IN THE

COURT OF APPEALS OF THE STATE OF CALIFORNIA

IN AND FOR THE

FIRST APPELLATE DISTRICT

DIVISION THREE

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EAST PALO ALTO ASSOCIATION OF CONCERNED HOME OWNERS AND RESIDENTS, et al.,

Appellants,

vs.

MENLO PARK, et al.,

Respondents.

A022110
SC 267915

APPELLANTS' OPENING BRIEF ~~AND REQUEST FOR STAY ORDER~~

Appeal from the Order of the Superior Court of the State of California in and for the County of San Mateo.

Honorable John J. Bible, Judge

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FIRST APPELLATE DISTRICT

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vs.

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Respondents.

A0022100
SC 267915

APPELLANTS' OPENING BRIEF AND REQUEST FOR STAY ORDER

INTRODUCTION

This is an appeal from an adverse judgment on appellants' complaint for declaratory relief and a petition for a writ of mandate. Appellants had sought to set aside respondent City of Menlo Park's approval of the Master Plan for the construction of an industrial complex (hereinafter referred to as the Project), as well as the certification of the Environmental Impact Report (EIR). Appellants contended that respondent city exceeded its authority in approving a project which significantly imposes severe environmental burdens on residents outside its municipal jurisdiction.

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Appellants also argued that the EIR prepared for use in considering the approval of Dumbarton Distribution Center was inadequate under the California Environmental Quality Act (CEQA).

The case was tried on January 7 and 13, 1983, before the Honorable John J. Bible, judge of the Superior Court, San Mateo County, sitting without a jury. (A/App Vol. IV, p. 163) On January 24, 1983, a decision was rendered denying the petition for Writ of Mandate. (A/App Vol. IV. p. 165) On March 23, 1983, a statement of decision was filed. (A/App Vol. IV, p. 163) Judgment was entered on February 7, 1983. (A/APP Vol. IV, p. 165) Petitioners filed notice of appeal on March 24, 1983 which was timely. (A/App Vol. IV, pp. 187-188)

STATEMENT OF THE CASE

A. Statement of Facts

1. Description of the Project

Dumbarton Distribution Center (hereinafter referred to as the Project), as approved, is to consist of warehouses and a manufacturing complex on a 52.6 acre parcel of land. (A/App Vol. I, P. 3,6) Nineteen complexes of different sizes will be built on the project site. (A/App Vol. I, p. 3,5) While four of these complexes are intended for warehousing use, the remaining fifteen are designed for manufacturing undertakings. (A/App Vol. I, p. 3,5) These manufacturing complexes immediately border the rear of the residential homes in East Palo Alto. (A/App Vol. I p. 4, 71, 113) Access to the project is primarily through the residential area of East Palo Alto. (A/App Vol. I, p. 3,70)

2. The Local Setting of the Project

The project site is located in, essentially, a rec-

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1 tangular shaped parcel situated between the respondent city
2 of Menlo Park and the City of East Palo Alto. (A/App Vol. I, p. 71)
3 At the heart of the present lawsuit is the project site's unique
4 location. While it is physically situated within respondent city
5 Menlo Park's municipal jurisdiction, it is, however, on the east
6 and south sides immediately bounded by single family residential
7 homes which are under the jurisdiction of the City of East Palo
8 Alto, an unincorporated area of San Mateo County at the time of
9 the law suit. (A/App Vol. I, p. 12, 127)

10 The respondent city's General Plan designates the area
11 where the project site is located as general industrial in which
12 heavy manufacturing use is permitted. (A/App Vol. I, p. 13) The
13 land use designation of the adjacent area in East Palo Alto is,
14 however, single family residential. (A/App Vol. I, p. 13) About
15 150 feet from the project site, on the East Palo Alto side, there
16 is an elementary school. (A/App Vol. I, p. 127) Trips to and
17 from the project are primarily through East Palo Alto's residential
18 area. (A/App Vol. I, p. 107A)

19 Furthermore, the proposed site of the project supports
20 a natural transition from upland meadow to wetland bay.(A/App Vol.
21 II, p. 37) These eco-systems support a great variety of wildlife.
22 (A/App Vol. II, p. 37) Because of its closeness to the bay, the
23 project site is subject to inundation with the occurrence of one
24 percent flood from tidal action. (A/App Vol. I, p. 29) The
25 project site is also between two recorded archeological sites.
26 (A/App Vol. I, p. 39)

27 3. <u>The Project And Community Response</u>

28 The residents of East Palo Alto, united as the East Palo

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Alto Association of Concerned Home Owners and Residents, have opposed the approval of the project since it was first presented to respondent city. (A/App Vol. III, public hearings on the Project) Their opposition flows not only from their affection for the single family residential character of their community but also from the arbitrary manner in which an enormous environmental burden was to be imposed on them by respondent city. (A/App Vol. III, public hearings) As a citizen once told the city council of respondent city:

> I hope that this Planning Commission and the council, will take under consideration that we live there. We have invested our life savings in our homes and we certainly would not want anything to come in and minimize the value of our property that we value quite highly....So, therefore, with this project that is going virtually in our backyard, how much more noise and pollution would be increased upon us....My conclusion: We're not against progress, but we hope that in line with progress, that you consider those that have tied up their life savings to invest in a place to raise their children, to see their grandchildren come up healthy and have a place to stay instead of being stifled by progress. (A/App Vol. III, pp. 197-198)

The record clearly shows that all the residents who spoke at the planning and city council meetings were opposed to the proposed site of the project. (A/App Vol. III, public hearings) The Municipal Council of East Palo Alto which was the public body which articulates the predominant concern of the community, was unanimously opposed to the project. (A/App Vol. III, pp. 229-230)

B. Summary of Administrative Proceedings

On its July 19, 1982 meeting, the Planning Commission recommended to the City Council the approval of the Master Plan of the project together with the certification of the Environ-

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1 mental Impact Report (EIR) thereon. (A/App Vol. III, p. 151)
2 Thereafter, at its August 17, 1982 meeting, the City Council of
3 respondent city approved the Master Plan and certified the En-
4 vironmental Impact Report. (A/App Vol. III, p. 276) It was
5 this city council's action that served as a focus for appellants'
6 lawsuit.

7 C. Summary of Trial

8 Appellants filed their petition in Propria Persona.
9 (A/App Vol. IV, p. 2) The petition and complaint filed were
10 labelled "Complaint For Declaratory Relief, Temporary Restraining
11 Order, Preliminary Injunction, Permanent Injunction and Damages".
12 (A/App Vol. IV, p. 2) Appellants' complaint/petition made
13 numerous allegations which sought a declaratory relief and writ
14 of mandate against respondent city of Menlo Park's approval of
15 the project as well as against the certification of the EIR.
16 While appellants' action for declaratory relief challenged the
17 authority of the respondent city to approve a project that imposes
18 substantially adverse environmental burdens on residents outside
19 its municipal jurisdiction, the action for a writ of mandate was
20 essentially based on the argument that EIR was inadequate under
21 CEQA. (A/App Vol. IV, pp. 2-12)
22 Respondent city demurred to appellants'/petitioners'
23 complaint. (A/App Vol. IV, pp. 13-37) The Court by a tentative
24 ruling, granted the demurrer with a leave to amend and reiterated
25 this ruling at the hearing on December 3, 1982. (RT, 3:20-26)*
26 However, after oral arguments at the hearing on December 3, 1982,
27 it appears that the court sustained the demurrer without leave
28 to amend. (January 7, 1983, RT, 9:20-22) The Court ruled against

* first number refers to page, second numbers refer to lines

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appellants on the petition for a writ of mandage. (A/App Vol. IV, p. 163) No decision on the merit was made on appellants' declaratory relief cause of action. Judgment was entered on February 4, 1983 and appellants filed their Notice of Appeal on March 24, 1983. (A/App Vol. IV, pp. 187-188)

ARGUMENTS

I.

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT SUSTAINED A DEMURRER WITHOUT LEAVE TO AMEND

A. Proceeding on Demurrer.

1) The Complaint/Petition

Appellants/Petitioners filed their complaint labelled "Complaint For Declaratory Relief, Temproary Restraining Order, Preliminary Injunction, Premanent Injunction, And Damages" in pro per at the Superior Court, San Mateo County. (A/App Vol. IV, p. 2) Although the complaint/petition is not artfully drafted, fairly read, it discloses two causes of action: A cause of action for declaratory relief and a cause of action for writ of mandate. In undertaking these two causes of action, petitioners intended to obtain two different reliefs. If successful, the relief they sought to obtain under declaratory relief would have stopped the project. The relief under the writ of mandate, however, would only have resulted in having the respondent re-prepare an adequate EIR.

a) Cause Of Action For Declaratory Relief

It is a general rule that in an action for declaratory relief, the complaint is sufficient if it sets forth facts showing the existence of an actual controversy relating to the

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1 legal rights and duties of the respective parties and requests
2 that the rights and duties be adjudged. Code of Civil Procedure
3 §1060; See also Bennett v. Hibernia Bank (1965) 47 Cal. 2d
4 540, 549-550. Furthermore, essential allegations not expressly
5 alleged, but which appear by necessary implication, may be suf-
6 ficient to allege a cause of action for declaratory relief.
7 Harney, Inc. v. Contractors' State License Bd (1952) 39 Cal. 2d
8 561, 564

9 In the instant case, appellants alleged that on
10 August 17, 1982 the City Council of Menlo Park, approved the
11 Master Plan for the construction of the Project. (Paragraph XII)*
12 Appellants further alleged that the approval of the Master Plan
13 will adversely affect the quality of life and the environment of
14 residents outside of the municipal jurisdiction of Menlo Park.
15 (Paragraphs XII, XIV, XV, XVI) More specifically, appellants
16 alleged that the approval of the project would subject residents
17 of East Palo Alto to increased traffic and noise level (Paragraph
18 XIX), to increased flood hazards (Paragraph XXI). Furthermore,
19 they alleged that the approval of an industrial complex next door
20 to residential neighborhood would diminish "the quality of the
21 environment and the peace and quiet enjoyment of home and property
22 to which the residents are entitled". (Paragraph XXIII) From
23 reading paragraphs XIX, XXII, XVI, XXX, and also the third para-
24 graph in the prayer, it is clear that appellants are seeking
25 a judicial declaration as to whether the respondent city exceeded
26 its municipal governmental power by approving a project which
27 significantly affects and severely burdens the environment of
28 ///////

*All references to paragraphs are to paragraphs in petitioners'/ appellants' complaint (A/App Vol. IV, p.p. 2-12) .

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non-residents outside the city's municipal jurisdiction.

b) Cause Of Action For Writ Of Mandate

That plaintiffs' complaint contains every allegation essential to a petition for a writ of mandate is not denied by respondent (see pages 3 and 4). An essential allegation for writ of mandate is stated in section 9.15 of *California Administrative Mandamus* (Continuing Education of the Bar pp. 145-146). The allegation consists of:

1. Beneficial interest of the party.
2. The capacity of the respondents.
3. Describe respondents' adjudicatory capacity.
4. Describe the basis in which respondents' actions are involved.
5. Allege that petitioner has exhausted his administrative remedies.
6. Show the absence of any other adequate remedies.

Appellants' complaint satisfies all these requirements. Paragraphs I and II allege beneficial interest; paragraphs III through IX allege respondent's capacity; paragraphs X through XXVI allege in detail respondent's action and its invalidity; paragraph XXVII states the exhaustion of administrative remedy; and finally paragraphs XXX and XXXI allege that plaintiffs do not have a plain, speedy or adequate remedy under the law.

From the above it is very clear that appellants did, indeed, meet their burden of alleging the essential elements of causes of action for both declaratory relief and a petition

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for a writ of mandate.

2) Respondent's Demurrer

Respondent demurred for failure to state a cause of action and at the same time answered on the assumption that the petition filed by petitioners can only be a petition for writ of mandate under section 21168 of the Public Resource Code. (A/App Vol. IV, pp. 13-37) Respondents demurrer was not couched in the language of the grounds permitted under §430.10, of the Code of Civil Procedure. By reading the Points and Authorities (A/App Vol. IV, p. 27) and also the waiver of objection to form of complaint filed by respondent (A/App Vol. IV, p. 43), it is, however, clear that the ground for the demurrer that respondent was alleging could only be failure to state a cause of action (a general demurrer).[1] Respondent in the "Waiver to objection to form of complaint" makes his ground of objection (demurrer) clear:

> It should be brought to the court's attention, however, that defendants herein have never during the course of these proceedings objected that plaintiffs failed to properly stylize this action as one for administrative mandamus. Rather, defendants' demurer/opposition to petition for writ of mandate attacks the legal sufficiency of the substance of plaintiffs' action. (A/App Vol. IV, p. 44)

B. Trial Courts Error and Prejudicial Abuse of Discretion

The trial judge by tentative ruling, sustained the demurrer with leave to amend. (December 3, 1982, RT 3:20-26) At the end of the oral argument held on December 3, 1982, the judge, however, dropped his tentative ruling and sustained the demurrer without leave to amend. (December 3, 1982, RT 22:21-26) The reason for dropping the tentative ruling was the filing by

1 This is because a demurrer can only be made on one of the grounds stated under Section 430.10 of the Code of Civil Procedure.

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1 respondent of waiver of his demurrer/objection to appellants'
2 "defective" petition. This is clear from the judge's statement
3 on January 7th hearing. The judge stated:

4 Originally, it was a question of whether or
5 not the demurrer was before me, and I said, if I was going to allow a demurrer, if it
6 was a demurrer and I was to hear a demurrer, I would allow an amendment because I didn't
7 want to rule without leave to amend, because I think that would be in error.

8 You then filed a waiver- - -the respondent's
9 did- - -of any defects, and wanted it treated as a writ of mandate and that's what was
10 decided on that day, and that's the way it stands. (January 7, 1983, RT 5:3-12)

11 Thus petitioners were not only denied the opportunity
12 to amend their complaint/petition but also were required to
13 proceed <u>only</u> on the writ of mandate cause of action. The court's
14 reason for denying leave to amend as could be noted from the above
15 statement, was the filing of a "waiver of objection to the com-
16 plaint" by the respondent. This, however, is contrary to law.
17 Section 430.80 of the Code of Civil Procedure clearly provides
18 that an objection that the pleading does not state facts sufficient
19 to constitute a cause of action cannot be waived. See also
20 <u>Stevens</u> v. <u>Torregano</u> (1961) 192 CA 2d 105. Thus to use the
21 "waiver of objection" filed by the respondent as a ground to deny
22 petitioners/appellants the opportunity to amend and also proceed
23 with their declaratory relief cause of action is clearly contrary
24 to law and an abuse of discretion.

25 Furthermore, and more importantly, it is settled as a
26 matter of law that when defendant/respondent demurrs on the ground
27 that the complaint does not state a cause of action (a general
28 demurrer), defendant/respondent is thereby limited to convincing

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the court at the hearing on the demurrer that a thorough search of the complaint will fail to reveal an adequate cause of action. Banerian v. O'Malley 42 Cal. App. 3d 604, 611; 3 Witkin, California Procedure 2d ed. 1971 §802 p. 2415. In the instant case, appellants met their burden of alleging the essential elements for both declaratory relief and writ of mandate. Respondent, however, instead of "searching" the complaint and showing the absence of any cause of action, admitted that a cause of action for a writ of mandate was properly pleaded. Respondent did not argue that petitioners' complaint does not state a cause of action for declaratory relief. Instead, respondent's objection, as summarized at oral argument on the hearing on December 3, 1982, was as follows:

> But the point is that all of these essential allegations for a petition for writ of mandate are in fact contained in the complaint they filed. So our objection is not that they--that an essential allegation of their cause of action is not there. It is that when the Court considers matters it must judicially notice there is no case here, and that is why the hearing on the petition for writ of mandate becomes the same thing as the hearing on the demurrer.
>
> On demurrer -- In other words, this it not the ordinary demurrer, Your Honor, where we are saying they have neglected to plead something essential. It is all there.
>
> In fact, we have prepared a waiver, if that needs to be clarified, of any objections to their failure to have pleaded an essential element of the cause of action.
>
> We are saying it is there. It is properly pleaded on its face. But once it is tested against matters the Court must judicially notice, it becomes very apparent there is no case here at all.
>
> So there is nothing that they need to do. They can polish this complaint, or what have you, you know, they can throw out the extraneous matter. But there is nothing fatally defective

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on the face of the complaint.

. . .

> Our demurrer doesn't say they need to amend to clean things up. Our demurrer says when the Court looks at the only facts it can look at in this case, and which it must look at on judical notice, there is no case here. There is nothing they can do by way of an amendment to cure that. It is not as though they omitted some essential.

Based on the above argument of the respondent, the trial court denied leave to amend and ruled that appellants' complaint is only for a writ of mandate. If respondent seeks to assert that the administrative records would vindicate respondent's action, he must do so through another procedure, something different than a demurrer to the complaint. A demurrer is not the vehicle by which respondent can invoke the administrative record to test the validity of the allegations stated in petitioners'/appellants' complaint. As the Appeals Court succinctly put it:

> [T]he sole function of a demurrer is to test the sufficiency of the challenged pleading. It cannot, properly, be addressed to or based upon evidence or other extrinsic matters. A defendant is not permitted to allege facts in his demurrer, which, if true would make the complaint vulnerable. Cravens v. Coghlan (1957) 154 Cal. App. 2d 215,217.

The existence of the administrative record, of which the court could take judicial notice, has nothing to do with the issue of whether plaintiffs have a cause of action for declaratory relief and writ of mandate. The administrative record was not filed as part of appellants' petition. It was filed as per the requirement of section 1094.5 (a) of the Code of Civil Procedure where all or part of the record of proceedings of an administrative body has to be filed so that the reviewing court, for the

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purpose of issuing peremptory writ of mandate, has to determine among other things: whether the evidence heard by the agency was sufficient or whether proper findings have been made. Thus, it is a document filed in the action to be reviewed and examined at the trial stage. In ruling on a demurrer the trial court cannot look into its content to test the sufficiency of appellants' allegations.

In Kleiner v. Garrison (1947) 82 Cal App 2d 442, a case factually similar to the instant case, plaintiff filed a petition for writ of mandate under Code of Civil Procedure §1094.5 to challenge the denial of insurance broker's license by the Insurance Commissioner. As in the instant case, a transcript of the administrative record and proceedings which had taken place before the administrative body (Insurance Commissioner) was filed. The defendant there as in the instant case, demurred on the ground that petitioners' petition for writ of mandate when tested against matters in the administrative record which the court must judicially notice, does not state a cause of action. As in the instant case, the trial court sustained defendants' demurrer. But the Appellate Court reversed the trial court's decision. In so doing the court unequivocally held:

> The vice of defendant's argument is in his contention that the right to take judicial notice that the record of the commissioner's proceedings had been filed among the papers of the case and was a record of the court must be extended to include the right to take notice of the truth of the evidence produced at the hearing.
>
> . . .
>
> In the instant case the record of the hearing before the commissioner was not included as a

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part of the petition for a writ of mandate nor was it made so by reference. It was merely a document filed in the action. In taking judicial notice of its records the court could go no further than to take notice that the record was in the file. Its contents were a concealed book insofar as the consideration of the demurrer was concerned. (Emphasis added) 82 Cal. App. 2d at 446

Whether appellants have made proper allegation for an action of declaratory relief, should have been tested only by examining appellants' allegation in the complaint.

In summary, the Superior Court has patently abused its discretion in sustaining respondent's demurrer in this case without leave to amend. It also made a prejudicial error in not recognizing appellants' declaratory relief cause of action. A cursory reading of the file available on appeal will readily disclose that the grounds for demurrer which respondent used to gain a favorable ruling in Superior Court to have appellants' declaratory relief action rejected were simply unavailable to him. Elementary civil procedure rules which bind the Superior Court as well as counsel, prohibit the use of a demurrer on any grounds except those stated in Civil Procedure Code Section 430.10. Furthermore, procedural rules prohibit attacking a complaint except on allegations either stated or missing on the face of the complaint. In the instant case, the complaint is not lacking for a cause of action in declaratory relief and writ of mandate. If respondent seeks to defeat the complaint on the basis of the "administrative record" of the respondent city, he must do so by some other legal procedure, not by use of a demurrer.

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II.

THE APPROVAL OF THE PROJECT BY RESPONDENT CITY VIOLATES THE STANDARDS SET FORTH BY THE CALIFORNIA SUPREME COURT IN ASSOCIATED HOME BUILDERS V. THE CITY OF LIVERMORE

A. The Livermore Standard

Traditionally local government's actions have been tested for their validity by judicial determination of whether the local municipal council's action bears a rational relation to the health, safety and general welfare of the affected community. Euclid v. Ambler Realty Co. (1926) 272 U.S. 365; Miller v. Board of Public Works (1925) 195 Cal. 477. With more urbanization and congested development, however, spill-over effects of local decisions became an issue for both courts and legislature. Thus in 1972, in Scott v. City Of Indian Wells (1972) 6 Cal. 3d 541, the California Supreme Court for the first time held that non-resident owners of property adjoining a proposed development should be consulted and that the city had a duty to hear their views and consider the project in light of its effect on them. The court very pointedly noted:

> In the early days of zoning, when there were "large undeveloped areas at the borders of two contiguous towns",...the municipality's responsibility in using its zoning power might extend only to the municipal boundary lines. In today's sprawling metropolitan complexes, however, municipal boundary lines rarely indicate where urban development ceases. We have come to recognize that local zoning may have even a regional impact....Certainly it is clear that the development of a parcel on the city's edge will substantially affect the value and usability of an adjacent parcel on the other side of the municipal line.
>
> To hold, under these circumstances, that defendant city may zone the land within its

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border without any concern for adjacent landowners would indeed "make a fetish out of invisible municipal boundary lines and a mockery of the principles of zoning". (Emphasis added) 6 Cal. 3d at 548

This judicial recognition that a municipal council in taking local governmental action within its territorial jurisdiction should consider the "public welfare" interest of next door neighbors was further confirmed by the Supreme Court in Associated Home Builders v. City Of Livermore, (1976) 18 Cal. 3d 582. (hereinafter referred to as Livermore). The California Supreme Court in the Livermore case was presented with an attack on an action by Livermore which prohibited the issuance of new residential building permits until school, water and sewer facilities were brought up to a certain standard. The effect of this local governmental action was to shift and impose the burden of providing housing facilities to regions outside the city of Livermore. The court, therefore, was confronted with the issue of the validity of local governmental action which subjects regions outside the municipal jurisdiction of the city to the burden of providing the housing needs. The court in an unambiguous statement set the standard upon which local action should be tested:

> When we inquire whether an ordinance reasonably relates to the public welfare, inquiry should begin by asking whose welfare must the ordinance serve. In past cases, when discussing ordinances without significant effect beyond the municipal boundaries, we have been content to assume that the ordinance need only reasonably relate to the welfare of the enacting municipality and its residents. But municipalities are not isolated islands remote from the needs and problems of the area in which they are located; thus an ordinance, superficially reasonable from the limited viewpoint of the municipality, may be disclosed as unreasonable when viewed from a larger perspective.
>
> These considerations impel us to the conclusion

that the proper constitutional test is one which inquires whether the ordinance reasonably relates to the welfare of those whom it significantly affects (Emphasis added) 18 Cal. 3d at 607

The court then set three helpful steps by which the reviewing court should examine the validity of local action with external impact:

(1) The reviewing court should forecast the probable effect and duration of the local governmental action in question.

(2) The court should then identify the competing interests affected by local action.

(3) Having identified and weighed the competing interests, the final step is to determine whether that local governmental action, in light of its probable impact, represents a reasonable accommodation of the competing interest. Cal. 3d at pp. 608-610

B. Respondent City Does Not Have Authority to Approve The Project

In the case at bar, appellants make three contentions. First, the approval of the Master Plan for the construction of the industrial complex, will result in significant environmental degradation thereby posing a greater danger to the public health and welfare of the residents of East Palo Alto. Second, the project, in as much as it significantly affects the residents of East Palo Alto, does not contribute to their welfare in any

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way. Third, the project violates the Livermore standard.

1. Some of the Project's Significant Adverse Environmental Effects on Residents of East Palo Alto

a) The approval of the project at its present location directly and fundamentally conflicts with low density single family residential community plan and goal of East Palo Alto. (A/App Vol. I, p. 13, 127) The Guidelines for the implementation of the California Environmental Quality Act of 1970, a regulation promulgated to implement the CEQA, in fact, clearly state that if the location of a "project" conflicts with a community plan, it constitutes a significant adverse environmental effect.[1] The economic and aesthetic values of the essentially single family residential neighborhood would be lost.

b) The project site is located in an area of potential geologic hazard. This poses a greater threat to the East Palo Alto residents.

c) Development of the project will increase and concentrate storm water run-off from the project site to the residential area.

d) Access to the project is primarily through East Palo Alto residential area. (A/App Vol. I, p. 107A) Thus the project will increase the noise level, as well as the traffic level in the residential neighborhood of East Palo Alto. (A/App Vol. I, p. 93) The increased traffic will expose to greater risk the safety of the school children going to nearby schools. (A/App Vol. I, p. 127)

e) As the result of increased traffic, congestion would create a potentially serious air pollution problem

1. The Guidelines under Appendix G provides: A project will normally have a significant effect on the environment if it will (a) Conflict with adopted environmental plans and goals of the community where it is located; (b) Have a substantial, demonstratable negative aesthetic effect.

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in the residential neighborhood of East Palo Alto. (A/App Vol. 1, pp. 51-53)

f) Land fill in the project site which is subject to tidal action, together with anticipated increase in run-off water would create a danger of flooding in the residential neighborhood of East Palo Alto. (A/App Vol. 1, pp. 29-30)

g) The project will eliminate the natural habitat and biological resources in the project site. (A/App Vol. 1, p.21) These resources are part of the environmental wealth of East Palo Alto.

h) Permission to construct on the project site will eliminate the open space and recreational site that is of significant benefit to the residents of East Palo Alto. (A/App Vol. 1, p. 93)

2. <u>There Is No Identifiable Benefit From The Project To The Residents Of East Palo Alto</u>

a) <u>Fiscal</u> - While the project generates public revenues, such as property tax, business license tax, and utility franchise taxes, for the city of Menlo Park, none, however, would benefit the residents of East Palo Alto.

b) <u>Employment</u> - It is estimated that the project will add approximately 1,100 to 1,300 new jobs over a four year period in the area. (A/App Vol. 1, p.88) But there is no indication that East Palo Alto residents would benefit from this employment opportunity nor is there any policy adopted that would formalize hiring of East Palo Alto residents. In fact in a letter, dated November 24, 1981, the San Mateo County Planning Department specifically requested that the "DEIR should also consider the project's effec-

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tiveness for alleviating unemployment in East Palo Alto" and suggested that programs to hire East Palo Alto residents be implemented. (A/App. Vol. II, p. 108) This specific concern, however, was never addressed in the final EIR.

Thus, to summarize, approval of this project places a dual burden on the residents of East Palo Alto. On the one hand it has significant adverse environmental effects thus posing a danger to the public health of residents and school children. On the other hand, the project not only patently fails to provide any job opportunity that is mostly needed in East Palo Alto, but also fails to make any kind of beneficial contribution whatsoever to the welfare of East Palo Alto.

3. The Project Violates the Livermore Standard

The Livermore decision, with its call for a special degree of judicial scrutiny in reviewing local government approval of projects with regional effect, is appropriate in the case at bar. Because appellants are all residents of East Palo Alto and not of Menlo Park, they cannot express their feelings on election day on the destructive environmental burden imposed on them by the respondent city. This fact is an important factor for invoking the Livermore standard. In its recent decision, the Appeals Court in Twain Harte Homeowners v. County of Toulumne (1982) 138 Cal. App. 3d 664 in recognizing the vital role voting and the political process plays in the deliberations, consideration and shaping of the content of an Environmental Impact Report (EIR), noted:

> Only by requiring the county to fully comply with the letter of the law can a subversion of the important public purposes of CEQA be

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avoided and only by this process will the public be able to determine the environmental and economic values of their elected and appointed officials, thus allowing for appropriate action come election day should a majority of the voters disagree. (Emphasis added) 138 Cal. App. 3d at 679; See also People v. County of Kern (1976) 62 Cal. App.3d 761, 769-774

Appellants in the instant case cannot vote for or against the environmental and economic values of the members of the Menlo Park city council. They have no say on whom shall be appointed to the Menlo Park planning commission. Participation and election in the political process of Menlo Park, an important check against reckless environmental decision of public agencies, is not available to them. Thus, under these circumstances, appellants contend that "judicial deference" to the wisdom of the legislature is tantamount to "judicial abdication".

The Appeals Court in Del Mar v. City of San Diego, (1982) 133 Cal. App. 3d 401, justifying the necessity for an elevated level of judicial scrutiny stated:

> The concept of judicial deference to legislative determinations is based, at least in part, on the assumption that legislative abuse is constrained by the political process. One can normally assume that a city council will accurately assess the best interests of the city's residents; if it does not, the residents may express their dissatisfaction in the next election. But when a city council is asked to consider and evaluate the interests of non-residents (i.e. inhabitants of the region surrounding the municipality), there would appear to be a latent predisposition toward undervaluation of these interests even in the most well-meaning of municipal governing bodies. (Emphasis added) 133 Cal. App. 3d, 409

In the case at bar, the interests of the residents of East Palo Alto were undervalued. There was more than a

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natural bias in favor of the approval of the project inspite of its adverse environmental burdens. This becomes vividly apparent in the statement made at a public hearing by Kay Paar, one of the council persons of the respondent city. Council Person Paar stated:

> The fact of the matter is we have a development that is clearly overdeveloped. It's a message to the residents and the character of the neighborhood---there is not one single place in Menlo Park where this development could be put up against any other residential housing in Menlo Park and we talk about LAFCo and we talk about the Sphere of Influence and we talk about all the little streets and what the policy is about one street or another and blah, blah, blah and you look at this---I mean, this is a disgrace. It is surrounded by a residential area of East Palo Alto, where people have every right in the world to be treated as a residential area and to put this here is so insulting that I can understand why the East Palo Alto Municipal Council has not been into this Council. But I know, I agree with the lady from, whose name I can't remember, who spoke last week and said there is no place in Menlo Park where this development would be put and she's absolutely right. There is not a single street in the City of Menlo Park that would let this hunk of development be behind it or across from it and I think that we really need to look at this from a standpoint of what we are doing to an area that cannot really speak for itself. An unincorporated area has very little input and so we really ought to be responsible and this project is very irresponsible and I think that the particular question, I'm seeing it now, has to be addressed. To leave that in the condition that it is and to leave that with a wall, with those folks on Kavanaugh Drive, is absolutely wrong. Whether or not the developer wants to fill the land with seven feet of fill, which to me is ridiculous but if that's what he wants to do, and that's the risk he wants to take, that to me is inconsequential because that's a risk the residents on Kavanaugh Drive are having to take by having the density of that development in their back yard. (Emphasis added) (A/App Vol. III, pp. 249-250)

Thus it may fairly be stated that the approval of the project was carried without regard for the rights and

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welfare of the residents of East Palo Alto. Insulated from public accountability, respondent city was in a position to approve the project with significant adverse environmental effect. This was in the face of serious opposition, both by the residents and the Municipal Council of East Palo Alto.

The Livermore opinion is directly on point in this case. It provides that local decision of any sort which has external impact must be viewed with the regional interests in mind, whatever those interests may be. The situation in Livermore happened to involve a local government action that placed a limitation on construction of houses, but it is obvious that the reasoning applies equally well to the construction of any large project which has an adverse spill-over effect on the welfare of next door residents. The Courts of other states have cited Livermore approvingly in applying it in precisely this manner.

The Supreme Court of the state of Washington, in a decision that deserves widespread judicial emulation, has explicitly applied the Livermore test to a situation where a local decision caused a negative environmental impact on residents outside the municipal jurisdiction. In Save v. City of Bothell, (1978) 89 Wash. 2d 862, 576 Pac 2d 401, the Washington Supreme Court concluded that the City of Bothell had not taken steps to recognize and mitigate the environmental impact of a proposed shopping center upon the surrounding non-resident population. The Court stated:

> Bothell may not act in disregard of the effects outside its boundaries. Where the potential exists that a zoning action will cause a serious environmental effect outside jurisdictional borders, the zoning body must serve

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> the welfare of the entire affected community. If it does not do so it acts in an arbitrary and capricious manner. The precise boundaries of the affected community cannot be determined until the potential environmental effects are understood. It includes all areas where a serious impact on the environment would be caused by the proposed action. The impact must be direct. For example, areas which would experience an increased danger of flooding or air pollution, or areas which would experience pressure to alter the land uses contemplated by their own comprehensive plans, would be part of the affected community. (Emphasis added) 576 Pac. 2d, 405

The court quoted approvingly from Livermore, specifically noting that the standard of judicial review in Livermore is applicable "when the interest at stake is the quality of the environment". 576 Pac. 2d at 406.

In summary, it is appellants' contention that the approval of the project does not bear a substantial and reasonable relationship to the public welfare of the residents of East Palo Alto. Respondent city, by approving the project that imposes adverse environmental burdens on residents outside its municipal power, exceeded its authority.

III.

THE ENVIRONMENTAL IMPACT REPORT (EIR) IS INADEQUATE UNDER CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

A. The EIR Failed to Discuss Reasonable Alternatives

Public Resource Code section 21100 sets forth the contents which must be included in environmental impact reports. Subdivision (d) thereof specifies that "alternatives to the proposed project" be discussed in an EIR. The Guidelines, section 15143(d) state:

> Alternatives to the Proposed Action. Describe

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> all reasonable alternatives to the project, or to the location of the project, which could feasibly attain the basic objectives of the project, and why they were rejected in favor of the ultimate choice. The specific alternative of "no project" must also always be evaluated, along with the impact. The discussion of alternatives shall focus on alternatives capable of eliminating any significant adverse environmental effects or reducing them to a level of insignificance, even if these alternatives substantially impede the attainment of the project objectives, and are more costly. If the environmentally superior alternative is the "no project" alternative, then the EIR shall also identify an environmentally superior alternative among the other alternatives. (Emphasis added)

This provision of the Guidelines, which requires the alternative discussion to focus on those alternatives capable of eliminating any significant adverse environmental effects or reducing them to a level of insignificance, is intended to foster two inter-related aims of CEQA. The first is to make CEQA a full disclosure informational document to enable decision makers to intelligently weigh environmental consequences of the proposed action. (City of Rancho Palos Verdes v. City Council 59 Cal. App. 3d 869, 890. The second, is to assure the mitigation or avoidance of significant impact on the environment whenever it is feasible. Thus one of the key means by which courses of action to minimize environmental impact is to be ferreted out is through the alternative discussion of an EIR.

> [T]hese CEQA requirements serve very specific and important purposes. The EIR is most significant in this regard. One of its major functions, preserved in §2180.5, is to ensure that all reasonable alternatives to proposed projects are thoroughly assessed by the responsible official. Wildlife Alive v. Chuckering, (1976) 18 Cal 3d 190, 197.

The courts have held that failure to include a

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reasonable alternative in an EIR renders the document legally inadequate. In County of Inyo v. City of Los Angeles, (1977) 71 Cal. App. 3d 185, the court concluded that an EIR prepared by the city failed to fulfill CEQA requirements on several grounds. One of those grounds was:

> Notably, the Los Angeles EIR omits another alternative, one freighted with costs other than dollars. The omitted alternative is a tangible, foreseeably effective plan for achieving distinctly articulated water conservation goals within the Los Angeles service area. It is doubtful whether an EIR can fulfill CEQA's demands without proposing so obvious an alternative. p. 203

The required alternative discussion need not include "unreasonable extremes" but it must enable agencies to make an objective, good faith effort to comply with CEQA by taking a "hard look" at the environmental consequences of their actions Residents Ad Hoc Stadium Com. v. Board of Trustees, (1979) 89 Cal. App. 3d 274, 286-87.

In the instant case none of the above stated objectives was satisfied since a reasonable and obvious alternative was ommitted. Alternatives to the Project are discussed on pages 111-112, and page 239 of A/App Vol. 1 extracted from the EIR. The discussion of alternatives is quite abbreviated compared to the length of the entire EIR which perhaps provides some indication of the attention given to alternatives. In any event, the alternatives set forth which are of any relevance to the case were:

(1) A public street north of the Hetch Hetchy right of way and provides accommodation of 63 to 225 units of housing. Reducing the project by about 12 acres.
(2) Phasing the project to allow development of

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treatment plant capacity.

(3) Scale down the size of the project or changing the proportional mix of warehousing and manufacturing to stay within the capacity of waste water treatment of respondent city. (A/App Vol. 1, p. 111)

Conspicuously missing from this list of alternatives is the alternative of not placing any structures on the project site south of the northern boundary of Hetch Hetchy right of way. A wall could be constructed at the right of way boundary. South of this line to the boundary line of East Palo Alto could remain an open space. This would provide a considerable buffer zone between the residential use of the property adjoining the project site. Consideration of this alternative, given the fact that an industrial use of the site conflicts with residential single family use of the adjoining property, is certainly a reasonable alternative as required by CEQA.

The critical role which the missing alternative could have played cannot be gainsaid. By providing a buffer zone (land use designation) between the residential and industrial use of property, the significant adverse environmental effect would have been eliminated. The EIR, however, only provided a 10 foot perimeter buffer planting between the residential housing and the manufacturing complex. This in no way mitigates or eliminates the inherent conflict between the two uses of land. The law clearly assumes that a project "will have a significant effect on the environment" if the project "conflicts with adopted environmental plans and goals of the community where it is located".[2] The law also presumes a project will have significant adverse environmental effect if it disrupts

2. See Guidelines Appendix G quoted in appellants' opening brief *Supra* p. 18

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the physical arrangement of an established community. The "ten foot perimeter" buffer neither eliminates nor mitigates the significant adverse effect. The mitigation or elimination can only be achieved by providing a buffer land use designation.

Respondent city was aware of the East Palo Alto community plan during the preparation process of EIR. The East Palo Alto community plan, as quoted in respondent city's final EIR, provides:

> In areas where industrial land is adjacent to residential land, the first parcel in the industrial area should be designated as "Industrial Buffer". Components suggested within the "Industrial Buffer" designation include:
>
> Uses permitted--offices, administration, and research
>
> Uses prohibited--manufacturing, assembling, materials, handling and storage
>
> No truck traffic on streets separating the uses
>
> Restrict access to employees and visitors
>
> Provide adequate onsite parking
>
> Require landscaped setbacks" (A/App Vol. I, p. 13)

Thus the "10 ten foot perimeter" recommended to mitigate the incompatible land use not only fails to mitigate or eliminate the significant environmental effect but directly contradicts the East Palo Alto Community Plan.

The first alternative suggested in the EIR, quoted above, which would have involved construction of housing below the Hetch-Hetchy right of way would have also eliminated the adverse significant impact. This alternative proposal was outrightly dismissed

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because it would reduce the available land by about 12 acres A/App Vol. I, p. 111) Thus development of the proposed project on 52 acres of land was "given" which stood inviolate defining the scope of available mitigation measures.

The failure to disclose and analyze the reasonable alternatives prevented the City Council from considering the project in an informed manner. Thus the "EIR" failed to become a full disclosure document as required by CEQA.

B. CEQA Requires That an EIR Include a Full Analysis of Cumulative Impacts

Sections 21000 and 21001 of the Public Resources Code set forth the legislative intent of CEQA, including, inter alia, that it is the policy of the state to enhance, develop, and maintain a high quality environment for its people. Section 21001 specifically states in part:

> The Legislature further finds and declares that it is the policy of the state to:
>
> (a) Develop and maintain a high-quality environment now and in the future, and take all action necessary to protect, rehabilitate, and enhance the environmental quality of the state.
>
> (b) Take all action necessary to provide the people of this state with clean air and water, enjoyment of aesthetic, natural, scenic, and historic environmental qualities, and freedom from excessive noise.

Consistent with the above legislative policy, case law under CEQA has made it clear that the Act is to be accorded a broader interpretation in favor of the protection of the environment. The California Supreme Court in the landmark decision Friends of Mammoth v. Board of Supervisors (1972), 8 Cal 3d 247,

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declared:

> [T]he Legislature intended CEQA to be interpreted in such a manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language. 8 Cal. 3d at 259.

Thus, as courts have consistently stated, "EIR is the heart" of CEQA. County of Inyo v. Yorty (1973) 32 Cal. App. 3d 795, 810. Section 21061of the Public Resources Code defines the EIR as a detailed statement setting forth the significant environmental effect of a proposed project. An important element that ought to be discussed in EIR is the cumulative impact of the proposed project. As Section 21083(b) of the Public Resources Code provides:

> (b) The possible effects of a project are individually limited but cumulatively considerable. As used in this subdivision, "cumulatively considerable" means that the incremental effects of an individual project are considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects.

Thus, all EIRs are required to include a detailed assessment of the cumulative impact accruing from the project in combination with other current and proposed projects in the area. The level of detail with which this cumulative impact should be prepared is provided under the Guidelines, Section 15023.5 which provides:

> Cumulative impacts refer to two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts.
>
> (a) The individual effects may be changes resulting from a single project or a number of separate projects.
>
> (b)The cumulative impact from several projects is the change in the environment which

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results from the incremental impact of the project when added to other closely related past, present, and reasonable foreseeable probable future projects. Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time.

(c) A discussion of cumulative impacts shall reflect their severity and significance but need not be discussed in as great detail as the direct effects of the project. The discussion of cumulative impacts should be guided by a standard of practicality and reasonableness. The following (three) elements are necessary to an adequate discussion of cumulative impacts:

(1) A list of projects producing related or cumulative impacts, including those projects outside the control of the agency.

(2) A summary of the expected environmental effects to be produced by those projects with specific references to additional information where that information is available, and

(3) A reasonable analysis of the cumulative impacts of the relevant projects.

The EIR in the instant case does not even contain a single paragraph on cumulative impact. Neither does it indicate that the project proposed does not have cumulative impact. The construction of Dumbarton Bridge replacement and the Raychem industrial construction are projects that were and are still in progress in the vicinity of the project site. (A/App. Vol. II, p. 63, 58) The interrelationship of these projects in terms of increased traffic, air pollution and noise on the environment of the area and specifically the residential neighborhood of East Palo Alto is not discussed. The EIR prepared by Respondent simply treats this particular project as an isolated "single shot" venture.

In People v. County of Kern, (1974) 39 Cal. App. 3d 830, appellant, like present appellants, argued that the development upon which an EIR was prepared must be viewed in light of other developments in the same vicinity, the Court of Appeal agreed

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and stated,

> The final EIR makes no mention of the combined impacts of those projects on the environment . . . [T]he final EIR also should consider and comment upon the overall impact of the project and other projects now in progress . . . regardless of their current state of development . . . . 39 Cal. App. 3d at 842, footnote 8.

Moreover, in Bozung v. LAFCO (1975), 13 Cal 3d 263, the California Supreme Court describing the Guidelines requirement of discussion of cumulative impact as a "vital provision" noted:

> . . . an EIR must describe the environment from both a local "and regional" perspective and that knowledge of the regional setting is critical to the assessment of environmental impact. It directs special emphasis on environmental resources peculiar to the region and directs reference to projects, existent and planned, in the region so that the cumulative impact of all projects in the region can be assessed. 13 Cal. 3d at 283

We submit that the foregoing clearly demonstrates that the final EIR falls short of the discussion of cumulative impact which CEQA requires. Because of this failure, the EIR is not a "full disclosure" document as required by law. Therefore, respondent city has been precluded from evaluating the various courses of action which a thorough consideration of all current and planned projects in the region would have permitted.

C. The Failure of The EIR to Discuss Flood Hazard on Adjacent Homeowners Renders The EIR Legally Inadequate

Appendix G of the Guidelines provides that a project will normally have significant effect on the environment if it

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will cause substantial flooding. The EIR identified that the construction of the project will increase and concentrate the storm runoff from the project site. (A/App Vol. I, pp. 29-30) This runoff water is collected in the Ravenswood Triangle, a basin north of the project site and is pumped out into the bay by CALTRANS. (A/App. Vol. I, p. 29) If the triangle overflows either as a result of CALTRANS pump failure or the natural tidal flooding associated with the area, the project site will be flooded. (A/App Vol. I, pp. 29-30)

The EIR provides mitigation measure to the impact of this flooding and overflow on the project site. It states:

> Importation of fill material to raise the site to permit the finished floors to be above the potential inundation level. (A/App Vol. I, p. 30)

What is important to note here however, is that the land-fill while mitigating the impact of flooding on the project site, it also subjects adjacent homeowners to serious flood hazard. The flood that would normally have over-flowed on the project site would now, as a result of land-fill, flow onto the adjacent home-owners property. This risk of flooding on the adjacent homeowners was clearly recognized by the EIR. However, its appropriate and full consideration was postponed for future study. The EIR provides:

> Preparation of a more detailed study of the potential flooding to assess the depth of flooding onsite and the effect of filling on the adjacent areas prior to building permit approval. (A/App Vol. I, p. 30)

This, indeed, renders the EIR inadequate as a full disclosure document. Without the information of the precise impact of the flood and the concomitant mitigation mearsures how could

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the public agency make the proper balancing of the benefit of the project against its environmental consequencies? This surely frustrates one of the goals of CEQA which requires that approval of a project should come only after full consideration of the environmental effect. As the Appeals Court in Santiago v. County of Orange (1981) 118 Cal. App. 3d 818 noted:

> Only through an accurate view of the project may affected outsiders and public decision-makers balance the proposal's benefit against its environmental cost, consider mitigation measures, assess the advantage of terminating the proposal...and weight other alternatives in the balance. An accurate, stable and finite project description is the sine qua non of an informative and legally sufficient EIR. (at p. 830)

Appellants contend that by postponing the issue of flooding on adjacent resident property to future study, an important ramification of the proposed project remained hidden from the approving agency. This fact alone renders the EIR legally inadequate.

IV.

APPELLANTS WERE DENIED "FAIR TRIAL"

Section 21168 of California Public Resources Code provides:

> Any action or proceeding to attach, review, set aside, void or annul a determination, finding, or decision of a public agency, made as a result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in a public agency, on the grounds of non-compliance with the provisions of this division shall be in accordance with the provisions of Section 1094.5 of the Code of Civil Procedure.

Section 1094.5(b) further, in its relevant part provides:

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1 The inquiry in such a case shall extend to the questions. . .whether there was a fair
2 trial. (Emphasis added)

3 Thus in examining environmental litigation cases the
4 legislature has commanded reviewing courts to determine whether
5 there was a fair trial. An essential element of fair trial is
6 an impartial tribunal. Le Strange v. City of Berkeley (1962)
7 210 Cal. App. 2d 313, 325.

8 It is quite settled under the law that a "fair trial"
9 requires more than the absence of actual bias. The United States
10 Supreme Court declared, "[O]ur system of law has always endeavored
11 to prevent even the probability of unfairness...".

12 Such a stringent rule may sometimes bar trial by judges who have no actual bias and would do
13 their very best to weigh the scales of justice equally between contending parties. But to
14 perform its high function in the best way "justice must satisfy the appearance of justice".
15 (In re Murchison (1955) 349 U.S. 133, 136)

16 Our California Supreme Court agrees (Comden v. Superior
17 Court 1978 20 Cal 3d 906, 912. This rule is not confined to the
18 formal criminal or civil judicial proceedings. Our courts have
19 repeatedly affirmed that "An administrative hearing. . .must
20 be attended, not only with every element of fairness, but
21 with the very appearance of complete fairness" (Amos Treat Co.
22 v. SEC (D.C. Civil 1962) 306 F. 2d 260, 267. Indeed, the need
23 for the appearance of fairness should be even greater in adminis-
24 trative hearings, (like respondent city council's hearings) where
25 many of the safeguards which have been thrown around court
26 proceedings have, in the interest of expedition and administra-
27 tive efficiency, been relaxed.

28 In the instant case, respondent city council has a

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"natural bias" in favor of the interest of its residents in weighing the benefits arising from the project against the adverse environmental effect on non-residents outside the city limits. This "natural bias" coupled with the unequivocal statement of one of the council persons, Kay Parr, that the project would not have been approved if it were next to a residential neighborhood of Menlo Park, would indeed, clearly show that the city council did not act as a neutral fact finder. Therefore, appellants were clearly denied a "fair trial" in their dealings with respondent city council.

Furthermore, the record clearly shows that appellants were not consulted early in the preparation of the draft EIR. Respondent city made the initial assessment of the environmental impact of the project on February 5, 1982. In this assessment it was observed that the project is potentially controversial (A/App Vol. I, p. 124) The city, however, never attempted to involve and consult East Palo Alto residents/appellants, early in the preparation of the Draft EIR. The initial environmental assessment was not sent to Appellants. (A/App Vol. II, p.p. 1-3) Appellants were only notified after the draft EIR had been prepared. This failure of respondent to consult and provide to appellants an opportunity to express their concern early in the preparation, not only violates the "fair trial" under 1094.5 of the Code of Civil Procedure, but is also directly contrary to the holding of the California Supreme Court in Woodland Hills Residents Association, Inc. v. City Council 26 Cal. 3d, 938, where the Supreme Court noted:

It must be apparent that in serving the policy

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of CEQA it is necessary to secure all conflicting views prior to preparation of even a draft EIR. Once a draft has been prepared by persons who have not had full opportunity to be apprised of all conflicting views, it becomes more difficult for those persons to accept at full value new views necessarily critical of the draft. Such contrary views cannot be weighed with the same objective balance had they been considered at the time of initial presentation. Moreover, in the interest of more efficient administration of CEQA - and inefficient administration of the act could impose intolerable burdens - all related views whether in favor of or against a specific proposal should be openly and timely solicited by or on behalf of those charged with preparation of the draft. (Emphasis added) 26 Cal. 3d at 950

V.

THE FINDINGS ARE LEGALLY INSUFFICIENT BECAUSE THEY DO NOT MEET THE STANDARDS REQUIRED BY THE TOPANGA V. COUNTY OF LOS ANGELES AND THE GUIDELINES. THE DECISION OF THE TRIAL COURT SHOULD BE REVERSED

Topanga Assn. For A Scenic Community v. County of Los Angeles 11 Cal. 3d, 506, decided by the Supreme Court of California, held that public agencies making decisions subject to administrative mandamus (CCP section 1094.5 review) should "Set forth findings to bridge the analytic gap between the raw evidence and the ultimate decision or order". (p. 515) Such high level and rigorous finding requirements serves many important functions. Identification of the policy reason for such finding requirement will better inform the type of finding required. The Supreme Court noted several reasons:

a) Orderly functioning of the process of review requires grounds upon which an administrative agency acts to be clearly disclosed and adequately sustained (p. 516)

b) Findings conduce drawing "legally relevant

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subconclusions supportive of the ultimate decisions" (p. 516).

c) Findings enable the reviewing court to trace and examine the agency's mode of analysis (p. 516).

d) Findings "serve a public relations function by helping to persuade parties that administrative decision making is careful, reasoned, and equitable". (p. 517)

e) The administrative ruling encourages vigorous and meandingful judicial review keeping the legislative and administrative decision making separate, protecting neighborhood land and "mitigating the effect of insufficiently independent decision making" (p. 518).

Consistent with the Topanga requirement, Guidelines, under section 15091, provides:

> (a) No public agency shall approve or carry out a project for which an EIR has been completed which identifies one or more significant environmental effects of the project unless the public agency makes one or more written findings for each of those significant effects, accompanied by a brief explanation of the rationale for each finding. The possible findings are:
>
> (1) Changes or alterations have been required in, or incorporated into, the project which avoid or substantially lessen the significant environmental effect as identified in the final EIR.
>
> (2) Specific economic, social, or other considerations make infeasible the mitigation measure or project alternatives identified in the final EIR.
>
> (As amended August, 1983.)

Furthermore, the Guidelines specifically provide that the decision making body of a public agency shall not delegate the making of the above findings. (Guidelines 15025(b))

The EIR in the instant case, identified several

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1 significant environmental effects of the project. Among them
2 are:
3 Flood: Construction of the project improvement
4 increases and concentrates the storm water runoff from the
5 project site. Furthermore, the project site would be subject
6 to flooding with the occurrence of the 100 year event. (A/App
7 Vol. I, p. 29)
8 Traffic & Noise: There will be increased traffic
9 as a result of daily trips to and from the project. (A/App Vol.
10 I, p. 13) Because access to the project site is primarily
11 through the residential area, the traffic increase would produce
12 sound levels to 66 dB Ldn and 67 dB CNEL. (A/App Vol. I, p. 35)
13 This is well beyond the 60 dB Ldn acceptable noise level even
14 for residential land use according to the Menlo Park Noise
15 Standard. (A/App Vol. I, p. 36)
16 Land Use: The industrial use of the land is incom-
17 patible with the existing residential uses adjacent to the site.
18 (A/App Vol. I, p. 16)
19 Wetlands: There was a serious question as to whether
20 the project site is wetlands subject to public trust. The State
21 Land Commission, through its staff counsel advised the respondent
22 city council that the project site may be subject to public
23 trust. (A/App Vol. III, p.p. 193-194)
24 The record clearly shows that respondent city made no
25 written "findings" for each of the above significant effects.
26 The trial court, however, after making the conclusion that
27 "findings may be gleaned from a review of the entire adminis-
28 trative record", stated:

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> The administrative record of the DDC EIR proceedings contains an express statement of findings by the Menlo Park City Council to the effect that mitigation measure had been incorporated into the project and changes and alterations required. (Administrative Record Vol. 1, p. 244) These findings are supported by the contents of the entire administrative record, consisting, in part, of transcripts and minutes of the 13 public hearings constituting the DDC EIR process. These transcripts and minutes, as well as thousands of pages documenting the studies and conclusions of experts and consultants retained by the City to evaluate the potentially significant environmental impacts of the DDC project, demonstrate the painstaking, thorough process the city followed in evaluating and reshaping the DDC project. (A/App Vol. IV, p. 185)

This conclusion of the trial court is directly contrary to the very essence of the Topanga case and also the Guidelines cited above. The whole essence of Topanga in requiring the making of findings with appropriate subconclusions is to assist courts in quickly evaluating the criteria by which administrative agencies reach ultimate decisions. If the above trial court's interpretation of "findings" requirement under Topanga is to be accepted, then it means that courts must scrutinize in detail each and every record from beginning to end in an attempt to find anything to support the conclusion expressed in the decision by the administrative agency. Topanga simply did not have this kind of procedure. Indeed, the Supreme Court spoke out strongly against it:

> Absent such roadsigns, a reviewing court would be forced into unguided and resource-consuming explorations; it would have to grope through the record to determine whether some combination of credible evidentiary items which supported some line of factual and legal conclusions supported the ultimate order or decision of the agency. Topanga, supra, p 516

Furthermore, the Guidelines quoted above not only

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clearly provide that the decision making body cannot delegate the making of findings, but also state that public agencies must make "written findings for each of the significant effects, accompanied by a brief explanation of the rationale for each finding". It is particularly apparent that the rational thought process which proper findings can facilitate did not occur in the present case. Therefore, not only do the respondent city's findings fall short of the requirements of Topanga and the Guidelines, but they also reveal that a key judicially recognized purpose of findings was not served.

VI.

APPELLANTS ARE ENTITLED TO A STAY ORDER PENDING APPEAL HEREIN

Where an agency proceeds with a project without preparation of an adequate EIR that meets statutory requirements, it does so in violation of procedural safeguards. Such safeguards are intended to insure that all the facts are known and considered and environmental concerns are adequately protected prior to action on a project. In the instant case, the EIR is so hopelessly inadequate and inaccurate, that it is not the informational full disclosure document mandated by CEQA and caselaw. Under such circumstances, an order staying any further construction, pending appeal is a normal and appropriate remedy. Denial of such an order would be tantamount to denial of any effective relief.

Furthermore, the public policy at issue in the present case is of particular importance warranting a stay order. The great importance with which the legislature viewed the public

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policy of CEQA is self evident from the legislative intent. Section 21001(d) of the Public Resources Code represents one of the strongest statements of the importance attached to CEQA.

> The Legislature further finds and declares that it is the policy of the state to:
>
> . . .
>
> (d) Insure that the long-term protection of the environment, consistent with the provision of a decent home and suitable living environment for every Californian, shall be the guiding criterion in public decisions.

This action of the appellants seeks to protect and preserve one of the most unique habitats. The project site "is a valuable area of wetland and contiguous upland, home to a variety of wildlife, which should be preserved as open space". (A/App Vol. II, p. 38) It is difficult to imagine how the public rights at issue here would be enforced if not by private citizens. Since CEQA's enactment, it has become clear that the majority of actions to enforce rights created by CEQA have had to be brought by private citizens.

It is appellants' position that if stay is granted no undertaking should be imposed. The land mark case, Natural Resources Defense Council v. Grant 4 E.R.C. 1657, (4th Cir. 1972), the district court conditioned award of an injunction upon a $75,000 bond. The plaintiff had an asset of 4 million. It sued to enjoin a watershed channelization development in part for violation of the National Enviromental Policy Act of 1962, 42 U.S.C.A. §4321 et seq. (NEPA) The Court of Appeals reversed the district court's requirement of $75,000 bond stating:

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There seems little or no reason for requiring more than a nominal bond of these plaintiffs, who are acting much as private attorneys general" 4 E.R.C. 1657, 1659, (4th Cir. 1972) (Emphasis added)

Similarly in Friends of Earth, Inc. v. Brinegar, 518 F. 2d 322 (9th Cir. 1975), the Ninth Circuit Court of Appeals reversing and reducing a bond of $4,500,000 to merely a token sum of $1,000 stated:

[I]f public interest groups and citizens are required to post substantial bonds in NEPA cases in order to secure preliminary injunctions or injunctions pending appeal, plaintiffs in many NEPA cases would be precluded from effective and meaningful appellate review. More importantly, they are such bonds which would seriously undermine the mechanisms in NEPA for private enforcement (518 F. 2d at 323)

The Supreme Court of California in many of its decisions has indicated that because of the similarity of wording, structure, policy and purpose of CEQA and NEPA, federal environmental law should be relied on by California Courts in cases such as the present one arising under CEQA. e.g. No Oil, Inc. v. City of Los Angeles, 13 Cal 3d 68, 80-81, 84-86.

The California Supreme Court too has stayed substantial developments at the behest of citizens without requiring any undertaking. Friends of Mammoth v. Board of Supervisors of Mono County (1972) 8 Cal. 3d 247. The Supreme Court stayed bay-fill operations without requiring any undertaking in People ex rel S.F. B.C.D.C. v. Town of Emeryville (1968) 69 Cal. 2d 533. In Burger v. County of Mendocino (1975) 45 Cal. App. 3d 322, the Court of Appeals reduced the amount of an injunction bond set by the trial court at $100,000 to a nominal bond of

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$500 and issued its Writ of Supersedes to stay development during appeal.

Homeowners respectfully submit that for the reasons set forth above, this court should immediately stay the construction of the industrial complex pending this appeal.

CONCLUSION

FIRST, appellants submit that this court, in the exercise of its inherent power to preserve the status quo, pending appeal, should issue its order staying construction of the industrial complex. Without a stay order, the question whether either the project should be approved and built would become moot.

SECOND, appellants contend within a certain range, any city has the right, without interference from the courts, to approve projects within its jurisdiction. However, where approval of the project imposes a severe adverse environmental impact, without any concomitant benefit, on the residents outside the city's municipal jurisdiction, courts must step in and declare that the proposed project is inconsistent with the "public welfare" of the affected citizens. It is possible to design and locate the project in such a way so as to protect the non-residents from adverse environmental effect. Therefore, the respondent city's approval of the project exceeds its municipal power.

THIRD, the EIR prepared to approve the project is

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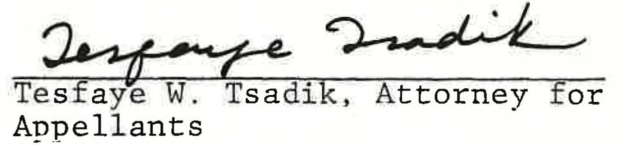
1 fatally defective for all the reasons set forth herein.
2
3 Respectfully submitted,
4

5 Robert W. Johnson, Attorney for
6 Appellants
7

8 Tesfaye W. Tsadik, Attorney for
9 Appellants
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