Filed 4/14/15 Ingalsbee v. City of Burbank CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

SHANNA INGALSBEE et al., Plaintiffs and Respondents, v. CITY OF BURBANK, Defendant, WAL-MART STORES, INC., Real Party in Interest and Appellant.	B252860 (Los Angeles County Super. Ct. No. BS137238)

APPEAL from a judgment of the Superior Court of Los Angeles County. Allan J. Goodman, Judge. Affirmed in part, reversed in part and remanded.

Morgan, Lewis & Bockius, Rollin B. Chippey II, Thomas M. Peterson, and Deborah H. Quick for Real Party in Interest and Appellant.

Law Office of Gideon Kracov, Gideon Kracov; Lozeau Drury, and Richard T. Drury for Plaintiffs and Respondents.

This appeal arises from an action concerning the ongoing efforts by real party in interest and appellant Wal-Mart Stores, Inc. (Walmart) to open a new store in an existing, empty building in the Empire Center development project in the City of Burbank.[1] The appeal is from a judgment after a court trial on a complaint for declaratory and injunctive relief, joined with a petition for peremptory writ of mandate, filed by three City residents[2] to challenge the City's actions declaring the proposed Walmart store project exempt from the environmental review requirements of the California Environmental Quality Act (CEQA; see Pub. Res. Code, § 21000 et seq.)[3] and issuing building permits to Walmart to prepare the empty building for re-use as a Walmart store. The judgment commands the City to set aside its decision declaring the Walmart store project exempt from CEQA, to set aside the building permits that it issued to Walmart, and to reconsider the Walmart store project in light of controlling law, including CEQA, before issuing any building permits to the retailer. We affirm the judgment with respect to the trial court's determination that the City stands in violation of a mandatory, statutorily imposed duty to implement prescribed traffic mitigation measures enacted into a City ordinance at the time the City approved the Empire Center development project. We reverse the judgment with respect to the trial court's decision to enjoin the City from issuing building permits to Walmart.

FACTS

Background

From about the 1920's to the early 1990's, the Lockheed Martin Corporation (Lockheed) and its predecessors manufactured aircraft in facilities on approximately 100 acres of land within the City, south of what is now known as the Burbank Bob Hope

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[1] We hereafter refer to the City of Burbank as the City. Our references to the City include the City Council of the City of Burbank. The City participated in the litigation in the trial court, but elected not to file an appeal for itself.

[2] We hereafter refer to the City residents as the Petitioners.

[3] All further undesignated section references are to the Public Resources Code unless otherwise noted.

Airport. After Lockheed ended manufacturing at the site, it demolished its facilities, leaving a 100-acre area of open land ripe for development.

In 1997, Lockheed and a development partner, Vestar Development Company (Vestar), submitted an application to the City to build a development project on the site of Lockheed's former manufacturing facilities. The proposed project's primary elements included changing the City's general plan designation for the property, approving site-specific zoning to allow for a mix of retail and commercial uses, and approving a development agreement with the City.

In October 1997, the City sent a Notice of Preparation to public agencies stating that it was going to prepare an environmental impact report (EIR; § 21100 et seq.) for the proposed development project. In November 1997, the City held a "public scoping meeting" to allow local residents to comment on the proposed project.

In January 2000, the City released a draft EIR (DEIR) for the proposed "Empire Center" development project, initiating the period for public comment. By this time, Lockheed had ended its relationship with Vestar, and had joined with a new development partner, Zelman Retail Partners, Inc. (Zelman). Zelman's plans for the proposed Empire Center development project, as shown in the DEIR, contemplated that there would be five "sub areas" within the overall project development, each with its own "identity" as to types of permitted economic activities, and designated as Sub Areas A through E.[4] As presented to the public in a showing held at a community center, and to the City's planning board, the proposed development project identified the permitted uses for Sub Area D as "Retail Sales 160,000 sf / or an Auto Dealership," and identified a home furnishings retail store, namely, "Sears Great Indoors," as a potential initial tenant.

[4] The current case concerning Walmart's proposed store involves what is known as "Sub Area D." We will discuss Sub Area D, including the permitted uses in Sub Area D, in more detail below.

At public meetings in June 2000, the City certified the final EIR (FEIR) for the Empire Center development project. *All* matters concerning the validity of the EIR process with respect to the approval of the Empire Center development project, e.g., the sufficiency of the EIR preparation, the review and approval process, are now long-settled, and not subject to further judicial review. We discuss the EIR documents below only as they help or hinder our understanding and evaluation of the issues presented by the current case.

At the same time it certified the FEIR for the Empire Center development project (June 2000), the City also approved an extensive "Development Agreement" (hereafter the DA) with Zelman. Further, and most critical for purposes of Walmart's current appeal, the City adopted a planned development ordinance amending the City's zoning to reflect and implement the framework of the Empire Center development project as outlined in the EIR documents, including numerous "conditions of approval" for the project. We hereafter refer to the City's planned development ordinance as "PD 97-3;" as do the parties to the present appeal. PD 97-3, and the DA between the City and Zelman, became effective in September 2000. We discuss the language contained in PD 97-3 in great detail below in addressing Walmart's appeal.

The Empire Center

In 2005, 2007, 2008, and 2009, the City issued annual reports on the subject of local development projects which indicated that the Empire Center development project had been "completed." Since September 2000, when PD 97-3 and the DA with Zelman became effective, the City has issued several hundred building permits to businesses operating within the overall Empire Center development project area. These have included what may be called ordinary building permits for such projects as ongoing maintenance needs, as well as a handful of permits attendant to the re-tenanting of premises in which the property uses have changed, e.g., the conversion of a Pier 1 Imports into a Men's Warehouse in 2012, the conversion of a sportswear store to a café in 2011, the conversion of Linens & Things to a Nordstrom Rack in 2010, and the conversion of Shoe Pavilion to a TJ Maxx in 2009. None of these building permits were

contested by the Petitioners at the time the permits were issued, nor were they ever contested by anyone else. Whether these hundreds of building permits are currently invalid is a matter we discuss below.

Traffic Mitigation

As noted above, PD 97-3 sets forth extensive "conditions of approval" for the Empire Center development project. These conditions include provisions addressing "Traffic and Circulation" in and around the area of the Empire Center development project, and "secondary economic effects" potentially arising from the project. The traffic provisions encompass the subject of a number of "off-site" street improvements in areas of the City surrounding the Empire Center development project. For purposes of Walmart's current appeal, the following three provisions in PD 97-3 may be viewed as the most relevant:

> "Mitigation Measure 7.1 Concurrent with issuance of the first building permit . . . the City . . . shall have prepared and shall have begun implementing a roadway and intersection improvement program to implement Mitigation Measures 7.1 through 7.14. The roadway and intersection improvement program shall include a listing of improvements to be completed. Such improvements shall be fully implemented pursuant to the roadway and intersection improvement plan such that significant [traffic] impacts are thereby avoided or mitigated below a level of significance at the time of completion of the project, or shall be substantially complete, as defined in the Development Agreement."[5]
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> "Mitigation Measure 7.2 *Buena Vista Street at Victory Boulevard (Intersection No. 17)* The City shall provide two left turn lanes on the eastbound and southbound approaches." (Italics in original.)

[5] Insofar as this court has been able to discern, there is no language in PD 97-3 defining what is meant by "significant [traffic] impacts" as used in Mitigation Measure 7.2, or by the language about avoiding or mitigating such traffic impacts "below a level of significance." This definitional issue is addressed below.

"Mitigation Measure 7.6 *Buena Vista Street at Empire Avenue (Intersection No. 19)* The City shall provide three left turn lanes on the westbound approach (and three southbound departure lanes), two left turn lanes on all other approaches, and an exclusive right turn lane on all approaches."

It is undisputed that the City only partially implemented Mitigation Measures 7.2 7.6 before the Empire Center development project was completed and businesses in the project began operating. It is also undisputed that full implementation of both mitigation measures remained uncompleted by the City as of the date of trial. As to 7.2, the City only constructed two left turn lanes for the eastbound approach; as to 7.6, the City only constructed two left turn lanes on all approaches, and exclusive right turn lanes on two approaches. Full implementation of 7.2 and 7.6 will require the City to use the power of eminent domain to condemn private property abutting present streets for additional right-of-way areas to accommodate the promised roadway improvements.

When the Empire Center development project was initially completed around the mid 2000s, a home furnishings store, the Sears "Great Indoors," began retail operations in a building in Sub Area D. Later, in 2007, an "Ulta" beauty salon and supply store was constructed in Sub Area D, crisscross from the front entrance of the Great Indoors store.

The Proposed Walmart Store

As noted above, when the Empire Center development project was completed in the mid-2000s, a Sears Great Indoors home furnishings store opened in a 143,000 square foot building that had been constructed in Sub Area D. As noted above, this store had been identified as a potential retailer in the EIR documents prepared during the approval process for the overall development project.

In late 2011, the Sears Great Indoors store closed, and the property was sold to Walmart. When it became known locally that Walmart was seeking to re-purpose the vacant building in Sub Area D, the retailer's plan was "met with opposition from some members of the community." At city council meetings in September and December

2011, the city council heard public comments on Walmart's proposed store, including comments from an attorney, Gideon Kracov, who later represented the Petitioners in the trial court and continues to represent the Petitioners on appeal. The city council, in turn, requested its planning department staff to provide the council members with informational reports about Walmart's proposal.[6]

At meetings in January and February of 2012, the city council received planning staff reports regarding Walmart's proposed store, including the claims and concerns raised by those who had voiced opposition to the Walmart store. Among the matters addressed in the reports, and relevant to the current appeal, were the assertions by the opponents of Walmart's proposed store that grocery sales by a general merchandise "Big Box" retailer are not allowed in Sub Area D by PD 97-3 and would require discretionary approval by the City's Development staff; and that the City had never fully implemented 7.2 and 7.6 as required by PD 97-3. The reports by the City staffers included conclusions that no discretionary approval was required for the proposed Walmart store in the existing vacant building in Sub Area D. Further, the reports included information about the City's implementation of the off-site traffic mitigation measures for the Empire Center development project as prescribed in PD 97-3.

At the conclusion of discussions at a public meeting on February 21, 2012, the city council members voted to "note and file" the staff reports.

The Walmart Building Permits

Meanwhile, in January 2012, Walmart applied to the City for building permits for renovations needed to re-purpose the vacant building in Sub Area D as a Walmart store. In May 2012, a member of the City's planning department signed off on a "zoning clearance" approval form, which we understand constituted a determination that Walmart's proposed store was a "'Big Box' retail use" that was a permitted use in Sub

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[6] In requesting information from the City's staff, the city council members plainly were acting in a political, information-gathering role. The city council had not been presented with a new project for which a decision-making vote of approval was pending, as had occurred earlier during 2000, when the city council voted to approve the FEIR for the Empire Center development project, along with PD 97-3 and the DA.

Area D under PD-97-3, and that the proposed store satisfied all other applicable zoning ordinances. On May 23, 2012, after a "ministerial" plan check, the City's planning department issued the building permits requested by Walmart. On May 30, 2012, the City's planning department issued a Notice of Exemption under CEQA, and delivered the notice to the Los Angeles County Clerk.[7]

The Litigation

In May 2012, even before the City issued its notice of exemption, Petitioners commenced the current action challenging the manner in which the City had approved Walmart's proposed store. In June 2012, Petitioners filed a first amended petition for writ of mandate and complaint for declaratory and injunctive relief, challenging the City's issuance of building permits to Walmart. Among the main allegations by the Petitioners were claims that the City violated CEQA by determining that the issuance of the building permits was exempt from CEQA, and the City had failed to implement fully 7.2 and 7.6, as prescribed in PD 97-3. Further, the Petitioners alleged that the City was precluded from issuing building permits to Walmart as a consequence of its violations of CEQA and its failure to perform its mandatory statutory duty to implement the traffic mitigation measures. In April 2013, the Petitioners filed their operative second amended petition for writ of mandate and complaint for declaratory and injunctive relief. The basic thrust of the litigation remained the same in the Petitioners' operative pleading.

Petitioners' claims were tried to the trial court in June 2013. In September, the court issued a tentative statement of decision in favor of the Petitioners. The City and Walmart filed objections. On September 27, 2013, the court entered its final statement of decision, along with a "Judgment Granting the Petition for Writ of Mandamus."

The judgment provides that Walmart's proposed use requires "a supplemental environmental evaluation" because the EIR process for the Empire Center development project had only analyzed a Sears Great Indoors store in Sub Area D. The court reasoned that the Development Agreement between the City and Zelman granted only "the right to

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[7] The filing of the Notice of Exemption triggered a 35-day statute of limitations period for challenging the City's exemption decision. (§ 21167, subd. (d).)

a permit for the original project, for that which was in the original plan, *viz.*, for the original furniture store," and allowed for expansion for a different use, "but only after the appropriate discretionary consideration by the [City]." Further, the court concluded that "no grocery operation can be approved in Sub Area D without the designated city officials first exercising their discretion." The court also held that the City failed to proceed in the manner required by law in issuing the building permits without having first analyzed traffic impacts, "grocery use," "economic impact on the retail community," and the need for a parking variance.

With respect to the City's obligation to fully implement the mitigation measures prior to issuing building permits, the court interpreted Measure 7.1 to require full implementation of 7.2 and 7.6 by the time construction of the Empire Center development project was "complete," without respect to the traffic performance of the intersections to which the mitigation measures applied. The court referred to the "use of LOS-D," which is a measure used to describe traffic levels, flow, or service. It is a graded measure in that LOS-A is considered better traffic flow than LOS-B, and so forth. The court determined that use of LOS-D, found in the EIR documents, was intended to operate as "a check on the efficacy of the specified improvements," not as a triggering standard for implementation of the specified traffic mitigation measures.

The trial court found that construction of the Empire Center development project was "complete" as early as May 2005 and no later than July 7, 2009. The court rejected the City's and Walmart's assertions that the Petitioners' claims with respect to the implementation of the traffic mitigation measures were time-barred. The court found this appropriate on a number of bases: (a) assuming that the Empire Center is not yet "completed" as suggested by the City and Walmart, i.e., if one assumed that the City presently has only an ongoing duty to monitor the intersections and fully implement the traffic mitigation measures as they become necessary to address traffic loads upon completion of the Empire Center, then any challenge by the Petitioners "cannot have ripened;" (b) as discretionary approval was required by law for Walmart's proposed store, a new "baseline" for CEQA analyses would have to be established and the statute

of limitations on the City's failure to establish this baseline ran from the filing of the Notice of Exemption on May 30, 2012; and (c) the City's mandatory statutory obligation to implement measures 7.2 and 7.6 is a "continuing one, such that the statute of limitations has not run."[8]

Walmart filed a timely appeal. The City did not appeal, thus implicitly accepting the judgment's decrees concerning its mandatory statutory obligations under PD 97-3.

DISCUSSION

I. Framework for Appeal

The judgment in this case provides declaratory, injunctive and mandamus relief encompassing four main issues. First, the judgment determines that Walmart's proposed store is not a permitted use in Sub Area D of the Empire Center development project as such uses are defined by the predominant governing statutory scheme involved in this case, namely, PD 97-3. Given this determination, the judgment provides that the City is required by law to initiate CEQA's review processes before approving a "discretionary" change in PD 97-3 so that it permits a store of the kind which Walmart proposes. Building permits may then follow. In summary, Walmart's proposed store is not a presently permitted use in Sub Area D within the meaning of PD 97-3. As a consequence, the proposed store must be treated as a "new project" requiring compliance with CEQA. Second, the judgment determines that Walmart's proposed store will have fewer parking spaces than required under the City's parking ordinances. As a result, Walmart must apply for and obtain a discretionary variance from existing City parking regulations, again triggering CEQA review. Third, the judgment determines that the City is violating a mandatory, statutorily-imposed duty to implement certain traffic mitigation measures for the Empire Center development project which are prescribed in PD 97-3. Finally, the judgment determines that an appropriate remedy for the City's violation of CEQA (as to a new project and as to a parking variance), and its failure to perform its duty to implement specified traffic mitigation measures, is writ and injunctive relief

[8] The court cited *Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, in support of its continuing obligation determination.

commanding the City, among other actions, not to issue any building permits to Walmart until such time as the City acts according to law by addressing the CEQA and traffic mitigation measures issues.

We address Walmart's assignments of error on appeal within the framework of the judgment as outlined immediately above.

II. Standard of Review

On appeal in a CEQA case, the appellate court "reviews the agency's action, not the trial court's decision; in that sense appellate judicial review under CEQA is de novo." (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 427 (*Vineyard Area Citizens*). This means that review in the CEQA context entails an appellate court's review on a clean slate, without the type of deference that an appellate court often gives to a trial court's decision on appeal. This being said, an appellate court in a CEQA case is guided, as is a trial court in the first instance, by certain standards governing *judicial review* of an agency's action. (*Ibid*.)

These standards governing judicial review of an agency's action include the following. On matters of law, an interpretation of a statute or ordinance by an administrative agency charged with its enforcement is entitled to great weight and will be followed by a court unless it is erroneous. (*Baldwin v. City of Los Angeles* (1999) 70 Cal.App.4th 819, 838 (*Baldwin*).) As the Supreme Court has explained, when an agency that is charged with putting a certain statutory scheme into effect has given a consistent interpretation to a statute (or to an ordinance or regulation deriving from a statute), the agency's interpretation should be accorded great weight for practical reasons, namely, when an agency's interpretation "'is of long standing and has remained uniform, it is likely that numerous transactions have been entered into in reliance thereon, and it could be invalidated only at the cost of major readjustments and extensive litigation.'" (*Ste. Marie v. Riverside County Regional Park & Open-Space Dist*. (2009) 46 Cal.4th 282, 292-293.) But, while an agency's interpretation of the meaning and legal effect of a statute within its purview may be entitled "to consideration and respect by the courts," an agency's interpretation is "not binding" on a court, nor "necessarily even authoritative"

for a court. (See *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7-8.) In short, it is the task of a court in the final analysis to determine independently the meaning of a disputed statute. (*Id*. at p. 7.)

On factual matters, all conflicts in the evidence are resolved in support of an agency's findings, and a court indulges all reasonable inferences to support the agency's findings, if possible. (*Friends of Oroville v. City of Oroville* (2013) 219 Cal.App.4th 832, 836.) In other words, a court must defer to an agency's factual determination when it is supported by substantial evidence. (*Concerned Dublin Citizens v. City of Dublin* (2013) 214 Cal.App.4th 1301, 1311.)

This then brings us to types of situation such as those involved in the current case in which stating the standard of judicial review applicable to an agency's CEQA action is more difficult. On one hand, when a court is presented with a claim that an agency "did not proceed in a manner required by law" (see § 21168.5), it is generally stated that a court must independently review the claim and assure that "all legislatively mandated CEQA requirements" have been "'scrupulously enforce[ed].'" (*Vineyard Area Citizens, supra,* 40 Cal.4th at pp. 426-427, 435.) But again, as to factual matters, e.g., what an agency actually did or did not do, judicial review follows the deferential substantial evidence test.

This is a CEQA case which presents the issue of whether a public agency properly determined that issuance of building permits was a "ministerial" matter because a CEQA review had already been completed and the proposed project involves no more than that which was previously approved by the agency. As such, "[t]he determination of what is 'ministerial' can most appropriately be made by the particular public agency . . . based upon its analysis of its own laws, and each public agency should make such a determination either as a part of its implementing regulations or on a case-by-case basis." (See Cal. Code of Regs, tit. 14, § 15000 et seq. (hereafter the CEQA Guidelines), specifically CEQA Guidelines § 15268(a); and see, e.g. *Friends of Davis v. City of Davis* (2000) 83 Cal.App.4th 1004, 1015.) As a matter of common sense, not every application for a building permit should compel CEQA review. When a public agency determines

that issuing a building permit for a particular project is exempt from CEQA on the ground that issuance is a "ministerial" act, and a lawsuit is commenced challenging the agency's determination, a court's review "'shall extend only to whether there was a prejudicial abuse of discretion. Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence.'" (*Madrigal v. City of Huntington Beach* (2007) 147 Cal.App.4th 1375, 1381.)

As the current case demonstrates, difficulties may arise when minds have differing perspectives as to whether a particular project should be viewed as involving building permits issued as a ministerial matter for a property use already approved, versus building permits for a brand new development project. In the trial court, the Petitioners had the burden to prove that issuance of building permits to Walmart was not a matter of issuing ministerial permits. (*Madrigal v. City of Huntington Beach*, *supra*, 147 Cal.App.4th at p. 1378.) On appeal, the standards of review discussed above apply.

III. Permitted Use

The Petitioners' action alleged that the City violated its own planned development ordinance and CEQA by not requiring Walmart to seek a discretionary change in zoning to allow a store of the nature of Walmart's proposed store. The trial court ruled in favor of the Petitioners, concluding that the use which was permitted in Sub Area D was the "original furniture store and its accoutrements." Walmart contends the judgment must be reversed because the trial court erred in ruling that a discretionary change in Sub Area D's permitted uses is needed before the retailer may re-purpose the vacant retail building that is already constructed in Sub Area D for use as a Walmart store. We agree.

Walmart correctly notes that one of the Petitioners' alleged claims in the present case is that the City "violated the law" when it determined that issuing building permits to Walmart was a "ministerial" matter, and that the City thus "violated the law" when it determined that Walmart was not required to apply for "discretionary permits" to operate a "big box" retail store (including grocery sales) in the former Sears Great Indoors building in Sub Area D. Walmart contends that PD 97-3 already expressly provides that

a “big box” retail store, with grocery sales, is a permitted use in Sub Area D. This would mean that no discretionary zoning change in the permitted uses allowed in Sub Area D is required for Walmart to operate its proposed store there. Walmart contends the Petitioners failed to demonstrate that their position was correct. This is true, argues Walmart, because the City “reasonably interpreted” its own planned development ordinance, namely, PD 97-3, to provide that Walmart’s intended “big box” use is a permitted use in Sub Area D of the Empire Center planned development. As noted above, we find Walmart’s position to be the better reasoned.

The Governing Ordinance: PD 97-3

PD 97-3 includes extensive provisions governing the conditions of approval of the Empire Center development project, including specific conditions governing “Land Use” within each of the five identified sub areas within the development. With respect to Sub Area D, Condition 1D of PD 97-3 reads:

> “SUB AREA D — RETAIL/AUTOMOBILE SALES
>
> D-1 *Land uses and square footages*
>
> Sub Area D is approximately 12.0 acres and is located on the eastern one-third of the project site. A maximum of 160,000 square feet of retail floor area, a new car automobile dealership, or a nationally franchised used car dealership such as *Car Max* or *Auto Nation* will be permitted in Sub Area D. The permitted and conditional uses for Sub Area D are shown in Exhibit B.” (Italics in original.)

The referenced Exhibit B is a two-page “List of Uses,” numbering some 80 uses which are permitted in the various sub areas within the Empire Center. The list of uses identified in Exhibit B run the spectrum from “Animal Grooming” to “Laundromat” to “Upholstery Shop,” as examples. By way of a type of “check off” identifier format, a review of Exhibit B shows that it identifies the following uses (among others) as being “permitted” within Sub Area D:

"Department Store"

"Retail Store/Sales"

Among Exhibit B's list of uses, the following other uses are expressly identified as being permitted in sub areas *other than* Sub Area D:

"Bicycle Sales"

"Clothing Store"

"Grocery/Market"

"Hardware Store"

"Picture Frame Store"

The list of uses that are identified in Exhibit B does not include any use which is identified with language to the effect of "Big Box Retail Store" or with any other similar type of reference. It must also be noted that the uses which are listed in Exhibit B are not expressly defined in Exhibit B, or anywhere else in PD 97-3, except as discussed below.

Apart from Exhibit B, PD 97-3 includes another "condition of approval" labeled as Condition Number 146. Condition number 146 is found in a section of PD 97-3 under the label "SECONDARY ECONOMIC EFFECTS" of the Empire Center development project. Condition Number 146 includes the following language:

> "146. 'Big Box' retail use permitted within Sub Areas C, D, and E is defined as a retail store with a minimum floor area of 125,000 sq. ft. No more than 300,000 s. ft. of floor area may be devoted to general merchandise 'Big Box' retail use within Sub Areas C, D, and E, such as Target and/or a Super K Mart. There is no cap on other types of specialty 'Big Box' retail use, such as large home improvement retailers, home design centers, or warehouse clubs, such as Costco or Sams.
>
> " . . .
>
> "B. *Sub Areas D and E may each have one (1) 'Big Box' retail use. . . .*" (Italics added.)

The plain and unambiguous language of Condition number 146 of PD 97-3 states that a "'Big Box' retail use" is a permitted use in Sub Area D (as well as Sub Areas C and E). The only qualifier is that, as to a "'Big Box retail use" that is "devoted to general merchandise," meaning use "such as Target and/or a Super K Mart," the total amount of building square footage devoted to such use is subject to a cap of 300,000 square feet. Prior to the time that Walmart's proposed store came into the picture, there was (and still remains today) a single "'Big Box' retail use" in Sub Areas C, D and E of a "general merchandise" nature, that being a Target store in Sub Area C with approximately 149,636 square feet. With the addition of Walmart's proposed store of 143,000 square feet in Sub Area D, the combination of "Big Box' retail use in Sub Areas C and D will not exceed the 300,000 square feet cap in Condition number 146.

Analysis and Interpretation

In accord with long-recognized canons of statutory construction, we must read the various provisions of PD 97-3 together as a whole, with each part giving meaning to the other parts, and harmonizing and giving effect to each part. (*People v. Mgebrov* (2008) 166 Cal.App.4th 579, 587.) Employing such an approach, we find that the permitted uses which are listed in Exhibit B of PD 97-3 and which are identified with the classification of "Department Store" and "Retail Store/Sales" may reasonably be interpreted to include a "Big Box" store such as Walmart's proposed store in Sub Area D. While Exhibit B of PD 97-3 does not include an express definition of what is meant by a "Department Store or by "Retail Store/Sales," it cannot be ignored that Condition Number 146, the section of PD 97-3 dealing with the "secondary economic effects" of the Empire Center development project, includes explicit language stating that a "'Big Box' retail use" is permitted in Sub Area D. In issuing building permits to Walmart, the City reasonably interpreted the language of PD 97-3 to allow a "Big Box" retail store in Sub Area D, meaning the City's decision to issue building permits to Walmart involved a "ministerial act" because the permits were to prepare a property for a use that is already allowed in Sub Area D. In short, Walmart's proposed store does not present a situation requiring a discretionary variance from the uses already allowed under PD 97-3.

This said, we recognize that, other than a reference to "minimum floor area," and to "Target and/or a Super K Mart," Condition Number 146 of PD 97-3 does not contain precise language defining the exact retailing structure of a permitted "'Big Box' retail use" in Sub Area D. In deciding to issue building permits to Walmart, the City interpreted "'Big Box' retail use" to encompass a Walmart store which includes a certain measure of grocery sales. The trial court rejected the City's interpretation. On appeal, Walmart argues that the trial court erred by (1) not giving due deference to the City's reasonable interpretation, and (2) in adopting an interpretation of PD 97-3 that "cannot be supported even [in the event] no judicial deference were owed." We agree with Walmart's argument on the deference front.

The trial court concluded that PD 97-3 is ambiguous with regard to the definition of a "'Big Box' retail use." In attempting to give clarity to PD 97-3, the court looked to the underlying EIR documents for the Empire Center development project, and concluded that a retail store of the same general nature as the originally envisioned home furnishings retail store was the best definition for "'Big Box' retail use" in Sub Area D because the EIR documents indicated that this was the initial use contemplated at the time the Empire Center development project was approved. As we will explain next, we find the court's interpretation is overly restrictive, particularly in light of the City's equally reasonable interpretation, which must be given deference given that the City is tasked with implementing and enforcing the law governing the permitted uses within the Empire Center development project.

In adopting PD 97-3, the City expressly stated its intention that the zoning and land use conditions for the Empire Center as set forth in Exhibit B of the ordinance "shall apply even after the expiration of the [DA for the project]." In other words, the identified uses in PD 97-3 were to stay in place going forward. Exhibit B to PD 97-3 identifies the permitted uses in Sub Area D to include, among others, a "Department Store" and a "Retail Store/Sales." These identified uses, in turn, are defined by reference to Condition Number 146, which states that a "'Big Box' retail use" is permitted in Sub Area D, and which defines "'Big Box' retail use" to mean "a retail store with a minimum floor area of

125,000 square feet." Condition Number 146 itself differentiates between types of "Big Box" stores — there are "general merchandise 'Big Box' retail," such as "Target and/or Super K Mart," and "specialty 'Big Box' retail use, such as large home improvement retailers, home design centers, or warehouse clubs, such as Costco or Sam's." Condition Number 146 allows "Big Box" retail use of both the "specialty" and "general merchandise" variety in Sub Areas C, D and E.

Under the statutory scheme summarized above, the City reasonably interpreted PD 97-3 to provide that Walmart's planned re-use of the 143,000 square foot building in Sub Area D is a permissible use as a "general merchandise 'Big Box' retail use." The City reasonably interpreted PD 97-3 to allow a "Big Box" retail use in the nature of a Target or of a Super K Mart. Walmart's proposed store plainly falls within this land use framework. The City's interpretation of PD 97-3 should control because it is reasonable and not clearly erroneous. (*Baldwin v. City of Los Angeles, supra*, 70 Cal.App.4th at p. 838.)

The trial court extensively relied on the EIR documents. To the extent the court looked to the EIR documents as a guide in interpreting what is a permitted use in Sub Area D under PD 97-3, we would approve of such an approach, provided PD 97-3 were sufficiently ambiguous to undermine the City's interpretation. However, PD 97-3 explicitly provides that a "Big Box" retail use is a permitted use in Sub Area D. To the extent the trial court may have looked to the EIR as independently determinative of the regulatory zoning governance in this case, we do not agree that such an approach is proper. An EIR is an informational document to assure that public officials in decision making roles, and the general public, are made aware of the potential environmental impacts of a particular project. (See Guidelines § 15003(c); and see, e.g., *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 86.) We have read no legal authority in any of the briefs on appeal supporting the proposition that an EIR has its own independent, ongoing regulatory effect continuing forward after it has been approved. It is the implementing regulations which govern.

Further, even when the EIR documents are taken into consideration, they do not undermine the City's reasonable interpretation of PD 97-3 that it authorizes a "general merchandise Big Box retail use" in Sub Area D. From the time of the developers' very first application until the adoption of PD 97-3, every proposed conceptual plan for the Empire Center development project contemplated that a major component of the project would include "retail use." Further, it was always contemplated that this retail use would include a "Big Box retail use." In short, multiple "Big Box" retail stores were always anticipated as a possibility in the Empire Center as ultimately reflected in Condition Number 146. The fact that a Walmart store is now proposed for Sub Area D does not change the understanding that existed in the early 2000's that there could be Big Box retail use throughout the Empire Center development project, and does not change the fact that such use was approved with the adoption of PD 97-3. Information provided in a report on the "Retail Market Impacts" of the Empire Center development project which was prepared during the EIR process is consistent with this understanding: "A wide range of tenants and mixes of tenants could fit within the entitlement envelope. And it is likely that the mix of tenants would change over time just as the makeup of retailing generally changes over time." Indeed, this report specifically identified a Walmart store as being "among the likely candidates for the proposed project."

The EIR documents assessed economic effects on other business and areas in the City (so-called "disinvestment") based upon "assumed" build-outs of the Empire Center development project which included a "reasonable worst case scenario" consisting of "three or more of the 'big box'/general retail large format value retailers" and "a 50,000 square foot food store" as possible uses in the new development. The EIR documents include conclusions that the Empire Center development project would not have significant secondary economic impacts provided that the square footage of general merchandise "Big Box" retail uses was capped, consistent with the site plan accompanying the original application for the development. The record does not show that the EIR document's conclusions were limited to assessing solely a Sears Great Indoors store in Sub Area D. It seems fairly undisputed that, at all times, the possibility

or likelihood of Big Box retailers in the Empire Center development project was an accepted component of the development for the assessment of the project by public officials as well as the general public. Again, the fact that a Walmart is coming to the party at a later hour does not change what was approved in the early 2000's.

Further, in interpreting PD 97-3, we keep in mind that CEQA does not require that a lead agency analyze every potential use or user in the greatest of detail. Rather, an EIR must include an adequate analysis of the range of uses supported by substantial evidence. It is largely the responsibility of the lead agency to determine whether the EIR process has developed reports and supporting documents to allow a meaningful analysis of the potential representative uses to furnish an adequate basis, i.e., evidence, to satisfy the informational purposes of the EIR. (See, e.g., *San Diego Citizenry Group v. County of San Diego* (2013) 219 Cal.App.4th 1, 21.) And, as noted above, all claims regarding the adequacy of the EIR documents concerning the Empire Center development project are long since beyond challenge. Thus, any identification of the Sears Great Indoors Store does not necessarily exist as a limiting factor in interpreting PD 97-3 today.

The record supports the conclusion that, at the time the City was reviewing the Empire Center development project, which was plainly envisioned as a broad-based retail destination, everyone from public officials to the general public recognized that retailers such as Walmart might operate in the overall retail area. This truly is not a remarkable perspective in today's retail environment. The Petitioners are complaining that a Walmart will adversely affect traffic. That is an issue better directed to the sufficiency of the EIR documents which were prepared at the time of the CEQA review process when the Empire Center development project was approved, not a factor giving post hoc guidance for interpreting PD 97-3 now. And, as we have regularly noted in this opinion, the sufficiency of the EIR documents is a matter that is legally beyond the time for challenge.

The remaining, more focused issue is whether grocery *sales* inside of a "Big Box" retail store such as Walmart's proposed store is an existing permitted use under PD 97-3. In its statement of decision, the trial court concluded that "allowing *grocery use* in Sub

Area D is expressly conditioned on the actual discretionary approval by both the City Manager and the Director of Community Development, as well as by compliance with [the Development Agreement] condition of approval no. [146]." (Italics added.) The court found as a factual matter "that no request for the exercise of [the City's] discretion was made, nor was it exercised."

Exhibit B of PD 97-3 includes "Grocery/Market" among its lists of uses identified for the Empire Center development project. It is indisputable that a "Grocery/Market" is not identified as a permitted use in Sub Area D. Accordingly, a discretionary approval by the City would be required for an application to operate a "Grocery/Market" to be operated in Sub Area D. This said, we find the interpretation proffered by the Petitioners, and accepted by the trial court, that there can be no grocery sales within the four walls of a permitted use of a "Department Store" in Sub Area D, should have yielded to the City's reasonable interpretation that a "Big Box general merchandise retail store" with a grocery section is a permitted use in Sub Area D under PD 97-3. Part of the trial court's interpretation appears to have been based on the fact that two of Exhibit B's identified uses are "Grocery/Market (no alcohol sales)" and "Grocery/Market (with alcohol sales/ packaged only)," and that these uses are only permitted in Sub Area C as reflected in Exhibit B to PD 97-3. The trial court appears to have reasoned that the restriction of a "Grocery/Market" to Sub Area C meant that no grocery *sales* of any kind are a permitted use in Sub Area D. As we have noted, we find the trial court's reasoning should have yielded to the City's reasonable interpretation that grocery sales are a permitted use within a "Department Store" such as Walmart's proposed store. Our reasoning follows.

First, as discussed above, the "Department Store" and "Retail Store/Sales" uses identified in Exhibit B may reasonably be interpreted to include "Big Box" retail stores "such as 'Target and Super K Mart,'" inasmuch as those retailers are expressly identified in Condition Number 146. As discussed above, this interpretation gives meaning to all of the interrelated language in PD 97-3 as adopted by the City, and harmonizes the various statutory parts, all in accord with well-recognized canons of statutory interpretation. (See, e.g., *Baldwin, supra*, 70 Cal.App.4th at p. 838.) Second, it is undisputed that

"Big Box" retailers such as Target sold groceries in their stores at all times relevant to the adoption of PD 97-3, and continue to do so as of the present date. In making such "Big Box" stores a permissible use within the ambit of the category of "Department Store" and "Retail Store/Sales," PD 97-3 did so in implicit recognition that such stores would have grocery sales. Finally, to accept that "grocery sales" are not permitted in a "Big Box" store in Sub Area D because a "Grocery/Market" is not permitted in that area, it would ineluctably follow that a "Big Box" store could not have "appliance sales," nor "beauty supply sales," nor "clothing sales," nor "hardware sales," and the like, because an "Appliance Store," a "Beauty Supply Store," a "Clothing Store," and a "Hardware Store" are also not identified as permitted uses in Sub Area D, but are identified as permitted uses in other sub areas. In our view, the statutory language should not be interpreted to allow little more than a "Big Box" retail store which can sell very few types of merchandise. Rather, a "Department Store" has different "departments" which sell a wide range of different types of retail goods.

For all of the reasons discussed above, we are confident that PD 97-3 may be reasonably interpreted, as the City did, to allow a Walmart store which includes grocery sales. The possibility that a contrary interpretation may be constructed does not defeat the conclusion that the City properly determined that a Walmart store is permitted in Sub Area D under the City's statutory law, i.e., PD 97-3. Accordingly, at least with respect to the issue of a permitted use in Sub Area D, the City did not act contrary to law in declaring Walmart's store project to be exempt from CEQA. Approval of Walmart's building permits was a matter of issuing "ministerial" permits for a use already approved in accord with CEQA and the EIR process.

IV. Parking Spaces

The Petitioners' action asserted a claim that Walmart was required to apply to the City for a discretionary variance from the City's municipal code governing the number of parking spaces required for a retail store. Petitioners further alleged that the City acted contrary to the law -- to its own parking codes and CEQA -- when it declared Walmart's proposed store project exempt from CEQA. The trial court ruled in favor of the

Petitioners on their parking spaces claim, finding that the City approved the Walmart store project and issued building permits to the company while "apparently not even considering whether a [parking] variance was required."[9] Further, the court ruled that the parking spaces issue should be addressed by the City "by consideration and issuance of a variance . . . done in an environmentally compliant manner." On appeal, Walmart contends there is no parking spaces problem with its proposed store in the Empire Center development project, and that no variance from existing parking spaces regulations is required. We agree.

It is not disputed that Burbank Municipal Code Sections 10-1-1406, 10-1-1408, 10-1-1422 and 10-1-1916 require compliance with minimum parking spaces rules or a discretionary variance from those rules, and that the Empire Center development project was approved subject to a condition of approval (Number 97) that "all parking areas shall conform to City standards, including . . . parking layout and circulation."[10] The parking spaces issues in the current case are largely interpretational, requiring a determination of how Walmart's proposed store fits within the framework of the City's parking and zoning codes.

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[9] In its opening brief on appeal, Walmart asserts that the City's staffers did review the parking matter, and did find that there was no need for a parking variance. Walmart cites to page 3490 of its appellant's appendix. That document is the "zoning clearance" issued by a staffer in the City's planning department in June 2012, shortly before the planning department issued building permits to Walmart. Walmart also points to email exchanges between City staffers and the Petitioners' counsel, discussing the parking spaces subject. Although the "zoning clearance" document is somewhat vague, it is the final determination that there were no zoning issues with Walmart's proposed store, and, as parking is a zoning matter, we are satisfied that it encompasses a determination by the City that there is no parking/zoning problem. But, in any event, we address here the question of whether Walmart's proposed store will have sufficient parking spaces or will require a variance, thus, the question of what the City actually decided or did not decide is not a critical matter.

[10] We hereafter refer to Burbank Municipal Code as BMC.

BMC Section 10-1-1408.2(k) requires five parking spaces for each 1,000 square feet of a building located in a "shopping center." "Shopping center" is defined under BMC Section 10-1-203 to mean "a unified complex with two . . . or more retail, sales, service, and/or restaurant tenants sharing common on-site pedestrian and parking facilities, whether located on one . . . or multiple lots or parcels and whether or not held under single ownership." It is undisputed that Sub Area C of the Empire Center development project is a "shopping center"; it is a unified, single building that is divided into separate stores, with a common area sidewalk in front of all the stores to allow pedestrian movement between the separate stores, and with a shared parking area for the several, separate stores.

At trial, the City (with Walmart in agreement) maintained that Sub Area D is not a "shopping center" because it is of a nature that is significantly different from Sub Area C. The trial court rejected the City's position. As we have noted, the City has not appealed. Walmart continues pressing the argument that Sub Area D is not a "shopping center" on appeal. We find Walmart's arguments persuasive.

Walmart argues the applicable parking rule is prescribed by the parking code for "general retail" areas under BMC Section 10-1-1408.2(j). This section requires only 3.3 parking spaces for each 1,000 square feet of floor area in a "general" retail area. If Walmart is correct, there are enough existing parking spaces in the parking lot adjacent to its proposed store to satisfy the City's parking codes. As the trial court explained in its statement of decision, the classification of the area near Walmart's proposed store "is significant because a City ordinance requires an increased ration for parking spaces under [the] classification [of a shopping center], increasing the ration from 3.3 to 5.0 per thousand square feet. . . . If the 5.0 ration is used, the number of required parking spaces is 765 . . . . The number Walmart intends [for its store] is 684, a difference of 81."

The City reasonably determined that Sub Area D, as currently developed, has two separate and free-standing retail buildings. It is not, in the language of BMC Section 10-1-203, a "unified complex" with two or more retail operations. The difference between Sub Area C, which is indisputably a "shopping center," and Sub Area D is apparent.

Sub Area C has broad, common area sidewalks connecting multiple frontages of different retail operations which are together in a "unified complex." In contrast, the two free-standing buildings in Sub Area D are not part of a "unified complex." Although there is a raised pedestrian sidewalk that partially runs between the two store buildings in Sub Area D, this does not make the two buildings part of a "unified complex." As Walmart correctly notes, the raised sidewalk does not fully connect the two stores in Sub Area D, and pedestrians are able to walk from the parking lot to the fronts of each store, without ever needing to use the raised pedestrian walkway to travel between the two retail establishments in Sub Area D. In the end, we find the trial court should have deferred to the City's conclusion that under the physical layout of Sub Area D, and the language of BMC Section 10-1-203, Sub Area D is not a "shopping center."

We acknowledge that Walmart's own August 2011 site plan for its store, which is found in the Administrative Record, included a notation suggesting that Walmart recognized it needed parking variance relief, and that "variance relief [had been] requested." This evidence, however, does not command that the trial court's interpretation be upheld. We find the trial court should have deferred to the City's conclusion that, in light of the physical layout of the buildings in Sub Area D, and under the language of BMC Section 10-1-203, Sub Area D is not a "shopping center." The two buildings in Sub Area D are in an off-street area, in a discrete area of the Empire Center development project, but they are not two parts of a "unified complex." Further, the trial court should have given deference to a memorandum by City staffers from October 2001 on the subject of parking in Sub Area D. That memorandum indicates that the City's "general retail parking" rule of 3.3 parking spaces for each 1,000 square feet of building floorage in Sub Area D would apply to that sub area, rather than the "shopping center" rule, meaning that a total of only 533 parking spaces is an acceptable number without any discretionary parking variance. Although the memorandum was drafted in 2001, and predates the construction of the Ulta building in 2007, it still shows that the City, from the beginning, considered Sub Area D to be subject to its own parking spaces rules.

The immutable and undisputed facts shown in the record are that there are presently two separate, not unified, buildings in Sub Area D.

V. Traffic Mitigation Measures

Walmart contends the judgment must be reversed because the trial court erred in ruling that the City failed and is continuing to fail to perform its mandatory, statutorily-imposed obligation to implement certain off-site traffic mitigation measures enacted at the time the City approved the Empire Center development project. As we have noted more than once already in this opinion, the City did not file an appeal, which we understand to mean that the City has accepted the trial court's judgment. Assuming without deciding that Walmart has standing to challenge a judgment commanding the City to perform its duty to build out traffic improvements, we reject Walmart's challenge to the judgment's traffic mitigation elements, and affirm the trial court's determination that the City has violated and is continuing to violate its required duty under PD 97-3.

Walmart's contention involves two issues. The first involves the interpretation of the City's obligation to implement specified traffic mitigation measures prescribed in PD 97-3, and the second, depending upon the interpretation that is adopted, is whether the Petitioners' claims against the City for a failure to perform its statutorily-mandated obligation are time-barred. We find the trial court correctly determined all issues respecting the City's statutorily-imposed obligations to implement specified traffic mitigation measures prescribed in PD 97-3.

1. Interpretation of the Specified Traffic Mitigation Measures

Walmart sets forth the following framework for its arguments: "At issue is whether the City was required by Mitigation Measure 7.1 to *fully* implement Mitigation Measures 7.2 and 7.6, *regardless of the performance of the intersections*, as a pre-condition to issuing building permits."[11] (Italics in original.) Walmart's position is that PD 97-3 gives the City discretion to defer full implementation of certain traffic mitigation

[11] From this point forward in the opinion, we use the acronym "MM" to refer to all of the traffic mitigation measures in PD 97-3. Thus Mitigation Measure 7.1 is hereafter referred to as MM 7.1, and so forth.

measures in the ordinance, so long as traffic congestion has not reached certain levels. In short, Walmart argues that PD 97-3 contemplates that there are traffic congestion "triggers" for implementation of the traffic mitigation measures prescribed in the ordinance. The trial court rejected such an interpretation, and so do we.

The Statutory Language

The planned development ordinance, PD 97-3, includes the following general provision governing traffic mitigation measures:

> "[MM] 7.1 [1] *Concurrent with issuance of the first building permit . . . the City . . . shall have begun implementing a roadway and intersection improvement program to implement Mitigation Measures 7.1 through 7.14. . . .* [2(a)] Such improvements shall be fully implemented pursuant to the roadway and intersection improvement plan *such that significant impacts are thereby avoided or mitigated below a level of significance* [(b)] at the time of completion of the project, or [(c)] shall be substantially complete, [(d)] as defined in the Development Agreement." (Italics and internal numbering added.)

Analysis

It cannot be doubted that all of the traffic mitigation measures included in PD 97-3 were adopted by the City with the intention of implementing the EIR's discussion of the traffic mitigation measures that would accompany the construction of the Empire Center development project. Walmart argues that it is reasonable for a public agency, when approving a development project, to connect roadway capacity improvements to certain measured levels of traffic. According to Walmart, certain specified traffic mitigation measures that are prescribed in PD 97-3, specifically MM 7.2 and 7.6, may be implemented in phases in accord with the overall governance of 7.1, with the timing of any particular road improvements to enhance roadway capacity being tied to traffic performance criteria so that improvements are implemented on an "as needed" basis, if ever. The Petitioners call this interpretation the "Wait Until [Traffic Becomes] a Crisis" interpretation.

Walmart faults the trial court for concluding that the traffic mitigation measures had to be fully implemented by the time of the initial completion of the Empire Center development project. Walmart argues the court relied too much on 7.1's "shall be fully implemented" language and that such undue focus on this language eliminates the significance of the phrase "*such that significant [traffic] impacts are thereby avoided or mitigated below a level of significance at the time of completion of the project. . . .*" In Walmart's view, when MM 7.1, 7.2 and 7.6 are read together, the resulting interpretation should satisfy standards for adequate mitigation measures in accord with the intentions of the underlying EIR documents, but also reserves for the City a meaningful amount of flexibility to implement the traffic mitigation measures. Walmart argues such flexibility would take into account the practical complexities associated with any City initiation of the construction of the roadway improvements as such construction will require the City to exercise condemnation powers. We note there is no dispute in this case that implementation of MM 7.2 and 7.6 will require the City to acquire privately owned land to implement the roadway widening contemplated by those measures.

Walmart's arguments do not persuade us that the trial court erred in interpreting 7.1. If the City had intended that implementation of MM 7.2 and 7.6 was tied to an identified traffic performance standard, then it could have stated as much. It did not. MM 7.1's general language that traffic mitigation measures shall have started by a certain time ("concurrent with the issuance of the first building permit"), and shall have been fully implemented "such that significant [traffic] impacts are thereby avoided or mitigated below a level of significance at the time of completion of the project," plainly states a legislative intent concerning the time frame for traffic mitigation measures. Following MM 7.1, PD 97-3 then lists specified traffic mitigation measures. Some have qualifying language as to implementation, but others, including MM 7.2 and 7.6, do not. The "traffic impacts" language in MM 7.1 is not reasonably susceptible to the interpretation that the City might never be required to implement certain measures that

were not subject to any qualification in the language of the measures themselves, such as MM 7.2 and 7.6.

The underlying EIR documents consistently imparted an understanding to public officials reviewing the Empire Center development project, and to the general public, that mitigation measures to address traffic congestion concerns would accompany the build out of the Empire Center, but some proposed ideas might not be implemented. For example, the EIR documents discuss potential effects on freeway traffic congestion and associated traffic mitigation measures, and state that such traffic mitigation might be completed "after occupancy" of the completed Empire Center development project, and that the timing of implementation was "speculative" or "subject to delay" due to the need to work with state officials at CALTRANS regarding freeway matters. The drafters of the EIR documents knew how to tell the City's officials, and the public, just which traffic mitigation measures were to be implemented in connection with the completion of the Empire Center development project, and which measures were not.

In summary, there is no language in PD 97-3, and no materials in the underlying EIR documents, explicitly stating that the City's implementation of MM 7.2 and or 7.6 was subject to an identified traffic congestion trigger. As the trial court noted in its statement of decision: "Although the FEIR contemplates that certain traffic mitigation measures will be not completed until after occupancy of the completed project, these do not include the improvements at issue in this case. . . ."

In response to the plain language of PD 97-3, or, perhaps more accurately, the absence of plain language in the ordinance, Walmart points us to excerpts from the EIR documents and other reports in the record in support of its proffered interpretation that the City is authorized to defer implementation of MM 7.2 and or 7.6 until traffic flows fall below a standard of "Level of Service" (hereafter LOS), Level "D." The simple answer to this is that PD 97-3 does not include such a reference to LOS-D. Perhaps this is the reason the City decided not to appeal, and implicitly has accepted the trial court's interpretation of its statutorily-mandated obligation under PD 97-3. Apart from this, the LOS references cited by Walmart are largely contained in materials in the context of

studies of either anticipated traffic patterns at the time of the EIR process or in ongoing traffic monitoring in the City. To the extent the LOS references are helpful, they tend to explain the reason traffic mitigation measures were identified and prescribed, but do not tend to show that the City was authorized to defer measures until a particular traffic congestion "trigger" had been reached. The LOS figures, at most, explain the reason for preemptive action, and are not an explanation of reasons for deferred action.

As the trial court correctly ruled, when the FEIR and Mitigation Monitoring Plan are read in context with PD 97-3, the proper interpretation of the two sentences in MM 7.1 upon which Walmart relies is that LOS-D should be viewed as the standard that the City employed in developing the mitigation measures, not as a standard to be used to avoid the measures altogether. Thus, while delay of certain traffic mitigation measures such as MM 7.7 to 7.9 was expressly contemplated, the Mitigation Monitoring Plan stated that MM 7.2 and 7.6 (and others) were to be timed "prior to issuance of building permits for each building in each phase" in the Empire Center development project.

The Petitioners offer an instructive analogy in their respondents' brief. In a hypothetical EIR case, a public agency adopts an ordinance prescribing mitigation measures which include a provision that the agency shall install a storm water berm "sufficient to withstand a 100 year flood," and the agency fails to install the berm, arguing they are not required to do so because a 100 year flood has not yet occurred. We agree with the Petitioners that such an argument must be rejected as unreasonable; the reference to a 100 year flood is to explain the goal of the mitigation, not a performance standard to be used to avoid the mitigation altogether. This is largely the manner in which the trial court explained the adopted traffic mitigation measures in the current case, and we find nothing in Walmart's argument on appeal to persuade us that the trial court's interpretation must be rejected in favor of Walmart's contrary, "wait-until-there-is- a-problem" interpretation. The very purpose of the CEQA review process is to identify potential environmental problems and mitigate against those problems.

We adopt the trial court's conclusions and interpretation on this point: "The use of LOS D as a standard is a check on the efficacy of the specific improvements which are

[to be] implemented; it is not an excuse to not actually make the improvements as [the] City and [Walmart] contend . . . . The EIR does not say that the improvements need not be made so long as the LOS at the intersections is level D or better. . . . The EIR mandates making these improvements, and then sets out the minimum level they must meet . . . . [The] City and [Walmart]'s contention constitutes a post hoc attempt to support a misinterpretation of a critical document and to excuse a material failure. . . . The Court determines that the allowance of LOS D status for any intersection affected relates to the *minimum result that* must be achieved by the mitigation — it is not an excuse not to do the mitigation in the first place . . . ." We could not say it better.

We agree with Walmart in the abstract that CEQA does not preclude a public agency from tying mitigation measures to threshold triggers as a lawful and reasonable means of addressing an environmental concern associated with a development project. For example, in *Mount Shasta Bioregional Ecology Center v. County of Siskiyou* (2012) 210 Cal.App.4th 184, the court rejected allegations of improper deferral and upheld noise mitigation measures requiring post-operation acoustical testing only if noise complaints were received and tests showed noise levels exceeding EIR-identified levels of significance. (*Id*. at p. 208.) *Friends of Oroville v. City of Oroville, supra,* 219 Cal.App.4th 832, is similar. There, the Court of Appeal ruled that deferral of mitigation measures may properly be linked to post-approval drainage plans containing objective benchmarks. (*Id*. at p. 838.) The problem with Walmart's reliance on cases such as *Mount Shasta* and *Friends of Oroville* is that the governing ordinance, i.e., PD 97-3, does not authorize the deferral of mitigation measures. A public agency may, without violating CEQA, adopt a plan contemplating mitigation measures which will be deferred until triggers are reached, when the agency provides for such a plan in connection with a project. However, an agency may not say that it is going to implement mitigation measures, then simply defer those measures unilaterally, as it chooses. Here, the relevant documents and ordinance do not specify LOS-D as a trigger for implementing MM 7.2 or 7.6. As the trial court correctly recognized and held, if the City had approved the

mitigation measures tied to LOS-D as a performance standard, then it could have said so. It did not.

In addition, we do not agree with Walmart that trial court's interpretation in this case leads to an absurd result. Walmart may be correct that the trial court's interpretation tying implementation of the traffic mitigation measures in PD 97-3 to the completion of the Empire Center development project would mean that every building permit issued by the City for projects in the Empire Center in recent years was invalidly issued in the face of the City's failure to implement MM 7.2 and 7.6.[12] Walmart is conflating the issue of the City's failure to perform its duty, with the issue of the proper remedy for the City's omissions, an issue we address below. Assuming here that building permits should not issue in the face of violations of PD 97-3, the fact that the City has done so would not necessarily make the trial court's interpretation of the City's "duty to implement" under the ordinance absurd, it would merely mean that the City has been regularly violating its own planned development ordinance vis-à-vis its "duty to implement." The issue before us in this case is the proper interpretation of certain traffic mitigation measures specified in PD 97-3, which, for the reasons explained above, we find the trial court correctly interpreted.

The City must implement MM 7.2 and 7.6.

Finally, we also disagree with Walmart that an interpretation allowing for deferral of the implementation of MM 7.2 and 7.6 "is also consistent with state law limitations on the City's power of condemnation." Walmart argues that the City will be unable to win a condemnation lawsuit because it will not be able to issue the required "resolution of necessity" for the acquisition of the land for a wider roadway. (See Code Civ. Proc., §§ 1245.220, 1245.230.) We see no legal authority in Walmart's argument to support the proposition that a public agency cannot declare a roadway widening project to be a matter in "[t]he public interest and necessity" (§ 1245.230) unless traffic congestion levels are at

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[12] The record shows that approximately 1,100 building permits have been issued since the September 2000 effective date of PD 97-3, with approximately 120 building permits issued since mid 2009.

a particular LOS level. If the City has to initiate condemnation proceedings, then so be it. The City legislatively promised to implement MM 7.2 and 7.6 and must perform its promised duty.

2. Statute of Limitations

Walmart contends that if the trial court's interpretation of the traffic mitigation measures is correct, then the Petitioners' claims regarding the City's failure to implement those measures were time-barred by the time they commenced their action in June 2012. The trial court disagreed and so do we.

Walmart argues the Empire Center development project was "fully completed" as early as May 2005, as evidenced in an annual report on development agreements that was issued by the City, and no later than July 2009, as evidenced in another annual report of development agreements issued by the City. The trial court's findings in its statement of decision are in accord with these dates. Given either of these dates for the completion of the Empire Center development project, Walmart argues that the Petitioners' claim that the City failed to perform a statutorily-imposed, mandatory duty to complete full implementation of MM 7.2 and or 7.6 accrued at the time of completion of the project, which means, argues Walmart, that the Petitioners' claims are barred under every potentially applicable statute of limitations. Walmart cites Code of Civil Procedure section 338, subdivision (a), the three-year statute for an action upon a liability created by a statute, and Code of Civil Procedure section 343, the four-year "catch-all" limitations period, as possibly applicable limitations periods and calculates that even under the longest limitations period, the Petitioners did not sue in time.

The trial court's statement of decision, which is incorporated into its judgment, addresses the statute of limitations as follows: "[The City and Walmart] contend that any dispute as to the mitigation monitoring program is barred by the statute of limitations. This contention is without merit for several reasons: (1) To the extent [the City and Walmart] claim the project is not completed, the time to make any challenge . . . cannot have repined: The time to challenge cannot be cut off before the mitigation monitoring program requirements have been completed. (This is not to say that [the City and

Walmart] are correct [about the completion of the project]; rather that their argument has an inherent flaw.) (2) The statute of limitations cannot begin to run until the analytical baseline has been established. The facts in this case clearly set a new analytical baseline with the approval of [the] permits [issued to Walmart] (or with the filing of the Notice of Exemption with the State Clearinghouse) on May 30, 2012; only then did [the] statute begin to run. [Citation.] (3) Here, the [statutory] obligation [on the City] was a continuing one, such that the statute of limitations has not run. (E.g., *Aryeh v. Canon* [*Business Solutions, Inc., supra*] 55 Cal.4th 1185.) . . . ."

Walmart argues that the Petitioners' cause of action must be deemed to have accrued on the date of completion of the project where, as here, implementation of the mitigation measure is statutorily tied to "completion" of the approved project. Further, Walmart urges that such an accrual date may not be avoided on the basis that the City's failure to fully implement MM 7.2 or 7.6 constituted a "continuing" violation of the mandatory, statutory obligation as ruled by the trial court. The Petitioners counter that the accrual date of their claim against the City may be fixed as of the date that the City issued any *new* permit related to the Empire Center development project where the mitigation measure to be implemented in relation to the project remains unimplemented. As stated in the Petitioners' respondent's brief: "[T]he City's May 2012 issuance of permits to [Walmart] without completing the required traffic mitigations [was] a fresh violation not barred by limitations . . . ."

In our view, accrual requires a determination of whether an agency's failure to implement a mitigation measure should be viewed as a one-time violation of a statutory duty which occurred on the date of the completion of an approved project, or as a continually recurring failure to perform an ongoing statutory duty. Accordingly, we do not focus on the Petitioners' reliance on the trigger of the issuance of each new permit. Like the trial court did, we find the continuing or recurring failure to perform to be the approach which best serves the interest of the statute of limitations.

That the Petitioners could have brought an action for declaratory, injunctive or mandamus relief at the time of the completion of the Empire Center development project

does not compel the conclusion that such an action was untimely because it was brought later. Here, the City was continuing in its failure to implement mitigation measures that it was statutorily-bound to implement. So long as an action for relief concerns a public agency's failure to perform a statutorily-imposed obligation that presently exists in law, we have been offered no good argument to support the conclusion that the action must be deemed time-barred because it could have been brought earlier. The Petitioners were not seeking any manner or measure of relief arising from the City's past failure to perform its statutorily-imposed duty; they were seeking to compel the City to perform its duty going forward. At the time the Petitioners commenced their action, there existed an actual and continuing controversy between themselves and the City concerning the City's statutorily-imposed obligation to implement certain traffic mitigation measures associated with the Empire Center development project. When a public agency fails to perform a statutorily-imposed duty, declaratory and mandamus relief is available.[13]

In arguing for a different result, Walmart points to evidence that the intersections which are involved in MM 7.2 and 7.6 have operated at LOD D or better from 2000 to the present, with the exception of a single occasion during a "p.m. peak hour" in 2004. Walmart then argues that "[the] time–bar cannot be avoided on the basis that implementation of MM 7.2 would be a continuing violation . . . . Undisputed evidence demonstrates all traffic studies from 2006 to the present show the intersections performing at LOS D or better." In essence, Walmart argues the City is not guilty of a "continuing" failure to perform any duty because it has no duty. The problem with this argument is that it is necessarily predicated on Walmart's underlying argument that the duty to implement is not triggered until certain standards of traffic congestion come to

[13] To the extent Walmart's statute of limitations argument is based on a claim that the City's failure to perform its statutorily-imposed duty to implement traffic mitigation measures does not support the withholding of Walmart's building permits, we find this claim is a matter better suited to the issue of the role of judicial remedies, not a basis for finding the Petitioners' claims to be time-barred. We address the issue of appropriate remedies in the current case below.

exist. As we explained above, we do not agree with Walmart's predicate concerning when the City must implement MM 7.2 and 7.6.

We find the City's failure to perform its mandatory, statutorily-imposed duty may be likened to an agency which is allegedly affirmatively violating the law. In such an affirmative wrongful act situation, while some relief might be time-barred, it does not mean that the public agency will forever be in the clear to continue violating the law due to the passage of time. A plaintiff may still bring an action to stop an unlawful act going forward in time. (See, e.g., *Howard Jarvis Taxpayers Assn. v. City of La Habra* (2001) 25 Cal.4th 809 [action alleging illegal tax not time-barred although years had passed since the public agency enacted and began collecting the tax; although some relief for past taxes collected might be time-barred, plaintiff's claim for an end to the tax was not time-barred].) Here, to accept Walmart's statute of limitations argument would mean that a government agency could enact a law requiring action, then never act, and hope the passage of time would relieve it from ever having to act. So long as the City is failing to perform its duty, an action may be brought to compel it to perform its duty.

VI. Remedy

Walmart contends the judgment must be reversed because, even in the event it is determined that the City failed and is failing to perform a mandatory, statutorily-imposed duty to implement certain traffic mitigation measures specified in PD 97-3, the trial court erred when it ruled that a proper remedy for the City's omission is a court order enjoining the City from issuing any building permits to Walmart.[14] In their respondents' brief, the Petitioners do not address the issue of proper remedies in any meaningful manner. We agree with Walmart that the City's failure to perform its mandatory, statutorily-imposed duty may not be visited on a third party, Walmart, having no control over the City's performance. Accordingly, we agree with Walmart that, while the City may

[14] Because we have determined that the City properly determined that Walmart's proposed store is a permitted use in Sub Area D and that a parking spaces variance is not required, an order enjoining the issuance of the building permits may only be predicated upon the City's omissions under PD 7-3.

properly be compelled by mandamus to implement MM 7.2 and 7.6, it does not follow that a court may enjoin the City from issuing any building permits until it has so performed. As Walmart accurately observes: "Allowing Walmart to occupy the vacant building in [Sub Area D] will not impede the City from further implementing 7.2 and 7.6 . . . ."

Compliance with CEQA is required for all "discretionary projects proposed to be carried out or approved by public agencies, including, but not limited to, . . . the issuance of zoning variances . . . ." (§ 21080, subd. (a).) When a court finds that a particular determination, finding, or decision by a public agency was made without complying with CEQA, the court has the statutory authority to enter an order mandating that the agency void the determination, in whole or in part. (See § 21168.9, subd. (a)(1).) Further, when the court finds that project activities will prejudice the CEQA process, the court may enter an order mandating that the public agency and any real parties in interest suspend such project activities pending actions that may be necessary for following the requirements of CEQA. (See § 21168.9, subds. (a)(2), (a)(3).) However, as explained above, we do not have a discretionary permit situation in the current case.

Where a public agency fails to perform a mandatory, statutorily-imposed duty, a trial court has the authority to issue a writ of mandate commanding performance. (See Code Civ. Proc., § 1085.) Thus, the trial court in the Petitioners' current action properly issued a mandamus judgment to compel the City to implement MM 7.2 and 7.6, or to otherwise proceed in accord with the law. In the event the City remains resistant to implementing MM 7.2 and 7.6, it may commence appropriate CEQA proceedings toward the end of rescinding or modifying all or any part of the traffic mitigation measures that the City previously enacted into the governing ordinance, PD 97-3, at the time it approved the Empire Center development project. (See, e.g., *Lincoln Place Tenants Assn. v. City of Los Angeles* (2005) 130 Cal.App.4th 1491, 1508-1509 (*Lincoln Place Tenants Assn*.); and see also *Sierra Club v. County of San Diego* (2014) 231 Cal.App.4th 1152.) In the latter situation, a public discussion, and a public evaluation of facts and

circumstances concerning the reasons for changing the earlier promised and enacted traffic mitigation measures, will ensue as contemplated under CEQA.

The one outcome that should not be abided under CEQA is to allow the City (or any public agency in connection with any development project) to make promises during the EIR review process that certain, specified environmental mitigation measures will be implemented in connection with a development project, to enact those mitigation measures into law by ordinance, and then simply neglect or disregard its statutorily-imposed obligation. (See *Lincoln Place Tenants Assn.*, *supra*, 130 Cal.App.4th at p. 1508.) Adopted mitigation measures are not meant to be mere "expressions of hope." (*Ibid*.)

As to enjoining the issuance of building permits until the City acts in accord with the law, Walmart offers an argument based on the DA between the City and Zelman. As Walmart accurately notes, the DA includes provisions governing the City's authority to deny building permit applications. Specifically, the DA includes a provision reading as follows: "The City may deny an application *only if the application* does not comply with [the DA] and the Existing Development Regulations." As Walmart further accurately notes, its application complies with the DA and the existing development regulations, as we have interpreted those regulations in this opinion. Thus, under the DA, the City may not deny a building permit application pending its completion of its obligations under PD 97-3.

Ultimately, it was the City's obligation to implement the traffic mitigation measures involved in this case. Walmart makes a persuasive argument that the DA precludes the City from denying a building permit application even if MM 7.2 or 7.6 have not been implemented, and we see no countervailing argument from the Petitioners. Certainly, an approach allowing the issuance of building permits has been consistently followed throughout the existence and operations of the Empire Center development project. It is undisputed that hundreds of such building permits have issued since the Empire Center development project began retail operations. The Petitioners have not meaningfully explained in their respondents' brief why relief in the form of enjoining

building permits only to Walmart is appropriate at this date, given the fact that neither they nor anyone else has done anything to invalidate the hundreds of building permits issued by the City after July 2009, including permits facilitating new tenancies that changed property uses. Further, to accept that the issuing of permits may properly be enjoined would mean that every permit issued from this date forward would be suspect or subject to being enjoined. We see no reasonable argument in the Petitioners' brief to explain why a property owner in the Empire Center should not be able to get a building permit to replace a leaking roof, or an inefficient heating and air conditioning unit until the City has built out MM 7.2 and 7.6. The interests of the property owners and tenants at the Empire Center in obtaining routine building permits should not be dependent on actions over which they have no control, namely, the City's failure to perform a mandatory, statutorily-imposed duty to implement traffic mitigation measures. The fact that the property owner involved in this case is Walmart should not change this dynamic.

None of the authorities discussed in the parties' briefs is particularly helpful in analyzing the remedy issue presented here. Walmart is correct that *Katzeff v. Department of Forestry & Fire Protection* (2010) 181 Cal.App.4th 601, and *Lincoln Place Tenants Assn.*, *supra*, 130 Cal.App.4th 1491, do not support a rule that a court has the authority to enjoin a public agency from issuing building permits when the agency fails to perform a mandatory, statutorily-imposed duty at a point in time after the CEQA review process has been concluded. At the same time, Walmart has cited no case which supports a rule that a court has no such authority. In the end, we are left with the principle that, "'for truly ministerial permits an EIR is irrelevant. No matter what the EIR might reveal about the terrible environmental consequences of going ahead with a given project the government agency . . . could not lawfully deny the permit nor condition it in any way which would mitigate the environmental damage in any significant way.'" (*Leach v. City of San Diego* (1990) 220 Cal.App.3d 389, 394.) Similarly: "Whether an agency has discretionary or ministerial control over a project depends on the authority granted by the laws providing the controls over the [project]. Similar projects may be subject to discretionary controls in one city or county and only ministerial controls in another." (See CEQA Guidelines,

§ 15002(i)(2).) Here, the Petitioners have not explained what lawful authority, whether statutory, contractual or other, allows the City to deny building permits for a ministerial permit, nor have the Petitioners explained how allowing Walmart to re-purpose the existing building in Sub Area D will impede the City from performing its obligation to fully implement MM 7.2 and 7.6.

DISPOSITION

The judgment is affirmed in part and reversed in part as stated in this opinion. The case is remanded to the trial court with direction to enter a new judgment which includes provisions (1) declaring that Walmart's proposed store is a permitted use in Sub Area D; (2) that a parking variance is not required for Walmart's proposed store; (3) that the City has failed and is failing to perform its mandatory, statutorily-imposed obligation under PD 97-3 to implement Mitigation Measures 7.2 and 7.6; and (4) commanding the City to implement Mitigation Measures 7.2 and 7.6 fully, or to otherwise act in accord with the law by commencing appropriate CEQA review processes to rescind or modify the subject traffic mitigation measures enacted in PD 97-3. Further, the judgment shall not enjoin the City from issuing building permits to Walmart. We will leave the precise language of the judgment to be resolved by the trial court and the parties on remand. Each party to bear its own costs on appeal.

BIGELOW, P.J.

We concur:

FLIER, J.

ALDRICH, J. *

* Associate Justice of the Court of Appeal, Second Appellate District, Division Four, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.