

**C090177**

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

CIVIL NO. C090117

OLD EAST DAVIS NEIGHBORHOOD ASSOCIATION, *et al.*  
Plaintiff, Respondent & Cross-Appellant

v.

CITY OF DAVIS, *et al.*  
Defendants, Appellants and Cross-Respondents

TRACKSIDE CENTER  
Real Party-in-Interest, Appellant and Cross-Respondent

On Appeal from the Judgment entered by the Superior Court, County of Yolo,  
Case No. PT17-2111  
The Honorable Samuel T. McAdam, presiding.

**RESPONDENT'S OPPOSITION BRIEF AND  
CROSS-APPELLANT'S OPENING BRIEF**

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<b>CERTIFICATE OF INTERESTED ENTITIES OR PERSONS</b>		
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- (1)
- (2)
- (3)
- (4)
- (5)

Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: September 3, 2020

Donald B. Mooney  
(TYPE OR PRINT NAME)

  
(SIGNATURE OF APPELLANT OR ATTORNEY)

## TABLE OF CONTENTS

I.	INTRODUCTION AND SUMMARY OF ARGUMENT .....	10
II.	ISSUES PRESENTED FOR REVIEW.....	11
III.	STATEMENT OF APPEALABILITY/RELIEF SOUGHT ..	12
IV.	BACKGROUND FACTS .....	12
A.	The Project Location.....	12
B.	The Project.....	13
C.	The City’s Environmental Review for the Project .....	14
D.	The City’s Approval of the SCEA/IS and the Project .	14
E.	The Trial Court’s Decision.....	15
IV.	STANDARD OF REVIEW ON APPEAL .....	16
A.	Standard of Review for State Planning and Zoning Law.....	16
B.	Standard of Review for the California Environmental Quality Act .....	17
VI.	LEGAL DISCUSSION .....	18
A.	The Court Correctly Held That the Project is Inconsistent with the General Plan .....	18
1.	The State Planning and Zoning Law .....	19
2.	The Court Correctly Applied the Standard of Review .....	21
3.	The City’s General Plan, Core Area Specific Plan and DTRN Design Guidelines Require That the Project Make an Appropriate Transition From Adjacent, Smaller Structures .....	24

4. Appellants Misapply the Standard of Review.....	27
5. The Project is not Within the B and 3rd Streets Visioning Area, so the Core Visioning Provisions Cannot be Applied to the Project .....	30
6. The Project’s Upper Story, East Side Setbacks do not Constitute, or Substitute for, an Appropriate Transition Between the Old East Davis Neighborhood and the Downtown Core .....	35
7. Appellants Incorrectly Interpret “Transition” as Relating to the Mass and Scale of Hypothetical Future Buildings in a Future Downtown Core, When in Fact a Transition to the Built, Material Environment is Implied by the City’s Land Use Documents.....	36
8. The Third Street Corridor Case Study Does Not Support the City’s Findings that the Project is Inconsistent with the DTRN Design Guidelines....	37
9. The Trial Court Properly Found that Substantial Evidence Does Not Support a Consistency Finding .....	39
10. Appellants Failed to Address DMC Section 40.13A.020(b) .....	44
11. The City Abused its Discretion in Making Project Findings and Therefore Does Not Enjoy the Expected Deference from the Court .....	55
B. The Trial Court Failed to Rule on the All of the Issues Raised Regarding the City’s Failure to Comply with CEQA.....	56
1. The Sustainable Communities Strategy and Sustainable Community Environmental Assessment.....	57

2.	The Project is Inconsistent with the General Plan Policies on Historic Preservation and Will Impact the Conservation District .....	58
3.	The SCEA/IS Failed to Adequately Analyze, Address and Mitigate the Impacts of the Foreseeable Loss of the Leased Land That is Part of the Project Area. ....	61
4.	The SCEAS/IS Failed to Adequately Analyze, Address and Mitigate the Impacts of the Potential of Hazardous Materials at the Project Site. ....	63
C.	The Project Violate the City of Davis’ Design Guidelines Under DMC Article 40.13A .....	65
4.	The Project Fails to Meet the Requirements for Sustainable Communities Environmental Assessment .....	67
VI.	CONCLUSION .....	69

**TABLE OF AUTHORITIES**

<u>Cases</u>	<u>Page(s)</u>
<i>Anderson First Coalition v. City of Anderson</i> (2005) 130 Cal.App.4th 1173.....	56
<i>Citizens of Goleta Valley v. Board of Supervisors</i> (1990) 52 Cal.3d 553 .....	17, 19
<i>Corona-Norco Unified School Dist. v. City of Corona</i> (1993) 17 Cal.App.4th 985 .....	19
<i>East Sacramento Partnerships for a Livable City v. City of Sacramento</i> (2016) 5 Cal.App.5th 281 .....	20, 27, 38, 42
<i>Endangered Habitats League, Inc. v. County of Orange</i> (2005) 131 Cal.App.4 <sup>th</sup> 777.....	20, 21
<i>Families Unafraid to Uphold Rural El Dorado County v. Bd. of Supervisors</i> (1998) 62 Cal.App.4th 1332.....	17, 19, 20
<i>Leshar Communications, Inc. v. City of Walnut</i> (1950) 52 Cal.3d 531 .....	19, 21, 22, 24
<i>Napa Citizens for Honest Government v. Napa County Board of Supervisors</i> (2001) 91 Cal.App.4th 342 .....	24
<i>Rio Vista Farm Bureau Center v. County of Solano</i> (1992) 5 Cal.App.4th 351 .....	63
<i>San Francisco Tomorrow v. City and County of San Francisco</i> (2014) 229 Cal.App.4th 498.....	27
<i>Sequoyah Hills Homeowners Assn v. City of Oakland</i> (1993) 23 Cal.App.4th 704 .....	17, 20

<i>Schaeffer Land Trust v. San Jose City Council</i> (1989) 215 Cal.App.3d 612.....	17
<i>Stanislaus Natural Heritage Project v. County of Stanislaus</i> (1996) 48 Cal.App.4th 182 .....	17
<i>Vineyard Area Citizens for Responsible Growth, Inc.</i> <i>v City of Rancho Cordova</i> (2007) 40 Cal.4th 412 .....	17, 18
<i>Yamaha Corp. of America v. State Bd. of Equalization</i> (1998) 19 Cal.4th 1 .....	33

**Codes and Statutes**

**Code of Civil Procedure**

904.1 .....	12
1094.5 .....	20, 66

**Government Code**

14 .....	67
65000 .....	10, 16
65300 <i>et seq.</i> .....	19
68860 .....	19
65860(a).....	19

**Public Resources Code**

5024.1(g).....	68
21000 <i>et seq.</i> .....	10
21080(e).....	65
21080(e)(1) .....	18
21084.1 .....	68, 69
21151.1(a) .....	57
21155 .....	11, 14, 57, 68
21155(b).....	15, 67
21155.1(a)(5).....	16, 68
21155.1(b).....	57
21155.1(c) .....	57
21155.2 .....	68
21155.2(b).....	18
21155.2(b)(1) .....	58
21155.2(b)(2) .....	58
21155.2(b)(5) .....	58
21155.2(b)(7) .....	18
21155.3 .....	57
21159.28 .....	57

**Title 14 California Code of Regulation (“CEQA Guidelines”)**

15384 .....	
15384(b).....	
15378 .....	63



**Davis Municipal Code**

40.13A .....	10, 13, 16, 65
40.13A.020.....	13, 66
40.13A.020(b).....	49, 50, 54, 55, 67
40.15.030 .....	28
40.18.020 .....	28

## I.

### INTRODUCTION AND SUMMARY OF ARGUMENT

Respondent/Cross-Appellant Old East Davis Neighborhood Association (“OEDNA”) respectfully submits this Opposition Brief and Opening Brief. In this action OEDNA challenged the City of Davis’ approval of approval of the Sustainable Communities Environmental Assessment/Initial Study (“SCEA/IA”) for the Trackside Center Project (“Project”) and approval of the Project on the grounds that such approvals violate the requirements of the California Environmental Quality Act (“CEQA”), Public Resources Code, section 21000 *et seq.*; Davis Municipal Code (“DMC”) section 40.13A; and the Planning and Zoning Law, Government Code, section 65000 *et seq.* The court granted the Petition for Writ of Mandate on the grounds that the Project is inconsistent with fundamental policies of the General Plan that mandate a transition between the downtown core area and adjacent neighborhood. (Appellants’ Appendix (“AA”) 336-345.) The court also held that the Project violated the CEQA as the SCEA/IS failed to adequately address the Project’s inconsistency with the General Plan and Core Area Specific Plan (“CASP”).

Contrary to Appellants’ argument, the court properly applied the substantial evidence standard of review and gave substantial deference to the City’s interpretation of its General Plan and CASP”, and the Davis Downtown and Traditional Residential Neighborhood (“DTRN”) Design Guidelines. After a thorough review of the administrative Record, the court properly concluded

that the Trackside Project location is a transition property and the City's approval of the Project was inconsistent with the fundamental and mandatory policies regarding transition from old east Davis to the downtown core. A thorough review of the applicable policies in the General Plan, CASP and DTRN Design Guidelines will confirm that the large scale of the Project outside of the downtown core does not constitute a "transition" from the residential neighborhood to the downtown.

## II.

### ISSUES PRESENTED FOR REVIEW

1. Whether the City of Davis' approval of the Trackside Project violates the State Planning and Zoning Law on the grounds that the Project is inconsistent with mandatory policies in the City of Davis' General Plan and CASP?
2. Whether substantial evidence supports the City of Davis' adoption of the SCEA/IS?
3. Whether the City of Davis has a mandatory duty to comply with the design guidelines contained in the DTRN Design Guidelines?
4. Whether the Trackside Project qualifies for use of a SCEA/IS under Public Resources Code section 21155 *et seq.*?

### **III.**

#### **STATEMENT OF APPEALABILITY/RELIEF SOUGHT**

On June 25, 2019, the court issued its Judgment Granting Petition for Writ of Mandate. (AA 347-351.) The Judgment disposed of all of the issues between the parties. (*Id.*) Therefore, this matter is appealable. (Code Civ. Proc. § 904.1.) On July 30, 2019, Appellant/Real Party in Interest Trackside Center filed a Notice of Appeal. (AA 363-364.) On August 2, 2019, Appellant City of Davis filed a Notice of Appeal. (AA 369-370, 372.) On August 19, 2019, Cross-Appellant OEDNA filed a Cross-Appeal. (AA 378-379, 380.)

OEDNA seeks an order affirming the Superior Court's Judgment Granting a Petition for Writ of Mandate with respect to the second and fourth causes of action in the Petition for Writ of Mandate. OEDNA also seeks an order reversing the Superior Court's decision with respect to the First and Third and causes of action. If this Court, however, reverses the Superior Court's ruling on the Second Cause of Action regarding compliance with CEQA, OEDNA seeks an order addressing the CEQA claims raised in the second cause of action that the Superior Court did not address.

### **IV.**

#### **BACKGROUND FACTS**

##### **A. THE PROJECT LOCATION**

The Project is located at 901-919 3rd Street, Davis, California and on an

additional 0.167 acres of Union Pacific Railroad Company right-of-way area. (Administrative Record (“AR”) 0457.) The Project consists of 0.69-acre site in an area designated as Old East Davis pursuant to DMC section 40.13A.020. (*Id.*) The Project area consists of a mix of residential, commercial, and retail uses. (*Id.*) The Project site is bordered on the south by 3rd Street, on the east by an alley and single-family residential properties, on the north by a commercial landscape/rock retail business, and on the west by the Union Pacific right-of-way and downtown commercial properties. (*Id.*)

The Project is located within the Downtown and Traditional Neighborhood Overlay District (DMC, § 40.13A), also known as the Conservation District. (*See* AR 459.) The Conservation District includes the downtown and three adjacent traditional residential neighborhoods. (*Id.*) The Project site is subject to the Davis Downtown and Traditional Residential Neighborhood (“DTRN”) Design Guidelines. (*Id.*, 6023-6164; DMC, § 40.13A.)

## **B. THE PROJECT**

The Project includes the removal of two existing one-story commercial buildings and the construction of a four-story mixed-use building located at 901-919 3rd Street. (AR 0458.) The 47,983 square-foot building consists of 8,950 square feet of retail space on the ground floor and 27 apartment units on the upper three floors. (*Id.*) The site improvements include surface parking, an

outdoor plaza, landscaping, drainage, sidewalks, pedestrian and bicycle facilities. The Project also includes an area leased from Union Pacific. (*Id.*) The leased area is along the west side of the Project site where the outdoor plaza and several parking spaces are to be located. The lease is a 10-year lease, but Union Pacific retained the right to terminate the lease for any reason with 30-day's notice. (AR 13536, 13543.) The leased area may only be used for parking and beautification/landscaping. (AR 13536.)

The Project provides for a residential density of 39 units per net project acre (51.4 units per acre excluding the lease area). (AR 0458.) The Project includes 30 parking stalls in a mix of covered and uncovered spaces. (*Id.*)

**C. THE CITY'S ENVIRONMENTAL REVIEW FOR THE PROJECT**

The City determined that the Project qualified as a Transit Priority Project under CEQA. (§ 21155 *et seq.*)<sup>1</sup> OEDNA and its members submitted comments on the SCEA/IS. (*See e.g.*, AR 0062-0066; 0083-0092; 0097-0100; 101; 0111-0112; 0114-0117 122-136; 0151-0174; 6557, 6653-6657, 6554-6556.)

**D. THE CITY'S APPROVAL OF THE SCEA/IS AND THE PROJECT**

The Historic Resource Management Commission reviewed the Project regarding impacts to historic resources and concluded that the Project is not consistent with the DTRN Design Guidelines and rejected a determination that the Project's impacts would be less than significant on historic resources. (AR

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<sup>1</sup> All references are to the Public Resources Code unless otherwise stated.

1552 3312-3322, 3501-3518.)

The Planning Commission voted 5-1 to recommend that the City Council not adopt the SCEA/IS. (AR 3126-3130; 3303-3310.) The Planning Commission also unanimously voted to recommend that the City Council not approve the Design Review for the proposed Project. (*Id.*)

On November 14, 2017, the Davis' City Council rejected the commissions' recommendations and adopted the SCEA/IS and approved the Project. (AR 0005-0019; 0665, 0020-0022, 0023-0027, 2897-2900.)

#### **E. THE TRIAL COURT'S DECISION**

The Petition for Writ of Mandate contains four causes of action. (AA 922.) The First Cause of Action alleges that the City's SCEA/IS violates CEQA because the Project fails to conform to local land use plans and zoning ordinances. (AA 15-16.) Additionally, as the Project may have an effect on a historical district it does not qualify as a SCEA. (§ 21155.1(a)(5).) The court denied the First Cause of Action on the grounds that the City satisfied the elements of section 21155(b). (AA 345-346.)

The Second Cause of Action alleges that the City committed a prejudicial abuse of discretion by relying on an SCEA/IS that fails to meet the requirements of CEQA for disclosure, analysis, and/or mitigation of significant project impacts. (AA 16-19.) The Court granted the Petition on the Second Cause of Action on the grounds the Project is not consistent with the General Plan and the

SCEA/IS was inadequate as it did not properly assess project inconsistency with the General Plan and related planning provisions. (AA 345.) The court ruled that since this conclusion would require changes to the SCEA/IS for the Project in the areas of aesthetics and land use/planning, the court declined to address OEDNA's remaining allegations. (AA 345; *see also* AA 16-18; 96-110.)

The Third Cause of Action alleges that the Project violates the City's Design Guidelines, DMC, § 40.13A. (AA 19-20.) The court denied the Third Cause of Action asserting that OEDNA failed to establish that the City had a mandatory duty to strictly comply with the DTRN Design Guidelines. (AA 335.)

The Fourth Cause of Action alleges that the Project violates the State Planning and Zoning Law, Government Code section, 65000 *et seq.*, as it is inconsistent with the City's General Plan and the CASP. (AA 20-21.) The court granted the Petition with respect to the Fourth Cause of Action holding that the property is a transition property and the approval of the project was inconsistent with the fundamental policies of the General Plan requiring a transition between the downtown core area and adjacent neighborhood. (AA 336-345.)

## **V.**

### **STANDARD OF REVIEW ON APPEAL**

#### **A. STANDARD OF REVIEW FOR STATE PLANNING AND ZONING LAW**

An agency's determination that a project is consistent with the General



Plan is reviewed under the abuse of discretion standard. (*Families Unafraid to Uphold Rural El Dorado County v. Board of Supervisor (“FUTURE”)* (1998) 62 Cal.App.4th 1332, 1336.) The approval may be overturned if the agency did not proceed in a manner required by law, its decision is not supported by findings, or the findings are not supported by substantial evidence. (*Sequoyah Hills Homeowners Ass’n. v. City of Oakland* (1993) 23 Cal.App.4th 704, 717.)

**B. STANDARD OF REVIEW FOR THE CALIFORNIA ENVIRONMENTAL QUALITY ACT**

In CEQA actions, appellate courts review the lead agency's actions *de novo*. (*Stanislaus Natural Heritage Project v. County of Stanislaus* (1996) 48 Cal.App.4th 182, 192.) The appellate court conducts its “own independent review and the conclusions of the superior court and the superior court’s disposition of the issues in this case are not conclusive on appeal.” (*Schaeffer Land Trust v. San Jose City Council* (1989) 215 Cal.App.3d 612, 622.)

Under CEQA the court must determine whether the agency has committed a prejudicial abuse of discretion. (§ 21168.5.) An abuse of discretion is established if: 1) the agency’s determination or decision is not supported by substantial evidence; or 2) the agency has failed to proceed in a manner required by law. (*Id.*; *Vineyard Area Citizens for Responsible Growth, Inc. v City of Rancho Cordova* (2007) 40 Cal.4th 412, 435.) A court determines *de novo* whether the agency employed the correct procedures, “scrupulously enforc[ing] all legislatively mandated CEQA requirements” (*Citizens of Goleta Valley v.*

*Board of Supervisors* (1990) 52 Cal.3d 553, 564), we accord greater deference to the agency’s substantive factual conclusions. In reviewing for substantial evidence, the reviewing court “may not set aside an agency’s approval on the grounds that an opposite conclusion would have been equally or more reasonable,” on factual questions, our task “is not to weigh conflicting evidence and determine who has the better argument. (*Vineyard, supra*, 40 Cal.4th at 435; *see* § 21080(e)(1); CEQA Guidelines, § 15384(b) [Substantial evidence consists of “fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact.”].)

If a project qualifies as a transit priority project, and the agency prepares a SCEA/IS pursuant to section 21155.2(b), the decision to review and approve a transit priority project with a SCEA is reviewed under the substantial evidence standard. (§ 21155.2(b)(7).)

## VI.

### LEGAL DISCUSSION

#### A. THE COURT CORRECTLY HELD THAT THE PROJECT IS INCONSISTENT WITH THE GENERAL PLAN

The court held that the Project was inconsistent with the fundamental policies in the City’s General Plan regarding transition to protect adjacent neighborhoods to downtown Davis. (AA 336.) The court found that the “transition” requirement of the General Plan is fundamental to any planned development at the project site. (AA 344.) The court further held that the

fundamental policy cannot be disregarded in the name of other important planning goals, such as increased densification. (*Id.*)

## **1. THE STATE PLANNING AND ZONING LAW**

The State Planning and Zoning Law, Government Code section 65000 *et seq.*, establishes the General Plan as the constitution for all future development, to which any local decision affecting land use and development must conform. (*Citizens of Goleta Valley, supra*, 52 Cal.3d at 570.) Every city and county must adopt a “comprehensive, long-term General Plan for the physical development of the city or county ...” (Gov’t Code § 65300.) The Supreme Court described “the function of a general plan as a “constitution,” and labeled it the “basic land use charter governing the direction of future land use” in the locality. (*Leshar Communications v. City of Walnut* (1950) 52 Cal.3d 531, 540.) The propriety of an agency’s decision affecting land use and development depends on the project’s consistency with the objectives, policies and land uses specified in the General Plan. (Gov’t Code § 65860; *Corona-Norco Unified School Dist. v. City of Corona* (1993) 17 Cal.App.4th 985, 994.)

Local land use and development decisions must also be consistent with the applicable general plan. (*FUTURE, supra*, 62 Cal.App.4th at 1336; Gov’t Code, § 65860(a).) The requirement that local land use decisions adhere to the governing General Plan is known as the “consistency doctrine.” (*Leshar Communications, supra*, 9 Cal.3d at 541.) This doctrine is “the linchpin of

California's land use and development laws; it is the principle which infused the concept of planned growth with the force of law." (*Id.*) A project is consistent with the General Plan if "it will further the objectives and policies of the General Plan and not obstruct their attainment." (*FUTURE, supra*, 62 Cal.App.4th at p. 1336.) While a court accords deference to an agency's interpretation of its general plan and various elements, an abuse of discretion is established if the agency has not proceeded in a manner required by law, its decision is not supported by findings, or the findings are not supported by substantial evidence. (See Code Civ. Proc., § 1094.5; *East Sacramento Partnerships for a Livable City v. City of Sacramento* (2016) 5 Cal.App.5th 281, 305.) A project need not be in perfect conformity with each and every General Plan policy as no project can completely satisfy every General Plan Policy. (*Sequoyah Hills Homeowners Ass'n, supra*, 23 Cal.App.4th at 719.) The City, however, cannot ignore General Plan goals, policies and objectives that are by their very terms fundamental, mandatory and clear. An action must be consistent with the very specific and mandatory policies of the general plan. (*Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 785-786, 789.) A project is inconsistent with the General Plan, and thus cannot be approved, where it violates such a policy or policies. (*Id.*)

Courts require strict compliance with adopted General Plan policies. In *FUTURE, supra*, 62 Cal.App.4th at 1336, the applicable General Plan policy

clearly specified that the designation “Low Density Residential” would be restricted to lands contiguous to “community regions” and “rural centers.” The developer and the County argued that this General Plan policy was simply one of many policies dictating land use planning and that the project could not be expected to achieve “perfect consistency.” The Court disagreed, holding that the developer’s project to develop housing designated “Low Density Residential” in an area which was not contiguous to community regions or rural centers was inconsistent with the County’s General Plan. In acknowledging that perfection was not required, the court stated “[t]hat may be true, but the nature of the policy and the nature of the inconsistency are critical factors to consider.” (*Id.*)

**2. THE TRIAL COURT CORRECTLY APPLIED THE STANDARD OF REVIEW**

Appellants argue that the Court did not correctly apply the standard of review because the Court was to provide deference to the City Council’s decision. Under Appellants’ interpretation and application of the standard of review, the deference to the agency is near absolute. That is not consistent with the applicable caselaw. (See *Endangered Habitats League, supra*, 131 Cal.App.4th at 785-786, 789; *Leshar Communications, supra*, 52 Cal.3d at 540.) Despite the near absolute deference that Appellants seek in this matter, the City cannot ignore the General Plan and CASP’s goals, policies and objectives that are by their very terms fundamental, mandatory and clear. (*Endangered Habitats League, supra*, 131 Cal.App.4th at 785-786, 789.)

Appellants further argue that the Court conducted an independent review of the record. A review of the Court's Decision quickly reveals that this is not the case as the Court reviewed the record and determined whether the record supports the City's decision to approve the Project with respect to compliance with the General Plan, the CASP and the DTRN Design Guidelines. The court's review did not constitute an independent judgment regarding the project, but a review of the record to determine whether substantial evidence supports the City's decision even when giving deference to the City. The court's Decision states:

The features relied upon by the City to justify the Project, like the step-back design, do not really address the larger issue of the mass and scale of the project. ***Nothing in the Staff Report or record rationally explained how a 47,900 square foot building constituted a transition project.*** (AA 343 [emphasis added].)

The Court also found that based upon the General Plan and other related planning provisions and guidelines, it is evident to the court that the "transition" requirement of the General Plan is material to any planned development on that location. (AA 344.) This determination is critical to the court's decision as caselaw clearly requires that the City not ignore the General Plan and CASP goals, policies and objectives that are by their very terms fundamental, mandatory and clear. (*Endangered Habitats League, supra*, 131 Cal.App.4th at 785-786, 789.) Thus, the City's approval must be consistent with the material provisions of the planning documents regarding transition. (*Id.*) As the

transition requirements are material or fundamental to the planning documents, it was not only appropriate for the court to focus on the transition requirements, but the court was required to review the project in light of these fundamental/material requirements. Based upon the court's review of the record, the court found that the record lacked evidentiary support for the City's decision and that the mass and scale of the Project in comparison to other buildings is inconsistent with the City's planning documents governing transition between the Core Area to the Old East Davis neighborhood.

Simply because the City Council claims the Project is consistent does not create automatic deference. A determination of consistency must be supported by substantial evidence. The Court after a thorough review of the record concluded that the Project is not consistent with the planning documents. (AA 344-345.) Moreover, based upon its review of the record and planning documents, the court found that given the mass and scale of the Project building compared with the Old East Davis Neighborhood and buildings in the core area, the City's determination is simply not reasonable as the building that is supposed to be part of the "transition" is the largest building in the area. (AA 344.) Based upon the record, the Court found that "there simply is not a logical and reasoned case to be made that Trackside is a "transition" from the Core Area to the Old East Davis neighborhood. Trackside would overwhelm the existing residential neighborhood." (*Id.*) The court then concluded based upon

a review of the entire administrative record, that the record lacks evidentiary support for the City's decision. (*Id.*)

Appellants attempt to argue that the Project achieves other goals of the General Plan and CASP. The City, however, cannot ignore these material (or fundamental) provisions regarding transition from the core area to the Old East Davis Neighborhood. (AA 344; *Endangered Habitats League, supra*, 131 Cal.App.4th at 785-786, 789.) Inconsistency exists when the project frustrates the achievement of the General Plan's goals and policies. (*Napa Citizens for Honest Government v. Napa County Board of Supervisors* (2001) 91 Cal.App.4th 342, 379.) 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 and inconsistent with the DTRN Design Guidelines regarding transition.

**3. THE CITY'S GENERAL PLAN, CORE AREA SPECIFIC PLAN AND DTRN DESIGN GUIDELINES REQUIRE THAT THE PROJECT MAKE AN APPROPRIATE TRANSITION FROM ADJACENT, SMALLER STRUCTURES**

The Decision emphasizes that 'transition' is a planning objective common to the General Plan, CASP and DTRN Design Guidelines. (AA 333-334.) In establishing its analytic context, the Decision states: "One overarching principle set forth in the General Plan and the Design Guidelines is that the subject property here serve as a 'transition' from the Core Commercial Area to the Old East Davis neighborhood." (AA 333.) The Decision further states: "The



concept of transition permeates the General Plan’s designation of the Core Area Specific Plan.” (*Id.*) Policies related to the concept of “transition” from the General Plan and CASP, referenced in the Decision’s analysis, include:

a) “Accommodate new buildings with floor area ratios that can support transit use, especially within 1/4 mile from commercial areas and transit stops, but maintain scale transition and retain enough older buildings to retain small-city character.” (Land Use Principle 4 (AR 5700); AA 333.)

b) Require an architectural ‘fit’ with Davis' existing scale for new development projects.” Subsequently, three standards are paraphrased: 1) “There should be a scale transition between intensified land uses and adjoining lower intensity land uses.” 2) “Taller buildings should be stepped back at upper levels in areas with a relatively smaller-scale character.” 3) “Buildings should be varied in size, density and design.” (Policy UD 2.3 (AR 5803); AA 333.)

c) The Core Area Specific Plan “...promotes building up the ‘downtown core’ (the area between First and Third Streets and D Street and the railroad tracks east of G Street) before greatly increasing densities in the remainder of the core area, thereby protecting existing residential neighborhoods and their character.” And subsequently, the CASP

encourages “...appropriate scale transitions between buildings.” (General Plan, E. Relationship to Other Plans (AR 5651-5652); AA 333.)

d) “The single most important issue of infill development is one of compatibility, especially when considering larger developments. When new projects are developed adjacent to older single-family residences, concerns exist that the height and bulk of these infill projects do not have a negative impact on smaller scale buildings.” (CASP Section 4.2, New Buildings in Residential Neighborhood (AR 6311); AA 333-334.)

e) “The area along Third Street shall be treated with sensitivity because of potential impacts on adjacent land uses. Development along this corridor shall be of an appropriate scale and character in relation to the surrounding and adjacent land uses.” (CASP Land Use Policy 7B (AR 6264); AA 334.)

After considering these General Plan and CASP policies, along with policies from the DTRN Design Guidelines applicable to the Project’s transition site, the court concluded that “...Trackside is not consistent with the City of Davis planning provisions governing the transition between the Core Area to the Old East Davis neighborhood.” (AA 343.) Clearly, the Court’s conclusion is based on transition concepts from each of the three planning documents: the General Plan, CASP and DTRN Design Guidelines.

#### 4. APPELLANTS MISAPPLY THE STANDARD OF REVIEW

Describing the standard of review required for a court to overturn a consistency determination, the City quotes from *East Sacramento Partnerships for a Livable City v. City of Sacramento, supra*, 5 Cal.App.5th 281 at 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.’” (City Opening Brief (“COB”) at 14). The City quotes another court’s statement of the required standard of review: “...we defer to an agency’s factual finding of consistency unless no reasonable person could have reached the same conclusion on the evidence before it.” (*San Francisco Tomorrow v. City and County of San Francisco* (2014) 229 Cal.App.4th 498, 514). The latter decision provides the standard paraphrased in the COB, for example: “Petitioner must show that no reasonable person could reach the conclusions the City reached.” (COB at 17.)

The City makes an error of logic in attempting an affirmative paraphrase of the standard of evidence: “...the law allows inconsistencies to exist so long as some evidence supports the City’s decision that the Project furthers local planning policies.” (COB at 25.) The City’s statement “...some evidence supports the City’s decision...” is not the same as the statement “...no reasonable person could have reached the same conclusion on the evidence before it.” The City’s paraphrase is overly generous to the City.

Real Party's affirmative paraphrases are logically erroneous: "...the cited factors could certainly be relied upon by a 'reasonable person' as providing an appropriate mass and scale transition..." (Real Party Opening Brief ("RPOB") at 11); and subsequently: "...a 'reasonable person' could have easily concluded that the mass and scale transition provided was satisfactory based on the enumerated factors." (*Id.* at 13.) These reproduce the faulty logic of the City's "...some evidence supports..." and are incorrect and overly generous to the City.

Real Party improperly suggests that two parking garages located in the downtown core are appropriate comparators for the Project, referring to them as "mixed-use parking structures." (RPOB at 20, fn 8.) Parking is not a permitted use for the Mixed Use or Commercial Mixed Use zoning in the DMC. (DMC, § 40.15.030, 40.18.020.) The parking structures are not "mixed-use" as there is only parking. The assertion repeats similar errors found in the Project's SCEA/IS (AR 532) and Staff Report for the City Council. (AR 687). The appropriate mixed-use comparators for the Project are the Chen Building, the McCormick Building and the Roe Building where both retail, office and/or residential are in the same building. (AR 73; 111; 156-157; 401; 532; 884; 1639-1640.) The court's assertion that the Project "...would be the 'largest mixed-use or commercial building in Davis by a longshot'" is true.

A height guideline for buildings in the downtown core, "The primary portion of any new building should not exceed 45 feet in height," (AR 6074) was

properly used by the court as a comparator, in determining that the proposed Project, at 50 feet tall, “...is taller than any other mixed-use project inside the Core Commercial Area and taller than the guidelines even for the Core Commercial Area.” (AA 339.) In light of the height guideline, and the Real Parties’ mischaracterization of the parking garages in the downtown core as “mixed use”, Real Party’s claim that the court’s height comparison “...is not supported by the evidence in the record” is false.

The City objects to the court’s reference to the 45-foot height guideline, emphasizing that the wording of the guideline is discretionary. (COB at 19.) The City fails to acknowledge the court’s logic: that the 45-foot height guideline applies in the *downtown core*, where the most intensive development in the City is intended to take place. (AR 5651-5652; 6062-6074.) The Project is *not* in the downtown core. The court noted that the Project, though located in the residential Old East Davis neighborhood, would be “...taller than any other mixed-use project inside the Core Commercial Area and taller than the guidelines even for the Core Commercial Area. . . .” (AA 333.)

Appellants incorrectly report a 53-foot distance between the proposed Project building and the nearest residential structure in Old East Davis. (COB at 11; ROB at 8.) The correct distance is 32 feet, as stated in the court’s Decision. (AA 314; AA 327, fn 1).

**5. THE PROJECT IS NOT WITHIN THE B AND 3RD STREETS VISIONING AREA, SO THE CORE VISIONING PROVISIONS CANNOT BE APPLIED TO THE PROJECT.**

The City undertook the B and 3rd Streets Visioning Process from 2004-2007 to consider more intensive development in a specific, bounded area of the downtown core, which resulted in amendments to the Downtown Davis and Traditional Residential Neighborhoods Design Guidelines. (AR 6033.) The B and 3rd process concerned the downtown blocks between Central Park (to the east) and the UC-Davis campus (to the west), defined by "... the west side of B Street, between 2nd Street and 4th Street, and on the north and south sides of 3rd Street, between University Avenue and B Street." (AR 126.) The DTRN Design Guidelines' amendments consist of discrete, bulleted items and images added to, but distinct from, the existing guidelines. Guidelines added for the B and 3rd Visioning area can be discerned by comparing the amended DTRN Design Guidelines (AR 6023-6164) to the original DTRN Design Guidelines (AR 15813-16090). New guidelines applying only to the B and 3rd Streets Visioning area are textually marked, with specific references to the B and 3rd location, and to greater building heights or densities (AR 122-136; 3207-3210; 6085 [fourth bullet item below guideline A], compare with 16015; 6109 [first bullet item below "Design Objectives"], compare with 16035; 6110 [image at bottom]; 6588-6597; 6638-6640).

The Project is located on 3rd Street to the east of G Street and the railroad tracks, more than five blocks from the B and 3rd Streets Visioning area. Planning provisions for the B and 3rd Streets Visioning area do not apply to the Project, because the Project is not within the B and 3rd Streets Visioning area it is not even in the commercial core area.

The City's planning documents for the Project used inapposite images and references to B and 3rd provisions from the DTRN Design Guidelines, despite OEDNA's repeated objections. (AR 122-136; 3207-3210; 6588-6597; 6638-6640). B and 3rd provisions and images cited by the City erroneously appear to permit more intensive, "vertical mixed use" development at the Project location than is allowed when only provisions correctly applicable to the Project had been used. (AR 122-136; 3207-3210; 6588-6597; 6638-6640.)

The City inappropriately relies on at least five references to B and 3rd provisions (COB at 37, 38, 42, 43, 50). Arguing that "The City is Best Positioned to Interpret its Own Guidelines" (COB at 34), the City cites the guideline: "Higher density/intensity residential and mixed use projects allowed on Third and B Streets should be compatible with the residential character of the neighborhood." (*Id.* at 37.) This guideline is an amendment for the B and 3rd Streets Visioning area. It is textually marked, referring to "higher density/intensity" development and the "Third and B Streets" location. This provision does not apply to the Trackside Project, because the Project is not

within the B and 3rd Streets Visioning area. Yet the City imputes the words “Trackside location” to the phrase “Third and B Streets”, which is more than five blocks away as if the provision applies to the Project. The claim that “the City is best positioned to interpret its own guidelines” cannot depend on the premise that the City may approve projects based on erroneously applied guidelines.

The City further confuses provisions specific to the B and 3rd Streets Visioning area, which do not apply to the Project, with broader provisions for the Third Street Special Character Area, which *do* apply to the Project. The Third Street Special Character Area extends along both sides of Third Street, from the Project location (to the east) to the university campus (to the west). (AR 6109-6111.) The 3rd and B Mass & Scale guideline cited by the City, “Increased building scale and height may be allowed...”, is not among the guidelines for the Third Street Special Character Area. Third Street Special Character Area guidelines concerning building heights, and transitions to smaller-scale structures, include: “Buildings vary from one to three stories”; “Two and three story buildings should predominate”; and “Careful transition to adjacent single story buildings should be incorporated.” (AR 6109.)

Arguing that “Properly Interpreted, the Mass & Scale and Core East Transition Guidelines Fully Support the Project” (COB, at 40 *et seq.*), the City asserts that the court “ignored” the Mass & Scale 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.” (*Id.* at 42.) This guideline applies only to the B and 3rd Streets Visioning area, not to the Project, and was properly not considered relevant by the court. The City conflates this guideline with those for the Third Street Special Character Area, claiming that the City relied “*inter alia*” on the B and 3rd Mass & Scale guideline, because the proposed Project “... is located in the Third Street Special Character Area.” (*Id.* at 42.) Invoking *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, the City claims: “Under *Yamaha*, this Court should give substantial weight to the City’s interpretation of the guideline that ‘[i]ncreased building scale and height may be allowed’ in the special character area where Trackside is located.” (COB at 43.) The claim fails because the Mixed Use Mass & Scale guideline “[i]ncreased building scale and height may be allowed” applies only to buildings in the B and 3rd Visioning area, and because the City incorrectly imputes the guideline into the guidelines for the Third Street Special Character Area.

The Project, a 4-story building, twice as large in square footage as the nearest mixed use building within the downtown core (AR 73; 111; 156-7), and adjacent to single-story homes, is inconsistent with all of these Third Street Special Character Area guidelines.

The City again relies on an inapplicable guideline provision: “Cultivate the evolution of Third Street between A and B Streets as a unique higher density mixed use urban village.” (COB at 46.) This guideline is textually marked with references to the B and 3rd Visioning area, and to higher density development. It does not apply to the Project; yet the City argues that “The objective’s focus on Third Street between A and B Street cannot plausibly be construed as a prohibition on higher density in every other block of Third Street”. (*Id.* at 47.) An absurd consequence of the City’s claim would be that zoning and planning provisions intended for specific, bounded block-faces could be applied anywhere else on the same street. A plain reading of the guideline makes it clear that this was not intended: the guideline specifically names the block faces where it applies, and describes the built environment as “unique”.

The City criticizes the court for its reference to a guideline for Third Street between E Street and B Street, stating that the guideline does not apply to the Project. (*Id.*) The guideline specific to Third Street between E Street and B Street, however, further supports the notion that different blocks of Third Street are to be developed differently. The City’s repeated reliance on inapplicable provisions diminishes their criticism of the court. The City’s arguments and evidence for Project approval, depend on inapplicable provisions and fall flat when properly applied.

**6. THE PROJECT’S UPPER-STORY, EAST SIDE SETBACKS DO NOT CONSTITUTE, OR SUBSTITUTE FOR, AN APPROPRIATE TRANSITION BETWEEN THE OLD EAST DAVIS NEIGHBORHOOD AND THE DOWNTOWN CORE**

The City argues that there is no prohibition on a fourth story at the Project site. (COB at 46.) There is no mention of a fourth story in the CASP text, though if the addition of a fourth floor were *even contemplated* by the CASP, a fourth floor step back would surely have been suggested. In fact, the CASP stated from which the quoted text is taken begins with: “Buildings in the Core Area are generally one and two story structures. It is possible that some second and third story additions could be made to certain structures in the Core Area.” (AR 6306.) Again, the Project is not in core area.

The CASP section titled New Buildings in Residential Neighborhoods, which is more specifically relevant to the Trackside Project, states: “Because infill projects are likely to be taller than one story, their height and bulk can impose on adjacent smaller scale buildings. The height of new projects should be considered within the context of their surroundings. Buildings with greater height should consider setbacks at the second story.” (AR 6313.) Here, only a second story is mentioned. The notion that the height and bulk of a four-story building *would not* “...impose on adjacent smaller scale buildings...” contravenes the clear intent of the infill provision.

The plain meaning of the CASP sections is that a new or remodeled building adjacent to smaller scale buildings may have at most three stories. By

definition, a four-story building, such as the Trackside Project, does not appropriately transition from adjacent smaller scale buildings.

**7. APPELLANTS INCORRECTLY INTERPRET “TRANSITION” AS RELATING TO THE MASS AND SCALE OF HYPOTHETICAL FUTURE BUILDINGS IN A FUTURE DOWNTOWN CORE, WHEN IN FACT A TRANSITION TO THE BUILT, MATERIAL ENVIRONMENT IS IMPLIED BY THE CITY’S LAND USE DOCUMENTS**

The City argues that the court misinterpreted the mass and scale and Core East Transition guidelines. (COB at 40.) This City’s interpretation of transition is not reflected in the policies applicable to the Project. The DTRN Design Guidelines for the Core Transition East state: “This area should improve the visual and land use transition from the Commercial Core to the Old East residential neighborhood.” (AR 6101.) The Guidelines clearly contemplate a transition from commercial core to the residential area where the Project is located. Had the guideline been intended to apply to hypothetical, future land uses, it could have stated: “...improve the visual and land use transition from *structures contemplated in* the Commercial Core to *structures contemplated in* the Old East residential neighborhood.” But the guideline was not written this way. The Core Transition East guidelines go on to state: “Building architecture should respect the traditional residential character of the neighborhood.” (AR 6101.) The intended transition is plainly from the built environment of the Commercial Core to the existing traditional homes in Old East Davis.

As noted in the Decision, the CASP promotes “... building up the ‘downtown core’ (the area between First and Third Streets and D Street and the railroad tracks east of G Street) before increasing densities in the remainder of the core area, thereby protecting existing residential neighborhoods and their character.” (AA 333, *see* AR 5651.) The Decision correctly examined the Project’s transitional aspects in light of the adjacent, existing homes in Old East Davis, the existing Davis ACE buildings and other buildings along Third Street (AR 125), and the Chen Building a few blocks away. (*See* AR 73; 111; 156-157.)

**8. THE THIRD STREET CORRIDOR CASE STUDY DOES NOT SUPPORT THE CITY’S FINDING THAT THE PROJECT IS CONSISTENT WITH THE DTRN DESIGN GUIDELINES**

The City’s claim that the Third Street Special Character Area case study supports Project approval is based on a misleading narrative for an exterior rendering of the case study. (AR 6111.) The City dissociates the rendering from the text on the same page, failing to report written details that abrogate the City’s claims. Case study floorplans (AR 6111) refer to street level and levels 2-3, but not to a fourth level. The case study is therefore a three story building. There is no mention of “fourth story elements” (COB at 47) in the written details for the case study; the “fourth story element” was created by City planning staff in materials prepared for the City Council. (AR 698). Departing from the more carefully-parsed phrase, “fourth story elements”, the City goes on to assert the

existence of a fourth story in the case study: "...the trial court overlooked the case study drawing showing a fourth story..." (COB at 48.) The City has produced a "four-story case study" from a three-story floorplan.

The City criticizes the court's suggestion that the case study building facade above the third story likely represents an "extended roof line or tower", going on to state that "...the guidelines expressly provide that 'setbacks to third and fourth stories should be considered.'" (COB at 48.) No page reference is given for the cited guideline, but a search reveals that it is a guideline for the Downtown Core. (AR 6074.) The guideline is inapplicable: the claim that the case study supports the Project cannot depend on a preference for fourth-story setbacks in the downtown core, nor imputing a drawing for one thing and a description of another.

A mere resemblance between the renderings of the Third Street Special Character Area case study and the Trackside building is not evidence for Project approval: in fact, the case study text (AR 6111) describes a three-story building that is significantly less imposing than the four-story, 47,983 square foot Project building. (AA 340.) As it is a different building that could be allowed. The Trackside building is not like the case study. Recalling the standard set forth in *East Sacramento Partnerships, supra*, 5 Cal.App.5th at 305), "...a reasonable person could not have reached the same conclusion" that the Third Street Special Character Area case study supports a finding of Project consistency with the

DTRN Design Guidelines as a 3-story building is vastly different than a 4-story building.

Relevant guidelines for the Third Street Special Character area state that: “Two and three story buildings should predominate. Careful transition to adjacent single story buildings should be incorporated.” (AR 6109). The written record and public comments demonstrate that the Project fails to make a transition to adjacent single story buildings. (AR 71-78; 122-136; 2956-2958; 6569-6570.) Images and descriptions of “careful” transitions to adjacent single story buildings are found in the record before the City Council and Planning Commission. (AR 159; 2956-2958; 3004-3007; 3015-3018; 3221-3223; 6569-6570.)

**9. THE TRIAL COURT PROPERLY FOUND THAT SUBSTANTIAL EVIDENCE DOES NOT SUPPORT A CONSISTENCY FINDING**

General Plan Policy UD 2.3, quoted in full, states: “Require an architectural ‘fit’ with Davis' existing scale for new development projects.” (AR 5803). Subsequently, three “Standards” are listed: a) “There should be a scale transition between intensified land uses and adjoining lower intensity land uses.” b) “Taller buildings should be stepped back at upper levels in areas with a relatively smaller-scale character.” c) “Buildings should be varied in size, density and design.” (*Id.*)

Policy UD 2.3 is stated in the imperative: it is mandatory that new development projects have “an architectural ‘fit’ with Davis’ existing scale....”

Although the City emphasizes the discretionary wording of standard a) “There should be a scale transition between intensified land uses and adjoining lower intensity land uses” (COB at 22), the mandatory requirement that new buildings fit with the City’s existing scale is established in the primary policy statement. The court properly treated Policy UD 2.3 as mandatory.

Land Use Principle 4 of the General Plan is similarly stated in the imperative: “Accommodate new buildings with floor area ratios that can support transit use, especially within 1/4 mile from commercial areas and transit stops, but maintain scale transition and retain enough older buildings to retain small-city character.” (AR 5700). Plainly read, Land Use Principle 4 requires that new buildings maintain a scale transition.

Land Use Policy 7B of the CASP regulates, with high specificity, development in the Project’s Third Street context: “The area along Third Street shall be treated with sensitivity because of potential impacts on adjacent land uses. Development along this corridor shall be of an appropriate scale and character in relation to the surrounding and adjacent land uses.” (AR 6264.) Policy 7B’s focus on “potential impacts on adjacent land uses” and its nondiscretionary requirement that a new building shall be of “an appropriate scale and character in relation to” its surroundings go to the heart of the Petitioner’s objections to the City’s consistency findings for the Project.



Concepts of appropriate building scale and scale-transition stated in the General Plan and CASP Policies above are supported by the DTRN Design Guidelines, which reflect the City's stated intentions for new development in the Project's context. Mixed Use Design Guidelines: Building Mass and Scale (AR 6085):

- a) A building shall appear to be in scale with traditional single-family houses along the street front. (With accompanying illustration.)
- b) Maintain the scale of a new structure within the context of existing buildings on the block.
- c) Design a front elevation to be similar in scale to those seen traditionally on the block.
- d) A new multi-unit structure should not overwhelm existing single family structures in terms of height.
- e) The front wall of a building should not exceed two stories in height.
- f) The primary building face should not exceed the width of a typical single family building in a similar context.

Mixed Use Character Areas: Core Transition East (AR 6101):

- g) This area should improve the visual and land use transition from the Commercial Core to the Old East residential neighborhood.

And subsequently: Building architecture should respect the traditional residential character of the neighborhood.

The City's arguments regarding the findings of consistency rest on claims about the primacy of the City's discretion to interpret and apply the policies of the General Plan and CASP: "The trial court's myopic mode of analysis usurps the City's well-established discretion to apply its broader policies to the project." (COB at 28.) But this discretion cannot be unbounded, and is open to challenge if the City's "...determination is not supported by findings, or if the findings are not supported by substantial evidence." (*East Sacramento Partnerships, supra*, 5 Cal.App.5th at 305.) In making this argument, the City chooses to ignore both the residential character of the neighborhood and the mandatory provisions of the Guidelines.

Emphasizing the City's discretion to interpret CASP provisions, the Appellant quotes *East Sacramento Partnerships*: "The specific plan's policies 'reflect a range of competing interests' and the City 'must be allowed to weigh and balance the plan's policies when applying them.'" (COB at 29.) The license accorded to the City by the Appellant stands in contrast to the CASP's own consistency language: "A development application may be found to be consistent with the Core Area Specific Plan if it adheres to the land uses designated as appropriate for the location of the project and 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, emphasis added; 6588-6597). By its own wording, the CASP does not empower the City to elevate broad goals, such as “...continu[ing] to encourage and enhance cultural, social, and economic activity in a walkable environment...” (COB at 30), above restrictive provisions regulating the built environment, such as the provision that new buildings on Third Street “...shall be of an appropriate scale and character in relation to the surrounding and adjacent land uses.” (AR 6264). The CASP does not entitle the City to make trade-offs between CASP provisions in determining a project’s consistency.

The City particularly emphasizes the City’s “broad discretion” in interpreting the concept of “appropriate scale and character” invoked in CASP Land Use Policy 7B, stating that “...Trackside could be said to be of an ‘inappropriate scale’ only if its mass and scale violated some *other* planning provision mandatory in nature.” (COB, pg. 31). The City produces just such a provision later in the brief: “A building shall appear to be in scale with traditional single-family houses along the street front” (COB at 49; AR 6085). The mandatory provision, “A building shall appear to be in scale...”, along with the accompanying image illustrating the concept of being “in scale” and the supporting guidelines listed above in b) - f), establish the “appropriate scale and character” for Trackside in its neighborhood context. The fundamental dimensions of the Trackside building are at least three times greater than those

of adjacent homes (AR 122-136; 2990-2992; 3205-3207; 6563-6566; 6683-6686): the Project does not “appear to be in scale with traditional single-family houses along the street front.” By the City’s own logic, Trackside is of an “inappropriate scale.” There are no 4-story buildings outside the core and none in the transition area.

Turning to the matter of scale transition, the Appellant emphasizes the Project’s series of setbacks from the east, and greater massing to the west, arguing that “The City reasonably concluded that scaling Trackside’s mass away from the adjacent residential neighborhood satisfies the policy of ‘scale transition’”. (COB at 27.) Real Party similarly emphasizes the Project’s setbacks from the east, including illustrative line drawings. (RPOB at 8 *et seq.*) The City’s and Real Party’s arguments both rest on the premise that an appropriate scale transition can be made *within* a building envelope, while still attaining the required “...architectural ‘fit’ with Davis’ existing scale.” (General Plan Policy UD 2.3, AR 5803). But the scale transition standard of Policy UD 2.3 describes the transition differently: “There should be a scale transition *between* intensified land uses and adjoining lower intensity land uses.” (AR 5803 [emphasis added].)

Scale variation “within” a parcel has different consequences for adjacent properties than scale variation “...between intensified land uses and adjoining lower intensity land uses.” The City’s consistency finding for the Project

implicitly substituted a “within” concept, in place of “between”. The Project is situated on a half-block of Third Street, across the railroad tracks from the downtown core, and adjacent to parcels of the Old East Davis neighborhood containing small, single-story houses. A sharp transition over a half-block, from four stories on the west, to one story on the east— as exhibited by the Project building’s setback study (ROB at 9)— is neither “sensitive”, nor “of an appropriate scale and character in relation to the surrounding and adjacent land uses” and is antithetical to the entire planning process.

At the Planning Commission hearing, after asking City staff about height limitations in the downtown core, across the railroad tracks from the Project site, Commissioner Robertson stated: “...obviously the idea of transition zones is that you sort of go from less dense to slightly more dense to more dense, and if we’re going from— this is low density residential right next to it, right, and we go from that to a four-story building. On the other side, we can’t go any higher than two or three stories. Are we really transitioning or are we creating the wall in Game of Thrones?” (AR 3279-3280.)

Regarding the use of setbacks, CASP Section 4.2, *New Buildings in Residential Neighborhoods*, states: “The single most important issue of infill development is one of compatibility, especially when considering larger developments. When new projects are developed adjacent to older single-family residences, concerns exist that the height and bulk of these infill projects do not

have a negative impact on smaller scale buildings.” (AR 6311). CASP Section 4.2 goes on to state: “Because infill projects are likely to be taller than one story, their height and bulk can impose on adjacent smaller scale buildings. The height of new projects should be considered within the context of their surroundings. Buildings with greater height should consider setbacks at the second story.” (AR 6313). Only a second story is mentioned in this infill provision. There is no mention of a third or fourth story in the CASP text, though if stories above the second story were *even contemplated* by the CASP, setbacks would surely have been suggested for them. The notion that the height and bulk of the four-story, 47,983 square foot Trackside building would not “...impose on adjacent smaller scale buildings...” contravenes the clear intent of the provision.

The setbacks described by the Appellants are wholly inadequate as a substitute for a proper “...scale transition between intensified land uses and adjoining lower intensity land uses” (AR 5803), because the setbacks do not compensate for the disparities in height and bulk between the Trackside building and adjacent single-story homes. The written record and public comments for the City Council demonstrate that the Project fails to make a transition between the downtown core and the traditional residences in the Old East neighborhood. (AR 71-78; 122-136; 2956-2958; 6569-6570.) Images and descriptions of appropriate transitions are found in the Project’s written record, and in public comments for the City Council and Planning Commission. (AR 159; 2956-

2958; 3004-3007; 3015-3018; 3221-3223; 6569-6570). Appropriate transitions from small-scale homes to built-up areas occur over several blocks (AR 6570), and the structures closest to the homes are two or three story buildings of moderate sizes.

General Plan Policy UD 2.3, General Plan Land Use Principle 4, CASP Land Use Policy 7B and CASP Section 4.2 are invoked when new infill projects adjacent to smaller-scale structures are proposed as is the Project scenario. These policies restrict the height, scale and/or bulk of new buildings, and require that buildings make scale transitions to lower-intensity land uses, to ensure that these buildings are compatible with their surroundings and do not overwhelm nearby structures. The administrative record (AR 71-78; 122-136; 209-211; 6588-6597) and the court's Decision demonstrate that the City's General Plan and CASP consistency findings for the Project were not supported by substantial evidence. (AA 336-345.)

The court examined the materials in the record pertaining to findings of Project consistency and issued a final decision stating the relevant facts, describing the legal framework for court review, and analyzing the basis for the City's approvals. (AA 325.) Examining the evidence for the City's consistency findings was a necessary part of the court's task: to systematically assess whether the rendered decision was reasonable and supported by substantial evidence. The court did not impermissibly reweigh the evidence. The court's

analysis of the basis for the City’s decision recognized that appropriate transitions between higher and lower intensity land uses are a policy objective common to the General Plan, CASP and DTRN Design Guidelines. (AA 3436.) To assess the City’s application of transition concepts to the Project building, the court considered existing buildings in the downtown core— the Chen, McCormick and Roe Buildings— asking whether or not the City properly found that the Project would make a transition between such buildings and adjacent structures in Old East Davis. (AA 343.) Any reasonable person would use the characteristics, quantitative metrics, and locations of existing buildings for comparison.

The court noted that “Trackside is twice the size of the nearby Chen Building. It is significantly larger than the McCormick Building and the Roe Building...” all of which are located in the commercial core. (AA 343.) The court went on to note that “All of the adjacent buildings [to the Project], either commercial or residential are single story”. (*Id.*) The court found that “Nothing in the Staff Report or record rationally explained how a 47,900 square foot building constituted a transition project.” (*Id.*)

The court found that the materials employed by the City as evidence for Project approval did not provide a rational basis for the approval. The court’s Decision was properly formulated. The City’s findings of Project consistency with the General Plan and CASP *were not* supported by substantial evidence.



**10. APPELLANTS FAILED TO ADDRESS DMC SECTION 40.13A.020(b)**

DMC section 40.13A.020(b) provides that “Wherever the guidelines for the DTRN Guidelines conflict with the existing zoning standards including planned development, the more restrictive standard shall prevail”, implies that the mandatory design guideline: “A building shall appear to be in scale with traditional single-family houses along the street front” controls the mass and scale of the proposed Project. The City could not properly find that the Project complies with applicable zoning ordinances, nor could the City properly grant Project approvals, because the City did not apply the more restrictive standard for the Project’s mass and scale.

The City never grappled with the consequences for Project approval of DMC section 40.13A.020(b) and the guideline, “A building shall appear to be in scale...”, instead calling upon community members to “...cite what specific zoning standard the guideline conflicts with and/or prevails over.” (AR 42; 2990-2992; 6563-6566; 6588-6597). Nonetheless, section 40.13A.020(b) implies that the mandatory guideline, “A building shall appear to be in scale with traditional single-family houses along the street front” (AR 6085) controls the mass and scale of the Project, as the requirement that the Project “appear to be in scale with” neighboring houses is “the more restrictive standard”, compared to standards for the Project’s height and building area in the Project’s Planned Development zoning. (AR 797.)

Appellants do not discuss section 40.13A.020(b) in their Opening Briefs; yet this rule resolves the confusion about how the Mass & Scale provision should be applied, "...when doing so would nullify or void other terms." (*See* COB at 49.) The Mass & Scale provision broadly supports the applicable Mass & Scale guidelines, and where they seemingly deviate, the "more restrictive standard" rule must resolve the differences. The City failed to apply the "more restrictive standard" to the Project.

Architectural drawings and maps typically state the scale under which they were rendered; for example, the Project's Preliminary Site Plan indicates a scaling of 1 inch = 20 feet, or a ratio of 1:240. (AR 758 [upper right].) The Mass & Scale provision, "A building shall appear to be in scale with traditional single-family houses along the street front" appears below a figure illustrating "...a new structure within the context of existing buildings on the block"— the new structure being indicated by gray shading at grade level. (AR 6085.) Dashed horizontal lines in the figure emphasize that the primary front planes of the buildings, and the building volumes overall, appear to be in a 1:1 scaling relationship to each other. This is the plain meaning of the statement: "A building shall appear to be in scale with traditional single-family houses along the street front". (*Id.*)

The City distorts this plain meaning, incorrectly stating that the Petitioner claims the Mass & Scale provision "...requires any new structure to be built to

the scale depicted in the drawing...” (COB at 49), and later suggesting that the Petitioner understands the provision “...to require all new buildings to resemble the drawing described in the caption.” (*Id.* at 51.) These characterizations are misleading. The Mass & Scale provision describes the scale of a mixed use building *in relation to* the scale of single-family houses that share the street front with it. Larger single-family houses along the street front— for example, more imposing two-story houses— would accommodate a larger mixed use building: the building would still be “in scale”. To be “in scale with” nearby single-family structures does not imply that all mixed use buildings must resemble the building in the drawing.

The City agrees that the provision “shall appear to be in scale” is “...mandatory in nature.” (COB at 49.) The mandatory “shall” states a “...required action or implementation,” giving the provision the quality of a standard. (AR 6036). As stated in the DTRN Design Guidelines: “Language utilized for standards is unequivocal and often quantifiable.” (AR 6036). The City, however, incorrectly argues that treating this provision as controlling would “... lay waste to the very guidelines appearing on the left side of the same page.” (COB at 49.) The City goes on to nominate five such guidelines. (*Id.* at 50.) Of these, the second is inapplicable; quoted completely, it states: “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.) This is a guideline for the B and 3rd Visioning area; it does not apply to the Project, so it is not nullified by application of the mandatory provision and by the location of Project.

Other guidelines claimed by the City to be “...at odds with...” the application of the mandatory Mass & Scale provision (COB at 50) are:

a) *A new multi-unit structure should not overwhelm existing single family structures in terms of height.* (AR 6085.) The standard “...shall appear to be in scale...”, and the guideline, “...should not overwhelm existing single family structures in terms of height” are mutually supportive, emphasizing slightly different aspects of a building’s form. These provisions are not “at odds with” each other.

b) *The front wall of a building should not exceed two stories in height.* (AR 6085.) The Mixed-Use Design Guidelines, including this guideline, are applicable in four Mixed-Use Character Areas near the downtown core. (AR 6081.) Existing single family structures in these character areas are a mixture of smaller single-story houses and larger two-story houses. When situated on a street-front near two-story houses, a building that “...appear[s] to be in scale with traditional single-family houses...” could have a front wall up to two stories in height, but “...not exceed[ing] two stories in height.” In this case, the provisions are not “at odds with” each other. On the other hand, a new building situated near smaller, single-story homes could apparently not have a front wall

built to the discretionary two-story maximum, while also appearing to be in scale with the nearby houses. The “more restrictive standard” rule resolves this case: appearing to be “in scale” implies that the new building would have a single story.

c) *Buildings vary from one to three stories.* (AR 6109.) This is not a mixed-use guideline, but one applying to the Third Street Special Character Area. The Project site is located in the Third Street Character Area (AR 6109 [map at upper left]), and also located in the Core Transition East, a designated Mixed-Use Character Area. (AR 6081.) A properly-designed Project building could “...appear to be in scale with traditional single-family houses along the street front...” while at the same time supporting the Third Street Special Character Area guideline, “Buildings vary from one to three stories.” The “more restrictive standard” rule determines the building’s number of stories, between one and three, depending on the scale of nearby houses. New buildings located on a street-front without single-family houses could potentially be built to three stories.

d) *Two and three story buildings should predominate.* (AR 6109.) The Project site is at the extreme east end of the Third Street Special Character Area, which extends to the west along both sides of Third Street, through the downtown core to the university campus, a length of approximately 7.5 blocks. A properly-designed Project building could “...appear to be in scale...” with

nearby houses, while two and three story buildings could predominate on the remaining 14 (north and south) block-faces of the Third Street Special Character Area. As above, the “more restrictive standard” rule determines the number of stories based on the building’s context.

The fifth item named by the City as “at odds with” the mandatory Mass & Scale provision is not a guideline or other planning provision, but a case study for the Third Street Special Character Area. (COB at 51.) The case study is addressed below.

The Mass & Scale provision “A building shall appear to be in scale with traditional single-family houses along the street front” is more restrictive than the four-story, 50’-6” height, and the 47,983 square feet building area of the Project, specified in the Project’s “Final Planned Development Standards”. (AR 797.) DMC section 40.13A.020(b), which requires “the more restrictive standard” to prevail, when the DTRN Design Guidelines and Planned Development zoning have conflicting standards, puts the Mass & Scale provision in a controlling role in the Project’s case.

Appellants’ neglect of section 40.13A.020(b) mirrors the City’s initial failure to accurately state (AR 6638-6640; 6687-6689), and subsequent reluctance to interpret and analyze (AR 42) this rule and its consequences for Project approval. The administrative record contains images and text, presented to the City Council and Planning Commission, showing that the fundamental

dimensions of the Project building are at least three times greater than those of adjacent houses (AR 122-136; 2990-2992; 3205-3207; 6563-6566; 6683-6686): the proposed Project does not “appear to be in scale with traditional single-family houses along the street front”. The City could not properly find that the Project complies with applicable zoning ordinances, nor could the City properly grant Project approvals, because the City did not apply the strictest standard for the Project’s mass and scale, per DMC section 40.13A.020(b).

**11. THE CITY ABUSED ITS DISCRETION IN MAKING PROJECT FINDINGS AND THEREFORE DOES NOT ENJOY THE EXPECTED DEFERENCE FROM THE COURT.**

The City did not disclose or analyze DMC section 40.13A.020(b) in the Project’s SCEA/IS; the section was subsequently paraphrased in the staff report for the Planning Commission, but the reference to Planned Development was omitted. (*See* AR 6638-6640; 6687-6689.) The Mass & Scale guideline, “A building shall appear to be in scale with traditional single-family houses along the street front” (AR 6085), was not disclosed or analyzed in the SCEA/IS. (*See* AR 6638-6640; 6687-6689.) The City’s planning documents and findings for the Project used inapposite images and references to B and 3rd Street Visioning area provisions from the DTRN Design Guidelines, in some cases omitting text explicitly identifying the guidelines with the B and 3rd area. (AR 122-136; 3207-3210; 6638-6640; 6588-6597.) In each of these cases, the omission, selective paraphrase or inapposite reference removes a barrier to Project

approval, or worse wrongly justifies the Project's consistency with the City's land use policies.

In approving the Project, the City considered land use policies that are general, broadly-worded and permissive, but failed to appropriately consider policies that are prohibitive and that apply specifically to the Project. (AA 318.) The City failed to consider its land use policies "...in a reasoned, supported way." (*See Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173 1193.) No reasonable person would have understated the relevance of restrictive provisions, while employing inapposite provisions. Finally, no reasonable person, gauging the Project's physical features in light of restrictive scale and scale-transition provisions from the General Plan, CASP and DTRN Design Guidelines, could have concluded that the Project should be approved.

**B. THE TRIAL COURT FAILED TO RULE ON ALL OF THE ISSUES RAISED REGARDING THE CITY'S FAILURE TO COMPLY WITH CEQA**

The Petition raised numerous issues regarding the City's failure to comply with CEQA and the legal inadequacy of the SCEA/IS. (AA 16-19, *see also* AA 98-110.) The court, however, only ruled that SCEA/IS failed to address the Project's inconsistency with the General Plan and related planning provisions. (AA345.) If the Court should reverse the trial court's decision regarding the Second Cause of Action, then OEDNA requests that the Court rule on the remaining issues in the Second Cause of Action or remand the matter to



the trial court for further proceedings with respect to the Second Cause of Action.

**1. THE SUSTAINABLE COMMUNITIES STRATEGY AND SUSTAINABLE COMMUNITY ENVIRONMENTAL ASSESSMENT**

Senate Bill 375 provide a greater link between land use planning, transportation planning and efforts to reduce greenhouse gas emissions. Part of SB 375, exempted from CEQA certain transportation priority projects. (§ 21155-21155.3.) These CEQA streamlining provisions allow for “transit priority projects” that are consistent with the general plan land use designation, density, building intensity, and applicable policies for the project area as set forth in the applicable sustainable communities strategy or alternative planning strategy, if that applicable strategy has been approved by the California Air Resources Board. (*Id.*) In order to comply with CEQA’s streamlining provisions, the project must meet a list of environmental criteria set forth in section 21155.1(a) and a list of land use criteria set forth in section 21155.1(b). Finally, the project must provide one of three benefits identified in section 21155.1(c).

A SCEA/IS must identify all significant or potentially significant impacts of the transit priority project, other than those which do not need to be reviewed pursuant to section 21159.28 based on substantial evidence in light of the whole record. The SCEA/IS must identify any cumulative effects that have been adequately addressed and mitigated pursuant to the requirements of [CEQA] in prior applicable certified environmental impact reports. Where the agency

determines that a cumulative effect has been adequately addressed and mitigated, that cumulative effect shall not be treated as cumulatively considerable for the purposes of this subdivision.” (§ 21155.2(b)(1). Additionally, the SCEA “shall contain measures that either avoid or mitigate to a level of insignificance all potentially significant or significant effects of the project required to be identified in the initial study.” (*Id.*, § 21155.2(b)(2).)

An agency may approve a SCEA after a public hearing and making the following findings set forth in section 21155.2(b)(5).

**2. THE PROJECT IS INCONSISTENT WITH THE GENERAL PLAN POLICIES ON HISTORIC PRESERVATION AND WILL IMPACT THE CONSERVATION DISTRICT**

The Project is inconsistent with the General Plan Policies on Historic Preservation: HIS 1.2, HIS 1.3 and HIS 1.4. These policies seek to preserve the historic features of the Project area and to maintain the character of historic resources. Policy HIS 1.2 requires the City to incorporate measures to protect and preserve historic resources into all planning and development. (AR 5948.) Policy HIS 1.3 provides for the City to assist and encourage property owners and tenants to maintain the integrity and character of historic resources and to restore and reuse historic resources in a manner compatible with their historic character. (AR 5949.) Policy HIS 1.4 provides for the City to preserve historic features of the core area and historic districts. (AR 5950.) In addressing Policy 1.4, the

objective is to maintain the historic character of neighborhoods that including the Project site. (*Id.*)

The SCEA/IS discussed the Project's potential impacts to historic resources and concluded that the Project would not have any significant impact related to historic resources. (AR 0497-0517; 0044-0048.) The SCEA/IS and response to comments rely upon the *Historical Resource Analysis Study of the Traskside Center Project 901-919 3rd Street, Davis, Yolo County, California, 95616* prepared by Historic Resource Associates ("HRA") in September 2015/Revised September 2016 (AR 13650-13678); *Addendum Historical Resource Analysis Study of the Traskside Center Project 901-919 3rd Street, Davis, Yolo County, California, 95616* prepared by Historic Resource Associates in September 2015/Revised September 2016 (AR 13223-13235; *see also* 6962-6970.) The City's analysis concluded that the Project would not harm or materially impair, either directly or indirectly, any historic properties. (AR 13229-13230; 13675.)

After having reviewed HRA's historic analysis, GEI Consultants found that the Project would result in an indirect impact to designated historic resources because of their close proximity to the Project and the larger Old East Davis neighborhood, a Conservation District. (AR 0115-0116.) GEI found that the HRA analysis did not account for the Project's impact on the Conservation District, a defined area that must be considered during the planning process for

proposed projects, and designated historic resources. (AR 0116.) The record also contains numerous public comments regarding the impact to historic resources and the Conservation District where the Project is located. (See AR 6819-6820; 6823, 6925-6927; 6930-6932.) GEI's conclusions are supported by the Historical Resource Management Commission that determined that the Project would have a significant adverse effect on three nearby "merit" and "landmark" historic properties due to the change in setting and have a significant impact on the wider Conservation Overlay District. (AR 13627-13629, 3503-3510, 3313-3320.)

The response to comments fails to address the dispute over the Project's impacts to the Conservation District and historic resources. (AR 0044-0048.) The City argues that it is not bound by a single expert's opinion whether other expert's opinion, supported by substantial evidence, are different. (AR 0044.) The City misses the point as it is not a mere disagreement among experts. Instead, GEI Consultant's report states that HRA's analysis performed for the applicant and relied upon by the City, did not adequately account for the impact to the Conservation District and instead only reviewed the impact on historic resources such as specific buildings. (AR 0115-0116.) The City's Master Response to comments confirms that the review was limited to impacts on historic resources identified in the HRA analysis. (AR 0044-0048.)

Under the substantial evidence standard, the City's determination regarding the impact to the Conservation District is not supported by substantial evidence. Additionally, substantial evidence demonstrates that the Project is inconsistent with the General Plan's historic preservation policies to maintain the historic character of neighborhoods that include the Project site.

**3. THE SCEA/IS FAILED TO ADEQUATELY ADDRESS THE FORESEEABLE LOSS OF THE LEASED LAND**

The Project consists of two parcels in the downtown area. The first site is 0.525 acres. (AR 0457.) This parcel is owned and controlled by the applicant. The second parcel is 0.167 acres owned by the Union Pacific Railroad Company. (*Id.*) The Project relies upon a lease area from Union Pacific along the west side of the project site where the outdoor plaza and several parking spaces would be located. (AR 458, 475.) The lease is only for 10 years from April 15, 2016 to April 14, 2026. (AR 13536.) Section 13 of the Lease grants the power to Union Pacific to terminate the lease with just 30 days written notice. (AR 13543.)

Based on the terms of the Lease, the loss of the leased land during the life of the proposed building is a foreseeable event. Real Party does not have dominion over the leased land; nor can the City bind Union Pacific from developing the leased land. Therefore, no assurance exists that the leased land would be available as part of the Project area into the future or even at the time of construction. Although the SCEA/IS states that the leased land "...has historically been leased, controlled or utilized by the owners of the project

site...” (AR 0530), it is not reasonable to assume that the *status quo* for use of the leased land by the Real Party will continue throughout the life of the Project, given the current and expected future demand for property in and around Davis’ downtown core.

Inclusion of the leased land in the Project area inflates the denominator of the floor area ratio (“FAR”) above what the denominator would be, if the Project area contained only the land owned by the applicant. Additionally, leased land is used in the Project’s public plaza, which allows for a FAR bonus for providing outdoor space. Leased land is additionally used for twelve of the Project’s vehicle parking spaces (of which eight are tandem spaces).

The SCEA/IS lacks adequate discussion of the impacts associated with the foreseeable loss of the leased land. (See AR 487, 530-534.) The impacts of the foreseeable loss of the leased land, include, among other things: increased floor-area ratio, increased lot coverage and increased density, above the maximums allowed for mixed use, loss of parking spaces, and loss of open space. (AR 0152.) The SCEA/IS, however, does not discuss or disclose these impacts. (See AR 487, 530-534.) Exclusion of the open space means that the Project would not qualify for a FAR bonus, and the allowable FAR for the Project would be 1.5. (See AR 0074, 0531.)

The SCEA/IS failed to address the potential impacts associated with loss of the lease. The Project approval provides for notification to the City if the

lease is terminated to address the changes and impacts associated with the termination. (AR 0025.) CEQA requires all foreseeable uses of a project, the ‘whole of the action’, be analyzed in the same environmental review document in order to preclude impermissible “piecemealing” of environmental review. (CEQA Guidelines § 15378; *Rio Vista Farm Bureau Center v. County of Solano* (1992) 5 Cal.App.4th 351, 369-370.) In this case, the whole of the action, may be a project footprint smaller than what was analyzed and approved. A smaller footprint means less open space and less parking. The SCEA/IS fails to address those issues.

**4. THE SCEAS/IS FAILED TO ADDRESS THE IMPACTS OF POTENTIAL OF HAZARDOUS MATERIALS AT THE PROJECT SITE**

The SCEA/IS discusses the Phase 1 Environmental Site Assessment (“ESA”) that identified abandoned tanks and historical uses that likely would introduce other hazardous chemicals to the soil on the site. (AR 0438-0440, 0527, 2217-2242.) According to the SCEA/IS, the ESA identified the nearest active Leaking Underground Storage Tank (“LUST”) at 1010 Olive Drive, approximately 1,450 feet from the project site. (AR 0438-0440, 0527, 2238.) The ESA also identified a site at 920 Third Street undergoing remediation for soil and groundwater contamination. (AR 0438-0440, 0527, 2238.)

The ESA failed to address the potential of finding hazardous materials spilled from over 100 years of operation of the adjacent railroad. (*See* AR 2217-

2242.) The January 2015 Geotechnical Report found that some of the material cored from the site had an odor like petroleum products. (AR 2711, 2743, 0108.) The SCEA/IS fails to disclose and discuss that soil excavation may mobilize these noxious and corrosive chemicals as dust that will settle on all the structures in the neighborhood, including the historic resources. (See AR 0091; 0438-0440.)

Richard Casias, an expert geologist, concluded that the ESA failed to adequately evaluate the historical records obtained pursuant to the appropriate protocol nor did it conduct a proper vapor intrusion evaluation of the site and vicinity. (AR 0170.)

Mr. Casias provided testimony based upon his personal observations of VOC at Cable Car Wash and also identified the location of a fuel tank. (AR 170-171.) Finally, Mr. Casias concluded that the SCEA/IS and ESA did not properly address human exposure from hazardous substances. (AR 171.) Mr. Casias recommended investigation be conducted to address potential exposure issues from off-site and on-site vapor intrusion. (*Id.*)

In response to comments, GEOCON Consultants prepared an *Environmental Data Summary*. (AR 6627-6637, 0173.) GEOCON acknowledges the presence of contaminants, but concludes that they do not exceed the allowable limits and that there is insufficient data to make a determination. (*Id.*) GEOCON concludes that TCE may be present in



groundwater near or beneath the site, but based upon available data may not be high enough to cause an unacceptable health risk to current or future site user from potential soil vapor intrusion to indoor air. (AR 6630.) GEOCON's conclusions are based more upon speculation than facts and such speculation does not constitute substantial evidence. (§ 21080(e); CEQA Guidelines, § 15384.) Because of the uncertainty with its speculation, GEOCON proposes a Soil Management Plan to address handling contaminant-impacted soil. (AR 6630.) Nothing in GEOCON's report indicated that it relied upon the applicable 2013 ASTM International Phase I Standard that the ESA failed to do. (AR 6627-6637.)

Mr. Casias' based his comments on research of historical data and his own remedial investigation at some of the sites that may impact the Project site. (AR 0170.) This does not constitute a mere disagreement among experts. Instead, it demonstrates the failure of the HRA and GEOCON reports and studies to fully assess the risks from hazardous materials. As substantial evidence does not support the City's conclusions regarding impacts from hazardous materials, the City's approval of the SCEA/IS constitutes a prejudicial abuse of discretion.

**C. THE PROJECT VIOLATES THE CITY OF DAVIS' DESIGN GUIDELINES UNDER DMC ARTICLE 40.13A**

The court held that DTRN Design Guidelines are not mandatory and that the City does not have to strictly comply with the design guidelines. (AA 335.) The DTRN Design Guidelines for Mixed Use Building Mass and Scale display

a schematic figure with the caption: “A building shall appear to be in scale with traditional single-family houses along the street front.” (AR 6085.) The DTRN Design Guidelines also require that a project must : “Design a front elevation to be similar in scale to those seen traditionally on the block.” (AR 6805.) “The primary building face should not exceed the width of a typical single family building in a similar context.” (*Id.*) “Break up the perceived mass of a building by dividing the building front into 'modules' or into separate structures that are similar in size to buildings seen traditionally in the neighborhood.” (*Id.*) Two and three story buildings should predominate and careful transition to adjacent single story buildings should be incorporated. (AR 6109.) As discussed above, the Project’s mass and scale conflicts with the adjacent houses and structures. Given the mandatory standards set forth in the Design Guidelines and the requirement under DMC section 40.13A.020 that the more stringent standards apply, the Project is inconsistent with the DTRN Design Guidelines. As such, the City’s ignoring mandates and its approval of the Project constitutes a prejudicial abuse of discretion and is contrary to law. (*See* Code of Civil Procedure, § 1094.5.)

The DTRN Design Guidelines for Mixed Use Mass and Scale contain mandatory language applicable to the project: “A building shall appear to be in scale with traditional single-family houses along the street front.” (AR 6085.) The requirement that the guidelines be heeded in project review and approval is

re-enforced by DMC section 40.13A.020(b), which states: “Wherever the guidelines for the DTRN conflict with the existing zoning standards including planned development, the more restrictive standard shall prevail.” Not only do the DTRN Design Guidelines impose requirements on Mixed Use projects in the conservation overlay district, but also these requirements were adopted through ordinance. (*See* DMC, § 40.13A.020(b).)

The claim of “nonmandatory guidelines” is contradicted by use of the word “shall” in the DTRN Design Guidelines. The DTRN Design Guidelines state: “A building *shall* appear to be in scale with traditional single-family houses along the street front.” (AR 6085 [emphasis added].) “Shall” is mandatory. (Gov’t Code, § 14.) Section 40.13A.020(b) is applicable to the Project. The inclusion of the phrase “...including planned development...” indicates that the City adopted section 40.13A.020(b) to specifically guard against erosion of enforcement of the DTRN Design Guidelines even under “exceptional” planning scenarios such as planned development. Thus, the language that “[a] building shall appear to be in scale with traditional single-family houses along the street front” is unequivocal and mandatory. (*See* AR 6085.)

**D. THE PROJECT FAILS TO MEET THE REQUIREMENTS FOR SUSTAINABLE COMMUNITIES ENVIRONMENTAL ASSESSMENT**

The court, without any substantive discussion, held that the City satisfied the elements of Public Resources Code section 21155(b) authorizing the use of

SCEA/IS. (AA 345, fn 6.) Section 21155 sets forth the requirements for a project to qualify as a transit priority project. Only those projects that meet the requirements of a Transit Priority Project are eligible to rely upon a SCEA/IS as the environmental document under CEQA. (§ 21155.2.) In order to qualify as a transit priority project, a project must meet all of the requirements set forth in section 21151.1(a). The project cannot have a significant effect on historical resources pursuant to section 21084.1. (§ 21155.1(a)(5).) Section 21084.1 provides in relevant part that “[t]he fact that a resource is not listed in, or determined to be eligible for listing in, the California Register of Historical Resources, not included in a local register of historical resources, or not deemed significant pursuant to criteria set forth in subdivision (g) of Section 5024.1 shall not preclude a lead agency from determining whether the resource may be an historical resource for purposes of this section.”

Although the Planning Commission and Historic Resource Management Commission found that the Project area is not a historic district (AR 3312-3322, 3501-3518, 3126-3130, 3303-3310), the Conservation District (CD) zoning overlay serves as a functional equivalent of a historic district. The SCEA/IS states that “[a] Conservation District was adopted rather than a Historic District in order to allow more flexibility in redevelopment standards while allowing compatible new construction.” (AR 106, 120, 443, 484, 506.) This represents the purpose and intent of the Conservation District designation. The City

established the Conservation District as part of the implementation of the DTRN Design Guidelines, which implement historical protection policies and mitigation measures called for in the General Plan EIR. (*See* AR 0085, 0093-0095.) The City argues that since the City has not designated the Project area a Historic District it is not a designated historical resource under CEQA. (AR 106, 0044-0048; *see* § 21084.1.) Despite this statement, the City acknowledges that it adopted a Conservation Overlay Zoning District as opposed to historic district in order to provide some flexibility. (AR 106.) A review of the Design Guidelines and Conservation District overlay indicates that the City seeks to protect these traditional neighborhoods in the same way the City protects historic district. (*See* AR 0085-0088, 0106, 0044-0048.) As such, the City's reliance of CEQA streamlining and approval of a SCEA/IS constitutes a prejudicial abuse of discretion and is contrary to law.

## **VII.**

### **CONCLUSION**

Based upon the foregoing, OEDNA respectfully requests that this Court affirm the trial court's Judgment

DATED: September 3, 2020

Respectfully Submitted,

LAW OFFICE OF  
DONALD B. MOONEY

By \_\_\_\_\_/s/\_\_\_\_\_  
Donald B. Mooney  
Attorney for Plaintiff, Respondent  
& Cross-Appellant Old East Davis  
Neighborhood Association

**CERTIFICATE OF WORD COUNT**  
**(Cal. Rules of Court, Rule 8.204(c))**

The text of this brief consists of 13,928 words as counted by the Microsoft Word word-processing program used to generate the brief.

DATED: September 3, 2020

\_\_\_\_\_  
/s/  
Donald B. Mooney

**PROOF OF SERVICE**

I am employed in the County of Yolo; my business address is 417 Mace Boulevard, Suite J-334, Davis, California; I am over the age of 18 years and not a party to the foregoing action. On September 3, 2020, I served a true and correct copy of

**RESPONDENT’S OPOSITION BRIEF AND  
CROSS-APPELLANT’S OPENING BRIEF**

  X   Via TrueFiling

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Interest Trackside Center,  
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  X   (by mail) on all parties in said action listed below, in accordance with Code of Civil Procedure §1013a(3), by placing a true copy thereof enclosed in a sealed envelope in a United States mailbox in the City of Davis, California.

Clerk of the Court  
Yolo County Superior Court  
1000 Main Street  
Woodland, CA 95695

I declare under penalty of perjury that the foregoing is true and correct.  
Executed on September 3, 2020, at Davis, California.

\_\_\_\_\_  
/s/  
Donald B. Mooney



