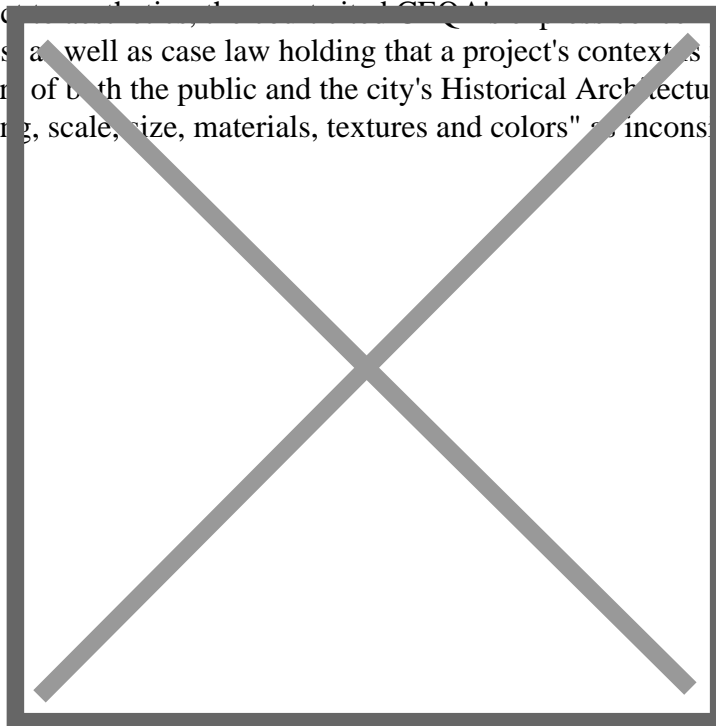


Aesthetic and Traffic Issues in Historic Overlay District Necessitate EIR

A court of appeal has overturned a city's mitigated negative declaration for a small mixed-use development in a historic overlay district, holding that aesthetic and traffic issues require the preparation of an environmental impact report. *Protect Niles v. City of Fremont*, 25 Cal. App. 5th 1129 (2018). The proposed project, comprising 98 housing units and 3,500 square feet of commercial uses, was to be located in the Niles Historic Overlay District within the City of Fremont. The city approved a mitigated negative declaration for the project, finding that with mitigation incorporated, the project would cause no significant environmental impacts necessitating an EIR. Residents sued, alleging that an environmental impact report was required because substantial evidence supported a fair argument that the project would cause significant impacts: due to 1) aesthetic incompatibility with the historic district; and 2) traffic impacts that were not acknowledged in the expert traffic report prepared for the city's analysis. The court of appeal upheld both challenges and required that an EIR be prepared.

Aesthetics. With respect to the project's aesthetic impacts, the court cited CEQA's requirement for aesthetic and historic environmental qualities, as well as case law holding that a project's context is critical to assessment of its aesthetic impacts. Here, members of both the public and the city's Historical Architectural Review Board had cited the project's "siting, massing, scale, size, materials, textures and colors" as inconsistent with the historic district's



"small town feeling."

The court first held that a

project's visual impact on a surrounding officially-designated historical district is an appropriate topic for aesthetic review under CEQA, and that such an aesthetic analysis does not undermine the separate scheme for CEQA review of environmental impacts on historical resources. Next, recognizing that aesthetic judgments are inherently subjective, the court observed that objections raised by HARB members and others "were not solely based on vague notions of beauty or personal preference, but were grounded in inconsistencies with the prevailing building heights and architectural styles of the Niles HOD." The court found that these personal observations constituted substantial evidence that the project would cause a significant aesthetic impact in the

context of the historic district. **Traffic.** The court next concluded that the city's expert traffic report could not prevail over individuals' observations of existing traffic conditions and predictions of hazards. The traffic report concluded that a new left-turn pocket in front of the project, while recommended, was not necessary, based in part on the posted speed limit. Commenters stated, however, that the posted speed limit was often ignored, and that without a left-turn pocket, the combination of high speeds, queued drivers waiting to turn left into the project, and a blind curve would result in dangerous conditions. The court identified these comments as substantial evidence supporting a fair argument that the project would create a traffic safety hazard. Nor did the city's established significance threshold for deterioration in traffic level of service protect it from the need to prepare an EIR. The city acknowledged that with the proposed project, the level of service nearby would deteriorate from an unacceptable LOS E to a still worse LOS F, but under the city's significance thresholds, this did not constitute a significant impact. The court, citing residents' and officials' reports of extreme traffic backups under existing conditions, concluded that these comments "supported a fair argument that unusual circumstances in Niles might render the thresholds inadequate to capture the impacts...." **Conclusion** The *Protect Niles* decision highlights the importance courts can attach to comments by the public - on both non-technical and technical issues - where an agency proposes to rely on a negative declaration rather than an EIR. Because CEQA is designed to favor EIRs over negative declarations, plausible fact-based comments (as opposed to generalized complaints) can, depending on the circumstances, prevail over both expert reports and agency significance thresholds, leading to the need for an EIR.

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