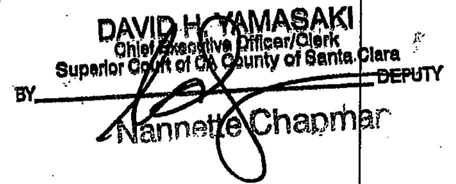

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

JOY OGAWA AND TERRY SHUCHAT, Petitioners, vs. CITY OF PALO ALTO, CITY COUNCIL OF CITY OF PALO ALTO, and DOES 1 through 25, Respondents.	Case No. 1-11-CV-198482 ORDER RE: PETITION FOR WRIT OF MANDATE

The Petition for Writ of Mandate by Petitioners Joy Ogawa and Terry Shuchat ("Petitioners") came on for hearing before the Honorable Patricia M. Lucas on October 7, 2011, at 9:00 a.m. in Department 2. Pursuant to Evidence Code §§452(b) and (c), the request for judicial notice by Respondents City of Palo Alto and the City Council of Palo Alto (collectively "City") is granted as to Exhibits A and C, the request regarding Exhibit B having been withdrawn at the hearing.

The matter having been submitted, the Court has carefully reviewed the relevant portions of the administrative record and all briefs and pleadings in the matter and now finds and orders as follows:

I. First Cause of Action For Violation of California Environmental Quality Act

Petitioners' first cause of action alleging violation of the California Environmental Quality Act (CEQA) is granted. According to the City, its project approval for CEQA purposes did not take place until February 14, 2011, when the City Council approved the California Avenue Negative Declaration and established the Capital Improvements Program ("CIP") to fund the project. However, the Administrative Record ("AR") makes clear that City Council Resolution No. 9118 (AR 0003-0005), passed on December 6, 2010, committed the City to a specific design outcome, i.e., reducing California Avenue from four lanes to two, as the City had expressly offered to do in its October 4, 2010 grant application submitted to the Valley Transportation Authority ("VTA"). Accordingly, that Resolution constituted a "legislative action" by Respondents, an approval under CEQA Guidelines §15352[1], taken without prior CEQA compliance.

A. Factual Background

The City submitted a "Capital Grant Application", dated October 4, 2010, to VTA for "California Avenue-Transit Hub Corridor Improvements". AR 0625-0655. The money from this grant would constitute approximately 68% of the proposed project's budget: roughly $1.15 million out of an estimated $1.7 million total. AR 0629. In the application, the City stated its intention, if awarded the grant money, to "transform California Avenue into a bicycle and pedestrian corridor," to be "accomplished by de-emphasizing vehicle transportation modes through a 4- to 2-vehicle lane reduction . . . ." AR 0628. The "Project Scope" is described as including "a 4- to 2- vehicle lane reduction to promote a safer bicycle and pedestrian environment." AR 0632. The City stated that "[t]he environmental stage is envisioned to be a

[1] The CEQA Guidelines are located at Cal. Code Regs., tit. 14 §15000 et seq.

relatively minor process with a focus on a transportation study to *validate* the proposed 4- to 2-lane reduction and provide recommendations for traffic improvements to adjacent streets. *Traffic counts collected by the City do not show any significant impact with the lane reduction on California Avenue.* Upon award of gran[t] funding for the project, the City will complete all necessary CEQA and NEPA clearances to satisfy the requirements of the Caltrans Environmental Review process." AR 0634, emphasis added. These "traffic counts", presumably taken before October 4, 2010, are not further identified in the record, but are apparently not the same counts taken later in November 2010 (See AR 0685-0987, traffic impact analysis dated December 14, 2010: reference at 0691 to "data obtained in November 2010").

The City Manager's Status Report for the Council's October 4, 2010 Meeting informed the City Council that the acceptance of the grant would commit the City to a certain design feature: the lane reduction. "The plan for lane reduction . . . has been controversial. *Staff submitted a grant proposal to the [VTA] for funding for streetscape improvements that may be granted only if the street is reconfigured to a two lane street.* The grants will be announced in late November. If the Council does not support the lane reduction, staff can request withdrawal of the submitted application or can discuss with VTA acceptable modifications to the streetscape design." See AR 0326, emphasis added.

At the October 27, 2010 meeting of the City's Planning and Transportation Commission, City Planning Official Caporgorno informed the Commission that *"[w]e found out yesterday that the grant was funded. So we got the grant money. So we have a confined timeframe in which we need to get a Resolution that will accept the grant money.* So from now until the time we bring it to the Commission we are going to be working on the environmental review, some traffic analysis is being done particularly to look at the possibility of conversion from four lanes to two

lanes. So the concepts that went to VTA for the streetscape plan will be coming back to you. Then you will make a recommendation to Council, and the Council will decide whether or not we want to accept the money. . . . *I think we will be locked in probably if we accept the money for the two lanes versus the four lanes. So that is pretty much locked.*"

City Planning Director Williams then added that "[w]e are not asking you to recommend anything at this point other than to just understand that we are going to the Council with a Resolution that tentatively accepts the grant. They have not officially awarded it but in order to take action at their December VTA meeting *they need a Resolution from the City saying that we are willing to accept this* but Staff understands that we have a whole process to go through in terms of continuing to vet those improvements including *the four lane versus two lane issue, which is pretty much a deal breaker on the grant.* We want to set that grant so it is there and available assuming that we do wish to move forward with a program as proposed in the grant. So I just want to be sure it is understood, and if for some reason the two lanes doesn't happen and we lose the grant, and we don't move forward with the grant."

Commission Chair Tuma then asked Williams: "That decision to accept locks us into the two lane configuration. Is that correct?" Williams responded: "No, only if we ultimately pursue it, but we can't pursue it just by saying we will accept that." Commission Chair Tuma: "So we can accept the funds but then eventually reject the funds?" Williams: "Right. Right, if the project does not proceed to fruition then we would not proceed with it, or if for some reason we didn't have the matching funds. There are a variety of reasons why it might not." AR 0407-0409, emphasis added.

City Staff's presentation to the Planning and Transportation Commission at its Jan. 12, 2011 meeting again confirmed that the grant proposal was first submitted to VTA in October

2010 and that "the major item in there is a proposed four-lane to two-lane reduction, *which is really how we sold the project to the VTA* to help tie in the pedestrian connectivity of the street to the exiting land, the adjacent land uses, and the transit uses at the Caltrain station as well as the VTA and other public transit services along El Camino Real." AR 0490, emphasis added.

The City Council's December 6, 2010 Resolution, No. 9118, stated that the City "is submitting a grant application"—which in reality had already been submitted on October 4, 2010 and which the City had already been informed would be awarded. The December 6, 2010 Resolution also stated that "as part of the application for . . . funding, MTC [Metropolitan Transportation Commission] requires a resolution adopted by the responsible implementing agency stating the following: ... 4) *The assurance of the sponsor to complete the project as described in the application* . . ." AR 0004, emphasis added. The Resolution went on to recite the City's legal conclusion that "The Council finds that this resolution is not a project under the [CEQA] and, therefore, no environmental impact assessment is necessary."

B. Analysis

Public Resources Code section 21100(a) provides, in pertinent part, that "All lead agencies shall prepare, or cause to be prepared by contract, and certify the completion of, an environmental impact report on any project which they *propose to carry out or approve* that may have a significant effect on the environment." (Emphasis added.) Section 21151, pertaining to local agencies, contains similar language as to projects "they *intend to carry out or approve*." CEQA Guidelines 15352(a) defines an "approval" as, in part, "the decision by a public agency which commits the agency to a definite course of action in regard to a project intended to be carried out by any person. ... Legislative action in regard to a project often constitutes approval." CEQA Guidelines 15378 defines "project" as "the whole of an action, which has a

potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment," including, pursuant to subdivision (1), "An activity directly undertaken by any public agency including but not limited to public works construction and related activities . . . improvements to existing public structures. . . ."

"Choosing the precise time for CEQA compliance involves a balancing of competing factors. EIRs and negative declarations should be prepared as early as feasible in the planning process to enable environmental considerations to influence project program and design and yet late enough to provide meaningful information for environmental assessment." (Cal. Code Regs., tit. 14, section 15004, subd.(b).) The purpose of CEQA is to inform the public and public officials of the environmental consequences of decisions *before they are made. Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal 3d 553, 564. "To be consistent with CEQA's purposes, the line [when a project ripens into a commitment] must be drawn neither so early that the burden of environmental review impedes the exploration and formulation of potentially meritorious projects, nor so late that such review loses its power to influence key public decisions about those projects." *Save Tara v. City of West Hollywood* (2008) 45 Cal 4th 116, 130-31. An agency must consider environmental problems at a point in the planning process where there is still "genuine flexibility." *Mount Sutro Defense Committee v. Regents of the University of California* (1978) 77 Cal App 3d 20, 34.

"Drawing this line [when an agency's favoring of and/or assistance to a project becomes a commitment] raises predominantly a legal question, which we answer independently from the agency whose decision is under review. . . . A claim . . . that the lead agency approved a project with potentially significant environment effects before preparing and considering an EIR for the project 'is predominantly one of improper procedure' to be decided by the courts independently.

... [T]he timing question may also be framed by asking whether a particular agency action is in fact a 'project' for CEQA purposes, and that question, we have held, is one of law. ... [A]n agency has no discretion to define approval so as to make its commitment to a project precede the required preparation of an EIR." *Save Tara,* 45 Cal 4th at 131-132, internal citations omitted, bracketed comments added.

In *Save Tara*, the Supreme Court further stated that, in determining if a public agency's preliminary agreement amounted to a project approval: "courts should look not only to the terms of the agreement *but to the surrounding circumstances to determine whether, as a practical matter, the agency has committed itself to the project as a whole or to any particular features, so as to effectively preclude any alternatives or mitigation measures that CEQA would otherwise require to be considered, including the alternative of not going forward with the project*." 45 Cal 4th at 139, emphasis added. See also *Cedar Fair L.P. v. City of Santa Clara* (2011) 194 Cal App 4th 1150, 1170 (quoting and applying *Save Tara*).

While the *Save Tara* decision concerned an EIR, its test applies equally to the preparation of any purportedly CEQA-compliant document by a public agency, such as the Negative Declaration here. CEQA Guidelines §15004 [Time of Preparation], subdivision (b)(2) states in pertinent part that "public agencies shall not undertake actions concerning the proposed public project that would have a significant adverse effect *or limit the choice of alternatives* or mitigation measures, before completion of CEQA compliance. For example, agencies *shall not*: ... (B) Otherwise *take any action which gives impetus to a planned or foreseeable project in a manner that forecloses alternatives or mitigation measures that would ordinarily be part of CEQA review of that public project*." Emphasis added.

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After passage of the December 6, 2010 Resolution No. 9118, there was no longer "genuine flexibility" in the planning process for the California Avenue improvement project. The City had submitted a detailed grant application describing the lane reduction, and the Resolution was intended to, and did, satisfy the MTC requirement that it contain *"the assurance of the sponsor to complete the project as described in the application . . ."* The City's application committed it to a lane reduction: a design feature that foreclosed other options, including leaving the street as it is with four lanes (the "no project" option required to be considered under CEQA). City staff was well aware of this and had told the City Council and the City Planning & Transportation Commission as much. Given that traffic is a recognized as an environmental impact under CEQA, a lane reduction from four lanes to two qualifies as at least a reasonably foreseeable indirect physical change in the environment that here was also an activity being undertaken by a public agency.

Thus, the Resolution was a "legislative action"--an approval within the meaning of CEQA Guideline §15352--that committed the City to the lane reduction it had offered to VTA in its October 4, 2010 grant application. By no later than Dec. 6, 2010, the City had approved a project *without prior CEQA review*: more than two months before the City's approval of the Negative Declaration, and before the Negative Declaration was even circulated for public review. Applying the principle of *Save Tara* to "emphasize[] the practical over the formal in deciding whether CEQA review can be postponed, insisting it be done early enough to serve, realistically, as a meaningful contribution to public decisions" (*supra,* 45 Cal.4th at 135), the City's CEQA process came too late.

The language in Resolution No. 2118 that the grant application was not a project for CEQA purposes is self-serving and not credible in light of the administrative record. In any

event, whether a project existed is an issue for independent court review without deference to the City's characterization.

The City contends (Opp. Brief at 9:8-21) that even if it pre-committed to the lane reduction and performed its CEQA analysis after the fact, this error was harmless because the CEQA review completed and approved in February 2011 still found no significant impact to the environment. However, because the purpose of CEQA is to foster transparency and informed public participation before public agencies approve projects or foreclose alternatives, generally there are no harmless errors where information was not disclosed to the public. " '[W]hen an agency fails to proceed as required by CEQA, harmless error analysis is inapplicable. The failure to comply with the law subverts the purposes of CEQA if it omits material necessary to informed decision making and informed public participation. Case law is clear that, in such cases, the error is prejudicial.'" *Sierra Club v. County of Napa* (2004) 121 Cal App 4th 1490, 1497, internal citation omitted. But see *Sunnyvale West Neighborhood Assn. v. City of Sunnyvale* (2010) 190 Cal App 4th 1351, 1384 (discussing instances where there may be no prejudice even under CEQA).

The City's passage of Resolution No. 9118 on Dec. 6, 2010, authorizing an application to the MTC made two months before and committing the City to reduce California Avenue from four lanes to two—*without a CEQA review*--violated CEQA Guidelines §15004(a) and constituted a failure to proceed in the manner required by law in violation of Public Resources Code §21168.5. Accordingly, pursuant to Public Resources Code §21168.9(a), the Court orders that the City must declare void that Resolution, as well as its later February 14, 2011 approval of the Negative Declaration and CIP funding for the project, and must reconsider those decisions

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after appropriate CEQA review. This Court will retain jurisdiction over this matter until a return on the writ has been accepted.

II. Second Cause of Action for Violation of General Plan Consistency

Petitioners' second and third causes of action allege that in connection with the February 14, 2011 City Council meeting, the City took action not consistent with its General Plan and failed to comply with the Brown Act (Gov. Code §54950 et seq.), respectively. In light of the Court's finding on the first cause of action, these claims are both moot.

If not considered moot, relief under the second cause of action is denied: as a charter city Palo Alto was not required to make a finding that its approval of the CIP was consistent with its General Plan. See *DeVita v. County of Napa* (1995) 9 Cal 4th 763, 784; *Garat v. City of Riverside* (1991) 2 Cal App 4th 259, 284, overruled on other grounds by *Morehart v. County of Santa Barbara* (1994) 7 Cal 4th 725, 743 n.11. In any event, the statements by City Staff in reports prepared for the City Council and the Planning and Transportation Commission meetings that the program for "streetscape improvements" on California Avenue was consistent with goals of the City's Comprehensive Plan (see AR 0139 and 130) are sufficient to meet the lenient standard of review where such findings are required. "'The standard for judicial review of administrative decisions by local public agencies with respect to consistency with applicable general plans 'is whether the local adopting agency has acted arbitrarily, capriciously, or without evidentiary basis.' 'A city's findings that [a] project is consistent with its general plan can be reversed only if [they are] based on evidence from which no reasonable person could have reached the same conclusion.'" *San Franciscans Upholding The Downtown Plan v. City & County of S.F.* (2002) 102 Cal App 4th 656, 677, internal citations omitted.

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III. Third Cause of Action for Violation of the Brown Act

Petitioners' third cause of action, to the extent it is not moot in light of the Court's finding of CEQA violations, is denied. Gov. Code §54960.1(a) states that an action in mandamus seeking to have local agency actions declared null and void may be brought for violations of Gov. Code §§54953, 54954.2, 54654.5, 54954.6, 54956 or 54956.5. Petitioners seek to have the City's approvals of the Negative Declaration and the CIP declared null and void because "[t]he City violated sections 54954.2 and 54954.3(a) by failing to include all documents considered by the City Council in the agenda packet available to the public for the February 14, 2011 City Council Meeting and failed to provide an opportunity on the Agenda for the February 14, 2011 meeting for members of the public to comment on the approvals of the ND and CIP prior to the Council's consideration of those items." (Petition, at 16, paragraph 85.)

Only the alleged violation of §54954.2 is a ground for an action in mandamus voiding the City's actions pursuant to §54960.1(a). Section 54954.2 merely requires in pertinent part that the "legislative body of the local agency [the City Council] shall post an agenda containing a brief general description of each item of business to be transacted or discussed at the meeting, including items to be discussed in closed session. A brief general description of an item generally need not exceed 20 words." The agenda for the City Council's February 14, 2011 Meeting (AR 1218-1221) at Action Item No. 10 adequately complied with Gov. Code §54954.2.

Moreover, even if a minor violation were established, the Court has the discretion to deny this ground for mandamus relief. "The cases have held that a violation of the Brown Act will not automatically invalidate an action taken by a local agency or legislative body. The facts must show, in addition, that there was *prejudice* caused by the alleged violation. 'Even where a plaintiff has satisfied the threshold procedural requirements to set aside an agency's action,

Brown Act violations will not necessarily 'invalidate a decision. Appellants must show prejudice.'' Here, no facts are alleged to show that [petitioner] was prejudiced in any way by the alleged violation." *Galbiso v. Orosi Public Utility Dist.* (2010) 182 Cal App 4th 652, 670-671, emphasis in original, internal citations omitted. As in *Galbiso*, "in light of the long history of this assessment dispute and litigation in which both parties were well aware of the other side's position and arguments, no prejudice is apparent." *Id.* at 671. The Administrative Record in this matter includes multiple written communications from Petitioners' Counsel setting forth their position on the California Avenue project, including the lane reduction, a position that did not significantly change during the entire period covered by the administrative record. Petitioners' allegation that they were not given sufficient time to speak at the Feb. 14, 2011 City Council Meeting could not possibly result in a finding of prejudice: by that point, each side was entirely aware of the other's position.

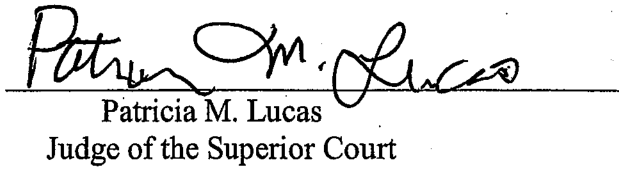
IV. Fourth Cause of Action for Declaratory Relief

Petitioners' request for declaratory relief, is denied. "[D]eclaratory relief operates prospectively, and not merely for the redress of past wrongs. It serves to set controversies at rest before they lead to repudiation of obligations, invasion of rights or commission of wrongs; in short, the remedy is to be used in the interests of preventative justice, to declare rights rather than execute them." *Gafcon v. Ponsor & Associates* (2002) 98 Cal App 4th 1388, 1403, internal quotations omitted. Petitioners attack the City's past approval of the negative declaration and CIP as already addressed by their other claims. See Writ Petition at 87-90. Accordingly, the Court finds that declaratory relief is neither necessary nor proper. See CCP §1061.

Petitioners are directed to prepare and to submit to Respondent for approval as to form: 1) an appropriate form of Judgment granting Peremptory Writ of Mandate, and 2) a Peremptory

Writ of Mandate, both consistent with this Order. The parties are directed to meet and confer and to communicate to the Court Clerk a proposed return date on the Writ.

Dated: November 8, 2011



Patricia M. Lucas
Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA
191 N. First Street
San Jose, CA 95113-1090

FILED
NOV 09 2011
DAVID H. YAMASAKI
Chief Executive Officer/Clerk
Superior Court of CA County of Santa Clara
BY Nannette Chapman DEPUTY

TO: FILE COPY

RE: J. Ogawa, et al vs City Of Palo Alto, et al
Case Nbr: 1-11-CV-198482

PROOF OF SERVICE

Order Re: Peition for Writ of Mandate

was delivered to the parties listed below in the above entitled case as set forth in the sworn declaration below.

Parties/Attorneys of Record:

CC: Donald A. Larkin , City Attorney's Office - PA
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If you, a party represented by you, or a witness to be called on behalf of that party need an accommodation under the American with Disabilities Act, please contact the Court Administrator's office at (408)882-2700, or use the Court's TDD line, (408)882-2690 or the Voice/TDD California Relay Service, (800)735-2922.

DECLARATION OF SERVICE BY MAIL: I declare that I served this notice by enclosing a true copy in a sealed envelope, addressed to each person whose name is shown above, and by depositing the envelope with postage fully prepaid, in the United States Mail at San Jose, CA on 11/09/11. DAVID H. YAMASAKI, Chief Executive Officer/Clerk by Nannette Chapman, Deputy