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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

AMERICAN CANYON COMMUNITY UNITED FOR RESPONSIBLE GROWTH, Petitioner and Appellant, v. CITY OF AMERICAN CANYON et al., Defendants and Respondents, LAKE STREET VENTURES, L.L.C., et al., Real Parties in Interest.	A111278 (Napa County Super. Ct. No. 26-27462)
CITIZENS AGAINST POOR PLANNING et al., Petitioner and Appellants, v. CITY OF AMERICAN CANYON et al., Defendants and Respondents, LAKE STREET VENTURES, L.L.C., et al., Real Parties in Interest.	A112088 (Napa County Super. Ct. No. 26-27534)

The City of American Canyon (City) adopted a mitigated negative declaration for a multi-use development project that was to be constructed in two phases. After the negative declaration and the project approval became final, the developer changed the size and type of retail development proposed for Phase Two of the project, replacing a

shopping center with a 24-hour supercenter that combined a big-box discount store and a full grocery store. The City approved the supercenter proposal without requiring supplemental environmental review under the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.) or a major modification approval or conditional use permit under its zoning ordinance.

We conclude that the City prejudicially violated CEQA. First, the City unreasonably minimized the size increase in the Phase Two retail component. That error fatally undermined the validity of the City's updated traffic analysis. The City's determination that the project changes would not substantially increase the project's impact on traffic is not supported by substantial evidence. Second, the City failed to proceed as required by law when it refused to consider the extraterritorial effects of the proposed supercenter, specifically the urban decay effects that might result from store closures in neighboring cities caused by economic competition from the supercenter.

We also conclude that the City prejudicially violated its zoning ordinance by approving the supercenter without approving a major modification application. We reject the Appellants' other claims of zoning ordinance violations.

BACKGROUND

Master Plan Approval in 2003

On July 10, 2003, Lake Street Ventures (Developer) applied for land use approvals for a development called Napa Junction Project (Project) to be located on a 40-acre site on Highway 29 in American Canyon.[1] The Project consisted of three main components, a hotel, multi-family residences with a park, and retail space. The Developer planned to develop the Project in two phases of approximately 20 acres each. Phase One consisted of approximately 32,000 square feet of retail space, the hotel and the multifamily

[1] Napa Junction I, LLC, another real party in interest in this action, is Lake Street Ventures' successor in interest.

housing. Phase Two added about 165,000 square feet of retail space in various size buildings and pad sites on the northern half of the property.

With its application for design permit of Phase One, the developer submitted a site plan and a landscape plan. The site plan showed a detailed layout of the Phase One area, but the Phase Two area was simply a blank space with the notations "163,000 SF developable area" and a "future road" indicated by dotted lines running north to south. The Project's landscape plan, on the other hand, showed a detailed layout for Phase Two, which included a roadway, parking areas, and at least eight retail buildings or pads.

In October 2003, the City issued an Initial Study and Mitigated Negative Declaration of Environmental Impact (MND). The MND incorporated the Project site plan, which showed an essentially blank Phase Two area. The MND also incorporated a traffic study (MND Traffic Study), which analyzed site access to and internal circulation within the Project based on the landscape plan, which showed a detailed layout for the Phase Two area.

In accord with the Planning Commission's recommendation, the City Council adopted the MND and approved the Project in December 2003 by adopting a zoning ordinance and map amendment, a General Plan amendment, and a tentative map.

Wal-Mart Supercenter Proposal in July-August 2004

In July and August 2004, Wal-Mart applied for a design permit and a sign program for the proposed construction of a Wal-Mart Supercenter in the Phase Two area of the Project. The proposed supercenter would operate seven days a week, 24 hours a day and would include a full service grocery department in addition to a general merchandise department. The Planning Commission staff reported, "The proposed site plan would locate an approximately 173,653-square-foot building and a 12,676-square-foot outdoor garden center on a 15.48-acre site at the northeast corner of the Napa Junction property, separated by a parking lot from Highway 29. An outdoor seasonal

event sales area of 7,625 square feet is proposed in the parking lot near the southern building entrance and would occupy 24 parking spaces when in use. [¶¶] The remaining portion of Phase II at the southeast corner of Highway 29 and Napa Junction Road is reserved for future uses and will be subject to separate design review."

Public concern about the proposed supercenter emerged almost immediately. American Canyon Community United for Responsible Growth (Appellant) formed and demanded CEQA review. City staff advised the Planning Commission that further CEQA review was unnecessary: "The subject project includes 154,074 square feet of commercial uses (excluding the stockroom, employee use area and seasonal events sales area), which when added to the 37,930 square feet of commercial uses currently planned for Phase I, is consistent with the 196,000 square feet evaluated by the Mitigated Negative Declaration for the entire Napa Junction project. [¶] Because there are no substantial changes that have occurred . . . that would require revisions to the previously-approved Mitigated Negative Declaration, . . . further California Environmental Quality Act documentation is not needed." Following a heavily-attended public hearing and the receipt of conflicting legal opinion letters from the City Attorney and Appellant, the Planning Commission approved the supercenter on the condition that the hours be restricted to 6:00 a.m. to midnight. The Commission found that further environmental review of the Project was not required.

Appellant appealed the Commission's decision to the City Council, and Wal-Mart appealed the restriction on its operating hours. The City Manager provided the City Council with a fiscal impact report analyzing the costs and revenues the City could expect if the supercenter proposal went forward. In response, Appellant submitted its own expert's study of the economic effects of the supercenter, which included regional store closures that could lead to urban decay. Appellant also submitted several studies of the effects of supercenter development in other areas of the country.

City staff released a revised trip generation analysis for the Project, which evaluated the number of vehicle trips that would be generated by the Project if it included the supercenter. Using 154,074 as the square footage of the supercenter, the analysis projected traffic at levels below those projected in the MND Traffic Study. Appellant responded by submitting its own traffic studies that concluded the Project with the supercenter would generate significantly more traffic than had been projected in the MND Traffic Study.

Following public hearings, the City Council approved the design permit application and sign program and reversed the Planning Commission's restriction on the supercenter's operating hours. The City issued a notice of determination that the Project would not have a significant effect on the environment.

Trial Court Proceedings

Appellant filed a petition for writ of mandate in the superior court seeking revocation of the City's approval of the supercenter proposal. Appellant argued the approval violated CEQA and the City's zoning ordinance. Citizens Against Poor Planning, an organization that formed after the supercenter was approved, and Stacy Su (collectively, Citizen Appellants) also filed a petition for a writ of mandate challenging the supercenter approval and also asserted CEQA and zoning ordinance violations. The actions were consolidated in the superior court.

The trial court denied the petitions. It concluded that the City's determination that no supplemental environmental review was necessary was supported by substantial evidence in the administrative record. On the alleged zoning ordinance violations, the court found either that the City complied with the ordinance or that its noncompliance was nonprejudicial.

Both petitioners appealed. Appellant raises several CEQA issues and argues the City prejudicially violated its zoning ordinance. The City filed a protective cross-appeal

arguing it did not violate its zoning ordinance. Citizen Appellants filed an appeal that focuses on a single CEQA issue, whether the City violated CEQA by failing to consider cross-jurisdictional impacts. While the appeals were pending, Appellant filed two petitions for writs of supersedeas seeking stays of construction of the supercenter. This court denied both petitions and expedited briefing of the appeals.

DISCUSSION

After discussing the applicable standard of review, we address the CEQA issues raised on appeal and then proceed to the zoning ordinance issues.

I. *Standard of Review*

Judicial review in an administrative mandamus action is limited to ascertaining "whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." (Code Civ. Proc., § 1094.5, subd. (b).) This standard governs our review of the City's compliance with CEQA and with its zoning ordinance. (*Lucas Valley Homeowners Assn. v. County of Marin* (1991) 233 Cal.App.3d 130, 142 (*Lucas Valley*); Code Civ. Proc., § 1094.5; Pub. Resources Code, § 21168[2]; see also *Bowman v. City of Petaluma* (1986) 185 Cal.App.3d 1065, 1071-1072 & fn. 7 [same standard of review under §§ 21168, 21168.5].)

The scope of our review is identical with that of the superior court. (*Desmond v. County of Contra Costa* (1993) 21 Cal.App.4th 330, 334.) We examine all relevant evidence in the entire record, considering both the evidence that supports the

[2] All statutory references are to the Public Resources Code unless otherwise indicated.

administrative decision and the evidence against it, in order to determine whether or not the findings of the agency are supported by substantial evidence. (*Id.* at p. 335.) Substantial evidence is evidence of ponderable legal significance, reasonable in nature, credible, and of solid value, evidence that a reasonable mind might accept as adequate to support a conclusion. (*Ibid.*) The burden is on the appellant to show there is no substantial evidence to support the findings of the agency. (*Id.* at p. 336.)

II. *CEQA Issues*

After providing an overview of the relevant legal standards under CEQA, we address and reject Appellant's argument that section 21166 does not govern our review because Phase Two is a new project. We then apply the standards of section 21166[3], considering first whether the City accurately identified the changes in the previously-approved Project; second, whether the project changes would have a substantially increased effect on traffic; and third, whether the City violated CEQA by refusing to consider possible extraterritorial urban decay effects of the supercenter.

When a local agency intends to carry out or approve a project covered by CEQA, the agency must prepare and certify the completion of an environmental impact report (EIR) if the project *may* have a significant effect on the environment. (§ 21151, subd. (a).) "An EIR is required whenever it can be 'fairly argued on the basis of substantial evidence that the project may have significant environmental impact.'

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[3] Section 21166 reads: "When an environmental impact report has been prepared for a project pursuant to this division, no subsequent or supplemental environmental impact report shall be required by the lead agency or by any responsible agency, unless one or more of the following events occurs: [¶] (a) Substantial changes are proposed in the project which will require major revisions of the environmental impact report. [¶] (b) Substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the environmental impact report. [¶] (c) New information, which was not known and could not have been known at the time the environmental impact report was certified as complete, becomes available."

[Citations.]" (*Friends of Davis v. City of Davis* (2000) 83 Cal.App.4th 1004, 1016-1017.) When, on the other hand, "[t]here is no substantial evidence, in light of the whole record before the lead agency, that the project may have a significant effect on the environment," the lead agency must prepare a negative declaration to that effect. (§ 21080, subd. (c)(1); Guidelines, §§ 15064, subd. (f)(3), 15070.)[4] The agency must prepare a mitigated negative declaration when "[a]n initial study identifies potentially significant effects on the environment, but (A) revisions in the project plans or proposals made by, or agreed to by, the applicant before the proposed negative declaration and initial study are released for public review would avoid the effects or mitigate the effects to a point where clearly no significant effect on the environment would occur, and (B) there is no substantial evidence, in light of the whole record before the lead agency, that the project, as revised, may have a significant effect on the environment." (§ 21080, subd. (c)(2); Guidelines §§ 15064, subd. (f)(2), 15070.)

As noted above, the City adopted an MND for the Project and approved the Project in 2003. Since the time limitations for challenging the MND have expired, the City's compliance with CEQA at that stage of the proceedings is conclusively presumed. (§ 21167.2.) Appellants do not contest the City's compliance with CEQA when it approved the Project in 2003.

When an agency has prepared an EIR, it shall not require a subsequent or supplemental EIR to be prepared unless, as relevant here, "substantial changes are proposed in the project which will require major revisions of the environmental impact

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[4] All references to "Guidelines" are to the State CEQA Guidelines (Cal. Code Regs., tit. 14, § 15000 et seq.). The Supreme Court "has not decided the issue of whether the Guidelines are regulatory mandates or only aids to interpreting CEQA. . . . At a minimum, however, courts should afford great weight to the Guidelines except when a provision is clearly unauthorized or erroneous under CEQA." (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 391, fn. 2 (*Laurel Heights*).)

report." (§ 21166, subd. (a).) Although the statute speaks only in terms of the EIR, CEQA Guidelines apply section 21166 to project changes following an agency's adoption of a negative declaration or a mitigated negative declaration as well as an EIR, and this interpretation has been upheld. (Guidelines, § 15162; *Benton v. Board of Supervisors* (1991) 226 Cal.App.3d 1467, 1477-1481.)

Guidelines section 15162 provides in part: "(a) When . . . a negative declaration [has been] adopted for a project, no subsequent EIR shall be prepared for that project unless the lead agency determines, on the basis of substantial evidence in the light of the whole record, one or more of the following: (1) Substantial changes are proposed in the project which will require major revisions of the previous . . . negative declaration due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects . . . (b) If changes to a project . . . occur . . . after adoption of a negative declaration, the lead agency shall prepare a subsequent EIR if required under subdivision (a). Otherwise the lead agency shall determine whether to prepare a subsequent negative declaration, an addendum, or no further documentation."

Section 21166 and Guidelines section 15162 (hereafter, collectively referred to as section 21166) represent "a shift in the applicable policy considerations. The low threshold for requiring the preparation of an EIR in the first instance is no longer applicable; instead, agencies are prohibited from requiring further environmental review unless the stated conditions are met. [Citation.]" (*Friends of Davis*, *supra,* 83 Cal.App.4th at pp. 1017-1018.) "[S]ection 21166 comes into play precisely because in-depth review has already occurred, the time for challenging the sufficiency of the original EIR has long since expired (§ 21167, subd. (c)), and the question is whether circumstances have *changed* enough to justify *repeating* a substantial portion of the process." (*Bowman*, *supra,* 185 Cal.App.3d at pp. 1073-1074.)

The issue before us is whether, in light of the whole record, there is substantial evidence to support the City's determination that the proposed changes in the Project would not create significant new or substantially increased environmental effects requiring major revisions in the MND or preparation of an EIR. (See Guidelines, § 15162(a)(1); *Snarled Traffic Obstructs Progress v. City and County of San Francisco* (1999) 74 Cal.App.4th 793, 798.)

A. *Section 21166 Applies*

As a preliminary matter, we conclude section 21166 governed whether further environmental review of the supercenter proposal was required under CEQA. Appellant argues that the project is not subject to section 21166 because the supercenter proposal was essentially a new project, not a change in the original Project.

In support of its argument, Appellant relies on *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307. *Sierra Club* discussed section 21166 in the context of tiered EIRs. (*Sierra Club*, at pp. 1318-1320.) A separate statutory scheme within CEQA governs tiered EIRs. Tiered EIRs are used when an agency prepares a *program EIR* for an extensive land use proposal that will encompass multiple site-specific projects. (*Sierra Club*, at pp. 1318-1320.) An EIR is required for a site-specific project within the larger program if the project *may* cause significant effects on the environment. (*Id.* at p. 1319; § 21094.) This standard applies *unless* the agency determines the project is subject to section 21166. (*Sierra Club*, at p. 1319; § 21094, subd. (b).) In the context of tiered EIRs, *Sierra Club* held that section 21166 governed "only when the question is whether more than one EIR must be prepared for what is *essentially the same project*." (*Sierra Club*, at p. 1320, emphasis added.) The project at issue was a proposal to change the mining and agricultural use designations for specific parcels of land and to allow mining on one of the newly designated mining parcels. The court held that this project was not essentially the same as the proposal considered in the program EIR, a proposed county-wide management plan for gravel and hardrock mining. (*Id.* at pp. 1313-1314, 1320-1321.) Thus, section 21166 did not apply. (*Sierra Club*, at p. 1321.)

Here, the supercenter proposal was not a specific application of a larger management plan that was evaluated in a program EIR. Rather, it was a proposed change (from a shopping center to a supercenter) in Phase Two of the same multiuse development that was evaluated in the 2003 MND. This project change is comparable to the project changes held to be subject to section 21166 in several appellate court decisions: the reconfiguration of a medical research and laboratory complex in *Fund for Environmental Defense v. County of Orange* (1988) 204 Cal.App.3d 1538; the modification of a proposed subdivision in *Bowman, supra,* 185 Cal.App.3d 1065; and the relocation of a winery in *Benton, supra,* 226 Cal.App.3d 1467. (*Sierra Club, supra,* 6 Cal.App.4th at p. 1320.) Section 21166 applies to the project change.

B. *The City Did Not Accurately Identify the Changes to the Project*

The first step in determining whether supplemental environmental review is required under section 21166 is to identify the changes in the project that were not considered in the original environmental review document. Aspects of the Project that were known at the time of the MND are not subject to our review because the MND, even if flawed, is final and not subject to reconsideration. (§ 21167.2.) The parties disagree about how the supercenter proposal differed from the original Project. We conclude that the supercenter proposal substantially changed the type and size of the retail component of Phase Two.

1. *Identity of Tenant*

Preliminarily, we reject Respondents' assertion that this appeal is fundamentally a challenge to the identity of the tenant in Phase Two, rather than to the nature of the development. The identity of a tenant is irrelevant to CEQA review. (*Maintain Our Desert Environment v. Town of Apple Valley* (2004) 124 Cal.App.4th 430, 443-449.) Here, Appellants base their argument on the particular type of retail use proposed, a supercenter consisting of a big-box discount store combined with a full grocery store,

rather than the identity of the company that plans to operate the supercenter. It may be that Wal-Mart is the only company that operates supercenters in this region, but that fact does not convert Appellants' arguments into a challenge to the identity of the tenant.

It also may be that Appellants are motivated by opposition to Wal-Mart's policies that are unrelated to the environmental effects of this proposed supercenter development. Those motivations are also irrelevant to our analysis. As the Fifth District declared in a similar CEQA case challenging the construction of a Wal-Mart supercenter, we give no weight to insinuations that Wal-Mart is a destructive economic force inherently inferior to smaller merchants, or that community organizations opposing Wal-Mart are front organizations defending the narrow economic interests of unionized workers or economic competitors. "[W]e have no underlying ideological agenda and have strictly adhered to the accepted principle that the judicial system has a narrow role in land use battles that are fought through CEQA actions." (*Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1196.) Our role is to decide whether there is substantial evidence in light of the whole record to support the City's determination that this supercenter proposal would not have significant new or substantially increased effects on the environment requiring major revisions in the MND or preparation of an EIR.

2. *Change in Type of Retail Use*

The City Attorney argued to the superior court that the character of the retail development in Phase Two had not changed: "the real land use was determined in December of 2003. The footprint was clearly established. It was known to be a big box store." Wal-Mart somewhat weakly revives the point on appeal. The record does not support the argument.

The original Project proposal stated, "Phase Two will complete the smaller retail buildings and pad sites along the highway frontage as well as add larger retail 'box'

tenants deeper into the north east quadrant of the site." The landscape plan depicted three adjoining "box" stores at the east end of the Phase Two area and smaller retail pads on the northern and eastern edges of the site. By visual comparison, the "box" stores each appear to be less than one-third the size of the proposed supercenter. There was no indication that these box stores would encompass a full grocery in addition to a big-box discount merchandise outlet, or that they would operate seven days a week, 24 hours a day.

A supercenter is a unique type of retail operation. "When the particular type of retail business planned for a proposed project will have unique or additional adverse impacts, then disclosure of the type of business is necessary in order to accurately recognize and analyze the environmental effects that will result from the proposed project. A rendering plant has different environmental impacts than a chandler. In the retail context, Supercenters are similarly unique. Unlike the vast majority of stores, many Supercenters operate 24 hours per day seven days a week. Such extended operational hours raise questions concerning increased or additional adverse impacts relating to lights, noise, traffic and crime." (*Bakersfield Citizens for Local Control, supra*, 124 Cal.App.4th at p. 1213.) There is also evidence in the record that supercenters draw from a larger regional market than more typical shopping centers with the same total square footage of retail space and thus may have unique traffic impacts.

3. *Change in Size of Retail Component*

The most significant change in the Project was the increase in the square footage of retail space in the Phase Two area. The 173,653 square-foot building represented a 6.5 percent increase in the size of the retail component of the Phase Two area, originally projected to be 163,000 square feet of retail space. The City's own zoning ordinance, by way of comparison, classifies a 5 percent increase in the square footage of an approved

structure a major modification of a project. (American Canyon Zoning Ord. [hereafter, Zoning Ord.], § 19.45.020, subd. (B).)

The City's staff reports, the Developer's drawings, and Wal-Mart's letters clearly stated that the proposed supercenter would consist of a 173,653 square-foot building, a 12,676 square-foot outdoor garden center, and a 7,625 square-foot seasonal sales area, for a total of 193,954 square feet. The City Council resolution approving the supercenter proposal acknowledged these physical dimensions. Nevertheless, the staff reported to the Planning Commission that the proposal resulted in a net *decrease* in the square footage of retail space in the Project as compared to the original Master Plan: "The subject project includes 154,074 square feet of commercial uses (*excluding the stockroom, employee use area and seasonal events sales area*), which when added to the 37,930 square feet of commercial uses currently planned for Phase I, is consistent with the 196,000 square feet evaluated by the [MND]." (Emphasis added.) The City Attorney similarly informed the Planning Commission, "The total Project square footage including non Wal-Mart Napa Junction buildings would total 192,004 square feet, which is approximately 4,000 square feet less than the total square footage evaluated by the MND and *excludes approximately 32,255 square feet of stockroom and employee use area*." (Emphasis added.) The City Attorney concluded that the net decrease in retail square footage meant there was no substantial change in the Project requiring supplemental environmental review under section 21166. The Planning Commission adopted this analysis. The City Council acknowledged the physical dimensions of the supercenter, but concluded there were no substantial changes in the Project that would require revisions to the MND. Appellant repeatedly objected to the City's square footage analysis during the administrative proceedings.

The City provided no reasoned basis for excluding some areas of the proposed supercenter for purposes of evaluating changes in the size of the Project's retail component. On appeal, the City and Wal-Mart defend the City staff's square footage

analysis as consistent with a definition of "gross leasable area" in the City's General Plan. The definition of "gross leasable area" appears in the economic development element of the General Plan. Respondents provide no explanation why this definition is relevant to whether size changes in the Project were significant for purposes of environmental or other land use planning review.

Even assuming the definition is relevant, it does not support the City's analysis. The General Plan defines gross leasable area as "the total gross floor area designed for tenants' occupancy and exclusive use. It is the area for which tenants pay rent and the area [that] produces income." The storage and employee use areas of the supercenter building would be occupied by the tenant for the exclusive use of their agents and employees. The tenant would pay rent for those areas. Storage and employee use areas help to produce income because they provide a supply of merchandise to sell and of employees to do the selling.

The City's exclusion of storage and employee use square footage is arbitrary for an additional reason. In its initial evaluation of the Project, the City relied on the square footage of retail space indicated on the Project plans, without making adjustments for storerooms and employee use areas. By making adjustments in the square footage of the supercenter proposal and then comparing that adjusted square footage to the unadjusted square footage of retail space in the original Project, the City makes an inapt comparison. The City cites no evidence and makes no argument to justify using different methods of calculating the square footage of the supercenter and the other retail spaces. Absent such a foundation, the City's comparison is distorted and cannot support the conclusion that the square footage of the Project's retail component did not materially change.

Courts have acknowledged that an increase in the size of a development project can be a substantial change triggering subsequent environmental review. (*Concerned Citizens of Costa Mesa, Inc. v. 32d Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 937.) In *Fund for Environmental Defense, supra,* 204 Cal.App.3d 1538, the court rejected an

argument that a size increase triggered subsequent environmental review, but the case is distinguishable. In that case, the agency acknowledged and evaluated the size increase; the increase in square footage was offset by an insignificant change in the project's footprint and a decrease in the height of the overall project; and the agency reasonably concluded the increase would not affect the project's traffic impacts or otherwise require revisions in the original EIR. (*Id.* at pp. 1545-1546.) Here, the City minimized the size increase; the increase in square footage was not offset by stability in the project's footprint or reductions in its height; and, as we will discuss further, there is no reasoned basis for the City's conclusion that the size increase would have no traffic impacts.

The City's conclusion that the supercenter proposal did not materially increase the size of the retail component of the Project is not supported by substantial evidence.

C. *The City's Determination that the Project Changes Would Not Have Significant Environmental Effects Requiring Supplemental Environmental Review Was an Abuse of Discretion*

We conclude that the City did not accurately identify the supercenter proposal's changes to the type and size of retail uses in the Phase Two area. The City's determination that the supercenter proposal was not likely to create environmental effects requiring supplemental environmental review is therefore flawed. As to the traffic impacts of the supercenter proposal, the City's determination was not supported by substantial evidence. As to the urban decay effects of the supercenter proposal, the determination must be set aside because the City failed to proceed as required by law by failing to consider extraterritorial urban decay effects of the proposed supercenter.

1. *The City's Determination that the Supercenter Would Not Have Substantially Increased Traffic Impacts Is Not Supported by Substantial Evidence in the Record*

The City's low calculation of the supercenter's square footage fatally undermines its conclusion that the supercenter proposal would have no significant effects on traffic requiring supplemental environmental review.[5]

The MND Traffic Study for the original proposal assumed the Project would include 196,000 square feet of retail development. Diagrams in the traffic study depict Phase Two as consisting of several small retail pads. The trip generation factor used in the study to project traffic impacts was based on the "Retail (Shopping Center)" category in an industry trip generation manual. According to the trip generation table in the study, the shopping center category of use was predicted to generate 1.03 morning peak hour trips and 3.74 evening peak hour trips per 1,000 square feet. At this rate, the retail component of the Project was projected to generate 935 daily peak hour trips. The Project as a whole (including the hotel, residences and retail areas) was projected to generate 1,273 daily peak hour trips.

Subsequently, in response to public comments about potential traffic impacts of a supercenter, the City had its expert prepare a revised trip generation analysis. The revised analysis used 154,074 as the square footage of the supercenter and applied the "Free-Standing Discount Store" trip generation factor, which was higher than the "Retail (Shopping Center)" trip generation factor used in the MND Traffic Study. For the remaining 37,930 square feet of retail space in the Project, the analysis applied a lower

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[5] Wal-Mart argues that Appellant forfeited its traffic impacts argument because its opening brief discussed only urban decay impacts. The issue was not forfeited. Appellant discussed both the City's and its own traffic studies in its statement of facts, and it discussed traffic impacts in the context of its argument that the City failed to meet its CEQA obligations. Appellant clearly and persistently raised the issue of traffic impacts during the administrative proceedings and in its writ petition. The trial court addressed traffic impacts in its decision.

"Specialty Retail" trip generation factor. Using these factors, the supercenter was projected to generate 284 morning and 596 evening peak hour trips daily. The total retail component was projected to generate 312 and 699 morning and peak hour trips for a total of 1,011. After adjustments for captured and passer-by trips, which were required by the California Department of Transportation (Caltrans) and had not been used in the MND Traffic Study, the Project as a whole (including the hotel, residences and retail areas) was projected to generate 1,207 daily peak hour trips, as compared to 1,273 in the MND Traffic Study. The staff report stated, "This additional analysis shows an *overall reduction* in the number of peak hour trips [compared to the MND Traffic Study] . . . The potential traffic impacts of the overall Napa Junction project, assuming the implementation of required mitigation measures, would be unchanged."

Had the revised trip generation analysis used 173,653 square feet as the supercenter's square footage, the estimated morning peak hour trips generated by the supercenter would have been 320 in the morning and 672 in the evening. The estimated peak hour trips for the total retail component would have been 348 in the morning and 775 in the evening, for a total of 1,123. After adjustments, the total daily peak hour trips for the Project as a whole (including the hotel, residences and retail areas) would have been 1,303 rather than the 1,207 in the revised trip generation analysis. Compared to the 1,273 total daily peak hour trips projected in the original MND Traffic Study, the 1,303 figure represents a 30 trip increase.[6]

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[6] Wal-Mart argued that the analysis by Appellant's expert, VRPA, demonstrated the Project would generate 8 percent *less* traffic than originally anticipated. Wal-Mart errs by comparing only the evening peak hour trips projected in the MND Traffic Study and in VRPA's projections based on 173,653 square feet and the free-standing discount store trip generation factor. As the City's own revised trip generation analysis shows, when the free-standing discount store factor is used, morning peak hour trips increase and evening peak hour trips decrease. A fair comparison requires consideration of all aspects of the trip generation analysis.

Nothing in the record explains the City's use of 154,074 for the square footage of the supercenter in the revised trip generation analysis. The analysis itself is a one-page document consisting of two tables and footnotes, none of which explains how the relevant square footage of the supercenter was determined. The staff report to the City Council makes the naked assertion that 154,074 square feet was used because the storeroom and employee space "will not generate vehicle trips." Appellant's traffic expert, on the other hand, opined that the proper square footage for the supercenter in the trip generation model used in the City's studies was 173,653. She defended that opinion by reference to the same manual the City's expert had used to obtain the trip generation factors.[7]

Based on Appellant's expert opinion, an increase of 30 peak hour trips could be a substantial change requiring supplemental environmental review. The expert opined, "Based upon our engineering judgment and practice elsewhere in the State, a 5 percent increase in traffic or 50 Peak Hour trips can cause the level of service (LOS) at studied intersections to degrade to the next LOS." Appellant's expert further observed that Caltrans requires traffic studies when a project generates 1 to 49 peak hour trips and the adjacent state route is operating at level of service E or F. Level of service is a measure of traffic congestion at intersections, which ranges from A (little or no delay) to F (extreme traffic delay). The Level of Service Analysis in the MND Traffic Study

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[7] Appellant also produced expert evidence that supercenters generate traffic at a higher rate than free standing discount stores. If true, this evidence would demonstrate that even the trip generation estimates discussed above (based on 173,653 and the free standing discount store factor) underestimate the traffic that would be generated by the proposed supercenter. We do not analyze this evidence in detail because we conclude the City's conclusion that the supercenter would have no significant traffic effects is not supported by substantial evidence because of its use of an unreasonably low figure for the square footage of the supercenter. We note, however, that Appellant's evidence is consistent in principle with the City's own traffic studies, which projected different rates of trip generation per square foot for different types of retail uses.

indicates that the pre-Project level of service at intersections near the Project ranged from A to E. A 30-trip increase could have a significant effect on those intersections that were already operating at level of service E.

This case is readily distinguishable from cases where courts have upheld an agency's decision not to require supplemental environmental review under section 21166. The significant distinction is that the City based its section 21166 analysis on an inaccurate piece of information, that the supercenter was only 154,074 square feet in size. This inaccuracy resulted from the City's minimizing or underreporting the size of the structure in assessing the environmental effects of the project changes. In each of the cases cited, the court was able to identify specific, solid evidence in the record supporting the agencies' determinations that project changes would not have significant environmental effects requiring supplemental environmental review. (See *Bowman, supra,* 185 Cal.App.3d at pp. 1078-1080; *Fund for Environmental Defense, supra,* 204 Cal.App.3d at pp. 1545-1548; *Benton, supra,* 226 Cal.App.3d at pp. 1473, 1483; *River Valley Preservation Project, supra,* 37 Cal.App.4th at pp. 174-175; *Snarled Traffic Obstructs Progress, supra,* 74 Cal.App.4th at pp. 800-802.)

The City's determination that the supercenter proposal would not have significant traffic effects requiring supplemental environmental review is not supported by substantial evidence.

2. *The City's Determination that the Supercenter Would Not Have Significant New Urban Decay Effects Must Be Set Aside Because the City Failed to Proceed as Required by Law*

Both Appellant and Citizen Appellants (collectively, Appellants) argue the City's determination that the supercenter proposal would not cause significant urban decay impacts requiring supplemental environmental review must be set aside because the City

failed to proceed as required by law. Appellants fault the City for refusing to consider potential urban decay effects outside the City's boundaries.

"Economic and social changes resulting from a project shall not be treated as significant effects on the environment. Economic or social changes may be used, however, to determine that a physical change shall be regarded as a significant effect on the environment. Where a physical change is caused by economic or social effects of a project, the physical change may be regarded as a significant effect in the same manner as any other physical change resulting from the project. Alternatively, economic and social effects of a physical change may be used to determine that the physical change is a significant effect on the environment." (Guidelines, § 15064, subd. (e).)

Physical deterioration of a commercial area resulting from the economic competitive effects of a new development has long been recognized as an environmental effect subject to CEQA's requirements. (*Bakersfield Citizens for Local Control*, *supra*, 124 Cal.App.4th at pp. 1205-1207 [reviewing cases].) "It is apparent from the case law . . . that proposed new shopping centers do not trigger a conclusive presumption of urban decay. However, when there is evidence suggesting that the economic and social effects caused by the proposed shopping center ultimately could result in urban decay or deterioration, then the lead agency is obligated to assess this indirect impact. Many factors are relevant, including the size of the project, the type of retailers and their market areas and the proximity of other retail shopping opportunities. The lead agency cannot divest itself of its analytical and informational obligations by summarily dismissing the possibility of urban decay or deterioration as a 'social or economic effect' of the project." (*Id.* at p. 1207.) *Gilroy Citizens for Responsible Planning v. City of Gilroy* (2006) 140 Cal.App.4th 911, 931-934 illustrates how the urban decay impacts of proposed Wal-Mart supercenters may be analyzed.

The Supreme Court recently confirmed that an agency must identify and attempt to mitigate the extraterritorial environmental effects of any project it intends to carry out

or approve. (*City of Marina v. Board of Trustees of California State University* (2006) 39 Cal.4th 341, 359-360.) "CEQA requires a public agency to mitigate or avoid its projects' significant effects not just on the agency's own property but '*on the environment*' (Pub. Resources Code, § 21002.1, subd. (b), italics added), with 'environment' defined for these purposes as 'the physical conditions which exist *within the area which will be affected by a proposed project*' (*id.*, § 21060.5, italics added)." (*City of Marina*, at p. 360.) In *City of Marina*, the Court held that the Board of Trustees of the California State University had to mitigate the off-campus traffic effects of its campus expansion plans by contributing to a regional agency. (*Id.* at p. 367.)

On appeal, Respondents rely in part on the city manager's fiscal impact study as substantial evidence that the proposed supercenter would not have urban decay effects requiring supplemental environmental review. That study did not purport to be an assessment of environmental effects, but instead offered a financial cost/benefit analysis of the proposal on the City's municipal coffers. The study was relevant to urban decay analysis because it considered whether the supercenter would cause other stores to close and store closures are triggers of urban decay, but it did not suffice as a full assessment because it expressly declined to consider any effects beyond the City's boundaries. The study stated that the store at greatest risk of closure due to competition from the supercenter was the Food-4-Less discount grocery store in Vallejo. "However, for the purposes of this study, the impacts are limited to the American Canyon community." Other evidence in the record strongly suggested the supercenter might have substantial extraterritorial effects. Appellant's expert predicted that the supercenter would cause both a Wal-Mart discount store and a Food-4-Less grocery store in Vallejo to close.

Because those stores are co-anchors of a shopping center, the expert opined that their closure would likely lead to urban decay.[8]

Without citation to the administrative record, Wal-Mart argues that comments by the mayor and city council members provided substantial evidence in support of the City's determination that the supercenter would not have urban decay effects requiring supplemental environmental review. We have independently reviewed the transcripts of the City Council meetings. Council members' only comments were that they had observed ample commercial development in the vicinity of supercenters; there was no reference to effects in neighboring jurisdictions. One council member said he understood that when stores close they are reoccupied quickly. He made the comment without any identified factual foundation and in the context of asking for more information on the subject. The mayor observed that the opening of a new grocery store in the City had not caused store closures within the City; she made no comment about the competitive effects of supercenters, extrajurisdictional or otherwise. None of the council members responded to Appellant's expert's study of potential urban decay effects of the proposed supercenter, which was produced at the first council meeting before the council made a final decision on Appellant's appeal. The council members' anecdotal comments do not fill in the gap created by the City's failure to consider the extraterritorial environmental effects of the supercenter proposal.

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[8] A report by the Bay Area Economic Forum, a partnership of the Association of Bay Area Governments and business, labor, university and community leaders, similarly warns that supercenters can threaten the economic vitality of neighborhood shopping centers and discusses several obstacles to the prompt releasing of abandoned buildings following store closures. Studies of the economic effects of Wal-Mart supercenters in other parts of the country also show a pattern of resulting store closures that can lead to urban delay.

D. *Conclusion*

In sum, we conclude that the City violated section 21166. The City's determination that the supercenter proposal would not have significant new or substantially increased effects on the environment requiring supplemental environmental review is not supported by substantial evidence. On remand, the City must redetermine, based on an accurate identification of the project changes, whether subsequent environmental review of the project is required under section 21166.

Unlike the requirement for an initial study on initial environmental review, there is no fixed format for an agency's analysis under section 21166. (*Friends of Davis, supra,* 83 Cal.App.4th at p. 1018.) For this appeal, the City unsuccessfully attempted to piece together parts of the administrative record to justify its section 21166 determination. We note that in other section 21166 cases, agencies have used the format of an addendum to the initial environmental review document to substantiate the determination that no subsequent environmental review was required. (*Bowman, supra,* 185 Cal.App.3d at p. 1070; *Fund for Environmental Defense, supra,* 204 Cal.App.3d at p. 1543.) It may be in the City's interest to gather information into a similar single document in order to fairly evaluate and explain its section 21166 determination. Ultimately, the question for this court is simply whether the determination is supported by substantial evidence. On the record before us, it is not.

E. *The Environmental Effects of Reasonably Foreseeable Future Development of the Reserved Areas of Phase Two*

In order to avoid an unnecessary round of further litigation, we address an additional problem with the City's section 21166 determination that appears from our review of the record. The supercenter proposal changed the original Project not only by adding the supercenter but by reserving two other areas of Phase Two for future development. In the original Project proposal, those reserved areas were part of the 163,000-square-foot shopping center and parking lot in Phase Two. If the reserved areas

in the supercenter proposal are developed as retail uses, the increase in the size of the retail component of the Project will be even greater than the increase caused by the supercenter alone, as we have discussed. Future development of the reserved areas might also affect the reconfiguration of the parking lot and roadway in the Phase Two area. The record suggests that the City did not consider the environmental effects of the future development of these reserved areas when it determined whether supplemental environmental review was necessary under section 21166.

"[A]n EIR must include an analysis of the environmental effects of future expansion or other action if: (1) it is a reasonably foreseeable consequence of the initial project; and (2) the future expansion or action will be significant in that it will likely change the scope or nature of the initial project or its environmental effects." (*Laurel Heights, supra,* 47 Cal.3d at p. 396.) "This standard is consistent with the principle that 'environmental considerations do not become submerged by chopping a large project into many little ones—each with a minimal potential impact on the environment—which cumulatively may have disastrous consequences.' [Citation.] The standard also gives due deference to the fact that premature environmental analysis may be meaningless and financially wasteful." (*Ibid.*) On remand the City may need to consider the reasonably foreseeable future development of the reserved areas of Phase Two.

III. *Zoning Ordinance Issues*

Appellant argues the City violated its zoning ordinance in three ways: (1) the City approved the supercenter proposal without requiring and approving a major modification application; (2) the City approved the sign program without issuing a conditional use permit for an oversized sign; and (3) the City approved the supercenter proposal without issuing a conditional use permit for the grocery component of the supercenter. The trial court ruled that the first two alleged violations occurred but they were not prejudicial. The court ruled that the third alleged violation did not occur. In its cross-appeal, the City

challenges the trial court's finding that there was any violation. Appellant argues all three violations occurred and were prejudicial. We first discuss the standard of review and then address each alleged violation of the ordinance.

A. *Standard of Review*

In approving Wal-Mart's design permit and sign program applications, the City was bound by the requirements of its zoning ordinance. "Issuance of a permit inconsistent with zoning ordinances . . . may be set aside and invalidated as ultra vires." (*Land Waste Management v. Contra Costa County Bd. of Supervisors* (1990) 222 Cal.App.3d 950, 958.) Where the meaning of a local ordinance is in dispute, the construction of the ordinance is governed by the same rules as the construction of statutes. The cardinal rule is that " 'a statute must be read and considered as a whole in order that the true legislative intention may be determined. The various parts of a statute must be construed together and harmonized, so far as it is possible to do without doing violence to the language or to the spirit and purpose of the act, so that the statute may stand in its entirety. . . . [¶] Moreover, "[t]he contemporaneous administrative construction of a statute by an administrative agency charged with its enforcement and interpretation is entitled to great weight unless it is clearly erroneous or unauthorized." ' " (*Flavell v. City of Albany* (1993) 19 Cal.App.4th 1846, 1851.)

B. *The City Violated the Ordinance By Approving the Supercenter Without Requiring a Major Modification Application and the Violation was Prejudicial*

Appellant argues the City violated its zoning ordinance by approving the supercenter proposal without requiring a major modification application. Appellant argues the increase in the size of the retail component of the Project was a major modification under the ordinance.

The zoning ordinance provides that a major modification of a previous Planning Commission approval must be approved by the Planning Commission following a public

hearing. (Zoning Ord., § 19.40.030.) A major modification is defined as "a significant revision of a previously-approved plan or permit. Examples include: . . . 2. A greater than 5% increase in the square footage of an approved structure or use." (Zoning Ord., § 19.45.020, subd. (B).)

Under the plain language of the zoning ordinance, a major modification application was required for the supercenter proposal. The proposed supercenter is a 173,653 square-foot building, not including its fenced-in garden center and a seasonal sales area. Combined with the 37,930 in retail space already developed in Phase One, the total retail square footage in the Project with the supercenter is 211,583, an 8 percent increase in the square footage of the approved use. Considering only the 163,000 in retail square footage originally projected for Phase Two, the 173,653 square-foot supercenter represents a 6.5 percent increase. The City attempts to avoid this obvious conclusion by contending that the relevant square footage for the supercenter is 154,074. This contention fails for the reasons stated in our CEQA discussion at part II; namely, the City offered no explanation for excluding 32,255 square feet of stockroom and employee use areas from the square footage of the supercenter. A comparison of the square footage of the supercenter adjusted to exclude those areas with the square footage of the original Project unadjusted to exclude those areas is a distorted comparison. The increase in the total retail square footage of the Project was a major modification requiring Planning Commission approval.

We conclude that the City's failure to require and approve a major modification application was prejudicial. To approve a major modification, the Planning Commission would have been required to find, *inter alia*, that the supercenter proposal "will not be materially detrimental to the public health, safety, or welfare, or to property or residents

in the vicinity." (Zoning Ord., § 19.45.030, subd. (D)(3).)[9] When it approved Wal-Mart's design permit and sign program applications, the City made findings that were much more limited in scope: whether the supercenter proposal conformed to the zoning ordinance, earlier Project approvals, the General Plan and the general aesthetics of the surrounding area. (Zoning Ord., §§ 19.41.050; 19.23.060, subd. (D).) During the administrative proceedings, the City Attorney emphasized that the City's discretion to approve or reject the supercenter proposal was strictly confined to the design permit and sign program criteria. The findings the Commission made were markedly different from the public welfare finding it would have been required to make had it considered a major modification application.

We cannot assume that the Commission would have made the public welfare finding had it considered a major modification application. To do so would be to usurp the City's role in making local land use decisions and would exceed the proper bounds of judicial review. Moreover, excusing City officials from affirmatively deciding whether to make the required findings undermines the public decisionmaking process. Because the Planning Commission did not entertain a major modification application, the commissioners never affirmatively decided whether the supercenter proposal was detrimental to the public welfare.

The City argues for the first time on appeal that Government Code section 65010 requires us to affirm the City's action. Government Code section 65010 provides that

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[9] The other required findings are: "1. The modification is in substantial conformity with the previously-approved plan or permit, or if the change is substantive, that the revised project is equivalent to the original project design concept in terms of consistency with City design and development standards and policies. [¶] 2. The modification will not create impacts substantially different from those of the previously-approved project. . . . [¶] 4. The proposed modification is consistent with the policies and exhibits contained in the General Plan." (Zoning Ord., § 19.45.030, subd. (D).) They are similar to the findings the Commission made in approving Wal-Mart's design permit and sign program applications.

certain types of errors in land use proceedings shall not be deemed prejudicial unless a different result was probable absent the error.[10] Government Code section 65010 applies only to evidentiary and procedural irregularities, not substantive or significant procedural errors. (*City of Sausalito v. County of Marin* (1970) 12 Cal.App.3d 550, 556 & fn. 3, 566-567.) In *City of Sausalito*, for example, the court held that publication of notice six days before a hearing on a proposed zoning ordinance, where the controlling statute required 10 days' notice, was a procedural irregularity subject to the forgiving harmless error standards of former Government Code section 65801, the predecessor to Government Code section 65010. (*City of Sausalito,* at p. 558-559.) In contrast, a complete failure to provide notice of such a hearing was not curable under former Government Code section 65801. (*City of Sausalito,* at p. 567.) Approval of a land use project without requiring and approving a major modification application mandated by the zoning ordinance and without making the foundational findings mandated is a substantive failure to comply with the ordinance.[11]

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[10] Government Code section 65010 provides, "(a) Formal rules of evidence or procedure applicable in judicial actions and proceedings shall not apply in any proceeding subject to this title [Title 7, Planning and Land Use] except to the extent that a public agency otherwise provides by charter, ordinance, resolution, or rule of procedure. [¶] (b) No action, inaction, or recommendation by any public agency or its legislative body or any of its administrative agencies or officials on any matter subject to this title shall be held invalid or set aside by any court *on the ground of the improper admission or rejection of evidence or by reason of any error*, irregularity, informality, neglect, or omission (hereafter, error) as to any matter *pertaining to petitions, applications, notices, findings, records, hearings, reports, recommendations, appeals, or any matters of procedure* subject to this title, unless the court finds that the error was prejudicial and that the party complaining or appealing suffered substantial injury from that error and that a different result would have been probable if the error had not occurred. There shall be no presumption that error is prejudicial or that injury was done if the error is shown." (Emphasis added.)

[11] Our conclusion is consistent with case law applying Government Code section 65010. (See *Saad v. City of Berkeley* (1994) 24 Cal.App.4th 1206, 1215; *Hayssen v. Board of Zoning Adjustments* (1985) 171 Cal.App.3d 400, 407-408.)

The City's reliance on *Lucas Valley, supra*, 233 Cal.App.3d 130 is misplaced. In *Lucas Valley*, the county granted a conditional use permit for the conversion of a single family home into a neighborhood synagogue. (*Id.* at p. 138.) The county counsel provided erroneous advice regarding First Amendment requirements. (*Id.* at pp. 146-147.) The court concluded that this erroneous advice did not require automatic reversal of the permit: "Error occurring in an administrative proceeding will not vitiate the ruling unless it actually prejudices the petitioner." (*Id.* at p. 147.) The court cited Government Code section 65010 as supporting authority. (*Lucas Valley*, at p. 147.) In *Lucas Valley*, the county complied with its zoning code by issuing the necessary permit and making the required foundational findings; the only question was whether inaccurate legal advice infected the proceeding to such an extent that the court could not confidently conclude that the same result would have occurred absent the error. In contrast, here the City did not comply with its zoning ordinance. It did not approve a major modification application as mandated by the zoning ordinance, nor did it make the required foundational findings.

C. *The Ordinance Did Not Require a Conditional Use Permit for the Sign Program*

Appellant argues the City erred by approving Wal-Mart's sign program without requiring a conditional use permit for oversized signs.

"Proposed Commercial Centers containing five acres or more in area are subject to a sign program approved by the Planning Commission as part of a Conditional Use Permit, Site Plan Review, or similar entitlement request. Sign area and heights may be greater than those specified in Table S-1 as may be determined under the Conditional Use Permit subject to the findings set forth in Section 19.23.060 (D)." (Zoning Ord., § 19.23.050, subd. (B).) Zoning ordinance section 19.23.060, subd. (D) sets forth three findings required for approval of a sign program.

It is undisputed that a sign program was required for the proposed supercenter and that Wal-Mart's proposed sign program exceeded the sign area and height limits in Table S-1. As the Planning staff report explained: "the project is entitled by Table S-1 to two 50-square-foot signs along Highway 29 and one 50-square-foot sign on Napa Junction Road, but only one free-standing sign is proposed. Staff agrees that a single 120-square-foot free-standing sign is preferable to three 50-square-foot free-standing signs and the size of the sign is appropriate in relationship to the large size of the project site." The staff report recommended the City Council find, as required by zoning ordinance section 19.23.060, subdivision (D), that the application complies with all applicable provisions of the chapter, explaining, "Assuming the Planning Commission approves the request for a larger free-standing sign than allowed by Table S-1, the sign program complies with all applicable provisions of Chapter 19.23." (Italics omitted.) The City made the findings required by section 19.23.060, subdivision (D).

The parties' dispute about whether a conditional use permit (CUP) was required for Wal-Mart's sign program arises from the ambiguity in the second sentence of zoning ordinance section 19.23.050, subdivision (B): "Sign area and heights may be greater than those specified in Table S-1 *as may be determined under the Conditional Use Permit subject to the findings set forth in Section 19.23.060 (D).*" (Emphasis added.) Appellant argues the italicized phrase requires a CUP for any sign program that exceeds the sign area and heights specified in Table S-1.

The City argues the italicized phrase cannot logically be construed to require a CUP because "*the findings set forth in Section 19.23.060 (D)*" are different from the findings that are ordinarily required for a CUP. (See Zon. Ord. § 19.42.020, subd. (D).) The City suggests the mention of a CUP in the italicized phrase is an incomplete reference back to the first sentence of section 19.23.050, subdivision (B), which allows a sign program to be approved "as part of a Conditional Use Permit, Site Plan Review, or similar entitlement request." Under the City's suggested interpretation, the second

sentence would in effect read: "Sign area and heights may be greater than those specified in Table S-1 as may be determined under the Conditional Use Permit *or similar entitlement request in which the sign program is being reviewed,* subject to the findings set forth in Section 19.23.060 (D)." In other words, under the City's interpretation, the Planning Commission could approve a sign program with sign areas and heights in excess of the Table S-1 specifications if it (1) determines the approved sign areas and heights in the entitlement request proceeding in which it is reviewing the sign program, and (2) makes the findings required by zoning ordinance section 19.23.060, subdivision (D).

The zoning ordinance's chapter on CUPs demonstrates that the main, if not exclusive, purpose of a CUP is to approve "uses listed in Chapter 19.05, *Use Classifications*, as a use permitted subject to the securing of a [CUP]." (Zoning Ord., § 19.42.010.) Zoning ordinance chapter 19.05 lists categories of residential, commercial and industrial uses. It does not relate to questions of structural design such as the size of a project's signs. (Zoning Ord., § 19.05.050.) Moreover, the language "as may be determined under the Conditional Use Permit" would be an awkward way to impose an additional permit requirement in the ordinance and inconsistent with the reference to the findings required by section 19.23.060, subdivision (D). We conclude that the City did not violate the zoning ordinance by approving the sign program without requiring a CUP.

D. *The Ordinance Did Not Require a Conditional Use Permit for the Grocery Component of the Supercenter*

Appellant argues that the City violated the zoning ordinance by approving the supercenter proposal without requiring a CUP for the grocery store within the supercenter. Appellant relies on a version of the zoning ordinance circulated to the public in July 2004, which states that a Retail Food Sales use in the zoning district where the supercenter is located requires a CUP. A grocery store falls within the definition of a Retail Food Sales use.

Substantial confusion surrounds this issue as a result of numerous inconsistencies on the part of the City. First, the City published conflicting versions of the relevant section of the zoning ordinance. The publicly circulated version of the zoning ordinance at the time the supercenter was proposed stated that "Retail Food Sales" required a CUP in the zoning district where the Project was located (Community Commercial district), whereas "Retail Sales" did not. Relying on this version of the ordinance, Appellant took the position that a CUP was required for the supercenter because it included a grocery component and thus fell within the Retail Food Sales category. The City, however, explained that the publicly circulated version of the ordinance was inaccurate because it did not incorporate December 2000 revisions to the ordinance. The correct version of the ordinance included "Food Sales" and "Grocery and drug stores" as additional categories of use, both of which were permitted uses in the Community Commercial district. The December 2000 City Council resolution amending the ordinance confirms that these new categories were added as permitted uses in the Community Commercial district.

Second, the City presented conflicting interpretations of the ordinance. All versions of the ordinance list "Retail Food Sales" followed by "Convenience store" and "Liquor store." These categories are listed on three consecutive rows of a table. Under the column heading for the Community Commercial Zoning District, the cell corresponding to the Retail Food Sales row contains a C and the cells corresponding to the two subcategory rows contain Ps. Appellant interprets this table as requiring a CUP for Retail Food Sales except when a retail food sales outlet is a convenience or liquor store, in which case no CUP is required. Planning staff first took the position that the correct version of the ordinance would identify Retail Food Sales as a permitted use. Shortly thereafter, the Planning Director stated in a letter to Appellant that Retail Food Sales was a conditionally-permitted use. The City Attorney confirmed this interpretation. Following the Planning Commission approval of the supercenter proposal, however, the City Attorney took the position that "the subsection to the Retail Food Sales use is

subject to a CUP specifically relates to Liquor Store uses, while the general definition of Retail Food Sales . . . is not subject to a CUP." If the City chose to classify the supercenter as a Retail Food Sales use, the City Attorney argued, no CUP would be required.

Finally, the City provided conflicting rationales for its conclusion that no CUP was required for the supercenter. Planning staff originally implied that the supercenter would be considered a combined Retail Food Sales and Retail Sales use. The Planning Commission then took the position that the supercenter fell in the Grocery and Drug Store and Retail Sales categories of use and the City Attorney confirmed this designation. The City Attorney ultimately argued that no CUP was required regardless of whether the supercenter's supermarket component was classified as Retail Food Sales or a Grocery and Drug Store use.

The City's final conclusion that no CUP was required for the supercenter's commercial uses is consistent with the zoning ordinance. The supercenter was properly classified as a combined Grocery and Drug Store and Retail Sales use and a CUP was not required.[12]

Appellant acknowledges that the supercenter consists of a full grocery store in addition to a large general merchandise discount store. The supercenter will sell drug related products. The grocery and drug components of the supercenter fall within the Grocery and Drug Store classification, which is defined in zoning ordinance section

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[12] We reject the City Attorney's strained interpretation of Table 1 as permitting Retail Food Sales without a CUP. The table clearly labels Retail Food Sales with a "C" in the Community Commercial district and the subcategories of convenience and liquor stores with "P"s. Section 19.11.040 clearly states that "A 'P' designates a permitted use. A 'C' indicates a conditionally permitted use subject to approval of a Use Permit by the Planning Commission." The City Attorney's interpretation is unexplained. " '[A]n agency's interpretation of a regulation or statute does not control if an alternative reading is compelled by the plain language of the provision.' [Citation.]" (*Stolman v. City of Los Angeles* (2003) 114 Cal.App.4th 916, 930.)

19.05.050 as an "establishment where grocery and drug related products are sold to the general public." Retail Food Sales are defined as "[r]etail sales of food and/or beverages for off-site preparation and consumption." (Zoning Ord. § 19.05.050.) A grocery store literally falls within the definition of a Retail Food Sales use, but classifying a grocery store as a Retail Food Sales use would render another commercial use category surplusage: "Food Sales" is defined as a "retail establishment such as a grocery store or market providing food-related products."[13] (*Ibid.*) Like the Grocery and Drug Stores category, Food Sales is a permitted use in a Community Commercial zoning district under the terms of the December 2000 ordinance. The Grocery and Drug Stores category simply combines two permitted uses, Food Sales and Drugstores, into a single permitted use category. (*Ibid.*) When interpreting ordinances, we must, if possible, give significance to every word or phrase in the ordinance. (*Santa Clara Valley Transportation Authority v. Public Utilities Com.* (2004) 124 Cal.App.4th 346, 359; *Flavell, supra,* 19 Cal.App.4th at p. 1851.) Further, a specific statutory provision will control over a general provision. (*Arbuckle-College City Fire Protection Dist. v. County of Colusa* (2003) 105 Cal.App.4th 1155, 1166.) Classifying the supercenter as a Grocery and Drug Store use gave effect to the specific Grocery and Drug Store category which, unlike the more general Retail Food Sales category, was a permitted use in the supercenter's zoning district.

Appellant argues that when a proposed use falls within more than one classification the zoning ordinance requires the City to apply the more restrictive classification. Thus, a grocery store must be classified as a Retail Food Sales use, which

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[13] Similarly, although drug stores fall within the definition of the "Retail Sales" category (defined as establishments that sell goods or merchandise to the general public), classifying a drug store as a Retail Sales use would render the "Drugstores" category (retail sales of medicinal and pharmaceutical related products) surplusage. (Zoning Ord. § 19.05.050.)

requires a CUP. Appellant relies on zoning ordinance section 19.01.060, subdivision (A), which provides, "The regulations of this Title [Title 19, Zoning Ordinance] and requirements or conditions imposed pursuant to this Title shall not supersede any other regulations or requirements adopted or imposed by the [City] or any other local, state or federal agency that has jurisdiction by law over uses and development authorized by this Title. . . . *Where two or more ordinances regulate the same use or activity, the more restrictive ordinance shall apply*."[14] (Emphasis added.) Appellant relies on the italicized sentence. Zoning ordinance section 19.01.060 addresses the relationship of the zoning ordinance to other City ordinances and state or federal laws. It does not address how the City should apply overlapping provisions of the zoning ordinance. Moreover, if the City were required to apply the Retail Food Sales classification whenever a grocery store fell within that classification, the Food Sales classification would be rendered surplusage, contrary to established principles of statutory construction.

Appellant also argues that the City's interpretation of Chapter 19.11, Table 1 is not entitled to deference because it was inconsistent. We do not rely here on the principle that we must defer to a city's interpretation of its own ordinance. Rather, we apply established rules of statutory construction to conclude a grocery store falls within the more specific classifications of Food Sales or Grocery and Drug Stores, rather than the more general Retail Food Sales classification. Accordingly, the supercenter was reasonably classified as a combined Grocery and Drug Store and Retail Sales use.

Finally, Appellant faults the City for enforcing an unpublished ordinance. The City did not have the power to apply the publicly circulated ordinance because it did not accurately reflect the legislative enactments of the City Council. As Appellant vigorously argues, when a city "acts in an administrative capacity, as in granting permits

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[14] Section 19.01.060 appears in the introductory chapter of the Zoning Ordinance, entitled "Authority, Purposes, and Effects Of the Zoning Ordinance."

under a zoning ordinance, it is bound by the terms of the ordinance until the ordinance is amended *through proper legislative procedure*." (*Johnston v. Board of Supervisors* (1947) 31 Cal.2d 66, 74 [emphasis added], disapproved on other grounds by *Bailey v. County of Los Angeles* (1956) 46 Cal.2d 132, 138-139.) A city's legislative body cannot amend an ordinance by way of granting a use permit in lieu of following its established amendment procedures. (*Ibid.*) Much less can the legislative body amend an ordinance simply by publishing an inaccurate codification of City enactments. The City was bound by the zoning ordinance as it was amended in December 2000, not by the inaccurate publicly circulated version of the ordinance.

DISPOSITION

We reverse and remand to the trial court with directions to issue a writ of mandate requiring the City to comply with Public Resources Code section 21166 and its own zoning code, consistent with the views expressed in this opinion, and to determine pursuant to section 21168.9 whether to stay construction and retail activities until full compliance with CEQA has occurred. Appellants are awarded their costs.

GEMELLO, J.

We concur.

JONES, P.J.

BRUINIERS, J.*

* Judge of the Superior Court of Contra Costa County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

AMERICAN CANYON COMMUNITY UNITED FOR RESPONSIBLE GROWTH, Petitioner and Appellant, v. CITY OF AMERICAN CANYON et al., Defendants and Respondents, LAKE STREET VENTURES, L.L.C., et al., Real Parties in Interest.	A111278 (Napa County Super. Ct. No. 26-27462)

BY THE COURT:

The opinion in the above-entitled matter filed on November 13, 2006, was not certified for publication in the Official Reports. For good cause it now appears that the opinion should be partially published in the Official Reports, and it is so ordered. Pursuant to California Rules of Court, rules 976(b) and 976.1, the opinion is certified for publication with the exception of Part III.

American Canyon Community v. City of American Canyon, A111278

Trial court:	Napa County Superior Court
Trial judge:	Hon. Raymond A. Guadagni

Steven A. Herum, Brett S. Jolley and Herum Crabtree Brown for petitioner and appellant American Canyon Community United for Responsible Growth.

Somach, Simmons & Dunn, Timothy M. Taylor, Christian C. Scheuring and Jacqueline L. McDonald for petitioner and appellant Citizens Against Poor Planning and Stacy Su.

Law Offices of William D. Ross, William D. Ross, Noemi Cruz and Kypros G. Hostetter for defendant and respondent City of American Canyon.

Steefel, Levitt & Weiss, Judy V. Davidoff, Arthur J. Friedman and Amy B. Briggs for real parties in interest Wal-Mart Stores, Inc., Lake Street Ventures, and Napa Junction I.