Appellate Case No.: C090117

IN THE COURT OF APPEAL, STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

OLD EAST DAVIS NEIGHBORHOOD ASSOCIATION,

Plaintiff, Respondent, and Cross-Appellant,

v.

CITY OF DAVIS and CITY COUNCIL OF THE CITY OF DAVIS,

Defendants, Appellants, and Cross-Respondents,

TRACKSIDE CENTER, LLC,

Real Party in Interest, Appellant, and Cross-Respondent

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF YOLO

HON. SAMUEL T. MCADAM, CASE NO. PT17-2111

APPELLANTS' REPLY BRIEF AND CROSS-RESPONDENTS' BRIEF OF CITY OF DAVIS AND CITY COUNCIL OF THE CITY OF DAVIS

G. INDER KHALSA (BAR NO. 222328)
CITY ATTORNEY, CITY OF DAVIS
IKhalsa@rwglaw.com

RICHARDS, WATSON & GERSHON
A Professional Corporation
T. PETER PIERCE (BAR NO. 160408)
ppierce@rwglaw.com
1 Sansome Street, Suite 2850
San Francisco, California 94104-4811
Telephone: 415.421.8484
Facsimile: 415.421.8486

Attorneys for Appellants and Cross-Respondents
City of Davis and City Council of the City of Davis

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APPELLANTS' REPLY BRIEF

I. INTRODUCTION

The brief filed by petitioner Old East Davis Neighborhood Association (petitioner)[1] continues to misconstrue the City's General Plan, Core Area Specific Plan (CASP), and Downtown Guidelines. Properly construed, each provision supports the City's approval of the Trackside project. On this basis, the Court should reverse the judgment as to the fourth cause of action and, correspondingly, as to the second cause of action.

Petitioner forfeits as an alternative basis for affirming judgment on the second or fourth causes of action any issue the trial court omitted from its tentative ruling and Statement of Decision. Not only did petitioner fail to object to the omission of certain issues; petitioner affirmatively urged the trial court to rule only on the fourth cause of action.

Turning to the cross-appeal, petitioner's short discussion of its third cause of action consists of a summary of its arguments on the fourth cause of action. The third cause of action therefore fails along with the fourth.

Petitioner also fails to show prejudicial error with respect to its first cause of action alleging a deficient environmental review. The City adopted a sustainable communities environmental assessment under CEQA. Petitioner ignores this altogether, and complains that the City failed to meet one criterion for an inapplicable CEQA exemption determination. The City never sought an exemption. Petitioner's argument is misplaced.

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[1] This brief refers to the Old East Davis Neighborhood Association as "petitioner" to remain consistent with the terminology in the Appellants' Opening Brief (AOB) and in Trackside's briefs.

II. PETITIONER FAILS TO APPLY THE CORRECT STANDARD OF REVIEW

A. Petitioner Articulates But Fails to Apply the Governing Deferential Standard.

This Court clearly articulates judicial deference to legislative decisions of general plan consistency. (See *East Sacramento Partnerships for a Livable City v. City of Sacramento* (2016) 5 Cal.App.5th 281.) As relevant here, courts will overturn a consistency decision "if the findings are not supported by substantial evidence." (*Id.* at p. 305.) Lack of substantial evidence will be found "only if, based on the evidence before the local governing body, . . . a reasonable person could not have reached the same conclusion." (*Ibid;* see also *San Francisco Tomorrow v. City and County of San Francisco* (2014) 229 Cal.App.4th 498, 514 [consistency decision will not be overturned "unless no reasonable person could have reached the same conclusion on the evidence before it."]) The same deferential standard applies to a decision of specific plan consistency, and petitioner does not urge otherwise. (*Foothill Communities Coalition v. County of Orange* (2014) 222 Cal.App.4th 1302, 1307.)

Petitioner never comes to grips with this deferential standard. Peppered throughout its opposition brief are references to "substantial evidence." (See, e.g., RB 22, 23, 42, 47, 48.)[2] But the analysis fails faithfully to inquire whether no reasonable person could have reached the same conclusion. Instead petitioner asks whether the City's findings and analysis include "appropriate comparators" (RB 28); whether the stepped back fourth floor is an "appropriate transition" (RB 35); whether Trackside is an adequate substitute for a "proper" transition project (RB 46); and whether the alternative projects suggested by others are more "appropriate transitions." (RB 46).

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[2] Citations to petitioner's opposition brief (encaptioned "Respondent's Opposition Brief") appear as "RB" followed by page number(s).

Petitioner goes so far as to rely upon a sketch it submitted to the City, and exclaim that "[a]ppropriate transitions from small-scale homes to built-up areas occur over several blocks, and the structures closest to the homes are two or three story buildings of moderate sizes." (RB 47; AR 6570.) This is *one plan* for achieving scale transition, but petitioner suggests that it is the *only* way and that no other way to achieve scale transition would be legal.

Petitioner intones that "[i]mages and descriptions of 'careful' transitions to adjacent single story buildings are found in the record before the City Council and Planning Commission" (RB 39), as if there is but a singular, objective manifestation of a "careful" transition. There isn't. Petitioner's position, boiled to its essence, urges that no reasonable person could conclude that any plan other than petitioner's plan achieves scale transition. Petitioner of course does not employ this correct standard because it is fatal to petitioner's case.

Petitioner fails to meet head on the City's examples of the trial court discovering mandates where none exist. (See AOB 18-19.) The trial court characterized as a mandate a guideline that buildings in the core commercial area "should not exceed 45 feet in height." (AR 6074; AOB 19.) The trial court's error formed part of its basis for invaliding the approvals of Trackside. (AOB 19-20.) Petitioner observes that Trackside is not located in the downtown core. (RB 19.) So what? The point is that the trial court used the downtown core as a comparator for Trackside -- mischaracterizing the height guidelines as mandatory -- and used that invented limit as a basis for concluding Trackside is not an "appropriate" transition as to mass and scale. (AOB 19). The trial court improperly second-guessed the City's decision.

B. Petitioner's New Spin on Judicial Deference Fails.

In a last ditch effort to avoid the deferential standard of review, petitioner urges that the standard does not apply at all. (RB 55-56.) According to petitioner, judicial deference evaporates

when an agency does not adequately analyze a project's compliance with applicable planning and zoning laws. (*Ibid.*) This position fails for three reasons.

First, petitioner did not raise this issue below. The reader searches in vain for any hint of this point in petitioner's trial briefs, or for any mention in the reporter's transcripts. "As a general rule, theories not raised in the trial court cannot be asserted for the first time on appeal; appealing parties must adhere to the theory (or theories) on which their cases were tried. This rule is based on fairness -- it would be unfair, both to the trial court and the opposing litigants, to permit a change of theory on appeal." (*Nellie Gail Ranch Owners Assn. v. McMullin* (2016) 4 Cal.App.5th 982, 997.) Petitioner forfeits its new argument.

Second, petitioner cites no authority that judicial deference to planning and zoning consistency findings depends on the particular provisions analyzed in the agency's report. The City has not located any such authority.

Third, petitioner would have the standard of review depend on which provisions the agency analyzed and which provisions the agency found inapplicable and did not analyze. This unprincipled approach would wreak chaos in the law as quasi-legislative deference would not apply uniformly, and would depend upon the particular circumstances of each case.

III. PETITIONER MISINTERPRETS GENERAL PLAN PRINCIPLES.

Petitioner's discussion is doomed from the outset by the analytical framework it employs. It proclaims that the applicable General Plan and CASP goals, policies, and objectives "are by their very terms fundamental, *mandatory* and clear." (RB 22 (italics added).) Petitioner repeats its strident and exaggerated statement: "The record in this matter clearly indicates that the Project's mass and scale is inconsistent with the *mandatory* policies set forth in the General Plan and CASP regarding

transition." (RB 24 (italics added).) A closer examination exposes the fallacy of petitioner's argument.

A. Land Use Principle 4 Provides No Mandate.

Taking the General Plan and CASP elements in the order in which petitioner lists them (RB 25-26), first up is Land Use Principle 4. Petitioner declares the principle to be "stated in the imperative," and that it "requires that new buildings maintain a scale transition." (RB 40.) One would expect to find some word at least suggesting a mandate. After all, the General Plan itself provides: "Standards are written as policy statements. Those standards containing the word "shall" are mandatory. Those that contain the word "should" are discretionary . . . ." (AR 5645.) Conspicuously absent from Land Use Principle 4 is the word "shall" or any other word suggesting the mandate that petitioner discovers. The words that actually appear in the principle -- such as "can support," "retain enough," and "small-city character" highlight the discretionary, non-mandatory nature of the principle. (AR 5700.) It cannot be said that no reasonable person could conclude that Trackside maintains scale transition with its stepped-back design, and retains enough older buildings to retain small-city character.

B. Urban Design Policy 2.3 Lacks Any Mandate.

Petitioner next finds a mandate lurking in General Plan Policy UD 2.3. (AR 5803.) "[I]t is mandatory that new development projects have an 'architectural fit' with Davis' exiting scale . . ." (RB 40.) Of course no objective standard exists by which to measure the highly subjective "architectural fit." That fit instead is informed by three discretionary standards phrased as what "should be" seen in new development, including "scale transition." (AR 5803.) These discretionary standards defeat any notion that an "architectural fit" articulates a mandate. (See *Fox v. County of Fresno* (1985) 170 Cal.App.3d 1238, 1243-44 [word "shall" in context of a permissive statute was

not a mandatory term].)

Petitioner therefore gains no ground with its defense that the trial "court properly treated Policy UD 2.3 as mandatory." (RB 40.) It cannot be said that no reasonable person could conclude that Trackside is a scale transition "between intensified land uses and adjoining lower intensity land uses." (AR 5803.) Trackside in fact expressly complies with the discretionary standard that "[t]aller buildings should be stepped back at upper levels in areas with a relatively smaller-scale character." (AR 5803.)

The City explained that it complied with its land use policies in finding Trackside's step-back four-story design to achieve " scale transition" from the Downtown Core to the Old East Neighborhood. (AOB 27.) Petitioner creates an artificial distinction that scale transition may be achieved "between" land uses but not "within a building envelope." (RB 44.) Petitioner cites no authority for its contrived theory, nor did it raise it in the trial court. The Trackside property occupies a mixed-use transition parcel between the Downtown Core and the Old East neighborhood. (AR 1908, 6029, 6052 [maps].) It serves as a transition "between intensified land uses and adjoining lower intensity land uses." (AR 5803.)

C. The General Plan Recognizes CASP Provisions as Discretionary Instead of Mandatory.

Petitioner next defends (at RB 25-26, 37) the trial court's decision that the CASP "dictates" that the downtown core be "densified first before densifying transition areas" (2 JA 340, lines 1-2), and "densification shall occur first" in the downtown core (2 JA 343, line 11.) But the portion of the General Plan to which petitioner and the trial court refer contains no mandate whatsoever. Instead, the General Plan expressly observes that the CASP "promotes building up the 'downtown core' [] before greatly increasing densities in the remainder of the core area, thereby protecting existing residential neighborhoods and their

character." (AR 5651, item 1.a.) The words "promote," "greatly increasing," and "protecting character" hardly constitute objective, measurable mandates. Given the tall buildings in the downtown core identified in the record (AR 884), a reasonable person easily could conclude that Trackside does not "greatly increase density" in the remainder of the core area before "building up the downtown core."

IV. PETITIONER MISINTERPRETS CASP PROVISIONS

A. Petitioner Reads Into CASP Section 4.2 Nonexistent Content.

Petitioner's next mistake arises not from misinterpreting a planning provision, but from adding to a planning provision language that simply does not exist. Section 4.2 of the CASP discusses "Aesthetic Elements." (AR 6281-6314.) Within that section is found "Second and Third Story Guidelines." (AR 6306.) They observe that "[b]uildings in the Core Area are generally one and two story structures." (*Ibid.*) "[S]ome second and third story additions could be made to certain structures in the Core Area," and those additions "shall be of the proper scale and proportion in relation to the existing and surrounding buildings and to the street." (AR 6306.) "In some instances, it may be necessary to step back the second or third story addition in order to achieve the appropriate human scale and to create a transition from smaller to taller buildings." (AR 6306.) Petitioner properly observes that Trackside is not within the downtown core; yet petitioner proceeds to read into Section 4.2 a prohibition on fourth floors in the Core Area, and therefore a ban on Trackside's fourth floor. (RB 35.) Absent an express mention of a fourth floor, the CASP, according to petitioner, cannot have contemplated that floor. (RB 35.) Thus, petitioner first concludes that the "plain meaning" of the CASP limits new buildings to three stories. (RB 35.) Petitioner then backtracks and concludes that new buildings actually are limited to two stories because another section of the

CASP (AR 6313 ["Architectural Considerations"]) fails to mention a third or fourth story. (RB 46.)

The CASP in fact provides that the "development of dwelling units, including senior housing, shall be encouraged in the Core Area." (AR 6259, Land Use Policy 2.6.1.I.) "This includes, but is not limited to, the promotion and development in housing of upper stories in the Downtown Core . . . ." (*Ibid.*) Several buildings in the Core Area, located within one block of the project site, reflect these CASP policies for increased height, including the four-story Chen building, the four-story Roe building, and the four-story McCormick building. (AR 1305, 17156.) Also of note in rebutting petitioner's contrived ban on four-story buildings is the five-story mixed-use parking garage.[3] (AR 1305, 17156.)

Petitioner creates a rule that the CASP must expressly authorize a four-story building for Trackside to be consistent with the CASP. (RB 35.) No such rule exists on the face of the CASP. The mention of only second and third stories in the downtown core (AR 6306) also cannot imply a prohibition on a fourth story in either the Core or in the transition area.

First, an implied prohibition would be irreconcilably inconsistent with the design guidelines for the downtown core specifying that "[s]etbacks to third and fourth stories should be considered" (AR 6074) and that "[p]redominantly two and three-story buildings should be developed with consideration for four-story elements." (AR 6073.) The Court may not construe the CASP in way that renders any of the design guidelines null and

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[3] Petitioner asserts that the City incorrectly relied upon the height of the parking garage as a comparator because it is not mixed-use. (RB 28.) Petitioner fails to explain how the use of a building matters when comparing height. Moreover, the parking garage is mixed-used with commercial use on the ground floor and parking above. The outside awning leading to the ground floor commercial space is pictured in the Downtown Guidelines. (AR 6047, bottom photograph.)

void. "'When two statutes touch upon a common subject,' we must construe them 'in reference to each other, so as to harmonize the two in such a way that no part of either becomes surplusage.'" (*Garcia v. McCutchen* (1997) 16 Cal.4th 469, 476 (quotation marks and citation omitted).)

Second, general and specific plans by their very nature are flexible documents which should not be subject to invented constrictions (i.e., a fourth floor ban). (See *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 570-71.) "[G]eneral and specific plans attempt to balance a range of competing interests." (*Sierra Club v. County of Napa* (2004) 121 Cal.App.4th 1490, 1510.) In reviewing compliance with a general plan or a specific plan which furthers its objectives, courts "accord great deference to the agency's determination" because the legislative body "has unique competence to interpret those policies when applying them in its adjudicatory capacity." (*Id.* at p. 1509 (citation omitted).) Importing a restriction into a specific plan where none exists - as petitioner does here with respect to a fourth floor - thwarts the very legislative deference woven into judicial review. That deference unravels when the judicial branch accepts an invitation to import terms into the plan -- not to mention binding the legislative body to those terms. Petitioner's poorly conceived reading of the CASP fails.

Third, petitioner aggravates the deficiencies in its analysis by again ignoring well-settled rules. Petitioner exclaims that the height and bulk of Trackside "contravenes the clear intent" (RB 46) of the CASP policy that the "height of new projects should be considered within the context of their surroundings." (AR 6313.) The intent of the legislative body is reflected in the language of adopted legislation. Petitioner imagines from whole cloth an intent to prohibit the construction of a four-story building.

B. Petitioner's Remaining Challenges Under the CASP Fail.

Turning to the remaining parts of the CASP discussed by petitioner, Land Use Policy 7B provides that development along the Third Street corridor "shall be of an appropriate scale and character in relation to the surrounding and adjacent land uses." (AR 6264.) Petitioner does not dispute that Trackside would violate this provision only if its mass and scale violated some *other* planning provision mandatory in nature. Instead, petitioner contends that Trackside does violate other planning provisions -- namely some of those found in the Downtown Guidelines. (See, e.g. RB 41, 43-44.) The City replies in the next section of this brief immediately below to each of petitioner's points regarding those guidelines.

Petitioner's discussion of Section 2.4 of the CASP (RB 42-43) misunderstands the City's position. That section provides that Trackside may be found consistent with the CASP "if it is determined that the project meets the policies and standards set forth in all sections of the Core Area Specific Plan." (AR 6254.) Petitioner for some reason believes the City is of the unstated view that it need not comply with that provision. Not so. The City's point is that in reviewing compliance, the Court employs a deferential standard reflecting the City's authority to weigh and balance competing policy interests. (See AOB 15, 29-30.) Moreover, the City's AOB and this brief show that Trackside satisfies all provisions of the CASP on which petitioner bases its challenge.

V. TRACKSIDE COMPLIES WITH THE DOWNTOWN GUIDELINES

Petitioner relies most heavily throughout its brief on a caption under an illustration in the Mixed-Use Design Guidelines regarding "Building Mass & Scale." (AR 6085.) The City replies first to this issue in some detail, and then addresses the

remaining guidelines on which petitioner focuses. In evaluating petitioner's persistent argument that these Guidelines comprise "fundamental and mandatory" policies (RB 11), the Court should bear in mind that guidelines generally "describe a preferred policy direction of the City," and are not mandates. (AR 6036.)

A. The Caption Describing an Illustration Provides No Basis to Derail the Trackside Project.

The caption that a "building shall appear to be in scale with traditional single-family houses along the street front" (AR 6085; hereafter "Caption") cannot be reconciled with the guidelines on the left side of that same page. (See AOB 48-51.) In urging that the Caption is consistent with those guidelines, petitioner misreads the guidelines.

Petitioner focuses primarily on one guideline: "Increased building scale and height *may be allowed* in portions of mixed use special character areas such as along B and 3rd Streets where new development patterns are allowed." (AR 6085, fourth bullet point under item A (italics added); RB 30-34; 51-52.) Most notably, petitioner does *not* contest that this guideline is inconsistent with the Caption. Instead, petitioner asserts that the guideline does not apply to Trackside at all because "[t]his guideline applies only to the B and 3rd Streets Visioning Area, not to the Project." (RB 33.)

In the first place, guidelines adopted in 2007 that apply only to the B and Third Street Visioning Area indicate as much. For example, one design objective promotes "[c]ultivat[ing] the evolution of Third Street between A and B Streets as a unique higher density mixed use urban village . . ." (AR 6109.) Another provides that "[r]esidential roof forms with upper levels within the roof area should predominate on Third Street between A and B Streets." (AR 6109.)

In sharp contrast, nothing in the "increased building scale and height" guideline (AR 6085) even hints that it applies *only* to the B and Third Street Visioning Area. Instead, the guideline

mentions B and Third Street as one *example* of a location where the City may permit an increase in building scale and height over what may otherwise be permitted. This increase is allowed "in portions of mixed use special character areas *such as* along B and 3rd Streets where new development patterns are allowed." (AR 6085 (italics added).) "Such as" does not mean "only;" "such as" is an inclusive term. "[A]n objective reader would interpret the phrase 'such as' to mean 'for example.'" (*Jon Davler, Inc. v. Arch Insurance Co.* (2014) 229 Cal.App.4th 1025, 1040 (quotations marks and citations omitted).) This guideline allowing increased height and scale -- found on the page "Mixed-Use Design Guidelines" (AR 6085) -- obviously applies to all mixed-use properties, which without question includes Trackside. (AR 1908 [map].) The permissive guideline allowing increased building scale and height cannot be reconciled with the Caption -- a point which petitioner fails to contest -- as explained in the City's AOB (pp. 48-51.) For this reason alone, the Caption cannot be interpreted as a mandatory guideline.

Nor can applying the Caption as a mandate be squared with the other Mixed Use Building Mass & Scale guidelines, or the Third Street Special Character Area guidelines identified in the AOB (pp. 50-51). Those guidelines might not be at odds with the Caption as to every potential project, but the discretion conferred by those guidelines in the City to approve a project like Trackside is at odds with construing the Caption as mandatory.

Separately and independently, the guidelines themselves note that mandatory standards are "unequivocal and often quantifiable." (AR 6036.) There is nothing quantifiable about the Caption's words that a "building shall appear to be in scale with traditional single family houses along the street front." (AR 6085). Though the qualifier "often" leaves open the possibility of a non-quantifiable mandate, the Caption's terms such as "appear to be" and "traditional" render it difficult to enforce the Caption as an ironclad requirement.

Petitioner's other arguments about the Caption fare no better. At the same time petitioner contends that the City may

not rely upon the permissive "increased building scale and height" guideline (AR 6085), petitioner criticizes the City for not complying with other guidelines on the very same page. (RB 41, 49-52.) Which is it? Either the guidelines apply or they do not. Petitioner cannot cherry pick those it finds inconvenient -- i.e. "increased building scale and height" -- and declare them inapplicable, while simultaneously relying on others to make its case. This is not a principled approach.

The Caption is really a description of an illustration, and not a mandatory standard. If it were otherwise, the Caption would be set out as a guideline across the page with the others. It makes no sense that the City would hide a mandatory guideline in a caption when all other guidelines are listed individually, and separately bulleted on the left side of the page. The Caption lacks the force of a mandate for all of the above reasons. It cannot serve as a basis for invalidating Trackside's approvals.

B. The Caption Finds No Life in Davis Municipal Code Section 40.13A.020.

Davis Municipal Code Section 40.13A.020, subdivision (b) provides: "Wherever the guidelines for the DTRN conflict with the existing zoning standards including planned development, the more restrictive standard shall prevail." (AR 334, lines 13-15.) The trial court did not analyze this provision, and much less did it find the conflict petitioner urges. The trial court noted only that this provision, taken collectively with others, shows that the Downtown Guidelines in general are relevant to the analysis. (AR 334, lines 15-19.)

Petitioner's reliance on Section 40.13A.020, subdivision (b) rests on that the flawed premise that the Caption is a mandate in the first place. It is not, as explained above. Furthermore, subdivision (b) applies only when there is a conflict between a "standard" in the Downtown Guidelines and an existing zoning standard; hence the admonition that "the more restrictive standard shall prevail." (AR 334, line 15.) The Caption, however,

does not qualify as a "standard" as that term is defined in the guidelines: "standards prescribe minimum acceptable limits." (AR 6036.) The Caption prescribes no such thing with its general admonition that a "building shall appear in scale with traditional single family homes along the street front." (AR 6085.) In sharp contrast, standards in the guidelines prescribe a limit. For example, a "minimum of 50% of the building front shall have a zero foot setback." (AR 6102.) There is no conflict between two "standards" here. Absent a conflict, Section 40.13A.020, subdivision (b) cannot deploy the Caption to defeat the conditions of Trackside's development.

The rule that more specific provisions prevail over general provisions also defeats petitioner's reliance on Section 40.13A.020. The "more restrictive standard rule," as petitioner calls it (RB 53), could apply only if the Caption applied in the first place. In comparing the Caption to more specific guidelines (RB 51-54), petitioner overlooks the specific versus general rule that renders the Caption of no effect here. "Under settled rules of statutory construction, a specific statute controls over a more general statute." (*Okasaki v. City of Elk Grove* (2012) 203 Cal.App.4th 1043, 1049.) "[T]he rule that a specific provision governs over a conflicting general provision applies only if an inconsistency cannot otherwise be reconciled." (*Hoitt v. Dept. of Rehabilitation* (2012) 207 Cal.App.4th 513, 525.)

The guideline that "increased building scale and height may be allowed in portions of mixed use special character areas" (AR 6085) is more specific than the Caption. The Caption applies to all mixed-use sites (see map at AR 6052). The Caption appears on a page entitled "Mixed-Use Design Guidelines" (AR 6085). The "increased building scale and height" applies not to all mixed use sites, but only to "portions of mixed use special character areas." (AR 6085.) The more specific "increased building scale and height" guideline overcomes petitioner's reliance on the Caption.

The same "specific governs over general" principle illuminates the specific guideline that "two and three story buildings should predominate" (AR 6109) in the Third Street

special character area where Trackside would be located. (See RB 53-54.) This permissive guideline, which leaves room for Trackside's dimensions, provides far more specificity than the Caption's general "building shall appear in scale with traditional single family homes." (AR 6085.) Petitioner cannot rely on the Caption to invalidate the Trackside project.

C. Petitioner's Scattered Discussion of Other Downtown Guidelines Lacks Merit.

Petitioner's wildly inconsistent approach leads to further mischief. Petitioner exclaims that the absence of an "increased building scale and height" provision in the Third Street Special Character Area Guidelines means that the provision does not apply to Trackside and other properties in that special character area. (RB 32.) Petitioner offers no authority, and much less an explanation or a principled analysis.

Petitioner next notes that the "increased building scale and height" provision was added to the Downtown Guidelines in 2007. (RB 30, comparing AR 16015 [original Building Mass & Scale guidelines] to AR 6085 [current guidelines.) But petitioner fails to explain how this is relevant to whether or not the provision applies to Trackside. The addition of the provision in 2007 surely does not operate to exclude Trackside from the updated guidelines, and petitioner only coyly suggests otherwise.

Petitioner's comparison of the current guidelines to the original guidelines (RB 30) exposes another flaw in its position. "'If conflicting statutes cannot be reconciled, later enactments supersede earlier ones [citation]." (*Lopez v. Sony Electronics, Inc.* (2018) 5 Cal.5th 627, 634.) As petitioner admits (RB 30), the original Downtown Guidelines did not include the fourth bullet point allowing for "increased building scale and height" in portions of the mixed use special character areas. (See AR 16015.) The original guidelines did however include the Caption. (See AR 16015.) The later enacted "increased building scale and height" takes precedence over the older Caption.

Next, petitioner entirely misses the point of the City's reference to "higher density/intensity residential and mixed use projects allowed on Third and B Streets." (AR 6060; AOB 37.) The City cited the provision as evidence of the broad discretion vested by the guidelines. Petitioner ignores the point, and notes inaptly that the provision is constrained to the B and 3rd Street visioning area. (RB 31-32.) First, the provision does not say that; petitioner creates yet another limit that does not exist. Second, it is beside the point.

D. Petitioner Misunderstands the Third Street Guidelines.

The Third Street Guidelines aim in part to develop Third Street between A and B Streets as a higher density mixed use neighborhood. (AR 6109) The City explained the trial court's mistake in using that objective to conclude that Trackside is too large for its location. (See AOB 46-47.) Instead of responding head on, petitioner answers a point nobody has ever made. Petitioner says the high density mixed use objective does not authorize Trackside. (RB 34.) Nobody said it did. The point is that the objective has no bearing on Trackside's consistency with the Design Guidelines.

The City raised a similar point as to the guideline governing development on Third Street between B and E Streets. (AR 6109.) The City highlighted the trial court's error in relying on the guideline to criticize Trackside's size. (AOB 47.) Nobody has ever asserted that the guideline itself authorizes Trackside; the guideline simply is not a valid basis to overturn the project approvals. Yet petitioner bemoans the City's "repeated reliance on inapplicable provisions." (RB 34.) It is the trial court -- not the City -- that relied upon Third Street guidelines inapplicable to Trackside, and did so incorrectly to jettison the project.

Petitioner's Third Street case study analysis (RB 37-38) presumes that the study must itself depict a four-story building or else Trackside is inconsistent with the Third Street guidelines.

The case study need not resemble Trackside in every dimension. "The case study illustrates a manner in which the design guidelines, *when combined*, would result in a development that meets the community's objectives for the Mixed Use Character Areas." (AR 6111 [italics added]). The case study is simply a graphic illustration of the type of development that would satisfy community objectives in the Mixed Use Character Area. (AR 6111.)

The relevant inquiry, as with the CASP, is whether "no reasonable person could have reached the same conclusion." (*California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 637.) After all, the CASP "serves as a foundation" for the Downtown Guidelines. (AR 6034.) A reasonable person could conclude that the case study strikingly resembles Trackside for the reasons explained in the City's AOB (pp. 47-48).

Petitioner also misses the point of the City's reference to the "third and fourth stories" in the guidelines governing the Commercial Core across the train tracks from Trackside. (AR 6074). The obvious point of the reference: the inclusion of "fourth story" in the guidelines undermines the trial court's speculation that "fourth story element" shown in the case study is "likely referring to some other type of design feature such as an extended roof line or tower and not a full floor of [residences]." (2 JA 339, lines 18-20.)

E. Petitioner Fails to Address Directly the Core East Transition Guidelines.

Petitioner fails to address the errors suffusing the trial court's analysis of the Core East Transition Guidelines. (See AOB 40-45.) Instead, petitioner observes that these "Guidelines clearly contemplate a transition from commercial core to the residential area where the Project is located." (RB 36.) Everyone already knows that and nobody has said differently. More baffling is petitioner's statement that the Guidelines were not "intended to

apply to hypothetical, future land uses." (RB 36.) Nobody said they were. The word "hypothetical" does not even appear in the City's AOB; nor is there any mention of "future land uses." The Court can see a theme emerging from petitioner's brief: Petitioner has no meritorious response to much of the City's AOB, so it creates non-issues and responds to those. None of it is effective.

* * * * *

The discussion above, coupled with the analysis in the City's AOB, show that the trial court prejudicially erred in entering judgment for petitioner on its fourth cause of action. The judgment on that cause of action should be reversed with instructions to the trial court to deny the petition for writ of mandate.

VI. PETITIONER HAS FORFEITED MOST OF ITS CHALLENGES UNDER CEQA

The trial court's error as to the fourth cause of action infected its judgment on the second cause of action. The trial court found inconsistencies between Trackside and the planning and zoning law, and on that basis granted relief on the fourth cause of action. The trial court necessarily found that the City failed to address those inconsistencies in its environmental review, and on that basis alone granted relief on the second cause of action. The judgment on the second cause of action therefore should be overturned along with the judgment on the fourth cause of action.

Petitioner nonetheless urges either (1) affirmance of the judgment on grounds upon which the trial court did not rule, or (2) remand to the trial court with instructions to consider and then rule on those grounds. (RB 56-57.) Under the particular circumstances, petitioner has forfeited the grounds on which the trial court did not rule.

A. Petitioner Failed to Object to the Trial Court's Tentative Ruling, and Instead Urged its Adoption.

A complete discussion of this issue requires tracing the procedural history beginning with the trial court's tentative ruling. (2 JA 250-264.) The tentative ruling granted petitioner writ relief on the fourth cause of action only, setting aside the approvals of Trackside based on inconsistency with the City's General Plan, CASP, and Downtown Guidelines. (2 JA 263, line 1 to 264, line 7.) The ruling expressly provided that "the Court will not decide the other issues presented." (2 JA 263, line 22.)

The trial court cautioned that the tentative ruling would become the statement of decision unless within 10 days "a party specifies those principle controverted issues as to which the party is requesting a statement of decision or makes proposals not included in the tentative decision." (2 JA 251, lines 3-6.) The trial court repeated its invitation: "The Court encourages the parties to identify any mistakes or material omissions in the Court's recitation of the facts, any mistakes of law, any necessary and proper remedy that follows from the Court's final decision." (2 JA 264, lines 11-14.)

The City requested generally that the trial court rule on all four causes of action to generate an appealable judgment. (2 JA 295-96.) Trackside similarly sought a ruling on all four causes of action, including specific issues. (2 JA 268-69.)

Petitioner, however, did not request a ruling on any cause of action other than the fourth cause of action addressed in the tentative ruling. Indeed, petitioner opposed in writing the City's and Trackside's requests by urging that "the Court adopt the Tentative Decision and grant the Petition for Writ of Mandate on the grounds that Petitioners' approval of the Project violated the Planning and Zoning Law." (2 JA 321, lines 8-10.)

Petitioner urged the same at the hearing on the other parties' requests for a statement of decision. When the trial court asked what remedy it sought, petitioner asked the court to order "the City to vacate and rescind the project approvals" (RT 54,

lines 11-12 (April 15, 2019)), and order the City "not to re-approve the project unless and until they -- they bring it into compliance with the general plan, the design guidelines and the CASP." (RT 54, lines 14-17.)

The Statement of Decision filed one month later adjudicated all four causes of action. It denied the writ petition as to the first and third causes of action. (2 JA 335, fn. 3; 345, fn. 6.) It granted the writ petition as to the fourth cause of action (2 JA 345, lines 8-10) - the centerpiece of the analysis -- finding Trackside inconsistent with the General Plan, CASP, and Design Guidelines. (2 JA 344, line 12 to 345, line 7.) The trial court granted the writ petition as to the second cause of action solely because the City's environmental review did not assess Trackside's inconsistency with the General Plan, CASP and Design Guidelines. (2 JA 345, lines 12-21.)

B. Petitioner's Failure to Object Forfeits Any Challenge Based on Omitted Issues.

Petitioner's failure to object to the tentative decision, and its urging that the trial court adopt it, forfeits four alternative bases on which petitioner urges affirmance (or remand) here: (1) Trackside allegedly is inconsistent with General Plan policies on historic preservation (RB 58-61); (2) the City's Sustained Communities Environmental Assessment (SCEA) failed to address adequately the project's alleged inconsistency with historic preservation policies (RB 58-61); (3) the SCEA allegedly failed to address adequately the loss of leased land (RB 61-63); and (4) the SCEA allegedly failed to address the potential impacts of hazardous materials (RB 63-65).[4] For ease of reference, the City refers to these forfeited issues as the "four alternative issues."

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[4] The alleged inconsistency with historic preservation formed part of the fourth cause of action (1 JA 21, ¶ 49). Challenges to the City's SCEA formed the second cause of action. (1 JA 8-11.)

"Together, sections 632 and 634 [of the Code of Civil Procedure], as implemented by rule 3.1590(d)-(g) of the California Rules of Court, establish a two-step procedure for requesting a statement of decision and *preserving objections for pursuit on appeal*." (*Thompson v. Asimos* (2016) 6 Cal.App.5th 970, 982 (italics added) (*Thompson*).) The first step requires action after the court issues a tentative decision. CCP section 632 requires any request for a statement of decision to "specify those controverted issues as to which the party is requesting a statement of decision." (CCP § 632.) "When the court announces its tentative decision, a party may, under [CCP] section 632, request the court to issue a statement of decision explaining the basis of its determination, and *shall* specify the issues on which he is requesting the statement; following such a request, the party may make proposals relating to the contents of the statement." (*In Re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133 (italics added) (*Arceneaux*).) "This initial step serves the function of advising the trial court of exactly what issues the parties view as materially controverted at the close of the evidence, just as the process of settling jury instructions serves to frame issues for decision by the fact-finder in the jury trial setting." (*Thompson,* 6 Cal.App.5th at p. 982.)

By failing to object to the omission of the four alternative issues from the tentative ruling -- not to mention affirmatively urging the trial court to adopt the tentative as the Statement of Decision -- petitioner forfeits its challenge to the Trackside project based on any of the four alternative issues. Illustrative is *Porterville Citizens for Responsible Hillside Development v. City of Porterville* (2007) 157 Cal.App.4th 885 (*Porterville*). There, opponents of a housing development project challenged under CEQA and the Subdivision Map Act (Map Act) the City's approval of the project. (*Id.* at p. 889.) The trial court granted the opponents' writ petition. (*Id.* at pp. 889-890.) In doing so, the trial court did not address the Map Act in its tentative ruling. (*Id.* at p. 911.) The project opponents did not object to the tentative ruling nor alert the trial court to its failure to rule on the Map Act issue.

(*Ibid.*) On appeal, the opponents asserted that the trial court failed to address the Map Act claim and urged remand to the trial court with directions to grant relief on that claim. (*Ibid.*)

The Court of Appeal concluded that the "trial court impliedly rejected the [Map Act] claim and [project opponents] forfeited appellate consideration thereof by failing to object to the tentative decision." (*Porterville, supra,* 157 Cal.App.4th at p. 911.) The appellate court inferred that the trial court rejected the Map Act claim because it did not order any relief based on that claim. (*Id.* at p. 912.) The trial court's ruling on the CEQA claim "d[id] not support an implied conclusion that it found the [Map Act] claim meritorious; the two claims are independent." (*Ibid.*) The peremptory writ of mandate lacked any reference to the Map Act. (*Ibid.*) Thus, "the trial court did not impliedly rule in [project opponents'] favor on the [Map Act] claim." (*Ibid.*)

From these circumstances, the Court of Appeal observed: "It is unfair to the trial judge and the adverse party to attempt to take advantage of an alleged error or omission on appeal when the error or omission could have been, but was not, brought to the attention of the trial court in the first instance." (*Porterville, supra,* 157 Cal.App.4th at p. 912.) "It follows that when a trial court announces a tentative decision, a party who failed to bring any deficiencies or omissions therein to the trial court's attention forfeits the right to raise such defects or omissions on appeal." (*Ibid.*)

The *Porterville* forfeiture analysis could have been written on the record here. Petitioner failed to notify the trial court that the tentative ruling omitted any discussion of the four alternative issues. Even worse than the omission in *Porterville*, petitioner here *affirmatively urged* that "the Court adopt the Tentative Decision and grant the Petition for Writ of Mandate on the grounds that Petitioners' approval of the Project violated the Planning and Zoning Law." (2 JA 321, lines 8-10.) Petitioner urged the same at the hearing on the tentative ruling days later: "If the Court adopted the tentative decision I think that the remedy would be an order directing the City to vacate and

rescind the project approvals . . . and not to re-approve the project unless and until they -- they bring it into compliance with the general plan, the design guidelines and the CASP." (RT 54, lines 9-17 (April 15, 2019).)

Petitioner uttered nary a word about any of the four alternative issues -- nothing about historic preservation; nothing about leased land; and nothing about hazardous materials. It follows inexorably that petitioner "forfeited appellate consideration thereof by failing to object to the tentative decision" and, even worse, urging its adoption. (*Porterville, supra,* 157 Cal.App.4th at p. 911.) "It is axiomatic that a party may not complain on appeal of rulings to which it acquiesced in the lower court." (*Id.* at p. 912.)

Petitioner failed to preserve for appeal any of the four alternative issues. Petitioner purposely squandered several opportunities to urge the trial court to decide these issues. Petitioner therefore may not assert the issues as alternative bases for affirming the judgment as to the second or fourth causes of action. Nor may petitioner seek remand with directions to the trial court to decide these issues.

Petitioner's strategy not to seek a ruling on these issues -- and to ask this Court to rule in the first instance -- is particularly egregious given the substantial evidence standard of review. As this Court recently observed: "We review the City's decision to analyze and approve a transit priority project through an SCEA under the substantial evidence standard. [Citation.] We do not exercise our independent judgment on the evidence but only determine whether the agency's decision is supported by substantial evidence considering the whole record." (*Sacramentans for Fair Planning v. City of Sacramento* (2019) 37 Cal.App.5th 698, 722.)

This Court should roundly reject petitioner's invitation to examine the record for substantial evidence when petitioner failed to seek that very determination from the trial court. Although a trial court's decision whether substantial evidence supports an agency decision is owed no deference by this Court,

surely an analysis performed by the trial court provides a useful guide to this Court in many cases. Petitioner had multiple opportunities to secure that analysis on the four alternative issues and failed to do so.

If this Court nevertheless proceeds to decide any of the four alternative issues, the City adopts by reference here the arguments advanced by Trackside in its reply brief, and urges this Court to reject petitioner's position on each alternative issue.

VII. CONCLUSION

This Court should reverse the judgment of the trial court as to the second and fourth causes of action with instructions to enter judgment in favor of the City on those causes of action.

CROSS-RESPONDENTS' BRIEF

The Court is now familiar with the factual and procedural background, and the City does not recount that background here. (See Cal. Rules of Court, rule 8.216, subd. (b)(2).)

I. STANDARD OF REVIEW

With respect to the third cause of action, petitioner's argument that the project violates the Downtown Guidelines (RB 65-67) turns upon whether the City properly interpreted those guidelines as mandatory or discretionary. The crux of petitioner's third cause of action is, after all, whether the guidelines are mandatory. This Court reviews de novo the City's interpretation of the guidelines, as the City explained in the Standard of Review section in its AOB (pp. 15-16).

Petitioner's challenge to the judgment on the first cause of action turns on whether Public Resources Code Section 21151.1 applies here at all. This Court independently reviews that question. The meaning of a statute "entails the resolution of a pure question of law. [Citations.] The soundness of the resolution of such a question is examined de novo." (*People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432.) It is undisputed,

as shown below, that the City conducted environmental review under Section 21151.2, and not under Section 21151.1. When "the relevant facts are not in dispute, the application of the statute [] may be decided as a question of law." (*International Engine Parts, Inc. v. Feddersen & Co.* (1995) 9 Cal.4th 606, 611.)

II. TRACKSIDE COMPLIES WITH THE DOWNTOWN GUIDELINES

The City explained above in Section V. of its Appellants' Reply Brief that Trackside complies with the Downtown Guidelines. Petitioner's discussion of this issue -- in seeking to overturn the judgment as to the third cause of action (RB 65-67) -- repeats in cursory fashion the arguments petitioner asserts in defense of the judgment on the fourth cause of action (RB 24-55.) The City therefore has nothing to add to its comprehensive discussion of the Downtown Guidelines already set forth in its AOB and in Section V. above. The Court should affirm the judgment in favor of the City on the third cause of action.

III. PETITIONER MISUNDERSTANDS THE LAW GOVERNING ENVIRONMENTAL REVIEW OF TRANSIT PRIORITY PROJECTS.

Petitioner does not challenge the trial court's finding that Trackside satisfies the criteria for a transit priority project under Public Resources Code Section 21155. (2 JA 345, fn. 6.) Nor does petitioner challenge the trial court's finding under Section 21155.2, subdivision (a) that the project is eligible to satisfy CEQA through preparation of a sustainable communities environmental assessment (SCEA). (*Ibid.*) Petitioner likewise fails to challenge the project's compliance with the criteria for preparation and adoption of a SCEA under Section 21155.2, subdivision (b).

Petitioner instead mounts a narrow challenge to the judgment on the first cause of action. Petitioner argues solely that the project does not comply with Section 21151.1, subdivision (a)(5). (RB 67-69.) Section 21151.1 applies only if an agency aims to determine that a project is altogether exempt from CEQA review. In that case, the agency must satisfy the requirements set forth in Section 21151.1, including subdivision (a)(5) which requires an agency finding that the project does not have a significant effect on historical resources under Public Resources Code Section 21084.1. But here, the City did not seek to determine that the project is exempt from CEQA review under Section 21151.1; the City instead followed the alternative approach and prepared an SCEA under Section 21151.2. The trial court expressly determined that "the project is not subject to section 21151.1 because there was no request for an exemption from the SCEA/IS requirement for a [transit priority project]." (2 JA 346, fn. 6.)

The City has not found any case law addressing the distinction between Sections 21151.1 and 21151.2. One commentator has addressed the distinction at some length. Projects that satisfy the criteria for a transit priority project under Section 21155 "can qualify for two possible levels of streamlining: full CEQA exemption [Section 21151.1] or a Sustainable Communities Environmental Assessment (SCEA), a short-form EIR [Section 21151.2]." (Darakjian, *SB 375: Promise, Compromise and the New Urban Landscape* (2009) 27 UCLA J. Envtl. L. & Policy 371, 392-93.) The article describes the high hurdle agencies face in qualifying for an exemption (*Id.* at p. 393.) "Because qualifying for the full exemption is so difficult, the SCEA is likely to emerge as [SB 375's] most-sought incentive. For those [transit priority projects] that cannot meet the above requirements [for exemption], a truncated EIR is still available in the form of a SCEA." (*Ibid.*)

The City here opted to prepare a SCEA under Section 21151.2 instead of asserting that Trackside is exempt from

environmental review under Section 21151.1. The requirements to achieve exemption -- including Section 21151.1, subdivision (a)(5) -- simply do not apply here. Petitioner's challenge fails, and this Court should affirm the judgment in favor of the City on the first cause of action.

IV. CONCLUSION

The Court should affirm the judgment as to the first and third causes of action. Petitioner has requested that this Court affirm the judgment (RB 69), but the City assumes that this is a mistake and that petitioner actually seeks reversal of the judgment on its first and third causes of action, and that its request for affirmance is limited to the second and fourth causes of action.

Dated: November 13, 2020

RICHARDS, WATSON & GERSHON
A Professional Corporation

By: 

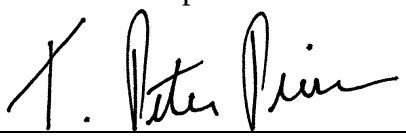
T. Peter Pierce
Attorneys for Defendants,
Appellants and Cross Respondents
CITY OF DAVIS, CITY COUNCIL
OF THE CITY OF DAVIS

CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.204 (c)(1) of the California Rules of Court, I certify that this brief is proportionally spaced, has a typeface of 13-point Century font, and contains 8,134 words, including footnotes, based on the word count generated by the word processing software used to prepare this brief.

Dated: November 13, 2020

RICHARDS, WATSON & GERSHON
A Professional Corporation

By: 

T. Peter Pierce
Attorneys for Defendants,
Appellants and Cross Respondents
CITY OF DAVIS, CITY COUNCIL
OF THE CITY OF DAVIS

PROOF OF SERVICE

Old East Neighborhood Association v City of Davis and City Counsel of the City of Davis

Yolo County Superior Court No. PT17-2111

Court of Appeal Case Number: C090117

I, Robin Hale, declare:

I am a resident of the State of California and over the age of eighteen years and not a party to the within action. My business address is One Sansome Street, Suite 2850, San Francisco, CA 94104. On November 13, 2020, I served the within document(s) described as:

PROOF OF SERVICE FOR APPELLANTS' REPLY BRIEF AND CROSS-RESPONDENTS' BRIEF OF CITY OF DAVIS AND CITY COUNCIL OF THE CITY OF DAVIS

on the interested parties in this action as stated on the attached mailing list.

☒ (BY MAIL) By placing a true copy of the foregoing document(s) in a sealed envelope addressed as set forth above. I placed each such envelope for collection and mailing following ordinary business practices. I am readily familiar with this Firm's practice for collection and processing of correspondence for mailing. Under that practice, the correspondence would be deposited with the United States Postal Service on that same day, with postage thereon fully prepaid at San Francisco, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☐ (BY OVERNIGHT DELIVERY) By placing the document(s) listed above in a sealed envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a FedEx agent for delivery, or deposited in a FedEx box or other facility regularly maintained by FedEx, in an envelope or package designated by the express service carrier, with delivery fees paid or provided for, addressed to the

person(s) at the address(es) set forth above.

☒ (BY TRUEFILING) I served the attached on the parties by transmitting a PDF version of the document to the parties listed below through TrueFiling e-service.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 13, 2020, at San Francisco, California.

Robin Hale (Signature)

SERVICE LIST

Donald B. Mooney
LAW OFFICES OF DONALD B. MOONEY
417 Mace Blvd., Suite J-334
Davis, CA 95618
Tel: 530-758-2377
dbmooney@dcn.org

Attorneys for
OLD EAST DAVIS NEIGHBORHOOD ASSOCIATION

Kate A. Wheatley
Matthew S. Keasling
TAYLOR & WILEY
500 Capitol Mall, #1150
Sacramento, CA 95814
Tel: 916-929-5545
kwheatley@taylor-wiley.com
mkeasling@taylor-wiley.com

Attorneys for
TRACKSIDE CENTER LLC

TRIAL COURT
The Honorable Samuel T. McAdam
Judge of the Superior Court, County of Yolo
1000 Main Street
Woodland, CA 95695