Filed 2/9/11 Woodward Park HOA v. City of Fresno CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

WOODWARD PARK HOMEOWNERS ASSOCIATION, INC. et al., Plaintiffs and Appellants, v. CITY OF FRESNO et al., Defendants and Respondents; DEWAYNE ZINKIN et al., Real Parties in Interest and Respondents.	F059516 (Super. Ct. No. 09CECG00180) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Jeffrey Y. Hamilton, Jr., Judge.

Law Offices of Richard L. Harriman and Richard L. Harriman for Plaintiffs and Appellants.

Jones Helsley, Timothy Jones and John P. Kinsey for Defendants and Respondents and Real Parties in Interest and Respondents.

-ooOoo-

This is the second appeal involving the environmental review and approval by defendant City of Fresno (the city) of a commercial development known as the Fresno 40 Project, located at the intersection of Fresno Street and Friant Road in Fresno and proposed by real party in interest DeWayne Zinkin. The project was first approved by the city in 2004. The approvals, however, were reversed after plaintiff Woodward Park Homeowners Association, Inc. (Woodward Park), filed a petition for a writ of mandate in the superior court and ultimately prevailed in this court, where we concluded there were a number of important defects in the environmental impact report (EIR) and the statement of overriding considerations the city certified. (*Woodward Park Homeowners Assn., Inc. v. City of Fresno* (2007) 150 Cal.App.4th 683 (*Woodward Park I*).) Zinkin again sought approval of the project and the city certified a new EIR and statement of overriding considerations and issued the necessary approvals in 2008. Woodward Park filed another writ petition in the superior court, where it was denied.

The city and Zinkin contend the new EIR addressed the problems identified in our prior opinion and Woodward Park does not claim otherwise. Woodward Park's new arguments are (1) that the city could not properly approve the project without analyzing and requiring rooftop solar panels as a way of mitigating the project's impacts on air quality, and (2) that certain traffic mitigation measures the city adopted are inadequate. The superior court correctly rejected these contentions. We affirm the judgment.

FACTUAL AND PROCEDURAL HISTORIES

The proposed project would occupy 38.93 acres and include 278,200 square feet of office space, 209,650 square feet of retail space, and 24 apartments. It is similar to the original proposal approved by the city in 2004. The difficulties with the project approval that we identified in our previous opinion were (1) the EIR used as its environmental baseline a large hypothetical office development instead of the vacant land that actually exists at the project site; (2) the no-project alternative discussed in the EIR also wrongly assumed there would be a large development on the site, not vacant land, if the project

were not built; (3) although most of the project alternatives discussed in the EIR were larger developments than the proposed project, the statement of overriding considerations inconsistently asserted that the proposed project was justified despite its unavoidable impacts because it would provide greater economic benefits than the alternatives since the alternatives were less intensive; and (4) substantial evidence did not support the amount of a freeway impact mitigation fee—about $44,000— and the fee was incorporated into the city's approvals in a manner that might have made it unenforceable. (*Woodward Park I, supra,* 150 Cal.App.4th at pp. 707, 714, 718, 723-724, 729-730.)

None of these issues have been raised in this appeal. The city and Zinkin assert that the problems identified in our prior opinion have been cured and Woodward Park does not disagree. The new EIR uses vacant land for the no-project alternative and appears generally to use vacant land as the environmental baseline for analysis of impacts; the statement of overriding considerations does not contain the misleading statements located in the previous document; and the developer will contribute $255,175 for freeway-impact mitigation.

At issue in this appeal are air quality and traffic congestion impacts which the EIR found to be significant and unavoidable even with mitigation. On air quality, the EIR concluded that the project is located in a region that is in nonattainment status under applicable federal and state air quality standards and that the project would result in a considerable cumulative net increase in regulated pollutants. The impact would be significant and could not be avoided by means of mitigation measures. Greenhouse gases are among the pollutants that would significantly and unavoidably increase. On traffic, the EIR found that a number of intersections and street segments near the project currently operate at unacceptable levels of service and that the project would worsen this congestion, even with mitigation.

The city approved a statement of overriding considerations to explain why the project was justified in spite of the significant and unavoidable impacts. Among other

things, the statement found that the project was justified because it would promote a goal in the Fresno General Plan of building mixed-use developments; it would create retail, office and construction jobs; and it would generate tax revenues.

The draft EIR was released for public comment, with a noticed 45-day comment period, on September 19, 2008. Woodward Park and its counsel submitted no comments during this period, though Robert Merrill, vice president of Woodward Park, did so. A few of the comments the city received objected in general terms to air quality and traffic congestion impacts of the project, but none mentioned any of the specific issues that have been raised in this appeal. Merrill mentioned traffic; specifically, he objected to one of the proposed driveways leading into the project. No public hearing was held on the draft EIR.

The comment period closed on November 3, 2008, and the city published the final EIR on November 21, 2008. The city's planning commission held a public hearing on the final EIR and the project on December 3, 2008, at which Woodward Park presented its first comments orally through counsel. Counsel's comments were brief. Among the issues raised in this appeal, he mentioned only the use of solar panels to provide some of the project's electricity.

The city council held a public hearing on the final EIR and the project on December 16, 2008. On the same day, shortly before the hearing, Woodward Park's counsel submitted a comment letter. The letter asserted that substantial evidence did not support the EIR's conclusion that the project's significant air quality impacts were unavoidable even with feasible mitigation. It said the air quality impacts would be further mitigated if the developer were required to purchase pollution offsets in the form of off-site mitigation measures, as had been done in other projects in Fresno, Kern, and Madera Counties. The letter did not mention any particular forms of off-site mitigation the developer might be required to fund in this case. The letter also contended that roof-top solar panels should "be made mandatory for all structures constructed on the

proposed project site" to reduce the project's demand for electricity from power plants. It said the developer could use rents and common-area maintenance fees to pay for the solar panels.

The letter also addressed traffic congestion. It asserted that the proposed mitigation scheme purported to cap the average daily trips generated by the project at 12,400, but in reality would allow the city to raise the cap later without public notice or input. It further claimed that "many of the traffic impact mitigation fees are to be calculated and imposed in a non-public review process" by city staff. It suggested two specific changes to the project: the elimination of one driveway and the addition of a pedestrian walkway. The letter also included a discussion of open space and a claim that the statement of overriding considerations was inadequate, matters not at issue in this appeal.

Woodward Park's counsel spoke at the December 16, 2008, hearing. His oral remarks addressed a number of points, but none of those at issue in this appeal. Merrill also spoke, mentioning the purchase of off-site pollution offsets and criticizing the project's internal traffic circulation. One of the developer's consultants responded very briefly to Woodward Park's comments, saying that, "with regards to the comment on the solar panels, … it's our opinion that applying that mitigation measure would not reduce the severity by any substantial amount of the exceeding … NOx [one of the pollutants at issue] thresholds." The consultant also stated that "offsite mitigation measures of the type [Woodward Park's counsel] is suggesting are not available."

After the hearing, the city council voted to approve the project. The approvals were the certification of the EIR, including the statement of overriding considerations (resolution No. 2008-357); an amendment of the Fresno General Plan to allow the project to conform to the plan (resolution No. 2008-358); the approval of a conditional use permit (resolution No. 2008-359); and the rezoning of the property to allow the retail commercial use (ordinance No. 2008-79).

Woodward Park filed a petition for a writ of mandate in superior court on January 20, 2009. The claims it made that are relevant to this appeal were that the city violated the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.)[1] (CEQA) by (1) failing to require the use of solar panels or other alternative energy technology to mitigate the project's impacts on air quality; (2) allowing increases in the maximum allowable sizes of stores without public input after the project's approval; (3) failing to mitigate traffic impacts on adjacent jurisdictions, including Madera County; and (4) allowing the average daily trip cap of 12,400 to be raised without public input after the project's approval. The petition prayed for a writ directing the city to reverse its project approvals. In its memorandum of points and authorities in support of the petition, which closely resembles its opening brief in this appeal, Woodward Park focused on these four claims. On claim (3), the brief specified that the EIR's mitigation measure TRANS-11b, which required payment of the Fresno Major Street Impact (FMSI) fee, was inadequate. The brief also argued that the city failed to mitigate air quality impacts adequately because it did not require the developer to pay for off-site pollution offsets.

The superior court denied the petition in a 17-page order filed on October 23, 2009. On the arguments about the FMSI fee and the increase in store sizes, the court ruled that Woodward Park failed to exhaust its administrative remedies because its comment letter and oral comments in the agency hearings did not raise those issues or raised them with insufficient specificity. No other commenters raised the issues either.

On the argument that the city's action would allow a post-approval increase in the average daily trip cap without public input, the court found that this was a misinterpretation of the documents the city approved. One requirement, contained in a preexisting set of zoning conditions placed on the property in 1990, capped average daily

[1]Subsequent statutory references are to the Public Resources Code unless indicated otherwise.

trip generation for the project at 12,400 trips. Another requirement stated that several zoning conditions could be modified by the city's public works director and traffic engineer, but that the traffic generated could in no case exceed 12,400 average daily trips. The court ruled that Woodward Park was incorrect in arguing that the second of these requirements somehow undermined the first. The limit of 12,400 average daily trips was fixed and could not be adjusted by city staff.

The court rejected the argument that the city should have required the developer to purchase off-site pollution offsets. It observed that the EIR discussed this as a potential mitigation measure but found that it was infeasible because the available offset providers were not in California and it was not known whether they would reduce pollution in California. On the issue of solar panels, the court wrote that Woodward Park "presented no evidence at the hearing showing how the installation of solar panels would have resulted in reduced air quality impacts or a reduction in green house gasses." Relying on section 15204 of the Guidelines for the Implementation of the California Environmental Quality Act (Cal. Code Regs., tit. 14, § 15000 et seq.) (Guidelines), which discusses the information public commenters should include in their comments, the court stated that Woodward Park failed to sustain its burdens of submitting data, reasonable assumptions, or expert opinions to support its claims and of explaining how the proposed mitigation measure would reduce specific impacts.

DISCUSSION

Woodward Park's properly raised arguments in this appeal are limited to the following:

(1) Solar panels for air pollution mitigation: The EIR was required to discuss and analyze, and the city was required to mandate, the use of rooftop solar panels to mitigate the project's impacts on air quality and greenhouse gases.

(2) Traffic mitigation:

(a) The project approval documents allow a post-approval increase in the permitted number of average daily trips above 12,400 by city staff without public input.

(b) A mitigation measure in the EIR allows city staff to grant post-approval permission without public input for certain retail uses over 15,000 square feet.

(c) The EIR's mitigation measure TRANS-11b, pertaining to payment of the FMSI fee, allows the amount of the fee to be determined post-approval by city staff and fails to determine or mitigate impacts on street traffic in Madera County and Fresno County.

Woodward Park's opening brief contains remarks about other renewable energy technologies and about the purchasing of off-site pollution offsets. It also refers in passing to a lack of discussion in the EIR of health effects of the project's air quality impacts. It does not, however, present any organized arguments about why these matters would be grounds for reversal of the superior court's judgment. Woodward Park did not file a reply brief.

Standards of review and substantive legal standards

If a CEQA petition challenges agency action that is quasi-adjudicatory in character, the trial court's role is only to determine whether the action is supported by substantial evidence in the record. (§ 21168.) If the agency action was quasi-legislative in character, the trial court reviews the action for abuse of discretion. The agency abuses its discretion if it does not proceed in the manner required by law or if the decision is not supported by substantial evidence. (§ 21168.5.) "'Substantial evidence'" is defined in the Guidelines as "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." (Guidelines, § 15384, subd. (a).) The formulations in sections 21168 and 21168.5 embody essentially the same standard of review. Both require the trial court to determine whether the agency acted in a manner contrary to law

and whether its determinations were supported by substantial evidence, and neither permits the court to make its own factual findings. (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 392, fn. 5; *Burbank-Glendale-Pasadena Airport Authority v. Hensler* (1991) 233 Cal.App.3d 577, 589-590.) The Court of Appeal reviews the trial court's decision de novo, applying the same standards to the agency's action as the trial court applies. (*Neighbors of Cavitt Ranch v. County of Placer* (2003) 106 Cal.App.4th 1092, 1100.)

An EIR must "identify and focus on" those environmental impacts of the project that it finds to be significant. (Guidelines, § 15126.2, subd. (a).) If the agency has determined that possible impacts are actually not significant, the EIR must make a finding to that effect. (Guidelines, § 15128.) The EIR also must describe feasible measures that could minimize significant impacts. (Guidelines, § 15126.4, subd. (a)(1).) If more than one mitigation measure is available, the EIR must discuss each and describe reasons for the measure or measures it selects. (Guidelines, § 15126.4, subd. (a)(1)(B).) If no mitigation measures are feasible, the EIR must say so. (Guidelines, § 15091, subd. (a)(3).) An EIR can find that the feasible measures available to avoid or mitigate a significant impact are within the jurisdiction of another agency which has adopted them or can and should adopt them. (Guidelines, § 15091, subd. (a)(2).) In any event, the EIR's findings must be supported by substantial evidence. (§ 21081.5.)

An agency is forbidden to approve a project unless it finds there are no significant impacts; or imposes mitigation measures to reduce all significant impacts to an insignificant level; or finds feasible mitigation measures are not available to reduce all significant impacts to an insignificant level; or finds feasible mitigation measures are within the jurisdiction of another agency. (§ 21081, subd. (a); Guidelines, § 15091, subd. (a).) If the EIR finds there are significant impacts for which no mitigation measures are feasible, it must adopt a statement of overriding considerations before approving the project. (§ 21081, subd. (b); Guidelines, § 15093.)

I. Solar panels

Woodward Park's argument on solar panels divides into two parts: a claim that the EIR was required to *discuss and analyze* solar panels as a potential mitigation measure, and a claim that the city was required to *actually impose* a mitigation measure involving installation of solar panels. The first part pertains to CEQA's purpose of providing the public and decision makers with information; the second pertains to CEQA's purpose of requiring mitigation of impacts where feasible.

A. Failure to discuss and analyze solar panels

The first part of the argument is about the absence of any discussion of solar panels in the EIR. This part can be viewed in two ways: as a claim that, in the final EIR, the city did not sufficiently "respond to significant environmental issues" raised by commenters (as required by Guidelines § 15204, subd. (a)); and as a claim that the EIR failed to "describe feasible measures which could minimize significant adverse impacts" (as required by Guidelines § 15126.4, subd. (a)), independently of anyone's comments.

The argument cannot succeed as a claim about the adequacy of response to comments because of the lateness of Woodward Park's comments. Woodward Park did not comment until after the noticed comment period was closed and the final EIR was published. The Guidelines permit agencies to establish limited time periods for public comment on draft EIRs; they also permit, but do not require, agencies to respond to late comments. (Guidelines, §§ 15203, subd. (a), 15207.)

The second way of viewing the argument as a claim about the adequacy of the EIR's mitigation discussion gives rise to a question about burdens. To overcome a claim that an EIR omitted discussion of a mitigation measure it should have discussed, must an agency point to substantial evidence that the measure is not feasible? Or is the challenger required to point to substantial evidence that the measure is feasible? We have found no authority directly answering this question. On the one hand, we have held that a "'prejudicial abuse of discretion occurs if the failure to include relevant information [in

the EIR] precludes informed decisionmaking and informed public participation ….'" (*Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1109 [quoting *Association of Irritated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1391].) This suggests that a potential mitigation measure can be so important on its face that a failure to discuss it deprives the public of relevant information, and an EIR can be held inadequate for failing to discuss it even if the administrative record contains no specific evidence of its feasibility. On the other hand, a challenger generally has the burden, in both the trial court and on appeal, of showing that an agency abused its discretion or that its findings were not based on substantial evidence. Further, an EIR's failure to comply with CEQA's information-disclosure requirements is not necessarily reversible; the challenger must show prejudice. (*Gray v. County of Madera, supra*, at p. 1109.) In general, merely pointing out that an EIR does not discuss a mitigation measure the challenger favors is not enough to establish that the EIR is inadequate.

Assuming, for the sake of argument, that a mitigation measure could be so important on its face that an EIR not discussing it is inadequate even absent specific evidence in the record of its feasibility, the solar panels Woodward Park advocated do not fall into this category. We do not doubt that using solar panels to generate some of the project's electricity could have some positive incremental effect on air quality and greenhouse gas emissions by reducing the project's demand for electricity from the power grid. This is not enough, however, to show that the public was insufficiently informed about the project, its impacts, and ways of significantly reducing them. To prevail, Woodward Park would have to point to evidence in the record that solar panels were a feasible means of *significantly* reducing the project's impacts on air quality and greenhouse gas emissions, i.e., evidence of *how much* the solar panels would reduce these impacts relative to the size of the impacts. It has not pointed to any such evidence.

Conscious of this deficiency, Woodward Park asks that we take judicial notice of two statutes and a news report. The statutes are the Global Warming Solutions Act of

2006 (Health & Saf. Code, § 38500 et seq.) and the California Solar Initiative (§ 25780 et seq.). Woodward Park cites Health and Safety Code section 38501, which includes a legislative finding that global warming will "increase the strain on electricity supplies necessary to meet the demand for summer air-conditioning in the hottest parts of the state"; and section 25780, which states the Legislature's goals of installing solar energy systems and establishing a self-sufficient solar energy industry. The news report appeared in the Fresno Bee on August 25, 2010, and was repeated on a web site. It stated that hot weather led to a power outage in south Fresno. Taking judicial notice of these materials would not make any difference in our analysis. The materials support the proposition that solar power is generally beneficial, but they do not show that installing solar panels on this particular project is a feasible means of substantially reducing the project's impacts on air quality and greenhouse gas emissions. We deny the request for judicial notice as moot.[2]

B. Failure to require solar panels

The second part of the argument is that the city could not lawfully approve the project without imposing as a condition a requirement that the developer install a solar energy system. In effect, Woodward Park's claim is that the city's finding that the air impacts could not be mitigated to a level of insignificance was not supported by substantial evidence because requiring solar panels would have provided additional mitigation.

This argument fails for reasons similar to those we have already discussed. Woodward Park can point to no evidence in the record to show that solar panels are a

[2]Woodward Park also requests that we take judicial notice of a superior court case in which a settlement was reached that required a developer to pay for off-site pollution offsets. Since Woodward Park has not properly raised on appeal the issue of off-site pollution offsets, our taking judicial notice of that case would not help Woodward Park. We deny the request as moot.

feasible means of significantly reducing the project's impacts on air quality and greenhouse gas emissions.

The EIR found the project's air quality impacts to be significant and unavoidable despite several required mitigation measures. These included trees that would shade buildings and reduce their summer energy consumption; shading and cool paving materials to reduce the urban heat-island effect of the parking lot, which affects the generation of ozone precursors; bicycle parking facilities; showers and lockers to encourage employees to bike or walk to work; outdoor electrical outlets to encourage the use of alternatives to gasoline-powered landscape maintenance equipment; measures to discourage idling by delivery trucks; and compliance with San Joaquin Valley Air Pollution Control District rule 9510. Rule 9510 involves review by the air pollution control district to determine whether the project will be required to pay off-site mitigation fees or adopt other mitigation measures. The EIR also found the project's impacts on greenhouse gas emissions to be significant and unavoidable despite required mitigation measures. These included use of lower-emission construction vehicles; provision of electrical connections at the construction site to reduce the need for diesel-powered generators; solar panels as an available option to buyers of the residential units; and energy-efficient building design features and appliances. There is nothing in the record showing that adding a requirement of rooftop solar panels would contribute a further significant reduction in the project's impacts.

Woodward Park's argument implies that it would be legal error not to require solar panels in virtually any project involving the construction of buildings. This cannot be correct. CEQA only requires an agency's findings about impacts and mitigation to be supported by substantial evidence. The general proposition that buildings using solar power are better for air quality than those not using it is not enough to show that substantial evidence fails to support the findings of every agency that approves a building construction project without requiring solar panels.

II. Traffic mitigation

A. Average daily trip cap

Woodward Park claims the traffic mitigation measures the city approved improperly allow a cap on average daily trips to be changed post-approval by city staff. It focuses on a staff report to the city council that described the following measures, which are referred to as CZs (conditions of zoning):

> "h. Traffic generation from development of the subject site shall not exceed 12,400 daily vehicle trips as determined by ITE Trip Generation, Fourth Edition.
>
> "i. Upon submittal of a development entitlement application, which can provide for a more accurate basis for determining traffic impacts, the applicant shall be entitled to request that the above mitigation measures be modified by the Public Works Director and the Traffic Engineer. However, in no case may traffic generated by the site exceed 12,400 daily vehicle trips."

Woodward Park's argument is based on the principle that mitigation methods generally should be settled by the time of the project's approval, not left to be changed or finalized later. (See, e.g., *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 95-96.) As the trial court observed, however, the provisions Woodward Park objects to here do not allow the trip cap to be raised later. The court wrote:

> "Measure CZ h limits the total daily vehicle trips to 12,400, and Measure CZ i similarly also prohibits daily vehicle trips of more than 12,400. (AR, Vol. X, pp. 2972-2973.) While Measure CZ i does permit the applicant to request modification of the mitigation measures, it also states that, 'in no case may traffic generated by the site exceed 12,400 daily vehicle trips.' (*Id.* at p. 2973.) Therefore, the two measures are not inconsistent with each other, nor does Measure CZ i permit the applicant to obtain a modification that exceeds the maximum vehicle trips specified in Measure CZ h. Consequently, Petitioner's contention that the applicant can increase the total number of daily vehicle trips beyond the 12,400 limit without notice or a public hearing is incorrect."

We agree.

Further, the conditions of zoning to which Woodward Park refers are not measures the EIR found were needed to substantially reduce a significant impact. They are conditions that were recorded against the property when it was last rezoned in 1990. Woodward Park's argument that these measures violate CEQA presupposes that *any* condition an agency imposes on a project, even those not included in the EIR, must satisfy CEQA's requirements just as if they were included in the EIR. This is not correct. What CEQA actually requires is that "[a]n EIR shall describe feasible measures which could minimize significant adverse impacts …." (Guidelines, § 15126.4, subd. (a)(1).) Some measures might be available which, though they reduce impacts, do not substantially reduce a significant impact. An agency might want to impose these to give the environment *more* protection than CEQA requires. To show that a condition imposed outside the EIR (e.g., a zoning condition) must satisfy CEQA requirements just as if it had been a mitigation measure included in the EIR, a challenger must prove that it is relevant to a significant impact and was one of the available ways of substantially reducing the impact. Woodward Park has not attempted to show that this is true of any of the conditions of zoning imposed in 1990.

B. Possible subsequent approval of certain retail uses

Mitigation measure TRANS-11c, which was recommended by the EIR and adopted by the city, states that the project shall be conditioned:

> "On no development of a Supermarket as defined by Fresno Municipal [C]ode Section 12-105-S-36 or a home improvement center (herein the 'Prohibited Uses'). Notwithstanding the foregoing, it shall be permitted for the Project to have a specialty grocery and food sales, home design stores and appliance sales stores (the 'Restricted Uses') provided that no such individual store shall exceed 15,000 square feet in size, except with the prior approval of the Planning and Development Director, and provided further that in no event shall any such Restricted Use exceed 50,000 square feet in size."

This measure is intended to reduce the project's impacts on traffic congestion. Woodward Park argues that it improperly allows a post-approval change in mitigation by city staff without public input.

The trial court concluded that, because neither Woodward Park nor anyone else raised this issue in the agency proceedings—neither in writing nor orally at any public hearing—Woodward Park failed to exhaust its administrative remedies and was barred from raising the issue in this litigation. As we have held:

> "Before a petitioner can assert a CEQA violation against an agency in court, someone—not necessarily the petitioner—must raise the same issue before the agency in the administrative proceedings. (§ 21177, subd. (a).) The petitioner itself need only have raised *some* objection before the agency (§ 21177, subd. (b)); if it has, it may then litigate any issue raised before the agency by anyone. The claimed violation and the evidence on which it is based must have been raised by someone in the administrative forum. (*Barthelemy v. Chino Basin Mun. Water Dist.* (1995) 38 Cal.App.4th 1609, 1620-1621.) Even so, 'less specificity is required to preserve an issue for appeal in an administrative proceeding than in a judicial proceeding,' since citizens are not expected to bring legal expertise to the administrative proceeding. (*Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151, 163.) Where there was no public hearing or other opportunity for the public to raise objections, the exhaustion requirement does not apply at all. (§ 21177, subd. (e).) The purpose of the exhaustion doctrine is to give the agency an opportunity to respond to specific objections before those objections are subjected to judicial review. (*Park Area Neighbors v. Town of Fairfax* (1994) 29 Cal.App.4th 1442, 1449.)" (*Woodward Park I, supra*, 150 Cal.App.4th at pp. 711-712.)

The trial court applied this doctrine and found:

> "Petitioners' letter omitted the contention raised in their writ petition that the EIR permits a modification to the limit on supermarkets or home improvement stores of over 15,000 square feet without having to obtain a conditional use permit or hold a public hearing. (See Petitioners' Points and Authorities in Support of Writ of Mandate, pp. 12-13.) After a review of the Administrative Record, there appears no indication that any other party raised this argument prior to the close of the public hearing. Therefore, Petitioners have failed to exhaust their administrative remedies

> on this issue, and the Court cannot address the merits of Petitioners' arguments on it."

In its appellate brief, Woodward Park has not even attempted to address the trial court's ruling on exhaustion of administrative remedies. We agree with the ruling and adopt the reasons given.

We would not find reversible error even if Woodward Park had exhausted its administrative remedies. The purpose of mitigation measure TRANS-11c is to reduce the project's impact on traffic congestion. Woodward Park has not shown that the grocery or home-design stores between 15,000 and 50,000 square feet that might be allowed would be inconsistent with this purpose. Woodward Park has not shown, or even attempted to show, what effect the granting of permission to include these types of stores would have on traffic as compared with other kinds of retail tenants.

The city and Zinkin have requested that we take judicial notice of provisions of the Fresno Municipal Code having to do with the procedural requirements for granting a conditional use permit. They argue that these provisions are relevant because the city included in its approvals a requirement that the developer obtain a conditional use permit before developing a grocery or home-design store between 15,000 and 50,000 square feet. They claim Woodward Park's argument that these uses can be approved without public input is without merit because a conditional use permit can be granted only after notice and a public hearing. In light of the above discussion, we need not address this argument. We will deny the request for judicial notice as moot.

C. FMSI fee

In the letter he submitted to the city on December 16, 2008, Woodward Park's counsel wrote:

> "[T]here is a lack of disclosure when the traffic mitigation measures will actually be in place nor is there an identification of the extent to which the mitigation measures would alleviate the traffic impacts. Further, many of the traffic impact mitigation fees are to be calculated and imposed in a non-public review process by the City Traffic Engineer and Planning Director."

In his brief in the trial court, counsel explained that what he had in mind when he made these general comments in his letter was the EIR's mitigation measure TRANS-11b, which stated:

> "The project shall pay its Fresno Major Street Impact (FMSI) Fee, which will be determined at time of building permit. This FMSI fee is creditable towards major street roadway improvements included in the Nexus Study for the FMSI fee. The Traffic Impact Study should discuss the amount of this impact fee and compare the amount that would be paid with existing land use assumptions and with proposed land use assumptions. If the applicant is conditioned with improvements that are credited/reimburseable with this fee, they should work with the Department of Public Works and identify with a Professional Engineer's estimate the costs associated with the improvements prior to paying the FMSI fee at time of building permit."

Woodward Park's argument in the trial court is the same as its argument on appeal:

> "[T]he mitigation measure impermissibly defers the determination of the impacts on Fresno County and Madera County roadway improvements that will be impacted by traffic from this project, fails to provide the Nexus Study for the FMSI fee, has failed to provide a reference to the Nexus Study, and has not committed itself to a specific performance standard, but, instead, has deferred it to a private conference between the RPI Applicant's Engineer and the City's Traffic Engineer."

The trial court stated that, although Woodward Park's letter did object to the EIR's traffic mitigation measures in general terms and referred to traffic impact fees in general terms, it did not mention measure TRANS-11b and did not raise the issue of the FMSI fee specifically. It also did "not point out where in the EIR these problems exist, or which fees Petitioners believe will be imposed without a public hearing." As a result, Woodward Park "failed to adequately place the City Council on notice of the specific nature of the objections, and it did not give the agency an opportunity to respond to Petitioners' arguments." Since no other commenter raised these specific issues either, the court concluded that Woodward Park failed to exhaust its administrative remedies. Woodward Park did not address the trial court's reasoning in its appellate brief.

We adopt the trial court's reasoning and affirm its ruling. The vague references in Woodward Park's letter did not fairly raise the specific issues regarding measure TRANS-11b and the FMSI fee that it raised in the trial court and raises on appeal.

DISPOSITION

The judgment is affirmed. All parties' requests for judicial notice are denied as moot. The city and Zinkin shall recover their costs on appeal.

_____
Wiseman, J.

WE CONCUR:

_____
Hill, P.J.

_____
Dawson, J.