

**COURT OF APPEAL FOR THE FOURTH APPELLATE DISTRICT
STATE OF CALIFORNIA
(Division Two)**

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Docket no. E049432

San Bernardino Superior Court case no. CIVRS707723
(Judge Donald R. Alvarez--Department S33)

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ONTARIO MOUNTAIN VILLAGE ASSOCIATION,
Appellant,

v.

CITY OF ONTARIO *et al.*,
Respondents,

WAL-MART REAL ESTATE BUSINESS TRUST,
Real Party in Interest.

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Appellant's Opening Brief

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CERTIFICATE OF WORD COUNT

As required by Rule 8.204(c) of the California Rules of Court, and based on the “word count” function of the word processor on which this brief was written, I certify that there are approximately 9,126 words in this document, excluding the cover sheet, tables, running footers, and this certificate.

Date: January 22, 2010. By: _____
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I. INTRODUCTION

This lawsuit arose because of a good development idea--a Wal-Mart Supercenter (the “Project”)--approved for construction in the wrong place. On its face it may seem that Appellant Ontario Mountain Village Association’s members are a bunch of anti-Wal-Mart activists, objecting to the Supercenter simply because it is being proposed by Wal-Mart. The reality, however, is that the Supercenter is being built in the middle of a residential neighborhood, literally across the street from a large municipal soccer park¹ and within a mile of numerous pre-, elementary, junior-high, and high schools. Appellant’s objection to the Supercenter arises solely from its size and intensity near schools, parks, and homes. Indeed, Appellant publicly offered to support a scaled-down Wal-Mart operation at the site as a compromise that would allow Real Party in Interest to make productive use of its property without hurting the surrounding community. *See* Admin. R. 438:P24127.² Had that offer been accepted, this lawsuit would not exist.

¹ Ironically, the park is named after a professional *football* player, Anthony Muñoz, who grew up in the City of Ontario and during his athletic career became one of the National Football League’s child-exercise advocates.

² Throughout this brief, the tab number for the item cited in the Administrative Record (“Admin. R.”) is given before the colon, while the relevant sequential page number(s) for the cited item can be found after the colon. For example, “Admin. R. 1:15” refers to item 1, page 15, in the Administrative Record.

Appellant understands that even well-meaning public officials, trying their best to balance competing interests, will make decisions that end up having bad consequences for community health and welfare. California’s legislative and executive branches understand that, too, which is why they enacted the California Environmental Quality Act (“CEQA”). CEQA cannot guarantee that the best environmental decision is always reached, but it does ensure that public officials are held accountable for the environmental consequences of their actions. Consider this now-famous refrain from the California Supreme Court:

If CEQA is scrupulously followed, the public will know the basis on which its responsible officials either approve or reject environmentally significant action, and the public, being duly informed, can respond accordingly to action with which it disagrees. * * * ***The EIR process protects not only the environment but also informed self-government.***

Laurel Heights Improvement Ass’n of San Francisco v. Regents of the Univ. of Cal., 47 Cal. 3d 376, 392 (1988) (“*Laurel Heights*”) (citations and internal quotes omitted) (emphasis added); *see also Citizens of Goleta Valley v. Board of Supervisors*, 52 Cal. 3d 553, 564 (1990) (internal citations omitted) (echoing purpose of EIR to protect the environment and informed self-government). Taking this refrain seriously, Appellant’s members can live with a bad decision on the Supercenter if they must, but they should not have to live with that

decision *until* CEQA has been scrupulously followed and both the environment and informed self-government have been protected.

Despite Petitioner's successful challenge to the Supercenter's subsequent environmental impact report ("SEIR") in the trial court on a significant public-safety issue--the inability of big-rig delivery trucks to service the Supercenter without crossing into oncoming traffic--the SEIR still has serious informational shortcomings that rise to the level of a prejudicial abuse of discretion. The remaining issues are not "hyper-technical" flaws, as characterized by Respondent and Real Party in Interest below, but instead focus on some of the most central issues in CEQA review. In the pre-approval stages of the Supercenter's environmental review, Respondent failed to consult with local schools despite the Project's hazardous air emissions. Furthermore, the SEIR did not sufficiently analyze and explain the Project's significant environmental impacts: namely, *(i)* health effects of the Project's air pollution, *(ii)* the potential for urban decay, and *(iii)* traffic level-of-service inconsistencies with Ontario's General Plan. The SEIR also failed to consider a traditional Wal-Mart discount store as a lower-intensity alternative to the Project.

For the reasons explained below, the trial court’s decision with respect to these issues should be reversed and Respondent³ should be ordered to perform a legally sufficient environmental analysis of the Project. This case is fundamentally about making sure that CEQA’s goal of meaningful public participation and informed decision-making is achieved, thereby protecting both the environment and informed self-government.

II. DESCRIPTION OF PROJECT

The Project will be located at the northwest corner of Mountain Avenue and Fifth Street, one-quarter mile south of the San Bernardino Freeway (Interstate 10), in the City of Ontario. Admin. R. 476:P27297. The Project will consist of a 190,803-square-foot Supercenter on roughly 16.3 acres. Significantly, the Project is located a quarter-mile from two schools. *Id.*, 553:S7340-S7351.

The Project involves the demolition of existing buildings and the construction of facilities that will include sales of general merchandise, groceries, and alcoholic beverages; and further includes banking services, a pharmacy, a vision care center, a game arcade, an outdoor garden center, a food service center, a photo studio, and a photo finishing center. Admin. R.

³ Appellant refers to “Respondent” throughout this brief to refer to Respondent City of Ontario and, when the context requires otherwise, to all Respondents.

476:P27297-P27298. It will provide just under 820 parking spaces for customers and employees. *Id.*, 476:P27303. The Project was originally slated to be open for business 24 hours per day, but the ultimate approval was for 18-hour daily operations. Admin. R. 476:P27335.

III. SUMMARY OF ADMINISTRATIVE PROCEEDINGS

In 2004, M & H Property Management, on behalf of Realty Partners IV, L.P., applied to the City of Ontario for permission to build the Project. Admin. R. 513:S3308-S3315. An “Addendum to the Mountain Village Specific Plan EIR for the Ontario Wal-Mart Supercenter” was initially prepared. *Id.*, 520:S3387-S3452. After mounting public controversy over the addendum, a different applicant, EN Engineering, submitted an application for a modified proposal, and the City of Ontario elected to prepare a subsequent environmental impact report--what became the SEIR challenged here--in 2006. *Id.*, 529:S4022-S4033.

A meeting on the proposed scope of the Project’s environmental review was held on November 20, 2006, with more than 60 people in attendance. Admin. R. 531:S4035 & 532:S4036-S4047. Concerns raised at the meeting included air pollution and its impacts on children, as well as traffic impacts. *Id.*, 384:P21581. Also during the early stages, a five-page petition was

submitted because of concerns about locating the Project at its proposed site due to its proximity to schools and parks. *Id.*, 233:P15370-15374.

The draft SEIR was prepared and circulated for review and comment in June 2007. Admin. R. 360:P18234-P18734 (draft SEIR); 537:4086 (notice of completion). Approximately ten comment letters were received during the public-review period on the draft SEIR. *Id.*, 403:P23479, Ins. 13-17. The final SEIR was released in August 2007. *Id.*, 383:20957-21414.

Respondent's planning commission held a public hearing on August 30, 2007. Eighty-five members of the public submitted speaker cards for that hearing. *Id.*, 403:P23496, Ins. 11-15. After a staff presentation and questions to the staff, the Project applicant and members of the public expressed their views on the project. *See generally, id.*, 403:P23442-P23655. In addition to oral testimony, numerous letters were received both in support of and against the Project. *Id.*, 396:22980-23031; 404:P23665; 405:P23656 & 406:P23657. Among the comments received, Appellant and its members provided written and oral testimony expressing concerns about the Project. *See e.g., id.*, 396:23009, 23019 & 397:23038-23039. Ultimately, Respondent's planning commission certified the SEIR; adopted a statement of overriding considerations for traffic, noise, and air-quality impacts that would remain significant and unavoidable after mitigation; and gave other approvals

regarding the Project. *Id.*, 397:23032-23057; 398:23058-23083 & 399:23084-23089.

Appellant appealed the approval by Respondent's planning commission to the city council. Admin. R. 560:23965.1-.6. The city council was set to hold a public hearing on September 24, 2007. *Id.*, 411:P23698. Due to a problem with the notice, however, the meeting was continued. *Id.*, 415:P23707-23710. Still, members of the public who attended the meeting were allowed to speak; approximately 64 public speaker cards were submitted. *Id.*, 426:P23894-P23957 (speaker slips) & 430:P23992-P24111 (transcript of hearing).

Respondent's city council held a continued public hearing on October 9, 2007. Admin. R. 431:P24112-2. Again, the hearing suffered from a procedural defect due to an improperly-sized published notice. *Id.*, 444:24158-8-24158-9. Despite the defect in the notice, approximately 48 speaker slips were submitted and members of the public were heard. *Id.*, 441:P24144-24149 (speaker slips) & 444:24158-1-24158-72. In addition to the oral testimony, a number of letters and e-mails were submitted in opposition to and in support of the Project. *See, e.g. id.*, 432:P24113-P24115 (correspondence in opposition to the project) & 433:P24116-P24120 (correspondence in support of the project). That same day, Appellant submitted a letter to Respondents

and Real Party in Interest regarding the potential for a traditional Wal-Mart store as an alternative to the Project and offered a PowerPoint presentation focusing primarily on the Project's air-quality impacts. *Id.*, 438:P24127 (letter); 440:P24143-2 to -12.

The second continued hearing--this one having been properly noticed--was held on October 30, 2007. Admin. R. 460:P24294-P24389. Approximately 41 speaker slips were submitted at the hearing. *Id.*, 461:P24390-P24430. In addition to oral testimony, Appellant submitted written comments summarizing and supplementing comments submitted in earlier administrative proceedings by Appellant and other members of the public as well as evidence supporting the points made at the hearing. *Id.*, 553:S4591-S4601 (letter) & S4602-S9231 (supporting evidence). The hearing was continued yet again so that the city council could consider all comments and materials. *Id.*, 460:P24387-P24388. The hearing was supposed to take place on November 13, 2007, but due to the lack of a quorum was moved to November 26, 2007. *Id.*, 469:27156-3.

Responses to the issues raised by Appellant were prepared for the final public hearing. *See, e.g.*, Admin. R. 478:P27393-28406. At the close of the hearing, Respondent's city council denied the administrative appeal; upheld the planning commission's certification of the SEIR, adoption of statement of

overriding considerations, and other approvals; and approved a development plan for the demolition of existing on-site structures and a conditional use permit. *Id.*, 472:P27170-27175. One day later, Respondent filed a notice of determination with the San Bernardino County Clerk's Office, thereby triggering Appellant's deadline for filing suit. *Id.*, 551:S4583-S4584.

IV. SUMMARY OF TRIAL-COURT PROCEEDINGS

Appellant is a public-interest group that seeks to protect the quality of Ontario's environment. Appellant's App. I:1:2, ¶ 1.⁴ In furtherance of that goal, Appellant filed suit under CEQA on December 26, 2007, to challenge Respondent's approval of the Project based in general on the inadequacy of the Project's EIR.⁵ *See generally id.*, I:1:1-21.

In particular, Appellant argued below that Respondent had failed to consult with nearby schools about the Project's air-pollution impacts, that the SEIR failed to adequately analyze several environmental impacts, that the SEIR failed to adequately analyze a reasonable range of alternatives, and that all necessary administrative findings had not been made. *Id.*, I:8:134-154.

⁴ Like citations to the Administrative Record, the tab number for the item cited in Appellant's Appendix ("Appellant's App.") is given before the colon and the relevant sequential page number(s) for the cited item can be found after the colon. "Appellant's App. I:1-2" thus refers to item 1, pages 1 and 2, in Appellant's Appendix.

⁵ Petitioner added non-CEQA claims prior to trial but ended up dismissing them before trial. Appellant's App. II:24:479 & II:25:481.

There was no dispute below that Appellant had exhausted its administrative remedies and had standing. The trial court granted Appellant's petition due to the inadequate evaluation of serious traffic-safety impacts due to big-rig truck deliveries but rejected Appellant's remaining arguments.⁶ *Id.*, IV:32:811-864.

Judgment was ultimately entered on August 20, 2009, granting in part and denying in part Appellant's petition for writ of mandate. *Id.*, IV:39:901-960. Notice of the judgment's entry was given on August 24, 2009. *Id.*, IV:40:961-1023. The trial court's decision having become final, Appellant filed this timely appeal on October 13, 2009. *Id.*, IV:41:1024-1027 (appeal notice).

V. STANDARD OF REVIEW

The standard of review on appeal is the same standard of review that applied in the trial court, which means that this Court independently examines the administrative record to determine whether Respondent abused its discretion when it approved the Project. *See, e.g., Gentry v. City of Murrieta*, 36 Cal. App. 4th 1359, 1375-1376 (1995) (noting that the appellate court's task is the same as that of the trial court). In reviewing what Respondent did, this Court is not bound by the trial court's conclusion. *Gentry, supra*, 36 Cal.

⁶ No cross-appeal has been filed challenging the issue on which Appellant's petition for writ of mandate was granted.

App. 4th at 1376 (stating that appellate court reviews the administrative record independently and that trial court’s conclusions are not binding on it).

Challenges under CEQA are to be adjudicated in accordance with Section 1094.5 of the Code of Civil Procedure. PUB. RES. CODE § 21168. Under Section 1094.5, the central issue is whether the responding party acted without or beyond its jurisdiction, failed to provide a fair trial, or prejudicially abused its discretion. CODE OF CIV. PROC. § 1094.5(b). An abuse of discretion exists when the responding party has not proceeded in the manner required by law, its order or decision is not supported by the findings, or the findings are not supported by substantial evidence. *Id.*; *Laurel Heights, supra*, 47 Cal. 3d at 392.

In reviewing agency action under CEQA, a court must determine whether the challenged acts and decisions are supported by substantial evidence in light of the entire record.⁷ PUB. RES. CODE § 21168. While this Court may not substitute its own judgment for that of the agency, the Court “must, however, scrupulously enforce all legislatively mandated CEQA requirements.” *Citizens of Goleta Valley, supra*, 52 Cal. 3d at 564.

⁷ “Substantial evidence” includes “facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts.” PUB. RES. CODE § 21082.2(c). It does *not* include “[a]rgument, speculation, unsubstantiated opinion or narrative, evidence which is clearly inaccurate or erroneous, or evidence of social or economic impacts which do not contribute to, or are not caused by, physical impacts on the environment.” *Id.*

Specifically, when called upon to review the adequacy of an environmental impact report, the Court must ascertain whether the report's conclusions are supported with substantial evidence and whether the report itself is sufficient as an informational document, regardless of whether the project at issue is ultimately approved. *Bakersfield Citizens for Local Control v. City of Bakersfield*, 124 Cal. App. 4th 1184, 1197 (2004) (invalidating environmental impact report); *Friends of the Eel River v. Sonoma Cty. Water Agency*, 108 Cal. App. 4th 859, 872 (2003) (ruling that approval of project is “nullity” if based on impact report that does not provide required information to decision-makers and public). The Court's review of Respondent's factual determinations should be deferential, but there is no deference when considering whether there was a failure to act in the manner prescribed by law. *Bakersfield Citizens, supra*, 124 Cal. App. 4th at 1207-1208. Abuse of discretion is a question of law for the courts to answer. *Apple Computer v. Assessment Appeals Bd.*, 105 Cal. App. 4th 1355, 1370 (2003).

Toward this end, the Court must be mindful that an environmental impact report's overarching purpose is “to inform the public and its responsible officials of the environmental consequences of their decisions before they are made.” *Citizens of Goleta Valley, supra*, 52 Cal. 3d at 564 (emphasis added). Accordingly, an environmental impact report must provide

sufficient detail “to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project.” *Bakersfield Citizens, supra*, 124 Cal. App. 4th at 1198. A prejudicial abuse of discretion exists “when the omission of relevant information has precluded informed decision[-]making and informed public participation.” *See id.*

Overall, of course, CEQA must be “interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.” *Laurel Heights, supra*, 47 Cal. 3d at 390 (quoting *Friends of Mammoth v. Board of Supervisors*, 8 Cal. 3d 247, 259 (1972)). Indeed, CEQA’s dictates must be “strictly enforced.” *Citizens of Goleta Valley v. Board of Supervisors of Santa Barbara Cty.*, 197 Cal. App. 3d 1167, 1176 (1988). “Only by requiring [Respondent] to fully comply with the letter of the law can a subversion of the important public purposes of CEQA be avoided.” *Id.* There is no “harmless error” under CEQA; any violation is “necessarily prejudicial.” *Resource Defense Fund v. Local Agency Formation Comm’n of Santa Cruz Cty.*, 191 Cal. App. 3d 886, 897-898 (1987).

VI. ARGUMENT & ANALYSIS

An adequate environmental impact report is “the heart of CEQA” and “serves not only to protect the environment but also to demonstrate to the

public that it is being protected.” CAL. CODE OF REGS., tit. 14, § 15003. Respondent’s environmental review of the Project was flawed from start to finish. Early on, even before the SEIR was certified, Respondent had failed to consult with one of the two schools within a quarter-mile of the Project site about hazardous air emissions and did not give the schools sufficient prior written notification of the SEIR’s certification. Next, the SEIR as certified did not sufficiently analyze several potentially significant environmental impacts of the Project: namely, (i) health effects of the Project’s air pollution, (ii) traffic level-of-service inconsistencies with Ontario’s General Plan, and (iii) the potential for urban decay. The SEIR also failed to consider a traditional Wal-Mart discount store as a lower-intensity alternative to the Project.

Each point is developed below.

A. **Respondent Failed to Consult with One of the Schools within a Quarter-Mile of the Project Site about Hazardous Air Emissions and Did Not Give the Schools Sufficient Written Notification Before Certifying the Subsequent Environmental Impact Report**

The first reason why this Court should invalidate the SEIR and the Project’s approval is that Respondent failed to comply with one of CEQA’s key procedural mandates for protecting students who may be exposed to a nearby development’s hazardous air emissions. Under CEQA, a lead agency may not certify an EIR for any project that is within a quarter-mile of a school

if the project “might reasonably be anticipated to emit hazardous air emissions” unless two conditions are met: first, the agency must have “consulted with the school district having jurisdiction regarding the potential impact of the project on the school”; and second, the agency must have given the school district “written notification of the project not less than 30 days prior to the proposed certification of the environmental impact report.” PUB. RES. CODE § 21151.4(a) & (b).⁸ There are two schools located within a quarter-mile of the site of the Project: one at Redeemer Lutheran Church, and the other at Prince of Peace Church. Respondent failed to adequately satisfy its procedural obligations despite being told to do so. Admin. R. 553:S4600, ¶ VII.

The Project “might reasonably be anticipated to emit hazardous air emissions.” The SEIR acknowledges that the Project’s “NOx, ROG, diesel exhaust and other potentially hazardous or toxic emissions . . . may significantly and adversely affect nearby schools. . . .” Admin. R. 383:P21212-21213. Appellant anticipates that Respondent and Real Party in Interest may argue that Public Resource Code Section 21151.4 is inapplicable to the Project on its face because the statute applies to “facilities” and not

⁸ Section 21151.4 was amended after the administrative appeal was denied. Petitioner is quoting the version that was in effect at the time of denial.

“projects.” Such an argument is refuted by the statutory language taken as a whole. The introductory paragraph of Section 21151.4 prohibits (with Appellant’s emphasis) the certification of an EIR “for any *project* involving the construction or alteration of a facility within 1/4 of a mile of a school that might reasonably be expected to emit hazardous air emissions” unless certain requirements are met. Section 21151.4(a) requires Respondent (again with Appellant’s emphasis) to consult with “the school district having jurisdiction regarding the potential impact of the *project* on the school.” Particularly given that CEQA must be applied in a manner that provides the “fullest possible protection fo the environment within the reasonable scope of the statutory language,” *Friends of Mammoth, supra*, 8 Cal. 3d at 259, any ambiguity should be resolved in Appellant’s favor.

There are two schools within a quarter-mile from the Project site. The Prince of Peace Church houses a school within a quarter-mile of the Project. Admin. R. 553:S7340-S7341 & S7342-S7347 (establishing church’s distance from site); 553:S7341, ¶ 4 (establishing school’s existence at church); and 553:S7345 (sign advertising “preschool” at church). Redeemer Lutheran Church and School is also within a quarter-mile of the Project.⁹ *Id.*, 553:S7340-S7343 (establishing school’s distance from site) & S7351

⁹ Both schools are private schools

(establishing school's existence at location). Appellant expects no disagreement that the two schools are within a quarter-mile of the Project site as none was expressed in the trial court.

Respondent failed to “consult with the school district having jurisdiction regarding the potential impact of the project on the school.” The SEIR omits the Prince of Peace Church from the final list of “nearby schools,” and from the final list of “Persons and Organizations Consulted.” Admin. R. 383:P21212 (list of nearby schools) & 21412-21414 (list of consulted persons and organizations). Meanwhile, the SEIR confirms that Redeemer Lutheran Church and School was consulted. *Id.*, 360:P18733. If that private school was consulted, it was a prejudicial abuse of discretion for Respondent not to similarly consult with Prince of Peace Church. In sum, the evidence in the administrative record does not indicate that Respondent properly consulted with the school district “regarding the potential impact of the project” on the nearby schools.

Respondent's failure to consult with Prince of Peach Church was not the only violation of Public Resources Code Section 21151.4. There is a total absence of evidence in the record to show that Respondent gave “written notification of the project not less than 30 days prior to the proposed certification of the environmental impact report.” The total absence of such

evidence means that the notice was not given (and consequently that Section 21151.4(b) was violated). *Cf. Protect Our Water v. County of Merced*, 110 Cal. App. 4th 362, 364 (2003) (CEQA decision noting “three immutable rules” of appellate practice: “first, take great care to prepare a complete record; second, if it is not in the record, it did not happen; and third, when in doubt, refer back to rules one and two”). Appellant also expects no disagreement on this point as none was received in the trial court.

In sum, it cannot be disputed that there are two schools within a quarter-mile of the Project site, that the Project will emit hazardous air pollutants, that Respondent did not consult one of the two nearby schools, or that there is no evidence of proper written notice being given to both schools before the SEIR was certified. Any ambiguity in the statutory language should be read to trigger the application of this requirement when a project emits hazardous air pollutants, not just when a facility itself emits such pollutants. Owing to Respondent’s failure to properly consult and notify the nearby schools about the Project’s potential impacts, Respondent’s certification of the SEIR and approval of the Project should be invalidated. *See Bakersfield Citizens, supra*, 124 Cal. App. 4th at 1198 (explaining that violation of CEQA’s information-disclosure requirements is prejudicial abuse of discretion regardless of whether avoidance of violation would have yielded different outcome).

B. The Subsequent Environmental Impact Report Did Not Sufficiently Evaluate All Potentially Significant Impacts of the Project

The second reason for invalidating the SEIR and the Project’s approval is that the air-quality impacts, the Project’s urban-decay impacts, and the Project’s potential to reduce the flow of traffic to a level prohibited by Ontario’s General Plan have not been adequately analyzed. That mistake was fatal. According to the CEQA Guidelines:

An EIR shall identify and focus on the significant environmental effects of the proposed project. *
* * Direct and indirect significant effects of the project on the environment shall be clearly identified and described, giving due consideration to both the short-term and long-term effects.

CAL. CODE OF REGS., tit. 14, § 15126.2(a).

Case law confirms that an EIR must enable the public to understand and consider meaningfully the issues raised by the proposal under review. *Laurel Heights, supra*, 47 Cal. 3d at 405. Consequently, an environmental impact report is not sufficient if it simply includes bare conclusions and opinions; it must contain facts and analysis. *Santiago County Water Dist. v. County of Orange*, 118 Cal. App. 3d 818 (1981); *see also Berkeley Keep Jets Over the Bay Comm. v. Board of Comm’rs*, 91 Cal. App. 4th 1344, 1370 (2001) (“*Berkeley Jets*”) (finding EIR’s approach of simply labeling effect “significant” without accompanying analysis of project’s impacts on nearby

residents' health does not meet CEQA's environmental assessment requirements).

Respondent's failure to provide the required evaluation of the Project's air-quality impacts, potential to cause urban decay, and traffic impacts worse than the general plan allows renders the SEIR's certification and the Project's approval worthy of invalidation. Each of these failings is a separate CEQA violation, and Appellant will discuss each of them below.

1. The Subsequent Environmental Impact Report Failed to Adequately Evaluate Many Serious Lung-Related Illnesses that the Project's Air Pollution Will Cause

The problem with the SEIR's analysis of the Project's air-pollution impacts is that it ignored a long list of extremely serious, possibly even fatal, impacts that were amply documented by a few concerned members of the public (including Appellant) and never disputed by Respondent or anyone else. The SEIR looked at the potential for the Project's air emissions to cause cancer, but as shown below the risk of cancer is not the only serious risk that the nearby elderly, children, and other sensitive receptors will face because of the Project; the SEIR overlooked serious air-pollution impacts on this special class of individuals. Substantial evidence in the record establishes that the Project's air pollution can cause a variety of very serious lung ailments as well as death. The SEIR should have thoroughly evaluated these impacts so that

they could be fully understood by the public and the decision-makers before the Project was approved. Respondent rejected Appellant's pleas for such prior evaluation. Admin. R. 553:S4598.

Even though it may be "well known that air pollution adversely affects human respiratory health," an environmental impact report will not survive judicial scrutiny if it does not inform its readers of the health consequences of the proposal's air pollution. *Bakersfield Citizens, supra*, 124 Cal. App. 4th at 1219-1220. It was Respondent's obligation to connect the dots between the Project's air emissions and the health consequences that the *Project* will have. The problem here is that Respondent blew off the analysis, leaving the public to guess at the severity of the problem and stating only the generally known fact that air pollution causes health problems. *Accord Sundstrom v. Mendocino*, 202 Cal. App. 3d 296, 311 (1988) ("The agency should not be allowed to hide behind its own failure to gather relevant data. *** CEQA places the burden of environmental investigation on the government rather than the public.").

The record contains a tremendous amount of evidence regarding the potential of the Project's air pollution to cause non-cancer respiratory illness and disease. Highlights of the evidence include:

- **Fine particulate pollution can cause cardiovascular disease in women.**

Admin. R. 383:P21121-P21122 (showing Project's emission levels of particulate matter from construction activities); P21124-P21125 (showing Project's emission levels of particulate matter from operational activities); 553:S7470 (National Institute of Environmental Health Sciences article showing link between level of fine particulate pollution and cardiovascular disease in post-menopausal women); 553:S7471-S7481 (*New England Journal of Medicine* article showing link between particulate pollution and cardiovascular disease in women).

- **Ozone and nitrogen dioxide have been linked to lung-development problems for children and increase the risk of asthma and pulmonary distress.** Admin. R. 383:P21111 (final SEIR's observation that chronic exposure to air pollutants, even at levels meeting federal standards, can create pulmonary distress); 553:S7483 (National Institute of Environmental Health Sciences article showing link between air pollution, including ozone and nitrogen dioxide, and lung development in children); 553:S7484-S7495 (*New England Journal of Medicine* article); 553:S7496 (*Pediatrics* article regarding asthma in exercising children exposed to ozone); 553:S6741-6752 (*Epidemiology* article regarding ambient air pollutants causing children to have altered lung function and increased respiratory infections resulting in school absenteeism).
- **Ozone has been shown to cause death.** Admin. R. 553:S6702 (*Epidemiology* article providing evidence of short-term

associations between ozone and mortality); 553:S6718 (*Journal of the American Medical Association* article reporting significant association between short-term changes in ozone and mortality); 553:S7084-S7086 (physician’s testimony that Project will “exponentially increase the risk for an asthmatic child having an asthma attack,” and that risk includes “long lasting injury to the students, including the possibility of death”).

Against this evidentiary backdrop, Respondent’s error in certifying the SEIR lies in not ensuring that it provided a thorough analysis of how the Project’s emission of ozone, nitrogen dioxide, and fine particulate matter will affect sensitive receptors and others living, working, and playing in close proximity to the Project. Appellant’s complaint is not that the SEIR’s analysis was imperfect; the beef is that the analysis is altogether non-existent. Nobody knows, for example, how many kids playing soccer at the park across the street could develop asthma, how many kids living in the neighborhood and attending nearby schools could suffer from lung under-development, or how many current asthmatics could suffer acute respiratory distress because of the Project’s air pollution. Even worse, how many people could die? These questions are not scare tactics in disguise.¹⁰ They are firmly grounded in the

¹⁰ The SEIR acknowledged, as it had to, that air pollution has adverse health impacts. Admin. R. 383:P21111. What it failed to do, as shown below, is explain the *connection* between *this Project’s* air emissions and the respiratory harm done to *people breathing the emissions*.

evidence, which includes testimony from physicians and the American Lung Association. Admin. R. 553: S7082-S7083 (testimony of American Lung Association); 553:S7084-S7086 (testimony of Dr. Peter Ambrose); 553:S7087-7088 (testimony of Dr. Philip M. Gold). Respondent should have ensured that its decision-makers and the public were provided with answers to these questions before the SEIR was certified and the Project was approved.

Significantly, the City Manager for the City of Ontario did not dispute the studies; in his words, “[t]hese studies are valid.” Admin. R. 456:24281. He dismissed them, nonetheless, because in his view they “are a reflection of the impact of regional transportation and patterns of air quality on sensitive receptors” and inapplicable to “the replacement of the proposed commercial use with former similar uses in terms of trip generation and formerly higher levels of air pollution emissions.”¹¹ *Id.* The fallacy in the City Manager’s logic lies with his presupposition that the Project’s *local* contribution to a

¹¹ Appellant does not understand the City Manager’s last comment. Replacing *the Project* with former similar uses was not even up for consideration. What is more, he is using the wrong CEQA baseline, comparing the Project’s emissions to the emissions of uses that have long since ceased; the site has been abandoned for years. His comparison should have been to the current state of affairs--*i.e.*, no activities and therefore no emissions. See *Wal-Mart Stores, Inc. v. City of Turlock*, 138 Cal. App. 4th 273, 290-291 (2006) (disapproved on other grounds in *Hernandez v. City of Hanford*, 41 Cal. 4th 279 (2007)) (explaining that correct analysis of physical change triggering CEQA review for land-use regulation is comparison of conditions existing when proposal was first put forward and forecasts of reasonably foreseeable consequences of proposal’s implementation).

regional problem does not require evaluation under CEQA. That presupposition is patently false, for the “relevant question” is “not how the effect of the project at issue compares to the preexisting cumulative effect, but whether ‘any additional amount’ of effect should be considered significant in the context of the existing cumulative effect.”¹² *Communities for a Better Env't. v. California Resources Agency*, 103 Cal. App. 4th 98, 120 (2002) (invalidating CEQA Guidelines establishing *de minimis* exception to requirement for cumulative-impact analysis of project’s incremental effects).

A 2004 decision by the Court of Appeal confirms that the Project’s SEIR fails as an informational document because it does not draw a legally sufficient connection between the Project’s air pollution and the serious *non-cancer* health consequences attributable to the pollution. That case involved the construction of two Wal-Mart Supercenters roughly four miles apart. For present purposes, one can do no better than the appellate court’s own words:

¹² Nor did the City Manager’s lay opinion square with the expert opinion of Dr. Philip M. Gold, Loma Linda University Medical Center’s Chief of Pulmonary and Critical Care Medicine: “I was astounded and discouraged to learn that there are those who would justify approval of the development of a Wal-Mart Super Center, a project predicted to increase the local burden of air pollution, with the dismissive and misguided assertion that our local air quality is so bad that a little more pollution won’t make a difference. Nothing could be further from the truth. You need only ask the many patients suffering from emphysema in our area or watch an asthmatic child trying to exercise on the playground when oxidant levels are high.” Admin. R. 553:S7087.

The Gosford [Supercenter] EIR concluded that Gosford would cause significant unavoidable direct adverse impacts to regional air quality from construction and operation. The direct adverse air quality impacts are derived “primarily from automobile emissions during operation and from architectural coatings and construction equipment during construction phase. No feasible mitigation measures are available that would reduce impacts to less than significant levels.” Furthermore, Gosford “could potentially result in cumulatively considerable impacts to regional air quality from construction and operation.”

Similarly, the Panama [Supercenter] EIR concluded that Panama “may result in an overall increase in the local and regional pollutant load due to direct impacts from vehicle emissions and indirect impacts from electricity and natural gas consumption. This impact is considered significant and unavoidable for ROG and NOx.” The Panama EIR reached a different conclusion than the Gosford EIR with respect to cumulative impacts, determining that a “less than significant” impact would occur in this regard.

[Petitioner] contends that both EIR’s omitted relevant information when they failed to correlate the identified adverse air quality impacts to resultant adverse health effects. We agree.

Guidelines section 15126.2, subdivision (a) requires an EIR to discuss, inter alia, “health and safety problems caused by the physical changes” that the proposed project will precipitate. Both of the EIR’s concluded that the projects would have significant and unavoidable adverse impacts on air quality. It is well known that air pollution adversely affects human respiratory health. (See, e.g., Bustillo, *Smog Harms Children’s Lungs for*

Life, Study Finds, L.A. Times (Sept. 9, 2004.) Emergency rooms crowded with wheezing sufferers are sad but common sights in the San Joaquin Valley and elsewhere. Air quality indexes are published daily in local newspapers, schools monitor air quality and restrict outdoor play when it is especially poor and the public is warned to limit their activities on days when air quality is particularly bad. Yet, neither EIR acknowledges the health consequences that necessarily result from the identified adverse air quality impacts. Buried in the description of some of the various substances that make up the soup known as “air pollution” are brief references to respiratory illnesses. However, there is no acknowledgement [*sic*] or analysis of the well-known connection between reduction in air quality and increases in specific respiratory conditions and illnesses. **After reading the EIR’s, the public would have no idea of the health consequences that result when more pollutants are added to a nonattainment basin.** On remand, the health impacts resulting from the adverse air quality impacts must be identified and analyzed in the new EIR’s.

Bakersfield Citizens for Local Control, supra, 124 Cal. App. 4th at 1219-1220 (emphasis added). Thus, even though it may be “well known that air pollution adversely affects human respiratory health,” an environmental impact report will not survive judicial scrutiny if it does not inform its readers of the health consequences of the proposal’s air pollution. In fact, the SEIR’s acknowledgment that the Project emits substances known to have an array of health impacts is substantial evidence that further analysis was required. The

problem is that the SEIR failed to take the next step and to draw that connection for the people of Ontario with respect to the Project's serious non-cancerous effects on respiratory health and is therefore insufficient under CEQA.¹³ Overall, it did not "enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project." *Id.* at 1198. And it did not provide enough information to protect the environment and informed self-government. *Laurel Heights, supra*, 47 Cal. 3d at 392.

In sum, Respondent's certification of the SEIR and approval of the Project must be invalidated because the SEIR inadequately informed the public--and, indeed, Respondent's decision-makers--about the Project's adverse air-quality effects on the public's ability to catch its breath. There is no dispute that air-pollution causes respiratory health problems other than cancer. Unfortunately, the SEIR tells us nothing about the *Project's* contribution to these respiratory health problems caused by its air-pollution emissions.

¹³ The City of Ontario is in a non-attainment air basin for ozone and particulate matter. Admin. R. 383:P21113.

2. The Subsequent Environmental Impact Report Failed to Adequately Evaluate the Project's Potential to Cause Urban Decay in the Surrounding Community

Equally problematic for the SEIR is its analysis of the urban decay likely to be caused by the Project in the surrounding community.¹⁴ According to the SEIR, the urban-decay impacts will be less than significant because they will be “temporary,” “short-term,” and “not expected to lead to store closures”; overall, the Project will “result in a short-term surplus of general merchandise, food stores, and ‘other’ retail stores but is not expected to have a significant adverse impact over the long-term.” Admin. R. 383:P21238-P21240 & P21241. That conclusion was not supported by substantial evidence, Appellant told Respondent, and in fact substantial evidence shows that the Project is likely to cause long-term urban-decay impacts. *Id.*, 553:S4599.

As noted previously, an environmental impact report’s conclusions must be supported by substantial evidence in the record. *See Bakersfield Citizens, supra*, 124 Cal. App. 4th at 1197. “Substantial evidence” includes “facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts;” it excludes “[a]rgument, speculation, unsubstantiated

¹⁴ The term “urban decay” generally refers to “land use decisions that cause a chain reaction of store closures and long-term vacancies, ultimately destroying existing neighborhoods and leaving decaying shells in their wake.” *See Bakersfield Citizens, supra*, 124 Cal. App. 4th at 1204.

opinion or narrative, evidence which is clearly inaccurate or erroneous, or evidence of social or economic impacts which do not contribute to, or are not caused by, physical impacts on the environment.” PUB. RES. CODE § 21082.2(c). Where an agency fails to support its decisions by substantial evidence, or makes conclusions contrary to the evidence, that agency has abused its discretion under CEQA. PUB. RES. CODE § 21168; *Berkeley Jets, supra*, 91 Cal. App. 4th at 1355 (rejecting EIR because assumptions and conclusory statements were not supported by objective data). Understating the severity and significance of an environmental impact impairs informed decision-making under CEQA. *See, e.g., San Franciscans for Reasonable Growth v. City and County of San Francisco*, 151 Cal. App. 3d 61, 79-80 (1984) (concluding that understated cumulative impacts prevented, among other things, decision-makers’ ability to adopt effective mitigation measures and skewed their perspective of the project’s impacts).

In this case, the SEIR grossly understated the severity of the Project’s potential to cause urban decay by altogether ignoring key evidence provided by Respondent’s own expert. In August 2005, Respondent’s consultant, Keyser Marston Associates (“KMA”), provided a general economic impact analysis for the Project. Admin. R. 384:P22835-P22869. The following year,

in March 2006, KMA prepared a final focused analysis¹⁵ of the Project's impacts on food-store space within a two-mile radius. *Id.*, 210:P15226-2. KMA's analysis contained some rather disturbing predictions for grocery stores in such close proximity to the Project:

SUPPLY-DEMAND BALANCE [¶] Therefore, it appears that the *market area is currently saturated with food stores and there does not appear to be demand for an additional food store in the near- to mid-term. In the long-term, it is still unlikely that sufficient demand would exist to support a new food store*, assuming the current development patterns, as the majority of the market area is already developed. [¶] It should be noted that several of the grocery stores are located near the edge of the market area. For these stores, a large percentage of their sales comes from outside the market area. However, even if KMA takes this into account, *it is still our conclusion that the market is saturated with food stores.*

Id., 210:P15226-3 (emphasis added).¹⁶ Unfortunately, KMA's March 2006 analysis was not considered *anywhere* in the SEIR; the same is true for KMA's draft analysis in September 2005. The analysis was not mentioned in

¹⁵ KMA supplemented its August 2005 general analysis the very next month with an analysis focusing on the Project's impacts on food-store space. Admin. R. 384:P22870-P22871. Since the March 2006 focused analysis was the "final version," *id.*, 210:P15226-1, Appellant assumes that the September 2005 analysis was merely a draft.

¹⁶ KMA's analysis was confirmed by a report prepared by Appellant's expert, a professor in the business school at the University of Nevada, and by data from an independent third party. Admin. R. 553:S7308-S7333.

the introduction to the SEIR's chapter on socio-economic conditions as one of the analyses relied on in the chapter, was not cited anywhere in the chapter, and was not included on the SEIR's final "List of References." *Id.*, 383:P21234 (introductory paragraph), P21234-P21248 (chapter) & P21398 (List of References).

It is true that KMA conducted a vacancy analysis in December 2006, relied on by the SEIR, that determined "the potential for closure of existing supermarkets and the reuse of such vacant space" and concluded that "there are several viable tenant types that can reuse the space."¹⁷ Admin. R. 384:P22870 & P22875. Even that analysis, however, does not substantiate the SEIR's conclusions. First, the vacancy analysis identified "tenant *types*" and expressed no opinion about the amount of actual demand among those types of tenants for vacant food-store space or the feasibility of converting such space to other non-food-store use. Second--and this point raises doubt about the feasibility of food-store reuse by non-food retailers--the vacancy analysis indicates that "stores [actually converted to non-food uses] have spent between two months and *seven years* on the market." *Id.*, 384:P22875 (emphasis added). Moreover, as shown by KMA's list of the nineteen reused/reusable

¹⁷ According to KMA's vacancy analysis, the firm's prior analysis on food-store space "indicated an excess of food store space within the two-mile market area and that the development of a Super Wal-Mart would *exacerbate* the situation." Admin. R. 384:P22871 (emphasis added).

food stores in and around Ontario, twelve of them were on the market for at least *two years*, six of them were on the market for at least *three years*, and four of them were on the market for at least *five years*. *Id.*, 384:P22885-P22886.

The SEIR concluded that the Project would have only short-term impacts, probably not lead to store closures, and not have any significant long-term impacts. Admin. R. 383:P21238-P21240 & P21241. That conclusion was based on a general economic impact analysis that did not look at the specific impact of food-store closures within two miles of the Project's site. It was, meanwhile, based on a report that failed to identify the amount of demand for reusable food-store space yet confirmed that closed food stores in the Ontario region can sit vacant for many, many years. However one might characterize such evidence, it certainly is not substantial enough to support the SEIR's conclusion that the Project "is not expected to lead to store closures" or "expected to have a significant adverse impact over the long-term." On the other hand, the evidence from the KMA analysis that was left out of the SEIR proves just the opposite.

Accordingly, the Court should invalidate the SEIR's certification and the Project's approval.

3. The Subsequent Environmental Impact Report Failed to Adequately Evaluate the Project's Potential to Cause Traffic on Road Segments at Levels Prohibited by the General Plan

A third defect in the SEIR is its conclusion that the Project “would not conflict with the Ontario General Plan.” Admin. R. 383:P21050. That conclusion is based on the SEIR’s failure to consider the Project’s potential to increase traffic on road segments--as opposed to *intersections*--above levels prohibited by the General Plan. Appellant warned Respondent about the lack of evidentiary support for the conclusion to no avail. *Id.*, 553:S4593, § II-A. Appellant is not attempting to micro-manage Respondent’s selection of methodology; it is Respondent’s own General Plan--a plan that Respondent has the ability to amend if it so chooses--that sets forth an unambiguous standard.

Environmental impact reports “shall identify and focus on the significant environmental effects of the proposed project,” effects that may be direct or indirect. CAL. CODE OF REGS., tit. 14, § 15126.2(a). Furthermore, the reports must discuss any inconsistencies between proposals and all applicable general and regional plans. *Id.*, § 15125(d). The lead agency is required to “use its best efforts to find out and disclose all that it reasonably can.” *Id.*, § 15144. As a corollary, the agency may not rely on its own failure to study an impact as a basis for concluding that the impact will not be significant; that’s because “CEQA places the burden of environmental investigation on

government rather than the public.” *See Sundstrom, supra*, 202 Cal. App. 3d at 311 (holding that agency violated CEQA by not preparing environmental impact report).

The SEIR’s conclusion that the Project will not conflict with the General Plan is not supported by substantial evidence because there was *no* analysis of traffic impacts on *roadway segments*. General Plan Policy 12.2 mandates “at least a Level of Service D for roadway segments *and* at least Level of Service E for intersections on all streets whenever possible.” Admin. R. 383:P21050 (emphasis added). The SEIR blatantly disregarded this unambiguous standard, however, when it boldly asserted that “[r]oadway performance is controlled by the performance of intersections more than roadway segments. Roadway intersections in the area would operate at LOS D or better, with mitigation provided in Section 4.4. . . .” *Id.* Indeed, the two tables in the SEIR comparing traffic levels with and without the Project identify levels of service only at “Intersection[s].” *Id.*, 383:P21084 (“Year 2008 Peak Hour Intersection LOS without Project”) & P21086 (“Year 2008 with Project LOS” listing “Intersection[s]”). The lack of analysis of the Project’s traffic impacts on *roadway segments* cannot, as a matter of law, constitute substantial evidence supporting the SEIR’s conclusion that the Project will not conflict with the General Plan. *See Berkeley Jets, supra*, 91

Cal. App. 4th at 1370-1371 (invalidating EIR based on conclusion that health effects of toxic air contaminations were “unknown” where agency failed to evaluate effects).

Appellant anticipates that Respondent and Real Party in Interest may respond by claiming that all of this is much ado about nothing. In particular, they might say, the SEIR ultimately concluded that the Project is expected to have “unavoidable significant impacts related to traffic,”¹⁸ and for that reason Respondent adopted a statement of overriding considerations accepting the traffic impacts as a reasonable trade-off in light of the Project’s benefits. Admin. R. 383:P21105-21106 (traffic conclusion). Such a claim will go nowhere, however, for a nearly identical claim regarding a proposal’s emission of toxic air contaminants was rejected head on in *Berkeley Jets*. According to the Court of Appeal, “[t]his approach has the process exactly backward and allows the lead agency to travel the legally impermissible easy road to CEQA compliance. **Before** one brings about a potentially significant and irreversible change to the environment, an EIR must be prepared that sufficiently explores the significant environmental effects created by the project.” *Berkeley Jets*, *supra*, 91 Cal. App. 4th at 1371 (emphasis added).

¹⁸ The conclusion was made in the SEIR’s chapter analyzing traffic impacts, not in the chapter analyzing land-use and planning impacts.

Appellant also anticipates that Respondent and Real Party in Interest will argue that that Respondent was entitled to exercise its discretion in choosing methodology. However, Appellant’s argument is not that the traffic and transportation section is invalid because Respondent did not use the methodology set forth in the General Plan. The defect is that there is no substantial evidence to supporting the SEIR’s conclusion about there being no General Plan inconsistencies requiring analysis. That defect exists because the SEIR never looked at the Project’s impacts to roadway segments. *See Sundstrom, supra*, 202 Cal. App. 3d at 311 (“The agency should not be allowed to hide behind its own failure to gather relevant data. *** CEQA places the burden of environmental investigation on the government rather than the public.”).

Since the SEIR’s conclusion that the Project will not be inconsistent with the General Plan is unsupported by any analysis, and hence not supported by any substantial evidence in the record, the SEIR’s certification and the Project’s approval should be invalidated. *Accord Endangered Habitats League v. County of Orange*, 131 Cal. App. 4th 777, 783-784 (2005) (concluding that failure to use unambiguous traffic-level standard prescribed by general plan rendered proposal inconsistent with general plan and subject to being set aside).

C. The Subsequent Environmental Impact Report Did Not Evaluate a Traditional Wal-Mart Discount Store as a Reasonable, Feasible, Less-Damaging Alternative to the Project

Not only did Respondent not follow CEQA's procedures relating to nearby schools, and not only did Respondent failed to ensure that the SEIR analyzed all potentially significant impacts and back up the analysis with substantial evidence, but Respondent also failed to consider an obvious alternative to the Project that would have avoided several significant impacts. Appellant urged Respondent to consider the impacts of a lower-intensity alternative to the Project--in particular, a traditional Wal-Mart discount store. Admin. R. 438:P24127; 553:S4600, § VIII. Respondent, unfortunately, would hear nothing of it.

Black-letter CEQA law requires the analysis of a reasonable range of alternatives. CAL. CODE OF REGS., tit. 14, § 15126.6(a). While the SEIR did not have to analyze every conceivable alternative, it had to consider enough variations to allow for a reasoned choice. *Mann v. Community Redev. Agency*, 233 Cal. App. 3d 1143, 1151 (1991) (upholding EIR where enough variations were presented to permit informed decision-making).

The range of alternatives considered in the SEIR did not include a traditional Wal-Mart discount store. Admin. R. 383:P21324-P21326. The SEIR looked at a lower-intensity alternative, going so far as to label it as the

“environmentally superior alternative.” *Id.*, 383:P21347. Still the SEIR gave

four reasons for the alternative’s rejection:

- It would fail to fully respond to the demands of the local and regional market by only partially addressing the identified demand for general merchandise retailers in the market area.
- A smaller commercial/retail footprint would result in lower employment generation.
- The tax generation potential of the project site would not be fully exploited, reducing the City’s economic base.
- It would fail to reflect the development intensity in surrounding areas as intended in the Redevelopment Plan for Project No. 2 and the Mountain Village Specific Plan.

Id., 383:P21347. Given those reasons, it is hard to explain why the range of alternatives did not include a traditional Wal-Mart discount store.

Generally speaking, a traditional Wal-Mart discount store would sell all the same general merchandise and by that measure overcome the first reason for rejecting the lower-intensity alternative, the primary difference being that, unlike the Project, it would not sell food.¹⁹ Admin. R. 553:S7358 (describing “Wal-Mart Discount Stores” and “Wal-Mart Supercenters”). A traditional

¹⁹ A traditional discount store would alleviate the impacts of food-store closures discussed in the preceding section on urban decay.

discount store would also have the same tax-generation potential, thereby overcoming the third reason for rejection, by offering pretty much the same merchandise for sale with the exception of food, which would not generate sales-tax revenues anyway. *Id.* A traditional discount store would even achieve the intended development potential for surrounding areas, and thus overcome the fourth reason for rejection, because it would be more than fifty-percent larger than the lower-intensity alternative. *Cf. id.*, 553:S7357 (showing average size of California discount store as 101,000 square feet); 383:P21344 (showing lower-intensity alternative’s size as 64,000 square feet). The only plausible reason for not considering a traditional Wal-Mart discount store as part of a reasonable range of alternatives would have to be that it would employ fewer workers than the Project would--roughly 225 employees compared to the Project’s 350 employees. *Id.*, 553:S7358. In this regard, it should be noted, the Project’s list of objectives does not identify a specific job-creation threshold that an acceptable proposal would have to meet; the goal is simply to “increase economic benefits to the City through job creation.” *Id.*, 383:P21031. A traditional discount store with 225 employees would surely do that. *See* CAL. CODE OF REGS., tit. 14, § 15126.6(a) (requiring EIR to consider reasonable range of alternatives that would satisfy “most of the basic objectives of the project”).

Of course, the evidence in the record leaves no room for objection that a traditional Wal-Mart discount store would not be feasible. As the record makes clear, traditional discount stores can be found up and running throughout California--142, to be exact--and across the county.²⁰ Admin. R. 553:S4600 & S7352-S7357.

A traditional Wal-Mart discount store alternative would have had the same environmental benefits as the lower-intensity alternative (*e.g.*, reducing the project's demand-driven impacts such as traffic, air pollution, noise, public services and utilities), would avoid the additional environmental impact associated with urban decay because the vacancies that would result appear to be mostly connected to the grocery component of the project (which a traditional store does not have), and would be feasible given the project objectives. With the SEIR having failed to consider the most reasonable imaginable alternative to the Project, CEQA's goal of ensuring informed decision-making has been thwarted. Respondent's certification of the EIR and approval of the Project should therefore be invalidated.

²⁰ Appellant has been unable to locate any finding in the record that a traditional Wal-Mart discount store would be economically, technologically, or otherwise infeasible.

VII. CONCLUSION

For all the foregoing reasons, Appellant respectfully urges this Court to grant the appeal.