

1 GERALYN L. SKAPIK (SBN 145055)
2 MARK C. ALLEN (SBN 60415)
3 LAW OFFICE OF MARK J. SKAPIK
4 250 West First Street, Suite 330
5 Claremont, CA 91711
6 Tel: (909) 398-4404
7 Fax: (909) 398-1883
8 Email: gskapik@skapiklaw.com

9 Attorneys for Plaintiff/Petitioner
10 HUNTINGTON BEACH NEIGHBORS
11 (H.B. NEIGHBORS)

12 SUPERIOR COURT OF THE STATE OF CALIFORNIA
13 COUNTY OF ORANGE – CIVIL COMPLEX CENTER

14 HUNTINGTON BEACH NEIGHBORS
15 (H.B. NEIGHBORS), a non-profit
16 organization,

17 Plaintiff/Petitioner,

18 v.

19 THE CITY OF HUNTINGTON BEACH;
20 HUNTINGTON BEACH CITY COUNCIL;
21 and DOES 1-50,

22 Defendants/Respondents.

Case No. 30-2009-00325686

[Assigned to Judge Nancy Wieben Stock, Dept CX105]

**PETITIONER HUNTINGTON BEACH
NEIGHBORS' REPLY BRIEF IN
SUPPORT OF WRIT OF MANDATE**

[Code of Civil Procedure § 1085, 1094.5;
and Public Resources Code § 21000, et seq.]

*[Filed concurrently with Request for Judicial
Notice in Support of Reply Brief]*

Trial Date: March 17, 2011
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Verified Petition Filed: December 4, 2009
CEQA

23
24 Petitioner/Plaintiff, Huntington Beach Neighbors hereby replies to Respondents/
25 Defendants, City of Huntington Beach and Huntington Beach City Council's opposition in
26 response to Petitioner/Plaintiff Huntington Beach Neighbors' opening brief on Petition for Writ of
27 Mandate.

28 ///

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 As exhaustively set forth in Petitioners/Plaintiffs, Huntington Beach Neighbors (“HB
4 Neighbors”) opening brief, HB Neighbors challenges the approvals made by Respondents/
5 Defendants, (“City” or “Huntington Beach”) in connection with the Downtown Specific Plan
6 Update (“Project” or “DTSP Update”).

7 In response the City makes just two main arguments: First the City contends the Petitioners
8 failed to exhaust their administrative remedies as City alleges that the letter submitted and
9 accepted at the January 19, 2010, Council Meeting, prior to the close of the public hearing and
10 prior to the filing of the Notice of Determination (NOD) on January 22, 2010, was untimely
11 submitted and therefore cannot be relied upon by Petitioner’s. The argument is wrong and
12 disgracefully so. The letter complies with every requirement of exhaustion. Second, the City
13 seems to argue that the mere fact that City prepared a “study” for a topic means that it must be
14 deemed “credible” by the Court regardless of its content or merit. As we show below, the court
15 cannot ignore the flaws in the study just because it is prolix.

16 **II. CITY MISSTATES THE STANDARD OF REVIEW**

17 In an apparent effort to secure a more deferential standard of review, Respondents’
18 misleadingly suggest, ‘the failure to proceed in a manner required by law’ standard under CEQA
19 is applied very limitedly. As set forth more fully in Petitioners’ Opening Brief, an agency’s
20 failure to proceed in a manner required by CEQA occurs under a far broader range of
21 circumstances, anytime the, “failure to include relevant information precludes informed decision-
22 making and informed public participation.” (*Drycreek Citizens Coalition v. County of Tulare*
23 (1999) 170 Cal.App.4th 20, 26.) Therefore as a matter of law, court’s reject EIRs that do not
24 “provide certain information mandated by CEQA and... include that information in the
25 environmental analysis,” *Vineyard Area Citizens for Responsible Growth v. City of Rancho*
26 *Cordova* (2007) 40 Cal.App.4th 412, 435, also see *Berkeley Keep Jets Over the Bay Committee v.*
27 *Board of Port Commissions* (2001) 91 Cal.App.4th 1344, 1371 (EIR failed to support conclusory
28 statements with scientific or objective data); *Sierra Club v. State Board of Forestry* (1994) 7

1 Cal.4th 1198 (agency failed to obtain information necessary to meaningfully access potentially
2 significant environmental impacts and development of mitigation measures.)

3 The substantial evidence standard of review applies only to factual disputes, such as a dis-
4 pute over a finding that mitigation measures described in an EIR adequately mitigated the impact
5 and only if that finding is supported by substantial evidence in the record. *Vineyard Area Citizens*,
6 *supra*, 40 Cal.App.4th at 435. Accordingly, this Court need not accord difference to Respondents
7 in the many cases where the City’s EIR failed to meet CEQA’s informational requirement, as
8 relevant information precludes informed decision-making and informed public participation.

9 In this connection, an environmental impact report must provide enough detail, “to enable
10 those who do not participate in its preparation to understand and to consider meaningfully the
11 issues raised by the proposed project. See *Bakersfield Citizens for Local Control v. City of*
12 *Bakersfield* (2004) 124 Cal.App.4th 1184, 1198. It is important to note, that emphasis should be
13 on the process of the project’s environmental review, not on the final outcome; the prejudicial
14 abuse of discretion therefore exists when the ***omission of relevant information has precluded***
15 ***informed decision-making and informed public participation***. The approval of this Project was,
16 in short, misguided, unresponsive, and contrary to CEQA.

17 **III. PETITIONERS’ EXHAUSTED ALL ISSUES PRESENTED IN THEIR BRIEF**

18 It is City’s contention that Petitioners failed to exhaust their administrative remedies
19 because they relied upon Attorney, Cory Briggs’ letter submitted on January 19, 2010, prior to the
20 close of the public hearing on the project.

21 It should be noted that many of the “failure to analyze” arguments raised in Petitioner’s
22 Opening Brief are derived from issues first raised in a comment letter dated January 18,
23 2010, from the Briggs Law Corporation (the “Briggs Letter”) (7AR25:4436-44410).
(City’s Opp. brief pg. 26.)

24 City cites no case law, because none exists, to support their position that a comment letter
25 submitted **prior** to the close of the public hearing and **prior** to the filing of the NOD fails to satisfy
26 the exhaustion requirements of Public Resources Code (PRC) section 21177. PRC 21177 is clear:

27 No action or proceeding may be brought pursuant to Section 21167 unless the alleged
28 grounds for noncompliance with this division were presented to the public agency orally or
in writing by any person during the public comment period provided by this division or
prior to the close of the public hearing on the project **before** the issuance of the notice of
determination.

1 City contends in their opening brief that the January 19, 2010 hearing was “limited to
2 reconsider “density” issue addressed in the DTSP Update.” (City Opp. brief pg 26: ln 22.) This is
3 a misrepresentation of the facts. At the November 16, 2009, City Council meeting it was made
4 clear to the Councilmembers and Public that the entire Specific Plan would be re-opened and that
5 appropriate public notice must be given for re-consideration of the DTSP at the January 19, 2010,
6 hearing:

7 FEMALE 1[City Attorney McGrath¹]: You can take the vote to reconsider tonight. In fact,
8 it's the only time you can take it is tonight, and then count (sis) staff will re-notice and have
9 a public hearing the second meeting in January.

10 MR. HANSEN: So we'll have to have a -- *essentially, an entirely new public hearing?*

11 FEMALE 1: *Yes, because you can't open it up on just one issue. It opens up the entire
12 specific plan.*

13 MR. HANSEN: And we'll have to give notice based upon all the procedures, et cetera, that
14 we followed for the initial public hearing?

15 FEMALE 1: Absolutely, same parameters. (AR45: 5528)

16 The January 19, 2010 public hearing minute notes states:

17 “Communication received on *Public Hearing Item No. 3* regarding the reconsideration of
18 approval of the update to Specific Plan No. 5-Downtown Specific Plan previously
19 approved on November 2, 2009: Dennis Osta, ... *Cory J. Briggs, of Briggs Law*
20 *Corporation, and Mark Allen.*” (AR 46: 5540).

21 At the January 19, 2010, Public Hearing, Councilmember Hanson states that he is going to
22 make an alternate motion, “to adopt the Specific Plan per the terms of the recommended staff
23 action with some minor amendments, *including all the late communication items*, ...” (AR 47:
24 5594.)

25 Thus, a Public Hearing occurred on the Downtown Specific Plan Project on January 19,
26 2010, and written and oral comments were received. All late communication was accepted and
27 not rejected. Further, a NOD was filed on January 22, 2010, after the subsequent project approval,
28 which occurred on January 19, 2010. Given that the Public Comment Letter submitted by Cory
Briggs, was timely received, *prior* to the close of the Public Hearing on the Project and *prior*
to the posting of the NOD on January 22, 2010, all issues set forth in Petitioners Writ and Opening
Brief were properly exhausted as Petitioners complied with the mandates of PRC 21177.

[I]f a public hearing is conducted on project approval, then new environmental objections

¹ The transcripts seem to make it clear that “Female 1” is the City Attorney.

1 could be made until close of this hearing. [Citations.] If the decision-making body elects to
2 certify the EIR without considering comments made at this public hearing, *it does so at its*
3 *own risk*. If a CEQA action is subsequently brought, the EIR may be found to be deficient
4 on grounds that were raised *at any point prior to close of the hearing on project*
5 *approval.*" (*Bakersfield Citizens, supra at 1201* (emphasis added).)

6 IV. 11TH HOUR AMENDMENT AND GENERAL PLAN VIOLATION

7 After the **close of the public hearing**, on January 19, 2010, Councilmember Hansen made
8 an alternative motion which was to do the following:

9 To adopt the specific plan per the terms of the recommended staff action with some minor
10 amendments,...have within District 1 a maximum building height of 45 ft., not to exceed
11 four stories on building sites that have a net area of 8,000 sq. ft. So it would have to have
12 a minimum 8,000 sq. ft. before it could go to the maximum" (hereinafter referred to as
13 "11th Hour Amendment"). (AR 47:5594, 5595).

14 The concept of allowing 4 stories on building sites that have a net area of 8,000 sq ft was
15 never identified or discussed by the Planning Commission, staff, City Council or analyzed in the
16 EIR. It is City's position that because Petitioner never addressed this issue, Petitioners failed to
17 exhaust their administrative remedies. However, Petitioners could not have exhausted an issue
18 that was never placed before them to consider. The concept of increasing the maximum building
19 height in the Downtown Core from 3 stories on developments with a net site area of less than
20 25,000 sq ft, to 4 stories on buildings that have a net site area of at least 8,000 sq ft was never an
21 issue during the Project proceedings.

22 The Land Use Element of the Amended General Plan controls density and intensity. The
23 Downtown Core density/intensity requirement is "minimum building height is 25 ft.; three stories
24 maximum for developments with less than 25,000 sq. ft. net site area; four stories maximum for
25 net site area of 25,000 sq. ft. or greater." (AR 25:4304) The 11th Hour Amendment to the DTSP
26 Update to not exceed 4 story heights for buildings on a net site area of 8,000 sq. ft. is a clear
27 violation of the General Plan.

28 This issue was never analyzed or addressed by the EIR consultants or the City. City
Counsels' opinion that an impact never considered in the environmental document to support a
project will have no significant effect on the environment, does not constitute substantial evidence.

The law in this area is clear:

1 Information introduced at the end of the environmental review process without analysis or
2 the benefit of public scrutiny or participation does not fulfill the informational function of
3 an environmental impact report (EIR) under the California Environmental Quality Act
4 (CEQA). West's Ann.Cal.Pub.Res.Code § 21061; 14 CCR § 15064 ...

5 The failure to comply with the law subverts the purposes of the CEQA if it omits material
6 necessary to informed decisionmaking and informed public participation; in such cases, the
7 error is prejudicial. West's Ann.Cal.Pub.Res.Code § 21000. (*Sierra Club, supra*; *Kings*
8 *County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 712) *Sunnyvale West*
9 *Neighborhood Assn. v. City of Sunnyvale City Council* (2010) 190 Cal.App.4th 1351,1380.

10 The public was never presented with an opportunity to address this 11th hour amendment
11 decision. The law mandates otherwise. Because the DTSP Update is inconsistent with the
12 General Plan, the DTSP Update is invalid and the Project approval must be set aside.

13 **V. THE EIR PREPARED TO SUPPORT THIS PROJECT IS INADEQUATE**

14 **A. THE LEVEL OF SPECIFICITY OF AN EIR IS DETERMINED BY THE**
15 **NATURE OF THE PROJECT**

16 It appears that it is City's position that because a *program* EIR was prepared, it need not be
17 as exhaustive as a *project* EIR.

18 The fact that this EIR is labeled a "program" rather than a "project" EIR matters little for
19 purposes of this inquiry. "The level of specificity of an EIR is determined by the nature of the
20 project and the 'rule of reason' (*Laurel Heights Improvement Association of San Francisco v.*
21 *Regents of the Universities of California* (1988) 47 Cal.3d 407 ("*Laurel Heights I*"), rather than
22 any semantic label accorded to the EIR." (*Al Larson Boat Shop v. Board of Harbor*
23 *Commissioners* (1993) 18 Cal.App.4th 729, 741-742.) See also Guidelines, § 15146.) Further
24 given that a Program EIR was prepared, once certified and the Project is approved for
25 development of apx. 1,330,483 sq ft of retail, restaurant, and visitor friendly uses, all that may be
26 necessary for new development to commence is a consistency determination that the proposed
27 Project is consistent with the DTSP Update and no further environmental review is necessary.

28 In *Health First v. March Joint Powers Authority* (2009) 174 Cal.App.4th 1135, 1146, an
EIR that, "... is intended to serve as the project-wide environmental document for the March
Business Center Specific Plan" was prepared. (*Id.* at p. 1139) When a large warehouse distribution
center filed an application to locate its facility within the Business Center, the court concluded that
all that was necessary for the applicant was a consistency review by the lead agency, no further
environmental review was necessary. "Any challenge to the Specific Plan for business center on
former Air Force base should have been raised during the California Environmental Quality Act

1 (CEQA) review process, not years later in opposition to the design review process for a warehouse
2 distribution facility that was to be a component of the larger business center”

3 Given that this Project will result in the potential for development of approximately
4 1,330,483 sq. ft of retail, restaurant, visitor-serving uses, and residential development, (AR
5 24:4143) all which may be deemed “a component” of the DTSP, it is warranted that at this time
6 this Program EIR contain a more exhaustive consideration of the effects and impacts this project
7 will have on the environment. (Guidelines §15168 (b).)

8 **B. TRAFFIC**

9 It is the City’s position that because “the traffic study runs about 1,000 pages, it must be a
10 “substantially credible study.” (City’s Opp. brief p. 12, lns. 6-7.) It should be noted however, that
11 the City never points to the actual page within the study where the substantial evidence exists
12 when they cite to the study to support their position. The City merely says “it’s somewhere in
13 there.” City cannot cite to the evidence because the traffic study and its methodology is devoid of
14 this information.

15 The legal standard does not support the City’s view that merely being verbose suffices.
16 The law looks to whether the information contained within the document is accurate and complete,
17 and a good faith effort at full disclosure has been made. (*Eureka Citizens for Responsible*
18 *Government v. City of Eureka* (2007) 147 Cal App 4th 357, 372.)

19 **1. Levels of Service and Traffic Counts.**

20 Though the EIR and Administrative Record is riddled with statements and comments
21 concerning the impacts that weekend traffic currently has on the Downtown area, (cites include:
22 AR 8:377, 413, 405, 416; AR 14:536, 722, 772, 774; AR 15:1820,1862; AR 21:2167), the City’s
23 traffic consultant failed to include a summer weekend traffic counts as part of their traffic baseline
24 analysis, even though the Parking Study contained a summer weekend parking analysis. While
25 members of the public are not experts in any sense of the word, their firsthand observations should
26 not casually be dismissed as immaterial because “relevant personal observations are evidence.”
27 (*Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d
28 151, 173.) ‘An agency cannot acknowledge a significant impact and refuse to do or find anything

1 else about it, and approve the project anyway.’ *Woodward Park Homeowners Ass’n, Inc. v. City of*
2 *Fresno* (2007) 150 Cal.App.4th 683, 724.

3 The City omitted any analysis of weekend traffic impacts in the downtown area. The City
4 claims there is no error here because the courts must defer to the lead agency findings with respect
5 to an expert’s methodology. That would be true if the methodology contained a sufficient
6 discussion as to why a certain pattern and practice was followed, such as why the traffic consultant
7 believed that it was unnecessary to analyze weekend traffic within the baseline traffic analysis and
8 such decision was supported by reasoned analysis and evidenced in the record. Here the traffic
9 study is missing that justification, even though it is a significant concern identified by the lead
10 agency and the public.

11 In *Barthelemy v. Chino Basin Municipal Water District* (1995) 38 Cal.App.4th 1609, the
12 court held that the methodology chosen by the lead agency must be supported by reasoned
13 analysis. “If an EIR presents alternative methodologies for determining a baseline condition,
14 however, we believe CEQA requires that each alternative be supported by reasoned analysis and
15 evidence in the record so that the decision of the agency is an informed one. We further find that
16 the EIR must set forth any analysis of alternative methodologies early enough in the
17 environmental review process to allow for public comment and response.” The methodology
18 chosen by the City contains neither reasoning or analysis. The “study” fails to even acknowledge
19 weekend traffic impacts as part of its baseline analysis. As the Supreme Court explained: “An
20 approach using hypothetical allowable conditions as the baseline results in ‘illusory’ comparisons
21 that ‘can only mislead the public as to the reality of the impacts and subvert full consideration of
22 the actual environmental impacts,’ a result at direct odds with CEQA’s intent. (*Environmental*
23 *Planning Information Council v. County of El Dorado* (1982) 131 Cal.App.3d 350, 358.)

24 **2. Parking.**

25 As set forth in Petitioners opening brief, the existing parking demands, “greatly exceeds
26 the parking capacity on summer, holidays and special events,” and “at capacity” conditions occur
27 during peak summer days, *particularly in weekends.*” (AR 8:413.) The baseline for parking
28 indicates that development thresholds identified in the Downtown Parking Master Plan (“DPMP”)

1 have been met. (AR 8:176) The net new development added by this Project will be
2 approximately 1,330,483 sq. ft. (AR 24:4143) The manner in which the City attempts to avoid
3 addressing this significant impact and reduce the impact on “paper” is to eliminate the DPMP,
4 change the parking code requirements and conclude that parking under the DTSP will be required
5 to meet the new minimum code requirements.

6 The City’s new parking minimum code requirements reduces the ratio of required parking
7 per square foot of gross floor area in the Downtown Core. (AR 8:176) City’s Opposition brief,
8 does not cite even one fact that supports the City’s conclusion that implementation of the new
9 code requirement that reduces the ratio of required parking space per square foot of gross floor
10 area or eliminates on-street parking spaces (AR 8:176-177), will create enough parking for over a
11 million square feet of new development. The only thing that occurs with reducing the ratio is to
12 eliminate parking spaces code requirements for the commercial, restaurant or retail businesses, it
13 does not create more parking.

14 Further, the City, in their opposition brief, claim that the DTSP provided a “toolbox of
15 strategies” to meet the need for additional parking. (City Opp brief p. 15 lns7-13.) This toolbox
16 may contain “strategies” but clearly contains no mandatory mitigation measures to address
17 parking.

18 The Kimley-Horn parking Master Plan is inadequate as it failed to analyze a number of
19 issues and the parking study was not conducted during peak summer time, but on two days in late
20 August where it is known that students have started returning to school. (AR 15:1812) One can
21 only surmise that City conducted these studies at this time so as to get the most favorable parking
22 statistics during the summer time period.

23 The City’s Opposition brief raises no opposition to the issues Petitioners raised addressing
24 the inadequacies found in the Kimley-Horn parking study or the In-Lieu parking issues and the In-
25 Lieu parking program. See, Petitioners Opening page 13, lines 21 through page16 lines 9.
26 Petitioners clearly prevail on those issues.

27 The omitted traffic and parking information and discussions are essential to a basic
28 understanding as to whether this massive development project will result in significant

1 environmental impact in terms of traffic volume, delay, congestion, levels of service, parking,
2 ambient noise, and air quality as compared to the existing conditions. Without a straightforward
3 assessment of the project's full impact on existing conditions, the EIR process does not serve its
4 core informational purpose.

5 **C. CUMULATIVE PROJECT IMPACTS**

6 City argues that Petitioners failed to exhaust the issues addressing Cumulative Project
7 Impacts because, “only Cal Trans raised any issue regarding the identity of the proposed projects
8 included in the traffic cumulative effects analysis (3 AR15:1733), and even then Cal Trans did not
9 demand that the same projects be used for the traffic and cumulative effects analysis...” (City
10 Opp. brief pg 17-18.) The City misstates the position taken by Cal Trans and misstates the law.
11 As set forth above, Petitioner properly exhausted pursuant to PRC 21177. (See argument above
12 under Section III.)

13 Cal Trans question presented in its comment letter is:

14 The list of Cumulative Projects for traffic study (page 4-196) is different from the one
15 found on page 3-38 under "Project description". Please provide reasons for the discrepancy
16 and explain why projects *such as* the Beach/Edinger Specific Plan were not included in the
cumulative analysis, as the cumulative effects of these projects could be significant.
(AR 15:1733) (emphasis added)

17 Again, City misstates the record. Cal Trans never demanded that the ‘same project be used
18 for the traffic and cumulative effects analysis. Cal Trans requested that City provide reasons for
19 the discrepancy and an explanation why projects such as the Beach/Edinger Specific Plan project
20 were not included in the cumulative analysis as the “*cumulative effect of these projects could be*
21 *significant.*” Cal Trans is absolutely correct in their statement, failure to include the projects
22 identified in the Project description in the cumulative analysis section for the traffic study is an
23 issue and the cumulative effects of these projects could be significant. (AR 15:1733)

24 City attempts to get around this major defect in the EIR by claiming that the issue raised by
25 Petitioners is different than the issue raise by Cal Trans. The issue raised by Petitioners is the
26 same; Petitioners simply identified the 9 missing projects not reviewed by the City. This issue
27 was specifically identified for the City and in fact the City understood and responded to Cal Trans
28 question (AR 15;1829), however the response was misguided and untrue. As fully briefed in

1 Petitioners' Opening brief, page 17 through page 19, the cumulative year 2020 traffic volume
2 without project and cumulative year 2020 plus project missed the impacts of 9 projects, as these
3 projects are not identified on page 4-196 under Table 4.12.3. (AR 8:388) The same is true for
4 cumulative year 2030 projection.

5 The omission in the Traffic Cumulative Effects Section of the Beach/Edinger Corridor
6 Study alone should invalidate the analysis. The Beach/Edinger Corridor is within one mile of the
7 Project area and anticipates the addition of significant new development. (AR 8: 189) Further,
8 omission of Edison Community Center Youth Sport Complex from the Traffic Cumulative Effects
9 Study is also fatal to the study's validity given the traffic impacts that accompany such facilities.

10 **D. NOISE**

11 Once again it is City's position that because they prepared a Noise Assessment, the
12 information contained in the assessment is *ipso facto* credible. The Noise Study was conducted on
13 a non-peak, mid-week day (Tuesday and Wednesday) between 10:38 am-2:36 pm (AR 8:327) on
14 December 2-3, 2008, and no noise monitors were located in the first three blocks of Main Street,
15 the Downtown Core. Again the City has admitted on countless occasions that peak season is
16 summer, therefore it is truly uncertain as to why the noise study was conducted during mid-
17 morning to mid-afternoon, during a mid-week in December, quite possibly the quietest time period
18 in the City. Further the study sets forth no rationale as to why peak summer months were ignored
19 and no monitors were placed in the Downtown Core.

20 Again, as stated through Petitioners brief and also contained throughout the administrative
21 record, summer is the peak season for Huntington Beach. The Project is designed to bring in
22 businesses, restaurants and visitor-services into the Downtown area. The Noise Study is
23 completely devoid of any analysis or information as to how the noise generated during peak
24 season will affect the environment. The City cannot dismiss this issue by merely holding that
25 because their expert's methodology didn't account for this impact, they need not address it. In
26 *Barthelemy, supra*, the court held that the methodology chosen by the lead agency must be
27 supported by reasoned analysis. The City can point to no rational or reason to support the
28 methodology used by their noise experts.

1 **E. PERFORMING ARTS CENTER**

2 City's opposition brief argues that Petitioners position that the Performing Arts Center
3 should have been included within the cumulative project impact and traffic impact analysis is not
4 supportable. City then argues, "City and the EIR made a point of emphasizing that there is no
5 current plan for development of a Performing Arts Center. See: 3 AR1847, 1949." (See City Opp.
6 Brief p. 19, lns 24-26.) What is contained on the pages cited by the City are responses to comment
7 letters by city staff, nothing more. The EIR is riddled with statements relating to the proposed
8 development of a Performing Arts Center. (Ref. cites include: AR 8:812, 213, 254, 312, 341, 385;
9 AR 53:5698.) In fact in May 2009, prior to the release of the Draft EIR in July of 2009, the City
10 commissioned a study entitled: *Proposed Cultural Center, Huntington Beach Analysis of Potential*
11 *Market Demand, Estimated Revenue and Economic Impact; Dated May 2009.* (AR24:3843) This
12 Study was presented on September 4, 2009 at the Planning Commission Meeting. (AR24:3843)

13 Other than citing to staff's responses to comment letters regarding the construction of the
14 Performing Arts Center, City presents no evidence that supports their position that the City need
15 not discuss or evaluate as a cumulative impact the construction of the Performing Arts Center. It is
16 certainly a contemplated project as a detailed market analysis was prepared and presented to the
17 Planning commission. Therefore, the EIR is defective as an informational document as it does not
18 identify and analyze the cumulative effects of the Performing Arts Center.

19 **F. CULTURAL RESOURCES**

20 Petitioner Opening brief at pages 21-24, discusses in extensive detail why the Main Street
21 Library (the "Library") should have been identified as an historical resource in the EIR, pursuant
22 to both §§ 15064.5(a)(2) and (3). The Library is designated as a local landmark in the General
23 Plan Historic and Cultural Resources Element. (AR 8:254) Therefore, pursuant to CEQA
24 Guidelines § 15064.5(a)(2), the Library is presumed to be an historical resource, and should have
25 been identified as such in the EIR. City's argument does not refute Petitioners position and only
26 argues that no construction is contemplated on this site, again pointing to Staff's responses to
27 comment letter to support this position. However, this certainly contradicts the EIR provides
28 which provided the specifications for the potential Cultural Arts Center at the Library site. The

1 EIR states that the Project requires that the Cultural Arts Center stand no more than 3 stories and
2 35 feet tall, and span no more than 30,000 square feet. Furthermore, the Project provides that
3 there be no net loss of green space on the Library site. (AR 8:312-313)

4 The EIR should have categorized the Library as an historical resource. The Library meets
5 the criteria for listing on the CRHR.

6 **G. CITY ILLEGALLY PIECEMEALED THE PROJECT**

7 Petitioners set forth an entire discussion as to how the City is attempting to piecemeal this
8 project by refusing to analyze the impacts associated with construction of a Cultural Arts Center
9 and the impacts associate with amendments of the General Plan, the Zoning text and the Local
10 Coastal Program. (EIR Section 4.7; AR 8:296-320) The City dismissed Petitioners arguments in
11 their opposition brief. The EIR does not review the entire action that is contemplated. The Project
12 is merely one piece of a much greater project that entails updating the Specific Plan, amending the
13 General Plan, amending the Zoning text, amending the Local Coastal Program, and building the
14 Cultural Arts Center on the Library site. (AR 8:101, 254) The environmental analysis relating to
15 the amendment to the General Plan and the construction of the Cultural Arts Center is required to
16 be in the EIR.

17 **H. PACIFIC CITY PROJECT**

18 City sets forth no argument to refute Petitioners position that the construction of the Pacific
19 City Project, an approved and fully entitled project (AR24:4143; AR 117:7059) should have been
20 evaluated in the cumulative impacts section relating to construction activities within the
21 Downtown area. Again the project is entitled and approved. Given that City can point to no
22 evidence in the administrative record to support their position that this project need not be
23 reviewed, Petitioners prevail on this issue.

24 **I. AESTHETICS, UTILITIES AND SERVICE SYSTEMS, WATER SUPPLY,**
25 **HAZARDS AND HAZARDOUS WASTE, AIR QUALITY, GLOBAL**
WARMING

26 The City's main argument with respect to Petitioners contention that the EIR failed to
27 adequately address the environmental impacts in the above areas is that Petitioners failed to
28 exhaust their administrative remedies because Petitioners relied on the Briggs letter. This

1 argument is fully brief above Section III, thus Petitioners exhausted all issues relating to the above
2 areas. City never directly responds to Petitioners arguments addressing the EIR inadequate
3 analysis of the above areas, the City simply cites broad and general propositions instead of citing
4 to the record where substantial evidence exists to support the City's conclusion that the EIR
5 adequately.

6 For example, City argues that since the City's solid waste providers, Rainbow Disposal
7 and Integrated Waste Management, and Orange County Sanitation District were on the City's
8 notification list and provided no comment letter, there apparently is problem with the EIR's
9 analysis. (See City's Opp. Brief, pg 30, lns 9-11.) That is City's evidence to support that their
10 environmental analysis in this area was sufficient.

11 With respect to Water Supply, the mitigation measures identified are not mandatory, but
12 merely state what a developer should do, not must do. Mitigation measure 4.13-4 (AR8:438).
13 Again, City fails to address in their brief where in the record there is evidence to support their
14 decision that the above areas were adequately reviewed in light of the Projects impacts.

15 As for impacts to Global Warming, the EIR fails to include a full and adequate inventory
16 of the Project's Greenhouse Gas emissions ("GHG"). An inventory of Project emissions should
17 have included at a minimum, an estimate of emissions from Direct Impacts (i.e. construction
18 emissions, vehicle trips, and solid waste storage, etc.), and Indirect Impacts (i.e. energy
19 consumption). Table 4.2.9 shows that 89% of the GHG emissions generated by the Project to be
20 from motor vehicles (AR 8:236). Given the EIR failed to do an adequate traffic count, as weekend
21 traffic counts were ignored, this percentage will certainly be much higher.

22 **J. PUBLIC SERVICES**

23 Petitioners request this Court take Judicial Notice of two documents that were prepared
24 after the Project was approved. The first document attached as Exhibit A to the Judicial Notice, is
25 a business record prepared on July 1, 2010, by the Huntington Beach Police Department entitled
26 "Strategies to Address DUI Driver." On page 5 of this document Police Chief Kenneth Small
27 states that drunk drivers are the number one public safety problem in Huntington Beach:

28 ///

1 "In spite of having 12 officers standing by to stop suspected drunk drivers, once the
2 [Downtown] bars began to close, there was such a rush of suspected drunk drivers that
3 within 10 to 15 minutes all of the officers had detained suspected drunk drivers. Those
4 drivers were ultimately arrested while a large number of suspected drunk drivers continued
5 to drive out of the parking structure with no one left to stop them. Our resources were so
6 quickly overwhelmed we believe on any given night a large number of drunk drivers likely
7 leave our downtown area undetected. This is but one example of an event that leads us to
8 believe there are significant numbers of undetected DUI drivers each day in Huntington
9 Beach."

10 Inadequate police services were raised during the administrative process and the concern
11 was that with the increase of restaurants serving alcohol, there will be an increase in drunk driving
12 related accidents and deaths. (AR 15:1811) The City's response to this comment was, "The
13 current authorized staffing level of the Police Department is adequate for the provision of police
14 service within the City..." (AR8:355) Based upon the above report provided by the HB police,
15 the City's response to comments is incorrect.

16 The second document Petitioners request this Court take Judicial Notice of is attached as
17 Exhibit B to Petitioners Request for Judicial Notice and is the 2009 Safety report prepared by the
18 California Office of Traffic and Safety. This report was published 2010, after the Project was
19 approved. This document is attached to refute City's conclusion that the police staff is adequate to
20 handle current issues. The Report list City of Huntington Beach 2nd out of 56 cities in alcohol
21 related fatal and injury related accidents. The EIRs conclusion that the impact on police service is
22 less than significant is not supported by evidence.

23 The DTSP calculates the need for more police services only upon the number of new
24 residential units, not on full build-out of the Project. (AR 24:4143) The DTSP and EIR do not
25 adequately address the very high concentration of alcohol-serving restaurants (36 establishments
26 within a few city blocks) and the future impact of visitor-serving facilities on the surrounding
27 neighborhoods. The Section addressing Police Services is approx. 3 paragraphs (AR 8:355) and
28 makes no mention how the police will service the additional Retail, Restaurants and Bars that will
be developed. (AR 8:312)

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1 **VI. THE PROJECT'S EIR DOES NOT ANALYZE A REASONABLE RANGE OF**
2 **ALTERNATIVES**

3 It is City's position that Petitioners cite no authority to support its position that an EIR
4 must describe a reasonable range of alternatives to the project or, "...different combination of
5 uses. CEQA does not require that "different uses" of the subject property be analyzed as argued
6 by Petitioner." (City Opp. Brief pg 36 lns 1-5.) City is again incorrect in its legal position. Not
7 only does CEQA Guidelines §15126.6 support Petitioners position, but so does case law:

8 These statutory and judicial concepts are carried forward in the Guidelines, which state that
9 an EIR must "[d]escribe a range of reasonable *alternatives to the project, or to the location*
10 *of the project, which could feasibly attain the basic objectives of the project, and evaluate*
11 *the comparative merits of the alternatives."* (Guidelines, § 15126, subd. (d), italics added.)
12 As the underscored language suggests, project alternatives typically fall into one of two
13 categories: *on-site alternatives, which generally consist of different uses of the land*
14 *under consideration; and off-site alternatives, which usually involve similar uses at*
15 *different locations.* (See, e.g., *Laurel Heights, supra*, 47 Cal.3d at pp. 403-407, 253;
16 *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553,565. (emphasis
17 added)

18 City admits that it failed to include different intensities and uses as it believed CEQA did
19 not require such analysis. (City Opp. Brief, pg 36 lns 3-4.) As stated above case law and statute
20 dictate otherwise. In sum, as fully set forth in Petitioners opening brief, the EIR does not discuss a
21 reasonable range of alternatives to the Project, does not describe the alternatives to the Project in
22 sufficient detail, and does not provide adequate alternatives to the location of the Cultural Arts
23 Center. Such analysis omissions are violations of CEQA Guidelines §15126.6. Therefore the EIR
24 must be set aside and all Project approvals rescinded.

25 **VII. CONCLUSION**

26 For the reasons fully brief in Petitioner opening brief and further set forth above, Petitioner
27 respectfully requests that the Court grant the Petition for Writ of Mandate and requests that this
28 Court issue a Peremptory Writ of Mandate.

Respectfully submitted,

DATED: February 16, 2011

LAW OFFICE OF MARK J. SKAPIK

By: 
GERALYN L. SKAPIK
Attorneys for Plaintiffs/Petitioners

1 **PROOF OF SERVICE**

2 I declare that I am over the age of eighteen (18) and not a party to this action. My business
3 address is 250 West First Street, Suite 330, Claremont, CA 91711.

4 On February 16, 2011, served the following document(s): **PETITIONER**
5 **HUNTINGTON BEACH NEIGHBORS' REPLY BRIEF IN SUPPORT OF WRIT OF**
6 **MANDATE** on the interested parties in this action by placing a true and correct copy of such
7 document, enclosed in a sealed envelope, addressed as follows:

8 Jennifer McGrath, City Attorney
9 John M. Fujii, Sr. Deputy City Attorney
10 Scott Field, Asst. City Attorney
11 CITY OF HUNTINGTON BEACH
12 2000 Main Street
13 Huntington Beach, CA 92648

*Attorneys for Respondents: City of
Huntington Beach and Huntington Beach
City Council*

Tel: (714) 536-5555; Fax: (714) 374-1590
sfield@surfcity-hb.org
ifujii@surfcity-hb.org

14 Murray O. Kane, Esq.
15 Donald P. Johnson, Esq.
16 KANE, BALLMER & BERKMAN
17 515 South Figueroa Street, Suite 1850
18 Los Angeles, CA 90071

*Co-Counsel for Respondents:
City of Huntington Beach and Huntington
Beach City Council*

(213) 617-0480; Fax (213) 625-0931
mkane@kbblaw.com
don@kbblaw.com

19 **By U.S. Mail.** I am readily familiar with the business' practice for collection and
20 processing of correspondence for mailing with the United States Postal Service. I know
21 that the correspondence was deposited with the United States Postal Service on the same
22 day this declaration was executed in the ordinary course of business. I know that the
23 envelope was sealed and, with postage thereon fully prepaid, placed for collection and
24 mailing on this date in the United States mail at Claremont, California.

25 **By Facsimile.** The facsimile transmission of the foregoing document was reported as
26 complete and without error. A copy of the transmission report as issued by the
27 transmission facsimile machine is attached pursuant to California Rules of Court, Rule
28 2.306.

By E-Mail or Electronic Transmission. I caused a copy of the document(s) to be sent to
persons at the email addresses listed in the Service List. I did not receive, within
reasonable time after the transmission, any electronic message or other indication that the
transmission was unsuccessful.

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

Executed February 16, 2011, in Claremont, California.

27 
28 _____
MYRA RIOS