



## **Sixth District Holds Downtown San Jose Office Project FSEIR’s Brief Discussion And Rejection of “Compensatory” Mitigation for Historic Buildings Razed By Project Was Informationally Adequate Under CEQA Based On City’s Unchallenged Factual Finding That No Similar Historic Buildings Existed Elsewhere In City’s Downtown**

By [Arthur F. Coon](#) on May 22, 2023

In an opinion filed April 18, and belatedly ordered published on May 10, 2023, the Sixth District Court of Appeal upheld the City of San Jose’s (City) certification of a final Supplemental EIR (FSEIR) for development of three high-rise office towers (the “Project”) on an eight-acre downtown site containing several historic structures which the Project required to be demolished. *Preservation Action Council of San Jose v. City of San Jose (SJ Cityview, LLC, Real Party in Interest)* (2023) \_\_\_ Cal.App.5th \_\_\_. In affirming the trial court’s judgment denying Preservation Action Council of San Jose’s (Appellant) petition for writ of mandate, the Court rejected Appellant’s arguments that the FSEIR failed to adequately analyze and provide compensatory mitigation for the historic buildings and failed to adequately respond to comments on those issues.

### **The Project and Trial Court Litigation**

The Project site is located within City View Plaza, originally Park Center Plaza, which was one of the City’s first redevelopment sites built between the late 1960s and mid-1980s. It contained a 1971 Bank of California building (Bank) which, like several other buildings on the site, was a candidate City landmark, and which was also identified as eligible for listing on both the California Register of Historic Resources and the National Register of Historic Places. The Project would demolish all structures at City View Plaza and construct three new 19-story office towers with about 3.5 million square feet of office space, 65,000 square feet of ground floor retail, and five levels of underground parking at the site. During the draft SEIR’s circulation, Appellant nominated the Bank for consideration as a city landmark and the draft SEIR analyzed it as such a candidate and as an historic resource eligible for listing on both the National and

California registers; it identified the proposed demolition of the historic City View Plaza buildings as a significant unavoidable impact, presented pre-demolition mitigation measures (including extensive documentation, making the structures available for relocation and salvage, and commemoration measures), and evaluated a total of 11 project alternatives (including six historic preservation alternatives which entailed preserving different combinations of the historic buildings). Alternative 6 would have preserved the Bank, but at a loss of about 605,958 to 1,211,916 square feet of office space.

Comments on the DSEIR criticized the historic mitigation measures as inadequate, contended Alternative 6 and on-site Bank preservation was feasible, and proposed “compensatory” mitigation including financial support for preserving off-site historic resources, inter alia.

Ultimately, the City Council voted to certify the FSEIR, reject all the DSEIR’s project alternatives as infeasible, approve the Project with a statement of overriding considerations addressing the significant and unavoidable historic resources impacts, and not to designate the Bank as a City landmark.

Appellant’s ensuing CEQA action alleged the approved project would needlessly demolish significant historical resources despite feasible mitigation measures and alternatives that could accomplish fundamental project objectives, and raised particular concern with the proposed razing of the Bank. Appellant claimed the City failed to justify its rejection of suggested mitigation measures, including demolition deferral and “compensatory” payments to support preservation of other buildings in the City. After the trial court denied the writ petition, the Bank was immediately demolished, which the parties agreed mooted consideration of project alternatives and limited the litigation’s justiciable issues to the claimed CEQA violation of certifying the FSEIR despite an inadequate analysis and identification of mitigation for the project’s destruction of historic resources.

### **The Court of Appeal’s Opinion**

The issues presented on Appellant’s appeal were narrowed down to whether the FSEIR was inadequate for (1) failing to identify, analyze and impose “compensatory” mitigation for the project’s significant impacts to historic resources, and (2) failing to adequately respond to comments requesting compensatory mitigation. The Court applied a de novo standard of review to these issues, which it characterized as being based on the asserted “insufficiency of the City’s discussion underlying its rejection of the proposed compensatory mitigation.”

Despite agreeing with Appellant on and applying the standard of review most favorable to it, the Court went on to reject Appellant’s challenge to the adequacy of the FSEIR’s discussion of mitigation for the unavoidable loss of significant historic resources on the merits (also rejecting Respondents’ argument that Appellant failed to administratively exhaust the issue). The Court observed that CEQA expressly protects historic resources, and requires EIRs to discuss (and lead agencies to consider and adopt, if feasible) mitigation measures and project alternatives that would “substantially lessen” the project’s significant environmental effects. CEQA defines “mitigation” to include “[c]ompensating for the impact by replacing or providing substitute resources or environments” (CEQA Guidelines, § 15370(a)), and “feasible” as “capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social, and technological factors.” (§ 15364.) Mitigation measures must also meet applicable constitutional requirements, including the “essential nexus” and “roughly proportional” requirements of the *Nollan*, *Dolan*, and *Ehrlich* line of cases. (§ 15126.4(a)(4).)

The DSEIR recognized the project would result in loss of multiple Park Center Plaza historic structures that are representative of modernist commercial architecture of the 1970s, and for which there were no

other downtown examples, making the loss of 9 of 10 Plaza buildings “cumulatively considerable.” In responding to comments on the DSEIR expressing concerns about the demolition of the historic buildings, the FSEIR noted that its mitigation ensures appropriate recordation of the on-site buildings and Candidate City Landmark District and also provides for relocation, salvage, and commemoration; it also noted that no evidence suggested such mitigation was not proportional to the impact, but that requiring one project to support Citywide or downtown survey efforts is not proportional and lacked the required nexus to the project’s impacts, and further that “the City cannot require a project to provide financial contributions to support preservation of other buildings within the City.”

Arguing by analogy to cases endorsing compensatory mitigation for projects impacting biological resources and agricultural lands (see, *Save the Hill Group v. City of Livermore* (2022) 76 Cal.App.5th 1092, 1116, my 4/4/22 post on which can be found [here](#); *Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 274, my 11/28/12 post on which can be found [here](#); and *Masonite Corp. v. County of Mendocino* (2013) 218 Cal.App.4th 230, 237-238, my 8/2/13 post on which can be found [here](#)), Appellant asserted that the FSEIR was faulty for failing to include compensatory mitigation requiring investment in measures or funds that would enhance and promote protection of similar types of resources as those destroyed. While the Court agreed as a general matter that compensatory mitigation—i.e., compensating for an impact by replacing or providing substitute resources or environments (CEQA Guidelines, § 15370(a))—“may not be automatically excluded from consideration” when addressing impacts to historic resources, it held that Appellant had failed to show that such mitigation could, in the case before it, substantially lessen the project’s significant impacts.

Per the Court: “The theoretical availability of compensatory mitigation . . . does not resolve whether the City here abused its discretion . . . by rejecting the proposition of adding compensatory mitigation to the [already adopted] measures[.]” The City rejected adding compensatory mitigation because it found that “requiring any one project to support Citywide or downtown survey efforts is not [] proportional” and lacks the required nexus, and that it “cannot require a project to provide financial contributions to support preservation of other buildings within the City.” In other words, the “City determined that the proposed mitigation exceeds the scope of what the City can reasonably require toward mitigation and fails to satisfy the proportionality and nexus predicates[.]” The Court therefore stated: “In the absence of any evidence in the record to suggest the existence of comparable historic resources in the downtown area . . . [that] might feasibly serve as ‘substitute resources or environments’ [citation] for the anticipated loss of the Bank and historic plaza, we conclude that the City’s determination was neither erroneous nor inconsistent with CEQA’s substantive mandate.”

The Court discerned no such record evidence. Among the DSEIR’s specific findings was that “[a] review of the City’s Historic Resources Inventory does not show any specific buildings or group of buildings of the same architectural style, period of significance, and purpose within the downtown.” Per the Court: “The draft SEIR’s statement that no other building or group of buildings found in the downtown area shared similar architectural style or significance is a factual finding which [Appellant] has not challenged and to which we defer . . . .[¶] In light of the draft SEIR findings concerning the unique historic value of the plaza and its structures for San Jose, and the apparent dearth of other structures in the downtown area sharing the “same architectural style, period of significance, and purpose,” we decide the City did not abuse its discretion in rejecting, without more robust discussion and consideration, the proposed compensatory measures as mitigation . . . .”

The Court buttressed this conclusion by observing that “[h]istorical places and structures are rarely, if ever, fungible items of equivalent historical significance and value” [citation], that “[n]othing in the administrative record here suggests the existence of any structures of similar architectural and historic significance, and [that Appellant] has offered no authority to support its argument that compensatory

mitigation, broadly directed at historic preservation *generally* (such as by creating an historic preservation fund to identify and protect offsite historic resources), would serve as feasible mitigation in this context[,]” i.e., where no replacement or substitute resources capable of serving as feasible mitigation exist. “This circumstance, whereby the significant impact under CEQA is the loss of a unique, non-transferable element of the built environment, distinguishes this case from others which have required or upheld the application of compensatory mitigation.” Those cases applied compensatory mitigation in contexts (biological resources and agricultural land impacts) where substitution or replacement of the loss with “a reasonably equivalent resource was possible, rather than a situation where the proposed compensatory mitigation lacks “potential to actually mitigate the identified impact.” Per the Court: “[T]here is no statutory or other basis to require detailed consideration of measures proposed to an agency, absent some evidence that the compensatory mitigation measure would substantially lessen the significant impact.” Accordingly, in light of the DSEIR’s “unchallenged findings . . . concerning the uniqueness of the impacted historic resources,” the FSEIR’s brief consideration and rejection of the proposed additional compensatory mitigation was legally adequate.

For essentially the same reasons, while rejecting on the facts here Respondents’ arguments that Appellant failed to exhaust on its responses to comments challenge, the Court held the FSEIR’s responses were legally sufficient even “though lacking in detail.” When viewed in connection with the DSEIR’s findings discussed above regarding the unique historic value of the resources impacted, the challenged “response adequately conveys the City’s reasoning that general measures to promote historic preservation in the downtown area do not serve as compensatory mitigation for the loss of specific and unique architectural and historic resources.”

### **Conclusion and Implications**

While I found some of the Court’s reasoning on the exhaustion issues questionable and hard to follow, it obviously wanted to reach the merits of the compensatory mitigation issues and uphold the informational adequacy of the City’s FSEIR on that basis. This decision was likely published because, as the opinion itself observes, “there are apparently no [other] reported cases that address compensatory mitigation in the context of historic resources.” And while the opinion establishes that such mitigation is theoretically available, not legally precluded, and cannot be rejected from consideration out-of-hand in this context, it also makes clear that the devil will be in the factual details of future cases of this type, and that the proposed compensatory mitigation must involve a property (or properties) with the same type of historically significant attributes as the impacted resource to qualify as feasible mitigation that is capable of providing a “substitute” or “replacement” environment that actually lessens the project’s specific impacts. Given the unique and nonfungible nature of many historical resources, project challengers proposing compensatory mitigation in this context should carefully consider the nature of the specific impacts for which mitigation is sought and tailor their requests to include only substitute or replacement property with reasonably equivalent historical significance to that of the impacted resource. Further, in light of the representations of amicus curiae in this case that compensatory mitigation, in the form of historic preservation funds used for general historic preservation purposes, “is [currently] used by lead agencies throughout the state to preserve historic resources and offset development and redevelopment project impacts[,]” lead agencies may want to reconsider whether their mitigation practices in this regard comply with applicable constitutional “essential nexus” and “rough proportionality” and CEQA requirements, and real party developers may want to consider pushing back if they don’t.



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