185
e-mail: lbuford@cityofsacramento.org

>>> Luis Sanchez 05/12/05 12:48 PM >>>
I will pursue that avenue, thanks.

>>> Gary Stonehouse 05/12/05 12:23 PM >>>
The Council has already approved this project once. I'd suggest getting with Packowski to review improve the approved project...kindly.

>>> Luis Sanchez 05/12/2005 11:05:44 AM >>>
Hello folks. Kimberly and I met today in 300a, Tom and Ellie, you must have had conflicting meetings, since we did not see you! Kimberly brought me up to speed a bit on the project. I have questions and suggestions.

Questions: 1st: what would you like my task to be, to justify the existing design with a review of the current project; OR give additional design conditions to further enhance the buildings (make grander, as the Pocket folks asked) as part of the "aesthetic mitigation"....

2nd question: is there a list of the current design "mitigations" that have been done already by the developer and architect? Kimberly is getting me a copy of the previous env doc.

Suggestions: I think I'd like to meet with John Packowski on the overall design, and where do we go from here approach in reference to design...

and also, do we want to explore the 4plex "manor home" approach preferred by the neighbors, make them look like grand houses, rather than a string of single family homes (this could be exact opposite to what Regis wants, just exploring this)

So basically, I'd like to get your feel on what my approach should be, and recommended outcomes of my review...thanks.

Luis R. Sanchez, AIA
Design Review Director
City of Sacramento Design Review
lsanchez@cityofsacramento.org

TRAFFIC IMPACTS

The EIR takes the incorrect position that the Islands project's traffic impacts need not be studied "in depth." (DEIR at 3, FEIR at Master Response 2.) The Draft EIR therefore includes no new traffic analysis or study beyond the minimal review conducted for the Negative Declaration prepared in 2002. The Final EIR states that "as a courtesy to Caltrans" and "[a]lthough not required by CEQA or the Court of Appeal," the City commissioned a traffic study which it appended. The study was not circulated with the EIR, but was reviewed by City staff. (FEIR at 14.)

The appellate opinion did not restrict the focus or scope of the EIR; the Court required "the City to undertake an EIR on the proposed project." (Appellate opinion at 940.) The fact that the EIR preparers belatedly prepared a traffic study effectively concedes the point, but they did not go far enough. To be adequate, the traffic analysis and conclusions were required to be circulated for public and agency comment.

On March 10, 2005, *a few months before the Draft EIR was released in June 2005*, Katherine Eastman, Chief of Caltrans' District 3 Office of Transportation Planning, requested a focused traffic study for the Islands project. (Eastman letter attached.) She noted that the project was due to generate approximately 107 a.m. and 145 p.m. peak hour trips and would contribute to potential cumulative traffic impacts at the interchange of Interstate 5/Meadowview/Pocket Road Interchange.

In response to Caltrans' request, apparently following discussions and meetings attempting to dissuade Caltrans of its position (see discussion below), the City decided to prepare a traffic study. City planner Lezley Buford informed Anis Ghobril of the City's Development Services department that Regis Homes' attorney wished to contract directly with the traffic consultant for the study "due to the tight schedule on this project." (April 5, 2005, email from Buford to Ghobril, attached.) An email from attorney Sabrina Teller to Buford in April of 2005 explained that because of a conflict of interest, traffic consultant Fehr & Peers could not directly contract with Regis Homes for the study unless the request came from the City. Teller asked the City to authorize the study, and apparently the City did so. (Teller email, attached.) Yet no traffic study was included in the Draft EIR released in June 2005, which included minimal traffic information from the 2002 Initial Study. (DEIR at 121-127.) The EIR did find that the 18 foot new "substandard street width" could cause a significant impact, but was mitigated by prohibiting any on-street parking and by requiring that trash and recycling bins be placed on the same side of the road on garbage pick-up day. (DEIR at 127.)

On August 9, 2005, Caltrans Chief Eastman again wrote to the City asking why the Draft EIR did not contain a traffic study as she had requested. She stated that the Draft EIR was inadequate in not evaluating potential traffic impacts under CEQA and

again asked that a focused study be prepared for the project since the traffic volumes were beyond the threshold value warranting a study. (FEIR Comment letter 36.)

In fact, by that time a traffic study had been conducted and was completed for publication on August 8, 2005, by Fehr & Peers. The study was included in the Final EIR as an appendix; it was not circulated for public or agency comment.

Law clerk Rachel Howlett of this office spoke to Caltrans Chief Eastman on November 14, 2005, to ask whether her office had reviewed the traffic study in the Final EIR and, if so, whether Caltrans' concerns had been adequately addressed.

Chief Eastman explained to Ms. Howlett that her office provided no comments on the traffic study for several reasons: (1) the traffic study was not included in the Draft EIR; (2) Caltrans was not provided with a copy of the traffic study until the close of the EIR comment period, and it appeared that further comments would be untimely; and (3) the EIR stated that traffic analysis was not required and so Eastman inferred that traffic-related comments were not sought and would not be considered.

Eastman nonetheless reviewed the traffic study published in the Final EIR and told Ms. Howlett that the traffic impacts for the Islands project appeared to have been materially underestimated. She explained that the main-line figures were inaccurate because the traffic study did not take into account planned development expected in the area. Eastman indicated that she did not agree with the conclusions drawn in the EIR regarding the insignificance of traffic impacts for the project because the study did not evaluate (1) growth projected to occur in Elk Grove; (2) the new interchange and overcrossing on I-5; and (3) 9,000 homes planned for the Pocket area. Howlett confirmed the substance of the conversation in a letter to Chief Eastman. (Howlett letter attached.) No response was received from Eastman, thus confirming the accuracy of the letter.

It appears from emails between Samar Hajeer of the City's Public Works Transportation Department and applicant Bill Heartman of Regis Homes that they together determined in May 2005 to craft the traffic study so as to provide support for the Islands project and to give the applicant control over which intersections were to be included in the study. Hajeer stated that "[b]ecause of the sensitivity of this project, *we think that analyzing some intersections would be for benefit [sic] of the project, even though we are still thinking that no traffic is required, but having a well defensive [sic] section would be the best way to go.*" (May 2005 email from Hajeer to Heartman with cc's to Ghobril, Buford, J. Clark, and attorney Teller, attached.) Hajeer then informed the applicant which intersections would be studied. Hajeer stated that "including those intersections in the traffic study would give us a defensible document and it would be least probably challenged." In addition Hajeer stated that "*I will leave this decision to you and I will keep contacting Caltrans hoping that their letter would be revised and no analysis be required.* (Ibid., italics added)

In another email sent on June 9, 2005, Lezley Buford explained to attorney Sabrina Teller that, “there is much confusion with regard to the traffic analysis that is being completed.” She explained that, “[i]t is the City’s understanding that the traffic analysis was scaled back but would be included in the DEIR . . . Andrew [Bayne] told me that the study was being completed for informational purposes only and was being completed during the DEIR public review period. I have been told that the study will take 12 weeks so that really doesn’t work for the 45 day review period either.” (Buford email, attached.) It appears by her comment that Buford understood that the traffic study would be published after the 45 day review period, precluding public comment.

Not surprisingly, the EIR confirmed what the emails between the City and Public Works foretold, that the proposed project would not be expected to result in any potentially significant impacts requiring mitigation. (DEIR at 126-127; FEIR at Master Response 2 and Appendix A.)

The traffic section of the EIR is inadequate and incomplete and must be recirculated for comment by Caltrans and the public. Caltrans’ recommendations regarding necessary steps to make the traffic analysis adequate and its opinions regarding potentially significant impacts, both project-specific and cumulative, are important to the City decisionmakers and to hundreds of concerned area residents.

From: Anis Ghobril
To: Lezley Buford
Date: 4/8/05 8:44AM
Subject: Re: Islands at Riverlakes

Lezley,
I have forwarded your concerns to both Ed Williams and Samar. They should be contacting you regarding this project as I am not in the office full time until next week.

Thanks

Anis Ghobril
Development Services
808-5367
aghobril@cityofsacramento.org

>>> Lezley Buford 04/05/05 12:14 PM >>>
Anis,

I am attaching the comments received on the NOP for the Islands at Riverlakes including a letter from Caltrans requesting a focused traffic study. As you know, this EIR is being prepared as directed by the court. The applicant's attorney's would like to contract directly with a traffic consultant to prepare a traffic study due to the tight schedule on this project. Is this agreeable to you?

Ellie

Lezley E. Buford, AICP
Manager, Environmental Planning Services
1231 I Street, Suite 300
Sacramento, CA 95814
tele: 916 808-5935 fax: 916 264-7185
e-mail: lbuford@cityofsacramento.org

From: "Sabrina Teller" <STeller@rtmmlaw.com>
To: "Lezley Buford" <LBuford@cityofsacramento.org>
Date: 4/13/05 1:53PM
Subject: RE: Islands at Riverlake traffic study

Hi Lezley,

I just spoke to Jeff Clark at Fehr & Peers (548-3844) about the traffic study Caltrans requested. He said that because of F&P's existing "on call" contract with the City, F&P can't contract directly with the developer for the study, but that it could do it if the request came from the City. Therefore, could you or Ed Williams please contact him to authorize this study? He estimated it would take about 4 weeks, so we'd like to have F&P get started as soon as possible.

We also contacted DKS, who informed us of a similar contract conflict issue. If you have reason to believe that DKS could get it done faster, we'd have no objection to using them instead.

Thanks.

-----Original Message-----

From: Lezley Buford [mailto:LBuford@cityofsacramento.org]
Sent: Monday, April 11, 2005 3:31 PM
To: Sabrina Teller
Cc: Ed Williams; Joseph Cerullo; Tina Thomas
Subject: Re: Islands at Riverlake traffic study

Hi Sabrina,

Spoke to Ed Williams, Development, Engineering and Finance Senior Manager, and he has no objections as long as the CA's office concurs. Obviously, someone could raise the issue as to following the City's process at hearings etc.

LE

Lezley E. Buford, AICP
Manager, Environmental Planning Services
1231 I Street, Suite 300
Sacramento, CA 95814
tele: 916 808-5935 fax: 916 264-7185
e-mail: lbuford@cityofsacramento.org

>>> "Sabrina Teller" <STeller@rtmmlaw.com> 04/08/05 11:00 AM >>>
Hi LE,

Any word back yet from your traffic folks on whether we can get started on an outside traffic study?

Thanks.

Sabrina V. Teller
Remy, Thomas, Moose & Manley, LLP
455 Capitol Mall, Suite 210

From: "Bill Heartman" <BHeartman@srgnc.com>
To: "Samar Hajeer" <SHajeer@cityofsacramento.org>
Date: 5/27/05 4:57PM
Subject: RE: Islands of Riverlake PO5-0004

Samar,

We are OK expanding the F&P study to include your request below.

Rather than wait for F&P to again revise its scope, can you please put the contract together based upon their current scope of work, then they can prepare an amendment to incorporate your requested expansion?

If that works for you, let me know. We would like to get the commitment to Jeff ASAP.

Thanks,

Bill Heartman
Regional President
SARES-REGIS Group of Northern California, LP
REGIS HOMES of Northern California, Inc.
(916) 929-3193, Ext 18
email: bheartman@srgnc.com

—Original Message—

From: Samar Hajeer [mailto:SHajeer@cityofsacramento.org]
Sent: Friday, May 27, 2005 9:37 AM
To: Bill Heartman
Cc: Anis Ghobril; Lezley Buford; jclark@fehrandpeers.com;
STeller@rtmmlaw.com
Subject: Re: Islands of Riverlake PO5-0004

Hi Bill:

I received the 2 scopes of work for the project. The one which addresses Caltrans comments is fine, but I am concerned that in this section we will be focusing on Caltrans comments without analyzing any city intersection or project driveway. Because of the sensitivity of this project, we think that analyzing some intersections would be for the benefit of the project, even though we are still thinking that no traffic is required, but having a well-defensive section would be the best way to go.

I am thinking of analyzing the following intersections:

1. Pocket/ Greenhaven
2. Pocket/ Coleman Ranch
3. Pocket/ West Shore
4. Pocket/ silver Ranch

including those intersections in the traffic study would give us a defensible document and it would be least probably challenged.

I will leave this decision to you and I will keep contacting Caltrans hoping that their letter would be revised and no analysis would be required.

From: "Sabrina Teller" <STeller@rtmmlaw.com>
To: "Lezley Buford" <LBuford@cityofsacramento.org>
Date: 6/9/05 11:31AM
Subject: RE: Islands at Riverlakes

I think Jeff Clark at Fehr and Peers has more current information regarding the scope of the study and the timing. I would encourage you and Samaar to discuss it with him today.

-----Original Message-----

From: Lezley Buford [mailto:LBuford@cityofsacramento.org]
Sent: Thursday, June 09, 2005 11:15 AM
To: Sabrina Teller
Cc: Samar Hajeer
Subject: Islands at Riverlakes

Hi,

There is much confusion with regard to the traffic analysis that is being completed. It is the City's understanding that the traffic analysis was scaled back but would be included in the DEIR. This has been conveyed to the Council office and then onto members of the public. Today, Andrew told me that the study was being completed for informational purposes only and would be completed during the DEIR public review period. I have been told that the study will take 12 weeks so that really doesn't work for the 45 day review period either.

LE

Lezley E. Buford, AICP
Manager, Environmental Planning Services
1231 I Street, Suite 300
Sacramento, CA 95814
tele: 916 808-5935 fax: 916 264-7185
e-mail: lbuford@cityofsacramento.org

BRANDT-HAWLEY LAW GROUP

Environment/Preservation
Chauvet House PO Box 1659
Glen Ellen, California 95442

Susan Brandt-Hawley
Paige J. Swartley

Legal Assistants
Sara Hews
Shannen Jones

Law Clerk
Rachel Howlett



Katherine Eastman, Chief
California Department of Transportation
Office of Transportation Planning—Southwest
PO Box 942874
Sacramento, CA 94274

By fax: (916) 274-0648

Re: Islands at Riverlake Project EIR and Traffic Study

Dear Ms. Eastman:

Thank you for our conversation yesterday regarding the Islands at Riverlake project EIR and traffic study. I appreciated the time you took to explain to me that the reasons that your department provided no comments on the traffic study performed for the Islands project EIR were three-fold: (1) the traffic study was not included in the Draft EIR (as your August 9th letter to the City explains); (2) your department was not provided with a copy of the traffic study until the close of the EIR comment period, and so it appeared that further comments would be untimely; and (3) the EIR stated that traffic analysis was not required and so you inferred that traffic-related comments were not sought and would not be considered in the EIR process.

I further understand that you in fact nonetheless reviewed the traffic study published in the Final EIR and that it appears that the traffic impacts for the Islands project have been materially underestimated. You explained to me that the main-line figures were inaccurate because the traffic study did not take into account planned development projected in the project area. You indicated that you did not agree with the conclusions drawn in the EIR regarding the insignificance of traffic impacts for the project because the study did not evaluate (1) growth projected to occur in Elk Grove; (2) the new interchange and overcrossing on I-5; and (3) 9,000 homes planned for the Pocket area.

Letter re: Islands at Kiverlake Project EIR and Traffic Study
November 15, 2005
Page 2

Please let me know if I have accurately stated your concerns about the project. Our office has been reviewing the EIR on behalf of the Pocket Protectors group. The EIR's statement that traffic impacts need not be considered is patently incorrect. As you know, the Third District Court of Appeal found that the City's prior approval of the project on a mitigated negative declaration violated CEQA. Consequently, the Court ordered "the City to undertake an EIR on the proposed project." (*The Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 940.) The Court did not limit the scope of the EIR, and any area of potentially significant environmental impacts must be studied. The fact that the EIR preparers belatedly prepared a traffic study effectively concedes the point, but they did not go far enough. To be adequate, as you know, the traffic analysis and related conclusions were required to be circulated for public and agency comment.

We believe that it remains most appropriate and very important for your department to comment on the inadequacy of the traffic study prepared for the Islands project EIR and we respectfully urge you to do so. As part of your review, please note that there is now another project relevant to cumulative traffic analysis: a new private school, Bergamo Preparatory School, opening up at 8200 Pocket Road, projected to have in excess of 100 students which will generate significant traffic near the Dutra Bend entrance to the Islands project. This has, of course, not been considered in the EIR analysis.

The City Council hearing on certification of the EIR and consideration of project approval is now going to be continued until January 2006, and so there is still time for your department to comment on the traffic study and the conclusions drawn in the EIR regarding traffic. Your recommendations regarding necessary steps to make the traffic analysis adequate and your opinions regarding potentially significant traffic impacts, both project-specific and cumulative, are very important to the City decisionmakers and to hundreds of concerned area residents.

Thank you very much. Please call me with any comments or questions you may have, and I will look forward to your response.

Sincerely,



Rachel Howlett

Jennifer L. Williams

From: Anis Ghobril [aGhobril@cityofsacramento.org]
Sent: Wednesday, April 20, 2005 8:03 AM
o: Samar Hajeer; Andrew Bayne
Cc: Jesse Gothan; Jeffery Little
Subject: Re: Islands at Riverlake - Questions Regarding City StreetStandards

Andrew,

Yes, the City has changed the standards to what you have described in your e-mail, but this change has occurred after the project's approvals. And in any case, the project was approved with a special street section as described in the project's conditions of approval in the Planning and City Council staff reports. The internal street is designated as a private street, with less width as a standard residential street. That deviation from the standards was needed to accomodate the proposed density of the project and the product type. Private streets are required to be constructed to City standards regarding structural section and drainage, however, we do accept less width in certain cases. Hopefully i have answered your question.

Thanks

Anis Ghobril
Development Services
808-5367
aghobril@cityofsacramento.org

>>> Samar Hajeer 04/20/05 7:33 AM >>>
'i Andrew:

I forward your email to Anis Ghobrill, the Entitelement project Manger, and he will get back to you soon.

Samar Hajeer
Senior Civil Engineer
Development Services
Office: (916) 808-7808
Fax: (916) 264-5786
shajeer@cityofsacramento.org

>>> "Andrew Bayne" <Andrew.Bayne@SycamoreEnv.com> 04/19/2005 5:43:49 PM
>>>

Dear Samar Hajeer:

We are assisting the City with the preparation of the Draft Environmental Impact Report for the Islands at Riverlake project. Ms. Teller with Remy, Thomas, Moose, and Manley indicated that you are coordinating the traffic impact study for this project. We have several questions that we hope you can clarify to assist our evaluation of the project's consistency with the City's plans.

In our review of City Council Resolution Number 2004-118 dated 24 February 2004 (Resolution to approve pedestrian friendly street standards), we noticed that the City appears to have changed the minimum standard residential street right-of-way width from 41 feet for ADT 0-2000 to a standard residential street right-of-way width of 53 feet for ADT 0-4000. Is this correct?

So, we note that street width is measured from face of vertical curb to face of vertical curb. If correct, then the standard street with is 30 feet measured from face of vertical curb to face of vertical curb.

Jennifer L. Williams

From: Andrew Bayne
Sent: Monday, August 15, 2005 12:31 PM
To: 'lbuford@cityofsacramento.org'
Cc: 'steller@rtmmlaw.com'; 'mhabersack@rtmmlaw.com'; Jeffery Little
Subject: Response to Caltrans Comment Letter

Contacts: Ms. Lezley E. Buford AICP

Lezley:

Attached is a draft response letter to Caltrans' comment letter. You can make any changes and print out on the City's letterhead. Please call or email if you have any questions.

We would appreciate it if you could let us know the number of copies that will be needed so that we can start copying the appendices and comment letters. We would also like to know if the City has a preference between pairing the letters with the responses or grouping the letters and responses in separate sections.

Thanks



Response to
Caltrans Comment L.

Andrew Bayne
Environmental Planner
Camore Environmental Consultants, Inc.
916/ 427-0703

15 August 2005

Ms. Katherine Eastham
Department of Transportation
District 3 – Sacramento Area Office
Office of Transportation Planning
Venture Oaks, MS 15
P.O. Box 942874
Sacramento, CA 94274-0001

Ms. Eastham:

Thank you for reviewing and providing comments on the Draft Environmental Impact Report for the Islands at Riverlake project in the City of Sacramento, CA. In response to our Notice of Preparation, Caltrans requested in a letter dated 10 March 2005 that a traffic impact study (TIS) be completed for potential project impacts to I-5 on-/off-ramps. The City of Sacramento contracted with Fehr & Peers to prepare the TIS. The TIS is enclosed. It documents the findings in the Islands at Riverlake Initial Study (City of Sacramento February 2005) and DEIR.

The Traffic Impact Study (Fehr and Peers 8 August 2005) was conducted based on the procedures in Highway Capacity Manual (2000 HCM). The TIS examines the roadway, transit, and bicycle/pedestrian components of the overall transportation system. The TIS evaluated existing conditions without the project; existing conditions plus the project, cumulative conditions without the project, and cumulative conditions with project build-out. The analysis provides a Level of Service (LOS) analysis for the freeway ramps and ramp terminal intersections. Merge/diverge analysis was performed for the freeway and ramp junctions based on AM and PM peak hour volumes. The analysis includes LOS and traffic volumes at all study approaches and turn movements based on traffic counts conducted in June 2005.

Based on analysis of the data and forecasts of the cumulative traffic conditions in 20 years (year 2025), the trips generated by the proposed project do not result in any potentially significant impacts requiring mitigation.

Sincerely,

Lezley E. Buford, AICP
Environmental Planning Principal

Enclosure: Transportation and Circulation for Islands at Riverlake, City of Sacramento, CA
(Fehr & Peers 8 August 2005).

LAND USE IMPACTS

The EIR identifies twelve land use impacts but finds all of them to be less than significant, requiring no mitigation. (DEIR at 6, 10-11.) The EIR's conclusions on this key issue are conclusory, unsupported, and unlawfully inconsistent with the land use standards provided in the EIR and with the appellate opinion. The EIR fails to assess relevant evidence or to apply the provisions of the RI-A zoning and is therefore inadequate, incomplete, and fails as a good faith effort at full disclosure.

The Court of Appeal carefully reviewed the history of the LPPT PUD and ruled that “an entire development of detached houses” such as the Islands project cannot fairly be considered “a townhouse development” and is therefore inconsistent with the LPPT PUD R-1A zoning: “*It is clear* that this is not what the drafters of the PUD, or the City Council in approving the PUD, had in mind.” (Appellate opinion at 933, italics added.) The Court found no need to “clarify” the RI-A PUD category. The EIR fails to assess relevant evidence or to apply the provisions of the RI-A zoning and is therefore inadequate, incomplete, and fails as a good faith effort at full disclosure.

As a caveat to this discussion of land use issues, the Pocket Protectors note that Regis Homes has submitted for the record a number of studies referencing the need for housing and the importance of “smart growth” land use. The Pocket Protectors do not and have never disagreed with these good principles, and instead have consistently supported construction at density comparable to the Islands project. Its proposed clustered townhouse alternative would provide more affordable units. Thus, the Sierra Club and the Natural Resources Defense Council supported the Pocket Protectors in a letter to the Supreme Court in May 2005 (attached):

Appellant *Pocket Protectors* suggested a *more-affordable*, more dense, multi-unit housing *clustered project* over the double-rowed “mini-mansions” project at issue, because the former would have fewer environmental impacts; the Appellant never proposed a lower number of houses on the site. (Citation.) In this case it was actually the Appellant *Pocket Protectors* who championed smart growth. The . . . Opinion is . . . supportive of infill and affordable housing developments.

The Court of Appeal properly found a fair argument that the Islands project — which it recognized is *not* an “infill” project per City regulations — has significant land impacts *because it is inconsistent with the City's land use policies and regulations*; the Court found that preparation of an EIR was appropriate to analyze this issue. (Appellate opinion at 929-936.) This finding is now binding on this Council. Yet, based on a faulty analysis, the Islands EIR now concludes that the Islands project is somehow consistent with the LPPT PUD because it includes a modification to the PUD to “clarify” the type of housing allowed. This is not true.

Importantly, as your staff report and the record both confirm, “the project has not changed from the previous Islands project” (Email from Kimberly Kaufmann-Brisby attached.) After the appellate ruling, Regis submitted a new project application in January 2005. Among other things, it requested a “PUD Designation — Modification” to “[a]mend LPPT P.U.D. guidelines to *accomodate* [sic] single family detached small lot development.” (Italics added.) This was a recognition that the LPPT PUD does not currently allow single-family homes in the PUD’s R-1A zone. (Development Application at 1, 3, 4.)

While the Islands project application recognizes that the PUD does not allow single-family homes in the R-1A zone, during the EIR process a decision was made to “clarify” the PUD and South Pocket Specific Plan to provide that single-family homes are in fact allowed in the PUD’s R-1A zoning. The EIR’s project description describes

Amendments to the LPPT PUD and PACP-SPSP [Pocket Area Community Plan-South Pocket Specific Plan (PACP-SPSP)] to clarify that the “Townhouse and Related Development” (R-1A) designation allows the full range of residential uses allowed under the City zoning code for single-family residential alternative designation (R-1A), i.e., single-family attached or detached units, townhouses, cluster housing, condominiums, cooperatives or other similar projects.

(DEIR at 17, italics added.) The proposed amendments affect the PUD Guidelines, the resolution that adopted them, and the South Pocket Specific Plan. The proposed — amendments delete the phrase “Townhouse and Related Development” and the term “Townhouse” and replace them with the term “Alternative Housing.”

In response to a question from City planner Kaufmann-Brisby about the proposed amendments to the PUD, Regis Homes attorney Sabrina Teller explained to City staff that

[t]he term ‘Alternative Housing’ is defined in the proposed amendments to encompass the full range of uses allowed under the R-1A zone. Therefore, the proposed revision changing the term to ‘Alternative Housing,’ includes townhomes, but also small-lot single family detached, like the proposed project.

(July 2005 email from Teller.)

The Regis Homes attorneys were responsible for drafting the proposed PUD amendments and for devising the rationale behind them. (See also Teller email of 2/2/05, with PUD amendments, attached.) Under the Public Records Act, the Pocket Protectors requested that the City provide copies of “[a]ll versions of the amendments proposed to the LPPT Planned Unit Development Guidelines or to City Resolution 85-648 (including without limitation versions sent by Sabrina Teller to Lezley Buford on February 1 and

February 2, 2005),” plus all correspondence and comments about the proposed amendments. The City has not complied with this request and so it remains unclear exactly how and why the PUD amendments ended up in their final form.

LPPT PUD HISTORY. The land use provisions of the LPPT PUD are neither unclear nor ambiguous, and the City Code does not support the need for the amendments to “clarify” that “Townhouse and Related Development” was somehow always intended to include the full range of housing allowed under general R-1A zoning. Previous developments in R-1A zones in the LPPT PUD have not struggled with any ambiguity, and the community has long relied on the LPPT PUD designation for R-1A “Townhouse and Related Development.”

For example, the administrative record for the court action, all of which is part of the record now before the City Council, contains the relevant history of the LPPT PUD and projects approved under its auspices. The “Pocket Community Plan Area” was anticipated from the outset to have an ultimate make-up of 69% single family residences (12044), and 31% (5389) multi-family units under the City’s 1987 General Plan. (Administrative Record (AR)1:13.) The South Pocket Specific Plan adopted in 1976 contemplated the specific types of housing stock for the area, separating out “single family and duplex development” and “townhouses and related development” for “people not wishing the conventional homes or apartments.” (AR1:43, 54-57; *see* DEIR at 49.) The Plan recommends that the townhouses and related developments be located along major streets and notes that *‘problem parcels’ of unusual configuration would also be appropriate for townhouse uses.*” (AR1:59, italics added.)

When the PUD was created in 1985, its housing types were delineated in Resolution No. 85-648, calling out 71.7 acres for “Townhouse (or similar development)” R-1A zoning and 156.5 acres for “Single Family” R-1 zoning. (AR1:101-102.) References to “R-1 single family” and “R-1A townhouse” designations within the Pocket and LPPT PUD area abound in the 1980’s record. (*E.g.*, AR1: 92-93, 97, 126, 129, 130.)

The LPPT PUD Guidelines were also adopted in 1985. (AR1:107, 128.) The Guidelines spell out “four types of residential uses in the LPPT PUD,” including (1) single family, (2) townhouse and related development, (3) garden apartment, and (4) elderly housing. (AR1:108.) The Guidelines provide that for “Townhouse” development there shall be sod lawns in at least two-thirds of the open area, and specimen trees and low shrubs. (AR1:110.) The Guidelines stress that “the role of landscaping as a common element to unify the overall PUD cannot be overstated. It is essential that all landscaping be in accordance with these requirements . . .” (AR1:111.) The guidelines for projects “excluding single family residential” require 25% landscape coverage and 25 feet of landscaped setback from any public road. (AR1:111.) Landscape treatments are required to include “larger specimens of shrubs and trees along the site periphery, particularly along setback areas adjacent to public streets.” (AR1:121.) The

landscape guidelines also require “undulating landscaped berms located along street frontage and achieving a minimum height of four feet. . .” (AR1:121.) Further, “large growing street trees (preferably deciduous) shall be planted within landscape setback areas adjacent to all public streets” to minimize hot weather impacts and to provide a visual buffer from the street. (AR1:121-122.)

The PUD Guidelines provide a specific landscape directive for “Sites 21, 22, and 23 along Pocket Road, which shall be developed as indicated in Exhibit D.” (AR1:111.) These particularly key sites are now the Islands at Riverlake site. (*E.g.*, DEIR at 49.) Exhibit D is a diagram of the “Pocket Road Streetscape.” (AR1:127, 140.) It is telling that this proviso for the Islands site is in a section of the LPPT PUD Guidelines which applies, as noted above, to parcels “*excluding single family residential.*” (AR1:111.) Clearly, this site was never intended for single-family homes, as also underscored by Exhibit C to the Guidelines, which notes the site’s zoning as “TOWNHOUSE.” (AR1:126, DEIR at 50-b.) The Guidelines’ building standards for “multi-family residential” thus also logically apply to the site, including provisions relating to setbacks, landscaping, and parking. (AR1:117-123.)

In May 1987, Donald Joseph proposed projects for sites 21, 22, and 23, the current Islands site, but they were never built. The applications for clustered townhouses referenced the PUD requirements for the project. (AR1:131, 144-145.) The Joseph projects proposed clustered townhouses “at an angle to Pocket Road to diminish the ‘row effect’ often associated with linear townhouse developments.” (AR1:131, 144.) The project approvals found that “the proposed cluster homes/townhouse use conforms with the plan designation.” (AR1:136, 149.) Joseph’s subsequent application to build model homes on site 21 (also never built) shows that “the LPPT Schematic Plan designates [the site as] townhouse with a maximum of 8 du/acre.” (AR1:159.)

Another project was proposed by L. & P Land and Development and approved for the Islands site in 1994 for 167 attached “park homes.” (AR3:738, 755.) The City’s “preliminary review” for the project noted that “the PUD Schematic Plan designates the sites for townhouse development at a maximum density of eight units per acre. (*Ibid.*) Pursuant to “specific design criteria” of the PUD Development Guidelines, the project buildings were “broken up into clusters and staggered with varying elevations.” (*Ibid.*) Consistently, the staff’s review of the project noted the site’s “designation for townhouses.” (AR3:746.) Importantly, the staff report goes on to note the “four types of residential uses” [as described above] and that “To this point, within the PUD there has been the development of single family, apartments, and elderly care facilities. The development of the townhouses has not occurred. The applicant’s proposal completes the four housing types which were planned for the PUD.” (AR3:746.) The project was approved but was not built.

Years later, after the Islands project was proposed, City staff wrote to Regis Homes in April 2001, summarizing staff's initial concerns about the narrow proposed street width, inadequate setbacks from adjacent homes, lack of compliance with the City's Single Family Residential Design Principles, inadequate utility access, and lack of common space. (AR4:979; AR5:1727-28.) City staff pointed out that the Islands project "does not fulfill the intent of the LPPT PUD Townhouse land use designation insofar as it does not incorporate the landscaping and open space concepts embraced by the remainder of the LPPT PUD." (AR4:980.) City staff noted that the "necessity of shallow lots . . . limits the amount of privacy afforded adjacent property owners." (AR4:981.) Staff was also the first to point out the problematic "canyoning effect" created by the long expanses of similar buildings massed in double-row housing. (AR4:982.) Recognizing that landscaping is exceptionally important in the Pocket, staff also wondered whether the Pocket area norm of one shade tree per 30 lineal feet of street frontage would be possible within the small setback areas. (AR4:982.)

The City's Long Range Planning Team suggested changes to the project to add townhouses and duplexes or a reduced number of units designed into *a single row of houses on deeper lots*, agreeing with City staff regarding the potential "canyoning effect" of wide houses on small lots. (AR4:997.) These problems were echoed in numerous letters sent to the City from members of the public, including professional architects and planners. (E.g., AR4: 1014-1230.) Over 500 Pocket area residents signed petitions proclaiming considered opposition to the Islands project, agreeing that the ". . . housing proposal is too dense, appropriate set-backs (at least 30 feet) have not been met, traffic issues have not been resolved, strain on community services has not been assessed, use of common greenbelt as front yards for new homes, why the cluster concept was abandoned." (AR4:1023-27; 1098-1139, 1198.)

On August 8, 2002, after hearing public testimony and reviewing voluminous documents in the project file, the City Planning Commission decided to deny the project despite City staff's recommendation for approval. (AR6:1724-1826, AR7:1827-1931.) Following the preparation of findings, the Commission formally denied approval of the project by unanimous vote on August 22, 2003. (AR7:1933-2003; 2008.) The Commission found that configuration of the parcels did not allow adequate setbacks from adjacent properties. (AR7:1936.) Further, the massing of the houses created crowded conditions along the narrow interior private drive, resulting in inadequate play yards, inadequate front yards, inability to plant large shade trees, and inadequate parking. (AR7:1936.)

Additionally, the Planning Commission found that the proposed use of the site would adversely affect the general welfare of the surrounding residential neighborhood in several ways, including: (1) the height and bulk of the proposed dwellings not sufficiently mitigated by the rear yard setbacks; (2) the project infringing on the privacy of adjacent neighboring property owners; (3) the design of the proposed subdivision inconsistent

with the Sacramento General and Pocket Community Plans and LPPT Planned Unit Development as the proposed units are single-family detached units, rather than townhouse-style housing anticipated for the site. (AR7:1936-1937.) The Commission also found that the site is not physically suitable for the development because the shallow depth of the parcels affords inadequate setbacks. (AR7:1937.)

The Planning Commission further stated in its findings that the project would be detrimental to the public health, safety or welfare or be injurious to other properties in the vicinity, because it: (1) would facilitate a substandard lot configuration, (2) is not in accord with the intent and the purpose of the Subdivision regulations, (3) is not consistent with the General Plan and with the applicable specific plans of the City because the reduced street widths were previously approved for attached housing, not detached single-family residences, and (4) walkways will need to be constructed in the front yard setbacks of certain lots, thus reducing usable landscaping area to a less than acceptable width. (AR7:1937.)

Later, after the Council's approval of the project without preparation of an EIR, the Court of Appeal made clear that the Islands project as proposed is not consistent with the LPPT PUD based on the current record. That record has not changed.

EIR ANALYSIS. The DEIR does not fairly recite the land use history of the Islands site, as summarized above. The DEIR generally discusses the applicable South Pocket Specific Plan and the formation of the officially adopted LPPT PUD and its Guidelines. (DEIR at 46-51.) It notes that the LPPT PUD Schematic Plan designates four different types of housing, one of which is "Townhouse (R-1A zone)." (DEIR at 49.) While the LPPT PUD Development Guidelines refer to "Townhouse or related development," for this same category, the EIR consultants note that "it is the understanding of the City that no inconsistency was intended." (DEIR at 49, n.3.)

The EIR establishes "standards of significance" for land use impacts, many of which directly relate to the project site's existing zoning and the LPPT PUD amendments that Regis proposes. (DEIR at 53.) The DEIR explains in relevant part that a land use impact is to be *considered significant if the Islands project would:*

- *Conflict with [General Plan] designation or zoning;*
- *Conflict with applicable environmental plans or policies adopted by agencies with jurisdiction over the project;*
- *Be incompatible with existing land use or planned growth in the vicinity;*
- *Disrupt or divide the physical arrangement of an established community;*
- *Substantially alter the present or planned land use of the area;*
- *Be incompatible with long-term use on adjacent properties; or*
- *Alter the type or intensity of land use within the area.*

By providing single-family residences, the Islands project conflicts with the LPPT PUD Guidelines and R-1A PUD (Townhouse) zoning, and the South Pocket Specific Plan, as it alters the type of land use always planned for the site. It therefore has a significant impact on the environment per the EIR criteria:

1. **LAN-6 Impact:** *Inconsistency with the Pocket Area Community Plan — South Pocket Specific Plan (PACP-SPSP) goals and policies could result in potentially significant land use impacts on the Pocket Community in the City of Sacramento. (DEIR at 83-93.)*
2. **LAN-7 Impact:** *Inconsistency with the LPPT PUD Schematic Map could result in potentially significant land use impacts. (DEIR at 93-98.)*
3. **LAN-8 Impact:** *Inconsistency with the LPPT PUD Development Guidelines could result in potentially significant land use impacts. (DEIR at 98-100.)*
4. **LAN-9 Impact:** *Inconsistency with the Sacramento City Code (SCC) zoning ordinance could result in a potentially significant land use impact on the City of Sacramento. (DEIR at 100-101.)*

Further, the EIR unlawfully fails to acknowledge that the Islands project requires a rezoning of the site, not just a “clarification” of the PUD R-1A zoning that is currently unambiguous. The LPPT PUD zoning adopted in 1985 was for townhouses and similar development. This could mean condominiums; it does not mean single-family homes, which have always had their own separate category within the PUD. This is underscored by the 1985 Development Agreement for the Islands site, which provided that rezoning to R-1 would be required for any single-family development. (AR3:803-828 [*“If Developer wishes to develop as single-family residential one or more portions of the project zoned R-1A or for multifamily use, it may do so, in which case the portion or portions shall be rezoned R-1 and the plan shall be amended to show such development and Developer shall satisfy the usual subdivision requirements with respect to such portion or portions.”* (AR3:811.)]) This is what the Planning Commission explained in 2002 as part of the basis for its denial of the Islands project. (E.g. AR7:1921-1924.) Even though the Development Agreement expired in 2002, its provisions are relevant to understanding the context of the LPPT PUD in 1985, agreed by the Court of Appeal (*see* Excerpts); further, according to Riverlake developer William Parker in his correspondence to this Council, Regis Homes is bound by contract to comply with the terms of the Development Agreement.

The EIR’s reliance on Regis Homes attorneys’ insistence to “clarify” unambiguous LPPT PUD provisions to support its conclusion that the project will have no significant land use impacts is unsupportable. The current project is inconsistent with the LPPT PUD, as made clear by the Court of Appeal ruling that “the proposed mile-long project *facially conflicts with a PUD established by the City to mitigate the possible environmental effects . . . and has the potential to cause an immediate adverse environmental impact to hundreds of nearby residents.*” (Appellate opinion at 936, italics

added.) The City may only consider the project in the context of an amendment to R-1 zoning; this will be a significant environmental impact that requires EIR analysis and also consideration of feasible project alternatives.

Several provisions of the Sacramento City Code are consistent and also weigh against the EIR attempt to “clarify” the PUD Guidelines. Section 17.180 observes that PUDs “encourage the design of well-planned facilities, which offer a variety of housing or other land uses through creative and imaginative planning.” (DEIR at 53.) City staff and the developers of Riverlake did an admirable job in developing the well-planned LPPT PUD in 1985, which designated the long, narrow Islands site for townhouses.

As Pocket Protectors’ member Christopher Canales noted in the Planning Commission hearing, no evidence supports Regis’s request to “clarify” the LPPT PUD. No contemporaneous evidence exists to show that the LPPT PUD and South Pocket Specific Plan were drafted either ambiguously or incorrectly, nor that they intended to allow all R-1A housing types on this parcel, nor that they intended to allow *only* single-family detached housing on this parcel. All evidence is to the contrary, as discussed above. The staff report for the 2005 Planning Commission hearing incorrectly concluded that “this clarification is appropriate to remove all doubt as to the intention of the PUD’s land use designation for the subject site,” since there is no demonstrated ambiguity.

Sacramento City Code Section 17.12.050(C) already addresses a situation like this one, where the Code’s zoning category may differ from a more specific community plan or specific plan:

Community Plans or Other Specific Plans. When conflicts occur between the requirements of this title and standards adopted as part of any community plan or other specific plan, *the requirements of the community plan or other specific plan shall apply.*

(Italics added.) Similarly, Section 17.12.050(D), addressing PUDs, states that “[w]hen conflicts occur between the requirements of this title and development guidelines adopted for an applicable PUD, *the requirements of the PUD shall apply.*” (Italics added.) Christopher Canales aptly compared the City’s planning process to a “funnel”: the City Code is the opening of the funnel, through which all construction projects must pass. The funnel narrows as specific plans, such as the applicable South Pocket Specific Plan, make additional restrictions on development. The funnel narrows further if PUDs or development agreements impose more restrictions.

The proposed amendments are antithetical to standard planning practice. Amy Skewes-Cox, AICP, submitted lengthy comments on the EIR and on this issue in particular:

. . . in standard planning practice, the designations for single-family residences have always been distinguishable from “townhouses”. One is a form of low- to medium-density development and the other is a form of medium or high-density development. The unit types are easily distinguishable. It seems hard to believe that if the site had been designated for “Townhouse and Related Development” at the time of the PUD, that single-family units were considered for this site. In addition, the configuration of the project site (as compared to any standard subdivision) with its narrow and long shape, lends itself to creative townhouse development in a much more successful way than to standard box-shaped lots. It is surprising that a rezoning is not an automatic element of the project. This distinction between townhouses and single-family proposed land uses is even clearer when viewing Figure 10b [DEIR at 50b] that clearly distinguishes among a variety of land uses, each with its own respective zoning category. . . . The impacts of what should truly be a rezoning are not evaluated because a rezoning has not been required. Consequently, the DEIR fails to compare the difference between allowing townhouse development and allowing the proposed single-family development.

(FEIR Comment letter 1 from Amy Skewes-Cox at 3-4 [Comment 1-22].) The EIR does not provide a compelling answer to these comments, saying in part that the comment

. . . illustrates why the project proposes amendments to the PACP-SPSP and LPPT PUD Development Guidelines. The terms “single-family” and “townhouse and related” are ill defined in these planning documents resulting in difficulties in interpretation. . . . *A rezoning is not an automatic element of this project precisely because the standard 52-foot wide by 1,000-foot deep lot would not allow the site to be developed to the desired density.*

(FEIR Response 1-22, italics added.) There is no evidence of “difficulties in interpretation,” and this is the last undeveloped parcel in the LPPT PUD.

If the Islands at Riverlake project were truly an appropriate fit for this long, narrow, constrained parcel, Regis would not have to change the PUD and PACP-SPSP to accommodate it. If Regis wants to alter the type of housing allowed in the project area, Regis must request a rezoning to R-1 or redefine the meaning of the R-1A PUD. The impacts of rezoning should then be analyzed and mitigated as needed.

Further, while Regis requires a “special permit” in order to develop within the PUD, zoning issue aside, Section 17.212 notes that special permits are “not the automatic right of any applicant,” and requires the City to consider these guidelines in exercising its discretion in granting any such permit:

- A. Sound Principles of Land Use. A Special Permit shall be granted upon sound principles of land use.

- B. Not Injurious. A Special Permit shall not be granted if it will be detrimental to the public health, safety or welfare, or if it results in the creation of a nuisance.
- C. Must Relate to a Plan. A Special Permit use must comply with the objectives of the general or specific plan for the area in which it is to be located.

(DEIR at 53.) The Islands project does not comply with the objectives of the PUD relative to landscaping, open space, and types of housing, has significant aesthetic impacts, and violates sound land use planning. The EIR concedes that the narrow street may cause up to four minute delays in exiting a private driveway during garbage pick-up. (FEIR at 13.) While the EIR claims that the narrow street has been proclaimed adequate by city departments, there has been no direct input from the public works or fire department apparent since the onset of the EIR process. Surely in light of the controversy and the statements of the Court of Appeal, direct analysis relating to emergency access and garbage/moving van access and safety issues should be part of the EIR analysis.

The EIR acknowledges impact LAN-7: "inconsistency with the LPPT PUD Schematic Map could result in a [sic] potentially significant impacts." (DEIR at 93-98.) The EIR notes that other R-1A developments include single-family detached housing. Significantly, none of these R-1A developments include *only* single-family detached homes in parcels still designated for townhouse development. (DEIR at 95-96.) The EIR states that the Stillwater A&B neighborhood (Parcel 8 in the PUD) contains 36 "single R-1A" units, but the City Council resolution approving the project was "to *amend* the LPPT PUD Schematic Plan to *redesignate* . . . Parcel 8 . . . from Townhouse to Single-Family Residential in the Single-Family Alternative Planned Unit Development (R-1A {PUD}) Zone . . ." (Resolution 96-078, Feb. 20, 1996, italics added.) That project approval indicates that building only single-family detached homes on a parcel designated for townhouses would have been inconsistent with the LPPT PUD Schematic Map, thus the map was amended. However, in seeking to build only single-family detached homes on the Islands parcel, Regis's EIR concludes that "[t]he project is consistent with the LPPT PUD Schematic Map designation for the project site. Therefore, Impact LAN-7 is considered less than significant." (DEIR at 98.) This unsupported conclusion directly contradicts the City's established planning practice elsewhere in the LPPT PUD.

As proposed, the Islands project is inconsistent with the City's land use policies and regulations. The project requires rezoning, and the County must revise the EIR to examine all potential environmental impacts associated with that request.

CHATTEN-BROWN & ASSOCIATES

TELEPHONE:(310) 314-8040
FACSIMILE: (310) 314-8050

3250 OCEAN PARK BOULEVARD
SUITE 300
SANTA MONICA, CALIFORNIA 90405
www.cbaearthlaw.com

E-MAIL:
JCB@CBAEARTHLAW.COM

March 15, 2005

Honorable Chief Justice Ronald M. George
and Honorable Associate Justices
The Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Re: *The Pocket Protectors v. City of Sacramento*
Supreme Court Case No. S130830
Opposition to Petition for Review

Dear Honorable Chief Justice George and Associate Justices:

The Sierra Club and the Natural Resources Defense Council (“NRDC”) strongly oppose the Petition for Review, which does not merit review pursuant to Rule of Court 28 (b). The Slip Opinion in *The Pocket Protectors v. City of Sacramento* correctly and fairly applies the long-established, low-threshold “fair argument” standard of review unique to the question of whether an Environmental Impact Report (“EIR”) must be prepared for projects that are subject to discretionary agency review and approval. (*E.g., No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75; *Friends of B St. v. City of Hayward* (1980) 106 Cal.App.3d 988; CEQA Guidelines [14 Cal. Code Regs. § 15000, *et seq.*] § 15064, subd.(f).)

The agencies and developers urging this Court’s review of *The Pocket Protectors* case essentially object not to the particular facts or legal issues, which they both exaggerate and misstate, but to the “fair argument” standard of review itself. Their claims therefore lie solely within the province of the California Legislature and not with this Court.

An analogy may be helpful here. The posture of those petitioning for review in this case is somewhat akin to prominent corporations suddenly claiming to be aghast that a case applying a longstanding traffic rule, such as the law requiring large trucks to exit freeways for inspection, could delay and add expense to the beneficial transit of goods. The disingenuousness of the corporations’ affected surprise would be obvious, since such traffic laws have long been in place. Further, the Court knows that while such laws incidentally delay even salutary journeys, such laws fairly regulate transportation and

infrastructure needs in order to benefit the long-term public good. Similarly, the EIR process triggered by the “fair argument” standard of review does involve time and money, but it is essential to fulfill the laudatory purposes of environmental review. Further, *it has been established for three decades* by statute, case law, and guidelines.¹

The Petition for Review is without merit and should be denied.

A. Standing

NRDC is a national non-profit organization of scientists, lawyers and environmental specialists dedicated to protecting public health and the environment, with over 480,000 members nationally, more than 90,000 of whom live in California. Attorneys with NRDC’s southern and northern California offices have extensive experience with enforcement of state land use and environmental laws, and rely upon private attorney general fee awards for their work.

The Sierra Club is a national non-profit organization of 700,000 members dedicated to exploring, enjoying, and protecting the wild places of the earth; to practicing and promoting the responsible use of the earth’s ecosystems and resources; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives.

B. Discussion

The *Pocket Protectors* decision is congruent with and in no way eviscerates CEQA incentives for smart growth. The Islands at Riverlake project at issue in *Pocket Protectors* proposes 139 self-described “mini-mansions” that the City of Sacramento readily conceded are neither infill nor affordable housing. The City’s unwavering position was reflected from the outset in the Initial Study and Mitigated Negative Declaration: “*The project area is not an existing urban development and does not qualify as an infill project.*” (Administrative Record (AR) 5:1356, italics added; *see also*

¹ In other respects, the analogy with trucking is admittedly quite imperfect. For example, while most trucks are subject to inspection and fees, 95% of development projects still proceed *without* preparation of an EIR, and will continue to do so regardless of the outcome of this case. Also, an agency’s decision to prepare an EIR involves much more than rote qualifications such as size or weight, and preparation of an EIR does indeed take longer than a truck stop and provides much more extensive information. But it has been the determination of the Legislature that the benefits of EIR preparation and consideration merit such delay.

AR6:1680, 9:2443.) The City noted that “the project is not required to provide housing affordable to low-income families.” (AR5:1359.) Current exemptions from CEQA designed to facilitate “smart growth” urban infill and affordable housing thus do not apply to the Islands at Riverlake project. (*Ibid.*; Pub. Resources Code §§ 21159.20 *et seq.*)

Appellant *Pocket Protectors* suggested a *more-affordable, more dense, multi-unit housing clustered project* over the double-rowed “mini-mansions” project at issue, because the former would have fewer environmental impacts; the Appellant never proposed a lower number of houses on the site. (Slip Opinion at 26 -28.) In this case it was actually the Appellant *Pocket Protectors* who championed smart growth. The Slip Opinion is therefore, if anything, supportive of infill and affordable housing developments.²

On the merits of the case, the Slip Opinion scrupulously followed the correct legal process in determining whether an EIR was required, based on its comprehensive review of the administrative record. After explaining the “fair argument” standard of review applicable to triggering preparation of an EIR (Slip Opinion at 33-38), the Court cogently

1. Reviewed relevant sections of the CEQA Guidelines Appendix G Initial Study Checklist. (Slip Opinion at 39, 52.)
2. Determined that two of the Checklist sections applied to the project, relating to Aesthetics (Section I) and Land Use (Section IX). (*Ibid.*)
3. Reviewed the substantial evidence in the administrative record supporting a “fair argument” that the housing project may have significant environmental impacts. (Slip Opinion at 39-57.) In its review, the Court strictly applied the statutory definition of substantial evidence, which consists of facts and fact-based reasonable assumptions and expert opinions. (*Id.* at 35.) The Court duly noted the *expert opinion* submitted in both of the impact categories (*e.g., id.* at 41-45, 53) and the lack of any dispute regarding credibility of the experts. (*Id.* at 48-50.)

As to the standard of review for potential significant land use impacts, the Court explained:

Regis accuses the Pocket Protectors of turning ordinary planning and zoning issues into CEQA issues to avoid the substantial evidence test. This

² Moreover, both Sierra Club and NRDC are organizations strongly in favor of smart growth principles; to support a ruling that might be incongruent with these principles would be highly irregular.

argument fails for the reasons already given. Because the issues raised are genuine CEQA issues [relating to plans and policies adopted for purposes of environmental protection] to which the fair argument test applies, Regis's cited authorities, which hold that the test is merely whether substantial evidence supports the agency's determination, are inapposite.

(Slip Opinion at 47.)

The Court's application of the "fair argument" standard of review was without fault, and now provides an extremely valuable guide to agencies and developers in their compliance with CEQA. The Slip Opinion provides a scholarly, meticulous review of the case law relevant to several difficult issues including: evidence credibility disputes, the import of evidence provided by members of a Planning Commission, applicable standards of review for inconsistency with land use plans and policies under both the Government Code and CEQA, and CEQA's application to aesthetics. (Slip Opinion at 44-57.) As to the issue of aesthetics, the Court carefully distinguished the recent *Bowman v. City of Berkeley* (2004) 122 Cal.App.4th 572, *depublication pending* S129227, on its facts. (*Id.* at 56-57.)³ Thus, there is no split of authority among the appellate districts.

The *Pocket Protectors* Court assuredly did *not* substitute its own judgment about the evidence, as has been alleged, but systematically reviewed the facts and fact-based reasonable assumptions and expert opinion in the administrative record under two longstanding Appendix G categories, sections I [aesthetics] and IX [land use planning] to

³ In its Reply to Answer to Petition for Review, Regis raises an odd new argument, claiming that none of the aesthetic impacts raised in the administrative record should count under the "fair argument" standard because they do not relate to "*physical* impacts." (Reply at 2, italics in original, and 6-13.) This view has no support in CEQA or the case law. While aesthetic impacts are visual by definition, they are based on physical realities. The Legislature in adopting CEQA made it abundantly clear that all of CEQA's mandates were to apply to "provide the people of this state with clean air and water, enjoyment of aesthetic, natural, scenic, and historic environmental qualities, and freedom from excessive noise." (Pub. Resources Code § 21001 subd.(b).) Appendix G, § I, relied upon in the Slip Opinion, implements this policy by requiring an EIR if a project may "substantially degrade the existing visual character or quality of the site or its surroundings." Thus, *aesthetic* impacts are created through the *physical* attributes of a proposed project, including measurable qualities relating to design, scale, mass, and open space, necessarily *perceived* via human vision. EIRs study these things every day; and the City of Sacramento has just issued notice that it is proceeding to prepare an EIR on the Islands project. (Request for Judicial Notice in Support of Motion to Dismiss Petition for Review.)

see if, as a matter of law, a “fair argument” was presented. (Slip Opinion at 33-57.)

In contrast, without reviewing the law and the facts in the manner of the Slip Opinion, the Petition for Review and *amici* letters submitted in support of depublication are conclusory. Many of the letters worry that the Slip Opinion will somehow now require EIRs to be prepared for all housing projects. Helpfully, the Slip Opinion’s copious review of qualifying evidence easily rebuts such arguments. (Slip Opinion at 33-57.) The Court also clearly rejects any notion that mere argument, speculation, or unsubstantiated opinion is sufficient to require an EIR, thereby further alleviating concerns that EIRs will be required for all housing projects. (Slip Opinion at 37-38.) And while the *amici* are critical of the longstanding “fair argument” standard of review triggering the preparation of EIRs, their protestations that the standard is somehow new or was unfairly applied in *Pocket Protectors* are absolutely empty.

The misinformed *amici* mistakenly claim that the Slip Opinion followed an improper standard of review and that the *Pocket Protectors* opposed the housing project based on unquantifiable aesthetic issues. As explained above, and in the Slip Opinion itself, they are simply wrong on the facts and on the law. Many of the *amici* unfairly argue that the Slip Opinion somehow requires that “any individual or group opposing a development for any reason may force a city and applicant to jump through some very expensive and time consuming (and environmentally unnecessary) hoops merely by expressing personal distaste for a project’s appearance.” (*E.g.*, Letter from Applied Molecular Evolution, Inc. and AME Torrey View, LLC, February 24, 2005, p.1.) The Court’s findings are based on extensive, credible evidence and to the extent any of these worries have any basis at all, they lie with the “fair argument” standard that implements the important mandates of CEQA, and *not* from the well-reasoned Slip Opinion.

The scholarly *Pocket Protectors* case stands as a fine and fairly-rendered decision following all of the mandates of CEQA, consistent with smart growth. There is no important question of law presented that this Court should address since the Court

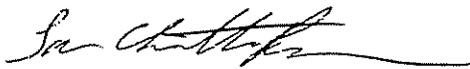
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previously addressed the fair argument standard in the *No Oil Inc.* case. Further, there is no split of authority among the appellate districts, and thus review is not necessary to assure uniformity of decisions. The Petition for Review should be denied.

Respectfully Submitted,
CHATTEN-BROWN & ASSOCIATES



Jan Chatten-Brown

Attachment: Proof of Service

From: Anis Ghobril
To: Kimberly Kaufmann-Brisby
Date: 7/12/05 12:52PM
Subject: Re: Islands at Riverlake project conditions (P05-004) prev. file P01-133

Hi kimberly,
Unfortunately this project is not mine on this second tour. This project is Jesse's. please send any communications directly to him. I will forward your e-mail to him.

Thanks & good luck

Anis Ghobril
Development Services
808-5367
aghobril@cityofsacramento.org

>>> Kimberly Kaufmann-Brisby 07/12/05 11:45 AM >>>
Hi all:

This project is finally coming to SRC on the 3rd of August. Even though the project has not changed from the previous Islands project, I need your new conditions for this project filing. Please keep in mind this is a very controversial project so we want to make certain to cover all contingencies so there are no grounds for appeal as far as our part is concerned (no pressure).

I will be routing a slightly modified map to you, the changes are minimal and involve the placement of a couple of 2-story homes and some parking spaces. For all intents and purposes, the map is the same as before BUT again, all of our ducks need to be in a row so there is no questions about anything.

If you could provide your conditions to me by next Thursday, the 21st, I think we'll be in good shape.

Thank you for all your cooperation and assistance, let's hope this one sticks !

Kimberly

From: Tom Pace
To: David Kwong
Date: 11/22/05 9:49AM
Subject: Fwd: Islands at Riverlake -- revised draft LPPT PUD amendments

I believe this is already in the record, but I'm sending it just in case.

>>> "Sabrina Teller" <STeller@rtmmlaw.com> 02/02/05 12:24 PM >>>
Hi Lezley,

After a little more thought, we decided to revise the draft PUD amendments I sent you yesterday. The latest revision is attached for your review. Please disregard the version I sent yesterday. Don't hesitate to call or email if you have any questions.

Thanks.

Sabrina V. Teller
Remy, Thomas, Moose & Manley, LLP
455 Capitol Mall, Suite 210
Sacramento, CA 95814
(916) 443-2745
(916) 443-9017 (fax)
steller@rtmmlaw.com <<mailto:steller@rtmmlaw.com>>

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Amendments to
Resolution 85-648
and
LPPT Planned Unit Development Guidelines
adopted August 27, 1985
under City Planning File No. P85-165
City of Sacramento, California

February __, 2005

A. Purpose

The LPPT Planned Unit Development Guidelines, dated July 11, 1985, under Sacramento City Planning File No. P85-165 ("LPPT Guidelines"), were adopted by the duly elected Council for the City of Sacramento, California (the "City") after a public hearing on August 27, 1985, pursuant to Resolution No. 85-648 (the "Resolution").

The Purpose of this document (the "Amendment") is to clarify, expand, and/or modify the LPPT Guidelines and the Resolution such that the LPPT Guidelines and the Resolution accurately reflect the intent, interpretation, and understanding of the City.

B. Intent

In the mid-1980's the word "Townhouse" was a generic term used to describe alternative residential uses different and typically higher in density than standard single family detached residential uses containing public streets, traditional lots sizes for the period, and standard setbacks. These alternative residential uses are residential uses allowed and described in the R-1A zoning code of the City, which includes, without limitation: small lot, single-family detached developments; clustered attached and detached houses; duplex or half-plex developments; attached or detached condominiums and townhouse developments; all of which may be on public or private streets with a variety of front, side, and rear setbacks ("Alternative Housing").

Townhouse and related development, sometimes referred to in the LPPT Guidelines and the Resolution as "Townhouse (or similar development)" or simply "Townhouse", (collectively referred to in this Amendment as "Townhouse") is one of the four types of residential uses found in the LPPT Guidelines and in other documents approved and adopted with the Resolution. The four types are: 1) Single Family, 2) Townhouse and related development, 3) Garden Apartment, and 4) Elderly Housing/Care Facility. The intent of the City when approving the Resolution and the LPPT Guidelines was not to limit the possibilities for residential uses under the Townhouse designation to only attached townhouses but to allow for a wide variety of alternative residential uses as allowed under the R-1A zoning. The intent of this Amendment is to add and modify some wording and exhibits in the LPPT Guidelines and Resolution to make clear that the "Townhouse" designation was intended to be interpreted to allow uses consistent with the range of residential uses allowed under the City's R-1A zone and General Plan. Therefore, to clarify this designation, the term "Townhouse" is changed to "Alternative Housing," as that term is used in the City's 2002 General Plan Housing Element.

C. Modifications to LPPT Guidelines adopted August 27, 1985:

1. Section A, "Purpose and Intent," last paragraph, is revised to read:
"These guidelines are intended to act as a supplement to existing City Ordinances and shall prevail when more specific than the City Ordinance. Any amendments hereto can only become effective upon approval by the

Planning Commission of the City of Sacramento, or ultimately, the City Council, pursuant to the City's ordinances and procedures."

2. Section B.1.: In the first line, describing the four types of residential uses found in the LPPT PUD, delete the phrase "Townhouse and related development" and replace with "Alternative Housing".
 3. Section D.1., second paragraph, first line: Delete "Townhouse" and replace with "Alternative Housing".
 4. Exhibits A, B, & C: Wherever "Townhouse" appears on Exhibits A, B, & C, the word "Townhouse" shall be replaced with "Alternative Housing".
- D. Modifications to City Resolution 85-648, adopted August 27, 1985:
1. Section B.1.d.: The words "Townhouse (or similar development)" shall be replaced by "Alternative Housing".

ALTERNATIVES ANALYSIS

The Pocket Protectors have always supported development of the Islands site at a density comparable to the Islands project. They continue to do so. They support a more-affordable, clustered townhouse project consistent with smart-growth principles, just as the LPPT PUD has always anticipated at the Pocket Road site. A key reason to prepare an EIR for the Islands project was to explore a townhouse alternative to see if it could feasibly accomplish project objectives. Remarkably, the EIR fails to provide adequate analysis of such an alternative. Revised EIR analysis must now be required, and feasible mitigations and alternatives should be imposed on the project to reduce or eliminate significant impacts. (*See* Aesthetic Impacts and Land Use Impacts sections.)

SCOPING. Following the finality of the Court of Appeal ruling requiring preparation of an EIR, Pocket Protectors member Gary Hartwick requested that the City hold a scoping session. The hope was that the EIR would provide complete and objective analysis of the townhouse alternative, and the scoping session was a way to air the community's requests and concerns at the outset of the process. However, the City denied Hartwick's request, signaling the beginning of a restrictive and truncated EIR process. After reviewing the scoping request, Regis Homes' attorney Sabrina Teller told City planner Lezley Buford that

We do not believe that the City is required to hold a scoping meeting, since (a) the EIR is being done on remand from the Court of Appeal, whose opinion already limited the scope of the issues required to be studied, and (b) the project does not meet the criteria set forth in CEQA Guidelines section 15206 warranting a mandatory scoping meeting . . .

(Email attached to EIR Process section.) Ms. Teller's statement regarding the limited scope of the EIR, later repeated in the FEIR master response 10, was inaccurate, as the Court of Appeal in fact ordered "the City to undertake an EIR on the proposed project," without limiting the issues. (Appellate Opinion at 940.) Even if one could somehow interpret the Court's ruling as limiting review of environmental issues, the need to include adequate analysis of project alternatives is beyond question. Further, section 15206 is not the only CEQA Guideline addressing scoping. Section 15083, "Early Public Consultation," notes in relevant part that

Prior to completing the draft EIR, the lead agency may also consult directly with any person or organization it believes will be concerned with the environmental effects of the project. Many public agencies have found that early consultation solves many potential problems that would arise in more

serious forms later in the review process. *This early consultation may be called scoping. . . .*

(a) Scoping has been helpful to agencies in identifying the range of actions, alternatives, mitigation measures, and significant effects to be analyzed in depth in an EIR and in eliminating from detailed study issues found not to be important.

(b) *Scoping has been found to be an effective way to bring together and resolve the concerns of affected federal, state, and local agencies, the proponent of the action, and other interested persons including those who might not be in accord with the action on environmental grounds.*

(Guideline § 15083, italics added.) Based on the Pocket Protectors' successful litigation, City staff knew that the members of the Pocket Protectors were "concerned with the environmental effects of the project" and "might not be in accord with the action on environmental grounds." (Guideline § 15083 and subd.(b).)

In most circumstances when an EIR is required, a lead agency welcomes the opportunity to find out just what area residents are hoping to see addressed in the EIR process. Here, by agreeing to the Pocket Protectors' request for a scoping meeting, the City could have assured an adequately scoped EIR. The irony is that Regis Homes, apparently in too big a hurry to agree to a scoping session, by convincing the City of its position has delayed the completion of an adequate environmental review process. While failing to hold a scoping session was not unlawful, it was the EIR's first misstep in inadequate analysis of project alternatives.

PROJECT OBJECTIVES. The EIR's evaluation of project alternatives is based on the project objectives, as the relevant question is whether there are feasible alternatives that can accomplish most of the project's objectives. The Islands project EIR provides a one-sentence project objective: "[t]he applicant's objective for the Islands at Riverlake project is to develop an *alternative housing type* at a density that is not currently provided in the Riverlake community." (Draft EIR at 40, italics added.) That's it. The objective does not define "alternative housing type."¹ Instead, the EIR's discussion of the objective states that "[t]he

¹ In other places, the EIR uses the term "alternative residential units." (E.g., Draft EIR at 1.) In her thorough, nine-page comment letter on the Draft EIR, planner Amy Skewes-Cox, AICP, noted that the term was undefined. (Final EIR Comment 1-10.) The EIR responded that "[a]lternative residential units' are those housing types for situations described in Sacramento City Code 17.20.010. Definition

applicant believes that small lot detached homes provide opportunities for a growing market that desires new home ownership without the requirements of large yards and without necessitating dwellings with common walls.” (*Ibid.*)

The EIR also states that the project’s “purpose . . . is to provide residential housing in the LPPT PUD in a manner that is consistent with the planning goals, policies, and objectives of the City of Sacramento and the Sacramento Area Council of Government’s ‘Blueprint.’” (*Ibid.*)

ALTERNATIVES ANALYSIS. The FEIR comment letters provided by Amy Skewes-Cox and Roger McCardle explain the deficiencies with the EIR’s alternatives analysis, and the City Council is respectfully directed to those letters. (FEIR Comment letters 1 and 37.) The alternatives analysis is inadequate at the outset because it flows from the EIR’s incorrect conclusions that the Islands project has no significant impacts. In fact, significant impacts relative to aesthetics, traffic, and land use are manifest. Without acknowledgement of such impacts, the alternatives analysis does not show the many reductions in environmental impacts offered by the alternatives. Further, as explained by architect McCardle, the EIR analysis of the Pocket Protectors Alternative 4, reviewed not only without scoping but without making even “one telephone call to representatives of the Pocket Protectors to discuss this alternative,” thus was drafted based on “wrong conclusions” regarding density and community development standards. (FEIR Comment letter 37, 37-4.) As stated by McCardle, who had drafted the initial Pocket Protectors’ alternative in 2003, when “the alternate proposal was presented, hardly any questions were asked” and thereafter the proposal was represented in a biased and inaccurate way.

As further stated by McCardle, “it is time to have a fair and open professional discussion of alternatives and how an environmentally better solution can be developed for the entire community. Let’s work together to provide an innovative solution that does not require bending of rules . . .” (*Ibid.*, 37-22.) CEQA requires no less.

provided on page 51, in Section 9 Glossary, and discussed on page 100 of the DEIR.” (Final EIR, § 3.2.2, Response 1-10.) However, the so-called “Glossary” does not appear to quote directly from the Code, and provides no clear definition of “alternative residential units.” (Draft EIR at 51.)

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EIR PROCESS OBJECTIONS

The Pocket Protectors ask that the City Council grant the group's appeal of the certification of the Final EIR, which was prepared by the Regis Homes consultant Sycamore Environmental Consultants. CEQA provides in mandatory language that a project EIR "shall be prepared directly by, or under contract to, a public agency." (Pub. Resources Code § 21082.1 subd.(a).) Further mandatory language provides that "all local agencies shall prepare, or cause to be prepared by contract" an EIR on any project they intend to approve. (Pub. Resources Code § 21151 subd. (a).)

Here, although both the Draft *and* Final EIRs state on their covers that they have been prepared "by" Sycamore "for" the City of Sacramento, the contract for preparation of the EIR does not include the City as a party. There is no dispute that Sycamore, directly under contract and thus responsible to Bill Heartman of Regis Homes, prepared both the Draft and Final EIRs. City staff reviewed and edited both documents, but the draft and final documents were each produced by Sycamore under its contract with Regis Homes. Some of the draft documents and emails relating to the preparation have been provided to the Pocket Protectors' counsel pursuant to Public Record Act requests, all of which are here incorporated by reference, but many documents have been omitted and the entire story has therefore not been publicly revealed.

CEQA provides, and case law confirms, that a project applicant's consultant may provide draft EIR "information or other comments" to a lead agency "in any format" which may be "included, in whole or in part, in any report or declaration." (Pub. Resources Code § 21082.1 subd.(b).) CEQA Guideline section 15084 provides that a project applicant consultant may prepare a draft EIR; however, *it does not allow a project applicant's consultant to prepare a final EIR.*

Further, it appears that even the allowance to prepare a draft EIR goes beyond the authority of the Public Resources Code and is unlawful. The Pocket Protectors support the dissenting opinion in *Friends of La Vina v. County of Los Angeles* (1991) 232 Cal.App.3d 144, here attached and incorporated by reference, which explains in compelling language that the lead agency fails to fulfill the mandates of CEQA when it allows a project applicant to prepare a draft and final EIR. Even in the majority opinion in *Friends of La Vina*, the applicant's consultant and attorneys *drafted* the Final EIR responses to comments but did not actually prepare the Final EIR as Sycamore Consultants have here done. Counsel also appear to have drafted and/or edited the City's staff report. (August email from Teller, attached.)

Further, knowing that the City was allowing Regis Homes to contract with an environmental consultant to prepare the Islands Draft EIR, and that the Regis Homes attorneys were directly involved in the process — as indicated from the outset when the Initial Study bore the name of the Remy Thomas Moose & Manley law firm — counsel for Pocket Protectors requested to be allowed to participate in the administrative draft process and to have access to the EIR consultants along with the Regis Homes attorneys. This was denied. No case of which the Pocket Protectors are aware has addressed the question of unequal treatment of the project applicant and the public in the EIR process, and this exacerbates the undue control and conflict of interest issues present in this case.

The fairness of the overall EIR process in this case was undermined by a large number of factors that are documented in the record. Aside from the EIR's preparation under contract to Regis Homes, there was no scoping process and thus no fair analysis of the Pocket Protectors' alternative; Planning Commissioner Notestine declined the Pocket Protectors' request for recusal despite prior employment with Regis Homes and his representation by the Remy Thomas firm in a recent business matter (both confirmed by Tina Thomas by letter, attached); and the lack of due process in the Planning Commission hearing conducted by the vice-chair D.E. "Red" Banes, as discussed in the cover letter.

FRIENDS OF LA VINA et al., Plaintiffs and Respondents, v. COUNTY OF LOS ANGELES, Defendant and Appellant; CANTWELL-ANDERSON, INC., et al., Real Parties in Interest and Appellants

No. B053286

Court of Appeal of California, Second Appellate District, Division Two
232 Cal. App. 3d 1446; 284 Cal. Rptr. 171; 1991 Cal. App. LEXIS 895; 91 Cal. Daily Op. Service 6221; 91 Daily Journal DAR 9519
August 5, 1991

DISSENTBY: GATES

DISSENT: GATES, [*23]** Acting P. J.

I respectfully dissent.

One person may never adequately represent conflicting interests. Whether expressed in classic or colloquial form, few verities have been more oft reproven over the centuries. n1 Consequently, our Legislature has proclaimed in clear, unambiguous language that:

"Any environmental impact report or negative declaration pursuant to the requirement of this division *shall be prepared directly by, or under contract to, a public agency.*" (Pub. Resources Code, § 21082.1.)

----- Footnotes -----

n1 "No man can serve two masters: for either he will hate the one, and love the other; or else he will hold to the one, and despise the other." (Matthew 6:24.) "Tell me whose food you eat and I will tell you whose song you sing." (Folk aphorism.)

----- End Footnotes-----

It is not contended, nor could it be, that this commandment was honored here. In this instance the applicant's agent not only prepared the initial draft environmental impact report (EIR), he was permitted to make all required responses to any concerns expressed in order that [***24] the final EIR, which he also composed, would satisfy his principal's desires. When any person's future income is dependent solely upon his ability to achieve success for those who retain his services, no matter how capable or honorable may be his intentions, his conflicting interests are so patent that the statutory proscription forbidding public agencies from casting him in such a role would hardly seem necessary.

[*1459] No derivative public benefit from this practice has been suggested. There are no resultant cost savings and, of course, any and all input from the applicant's agent in aid of his client's position is already expressly authorized by the second paragraph of Public

Resource Code section 21082.1.

I gravely fear that by reversing this judgment and thereby allowing Los Angeles County n2 and certain other public agencies throughout the state to continue to operate in this forbidden fashion, we will produce an effect that extends far beyond this particular project. Each year our state and local ballots are increasingly filled with initiatives and referendums manifesting the public's dissatisfaction with the conduct of its governmental officials. One may only speculate [***25] how much more their disillusionment and understandable cynicism will be increased upon learning that those authorities who control the very environment in which we live and raise our families need not even retain neutral experts to supply the information necessary to enlighten the affected citizenry or to assist the officials in preparing the materials prerequisite to any well-considered decision.

----- Footnotes -----

n2 Ironically, the county's own environmental document reporting procedures and guidelines mirror the state's dictate in this regard by explicitly declaring in section 602, subdivision D, that "A Draft EIR shall be prepared *by or under contract to the lead county agency . . .*" (Italics added.) Although provision is also made for the lead County agency to require the applicant to provide necessary data to assist it in its work, even in the form of a draft EIR, no such proviso is made for the final EIR. That is, subsection I states: "After evaluating the comments from those who reviewed the Draft EIR, a Final EIR *shall be prepared by the lead County agency.* The responses shall describe the disposition of significant environmental issues raised and shall be based on factual information." (Italics added.)

----- End Footnotes----- [***26]

[**179] However, I certainly have no wish to delay this particular applicant's project if, as my minority position would indicate, my views are erroneous. Therefore, I shall not attempt to compose an extended legal analysis but will merely adopt by way of an appendix, the trial court's statement of decision which I find both correct and persuasive.

[*1460] Appendix

"Writ of Mandate Granted.

"Pursuant to PRC 21168.9 ('Public agency' not in compliance with article [CEQA]; court's powers and duties), a writ of mandate is granted directing respondent to set aside its decision of December 26, 1989, approving Zone Change Case No. 87-044, Compound Plan No. 002-89 and Specific Plan No. 2, and its certification of the Environmental Impact Report in connection therewith; and further directing respondent to suspend all activity which could result in any change or alteration to the physical environment until

such time as respondent has complied with the requirements of CEQA in accordance with the specifications stated below in compliance with PRC 21168.9(b).

"1. It is clear that the purpose of CEQA is to protect the environment. *See, e.g.* PRC 21000 21001. The EIR has often been described [***27] as the 'heart' of CEQA; *see, e.g., County of Inyo v. Yorty*, 32 CA3 795, 810 (1973), *Laurel Heights Improvement Assn v. Regents*, 47 C3 376, 392 (1988), or as an 'environmental "alarm bell" whose purpose is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return'; *see, e.g., Laurel Heights* at 392. *See also* PRC 21002.1 (purpose of EIR to identify significant environmental effects of project, alternatives to project). All the appellate law which teaches that CEQA is intended to 'afford the fullest possible protection to the environment within the reasonable scope of the statutory language', *Friends of Mammoth*, 8 C3 247, 259 (1972), is not reviewed here, but yet provides the starting point for analysis of the requirements of the statute.

"2. The first paragraph of PRC 21082.1, codified in the 'General' chapter of CEQA, reads as follows:

"Any environmental impact report or negative declaration prepared pursuant to the requirement of this division *shall* be prepared directly by, or under contract to, a public agency.' (emphasis added).

"The 'division' is Division 13 of the PRC, which is [***28] CEQA.) PRC 21082.1 goes on to provide in its second paragraph that 'any person' may submit information or comments to 'the public agency responsible for preparing an environmental impact report or negative declaration' and that such information or comments may be 'in any format.' Presumably in response to this 'any format' provision, the Guidelines allow a developer or his consultant to prepare a *draft* EIR, as discussed below. There is nothing in the second paragraph of PRC 21082.1, however, which creates a permissible third alternative method for preparation of a final EIR in addition to 1) by the public agency itself, or 2) by an entity which has contracted to perform this service *for the public agency*. These provisions are mandatory ('shall').

"3. The first paragraph of PRC 21100, codified in the 'State Agencies, Boards and Commissions' chapter of CEQA, reads in pertinent part as follows:

"All state agencies, boards, and commissions *shall* prepare, or cause to be prepared *by contract* . . . an environmental impact report on any project they propose to . . . approve which may have a significant effect on the environment.' (emphasis added).

"These provisions are mandatory [***29] ('shall'). They have no direct application here, since here the lead agency is a local agency (see below). It is noteworthy, however, that the CEQA language is throughout consistent in this regard.

"4. The first paragraph of PRC 21251, codified in the 'Local Agencies' [**180] chapter of CEQA, reads in pertinent part as follows:

"All local agencies *shall* prepare, or cause to be prepared *by contract* . . . an environmental impact report on any project they propose to . . . approve which may have a significant effect on the environment.' (emphasis added).

"These provisions are mandatory ('shall'). These provisions apply to respondent as a local agency.

"5. CEQA is rather clear that a public agency charged with the responsibility of preparing an EIR may do so in only one of two permissible ways: the EIR may be prepared by the public agency itself, or the EIR may be prepared under contract to the public agency. While [*1461] 'any person' may submit information or comments, there is no provision for delegating the responsibility for EIR preparation to the agent of the very private applicant seeking approval of a project. This is not surprising. As discussed further below, it would [***30] be quite anomalous for CEQA, a statute designed to protect the environment, to delegate the very proponent of a proposed project the duty to generate the very 'alarm bell' that might result in rejection of the proposal.

"6. The Guidelines are of course subordinate to the these statutory provisions, but they are not necessarily inconsistent. It is noteworthy that while Guideline 15084(d)(3) does purport to allow a *draft* EIR to be prepared by the applicant or the applicant's consultant (because, presumably, this is information in 'any format'), Guideline 15089 clearly states: 'The lead agency shall prepare a final EIR before approving the project.' There is no provision in Guideline 15089 ('Preparation of Final EIR') allowing the *final* EIR to be prepared by the applicant or the applicant's agent. Guideline 15088 states that the 'lead agency shall' evaluate and respond to comments and revise or add to the draft EIR to produce a final EIR. Even the Guidelines, which both sides acknowledge to be subordinate to the statute, do not provide for the applicant to prepare the final environmental critique of his own project, this 'alarm bell' required for the purpose of alerting 'the [***31] public and its responsible officials to environmental changes before they have reached ecological points of no return.' *Laurel Heights* at 392. It would be quite remarkable for CEQA to ask the private applicant (or, more remarkable still, the private applicant's paid consultant) to find environmental reasons why the applicant's own project should be rejected.

"7. Except for *City of Poway v. City of San Diego*, 155 CA3 1037 (1984), discussed below, no one who has written on CEQA seems to have contemplated the prospect that a developer's own evaluation of his own project might constitute compliance with CEQA. In *Laurel Heights*, for example, Justice Eagleson wrote:

"Under CEQA, the public is notified that a draft EIR is being prepared (§§ 21092 and 21092.1), and the draft EIR is evaluated in light of comments received. (Guidelines, §§ 15087 and 15088.) *The lead agency then prepares a final EIR incorporating comments on the draft EIR and the agency's responses to significant environmental points raised in the review process.* (Guidelines, §§ 15090 and 15132, subs. (b)-(d).)' (emphasis added).

"Most other materials written on CEQA are also written from the express or [***32] implied perspective that it is the statutory duty of the public agency to prepare the final EIR. See, e.g., CEB Advanced Real Property Series, 'Mandate Proceedings Under the California Environmental Quality Act' (October/November 1987) ('CEQA requires preparation of an environmental impact report (EIR) by a state or local agency . . .'); 'California Environmental Law Handbook' (4th Ed.) (Government Institutes, Inc.) ('The lead agency has the responsibility for preparing the EIR, but preparation costs are typically funded by the applicant'); 'Primer on Environmental Law in California' (California Department of Justice, Feb. 1988) (CEQA applies to private agencies, not private entities, but private entities such as developers are often required by public agencies to pay for [**181] the cost of EIR preparation); Goldman, 'Legal Adequacy of Environmental Discussions in Environmental Impact Reports,' 3 Journal of Environmental Law 1 (1982) ('CEQA requires every public agency to prepare and consider an EIR before its approval or disapproval of a project that may significantly affect the environment').

"8. *City of Poway* does not constitute contrary authority. There is no doubt that in [***33] *City of Poway* the EIR was prepared by the developer's consultant. 155 CA3 1037, 1040. There is also no doubt that this was *not* one of the reasons asserted for the invalidity of the project's approval. 155 CA3 1037, 1041. Plaintiff in *City of Poway* attacked the EIR approval on three grounds. None of those grounds was that the EIR had impermissibly been prepared by the developer's representative rather than the public agency. Obviously, an appellate ruling is not authority for a proposition which it did not consider.

"9. The stark and irreconcilable conflict of interest which exists if the developer's paid consultant prepares the EIR is manifest. Moreover, if a consultant in the business of conducting environmental studies knows that its continuing source of employment will be [*1462] developers desirous of obtaining approval of their projects, is there need to inquire where the consultant's interests lie? Clearly those interests will not lie in achieving unbiased, objective environmental analysis, or in revealing environmental dangers in the proposed development, but instead in achieving approval of the principal's project. It would require a level of conscious [***34] integrity and subconscious mental discipline rarely found to result in production of an objective EIR in such a circumstance. A report prepared in such a circumstance is more comparable to an advocate's brief than an impartial observer's opinion. If, on the other hand, a consultant is under contract to, and consequently owes allegiance to, and has a hope of future employment from, a public agency, it is expectable that the consultant will be more motivated to provide the public agency with comprehensive, unbiased environmental analysis. This is the apparent purpose of CEQA's requirement that, if the public agency does not prepare the EIR itself, the preparation be done under contract to the public agency. The statute is clear on this point; there is no contrary authority.

"10. If authority beyond the plain words of the statute is needed, the most nearly on point is *Sundstrom v. County of Mendocino*, 202 CA3 296, 307 (1988). The court in *Sundstrom* ruled that it was an impermissible delegation of the responsibility to assess environmental

impact for the County of Mendocino to direct an applicant to conduct studies himself to determine whether unacceptable environmental impacts [***35] were involved. 'Under CEQA, the EIR or negative declaration must be prepared "directly by, or under contract to" the lead agency. (Pub. Resources Code, § 21082.1.)' ruled *Sundstrom* at 307. True, the County of Mendocino's attempted delegation in *Sundstrom* occurred at an early evaluation stage before an EIR was ordered, and did not involve a developer's preparation of his own EIR. However, respondent here indicates no rationale for more strenuous environmental protection during attempts to determine whether an EIR is necessary and more relaxed standards in later stages after determination that an EIR must be prepared because significant environmental impacts are likely. If anything, the rule might be the reverse. (See, e.g. the Guidelines allowance of a developer-prepared *draft* EIR, but not *final* EIR).

"11. If there is any doubt regarding whether a public agency may lawfully direct a developer to prepare his own EIR, it is dispelled by *Friends of Mammoth v. Board of Supervisors*, 8 C3 247, 259 (1972). In *Friends of Mammoth*, the Supreme Court ruled that CEQA is to be interpreted to achieve the maximum environmental protection that can be achieved within [***36] the reasonable scope of the statutory language. Here it is not merely well within the scope of the statutory language that the public agency, and not the applicant for the public agency's approval, bears the responsibility of conducting the environmental study; it [**182] is plainly stated in mandatory language. Clearly, a study conducted by a public agency charged with protection of the public interest and not in a position of conflict of interest is more likely to achieve the purposes of CEQA than a study conducted by paid consultant of the applicant. The point need not be belabored, but needs to be clearly in mind since it demonstrates the rationale for the wording of the statute. *Friends of Mammoth* and all the similar cases following *Friends of Mammoth* are further reason to find that respondent may not comply with CEQA by directing the applicant to conduct his own environmental study and to prepare his own EIR.

"12. This ruling is based upon the CEQA statute and guidelines, the corresponding case law, and general principles of conflict of interest. This ruling is not based upon any conclusion regarding the competence, integrity or motivations of the particular consultants [***37] hired by real party in interest in this particular case. The court is simply ruling that the hiring of a consultant by the applicant to conduct an environmental study and to prepare an EIR was not a permissible means of complying with CEQA.

"13. Counsel to confer on a return date.

"14. Petitioner to prepare judgment and order."

From: "Sabrina Teller" <STeller@rtmmlaw.com>
To: "Lezley Buford" <LBuford@cityofsacramento.org>
Date: 2/8/05 4:27PM
Subject: RE: Islands at Riverlake -- revised draft LPPT PUD amendments

My comments were not extensive. I will forward you the email I sent Sycamore earlier this week with those comments.

-----Original Message-----

From: Lezley Buford [mailto:LBuford@cityofsacramento.org]
Sent: Tuesday, February 08, 2005 4:23 PM
To: Sabrina Teller
Cc: Andrew.Bayne@SycamoreEnv.com
Subject: Re: Islands at Riverlake -- revised draft LPPT PUD amendments

I have all the City's comments on the IS/NOP. Can you please send me yours so I can compile and forward to Sycamore. Tom Pace is reviewing the draft PUD amendments. Thanks!

Lezley E. Buford, AICP
Manager, Environmental Planning Services
1231 I Street, Suite 300
Sacramento, CA 95814
tele: 916 264-5935 fax: 916 264-5328
e-mail: lbuford@cityofsacramento.org

>>> "Sabrina Teller" <STeller@rtmmlaw.com> 02/02/05 12:24PM >>>
Hi Lezley,

After a little more thought, we decided to revise the draft PUD amendments I sent you yesterday. The latest revision is attached for your review. Please disregard the version I sent yesterday. Don't hesitate to call or email if you have any questions.

Thanks.

Sabrina V. Teller
Remy, Thomas, Moose & Manley, LLP
455 Capitol Mall, Suite 210
Sacramento, CA 95814
(916) 443-2745
(916) 443-9017 (fax)
steller@rtmmlaw.com <mailto:steller@rtmmlaw.com>

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From: "Sabrina Teller" <STeller@rtmmlaw.com>
To: "Lezley Buford" <LBuford@cityofsacramento.org>
Date: 3/30/05 5:15PM
Subject: RE: Islands at Riverlake

No reasons given, unfortunately.

An electronic version of the comments in PDF format would be very helpful, thanks. Andrew Bayne will want an electronic copy as well, I suspect.

Thanks.

-----Original Message-----

From: Lezley Buford [mailto:LBuford@cityofsacramento.org]
Sent: Wednesday, March 30, 2005 4:57 PM
To: Sabrina Teller
Subject: Re: Islands at Riverlake

Hi,

Thanks for the update...I'm rather surprised. Do they give reasons for their decisions? I will put together NOP comments and can scan them into a PDF file and e-mail or make hard copies, whichever you prefer.

LE

Lezley E. Buford, AICP
Manager, Environmental Planning Services
1231 I Street, Suite 300
Sacramento, CA 95814
tele: 916 808-5935 fax: 916 264-7185
e-mail: lbuford@cityofsacramento.org

>>> "Sabrina Teller" <STeller@rtmmlaw.com> 03/30/05 4:46 PM >>>
Hi Lezley,

Maybe you heard that the Supreme Court denied the petition for review today and left the case published. Oh well. That means we'll want to move quickly on the EIR now. Could you please make a set of all of the comments received on the NOP/IS for my runner to pick up when it's ready? The end of the comment period is tomorrow, right?

Thanks.

Sabrina V. Teller
Remy, Thomas, Moose & Manley, LLP
455 Capitol Mall, Suite 210
Sacramento, CA 95814
(916) 443-2745
(916) 443-9017 (fax)
steller@rtmmlaw.com <mailto:steller@rtmmlaw.com>

CONFIDENTIAL COMMUNICATION
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From: "Sabrina Teller" <STeller@rtmmlaw.com>
To: "Lezley Buford" <LBuford@cityofsacramento.org>
Date: 4/21/05 11:30AM
Subject: Islands at Riverlake request for scoping meeting

Thanks for passing along Mr. Hartwick's request. We do not believe that the City is required to hold a scoping meeting, since (a) the EIR is being done on remand from the Court of Appeal, whose opinion already limited the scope of the issues required to be studied, and (b) the project does not meet the criteria set forth in CEQA Guidelines section 15206 warranting a mandatory scoping meeting. Additionally, there is nothing that prevents the City from moving forward with the EIR process in the absence of a "final" Court order.

Tina, Joe, what sort of response should the City send Mr. Hartwick regarding the request for the scoping meeting and for the info relating to the selection of and contract for the EIR consultant?

Sabrina V. Teller
Remy, Thomas, Moose & Manley, LLP
455 Capitol Mall, Suite 210
Sacramento, CA 95814
(916) 443-2745
(916) 443-9017 (fax)
steller@rtmmlaw.com <mailto:steller@rtmmlaw.com>

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CC: "Tina Thomas" <TThomas@rtmmlaw.com>, "Joseph Cerullo" <JCerullo@cityofsacramento.org>

June 6, 2005

Mr. Robbie Waters
City Hall
730 I Street, Suite 321
Sacramento, CA 95814

Re: EIR Report for Islands at Riverlake

Dear Mr. Waters:

I would like to make you aware of several concerns that the residents of the Riverlake community have with respect to the City's EIR process on the above referenced project. An important component of a proper EIR process is to obtain community input and community participation during the process. On April 8, 2005, the Pocket Protectors made a formal request (copy attached), to the City of Sacramento to hold a "scoping hearing" for the preparation of the subject EIR report. That request has gone without any response from the City of Sacramento. Additionally, it is my understanding that an Administrative Draft EIR Report has been completed. The only input requested by the City of Sacramento to date, was their Notice of Preparation of a Draft Environmental Impact Report for The Islands at Riverlake project (P01-133), dated February 25, 2005. A formal written response (copy attached) was provided to the City on March 11, 2005. This response pointed out several deficiencies in the proposed scope of the EIR report. Again, to date, we have not received any response or comments from the City.

On March 31, 2005, a letter was written to the City of Sacramento Planning Division (copy attached), discussing the California Supreme Court's unanimous decision to deny the City of Sacramento's petition for review of the decision by the Third District Court of Appeal requiring an EIR report for the proposed project. This letter also discussed the requirement to review alternative project plans. The Pocket Protectors, placed in the public file during one of the Sacramento City Council meetings, a proposed alternative project plan that effectively reduced the impacts to the community. The City of Sacramento or the firm completing the EIR report has not contacted the Pocket Protectors to review or discuss this plan.

I would also like to formally state we are concerned about who actually is in control of the EIR process for this project. The law requires that it should be a community process; it has been far from this. The community has been excluded from any participation in the EIR process. We have also expressed concern with

the City going forward with an EIR report prior to the issuance of the Court Order. This was formally done in a letter dated April 8, 2005, (copy attached), to Kimberly Kaufmann-Brisby at the Planning Department.

It is clear that the law, and the Published Opinion by the Court of Appeals for the Third District are in our favor and require a complete EIR report to be prepared. Anything short of a full and complete EIR report will result in the community having to evaluate its options.

Due to your previous involvement with this project, you are aware that the majority of the community is not in favor of this project. The community is also concerned that it does not have any representation on the City Council as a result of your recusal from discussion and voting at City Council meetings. Based on the requests contained in the enclosed correspondence, it is evident that this community is essentially being shut out of the process. Even though the law may require that you abstain from voting on any action related to this project that may come before the Council, as the community's representative on the City Council, we request your involvement in this process to insure the best interests of the community are considered.

We look forward to your involvement and representation of the community with respect to the many concerns expressed with this project.

Sincerely,

The Pocket Protectors
Gary Hartwick
1128 Rio Cidade Way
Sacramento, CA 95831
(916) 567-2616

cc: Mayor Heather Fargo
Mr. Ray Kerridge
Ms. Kimberly Kaufman-Brisby
Ms. L.E. Buford

Attachment(s)



**OFFICE OF THE
CITY ATTORNEY**

**SAMUEL L. JACKSON
CITY ATTORNEY**

**ASSISTANT CITY ATTORNEYS
RICHARD E. ARCHIBALD
SANDRA G. TALBOTT**

**SUPERVISING DEPUTY CITY ATTORNEYS
GUSTAVO J. MARTINEZ
ROBERT D. TOKUNAGA
BRETT M. WITTER
SUSANA ALCAJA WOOD**

**CITY OF SACRAMENTO
CALIFORNIA**

**9th NINTH STREET, TENTH FLOOR
SACRAMENTO, CA 95814-2736
PH 916-808-5346
FAX 916-808-7455**

**DEPUTY CITY ATTORNEYS
DENNIS L. BECK, JR.
MICHAEL J. HENNER
SHERI M. BUZARD
ANGELA M. CASAGRANDE
JOSEPH P. CERULLO
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MATTHEW D. RUYAK
JANETH D. SAN PEDRO
MICHAEL T. SPARKS
LAN WANG
JAMES F. WILSON
DAVID S. WOMACK**

June 10, 2005

Gary Hartwick
The Pocket Protectors
1128 Rio Cidade Way
Sacramento, California 95831

Re: **Environmental Impact Report for Islands at Riverlake**

Dear Mr. Hartwick:

Your letter to Council Member Robbie Waters, dated June 6, asserts that the city must hold a "scoping" meeting before preparing an Environmental Impact Report (EIR) for the Islands at Riverlake project. We disagree. The CEQA Guidelines require such a meeting *only* for projects of statewide, regional, or area-wide significance. Because the Islands at Riverlake does not meet the Guidelines' criteria for "statewide, regional, or area-wide significance," the city has determined that a scoping meeting need not be held. (See Cal. Code Regs., tit. 14, §§ 15082(c)(1), 15206.) I understand, incidentally, that Lezley Buford of the city's Development Services Department has previously explained this orally to several members of The Pocket Protectors.

Your letter also intimates that the EIR must consider The Pocket Protectors' alternative project. (See also your March 31, 2005, letter to Lezley Buford, attached to the June 6 letter.) This, too, is not true. Under the CEQA Guidelines, it is the city alone that determines which project alternatives the EIR should analyze. No "ironclad rule" governs this determination, moreover. Instead, guided by the "rule of reason," the city must select "a range of reasonable alternatives to the project" that would "feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project"—all with the goal of "foster[ing] meaningful public participation and informed decision making." (See Cal. Code Regs., tit. 14, § 15126.6.) Consistent with the Guidelines' requirements, the EIR will analyze a meaningful range of alternatives, including the alternative The Pocket Protectors presented to the city council during the May 2003 hearing.

Gary Hartwick
Re: Islands at Riverlake EIR
June 10, 2005
Page 2 of 2

Finally, your letter contends that the city should not have begun work on the EIR until after it received "the final Court Order from the decision rendered by the Court of Appeals." (See in addition your April 8, 2005, letter to Lezley Buford and Kimberly Kaufmann-Brisby, attached to the June 6 letter.) We know of nothing in the law that supports this contention.

• • •

Please be assured that the city intends to comply fully with the court's order and with CEQA. Far from being "excluded from" or "shut out of" the EIR process, all members of the community will have ample opportunity to comment on the EIR when the draft is released.

Sincerely,

SAMUEL L. JACKSON
City Attorney


JOSEPH P. CERULLO
Senior Deputy City Attorney

cc: Mayor Heather Fargo
Council Member Robbie Waters
Ray Kerridge, Assistant City Manager
Gary Stonehouse, Planning Director
Lezley Buford, Principal Planner

Subject: Islands at Riverlake Final EIR

Date: Tuesday, July 12, 2005 5:48 PM

From: susan brandt-hawley <susanbh@econet.org>

To: Joseph Cerullo <JCerullo@cityofsacramento.org>, Tina Thomas <tthomas@rtmmlaw.com>

Cc: Lezley Buford <LBuford@cityofsacramento.org>, <jeffrey.little@sycamoreenv.com>, <kkbrisby@cityofsacramento.org>

Hi Joe.

Thanks very much for the clarification. I am cc'ing this email (with your initial clarification to me, below) to Lezley Buford, Kimberly Kaufmann-Brisby, and Jeffrey Little so that they are directly in the loop.

I stand assured that -- specifically as to the Islands at Riverlake Project -- the applicants (Heartman etc) and their attorneys at RRTM will NOT be given or have access to an administrative draft of the EIR responses to comments NOR administrative draft revisions to the Final EIR and will also not be allowed to discuss the content of such responses or revisions with the City planners (including Kimberly Kaufmann-Brisby, Lezley Buford, or others involved in preparing the Final EIR and staff report and recommendations) and Sycamore Environmental Consultants. I appreciate this reassurance of a fair and equitable Final EIR process in light of the obvious deep involvement of the applicants and their attorneys in the Draft EIR process.

I understand your point that if the EIR consultant has a question about project details or purposes, the applicants' assistance may be solicited. In that circumstance, I request that the solicitation be made in writing and that I be provided a concurrent copy of the request and the response. Please confirm.

Also, I understand that RRTM may receive copies of the comments on the Draft EIR and may forward proposed draft responses to the City. I again request that such comments be transmitted from RRTM in writing, and that there be no discussion between staff or Sycamore and the applicants/RRTM. I would like to receive copies of comments concurrently with the applicant and RRTM. Please explain how I may receive these advance copies of Draft EIR comments.

Again, I sincerely appreciate your assurances of a fair and equal-access process here. It should benefit everyone, including the City's interest in the public perception of an

above-board proceeding on remand.

Susan
707-938-3908

On 7/11/05 4:49 PM, "Joseph Cerullo" <JCerullo@cityofsacramento.org> wrote:

> Susan,
>
> You've asked that Tina Thomas's firm not be involved in preparing the city's
> responses to comments received on the DEIR. As I understand the city's
> practice, neither the applicant nor the applicant's attorney works on the
> city's responses, with one exception: if a comment deals with project details
> or purposes, then the city sometimes will solicit the applicant's assistance
> in responding to that comment, as those are matters about which the applicant
> knows best. Please understand, however, that any member of the public,
> including the applicant, may ask for and receive copies of comments the city
> receives. Please understand, as well, that often an applicant's attorney
> responds independently to comments, especially when the comments are submitted
> by an attorney. I hope this addresses your concern.
>
> Joe Cerullo
> Senior Deputy City Attorney
> (916) 808-5346
>
>



**OFFICE OF THE
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SAMUEL L. JACKSON
CITY ATTORNEY

ASSISTANT CITY ATTORNEYS
RICHARD E. ARCHIBALD
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980 NINTH STREET, TENTH FLOOR
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JANETH D. SAN PEDRO
MICHAEL T. SPARKS
LAN WANG
JAMES F. WILSON
DAVID S. WOMACK

July 15, 2005

**By fax to (707) 576-0175
and by U.S. Mail**

Susan Brandt-Hawley
Brandt-Hawley Law Group
Chauvet House P.O. Box 1659
Glen Ellen, California 95442

Re: Islands at Riverlake

Dear Ms. Brandt-Hawley:

Your response to my e-mail of July 11 goes far beyond what I explained, and it echoes a position you have asserted in most if not all of our conversations and correspondence. Apparently you believe that the city must exclude Regis Homes and its attorneys and consultants from the CEQA process. But this assuredly is not the city's standard practice. More to the point, it is not the law. CEQA Guideline 15084 provides that "[a]ny person, including the applicant, may submit information or comments to the lead agency to assist in the preparation of the draft EIR. The submittal may be presented in any format, including the form of a draft EIR." What is more, California's appellate courts have long held, in case after case, that lead agencies may work closely with applicants and their representatives—not just when preparing draft and final EIRs but also when responding to comments on draft EIRs. See, for example, *Friends of La Vina v. County of Los Angeles* (1991) 232 Cal.App.3d 1446. There the court held that "an agency may comply with CEQA by adopting EIR materials drafted by the applicant's consultant, so long as the agency independently review, evaluates, and exercises judgment over that documentation and the issues it raises and addresses. . . ."

Susan Brandt-Hawley
Re: Islands at Riverlake
July 15, 2005
Page 2 of 3

(At page 1452.) In explaining this holding, the court observed at page 1454 that the CEQA Guidelines allow—

an agency to enlist the initial drafting and analytical skills of an applicant's consultant, subject to the requirement that the agency apply independent review and judgment to the work product before adopting and utilizing it. This methodology appears to be common in California [citation] More important, a consistent series of appellate decisions have endorsed local agencies' resort to applicants' consultants in the preparation of both draft and final EIRs, subject to the qualification of independent agency involvement and judgment, as against charges of unlawful delegation.

The court went on to note, at page 1455, that "preparation of an EIR is not a solitary, ruminative process but an inquisitive, cooperative one, in which the applicant and its experts naturally can and will be heavily involved, perhaps to the point of initially drafting the text." And, in confirming the propriety of an applicant's assisting the lead agency in responding to comments on a draft EIR, the court had this to say: "In short, in accordance with consistent practice and judicial application, the independent review, analysis[,] and judgment test, not the proposed physical draftsmanship test, applies to the EIR as a whole, including responses to comments." (At page 1456.)

In other words, then, whether the lead agency or a developer's consultant writes the draft EIR or suggests responses to comments on the draft is not important. What is important is that "the final EIR reflect[] the lead agency's independent judgment and analysis." (CEQA Guidelines 15090(a)(3).)

These principles still control today, as you doubtless know from your recent participation in *San Franciscans Upholding the Downtown Plan, v. City and County of San Francisco* (2002) 102 Cal.App.4th 656. Here's what the court said on page 684 in rejecting your clients' challenge to an EIR:

Appellants . . . contend that [an expert's] report cannot constitute substantial evidence because, rather than providing objective analysis, [the expert] instead was a paid consultant hired by Real Parties to produce a biased, self-serving study aimed at a predetermined result. This assertion is meritless. The courts have specifically rejected similar assertions that decisions of public agencies are tainted by input from economic analysts and experts retained by the interested parties. [Citations]. In this case, [the city's own expert] and the city architect both provided an independent review and corroboration of [the analysis by Real Parties' expert]. Together, their reports constituted substantial evidence in support of the City's ultimate decision

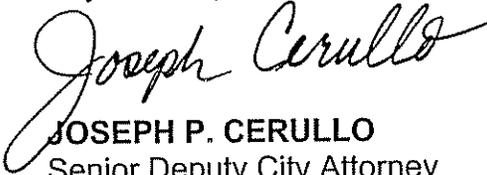
• • •

Susan Brandt-Hawley
Re: Islands at Riverlake
July 15, 2005
Page 3 of 3

Turning now to the Islands at Riverlake, let me clarify the city's position. As I explained previously, on most projects neither the applicant nor the applicant's attorney prepares or works on the city's responses to comments on the draft EIR. But when litigation is threatened, the city has worked with the applicant's attorney in responding to comments. Because litigation is obviously threatened here, therefore, I anticipate that city staff will be working with Regis's attorneys, with Remy, Thomas, Moose & Manley, on the city's responses to some or all of the comments received. Be assured, however, that the final comments themselves—as well as the final EIR—will reflect the city's independent judgment and analysis.

Sincerely,

SAMUEL L. JACKSON
City Attorney


JOSEPH P. CERULLO
Senior Deputy City Attorney

cc: Lezley Buford
Manager Environmental Planning Services
Kimberly Kaufmann-Brisby
Associate Planner
Tina A. Thomas
Remy, Thomas, Moose and Manley LLP

REMY, THOMAS, MOOSE and MANLEY, LLP
ATTORNEYS AT LAW

MICHAEL H. REMY
1948 - 2003

TINA A. THOMAS
JAMES G. MOOSE
WHITMAN F. MANLEY

BRIAN J. PLANT
JOSEPH J. BRECHER
OF COUNSEL

455 CAPITOL MALL, SUITE 210
SACRAMENTO, CALIFORNIA 95814

Telephone: (916) 443-2745
Facsimile: (916) 443-9017
E-mail: info@rtmmlaw.com
http://www.rtmmlaw.com

JENNIFER S. HOLMAN
ANDREA K. LEISY
TIFFANY K. WRIGHT
ASHLEY T. CROCKER
SABRINA V. TELLER
MICHELE A. TONG
MEGHAN M. HABERSACK
ANGELA M. WHATLEY
AMY R. HIGUERA

August 9, 2005

Via Hand-Delivery

Mr. Sam Jackson
City Attorney
City of Sacramento
915 "I" Street, Suite 4010
Sacramento, CA 95814

Re: Planning Commissioner Notestine Has No Legal Conflicts of Interest in
Voting at the Islands at Riverlake Hearing (P01-133)

Dear Mr. Jackson:

In the interest of full disclosure, Regis Homes submits this letter disclosing prior relationships with Planning Commissioner Notestine. These prior relationships do not constitute a conflict of interest. Two prior relationships with Mr. Notestine: (1) a prior contract with Regis Homes and; (2) a brief attorney-client relationship with Remy, Thomas, Moose & Manley ("RTMM") are discussed herein. Neither relationship rises to the level of a legal conflict of interest for Mr. Notestine because no financial gain accrues from either relationship. Mr. Notestine's relationship with Regis Homes was completed years ago and his attorney-client relationship with RTMM has concluded.

A. RTMM's Representation of Commissioner Notestine's Firm on Unrelated Matters Does NOT Create a Conflict.

The Sacramento City Codes ("City Codes") discuss conflict of interest rules in fairly general terms. For example, they only describe two situations whereby a city official should be disqualified from making a decision: (1) when another person with whom the official has an

Letter to Sam Jackson
August 9, 2005
Page 2

ownership interest in real property or investment in a business is an applicant in front of the board or; (2) when a family member is an applicant in front of the board or is principally involved in a matter in front of the board. (Sacramento City Code § 2.16.110.)

RTMM recently represented Commissioner Notestine's firm on a planning matter dealing with property subject to Sacramento County's jurisdiction. That representation concluded, however, a month ago. RTMM will appear before the Planning Commission on behalf of Regis Homes. Mr. Notestine does not have an ownership interest in real property with RTMM, nor is he an investor in Regis Homes, the applicant in front of the Commission. RTMM and Regis Homes are not family members of Mr. Notestine. Therefore, under the Sacramento City Codes, Mr. Notestine need not be disqualified from the Regis Homes hearing.

B. Commissioner Notestine's Previously Work for Regis Homes is Also Not a Conflict of Interest Requiring Recusal.

Commissioner Notestine and his firm worked for Regis Homes on another development project in West Sacramento a few years ago. Commissioner Notestine has not, however, performed any work for Regis for at least two years. The City Code does not explicitly address this issue. However, the Political Reform Act of 1974, which is codified in Government Code section 87110, et. seq. provides guidance (also adopted in Sacramento City Code § 2.16.210.)

A public official is prohibited from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest. (Gov. Code, § 87100.) A "public official" includes every natural person who is a member, officer, employee, or consultant of a state or local government agency. (Gov. Code, § 82048.) An official has a financial interest if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from the effect on the public generally, on the official or a member of his or her immediate family or on any source of income of \$250 or more received by or promised to the public official within twelve months prior to the time the decision was made. (Gov. Code, § 87103, subd. (c).) Generally, this means that a Planning Commissioner would have to recuse himself from a decision affecting an employer for whom he worked within the previous year. Since Mr. Notestine has not worked for Regis Homes for over two years, there is no conflict of interest.

Letter to Sam Jackson
August 9, 2005
Page 3

Furthermore, there is a special exception whereby if all factors are met, a former employment does not count as a financial interest under section 87103 subdivision (c):

- (1) All income from the employer was received by or accrued to the public official prior to the time he or she became a public official, AND;
- (2) The income was received in the normal course of the previous employment; AND;
- (3) There was no expectation by the public official at the time he or she assumed office of renewed employment with the former employer.

(Ibid.)

The Fair Political Practices Commission ("FPPC") has "primary responsibility for the impartial, effective administration and implementation" of the Political Reform Act. The FPPC provides opinions illuminating how the Political Reform Act applies to different situations.

In an opinion regarding prior employment creating a conflict of interest, the FPPC explained that although an engineering firm previously employed an agency's director of public works, the director was not prohibited from participating in a decision affecting the engineering firm because he had not received income from the company exceeding \$250 in the prior twelve months. Furthermore, the director qualified for a section 87103, subdivision (c) exception because the income was received before he joined the government agency, it was in the normal course of employment, and he did not expect to renew his employment with the engineering firm. (1991 Cal. Fair-Pract. LEXIS 297.)

Here, because Commissioner Notestine received income from Regis Homes before he became a public official, the income was received in the normal course of Commissioner Notestine's work as an architect, and there is no expectation that Regis would renew the employment, the prior business relationship between Notestine and Regis qualifies for the exception and does not create a financial conflict of interest.

* * *

Letter to Sam Jackson

August 9, 2005

Page 4

Because there is no potential financial gain for Mr. Notestine from either the prior attorney-client relationship with RTMM, or the prior employment relationship with Regis, there is no conflict of interest.

Very truly yours,



Tina Thomas

cc: ~~Joe Cerullo~~, Senior Deputy City Attorney
✓ Susan Brandt-Hawley (via email)

From: "Sabrina Teller" <STeller@rtmmlaw.com>
To: "Kimberly Kaufmann-Brisby" <KKBrisby@cityofsacramento.org>
Date: 8/23/05 12:23PM
Subject: RE: Islands at Riverlake staff report and supplemental info

Hi Kimberly,

Attached is the version of the staff report that I sent to Tom at about 1:30 last Wednesday. I don't think any of the changes I proposed in that version were made, since it appears that Tom last modified the document at 12:30 that day. Some of my changes were not that important, but some, like the corrections to the explanations of the setbacks, were. Can you please give me a call to discuss after you've reviewed my proposed revisions? Some of the points regarding infill and the "canyoning" effect are especially important to address, either in the staff report or in the presentation to the Commission, in order to have a very clear record when this goes back to the Court. Shortly after I sent these revisions, I sent another email to Tom and asked if you or he could also include some mention, either in the report or in your comments to the Commission, of how this project compares in terms of density and setbacks to other, recently approved R-1A products, such as in Natomas. Also, in the version you sent me today, the explanation of the environmental review process at pp. 18-19 makes no mention of the primary focus of the DEIR, the land use consistency and aesthetics analysis that was ordered by the Court. Is it too late to do an amended or revised staff report?

Thanks,
Sabrina

-----Original Message-----

From: Kimberly Kaufmann-Brisby [mailto:KKBrisby@cityofsacramento.org]
Sent: Tuesday, August 23, 2005 10:59 AM
To: Sabrina Teller
Cc: Tom Pace
Subject: Islands at Riverlake staff report and supplemental info.

Hi Sabrina:

I have attached both Tiff and PDF formats of the Riverlake Comm. Assoc. resolution as well as the staff report for your use.

Regards,

Kimberly

Kimberly Kaufmann-Brisby
City of Sacramento Development Services Dept.
Planning Division
Associate Planner-South Team
kkbrisby@cityofsacramento.org

CC: <BHeartman@srgnc.com>, "Tina Thomas" <TThomas@rtmmlaw.com>

From: "Bill Heartman" <BHeartman@srgnc.com>
To: "Kimberly Kaufmann-Brisby" <KKBrisby@cityofsacramento.org>
Date: 8/30/05 8:38AM
Subject: RE: Coordination meeting - Islands at Riverlake-Aug. 31st @ 10:30

I have in my calendar. Where are we meeting ?? What are we going over ??

I will check with Sabrina as to her availability (Sabrina ?).

Bill Heartman
Regional President
SARES-REGIS Group of Northern California, LP
REGIS HOMES of Northern California, Inc.
(916) 929-3193, Ext 18
email: bheartman@srgnc.com

-----Original Message-----

From: Kimberly Kaufmann-Brisby [mailto:KKBrisby@cityofsacramento.org]
Sent: Monday, August 29, 2005 4:46 PM
To: Bill Heartman
Cc: Andrew.Bayne@SycamoreEnv.com
Subject: Coordination meeting - Islands at Riverlake-Aug. 31st @ 10:30

Hi Bill:

I have scheduled a coordination meeting for staff for the first half hour (10-10:30) and then you and Sabrina joining us for the second half to make certain all points are covered.

Please let me know if you will be able to attend at your earliest convenience.

Thank you,

Kimberly

Kimberly Kaufmann-Brisby
City of Sacramento Development Services Dept.
Planning Division
Associate Planner-South Team
kkbrisby@cityofsacramento.org

CC: <Andrew.Bayne@SycamoreEnv.com>, "Sabrina Teller" <STeller@rtmmlaw.com>