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BY Cassandra Delatorre
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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN BERNARDINO
SAN BERNARDINO DISTRICT

<p>JOSHUA TREE DOWNTOWN BUSINESS ALLIANCE</p> <p>Plaintiffs/Petitioners, vs.</p> <p>COUNTY OF SAN BERNARDINO; BOARD OF SUPERVISORS OF THE COUNTY OF SAN BERNARDINO; DYNAMIC DEVELOPMENT, LLC,</p> <p>Defendants/Respondents, DYNAMIC DEVELOPMENT, LLC, and ROES 26-50 inclusive,</p> <p>Real Parties in Interest.</p>	<p>Case No: CIVDS 1307794</p> <p>[PROPOSED] JUDGMENT GRANTING PEREMPTORY WRIT OF MANDATE</p>
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This matter came regularly for hearing at 10:00 a.m. on January 17, 2014 in Department S-32 of this Court before the Honorable Donald Alvarez. Babak Naficy appeared on behalf of Petitioner and Plaintiff JOSHUA TREE DOWNTOWN BUSINESS ALLIANCE. Bart Brizzee appeared on behalf of Respondent, COUNTY OF SAN BERNARDINO and BOARD OF SUPERVISORS OF THE COUNTY OF SAN BERNARDINO. Jonathan Shardlow and John

1 Nolan of Gresham, Savage, Nolan & Tilden appeared on behalf of Real Party, DYNAMIC
2 DEVELOPMENT, LLC.

3 After reviewing the Administrative Record and the pleadings submitted by the parties and
4 considering the oral arguments presented by the counsel at the hearing on January 17, 2014, on
5 March 4, 2014, the Court issued a Ruling on Petition for Writ of Mandate, a true and correct
6 copy of which is attached hereto as Exhibit "A".
7

8 WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED:

- 9 1. Judgment shall be entered in this action in favor of Petitioner Joshua Tree
10 Downtown Business Alliance and against Respondents County of San
11 Bernardino, Board of Supervisors of the County of San Bernardino and Dynamic
12 Development, LLC, on the grounds that the County failed to properly analyze the
13 Project's impacts on the environment in the area of economic impacts resulting in
14 urban decay.
15
- 16 2. Clerk of the Court shall issue a Peremptory Writ of Mandate under the seal of this
17 Court directing Respondents, the County of San Bernardino and Board of
18 Supervisors of the County of San Bernardino, to set aside all of the County's
19 approvals of the Dollar General Retail Store (Application No.
20 P201100357/MUP), including but not limited to the following:
21
- 22 • approval of Conditional Use Permit P201100357
 - 23 • Certification of a Mitigated Negative Declaration
 - 24 • Notice of Determination
- 25 3. The County shall set aside any other permit, resolution, ordinance or other type of
26 approval issued, adopted or approved in connection with the Dollar General Retail
27 Store Project.
28

- 1 4. The County shall refrain from undertaking or authorizing any activities or issuing
2 permits or granting entitlements in furtherance of the Dollar General Store or in
3 reliance on the Mitigated Negative Declaration therefore unless and until the
4 Court has determined that the County has complied with CEQA by preparing an
5 Environmental Impact Report for the proposed Project.
- 6
- 7 5. The County is directed to serve a return to the peremptory writ of mandate issued
8 pursuant to this judgment no later than _____. The return shall
9 specify the actions taken to comply with the terms of the peremptory writ of
10 mandate. Upon a determination by this court that the actions taken by the County
11 comply in all respects with the terms of the writ and provisions of CEQA, the
12 Court shall discharge the writ of mandate.
- 13
- 14 6. This court shall retain jurisdiction pursuant to the Public Resources Code
15 §21168.9 to enforce the peremptory writ of mandate and judgment issued in this
16 action. This court shall retain jurisdiction over Respondents' proceedings by way
17 of a return to the peremptory writ of mandate until the Court has determined that
18 the County has complied with the terms of the writ issued pursuant to this
19 judgment, and to take such further action as may be appropriate or necessary
20 consistent with this Court's Ruling.
- 21
- 22 7. Petitioner, Joshua Tree Downtown Business Alliance shall recover costs of suit
23 against Respondents, the County of San Bernardino, Board of Supervisors of the
24 County of San Bernardino and Dynamic Development LLC in the amount of
25 \$ _____. The Court shall retain jurisdiction to determine Petitioner's
26 entitlement to attorney fees by noticed motion subsequent to the entry of
27 judgment.
28

IT IS SO ORDERED.

Dated: _____

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Donald Alvarez

Hon. Donald Alvarez
Judge of the Superior Court

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Superior Court of California
County of San Bernardino
Civil Division, Department S-32
303 West Third Street
San Bernardino, California 92415

FILED-Central District
SUPERIOR COURT
SAN BERNARDINO COUNTY

MAR - 4 2014

By *Stephanie Chandler*
Deputy

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN BERNARDINO
SAN BERNARDINO DISTRICT

JOSHUA TREE DOWNTOWN
BUSINESS ALLIANCE

Case No.: CIVDS 1307794

Plaintiffs,

RULING ON PETITION FOR WRIT OF
MANDATE

vs.

COUNTY OF SAN BERNARDINO;
BOARD OF SUPERVISORS OF THE
COUNTY OF SAN BERNARDINO;
DYNAMIC DEVELOPMENT, LLC

Defendants.

This matter came before the court for a hearing on a Petition for Writ of Mandate. The court has reviewed and considered the briefs of the parties as well as the Oral Arguments of counsel and issues its ruling as follows:

Factual and/or Procedural Context

Joshua Tree Downtown Business Alliance ("JTDBA") filed a petition for writ of mandate under CCP §§ 1085 and 1094.5 and Public Resources Code § 21168.5. (Petition ¶ 13.) It challenges the County of San Bernardino's adoption of a Mitigated

1 Negative Declaration ("MND") and approval of a Conditional Use Permit ("CUP"). The
2 Project Applicant and Real Party in Interest is Dynamic Development, LLC. ("Dynamic
3 Development").

4 The Project at issue involves the construction of a 9100 square foot general retail
5 store in Joshua Tree. It is on 1.45 acres with related site improvements, including
6 parking and landscaping. The Project site is bounded by 29 Palms Highway on the
7 south, Sunburst Avenue on the east, Commercial Street on the north, and Mountain
8 View Street on the west. Access to the site is by a driveway off Mountain View Street
9 and Commercial Street. (AR 1:D:130.)

10 The application for the Project was submitted as one for a minor use permit. (AR
11 3:G:1645-1708.) An initial study and negative declaration was prepared for the minor
12 use permit. (AR 1:D:60-123.) The public comment period was opened for review and
13 noticed to end on September 27, 2012. (AR 1:D:126.)

14 Based on the comments and new information received during the comment
15 period, the County decided to revise and recirculate the Initial Study. The noted
16 changes included:

- 17 • A change from a Minor Use Permit to a Conditional Use Permit, pursuant
18 to County of San Bernardino Development Code ("County Code") §
85.06.040(b);
- 19 • A revised Biological Resources analysis to address potential impacts to
20 the Burrowing Owl and the addition of Mitigation Measure BIO-1;
- 21 • A revised Cultural Resources analysis to address potential impacts and
22 the addition of Mitigation Measure CR-1; and
- 23 • A change in the environmental determination from "Negative Declaration"
to "Mitigated Negative Declaration." (AR 1:D:129-130.)

24 The County noticed the availability of the recirculated initial study and intent to
25 adopt the MND. The comment period ran from November 13, 2012 to December 12,
26 2012. (AR 1:D:127-128.) Comments were received. Ultimately, the Project was
27 noticed for a public hearing on January 17, 2013, before the San Bernardino County
28

1 Planning Commission. (AR 2:E:599-605.) The Planning Commission approved the
2 CUP. (AR 1:A:1; 1:B:6.)

3 On January 25, 2013, Petitioner JTDBA and other individuals appealed the
4 Planning Commission's approval of the Project and adoption of the MND. (AR
5 3:G:1512-1513.) The appeal was heard by the County Board of Supervisors on June 4,
6 2013. The appeal was denied and the MND was adopted. (AR 1:A:3-4; 2:F:1183.)

7 On July 8, 2013, Petitioner filed its petition for writ of mandate and complaint for
8 declaratory and injunctive relief, claiming: (1) violation of CEQA with respect to approval
9 of the MND; and (2) violation of Planning and Zoning Law with respect to approval of
10 the CUP.¹

11 Petitioner filed its brief in support. It raises the following issues. The County
12 violated CEQA because the County failed to evaluate whether the Project could cause
13 urban decay. It contends substantial evidence supports the conclusion the Project may
14 cause urban decay. Petitioner also asserts the Project description was inadequate,
15 because it did not disclose Dollar General as the tenant. It argues that the conclusion
16 the Project is consistent with the County's General Plan and the Joshua Tree
17 Community Plan ("Community Plan") is not supported by substantial evidence. Finally,
18 it asserts that the MND's conclusion that the Project will not result in significant traffic
19 and circulation impacts is not supported because the analysis was erroneous and an
20 incorrect threshold of significance was used.

21 Real Party Dynamic Development filed opposition, to which the County filed a
22 joinder.² Petitioner replies.

23

24

25 ¹ On July 8, 2013, Kerri N. Tuttle, Peggy Lee Kennedy, and David Fick filed a separate petition for writ of
26 mandate and complaint for injunctive relief, San Bernardino County Case No. CIVDS1307857. By stipulation and
order filed September 12, 2013, the matters were consolidated. On October 29, 2013, Case No. CIVDS1307857 was
voluntarily dismissed.

27 ² With its opposition, Dynamic Development requests the court to judicial notice of San Bernardino County
28 Code § 810.01.200(vv)(9), under Evidence Code § 452(b). (RJN Ex. 1.) Subsection (vv)(9) provides for a definition
for "Road System." The court takes judicial notice of this County Code pursuant to Evidence Code § 452(b), as a
legislative enactment.

1 **MND Standard of Review**

2 "[I]f there is no substantial evidence of any net significant environmental effect in
3 light of revisions in the project that would mitigate any potentially significant effects, [an]
4 agency may adopt a mitigated negative declaration. [Citation.]" (*Citizens for*
5 *Responsible & Open Government v. City of Grand Terrace* (2008) 160 Cal. App. 4th
6 1323, 1332.) An MND is one in which "(1) the proposed conditions "avoid the effects or
7 mitigate the effects to a point where *clearly* no significant effect on the environment
8 would occur, and (2) there is *no substantial evidence* in light of the whole record before
9 the public agency that the project, as revised, may have a significant effect on the
10 environment." (§ 21064.5, italics added.) [Citations.]" (*Id.*)

11 Under CEQA and its Guidelines, if a project is not exempt and *may* cause a
12 significant effect on the environment,³ the lead agency must prepare an environmental
13 impact report ("EIR"). (Pub. Res. C. §§ 21100, 21151; Guidelines, § 15064(a)(1), (f)(1).)

14 Under the fair argument standard for judicial review of an agency's decision to
15 adopt an MND instead of an EIR, a court must require an EIR whenever substantial
16 evidence⁴ in the record supports a fair argument that a project may have a significant
17 effect on the environment. (*No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal. 3d 68, 75,
18 82.)

19 The fair argument standard sets a "low threshold" for preparation of an EIR. (*City*
20 *of Grand Terrace, supra*, 160 Cal. App. 4th at p. 1332; *Pocket Protectors v. City of*
21 *Sacramento* (2004) 124 Cal. App. 4th 903, 928.) There is no weighing competing
22 evidence in the record; an EIR will be required even if there is other substantial
23 evidence indicating no significant effect. (*Friends of "B" Street v. City of Hayward*
24 (1980) 106 Cal. App. 3d 988, 1001-1002.)

25 _____
26 ³ "Significant effect on the environment" is defined as "a substantial or potentially substantial adverse
change in the environment." (Pub. Res. C § 21068; Guidelines, § 15382.)

27 ⁴ "[S]ubstantial evidence includes fact, a reasonable assumption predicated upon fact, or expert opinion
28 supported by fact" and "not argument, speculation, unsubstantiated opinion or narrative, evidence that is clearly
inaccurate or erroneous, or evidence of social or economic impacts that do not contribute to, or are not caused by,
physical impacts on the environment." (Pub. Res. C § 21080(e); see also Guidelines, § 15384.)

1 Finally, "[w]hile a fair argument of environmental impact must be based on
2 substantial evidence, mechanical application of this rule would defeat the purpose of
3 CEQA where the local agency has failed to undertake an adequate initial study. The
4 agency should not be allowed to hide behind its own failure to gather relevant data."
5 (*Sundstrom v. County of Mendocino* (1988) 202 Cal. App. 3d 296, 311.) "CEQA places
6 the burden of environmental investigation on government rather than the public. If the
7 local agency has failed to study an area of possible environmental impact, a fair
8 argument may be based on the limited facts in the record. Deficiencies in the record
9 may actually enlarge the scope of fair argument by lending a logical plausibility to a
10 wider range of inferences." (*Id.*)

11 **Urban Decay**

12 The Planning Commission's Staff Report noted that comments were received
13 expressing concerns over negative economic impacts. (AR 2:E:622.) In "Master
14 Response 2," the County responded to such comments. (AR 2:E:735-737.) It noted
15 that commenters had stated that CEQA requires consideration of potential economic
16 impacts of retail projects if such impacts have the potential to indirectly result in adverse
17 physical changes to the environment in the form of urban decay. (AR 2:E:735.)

18 The County's response first recited CEQA Guidelines § 15131(a) and (b). (AR
19 2:E:735-736.) With respect to urban decay, the County stated:

20 For the purpose of this response, urban decay is defined as, among other
21 characteristics, visible symptoms of physical deterioration that invite
22 vandalism, loitering, and graffiti that is caused by a downward spiral of
23 business closures and multiple long term vacancies. This physical
24 deterioration to properties or structures is so prevalent, substantial, and lasting
25 for a significant period of time that it impairs the proper utilization of the
26 properties and structures, or the health, safety, and welfare of the surrounding
27 community. The manifestations of urban decay include such visible conditions
28 as plywood-boarded doors and windows, parked trucks and long term
unauthorized use of the properties and parking lots, extensive gang and other
graffiti and offensive words painted on buildings, dumping of refuse on site,
overturned dumpsters, broken parking barriers, broken glass littering the site,
dead trees and shrubbery together with weeds, lack of building maintenance,
abandonment of multiple buildings, homeless encampments, and unsightly
and dilapidated fencing.

1 (AR 2:E:736.)

2 The County then addressed the assertion that the Project will result in urban
3 decay:

4 With respect to the comments that development of the Project will result in
5 urban decay (a physical change in the environment), the degree to which
6 urban decay may occur will be dependent upon many factors, including the
7 degree to which property owners cannot adequately maintain their properties.
8 The degree to which individual property owners can sustain a decline in
9 revenue associated with increased vacancy will also be a factor in the
10 potential emergence of urban decay, if they do not have the financial
11 wherewithal to provide proper maintenance.

12 However, the Commenters have provided no evidence to suggest that the
13 Project will contribute to or cause urban decay. There is no factual evidence
14 that development of the subject site with a small retail store would result in the
15 closing of businesses resulting in urban decay. The two court decisions
16 referenced by the Commenter were in regard to the preparation of
17 environmental documents for "big-box" stores and other large retail projects.
18 The proposed Project is a 9,100 square foot retail store on a 1.45 acre site
19 and is not of the size, scope, and scale of a "big-box" retail stores; so to
20 compare the economic impacts of the Project to the impacts associated with a
21 "big-box" retail store that can be as large as 150,000 square feet plus in not an
22 accurate comparison.

23 (AR 2:E:736.) The County then concluded:

24 Moreover, economic impacts and urban decay are not among the categories
25 listed within the CEQA Guidelines Appendix G checklist. Thus, in the absence
26 of any other significant impacts, there are no impacts to be "traced" through a
27 causal relationship to economic changes. MNDs may not be prepared for
28 projects with impacts that cannot be mitigated to below a level of significance;
this is why economic impact analyses are sometimes seen within EIRs, but not
within MNDs.

29 (AR 2:E:737.)

30 JTDBA argues that the County was required to consider whether the Project's
31 potential economic and social impacts can result "in a significant effect on the
32 environment by causing blight or urban decay." It asserts that County failed to evaluate
33 the Project's potential for causing urban decay simply because such was not a category
34 listed on CEQA Appendix G, citing AR 2:E:737 (quoted above).

35 JTDBA also refers to the following statement made by the County, "With respect
36 to the comments that development of the Project will result in urban decay (a physical

1 change in the environment), the degree to which urban decay may occur will be
2 dependent upon many factors, including the degree to which property owners cannot
3 adequately maintain the properties. The degree to which individual property owners
4 can sustain a decline in revenue associated with increased vacancy will also be a
5 factor...," quoting AR 2:E:736. JTDBA argues that by this statement, the County
6 essentially admitted the Project could potentially cause urban decay. However, the
7 County did not consider the Project's potential economic impacts because it erroneously
8 concluded it was not required to do so.

9 The County also concluded the Project would not cause urban decay because
10 evidence supplied by commenters did not adequately establish urban decay was likely.
11 JTDBA asserts that substantial evidence supports a fair argument that the Project could
12 cause urban decay and that an EIR should be required. JTDBA contends such
13 evidence exists in the form of testimony from business owners explaining the Dollar
14 General store can cause urban decay by running stores out of business, citing to AR
15 3:G:1391, 1520; AR 5:G:2278.

16 Dynamic Development, joined by the County, argues Petitioner misinterprets the
17 record to argue that the County determined the Project could potentially cause urban
18 decay. It asserts that Petitioner relies on a portion of a comment regarding urban
19 decay. However, in the next paragraph the County concluded, "There is no factual
20 evidence that development of the subject site with a small retail store would result in the
21 closing of businesses resulting in urban decay." The County also found that the cases
22 relied on by commenters involved "big-box" retail stores and this small retail store was
23 not of comparable size, scope, and scale.

24 It contends that only "when there is evidence suggesting that the economic and
25 social effects caused by the proposed shopping center ultimately could result in urban
26 decay or deterioration, then the lead agency is obligated to assess this indirect impact.
27 Many factors are relevant, including the size of the project, the type of retailers and their
28 market areas and the proximity of other retail shopping opportunities," quoting

1 *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal. App. 4th
2 1184, 1207. Dynamic Development argues there is no evidence to suggest that
3 economic and social effects caused by the Project could result in urban decay.

4 It contends that Petitioner's assertions that competition could be so severe to
5 cause urban decay or force existing businesses to close is immaterial to a finding of
6 urban decay. It argues that under CEQA, purely economic impacts are not themselves
7 considered significant and in order to be considered "significant" the impact must result
8 in a substantial physical effect, citing CEQA Guidelines, § 15064(e). It argues that the
9 totality of the evidence cited by JTDBA amounts to opinion testimony by two owners,
10 but does not support a finding that substantial evidence supports a fair argument that
11 urban decay may result.

12 As for the argument that the County failed to evaluate the Project's potential for
13 causing urban decay, Dynamic Development asserts that the County prepared
14 responses to the "economic impact" issue and noted that there was no evidence that
15 the development would result in businesses causing any urban decay.

16 The reply argues that the opposition does not address Petitioner's argument that
17 the County had an independent duty to consider urban decay and failed to do so.
18 JTDBA also asserts there is no evidence that the County undertook its own analysis
19 and it cannot blame the public for an alleged failure to support the claim of urban decay.
20 It contends that the County's conclusion the Project would not result in urban decay was
21 due primarily to the County's failure to undertake any analysis. JTDBA also asserts that
22 public comments that the Project could cause economic harm to certain stores and
23 thereby cause urban decay supports its fair argument contention, now citing to AR
24 3:G:1407-1408, 1252, 1260-1261, 1456-1457.

25 **Analysis**

26 There are two issues that exist: (1) whether the County undertook the review
27 required by CEQA in terms of the issue of urban decay; and (2) whether substantial
28

1 evidence supports a fair argument that the Project may have a significant impact with
2 respect to urban decay.

3 Even before the initial study/MND was circulated, individuals expressed concern
4 that the Project would cause local businesses to close and result in vacant buildings. In
5 November 2011, an individual noted that the Joshua Tree area already had two existing
6 dollar general stores. He asserted that another store would bring detriment to the
7 economic viability of other privately owned establishments that will not be supported by
8 the small population of the area. He contended a lack of consumer base for existing
9 businesses will be realized in the closure of existing shops and a decline in local debt
10 payments once existing stores are not able to clear their overhead. He asserted that an
11 additional general store will spread the consumer field thinner and create market strains
12 on established businesses. He also discussed that given the area and the existing
13 presence of two other stores in the immediate area, there was a risk the dollar store
14 could fail and result in closure and a useless building. (AR 3:G:1252.) Another
15 individual and business owner expressed similar concerns caused by the addition of
16 another retail store with a nearby Wal-Mart, Walgreens, Rite-Aid and other Dollar
17 General stores in the area. He discussed that an old K-mart sits vacant and that one
18 does not have to be an economist to see a pattern. (AR 3:G:1260-1261.)

19 With respect to the issue of whether the County undertook the review required by
20 CEQA, in *Citizens Association for Sensible Development of Bishop Area v. County of*
21 *Inyo* (1985) 172 Cal. App. 3d 151, 169-171, at issue was plaintiffs' contention that the
22 environmental consequences of economic and social changes must be considered by
23 the lead agency as part of the consideration of a negative declaration and related
24 approvals for a proposed shopping center. As in this case, plaintiffs asserted the lead
25 agency "must consider whether the proposed shopping center will take business away
26 from the downtown shopping area and thereby cause business closures and eventual
27 physical deterioration of downtown Bishop." (*Id.* at p. 169.)

28

1 The Court of Appeal concluded that under CEQA Guidelines, § 15064, “the lead
2 agency *shall* consider the secondary or indirect environmental consequences of
3 economic and social changes, but *may* find them to be insignificant.” (*Id.* at p. 170
4 (emphasis in original).) Therefore, the County was to “consider physical deterioration of
5 the downtown area to the extent that potential is demonstrated to be an indirect
6 environmental effect of the proposed shopping center.” (*Id.* at p. 171.)

7 It is recognized that CEQA is not a fair competition statutory scheme intended to
8 protect against economic competition. (See, e.g., *Waste Management of Alameda*
9 *County, Inc. v. County of Alameda* (2000) 79 Cal. App. 4th 1223, 1235, *disapproved on*
10 *other grounds in Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52
11 Cal. 4th 155, 169-170.) However, such must be considered if the loss of businesses
12 affects the physical environment by causing or increasing urban decay. (*Bakersfield*
13 *Citizens for Local Control, supra*, 124 Cal. App. 4th at pp. 1205-1206; *Friends of Davis*
14 *v. City of Davis* (2000) 83 Cal. App. 4th 1004, 1019-1020; *Citizens for Quality Growth v.*
15 *City of Mt. Shasta* (1988) 198 Cal. App. 3d 433, 446.)

16 As discussed in *Bakersfield Citizens for Local Control, supra*, 124 Cal. App. 4th
17 at p. 1207, a proposed shopping center, or as in this case even a new retail store,
18 “[does] not trigger a conclusive presumption of urban decay. However, where there is
19 evidence suggesting that the economic and social effects caused by the proposed
20 shopping center ultimately could result in urban decay or deterioration, the lead agency
21 is obligated to assess this indirect impact. Many factors are relevant, including the size
22 of the project, the type of retailers and their market area and the proximity of other retail
23 shopping opportunities. The lead agency cannot divest itself of its analytical and
24 informational obligations by summarily dismissing the possibility of urban decay or
25 deterioration as a ‘social or economic effect’ of the project.”

26 When the above is considered, the County did have to consider whether
27 economic or social changes would result in secondary or indirect environmental
28 consequences. After a review of the record, it is evident that as part of the initial study,

1 the County did not consider whether the Project would result in economic and social
2 changes that would result in significant physical changes to the environment, such as
3 urban decay. "The negative declaration is inappropriate where the agency has failed ...
4 to gather information and undertake an adequate environmental analysis." (*City of*
5 *Redlands v. County of San Bernardino* (2002) 96 Cal. App. 4th 398, 406, *citing*
6 *Sundstrom v. County of Mendocino* (1988) 202 Cal. App. 3d 296, 311; *Christward*
7 *Ministry v. Superior Court* (1986) 184 Cal. App. 3d 180, 197.) An agency "[will] not be
8 allowed to hide behind its own failure to gather relevant data.... CEQA places the
9 burden of environmental investigation on the government rather than the public. If the
10 local agency has failed to study an area of possible environmental impact, a fair
11 argument may be based on the limited facts in the record. Deficiencies in the record
12 may actually enlarge the scope of fair argument by lending a logical plausibility to a
13 wider range of inferences." (*Gentry v. City of Murrieta* (1995) 36 Cal. App. 4th 1359,
14 1378-1379, *quoting Sundstrom, supra*, 202 Cal. App. 3d at p. 311; *see also Christward*
15 *Ministry, supra*, 184 Cal. App. 3d at p. 197.)

16 Nonetheless, as *Gentry* goes on to discuss, the issue is not the validity of the
17 initial study, it is the validity of the adoption of a negative declaration, or in this case, the
18 MND. "Even if the initial study fails to cite evidentiary support for its findings, 'it remains
19 the appellant's burden to demonstrate by citation to the record the existence of
20 substantial evidence supporting a fair argument of significant environmental impact.'
21 [Citation] 'An absence of evidence in the record on a particular issue does not
22 automatically invalidate a negative declaration. "The lack of study is hardly evidence
23 that there *will* be a significant impact.'" [Citations.]" (*Gentry, supra*, 36 Cal. App. 4th at
24 p. 1379.) An agency's adoption of a negative declaration (or MND) may be based on
25 the initial study "together with any comments received during the public review
26 process.' (Guidelines, § 15074, subd. (b).)" (*Gentry, supra*, 36 Cal. App. 4th at p.
27 1379.) Therefore, additional information may cure defects in the initial study.

28

1 Here, in response to comments regarding economic impacts and the potential for
2 urban decay, the Planning Commission Staff concluded, "Commenters have provided
3 no evidence to suggest that the Project will contribute to or cause urban decay. There
4 is no factual evidence that development of the subject site with a small retail store would
5 result in the closing of businesses resulting in urban decay." (AR 2:E:736.) It
6 distinguished legal authority cited as involving "big-box" stores, which this Project was
7 not and therefore, economic impacts associated with "big-box" stores were not
8 considered a fair comparison. (*Id.*)

9 Earlier discussion in the Staff Report also noted community concerns that the
10 Project involved a "big-box" store and referred to the Joshua Tree Community Plan
11 consistency discussion. (AR 2:E:622.) In its analysis of whether the Project was
12 consistent with the Community Plan, in particular Goal JT/LU 2: "Support development
13 of the existing downtown commercial area of Joshua Tree as a focal point and core
14 activity center within the community," and Goal JT/LU 3: "Enhance commercial
15 development within the plan area that is compatible in type and scale with the rural
16 desert character, is located appropriately, and meets the needs of local residents and
17 visitors," the Staff Report stated:

18 The Project is a standard retail store compatible in size and character with the
19 development found within the community. Several of the comments from
20 residents in opposition to the project claim it is comparable to "Big Box"
21 development, which is discouraged by the Joshua Tree Community Plan. Per
22 the American Planning Association's definition, a "Big Box" is defined as a
23 stand-alone store of at least 100,000 square feet in floor area. Investopedia, a
24 prominent internet site devoted entirely to investing in education and owned by
25 Forbes Magazine, a well-respected source for financial information, defines a
26 "Big Box" retailer as, "... located in large-scale buildings of more than 50,000
27 square feet. The store is usually plainly designed and often resembles a large
28 box. Wal-mart, Best Buy, and Ikea are examples of big-box retailers." And
according to a report prepared by the School of Architecture, Preservation,
and Planning at Columbia University, a "Big Box" retailer "occupies more than
50,000 square feet of floor area, with typical ranges between 90,000-200,000
square feet."

1 Based on staff's experience and research, the Project is not a "Big Box"
2 retailer, and no evidence exists otherwise to suggest that the development will
3 have a negative economic impact on the community. Rather, based on the
4 underserved commercial designations in the area, it is anticipated that the
project will support future development of the existing downtown in line with
Goal JT/LU 2 of the Joshua Tree Community Plan.

5 (AR 2:E:617 (footnote omitted).)

6 Given the above, it is not demonstrated as Petitioner contends, that the County
7 failed to consider whether economic impacts would result in urban decay. The County's
8 conclusion was that the Project would not have a negative economic impact on the
9 environment and it flows from such conclusion that urban decay would not result.

10 However, the issue still remains whether substantial evidence exists to support a
11 fair argument that the Project *may* have a significant effect on the environment by
12 resulting in urban decay. Once again substantial evidence consists of "fact, a
13 reasonable assumption predicated upon fact, or expert opinion supported by fact."
14 (*City of Redlands, supra*, 96 Cal. App. 4th at p. 410.) Substantial evidence is not
15 "[a]rgument, speculation, unsubstantiated opinion or narrative, evidence which is clearly
16 inaccurate or erroneous, or evidence of social or economic impacts which do not
17 contribute to, or are not caused by, physical impacts on the environment." (Guidelines,
18 § 15384(a).) In addition, it is not necessary that JTDBA provide extensive studies or
19 expert testimony definitely proving the Project *will* result in urban decay. Petitioner only
20 is required to demonstrate the record contains substantial evidence sufficient to support
21 a fair argument the Project *may* have a significant growth-inducing effect. (See *City of*
22 *Redlands, supra*, 96 Cal. App. 4th at pp. 410-411; *Stanislaus Audubon Society, Inc., v.*
23 *County of Stanislaus* (1995) 33 Cal. App. 4th 144, 152-153.)

24 Dynamic Development discusses that personal observations of area residents on
25 nontechnical subjects may qualify as substantial evidence, citing *Pocket Protectors,*
26 *supra*, 124 Cal. App. 4th at p. 928. It then asserts, "Whether physical impacts may
27 result from economic effects of a new business on existing business does not constitute
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1 a nontechnical subject.” (Opp. p. 10, fn.4.) However, it provides no authority in support
2 of this contention.

3 Here, many factors are relevant to the issue of whether the economic impacts of
4 this Project could result in urban decay or deterioration, including the size of the Project,
5 the type of retailer, the market area, and proximity to other retail shopping opportunities.
6 (See *Bakersfield Citizens For Local Control, supra*, 124 Cal. App. 4th at p. 1207.)
7 Therefore, the issue for this court is whether the evidence cited by Petitioner meets
8 CEQA’s definition of “substantial evidence” with respect to this issue.

9 This court agrees that a simple statement by a competing business that the retail
10 store will cause other stores to go out of business is not substantial evidence. However,
11 when cited evidence is considered, the following evidence supports JTDBA’s fair
12 argument assertion.

13 In support of its appeal to the County Board, JTDBA submitted a letter authored
14 by Celeste J. Doyle. (AR 3:G:1444-1478.) Ms. Doyle is a member of JTDBA, a 12-year
15 resident of Joshua Tree, and a business owner. She was involved in the Community
16 Plan process and sat on the Citizen Committee appointed by the County to finalize the
17 Community Plan.⁵ (AR 3:G:1465 fn.58.) Her comments made on appeal expand on
18 comments made in her December 12, 2012 letter to the Planning Commission (AR
19 2:E:781-789), as well as statements made in JTDBA’s appeal to the County. (AR
20 3:G:1512-1513, 1517-1521.)

21 Ms. Doyle discussed the creation and adoption of the Community Plan that
22 residents, businesses and property owners of Joshua Tree worked on beginning in
23 2003. (AR 3:G:1448-1449.) She discussed that the Downtown District built itself up as
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28 ⁵ She also worked as an Assistant Attorney General in the Oregon Department of Justice, providing general
counsel services to the State’s Land Use, Transportation, and other agencies. (AR 3:G:1465 fn.58.)

1 unique with a character whose economic future depends on preserving and enhancing
2 that character, which "is our small commercial district populated by independent, locally-
3 owned restaurants and businesses that complement and cooperate with each other to
4 serve locals and visitors great food, and to offer everything from groceries and
5 household goods to local works of art, musical instruments, bicycles and climbing gear."
6 (AR 3:G:1449-1450.) She then discussed particular goals and policies of the
7 Community Plan. (AR 3:G:1450-1452.)

8 She also discussed that the proposed Project is not compatible in character, type
9 or scale with any existing development nearby or within the Joshua Tree community
10 area. She stated the proposed building of 9100 square feet was out of scale and would
11 be more than three times the size of any existing building nearby and twice the size of
12 any existing retail business in Joshua Tree. She noted Sam's Market, the largest
13 commercial/retail operation in Joshua Tree, occupied about 3500 square feet. (AR
14 3:G:1452 & fn.24.)

15 She then discussed that since the Community Plan was adopted in 2007, long-
16 standing and new business owners invested hundreds of thousands of dollars in their
17 businesses, buildings, and outdoor spaces in reliance on the policies of the Community
18 Plan. She discussed the following as examples. Sam's Market finished a multi-year
19 project renovating its building inside and out, including new refrigeration and freezer
20 units, expended fresh foods area, and made improvements to the parking lots. The
21 owners of Joshua Tree Health Food Store purchased the building next door and
22 invested tens of thousands of dollars working with the County to gut the building and
23 create two new commercial spaces to house a new restaurant and eco-market. The
24 new owners of Cross Roads Café closed the restaurant for six months and invested
25 tens of thousands of dollars gutting the inside of the rented building, making structural
26 improvements and completely renovating the building. The Joshua Tree Pharmacy
27 recently expanded and renovated its facility to provide more retail space and a larger
28 waiting area for patrons. (AR 3:G:1454-1456.)

1 She asserted the proposed Dollar General-type retail store will take business
2 away from Sam's Market, JT Trading Post, and Mike's Liquor Store, all of which already
3 sell much of what the Project tenant intends to offer. In addition, it will likely affect
4 three-non-profit thrift stores. It also will not noticeably increase the sales-tax or
5 employment based in Joshua Tree, because it will take sales away from existing locally-
6 owned businesses and the non-profit thrift stores. She stated, "This shift will lead some
7 of these local stores and businesses to close: [t]hey will no longer pay sales taxes, they
8 will lay-off their employees, and they will empty their buildings. Net retail sales in
9 Joshua Tree will not increase and the net number of jobs in Joshua Tree will not
10 increase, but the number of empty storefronts likely will increase." (AR 3:G:1456.)

11 She goes on to state that closed storefronts will likely stand empty for a very long
12 time, degrading the town's appearance and vitality, inviting vandalism and leading to
13 urban blight. She stated local residents can already purchase much of what the
14 proposed retail store will offer in local markets. In addition, what cannot be found in
15 Joshua Tree can be found four miles away in Yucca Valley where there exists a large
16 grocery store, a Walmart (scheduled to be replaced by a Super Walmart even closer to
17 Joshua Tree), a Walgreens, and a Dollar Tree Store, as well as other smaller retailers.
18 She also stated that just another mile down the road, is a new Rite-Aid, a Vons
19 Supermarket and other retailers. She asserted the proposed Project will not serve local
20 needs and harm existing businesses. (AR 3:G:1456-1457, 1463.)

21 Given Ms. Doyle's community involvement and knowledge of the downtown
22 business community, the cited discussion about local businesses, the amount of money
23 invested in such businesses, and the surrounding business community presents
24 substantial evidence in the form of facts and reasonable assumptions predicated upon
25 such facts to support a fair argument that the Project may have a significant
26 environmental effect in the form of urban decay. She discusses that general retail
27 needs are being met by existing local retail stores and nearby larger stores. Therefore,
28 this retail sales store will take sales away from existing businesses. A statement

1 regarding downtown store closures is based on this business owner's knowledge of the
2 downtown market and existing demand. In addition, given the level of investment
3 discussed, a reasonable assumption could be made that if these businesses close, they
4 will cause long-term vacancies of retail space resulting in degradation of the town's
5 appearance and blight, which would support a conclusion of a physical deterioration.
6 While Ms. Doyle may not be an expert in the traditional sense, her experience and
7 observations regarding the local business community and retail markets demonstrates
8 sufficient relevant personal observations that consistent of facts and reasonable
9 assumptions predicated upon such facts.

10 The evidence presented is based on factually relevant issues such as the size of
11 the project, type of retailer, the existing area and the proximity of other similar and
12 competing retail stores, level of demand, and type of community in support of the
13 contention that there is an oversaturation in retail stores for the area and that with this
14 Project it is reasonably probable that it will cause local stores to close, triggering adverse
15 effects on the physical environment in the form of physical deterioration of retail space
16 or the addition of more empty vacant retail space in the area, given the number and
17 type of retailers in the area, as well as market demand.

18 Therefore, the court grants the writ on this issue.

19 **Project Description**

20 The Project description in the recirculated Initial Study/MND states, "The
21 proposed Project is a Conditional Use Permit to construct a 9,100 square foot general
22 retail store on 1.45 acres with related site improvements such as parking and
23 landscaping. The Project is bounded by 29 Palms Highway on the south, Commercial
24 Highway on the north, Sunburst Avenue on the east, and Mountain View Street on the
25 west. Access to the Project site is proposed by a driveway off Mountain View Street
26 and Commercial Street." (AR 1:D:130.)

27 JTDBA argues the Project description was inadequate and violates CEQA to the
28 extent the County knew but deliberately withheld the identity of Dollar General as the

1 tenant. It also asserts that the County and Applicant tried to conceal the true identity of
2 the intended occupant. It argues that without knowing the identity of the store's
3 occupant, it was impossible to adequately analyze whether the Project could cause
4 urban decay. In addition, it was impossible to determine whether the Project was
5 consistent with the goals and policies of the Community Plan. It asserts that on
6 remand, the County should be ordered to revise the Project description by identifying
7 Dollar General as the almost certain occupant of the proposed store.

8 Dynamic Development, joined by the County, argues that there is no requirement
9 that the Project description identify the end user of the Project. It contends that only if
10 the end-user's identity implicates a potential physical environmental impact would
11 CEQA be concerned with the identity of an end-user. It also points out that the Land
12 Use Application clearly identified "Dollar General" as the anticipated tenant of the retail
13 store, citing AR 3:G:1646, 1651, 1656. In addition, a notice sent by the County to
14 reviewing agencies and neighboring property owners on October 7, 2011, identified the
15 Project as a "Dollar General," citing AR 1:B:54. Technical studies also attached to the
16 original and revised initial studies identified themselves as being prepared for "Proposed
17 Dollar General." (AR 1:D:95, 101, 116, 196, 264, 384, 456, 463, 520, 548-555, 574,
18 576-577.) It also refers to comment letters and the Planning Commission's Staff Report
19 that referred to Dollar General. Even at the Planning Commission hearing, the
20 Applicant's representative acknowledged it was a "good possibility" that "Dollar General"
21 would be the ultimate tenant. (AR 2:F:937.) In the Applicant's power point presentation
22 to the County Board, Dollar General was identified in several slides showing storefront
23 architecture and elevations. (AR 2:E:883-886.) It argues that the County properly
24 considered the Project as a 9100 square foot general retailer that would not significantly
25 differ based on the identity of the tenant.

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1 Analysis

2 In *Maintain Our Desert Environment v. Town of Apple Valley* (2004) 124 Cal.
3 App. 4th 430, 443-449 ("Apple Valley"), at issue was petitioners contention that an EIR
4 was inadequate because the project description did not contain the identity of the end
5 user, Wal-Mart. The Court concluded that CEQA and its guidelines do not require that
6 the end user of the Project be named in the project description. (*Id.* at pp. 444-445.)
7 The Court discussed that "in order to demonstrate that CEQA requires disclosure of the
8 identification of the end user of a project, it was incumbent upon [petitioners] to
9 demonstrate that the identity implicates potential physical environmental impacts.
10 Information that has no bearing upon the physical environment has no business in an
11 EIR." (*Id.* at pp. 445-446.)

12 In *Bakersfield Citizens for Local Control, supra*, 124 Cal. App. 4th at p. 1194, an
13 EIR did not identify any tenants. In response to comments about the tenants, it stated
14 that "no tenants have been identified." However, before the EIR was certified the public
15 and the City knew that one of the tenants was a Wal-Mart Supercenter. As part of the
16 urban decay discussion the Court noted that *Apple Valley, supra*, was factually
17 distinguishable. The Court stated, "Here, recognition of the characteristics of the
18 shopping centers' tenants is a necessary prerequisite to accurate identification and
19 analysis of the environmental consequences that will result from approval of the
20 proposed projects. When the particular type of retail business planned for a proposed
21 project will have unique or additional adverse impacts, then disclosure of the type of
22 business is necessary in order to accurately recognize and analyze the environmental
23 effects that will result from the proposed project." (*Bakersfield Citizens for Local*
24 *Control, supra*, 124 Cal. App. 4th at p. 1213.)

25 The *Bakersfield Citizens* Court then went on to discuss that a Supercenter is
26 unique, because "[u]nlike the vast majority of stores, many Supercenters operate 24
27 hours per day seven days a week. Such extended operational hours raise questions
28 concerning increased or additional adverse impacts relating to lights, noise, traffic and

1 crime. While specific identification of the name of the tenant may be unnecessary, to
2 simply state as did the [] EIR that 'no stores have been identified' without disclosing the
3 type of retailers envisioned for the proposed project is not only misleading and
4 inaccurate, but it hints at mendacity." (*Id.* at 1213.)

5 Petitioner contends the same "mendacity" exists here. In particular, it relies on
6 the County's response to a comment that the Project description was inadequate and
7 inaccurate because it did not describe the Project in enough detail. The commenter
8 asked, "Who is the tenant or who are the potential tenants?" (AR 2:E:773.) The
9 County's response stated, "The applicant informed County staff that no specific tenant
10 or end user has been identified for the building. Thus, the Initial Study did not identify
11 any prospective tenants or end users as that would have been speculative on the part of
12 County staff." (AR 2:E:774.) The response then went on to refer to *Maintain Our*
13 *Desert Environment, supra*, asserting that "[t]enant-specific review of a project is not
14 required under CEQA." (AR 2:E:774.) Later, in response to a comment that the end
15 user of a retail facility must be identified when a mega-discount box store has been
16 identified, citing *Bakersfield Citizens for Local Control, supra*, the County responded,
17 "[T]he applicant informed County staff that no specific tenant or end user had been
18 identified for the building. Thus, the Initial Study did not identify any prospective tenants
19 or end users as that would have been speculative on the part of the County staff." (AR
20 2:E:777.)

21 However, as Dynamic Development points out, the Land Use Application
22 identified Dollar General as the purported user of the general retail building, including a
23 description of Dollar General and its hours of operation. (AR 3:G:1646, 1651.) In
24 addition, as discussed above, various studies in support of the Initial Study/MND
25 referred to Dollar General, as did commenters, including the Applicant itself. Therefore,
26 the County's responses about the tenant/end user not being identified make little sense.

27 Nonetheless, this circumstance does not make this case similar to *Bakersfield*
28 *Citizens for Local Control*, where the Court noted the unique features of the proposed

1 Wal-Mart Supercenter. The *Bakersfield Citizens* Court also still concluded that "specific
2 identification of the name of the tenant may be unnecessary." The important issue was
3 whether "the particular type of retail business ... will have unique or additional adverse
4 impacts." But even in such case the important disclosure is "of the type of retailers
5 envisioned," not necessarily its specific name. (*Bakersfield Citizens for Local Control*,
6 *supra*, 124 Cal. App. 4th at p. 1213.)

7 In the case before this court, Petitioner does not demonstrate that a Dollar
8 General presents different environmental impacts from the usual general retail store.
9 The description of the store as a general retail store is not demonstrated to be
10 inadequate and sufficiently discloses the type of retailer envisioned.

11 Therefore, the court denies the writ on the claim the Project description is
12 inadequate because it failed to specifically include the name of the purported tenant,
13 Dollar General.

14 **Traffic Analysis**

15 The MND considered traffic impacts. (AR 1:D:187-188.) The analysis was
16 based in part on a Traffic Generation Analysis prepared by Linscott Law & Greenspan
17 on August 2, 2011, Appendix J. (AR 1:D:187-188, 583-587.) With respect to traffic, the
18 Initial Study/MND concluded the impact was less than significant on the issue of
19 whether the Project would conflict with an applicable plan, ordinance or policy
20 establishing measures of effectiveness for the performance of the circulation system. It
21 found the Project would not take direct access of 29 Palms Highway, but 29 Palms
22 Highway would serve as a major roadway providing access to the site via a driveway off
23 Mountain View Avenue. It also found that because the Project was forecasted to
24 generate less than 50 peak hour trips, it was not forecasted to reduce the level of
25 service on 29 Palms Highway or the surrounding street network. (AR 1:D:187.)

26 On the issue of whether the Project would conflict with an applicable congestion
27 management program, it concluded that the County of San Bernardino Congestion
28 Management Program, 2007 Update, established a Level of Service ("LOS") E, or the

1 current level, whichever is farthest from LOS A, as the LOS standard for intersections or
2 segments on the Congestion Management Program system of roadways. Based on
3 Project forecast it was found that the Project would not reduce the existing LOS for 29
4 Palms Highway in the vicinity of the Project. (AR 1:D:188.) Therefore, the impact was
5 found to be less than significant. (AR 1:D:187.)

6 JTDBA asserts that the Traffic Generation Analysis only focused on the Project's
7 potential impact on Twentynine Palms Highway and the County made no effort to
8 assess existing traffic conditions around the Project's vicinity, such as the intersection of
9 Sunburst and Twentynine Palms Highway. It argues that the County's conclusion that
10 the Project would not significantly impact traffic and circulation is not supported by
11 substantial evidence to the extent that the County did not even consider the Project's
12 impact on the intersection of Twentynine Palms Highway and Sunburst, or the
13 intersection of Sunburst and Commercial.

14 Petitioner also contends that the County did not consider the appropriate LOS as
15 set by the Community Plan. Therefore, it argues, the County failed to consider the
16 applicable threshold of significance for this Project. It argues that the County's traffic
17 consultant claimed the relevant LOS for the Project is an E or F, without any discussion.
18 However, the Community Plan requires the County "ensure that all new development
19 proposals do not degrade [LOS] on State and Major Arterials below LOS C." It argues
20 there is no evidence in the record to show that the County made an effort to determine
21 the existing LOS in the vicinity of the Project, including the intersection of Sunburst and
22 Twentynine Palms Highway. JTDBA asserts that as for 2004, the LOS for the
23 intersection of Twentynine Palms and Sunburst was "C," citing AR 4:G:2073. It
24 contends that evidence (what evidence is unclear), further establishes that vehicular,
25 bicycle, and foot traffic have substantially increased since 2004. Therefore, it is likely
26 that the Project would be in violation of the County's policy of maintaining a LOS C at
27 this intersection, which already is operating close to or below Los C. It argues that
28 under *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal. App. 4th

1 777, 783, approval of the Project must be set aside, because it is inconsistent with the
2 Community Plan's policy of maintaining a LOS C.

3 Dynamic Development, joined by the County, argues that the purpose of the Trip
4 Generation threshold of the Caltrans Guide is not only to evaluate the impact of the
5 Project on Twentynine Palms Highway, but also on "the adjacent roadway system,"
6 which included the intersection of Sunburst and Twentynine Palms Highway, citing AR
7 3:G:1531. It contends that both Caltrans and the County's engineering staff reviewed
8 existing "offsite" circulation and proposed street improvements and concluded the
9 Project would not have any significant traffic impacts, citing AR 2:E:874 (Land Use
10 Services Department Report/Recommendation to County Board Re Appeal).

11 As for the argument an incorrect threshold was used, Dynamic Development
12 argues it is based on an incorrect premise that the County's traffic consultant claimed
13 that the relevant LOS for the Project was an E or F. It contends that the traffic analysis
14 specifically found that the affected State highway facility did not operate at a Los E or F
15 in the vicinity of the Project citing, citing AR 3:G:1531. It also asserts that Petitioner's
16 contention that the Community Plan sets a threshold of LOS C for Joshua Tree is
17 incorrect. It contends that while the Community Plan identifies a policy regarding the
18 LOS relevant to particular streets in Joshua Tree, it is not a threshold of significance for
19 CEQA purposes. It also argues that the evidence illustrates the Project will not degrade
20 the LOS on State Routes and Major Arterials below LOS C. It cites to evidence that
21 states, "Because the Project is forecast to generate less than 50 Peak Hour Trips[,] it is
22 not forecast to reduce the Level of Service on 29 Palms Highway or the surrounding
23 street network," at AR 2:E:745. It asserts there is no evidence that the LOS would go
24 from level C to D.

25 It also asserts that absent from the record is any evidence that the Project could
26 impact a "Major Arterial" in Joshua Tree. It asserts that JTDBA assumes, without any
27 citation to the record, that the Project would impact a "Major Arterial." It cites to County
28 Code § 810.01.200(vv)(9) which defines "Major Arterial" as "[a] road or thoroughfare

1 that serves through traffic movement across urban areas, subject to controlled access
2 from properties fronting on the right-of-way; intersecting streets are subject to
3 appropriate spacing. It is a six-lane highway that may have grade separations at
4 intersections. It is striped for three lanes with shoulder in each direction with turn lanes
5 at intersections. Additional rights-of-way and roadway widths may be necessary for turn
6 lanes." It asserts that Sunburst Street and Commercial Street are not "Major Arterials,"
7 citing AR 2:E:666-667.

8 It then contends that the only evidence JTDBA offers in support is its own appeal
9 letter that involves unsubstantiated opinion or narrative. In addition, *Endangered*
10 *Habitats, supra*, is inapplicable, because JTDBA presented no evidence in support of its
11 claim the Project will degrade streets below LOS C.

12 JTDBA's reply brief again asserts that the Traffic Generation Analysis focused
13 only on the Project's potential impact on Twentynine Palms Highway, arguing there is
14 no evidence the consultant ever considered any potential impacts on local streets. The
15 reply also argues that the County used an improper threshold, LOS E, and that the
16 Community Plan mandates the County must ensure that all new development proposals
17 do not degrade the LOS on State and Major Arterials below LOS C. JTDBA also
18 asserts that personal observations regarding traffic are substantial evidence.

19 **Analysis**

20 The evidence cited by JTDBA with respect to the LOS at the purported relevant
21 intersections is at AR 3:G:1522. However, this document does not demonstrate
22 substantial evidence in support of a fair argument that traffic impacts are significant.
23 The document cited is JTDBA's letter in support of its appeal. It asserts that since
24 2004, the Highway 62/Sunburst intersection operated at Los C, citing Table 4 in the
25 Community Plan. (AR 3:G:1522, *see also* AR 4:G:2073.) It contends that the proposed
26 retail store will burden this intersection with over 450 additional vehicle trips per day, a
27 substantial amount of pedestrian and bicycle traffic, and an increase in the frequency
28

1 and duration of bus activity. (AR 3:G:1522.) However, the basis for such conclusion,
2 especially the addition of 450 additional vehicle trips is not provided.

3 To the extent JTDBA argues that personal observation can be offered in support
4 of substantial evidence supporting a fair argument that traffic impacts are significant,
5 such argument does not apply to the contentions being made. The assertion is that the
6 Project will cause the traffic impact to operate at a level below LOS C on surrounding
7 streets. However, personal observations of "increased traffic" since 2004 do not
8 demonstrate a reduced LOS, let alone one below LOS C as contended.

9 "The determination of whether a project may have a significant effect on the
10 environment calls for careful judgment on the part of the public agency involved, based
11 to the extent possible on scientific and factual data" (Guidelines, § 15064(b).)
12 Opinions outside areas of expertise do not constitute substantial evidence. (*Bowman v.*
13 *City of Berkeley* (2004) 122 Cal. App. 4th 572, 583.) The personal observations being
14 relied on in support of the contention that the Project will result in a reduced LOS cannot
15 be considered substantial evidence to support a fair argument of significant
16 environmental impact regarding traffic, because there is no mention of traffic analysis,
17 experience, or expertise for the conclusion being made of a reduced LOS.

18 In addition, it is not demonstrated that the County's analysis did not adequately
19 consider surrounding roadways. The traffic analysis concluded that the forecast for the
20 proposed general retail store was expected to generate approximately 443 daily trips,
21 with 10 trips produced during the AM peak hour and 38 trips produced during the PM
22 peak hour. (AR 1:D:583-585.) The MND stated, "According to the Traffic Generation
23 Analysis, and the Public Works Department/Land Development Division-Traffic Section,
24 29 Palms Highway is operating at an acceptable Level of Service. Because the Project
25 is forecast to generate less than 50 Peak Hour Trips it is not forecast[ed] to reduce the
26 LOS on 29 Palms Highway or the surrounding street network." (AR 1:D:187.) In
27 addition, the MND went on to explain that the County's Congestion Management
28 Program, established a LOS E, or current level, whichever is farthest from LOS A, as

1 the standard for intersections or segments on the Congestion Management Program
2 system of roadways. Once again, the forecast of less than 50 peak hour trips was cited.
3 The Public Works Department/Land Development Division-Traffic Section concurred
4 with a conclusion that such a peak hour trip estimate "will not reduce the existing LOS
5 for 29 Palms Highway in the vicinity of the Project." (AR 1:D:188.) These statements
6 are consistent with the County's responses to comments regarding traffic. (AR
7 2:E:745.)

8 As for Petitioner's argument the wrong threshold was used, Petitioner focuses on
9 the discussion in the traffic analysis that discussed the following. Given the trip
10 generation forecast was expected to generate less than 50 peak hour trips, the potential
11 traffic impact was assessed against the following Caltrans criteria: a traffic impact study
12 or some lesser analysis was required provided one of the following three occurred: (a)
13 "[a]ffected State highway facilities experiencing significant delay; unstable or forced
14 traffic flow conditions (Los 'E' or 'F');" (b) "[t]he potential risk for a traffic incident is
15 significant increased..." or (c) "[c]hange in local circulation networks that impact a State
16 highway facility..." (AR 1:D:588.) The Report concluded "the State Route 62
17 (Twentynine Palms Highway) facility does not operate at Los E or F in the vicinity of the
18 Project site, there is no significant increase in potential risk for a traffic incident (i.e. no
19 direct access to SR-62), and the proposed Project will not change the local circulation
20 network of SR 62 (i.e. site access is proposed along existing roadways)." Therefore,
21 the report concluded "based on the traffic generation potential of the proposed General
22 Retail Store project, which is expected to generate a maximum of 38 peak hour trips,
23 this project will not significantly impact the adjacent roadway system and therefore does
24 not require the preparation of a Traffic Impact Study." (AR 1:D:585.)

25 Even if the court accepts that the Community Plan required that all new
26 developments do not degrade the LOS on State Routes and Major Arterials below LOS
27 C, the findings, which included those of the County Public Works Department/Land
28 Development Division-Traffic Section, who is expected to have a sufficient level of traffic

1 analysis expertise, concluded a forecast of less than 50 peak hour trips will not reduce
2 the LOS for the Highway or surrounding streets. (AR 2:E:745.) Petitioner does not
3 present any substantial evidence supporting a fair argument that a forecast of less than
4 50 peak hour trips may result in a reduction of the existing LOS, let alone cause a
5 reduction below LOS C. Personal observation of increased traffic does not constitute
6 substantial evidence in support of a fair argument that traffic impacts may be significant.

7 Therefore, the court denies the writ on this basis.

8 **Consistency with the General Plan and the Joshua Tree Community Plan**

9 JTDBA argues the County's conclusion that the Project is consistent with the
10 General Plan and the Community Plan is not supported by substantial evidence.
11 Petitioner contends that the Community Plan recognizes the unique character of Joshua
12 Tree and it "outlines how the County of San Bernardino will manage and address
13 growth while retaining the attributes that make Joshua Tree unique." (AR 4:G:2049.) It
14 contends the Project is not consistent with the following policies.

15 JTCP/Economic Development Goal 1 states, "Preserve and protect Joshua
16 Tree's unique and evolving community atmosphere, artistic base and natural
17 surroundings while providing jobs and improving its tax base." (AR 4:G:2110.) In
18 support of this, JTCP/ED Policy 1.3 states, "Encourage and support small independent
19 businesses." (*Id.*) Petitioner contends the Project is not independently owned and will
20 do nothing to preserve and protect Joshua Tree's unique community atmosphere or
21 artistic base and directly compete with existing small and independent businesses.

22 JTCP/ED Policy 1.4 states, "Support commercial development that is of a size
23 and scale that ... is compatible with surrounding development and enhances the rural
24 character by incorporating natural desert landscape elements." (AR 4:G:2111.) JTDBA
25 argues the Project is inconsistent with this policy given its size and scale, "which is more
26 massive than almost any other business in town and does nothing to enhance the rural
27 charter of the desert landscape," citing AR 3:G:1520; AR 3:G:1401.

28

1 Along the same lines, JTDBA asserts the Project is inconsistent with JTCP/ED
2 Goal 4, which provides, "Commercial uses ... within the community shall be of a small
3 scale as needed to provide goods and services to residents and travelers and shall not
4 be of a regional scale." Policy JTCP/ED 4.1 provides, "Commercial development shall
5 be compatible with the rural environment, and shall protect the quality of residential
6 living." (AR 4:G:2113.) Petitioner simply asserts the Project is not compatible with
7 Joshua Tree's rural environment and will harm the quality of residential living.

8 Petitioner argues that the MND's analysis of the Project's consistency with the
9 Community Plan is arbitrary, capricious and lacking in evidentiary support to the extent
10 it does not consider any of these goals and policies. Instead, it merely concluded that
11 because it was determined the Project would not result in a significant impact on any of
12 the environmental resources identified in the Initial Study checklist, "it can be
13 determined the Project is not in conflict with any applicable land use plan, policy," citing
14 AR 2:E:709. In addition, the Planning Commission's Staff Report concluded the Project
15 is consistent with the Community Plan, because the Project is consistent with two
16 policies: LU/2, "Support development of the existing downtown commercial area of
17 Joshua Tree as a focal point and core activity center within the community" and LU/3,
18 "Enhance commercial development within the plan area that is compatible in type and
19 scale with the rural desert character, is located appropriately, and meets the needs of
20 local residents and visitors." (AR 2:E:617.) JTDBA argues that this analysis arbitrarily
21 focused on two individual policies, without considering the Community Plan as whole.

22 JTDBA then goes on to argue that the Project is not even consistent with these
23 two hand-picked policies. It asserts the Project is away from the downtown commercial
24 area and therefore will detract from that area, citing AR 2:E:667. In addition, the Project
25 is of relatively large scale, incompatible with the rural desert character of Joshua Tree
26 and there is no evidence the Project meets any unmet needs of local residents or
27 visitors, citing AR 3:G:1401; 4:G:1967.

28

1 Finally, JTDBA argues that approval is inconsistent with Circulation and
2 Infrastructure Policy 1.1, which requires the County "Ensure that all new development
3 proposals do not degrade Level of Service (LOS) on Major arterials below LOS C in the
4 Desert Region." However, as discussed in the traffic section above, this argument is
5 not demonstrated.

6 Dynamic Development, joined by the County, asserts the record demonstrates
7 the County considered all applicable land use plans, including the County's General
8 Plan and the Community Plan, and determined the Project conformed to those policies.
9 It contends that the Community Plan contains goals and policies that are necessarily
10 subjective and flexible. They argue that the County responded to comments regarding
11 inconsistency with the Community Plan, citing AR 2:E:741-742, 614, 617. It also was
12 discussed at the hearings, citing AR 2:F:911-1184.

13 Dynamic Development also asserts that the record demonstrates the County
14 considered such goals and policies and nothing more is required because perfect
15 conformity is not the standard, citing *Pfeiffer v. City of Sunnyvale City Council* (2011)
16 200 Cal. App. 4th 1552, 1563. It contends that the County made a consistency
17 determination based on the entirety of the Community Plan, including specific findings
18 related to the plan's land use and economic goals and policies, citing AR 2:E:617, 628,
19 872-873.

20 Dynamic Development argues that Petitioner does not cite to any evidence in
21 support of its contention that the Project is inconsistent with JTCP/ED Policy 1.3, which
22 is to "[e]ncourage and support small independent business." It argues that a community
23 can encourage small business and at the same time allow big business, both are not
24 mutually exclusive.

25 As for JTCP/ED Policy 1.4, the only relevant evidence offered by JTDBA is its
26 own statement that the size and scale of this building is out of proportion with the rest of
27 the community and downtown commercial district and will not complement or enhance
28 surrounding development or the rural character of the community, AR 3:G:1520. In

1 addition, Petitioner cites to a statement at AR 3:G:1401, that in review of other buildings
2 in the Downtown area, "this is twice the size of the biggest buildings...being at least
3 twice the size and effect and volume than any building in Downtown Joshua Tree."
4 Dynamic Development argues that the standard is reasonableness. It argues that as for
5 the first comment, it is by Project opponents and does not contain any facts or
6 reasonable assumptions predicated upon facts or expert opinion supported by facts. As
7 for the second, assuming the statement is true, the fact a Project is twice the size does
8 not mean it is not of the size and scale that complements the natural setting, or
9 compatible with surrounding development and enhances the rural character.

10 Finally, as for Economic Development Goal 4 and Economic Development Policy
11 4.1, Dynamic Development asserts that JTDBA offers nothing but conclusory argument,
12 without any citation to the administrative record.

13 **Analysis**

14 Petitioner presents this issue in the middle of its discussion of CEQA violations.
15 The precise nature of its argument as one brought under CEQA or one brought under
16 planning and zoning law is unclear. Petitioner contends that inconsistency with the
17 general plan is considered a significant environmental impact under CEQA, citing *Santa*
18 *Teresa Citizen Action Group v. City of San Jose* (2003) 114 Cal. App. 4th 689, 707.
19 However, *Santa Teresa Citizen Action Group* at p. 707, discussed that the petitioner
20 had sought a writ of mandate outside the CEQA context and that the issue regarding
21 that consistency with the general plan was whether the City had abused its discretion.

22 JTDBA also contends that CEQA mandates that any inconsistency between the
23 proposed project and applicable general plans be discussed, citing Guidelines, §
24 15125(d). Guidelines, § 15125(d) provides that an "EIR shall discuss any
25 inconsistencies between the proposed project and applicable general plans, specific
26 plans and regional plans." (Emphasis added.)

27 The CEQA Initial Study Checklist for the Project correctly considered whether the
28 Project may "[c]onflict with any applicable land use plan, policy, or regulation of an

1 agency with jurisdiction over the project ... adopted for the purpose of avoiding or
2 mitigating an environmental effect.” (AR 1:D:178.) With such issue, if substantial
3 evidence supports a fair argument that the Project conflicts with such policies, such
4 would constitute grounds for requiring an EIR. (See *Pocket Protectors*, *supra*, 124 Cal.
5 App. 4th at p. 930-931.)

6 JTDBA also asserts that this issue is controlled by CCP § 1085 and under such
7 standard, the County’s decision to approve the Project must be set aside if the court
8 finds the County’s conclusion was “arbitrary, capricious, entirely lacking in evidentiary
9 support, or procedurally unfair.” However, as discussed in *California Native Plant*
10 *Society v. City of Rancho Cordova* (2009) 172 Cal. App. 4th 603, 637, there is no
11 difference between the two standards of review (substantial evidence standard and
12 arbitrary and capricious standard), “at least when it comes to determining whether the
13 agency’s finding of consistency with the general plan has the requisite evidentiary
14 support of the record.” Ultimately, the issue comes down to whether the City
15 reasonably could have made a determination of consistency, which decision must be
16 upheld, regardless of whether the court would have made another decision. (*Id.* at pp.
17 637-638.)

18 As the above discussion demonstrates, the issue of whether the Project is
19 inconsistent with the Community Plan has a different standard of review when the issue
20 is being raised outside the CEQA context for purposes of approval of the CUP, as
21 opposed to being raised as part of an inconsistency argument in relation to approval of
22 an MND. If it is the former, the substantial evidence test would apply, the issue being
23 whether the County reasonably could have made a determination of consistency. If it is
24 the latter, the issue would be whether substantial evidence supports a fair argument that
25 the proposed Project conflicts with policies of an applicable land use plan or policy
26 adopted for the purpose of avoiding or mitigating an environmental effect.

27 Petitioner’s argument on this issue fails to account for this distinction. With
28 respect to any CEQA issue, an economic effect by itself is not considered a significant

1 effect on the environment. (Guidelines, § 15382.) However, as the court previously
2 discussed, with respect to urban decay, an economic impact may have an indirect
3 consequence. The problem with Petitioner's argument on the issue of plan consistency
4 is that it does not sufficiently address the argued economic development policies in the
5 context of demonstrating such were adopted for the purpose of avoiding or mitigating an
6 environmental effect and demonstrating an arguable environmental effect. For
7 example, JTDBA argues the proposed building is twice the size of other buildings and
8 therefore, the Project is inconsistent with ED Policy 1.4. However, the resulting
9 arguable environmental effect is not explained with respect to this purported
10 inconsistency.

11 To the extent the issue before the court is one of whether substantial evidence
12 supports the County's decision with respect to plan consistency, fair argument is not the
13 standard. Petitioner must demonstrate a finding of consistency is not supported by
14 substantial evidence in light of the whole record. To carry its burden, it is not sufficient
15 for Petitioner to cite only to opposing comments. Petitioner was required to
16 demonstrate that based on all relevant evidence, a finding of consistency could not
17 have reasonably been made. (*California Native Plant Society, supra*, 172 Cal App. 4th
18 at p. 639.)

19 Given the deficiencies in Petitioner's argument, the court denies the writ petition
20 based on inconsistency with the applicable Joshua Tree Community Plan.

21 **DISPOSITION**

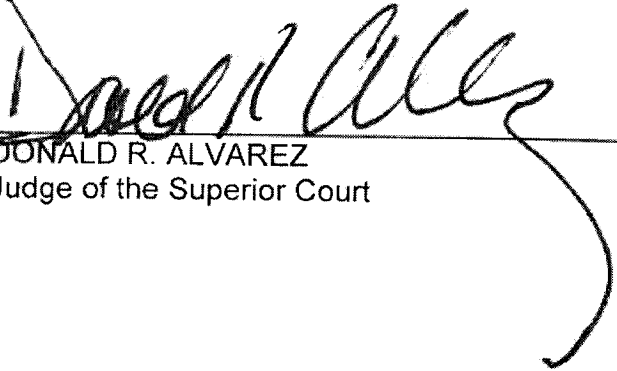
22 The court grants Dynamic Development's request for judicial notice and takes
23 judicial notice of San Bernardino County Code § 810.01.200(vv)(9), RJN Ex. 1.

24 The court grants JTDBA's petition for writ of mandate to overturn the approval of
25 the subject MND and CUP on the grounds of the failure to properly analyze the Project's
26 impacts on the environment in the area of economic impacts resulting in urban decay.
27 The County is required to undertake an EIR for the proposed Project.

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1 The court denies JTDBA's petition for writ of mandate to overturn the approval of
2 the subject MND and CUP on grounds of alleged failure to properly analyze the
3 Project's impacts on traffic and land use plan consistency. The approval also is not
4 demonstrated to be improper by the failure to identify "Dollar General" in the Project
5 description.

6 Dated this 3 MAR - 4 2011
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10 DONALD R. ALVAREZ
11 Judge of the Superior Court
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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN BERNARDINO
SAN BERNARDINO DISTRICT, CIVIL DIVISION

TITLE OF CASE (ABBREVIATED): In the Matter of

JOSHUA TREE DOWNTOWN BUSINESS ALLIANCE
V

COUNTY OF SAN BERNARDINO; BOARD OF SUPERVISORS OF THE COUNTY OF SAN
BERNARDINO; DYNAMIC DEVELOPMENT, LLC

CASE NUMBER: CIVDS 1307794

DECLARATION OF SERVICE BY MAIL

My business address is: San Bernardino Superior Court, 303 West Third Street, San Bernardino, California 92415.

I hereby declare that I am a citizen of the United States, over the age of 18, employed in the above-named county, and not a party to nor interested in this proceeding. On 03-05-14, I deposited in the United States mail at San Bernardino, California, a sealed envelope (postage prepaid) which contained a true copy of the attached:

NAME OF DOCUMENT:

RULING ON PETITION FOR WRIT OF MANDATE

which was addressed as follows:

Name and Address of Persons Served:

Babak Naficy
Law Offices of Babak Naficy
1504 Marsh Street
San Luis Obispo, CA 93401

Bart W. Brizzee, Deputy County Counsel
County Counsel - County of San Bernardino
385 North Arrowhead Avenue, 4th Floor
San Bernardino, CA 92415-0140


Jonathan E. Shardlow
550 East Hospitality Lane, Suite 300
San Bernardino, CA 92408

Kerri N. Tuttle
62025 Rincon Road
Joshua Tree, CA 92252

At the time of mailing this notice there was regular communication between the place of mailing and the place(s) to which this notice was addressed.

I declare under penalty of perjury the foregoing to be true and correct.

DATED: March 5, 2014

by 
ALVINA J HOLLENSBE
Administrative Assistant II

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN BERNARDINO
SAN BERNARDINO DISTRICT

SEP 22 2014

BY Cassandra Delatorre
CASSANDRA DELATORRE, DEPUTY

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN BERNARDINO
SAN BERNARDINO DISTRICT

JOSHUA TREE DOWNTOWN
BUSINESS ALLIANCE

Plaintiffs/Petitioners,
vs.

COUNTY OF SAN BERNARDINO;
BOARD OF SUPERVISORS OF THE
COUNTY OF SAN BERNARDINO;
DYNAMIC DEVELOPMENT, LLC,

Defendants/Respondents,

DYNAMIC DEVELOPMENT, LLC,
and ROES 26-50 inclusive,

Real Parties in Interest.

Case No: CIVDS 1307794

[PROPOSED] WRIT OF MANDATE

TO RESPONDENTS COUNTY OF SAN BERNARDINO AND BOARD OF
SUPERVISORS OF THE COUNTY OF SAN BERNARDINO (collectively referred to as
"County"):

Judgment having been entered in this action ordering that a peremptory writ of mandate
issue from this Court,

IT IS ORDERED THAT immediately upon receipt of this writ,

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1. The County shall set aside all of the County's approvals of the Dollar General Retail Store (Application No. P201100357/MUP), including but not limited to the following
 - approval of Conditional Use Permit P201100357
 - Certification of a Mitigated Negative Declaration
 - Notice of Determination
2. The County shall adopt a resolution to set aside any other permit, resolution, ordinance or other type of approval issued, adopted or approved in connection with the Dollar General Retail Store Project (Application No. P201100357/MUP).
3. The County shall refrain from undertaking or authorizing any activities or issuing permits or granting entitlements in furtherance of the Dollar General Store or in reliance on the Mitigated Negative Declaration therefore unless and until the Court has determined that the County has complied with CEQA by preparing an Environmental Impact Report for the Project and has discharged the Peremptory Writ of Mandate.
4. The County is directed to serve a return to the peremptory writ of mandate issued pursuant to this judgment no later than _____. The return shall specify the actions taken to comply with the terms of the peremptory writ of mandate. Upon a determination by this court that the actions taken by the County comply in all respects with the terms of the writ and provisions of CEQA, the Court shall discharge the writ of mandate. Under Public Resource Code §21168.9(c), this Court does not direct the County to exercise its lawful discretion in any particular manner.

1 This court shall retain jurisdiction pursuant to the Public Resources Code §21168.9 to
2 enforce the peremptory writ of mandate and judgment issued in this action. This court shall
3 retain jurisdiction over Respondents' proceedings by way of a return to the peremptory writ of
4 mandate until the Court has determined that the County has complied with the terms of the writ
5 issued pursuant to this judgment, and to take such further action as may be appropriate or
6 necessary consistent with this Court's Ruling.
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8 THE COUNTY IS HEREBY COMMANDED to make and file a return to this writ on or
9 before _____, 2014, setting forth what it has done to comply.

10 _____, Clerk
11

12 LET THE FOREGOING WRIT ISSUE
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14 DATED: ~~_____~~ **SEP 22 2014**

15 **Donald Alvarez**

16 _____
17 Hon. Donald Alvarez
18 Judge of the Superior Court
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