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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

WOODWARD PARK HOMEOWNERS ASSOCIATION, INC., et al., Plaintiffs and Appellants, v. CITY OF FRESNO et al., Defendants and Respondents, DEWAYNE ZINKIN, Real Party in Interest and Respondent.	F049481 (Super. Ct. No. 05 CECG00058) **ORDER MODIFYING OPINION, DENYING REHEARING, GRANTING REQUEST FOR JUDICIAL NOTICE, AND DENYING MOTION FOR LEAVE TO PRODUCE ADDITIONAL EVIDENCE [NO CHANGE IN JUDGMENT]**

THE COURT:

Respondent DeWayne Zinkin filed a petition for rehearing on April 27, 2007. The petition included a request to modify the opinion in several respects. On the same day, Zinkin filed a request for judicial notice and a motion for leave to produce additional evidence. The request and the motion were alternative methods of attempting to place the same materials before us. The city joined in Zinkin's petition, request, and motion.

The petition for rehearing provides, for the first time in this litigation, a record citation supporting respondents' contention that the city council included a freeway impact fee in its resolution certifying the EIR. We have incorporated this information

into the opinion as set forth in the modifications below. The petition also includes arguments based on two agreements dated May 30, 2006, of which respondents ask us to take judicial notice. These agreements are addressed in the modifications set forth below. The petition also re-argues a number of legal issues. We disagree with respondents' arguments on these issues for the reasons set forth in the opinion.

Finally, the petition claims that this court's judgment "was reached without a full and fair opportunity for the parties to present briefing" on the issues raised in the court's January 18, 2007, briefing letter. The briefing letter fully set forth the issues in question. The court granted the parties' request for an extension of time to file the supplemental briefs. The extended filing date was the date to which all parties had stipulated in their request for an extension. No party ever filed a request for an additional extension. No party's supplemental brief contained any indication that the time had been insufficient to brief the issues fully. With respect to the freeway-impact-mitigation issue, in fact, Zinkin's supplemental brief stated that the issue had already been "[t]horougly [b]riefed" before. At oral argument—in which the court emphasized from the bench its interest in the issues in the briefing letter—no party sought leave to submit postargument briefing. In the time between oral argument and the filing of our original opinion, no party sought leave to file an additional brief. The claim of an inadequate opportunity for briefing has no merit.

The petition for rehearing is denied. The request for modification of the opinion is granted to the extent that it coincides with the modifications set forth in this order and is otherwise denied. The request for judicial notice is granted. The motion for leave to produce additional evidence is denied as moot.

The published opinion filed herein on April 13, 2007, is modified in the following particulars. (The page numbers referenced in this order are based on the pagination in the hard copy of the original opinion filed in the clerk's office, a copy of which is attached to this order for reference.)

1. Page 2: Delete the second paragraph (beginning "One of CEQA's two major purposes" and ending "'holding the financial bag'") and insert in its place the following paragraph:

> One of CEQA's two major purposes is to require public agencies to adopt feasible mitigation measures to lessen the environmental impacts of the projects they approve. In this case, the project was expected to impact an already congested freeway interchange at State Route 41 and Friant Road. The city calculated a freeway impact fee of the kind frequently imposed on developments in other cities, but throughout almost the entire CEQA review process, the city took the position that it need not impose the fee or any other freeway mitigation measure. It took this position based on a long-standing Fresno policy of approving projects despite unmitigated freeway impacts, a policy apparently arising from the city's dissatisfaction with information provided to it by Caltrans. The policy is illegal because CEQA does not allow agencies to approve projects after refusing to require feasible mitigation measures for significant impacts. If the project went ahead without any freeway traffic mitigation, the driving public would be left "holding the financial bag."

2. Insert the following paragraph immediately after the above new paragraph:

> At the last minute, during the city council meeting at which the project was approved, the city decided to accept Zinkin's offer to pay a small freeway-impact fee. The fee was legally inadequate; as we will explain, the amount was not supported by sufficient evidence.

3. Page 8: At the end of the second full paragraph, after the final word "applicant," insert the following footnote:

> [2]After this court originally issued its opinion in this case, the city and Zinkin requested that we take judicial notice of an agreement between Caltrans and Zinkin executed May 30, 2006, relating to the earlier project.

> The request is granted. This agreement describes Zinkin's 1998 offer and states that Caltrans accepted it in 2000, contradicting the city's assertion during the CEQA review process in this case that Caltrans had rejected the offer. The agreement states that Zinkin and Caltrans then "negotiated" a payment of $27,000. In his request for judicial notice and accompanying papers, Zinkin does not deny that the original offer and acceptance were for $37,500 and does not claim that the agreement for that amount was ever honored.

4. Page 8: Delete the first sentence of the last paragraph ("The city never required Zinkin to pay any amount for mitigation of freeway traffic impacts").

5. Page 9: Delete the final two sentences of the partial paragraph at the top of the page ("She never received clarification … fee of $45,000 or any other amount"). Insert the following two sentences in their place:

> She never received clarification during the meeting. A version of the proposal (for $43,897) did, however, appear in the council's resolution certifying the EIR. We will set forth the details of the adopted version later in this opinion.

6. At the end of the above two sentences, after the final word "opinion," insert the following footnote:

> [3]After this court originally issued its opinion in this case, the city and Zinkin filed a request for rehearing or modification, supplying for the first time a citation to the administrative record supporting their claim that the city council's resolution certifying the EIR included a freeway-related measure. The city and Zinkin claimed in their original briefing that the city's approval included this measure, but their record citations did not bear out the claim. They claimed this again in their supplemental briefing after this court's briefing letter stated that there appeared to be no freeway traffic impact mitigation measure (and after the court granted an extension of time to a date stipulated to by all parties), but again their record citations failed to substantiate the claim. The court specifically asked them for a citation at oral argument, but again they failed to supply one that bore out the claim and failed to request leave to file a letter brief supplying one. Finally, after employing new appellate counsel, they produced the correct citation (pages 2022 and 2567 of the administrative record) in their request for rehearing or modification. They also asserted that, previously, the court did not give

them a sufficient opportunity to address this issue. The procedural history just recited refutes this assertion. Needless to say, it is counsel's responsibility to supply correct record citations in support of all factual assertions. The opportunities for doing so were more than adequate. We have, however, modified the opinion in the interest of accuracy to reflect the facts belatedly brought to our attention.

7. Page 20: In the fifth sentence of the first full paragraph, after the words "the city's refusal," insert the following footnote:

> [4]As noted in footnote 3 above, the parties supplied no citation to the record showing that any freeway-related measure was included in the city council's resolution certifying the EIR until after this court filed its original opinion in this case.

8. Page 43: Delete the second sentence of the second full paragraph (beginning "Continuing a long-standing practice") and insert in its place the following sentence:

> Continuing a long-standing practice, the city took the position during the CEQA review process that it need not require any form of mitigation for the project's impacts on freeway traffic—not because no impacts were identified, or the impacts were not significant, or mitigation was not feasible, but because the city has been dissatisfied with the performance of Caltrans in providing information and considers itself free to refuse to require mitigation so long as its dissatisfaction continues.

9. Page 43: After the second full paragraph (beginning "Perhaps the oddest" and ending "other significant impacts"), insert the following paragraph:

> At the last minute, the city decided to accept the developer's offer to pay voluntarily a small sum as a freeway impact mitigation fee; some confusing language regarding this payment was incorporated into the city council's resolution certifying the EIR. Because the amount was based on a calculation that ignored the most costly aspect of the project's freeway impact, the amount was not supported by substantial evidence. For this

reason, the fee was not an adequate mitigation measure under CEQA even assuming the language in the resolution constituted an enforceable mitigation measure.

10. Page 44: Delete the second full paragraph (beginning "The one thing an agency cannot do" and ending "must require mitigation"). Insert in its place the following paragraph:

> There are two things an agency cannot do: It cannot acknowledge a significant impact, refuse to do or find anything else about it, and approve the project anyway. And it cannot acknowledge a significant impact and approve the project after imposing a mitigation measure not shown to be adequate by substantial evidence.

11. Page 45: Change the number of the footnote from 2 to 5.

12. Page 49: Delete the first sentence of the second full paragraph (beginning "The record reveals").

13. Page 49: Delete the words "The city did so pursuant" from the second sentence of the second full paragraph. Insert in their place the words "The city's stance was pursuant …."

14. Page 50: Delete the first full paragraph (beginning "The city has never claimed" and ending "project's freeway traffic impacts") and the second full paragraph (beginning "Here is another way" and ending "permit this to happen").

15. Page 51: Delete the first sentence of the first paragraph (beginning "The city and Zinkin claim"). Insert in its place the following sentence:

> At the very end of the CEQA process, during the city council meeting at which the project was approved, the city consented to accept the developer's last-minute offer to pay a freeway impact fee voluntarily.

16. Page 51: Delete the last three sentences of the first paragraph (beginning "No freeway traffic mitigation" and ending "final EIR referenced in the resolution and exhibits").

17. Pages 51 through 52: Delete the second paragraph (beginning "For these reasons " and ending "but the fact is that it did not"). In its place, insert the following two paragraphs:

> The following language appears in the written resolution the council ultimately executed certifying the EIR: "Upon approval of the required 'master' conditional use permit/site plan, the developer shall deposit with the City of Fresno the project's fair share estimate for required improvements to the State Route 41 and related interchange with Friant Road as determined by [the city's traffic consultant] and as depicted on Page 4-6 of the Final EIR dated September 2004 in the amount of $43,897.00." The reason for the slight reduction in amount compared with the offer made by the developer's counsel at the meeting does not appear in the record. The details of the measure—such as the provision that the money be "deposit[ed] with the City" rather than simply paid to Caltrans—were never subjected to public scrutiny, since they were not mentioned by anyone at the meeting and the EIR was never recirculated after the meeting.
>
> It is also potentially significant that the $43,897 payment is not structured as a condition on site-plan approval and use-permit issuance. As written in the council's resolution, the measure operates the other way around: Plan approval and permit issuance are conditions that the city must satisfy before Zinkin is required to make payment. Rather than making the city's final approvals depend on payment of the mitigation measure, the resolution makes the obligation to pay the money (even as a mere "deposit") depend on the city's first issuing those approvals. The

resolution does not state that the project would suffer any adverse consequence if, after the master conditional use permit is issued and the site plan is approved, the "deposit" should go unpaid. The resolution's statement that the developer "shall deposit" the money cannot be construed as Zinkin's contractually enforceable promise to pay, since the resolution is not a contract and Zinkin is not a signatory of it. The Guidelines state that mitigation measures must be enforceable. (Guidelines, § 15126.4, subd. (a)(2) ["Mitigation measures must be fully enforceable through permit conditions, agreements, or other legally-binding instruments"].) It is not obvious that the resolution imposed on the developer an enforceable obligation to pay any money to Caltrans as a condition on the project going forward.

18. At the end of the above two new paragraphs, after the final words "going forward," insert the following footnote:

> [6]After this court originally issued its opinion in this case, the city and Zinkin requested that we take judicial notice of an agreement between Caltrans and something called "Fresno 40." The request is granted.
>
> So far as the record discloses, no corporate entity named "Fresno 40" exists. No such entity is a party or real party in interest to this litigation. We understand this to be merely an informal name by which the vacant land at issue in this case is commonly known. DeWayne Zinkin signed the agreement on behalf of "Fresno 40."
>
> The agreement recites that "the City of Fresno conditioned this project to mitigate for the identified impacts to the State Highway System at the reduced amount identified in the applicant's Environmental Impact Report, as stated in [the city council's resolution,] and Caltrans has accepted the conditioned reduced amount as full mitigation for this project." The agreement also duplicates the language of the resolution quoted in the text above.
>
> This agreement was executed on May 30, 2006, long after the city council's approval of the project and long after the trial court's ruling in this case. The city is not a party to the agreement. The agreement thus

does not constitute a mitigation measure upon which project approval was conditioned. Further, the amount is not supported by substantial evidence for the reasons stated in this opinion. Finally, Caltrans's agreement that the statements in the resolution constitute "full mitigation" does not make it so. Caltrans is not empowered to determine whether another agency has fulfilled its CEQA duties.

19. Page 52: Delete the first sentence of the first full paragraph (beginning "Even if a $45,000 impact"). Insert the following two sentences in its place:

> In spite of this, we will assume for the sake of argument that the language in the resolution regarding a deposit constituted an enforceable obligation. The mitigation of the impact is still not adequate, however, because the $43,897 figure was not supported by substantial evidence.

20. Page 54: Change the number of the footnote from 3 to 7.

21. Page 56: After the words "WE CONCUR," insert the following footnote:

> [*]Justice Cornell did not participate in the court's order filed on May 11, 2007, modifying the opinion, denying rehearing, granting a request for judicial notice and denying leave to produce additional evidence. The modification of the opinion did not alter the judgment.

Except for the modifications set forth in this order, the opinion previously filed remains unchanged. These modifications do not alter the judgment.

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Wiseman, Acting P.J.

I CONCUR:

_____
Dawson, J.