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**RIALTO CITIZENS FOR RESPONSIBLE GROWTH, Plaintiff and Respondent, v. CITY OF RIALTO et al., Defendants and Appellants; WAL-MART REAL ESTATE BUSINESS TRUST et al., Real Parties in Interest and Appellants.**

**E052253**

**COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION TWO**

***2012 Cal. App. LEXIS 849***

**July 31, 2012, Opinion Filed**

**NOTICE:** CERTIFIED FOR PARTIAL PUBLICATION*

> * Pursuant to *California Rules of Court, rules 8.1105(b)* and *8.1110*, this opinion is certified for publication with the exception of part VI.

**PRIOR HISTORY:** [*1]

APPEAL from the Superior Court of San Bernardino County, No. CIVSS810834, Donald R. Alvarez, Judge.

**DISPOSITION:** Reversed.

**COUNSEL:** Drinker Biddle & Reath, Henry Shields, Jr. and Paul M. Gelb for Real Parties in Interest and Appellants, Wal-Mart Real Estate Business Trust, Wal-Mart Real Estate Business Trust, Inc., and Wal-Mart Real Estate Trust, Inc.

Stradling Yocca Carlson & Rauth, Allison E. Burns, Joseph M. Adams, and Reed T.C. Glyer for Defendants and Appellants City of Rialto and Redevelopment Agency of the City of Rialto.

Briggs Law Corporation, Cory J. Briggs and Mekaela M. Gladden for Plaintiff and Respondent Rialto Citizens for Responsible Growth.

**JUDGES:** Opinion by King, J., with McKinster, Acting P. J., and Miller, J., concurring.

**OPINION BY:** King, J.

**OPINION**

**KING, J.**--

I. INTRODUCTION

Defendant, City of Rialto (the City), approved a 230,000-square-foot commercial retail center to be anchored by a 24-hour Wal-Mart "Supercenter" (the project). Plaintiff, Rialto Citizens for Responsible Growth (Rialto Citizens), petitioned the trial court for a writ of administrative mandate invalidating several project approvals, including the City's resolution certifying the final environmental impact report (the EIR) for the project, several resolutions [*2] amending the City's general plan and the Gateway Specific Plan governing the project site, and an ordinance approving a development agreement for the project.

The trial court entered judgment in favor of Rialto Citizens and issued a peremptory writ invalidating the challenged resolutions and ordinance. Real parties in

interest, Wal-Mart Real Estate Business Trust, Wal-Mart Real Estate Business Trust, Inc., and Wal-Mart Real Estate Trust, Inc. (collectively Wal-Mart), appeal. The City and its redevelopment agency, another named defendant, join Wal-Mart's appeal. Based on our de novo review of the City's actions certifying the EIR and approving the project, we find no prejudicial abuse of discretion on the part of the City. (*Code Civ. Proc., § 1094.5*.) Accordingly, we reverse the judgment in its entirety.

## II. SUMMARY OF CLAIMS AND CONCLUSIONS

As a preliminary matter, Wal-Mart claims for the first time on appeal that Rialto Citizens lacks standing to challenge the project approvals because neither it nor any of its members are beneficially interested in the issuance of the judgment or writ. Based on the record before us, we conclude that Rialto Citizens has public interest standing. It is [*3] therefore unnecessary to determine whether Rialto Citizens or any of its members have a beneficial interest in the issuance of judgment or the writ.

In a separate section of this opinion, we address whether the City violated the Planning and Zoning Law (*Gov. Code, § 65000 et seq.*)[1] in approving the project. The trial court set aside the City's resolutions approving the general and specific plan amendments and the ordinance approving the development agreement on the ground the City violated the Planning and Zoning Law in two respects. First, the court concluded that the notice of the public hearing on the project before the City Council was defective because it did not include the planning commission's earlier recommendations that the City Council approve the plan amendments and the development agreement. (*§§ 65033*, *65094*.) The court also ruled that the City erroneously adopted the ordinance approving the development agreement without expressly finding that the provisions of the agreement were consistent with the general and specific plans governing the project site, as the Planning and Zoning Law also requires. (*§ 65867.5, subd. (b)*.)

> 1 All further statutory references are to the Government [*4] Code unless otherwise indicated.

On independent review of these legal questions, we agree with the trial court that the notice of hearing was defective because it did not include the planning commission's recommendations. We also agree that the City erroneously adopted the ordinance approving the development agreement without finding that the provisions of the agreement were consistent with the general and specific plans. Importantly, however, Rialto Citizens made no attempt to show and the trial court did not find that either the defective notice of hearing or the omitted factual finding resulted in prejudice, substantial injury, and that a different result was probable absent these errors or omissions. (*§ 65010, subd. (b)*.) In the absence of these factual findings by the trial court, the resolutions approving the plan amendments and the ordinance approving the development agreement were erroneously invalidated as a matter of law.

In the final section of this opinion, we address whether the City violated the California Environmental Quality Act (CEQA) (*Pub. Resources Code, § 21000 et seq.*) in approving the project, specifically in certifying the EIR and in rejecting a "reduced density [*5] alternative" as infeasible. The trial court ruled that the EIR was inadequate and therefore erroneously certified because: (1) its project description did not identify the development agreement as an approval required to implement the project; (2) it inadequately analyzed the project's cumulative impacts on air quality, traffic, and on greenhouse gas emissions and global climate change; and (3) it improperly deferred mitigation measures to reduce the project's potential impacts on five special status plant species and three special status wildlife species, namely, the San Bernardino and Stephens' kangaroo rats, and the burrowing owl. The court also concluded that insufficient evidence supported the city council's factual finding, at the project approval stage, that the reduced density alternative to the project was infeasible.

We agree with the trial court that the project description was inadequate because it did not identify the development agreement as an approval required to implement the project. Importantly, however, this omission did not preclude or undermine informed decisionmaking on the project as a whole or the development agreement, because the ordinance approving the development [*6] agreement was duly noticed and considered, along with other project approvals, at the public hearing on the project before the City Council.

We also conclude, contrary to the trial court's rulings, that the EIR adequately analyzed the project's cumulative impacts on air quality, traffic, and on greenhouse gas emissions and global climate change, and

did not improperly defer mitigation of potential impacts on any of the special status plant or wildlife species. Lastly, we conclude that substantial evidence supports the City's finding, at the project approval stage, that the reduced density alternative was infeasible.

Thus we find no prejudicial violations of either the Planning and Zoning Law or CEQA in the City's approval of the project.[2]

> 2 In fairness to the trial court, Wal-Mart did not argue that Rialto Citizens did not demonstrate that the Planning and Zoning Law violations or the project description CEQA violation were prejudicial. (*Gov. Code, § 65010, subd. (b)*; *Pub. Resources Code, § 21005*.) Further, we discern no CEQA error in the EIR's analysis of the project's cumulative impacts on air quality, traffic, and global climate change, or in the City's rejection of the reduced density [*7] alternative as infeasible, after painstakingly reviewing and analyzing the EIR and the City's CEQA findings. The trial court had a lot of information to review in a short amount of time, and the parties at times directed it to portions of the EIR and the record which were taken out of context.

## III. BACKGROUND

### A. *The Project*

As approved on July 15, 2008, the project consists of an approximate 230,000-square-foot commercial retail center, anchored by a 24-hour Wal-Mart Supercenter with 197,639-square-feet of retail floor space. The Wal-Mart Supercenter would sell general merchandise, groceries, and liquor. It would also include a pharmacy with a "two-lane drive-thru," a vision and hearing care center, food service center, photographic studio and photographic finishing center, banking center, garden center, tire and lube facilities, and outdoor sales facilities.

In addition to the Wal-Mart Supercenter, the project also includes four commercial outparcels, a gas station with 16 fueling pumps, and a detention/retention basin for stormwater. The project will have a total of 1,143 parking spaces, including 880 on the Wal-Mart Supercenter parcel, and is expected to generate 17,317 additional daily [*8] vehicle trips. The project is located on 25.18 acres of vacant land, bounded by San Bernardino Avenue to the north, industrial uses and additional vacant land to the south, Riverside Avenue to the east, and Willow Avenue to the west.

### B. *The EIR and Project Approvals*

A draft EIR for the project was issued in May 2007 and circulated between May 18, 2007 and July 2, 2007. On July 15, 2008, following public hearings on the project before the planning commission and the City Council, the City Council adopted resolution No. 5612 certifying the final EIR, dated June 2008, and adopting factual findings and a statement of overriding considerations. The final EIR concluded that the project would have significant impacts on traffic, noise, and air quality despite mitigation measures to reduce these impacts.

Also on July 15, 2008, and as part of the project approvals, the City Council adopted resolution No. 5613 amending the City's general plan; resolution Nos. 5614 and 5615 amending the Gateway Specific Plan; and ordinance No. 1424 approving the development agreement between the City and Wal-Mart Real Estate Business Trust, Inc. The general and specific plan amendments changed the permitted land [*9] use on the project site from office to general commercial, and from office park to retail commercial, respectively.

## IV. ANALYSIS/PUBLIC INTEREST STANDING

We first address Wal-Mart's claim that Rialto Citizens lacks standing to bring the present writ petition. Lack of standing is a jurisdictional defect that may be raised at any time, including, as it is here, for the first time on appeal. (*Qualified Patients Assn. v. City of Anaheim (2010) 187 Cal.App.4th 734, 751 [115 Cal. Rptr. 3d 89]*.)

As we explain, Rialto Citizens has standing under the "public interest exception" to the general rule that a party must be beneficially interested in the issuance of a writ in order to petition for the writ. (*Waste Management of Alameda County, Inc. v. County of Alameda (2000) 79 Cal.App.4th 1223, 1232-1233 [94 Cal. Rptr. 2d 740]* (*Waste Management*), disapproved on other grounds in *Save the Plastic Bag Coalition v. City of Manhattan Beach (2011) 52 Cal.4th 155, 169-170 [127 Cal. Rptr. 3d 710, 254 P.3d 1005]* (*Save the Plastic Bag Coalition*).) It is therefore unnecessary to determine whether Rialto Citizens or any of its members was beneficially interested in the issuance of the writ. (*Code Civ. Proc., § 1086*.)[3]

3 *Code of Civil Procedure section 1086* provides, in pertinent part, that a writ [*10] of mandate "must be issued upon the verified petition of the party beneficially interested."

In its opening trial brief in support of its writ petition filed in January 2009, Rialto Citizens claimed it had standing to bring the petition and had exhausted all available administrative remedies. To support these claims, Rialto Citizens adduced the declaration of Richard Lawrence, the president of Rialto Citizens and Citizens for Responsible Equitable Environmental Development (CREED), both nonprofit corporations. Lawrence averred that, over the previous several years, CREED had advocated to ensure that "big box" development projects met all of the requirements of CEQA and other planning, zoning, and land-use laws.

According to Lawrence, around May 31, 2008, CREED began commenting on the project through the Briggs Law Corporation, using the name Rialto Citizens for Responsible Growth. At that time, Rialto Citizens was an unincorporated, nonprofit association, and CREED was one of its members. The record also includes a letter dated July 1, 2008, to the City Council from the Briggs Law Corporation on behalf of Rialto Citizens, urging the City Council not to approve the project and explaining [*11] why the project would violate CEQA, the Planning and Zoning Law, and other land use laws.

As indicated, the City Council certified the EIR and approved the project following a public hearing on July 15, 2008. On August 1, 2008, Rialto Citizens became a nonprofit public benefit corporation, organized to promote "social welfare through advocacy for and education regarding responsible and equitable environmental development."[4] The corporate entity, Rialto Citizens, then filed the present writ petition on August 8, 2008. (*Pub. Resources Code, § 21177, subds. (b), (c)* [organization formed after approval of a project may maintain CEQA action if a member of that organization objected to the approval of the project prior to the close of the public hearing on the project].)

4 A copy of Rialto Citizens's articles of incorporation is authenticated in and attached to Lawrence's declaration.

As a general rule, legal standing to petition for a writ of mandate requires the petitioner to have a beneficial interest in the writ's issuance. (*Regency Outdoor Advertising, Inc. v. City of West Hollywood (2007) 153 Cal.App.4th 825, 829 [63 Cal. Rptr. 3d 287]*; *Code Civ. Proc., § 1086*.) A petitioner is beneficially interested if he [*12] or she has " 'some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large.' " (*Save the Plastic Bag Coalition, supra, 52 Cal.4th at p. 165*, quoting *Carsten v. Psychology Examining Com. (1980) 27 Cal.3d 793, 796 [166 Cal. Rptr. 844, 614 P.2d 276]*.)

Beneficially interested parties "are ' "in fact adversely affected by governmental action" ' and have standing in their own right to challenge that action. [Citation.]" (*Save the Plastic Bag Coalition, supra, 52 Cal.4th at p. 170*.) A beneficial interest must be "direct and substantial." (*Id. at p. 165*.) Thus, "the writ must be denied if the petitioner will gain no direct benefit from its issuance and suffer no direct detriment if it is denied." (*Waste Management, supra, 79 Cal.App.4th at p. 1232*.) The beneficial interest requirement applies to ordinary as well as administrative mandate proceedings, including those alleging CEQA violations. (*Id. at pp. 1232-1233*.)

A petitioner who is not beneficially interested in a writ may nevertheless have "citizen standing" or "public interest standing" to bring the writ petition under the "public interest exception" to the beneficial interest requirement. [*13] (*Save the Plastic Bag Coalition, supra, 52 Cal.4th at p. 166*; *Regency Outdoor Advertising, Inc. v. City of West Hollywood, supra, 153 Cal.App.4th at p. 832*.) The public interest exception "applies where the question is one of public right and the object of the action is to enforce a public duty-in which case it is sufficient that the plaintiff be interested as a citizen in having the laws executed and the public duty enforced. [Citations.]" (*Waste Management, supra, 79 Cal.App.4th at pp. 1236-1237*.) The public interest exception " 'promotes the policy of guaranteeing citizens the opportunity to ensure that no governmental body impairs or defeats the purpose of legislation establishing a public right.' [Citations.]" (*Save the Plastic Bag Coalition, supra, at pp. 166*.)

Wal-Mart claims Rialto Citizens lacks public interest standing to challenge the City's actions certifying the EIR and approving the project because it has not shown it meets any of the four criteria formulated by the *Waste Management* court for determining whether a corporate entity has public interest standing. These are: (1) whether

the corporation has shown a continuing interest in or commitment to the public right being [*14] asserted; (2) whether it represents individuals who would be beneficially interested in the action; (3) whether individuals who are beneficially interested would find it difficult or impossible to seek vindication of their own rights; and (4) whether prosecution of the action as a citizen suit by a corporation would conflict with other competing legislative policies. (*Waste Management, supra, 79 Cal.App.4th at p. 1238*.)

In July 2011, after Wal-Mart filed its opening brief on this appeal, the court in *Save the Plastic Bag Coalition* disapproved *Waste Management* "to the extent it held that corporate parties are routinely subject to heightened scrutiny when they assert public interest standing," and accordingly placed a corporation's ability to invoke the public interest exception on equal footing with natural persons. (*Save the Plastic Bag Coalition, supra, 52 Cal.4th at pp. 169-170*, fn. omitted.) The court reasoned that, in the context of a citizen suit, or for purposes of public interest standing, "[t]he term 'citizen' ... is descriptive, not prescriptive. It reflects an understanding that the action is undertaken to further the public interest and is not limited to the plaintiff's [*15] private concerns. Entities that are not technically 'citizens' [including corporations] regularly bring citizen suits. [Citations.] Absent compelling policy reasons to the contrary, it would seem that corporate entities should be as free as natural persons to litigate the public interest. [Citation.]" (*Id. at p. 168*.) The court cautioned, however, that public interest standing is not "freely available to business interests lacking a beneficial interest in the litigation," and no party may proceed with a mandamus petition "as a matter of right" under the public interest exception. (*Id. at p. 170, fn. 5*.) In some cases, "[t]he policy underlying the exception may be outweighed by competing considerations ... ." (*Ibid.*)

On the record before this court, there is no compelling policy reason why Rialto Citizens should not have public interest standing to challenge the City's project approvals on CEQA and non-CEQA grounds raised in the petition. As the Lawrence declaration shows, Rialto Citizens is a nonprofit public benefit corporation formed for the purpose of promoting "social welfare through advocacy for and education regarding responsible and equitable environmental development." And [*16] by its writ petition, Rialto Citizens seeks to enforce the City's public duties to comply with CEQA and the Government Code in considering and approving the project.

In contrast to the present case, *Waste Management* involved a corporate landfill operator whose commercial or competitive interests were deemed an impediment to its public interest standing. (See *Save the Plastic Bag Coalition, supra, 52 Cal.4th at p. 167*; *Waste Management, supra, 79 Cal.App.4th at p. 1228*.) The landfill operator petitioned for a writ of mandate directing that permits issued to one of its competitors be set aside pending CEQA review of the environmental effects of the competitor's operations. The court concluded that the landfill operator lacked a beneficial interest and also lacked public interest standing. (*Waste Management, supra, at pp. 1235-1237*.)

Unlike the corporate landfill operator in *Waste Management,* Rialto Citizens is a nonprofit public benefit corporation, and as such has no commercial or competitive interests to undermine or override its public interest standing. Thus here, it is appropriate to apply the public interest exception.[5]

> 5 On June 3, 2011, the date it filed its opening brief on appeal, [*17] Wal-Mart requested that this court take judicial notice of the signed "self-authenticating" deposition transcript of Theresa Quiroz, "the [p]erson[] [m]ost [k]nowledgeable of ... Rialto Citizens ... ." (*Evid. Code, §§ 452, subd. (h)*, *459*; *Code Civ. Proc., § 909*.) Wal-Mart took the deposition in December 2010, after Rialto Citizens filed a motion for attorney fees under the private attorney general statute. (*Code Civ. Proc., § 1021.5*.) By taking the deposition, Wal-Mart sought to discover whether the writ was sought primarily for the personal benefit of any of Rialto Citizens's members, or other persons. (See *Save Open Space Santa Monica Mountains v. Superior Court (2000) 84 Cal.App.4th 235, 246-2450 [100 Cal.Rptr.2d 725]* [allowing limited discovery of private interests of party opposing *Code Civ. Proc., § 1021.5* motion].) We reserved ruling on the request for judicial notice with this appeal. Rialto Citizens does not oppose the request. We grant the request, and note that nothing in the deposition indicates that Rialto Citizens or any of its members has a personal, commercial, or other interest in the litigation that would constitute a compelling

reason not to apply the public interest exception.

It [*18] has long been observed that " 'strict rules of standing that might be appropriate in other contexts have no application where broad and long-term [environmental] effects are involved.' [Citation.]" (*Save the Plastic Bag Coalition, supra, 52 Cal.4th at p. 170*; *Burrtec Waste Industries, Inc. v. City of Colton (2002) 97 Cal.App.4th 1133, 1138-1139 [119 Cal. Rptr. 2d 410] [Fourth Dist., Div. Two]*; *Bakersfield Citizens for Local Control v. City of Bakersfield (2004) 124 Cal.App.4th 1184, 1198 [22 Cal. Rptr. 3d 203]* [noting CEQA's "liberal standing" requirement].) The City's certification of the EIR and its other actions approving the project will have broad and long-term environmental effects, and the City has a public duty to comply with the Planning and Zoning Law and CEQA in considering and approving the project. In sum, based on the record before us, Rialto Citizens has public interest standing to challenge the City's actions certifying the EIR and approving the project--even if neither Rialto Citizens nor any of its members have a direct and substantial beneficial interest in the issuance of the writ.[6]

6 Lawrence averred that Rialto Citizens's members included "a natural person who resides in the City of Rialto near the intersection [*19] of Foothill Boulevard and Riverside Avenue, less than three miles from the [p]roject site." Rialto Citizens argues that this unidentified person had a beneficial interest in the writ because "three miles is close enough to suffer the traffic and noise impacts of the [p]roject." (Cf. *Braude v. City of Los Angeles (1990) 226 Cal.App.3d 83, 88-89 [276 Cal. Rptr. 256]* [petitioner who traveled on the Harbor freeway with thousands of other people could not show he had an interest not held in common with the public and therefore lacked a beneficial interest in the writ, when the project would have only an incremental effect on traffic in the downtown Los Angeles area].) Again, however, it is unnecessary for us to determine whether Rialto Citizens or any of its members has a beneficial interest in the writ, given that Rialto Citizens has public interest standing.

## V. ANALYSIS/PLANNING AND ZONING LAW VIOLATIONS

### A. *The Notice of the Public Hearing Before the City Council Was Defective, But There Was No Showing That the Defective Notice Was Prejudicial (§§ 65094, 65010, subd. (b))*

Following a May 28, 2008, public hearing on the project, the planning commission certified the EIR and recommended that the City Council approve [*20] and adopt the general and specific plan amendments and the development agreement for the project. On June 21, 2008, the City published a revised notice in the *San Bernardino County Sun* newspaper, stating that on July 1, 2008, the City Council would hold a public hearing to consider certifying the EIR, adopting the plan amendments, and adopting the development agreement. At the close of the July 1 hearing, the City Council continued the hearing to July 15. On July 15, the City Council certified the EIR, adopted the general and specific plan amendments, and adopted the development agreement.

In the trial court, Rialto Citizens claimed and the trial court agreed that the notice of the July 1 public hearing before the City Council violated the Planning and Zoning Law because it did not indicate whether the planning commission had recommended that the City Council approve the plan amendments or the development agreement. (*§ 65094.*) On this appeal, Wal-Mart contends, as it did in the trial court, that the notice was not required to include the planning commission's recommendations. Instead, Wal-Mart argues that the notice complied with *section 65094* because it included the date, time, and [*21] place of the hearing, and further stated, among other things, that the approval of the plan amendments and the development agreement would be considered at the July 1 public hearing before the City Council.

We agree that the notice was required to include the planning commission's recommendations. But Rialto Citizens made no attempt to show in the trial court, and the trial court did not find, that the defective notice was prejudicial, caused substantial injury to anyone, or that a different result was probable absent the defect. (*§ 65010, subd. (b).*) Thus as a matter of law, the plan amendments and the development agreement were erroneously invalidated based on the defective notice.

Under the Planning and Zoning Law (*§ 65000 et seq.*), notices of public hearings on general and specific plan amendments and development agreements must be given in accordance with *section 65090*. (*§§ 65355*, *65453, subd. (a)*, *65867.*) Under *section 65090*, the notice

must include "the information specified in *Section 65094*." (*§ 65090, subd. (b)*.) *Section 65094*, in turn, defines a notice of public hearing as one that includes, among other things, "*a general explanation of the matter to be considered*" at the hearing. [*22] (Italics added.) The interpretation of a statute and its application to undisputed facts is a question of law subject to de novo review. (*State Water Resources Control Bd. Cases (2006) 136 Cal.App.4th 674, 722 [39 Cal. Rptr. 3d 189]*.)

The question here is whether the notice of the July 1 public hearing before the City Council was required to include the planning commission's recommendations to adopt the plan amendments and development agreement as part of "a general explanation of the matter to be considered" at the public hearing. (*§ 65094*.) *Environmental Defense Project of Sierra County v. County of Sierra (2008) 158 Cal.App.4th 877 [70 Cal. Rptr. 3d 474]* (*Environmental Defense Project*), an action for declaratory relief, is on point and persuasive.

At issue in *Environmental Defense Project* was whether the County of Sierra's so-called "streamlined zoning process"--in which the county routinely gave notices of hearings before its board of supervisors on proposed zoning ordinances and amendments (*§ 65856*) *before* its planning agency made its recommendations to the board--violated the Planning and Zoning Law. (*Environmental Defense Project, supra, 158 Cal.App.4th at p. 881*.) The court concluded that the notices of hearing had to be given [*23] *after* the board received the planning commission's recommendations, not before. (*Id. at pp. 881, 888-889*.) Importantly, the court *also* concluded that the notices "must include the planning commission's recommendation as part of the 'general explanation of the matter to be considered' (*§ 65094*)." (*Ibid.*)

Wal-Mart maintains that the second part of the court's holding in *Environmental Defense Project* is dictum. Indeed, as Wal-Mart points out, it was not necessary for the court to determine that the planning commission's recommendations had to be included in the notices of hearing before the board of supervisors in order to determine the question presented, which was whether the notices, as a matter of course, had to be given *after* the board of supervisors received the planning commission's recommendations. And here, the trial court acknowledged that the second part of the court's holding "might be technically classified as *dicta*," but found the court's reasoning on the point persuasive and applicable to the present notice issue. So do we.

The court in *Environmental Defense Project* reasoned that *section 65094* is properly read in conjunction with the state's policy and the Legislature's intent, [*24] expressed in *section 65033*, that the public "be involved in the planning process and be given 'the opportunity to respond to clearly defined alternative objectives, policies, and actions.' (*§ 65033*.)" (*Environmental Defense Project, supra, 158 Cal.App.4th at p. 891*.) After considering *section 65094* in the context of the statutory framework of which it is a part, the court concluded: "[T]here can be little doubt that the purpose of notice in cases such as this one is to inform the public of the legislative body's hearing so they will have an opportunity to respond to the planning commission's recommendation and protect any interests they may have before the legislative body approves, modifies, or disapproves that recommendation. If notice could be given before the planning commission made its recommendation *and, therefore, without inclusion of what that recommendation was*, the purpose behind the notice provision would be ill served, as the notice would not inform the public to what 'clearly defined alternative objectives, policies, and actions' they would be responding." (*Environmental Defense Project, supra, at pp. 889, 891-892*, italics added.)

The record before the court supported [*25] its conclusions. The Sierra County Planning Department had recommended approving a tentative parcel map and a zoning ordinance amendment at a January 27, 2005, meeting, and made changes to the project during that meeting. (*Environmental Defense Project, supra, 158 Cal.App.4th at p. 892*.) Notice of a February 1 hearing before the board of supervisors was given on January 20, *before* the planning department made its January 27 recommendations. Additionally, the planning department's project changes and recommendations were not transmitted to the board until late during the day on January 28, giving the public only one full business day to prepare comments on the changes and recommendations before the February 1 hearing before the board. (*Ibid.*) At the board hearing, the plaintiff commented that, due to the county's streamlined zoning procedure, she did not have sufficient time to " 'conduct a meaningful review of the project recommended for approval by the [planning commission],' " and this " 'detract[ed] from the public's participation in the process.'

" (*Ibid.*)

Unlike the notice in *Environmental Defense Project*, which was given before the planning department made its recommendations to the [*26] board of supervisors, the notice of the July1 public hearing before the city council was given on June 21, several weeks after the planning commission made its recommendations on May 28. But like the notice in *Environmental Defense Project*, the notice of the July 1 hearing did not include the planning commission's recommendations on the matters to be considered at the hearing, even though the recommendations were made well before the notice was given.

As *Environmental Defense Project* explains, *section 65033* recognizes "the importance of public participation at every level of the planning process," and expresses "the policy of the state and the intent of the Legislature" that the public "be afforded the opportunity to respond to clearly defined alternative objectives, policies, and actions." (*§ 65033*; *Environmental Defense Project, supra, 158 Cal.App.4th at p. 891*.) In light of the policy of full public participation expressed in *section 65033*, the planning commission's recommendations were a necessary part of "a general explanation of the matter to be considered" (*§ 65094*) at the July 1 hearing, and as such were required to be included in the notice of that hearing. (See *Environmental Defense Project, supra, at p. 889* [*27] [courts must not consider statutory language in isolation but look to the entire substance of the statute, harmonizing its parts and considering its clauses or sections in the context of the statutory framework as a whole].)

Nevertheless, the City Council's actions approving the plan amendments and the development agreement were erroneously invalidated based solely on the defective notice of public hearing. Under the Planning and Zoning Law, a court may not set aside the actions of a legislative body based on an error or omission in a notice of public hearing, unless the court finds the error was prejudicial, the complaining party suffered substantial injury, and a different result was probable had the error not occurred. (*§ 65010, subd. (b)*.) Neither prejudice, substantial injury, nor the probability of a different result may be presumed based on a showing of error alone. (*Ibid.*)[7]

> 7 The full text of *section 65010, subdivision (b)* states: "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 [*28] 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."

In the trial court, Rialto Citizens made no attempt to show, and the trial court did not find, that the defective notice of hearing resulted in prejudice or substantial injury to anyone, or that a different result was probable had the notice included the planning commission's recommendations. (*§ 65010, subd. (b)*.) For that matter, none of the parties informed the trial court that it had to find prejudice, substantial injury, and that a different result was probable absent the defective notice, before it could invalidate the plan amendments and the development [*29] agreement based on the defective notice. (*Ibid.*) Instead, the parties focused on whether *Environmental Defense Project* was controlling on the question of whether the notice was defective, but the case did not involve the application of *section 65010, subdivision (b)*.

*Environmental Defense Project* involved an action for declaratory relief, and as the court there pointed out, *section 65010, subdivision (b)* does not apply to actions for declaratory relief. (*Environmental Defense Project, supra, 158 Cal.App.4th at p. 887*.) In affirming the judgment of the trial court granting declaratory relief, the court did not set aside the board's actions approving the tentative parcel map and zoning amendment. (*Id. at pp. 883, 894*.) Indeed, the plaintiff was not seeking to set aside the board's actions, but a judicial declaration that the county's "streamlined zoning process," violated the Planning and Zoning Law. (*Id. at p. 882*.) In short, *Environmental Defense Project* did not involve the application of *section 65010, subdivision (b)*.

Rialto Citizens maintains Wal-Mart has forfeited its right to complain that Rialto Citizens did not demonstrate prejudice, substantial injury, or a probability of a different [*30] result based on the defective notice of hearing, because Wal-Mart did not raise these failure-of-proof issues in the trial court. Not so.

As the party seeking to set aside the City's actions approving the plan amendments and the development agreement based on the defective notice, Rialto Citizens had the burden of demonstrating prejudice, substantial injury, and the probability of a different result under *Government Code section 65010, subdivision (b)*, but failed to do so. (*Fukuda v. City of Angels (1999) 20 Cal.4th 805, 819-820 [85 Cal. Rptr. 2d 696, 977 P.2d 693]* [party contesting administrative action, which is presumed correct, has burden of producing evidence and proving action was incorrect]; *Evid. Code, §§ 110*, *115*, *664*.) Instead, Rialto Citizens relied on the defective notice alone as invalidating the plan amendment and development agreement approvals. But the City's approval of the plan amendments and the development agreement were erroneously set aside based on the defective notice alone, without a showing that the defective notice resulted in prejudice and substantial injury, and that a different result was probable had the notice not been defective. (*Gov. Code, § 65010, subd. (b)*.)

Lastly, Rialto Citizens argues [*31] there is evidence in the record "that would support the trial court's opinion that the [defective] notice inhibited full public participation." We disagree. But even if the record arguably contains any such evidence, the court's conclusion that the defective notice "inhibited full public participation" is unsupported by the necessary, underlying factual findings of prejudice, substantial injury, and the probability of a different result absent the error. (*§ 65010, subd. (b)*.) Nor is it the province of this court to make such factual findings, particularly when, as here, undisputed evidence does not support such findings. (See Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2011) § 1:12, p. 1-2.)

*Section 65010*, formerly section 65801, is a "curative statute" enacted by the Legislature for the purpose of "terminating recurrence of judicial decisions which had invalidated local zoning proceedings for technical procedural omissions. [Citations.]" (*City of Sausalito v. County of Marin (1970) 12 Cal.App.3d 550, 557-558 [90 Cal. Rptr. 843]*.) On this record, the failure of the notice of the public hearing before the City Council to include the planning commission's recommendations [*32] on the matters to be considered at the hearing was a harmless omission.

B. *The City Council Erroneously Approved the Development Agreement Without Finding Its Provisions Were Consistent With the General Plan and the Gateway Specific Plan* (*§ 65867.5*), *But There Was No Showing That the Omitted Finding Was Prejudicial* (*§ 65010, subd. (b)*)

Under the Planning and Zoning Law, "[a] development agreement is a legislative act that shall be approved by ordinance" and "shall not be approved unless the legislative body finds that the provisions of the agreement are consistent with the general plan and any applicable specific plan." (*§ 65867.5, subds. (a)*, *(b)*.) In the trial court, Rialto Citizens claims, and the trial court agreed, that the City improperly approved the project without finding that the development agreement was consistent with the general plan and the Gateway Specific Plan, and on this basis the trial court invalidated the ordinance approving the development agreement.

On this appeal, Wal-Mart claims that substantial evidence in the record shows that the City did in fact find that the development agreement was consistent with the general and specific plans. We disagree. The record [*33] nowhere indicates that the City made this finding.

To be sure, at its May 28, 2008 hearing, the *planning commission* approved and adopted resolution No. 8-25, finding that "the provisions of the proposed Development Agreement are consistent with the General Plan and Specific Plan ... ." Then, on July 15, 2008, the City Council adopted resolution No. 5612, certifying the EIR as complying with CEQA. The City's CEQA findings are attached to resolution No. 5612 as exhibit A. On the same date, the City adopted the general and specific plan amendments and the ordinance approving the development agreement. But none of these documents include a finding that the provisions of the development agreement were consistent with the general plan and the Gateway Specific Plan. Nor do any of these documents adopt the planning commission's resolution No. 8-25, or its consistency finding.

Wal-Mart maintains that the City's resolution No. 5612 and CEQA findings effectively include a finding

that the development agreement was consistent with the general and specific plans. Not so. Though the caption or title of resolution No. 5612 refers to the plan *amendments* and the development agreement, the resolution [*34] focuses solely on the EIR and certifies the EIR, and does not mention the development agreement or the plan amendments outside of its caption. The CEQA findings state that *the project* would be consistent with "the land use plan and relevant policies of the [g]eneral [p]lan," and that *the project* "would be in compliance with the applicable goals and policies of the Gateway Specific Plan." But neither the EIR nor the CEQA findings define the project as including the development agreement. Thus, neither resolution No. 5612 nor the CEQA findings include a finding that the development agreement was consistent with the general plan and the Gateway Specific Plan.[8]

> 8 Wal-Mart does not claim that the City's resolution Nos. 5613, 5614, and 5615, amending the general and specific plans and adopting the ordinance approving the development agreement, respectively, include a finding that the development agreement was consistent with the general and specific plans. Copies of these resolutions and the ordinance are not included in the record, though the record indicates that the City adopted them on July 15, 2008.

Nevertheless, the trial court erroneously invalidated the ordinance approving the development [*35] agreement based solely on the City's failure to make the consistency finding. (*§ 65867.5, subd. (b)*.) In order to invalidate the ordinance, the court had to find that the *absence* of the consistency finding resulted in prejudice and substantial injury and that a different result (e.g., disapproval of the ordinance) was probable absent the omitted finding. (*§ 65010, subd. (b)*.) The court did not make this finding.

Indeed, Rialto Citizens did not claim in the trial court, and does not claim on this appeal, that any of the provisions of the development agreement were inconsistent with the general and specific plans, as these plans were amended to accommodate the project. By all appearances, the City's failure to make the *section 65867.5* consistency finding, particularly after the planning commission made the finding, was an oversight and did not result in prejudice or substantial injury to anyone. (*§ 65010, subd. (b)*.) Further, there is no indication that a different result was probable had the City made the consistency finding. (*Ibid*.)

VI. ANALYSIS/CEQA ISSUES* [NOT CERTIFIED FOR PUBLICATION]

> * See footnote, *ante*, page ___.

VII. DISPOSITION

The judgment is reversed. Real parties shall recover their costs on appeal.

McKinster, Acting P. J., and Miller, J., concurred.

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