RIVERPARK COALITION and LA WATERKEEPER v. CITY OF LONG BEACH
Case Number: 21STCP01537
Hearing Date: June 22 and July 22, 2022

ORDER GRANTING PETITION FOR WRIT OF MANDATE

This proceeding challenges the Pacific Place project (Project), a large-scale commercial development consisting of a warehouse, storage facility, office building and a parking lot. The Project will replace 19 acres of open space along the Los Angeles River in the Wrigley Heights neighborhood in the City of Long Beach (City).

Petitioners, Riverpark Coalition and Los Angeles Waterkeeper assert the City failed to comply with its obligations under Public Resources Code section 21000, *et seq.*, the California Environmental Quality Act (CEQA), when it approved the Project in April 2021. Petitioners contend the City should have prepared an environmental impact report (EIR) to consider the Project instead of relying on a mitigated negative declaration (MND). Petitioners seek an order setting aside the City's approval of the Project and requiring an EIR be completed and considered prior to any future approval of the Project by the City.

The City and Real Parties in interest, Artesia Acquisition Company (Artesia), InSite Property Group (InSite), Paul Brown and the Jeanne Eve McDonald Revocable Trust (the Trust) (collectively, Respondents), oppose the petition.

Petitioners' Request for Judicial Notice in Support of Petitioners' Opening Brief (Exhibits A through F) is granted.

Respondents' Request for Judicial Notice in Support of Joint Opposition to Petitioners' Opening Brief (Exhibits A through D) is granted.

Petitioners' Request for Judicial Notice in Support of Reply Brief (Exhibits G through K) is granted.

The petition is granted based on the following:

1. The court finds the City failed to proceed as required by law when it approved the Project because it did not undertake an adequate analysis of the Project's environmental impacts on land use plans and polices.

2. The court finds substantial evidence supports a fair argument the Project (including its pre-approval surcharge testing activities) may have a significant impact on biological resources (southern tarplant).

3. The court finds substantial evidence supports a fair argument the mitigation measures (in particular BIO-1) may be inadequate to mitigate the potential impacts to special status species.

4. The court finds the City failed to proceed as required by law when it approved the Project because it did not undertake an adequate analysis of the Project's environmental impacts on air quality.

5. The court finds substantial evidence supports a fair argument the Project may have a significant impact on transportation safety.

STATEMENT OF THE CASE

The Project:

The Project site is located at 3701 Pacific Place/3916-4021 Ambeco Road adjacent to the Los Angeles River in the City. (AR 1:11; 4:34.) The site is currently vacant. (AR 4:32.) The Project site consists of parcels owned by Artesia (Artesia Property) and the Trust (Trust Property). (AR 1:1.) The total combined Project area is approximately 19.41 acres. (AR 251:18468-69.)

The Artesia Property had been used in the past as an oil brine treatment facility. (AR 38:8526, 4:39, 24:3485; 27:5679-81.)

On the Artesia Property, the Project consists of a three-story, 152,745 square foot self-storage building with approximately 1,132 self-storage units, recreational vehicle storage area for 578 vehicles, and a self-serve car wash with a waste disposal station. (AR 1:1; 4:39, 4:41.) The Project also includes 5,000 square feet of office space (AR 1:1.)

On the Trust Property, the Project would include "a single-story building with up to 77,000 square-feet of building area consisting of 73,500 square-feet warehouse space and 3,500 square feet of office space . . . ." (AR 1:1.)

At the time of the Project's entitlements application, the Artesia Property was zoned Light Industrial (IL), which allows a variety of industrial and manufacturing uses, and designated NeoIndustrial (NI). (AR 37:8498, 8502-8503.) Artesia requested a zone change to Commercial Storage (CS), which allows self-storage and parking; site plan review; a standards variance to increase the maximum allowable height; three conditional use permits for self-storage, recreational vehicle storage, and accessory car wash uses; as well as a lot merger. (AR 38:8526-8531.)

The City's Approvals:

The City prepared an initial study and a MND for the Project. (AR 4:18, 38:8531-8532.) On April 13, 2021, the City adopted the MND and approved the Project. (AR 3:5.)

STANDARD OF REVIEW

Judicial review of an agency's compliance with CEQA and legislative or quasi-legislative actions, " 'shall extend only to whether there was a prejudicial abuse of discretion,' " which is established " 'if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence.' " (*Vineyard Area Citizens for Responsible Growth Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 426 [citing Pub. Resources Code, § 21168.5].)

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. (Pub. Resources Code, § 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.' [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 "shall adopt a negative declaration to that effect." (Pub. Resource Code, § 21080, subd. (c)(1); Guidelines,[1] §§ 15064, subd. (f)(3), 15070.) The agency "shall" prepare a MND 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." (Pub. Resource Code, § 21080, subd. (c)(2); Guidelines, §§ 15064, subd. (f)(2), 15070.)

Finally, "[w]here the alleged defect is that the agency has failed to proceed in the manner required by law, the court determines de novo whether the agency has employed the correct procedures, scrupulously enforcing all legislatively mandated requirements." (*Chico Advocates for a Responsible Economy v. City of Chico* (2019) 40 Cal.App.5th 839, 845.)

[1] The CEQA Guidelines are found at Title 14, Chapter 3 in the California Code of Regulations. For ease of reference, the guidelines are cited herein as "Guidelines."

ANALYSIS

The Adequacy of the Project Description:

Petitioners challenge the adequacy of the Project description in the City's initial study and MND.[2] First, Petitioners argue the Project description in the initial study improperly excluded a description of the soil surcharge testing conducted prior to the Project's approval—even though such testing is considered part of the Project. Second, Petitioners argue the surcharge test violated CEQA because it was conducted without any environmental review of impacts on biological resources, air quality, hazards and water quality.

Standard of Review: Project Description

"An initial study shall contain in brief form: [¶] . . . A description of the project. . . ." (Guidelines, § 15063, subd. (d)(1).) "A negative declaration circulated for public review shall include: [¶] . . . A brief description of the project, including a commonly used name for the project, if any[.]" (Guidelines, § 15071, subd. (a).) The description of a project "should not supply extensive detail beyond that needed for evaluation and review of the environmental impact." (Guidelines, § 15124.)

"The scope of the environmental review conducted for the initial study must include the entire project." (*Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora* (2007) 155 Cal.App.4th 1214, 1222.) An agency must provide an accurate and complete description of the "project." (*Save Round Valley Alliance v. County of Inyo* (2007) 157 Cal.App.4th 1437, 1448.)

Where an agency fails to provide an accurate project description or fails to gather information and undertake an adequate environmental analysis in its initial study, a negative declaration is inappropriate. (*El Dorado County Taxpayers for Quality Growth v. County of El Dorado* (2004) 122 Cal.App.4th 1591, 1597.) "The failure to comply with the law subverts the purposes of CEQA if it omits material necessary to informed decisionmaking and informed public participation." (*County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 946.)

"All phases of project planning, implementation, and operation must be considered in the initial study of the project." (Guidelines, § 15063, subd. (a)(1); *Nelson v. County of Kern* (2010) 190 Cal.App.4th 252, 270 [*Nelson*].)

The failure to include a complete project description is a failure to comply with CEQA, and the omission of a material Project component can be treated as improper piecemealing. (See *Nelson, supra,* 190 Cal.App.4th at 271. ["This big picture approach to the definition of a project (i.e., including ' "the whole of an action" ') prevents a proponent or a public agency from

[2] The initial study and MND are a single document. (AR 4:18.) For ease, the court refers to the documents collectively as the MND herein.

avoiding CEQA requirements by dividing a project into smaller components which, when considered separately, may not have a significant environmental effect."])

Analysis: Project Description

Petitioners note Artesia altered the Project site to conduct a "surcharge test" prior to the City's approval of the Project. Through the surcharge testing, Artesia caused the removal of on-site vegetation (including southern tarplant species), graded and moved soil from the northern end of the site to the southern end, and created a mound of soil approximately 15 feet high to simulate future building weight. (AR 254-A:21465.2, 4:86.) Photographic evidence vividly reveals the extent of construction work involved in the surcharge testing performed prior to approval of the Project. (AR 99:17076 [construction equipment provides scale].)

Respondents concede the surcharge testing occurred prior to Project approval. (See AR 38:11680 ["moving and piling of soils to test conditions under various weights and conditions" in October 2020].) Respondents argue, however, the surcharge testing was "in the nature of a geotechnical study, and similar to other site investigations, such as environmental sampling, that are needed to evaluate the feasibility and suitability of a property for development." (AR 50:9281 [comments to the MND], 47:8845, 80-A:11388-89, 80-B:11680.) Respondents label the surcharge testing as "exploratory testing."[3] Further, Respondents assert the environmental impacts related to the surcharge testing were studied and disclosed. (AR 80-A:11369, 11388-89, 4:57-60, 70-91, 114-129, 50:9394, 9427-28, 9442, 80-B:11680.)

"CEQA's conception of a project is broad [citation], and the term is broadly construed and applied in order to maximize protection of the environment." (*Nelson, supra,* 190 Cal.App.4th at 271.) "The description must allow the reader to assess and analyze the project's potential impacts." (*League to Save Lake Tahoe Mountain etc. v. County of Placer* (2022) 75 Cal.App.5th 63, 92.)

The MND at Section 3.0 sets forth the Project description. (AR 4:41.) The MND discusses the proposed land uses involved with specificity (AR 4:41), access, circulation and parking (AR 4:45), drainage (AR 4:45), landscape and hardscape (AR 4:45) and remediation for both the Artesia Property and the Trust Property. (AR 48, 49-51.)

In addition, and importantly to Petitioners' CEQA challenge, the MND disclosed the surcharge testing. The MND provided the following brief information about the surcharge testing in its description of the Project:

> "Concurrent with grading activities, a soil surcharge program would be conducted. This program would occur over a 4- to 6-week period and involve import and

[3] The photographic evidence undermines the City's claim of mere "exploratory testing." (AR 99:17076.)

subsequent export of approximately 10,000 cy of soil for soil testing purposes." (AR 4:51.)

Thus, the MND disclosed to the public and decision makers the testing would occur. The MND described the surcharge testing as part of the Project. That is, the MND does not ignore the Project's need for surcharge testing or fail to disclose that it will be conducted as part of the Project.

Natural Resources Defense Council, Inc. v. City of Los Angeles (2002) 103 Cal.App.4th 268, 284 and *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 79, relied upon by Petitioners, do not inform on issues related to project description. Petitioners' claim that the "MND only briefly references the 'soil surcharge program,' yet fails to adequately analyze and disclose its impacts" (Opening Brief 12:21-22), must be considered in the context of the adequacy of the MND's impact analysis, not the project description. The surcharge testing is disclosed as part of the Project. Therefore, the MND must consider the environmental impacts of the surcharge testing along with all other aspects of the Project.

Natural Resources Defense Council, Inc. v. City of Los Angeles, supra, 103 Cal.App.4th at 284 and *No Oil, Inc. v. City of Los Angeles, supra,* 13 Cal.3d at 79, concern segmentation or piecemealing of a project. An MND cannot ignore the whole project including the reasonably foreseeable effects and consequences of that Project. An environmental document must evaluate future phases or uses of an entire project. "A fundamental purpose of an EIR is to provide decision makers with information they can use in deciding *whether* to approve a proposed project, not to inform them of the environmental effects of projects they have already approved. If postapproval environmental review were allowed, [EIRs] would likely become nothing more than *post hoc* rationalizations to support action already taken." (*Laurel Heights Improvement Assn. v. Regents of the University of California* (1988) 47 Cal.3d 376, 394.)

As the City disclosed the surcharge testing in the MND, the court finds Petitioners' segmentation argument unavailing. The MND discloses the whole of the project and its consequences.

The court finds Petitioners have not met their burden of demonstrating the Project description failed to comply with the law. Petitioners have not identified any deficiency in the Project description. Decision-makers and the public were sufficiently advised of the Project, including the surcharge testing.

<u>Whether there is a "Fair Argument" the Project will have a Substantial Impact on the Environment:</u>

Standard of Review: Fair Argument

" 'CEQA excuses the preparation of an EIR and allows the use of a negative declaration when an initial study shows that there is no substantial evidence that the project may have a significant

effect on the environment.' [Citations.]" (*McAllister v. County of Monterey* (2007) 147 Cal.App.4th 253. 270; Pub. Resources Code, § 21080, subd. (c); Guidelines, § 15070, subd. (a).) " 'Negative declaration' means a written statement briefly describing the reasons that a proposed project will not have a significant effect on the environment and does not require the preparation of an environmental impact report." (Pub. Resource Code, § 21064; Guidelines, § 15371.)

"When a court reviews an agency's decision to certify a negative declaration, the court must determine whether substantial evidence supports a 'fair argument' that the project may have a significant effect on the environment." (*County Sanitation Dist. No. 2 v. County of Kern* (2005) 127 Cal.App.4th 1544, 1579; see Pub. Resources Code, §§ 21080, subds. (c), (d); 21151.)

"The fair argument test is routinely described as 'a low threshold requirement for the initial preparation of an EIR that reflects a preference for resolving doubts in favor of environmental review.' [Citation.]" (*Nelson, supra,* 190 Cal.App.4th at 282.) "A logical deduction from the formulation of the fair argument test is that, if substantial evidence establishes a reasonable possibility of a significant environmental impact, then the existence of contrary evidence in the administrative record is not adequate to support a decision to dispense with an EIR." (*County Sanitation Dist. No. 2 v. County of Kern, supra,* 127 Cal.App.4th at 1580; see Guidelines, § 15064, subd. (f)(1).) "Stated another way, if the . . . court perceives substantial evidence that the project might have such an impact, but the agency failed to secure preparation of the required EIR, the agency's action is to be set aside because the agency abused its discretion by failing to proceed 'in a manner required by law.' " (*Friends of "B" Street v. City of Hayward* (1980) 106 Cal.App.3d 988, 1002 [quoting Pub. Resources Code, § 21168.5].)

" 'Substantial evidence' . . . means 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).) It is not "overwhelming or overpowering evidence." (*Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 152.) "CEQA does not impose such a monumental burden . . . ." (*Ibid.*) Substantial evidence "includes fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact." (Pub. Resource Code, § 21080, subd. (e)(1); accord, Guidelines, § 15384, subd. (b).) "Argument, speculation, unsubstantiated opinion or narrative, evidence which is clearly erroneous or inaccurate, or evidence of social or economic impacts which do not contribute to or are not caused by physical impacts on the environment does not constitute substantial evidence." (Guidelines, § 15384, subd. (a); Pub. Resources Code § 21080, subd. (e)(2).)

Conflicts with Applicable Land Use Plans

Appendix G of the Guidelines sets forth the following threshold of significance:

> "Would the project: . . . Cause a significant environmental impact due to a conflict with any land use plan, policy, or regulation adopted for the purpose of avoiding or mitigating an environmental effect?"

Petitioners argue the MND fails to meaningfully account for significant inconsistencies and discrepancies between the Project and current land use plans and policies, and requested permits.

An agency's "determination that a project is consistent with the city's general plan carries a strong presumption of regularity." (*Clover Valley Found. v. City of Rocklin* (2011) 197 Cal.App.4th 200, 238.) Further, an agency's determination that a project is consistent with its land use plans will only be reversed when "a reasonable person could not have reached the same conclusion." (*No Oil, Inc. v. City of Los Angeles, supra,* 196 Cal.App.3d at 243.) "A given project need not be in perfect conformity with each and every general plan policy. [Citation.] To be consistent, a [project] must be 'compatible with' the objectives, policies, general land uses and programs specified in the general plan. [Citation.]" (*Families Unafraid to Uphold Rural etc. County v. Board of Supervisors* (1998) 62 Cal.App.4th 1332, 1336.)

In the context of a challenge to an agency's use of an MND, if substantial evidence supports a fair argument that the proposed project conflicts with the General Plan an EIR is required. (*Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 930.)

Petitioners argue the Project is inconsistent with and/or the MND *failed to analyze* the consistency of five land use plans: (1) the 1996 Los Angeles River Master Plan (LARMP), (2) the 2007 Long Beach RiverLink plan (RiverLink), (3) the 2015 Lower Los Angeles River Revitalization Plan (LLARRP), (4) the 2003 Long Beach Department of Parks, Recreation and Marine Strategic Plan (Strategic Plan), and (5) the 2015 West Long Beach Livability Implementation Plan (LIP). (AR 49:9031, 9068, 9138; 4:130.)

In 2002, the City updated the General Plan Open Space and Recreation Element to formally establish a goal to reverse a harmful trend towards industrial development. (AR 265:21802.) Program 4.2 of this general plan element requires the City to achieve a citywide ratio of eight acres of recreational open space per 1,000 residents. (Pet's' RJN, Exh. B, p. 34; AR 265:21802.)

The LARMP designates the Project site for a City proposed park, and the recent draft update designates "Wrigley Heights River Park" as a "Planned Major Project." (Pet's' RJN, Exh. A, pp. 23, 27 [1996 LARMP]; AR 65:10628, 89:17033, 17015, 49:9030-31, 9138, 9097, 161:17721.) The LLARRP also designates the Project site as an opportunity area for Wrigley Heights River Park. (AR 80:11321.) Petitioners argue the "MND does not evaluate—or even mention—the Project's inconsistency with" the LARMP.

The City argues these plans are all long-term vision plans, or opportunity studies, to help the City (and other agencies) identify potential park and open space, evaluate the feasibility of acquisition and a locate resources, if available. The City asserts the documents (plans) are

aspirational in nature and do not bind any property unless or until a public agency acquires the site. (AR 67-A:10792.) The City also contends the Project site is owned by private third parties—Artesia and the Trust—not the City.

Petitioner argues the Project is inconsistent with the RiverLink. The RiverLink "plan," however is merely conceptual:

> "It is important to note that Riverlink is a conceptual plan. The large majority of the Destinations, Gateways, Pathways, and Connections presented are simply ideas to be discussed and pursued." (AR 265:21806.)

Petitioners correctly note, however, the General Plan incorporates some of the plans identified by Petitioners undermining the City's claims the plans are merely aspirational. (265:22362 [LU-M-86]; 265:22362 [LU-M-85]; Reply RJN, Ex. G, p. 19 [LU-M-54]; 80-B:14227 [draft land use element 8 implements the LIP]; Reply RJN, Ex. G, p. 19 [LUM-53]; 43:8820 [Condition 24 ("implementation of the updated" LARMP]; 265:22362 [LU-M-84 (City's Open Space needs)].)

For example, the City's Land Use Element of the General Plan expressly notes the City has adopted and *is implementing* the LIP. (Reply RJN, Ex. G, p. 19 ["continue to implement"].) The same is true of RiverLink and the Strategic Plan. (AR 265:22362 [LU-M-85 Strategic Plan ("continue to implement"] [LU-M-86 RiverLink ["[u]pdate and implement"].)

The initial study indicates the Project would have no impact "due to a conflict with any land use plan, policy or regulation adopted for the purpose of avoiding or mitigating an environmental effect." (AR 4:60.) The initial study states:

> "Development of the Project would not conflict with applicable plans, policies, and regulations. Upon approval of the requested General Plan Amendment, Zone Change, and CUP by the City of Long Beach, the proposed land uses would conform with zoning and General Plan policies for the Project site. Therefore, no impacts would occur, and no mitigation is required." (AR 4:130.)

The MND does not discuss all relevant and applicable land use plans and policies. The MND does not, for example, discuss RiverLink or the LIP. The City's General Plan Land Use Element requires the City to:

> "Update and implement the Long Beach RiverLink Plan to create a continuous greenway of pedestrian and bike paths and linkages along the east bank of the Los Angeles River, as well as to connect to existing and future parks, open space and beaches along the western portion of the City." (AR 265:22362.)

While the City may not have sufficient funding to acquire the privately owned Project site or there may be other issues suggesting the Project site is undesirable to accomplish the City's land use policies, the MND provides *no* discussion of the issue as required by Appendix G of the

Guidelines. In fact, the MND does not appear to even reference the RiverLink plan. The same is true of other applicable plans. (See, e.g., Pet's' RJN, Ex. C [LIP], p. 45-46 [p. 46 park at item 17], Reply RJN, Ex. G, p. 19 ["continue to implement"], AR 4:34.) The City's omission deprived decision makers and the public of the information to allow complete consideration of the environmental impacts of the Project and land use plans and policies—rendering it defective as an informational document.

Petitioners also challenge the Project on the land use impacts relating to recreation and open space. (Opening Brief 14:1-15.)

The City contends it complied with CEQA by evaluating the thresholds of significance set forth in Appendix G of the Guidelines. The City found no environmental impact because the Project would not result in a population increase and therefore not generate a greater demand for parks. (AR 4:144.) The City argues Petitioners' challenge fails "to provide any stand-alone evidentiary support for their recreational impact argument" such that it lacks substantial evidence. (Opposition 16:7.) The court agrees.

Perhaps still focusing on applicable plan consistency, Petitioners fail to focus on the City's thresholds of significance in the context of recreation. Petitioners do not provide substantial evidence of a fair argument of a significant environmental effect of the Project based upon recreational impacts.

Lastly, Petitioners argue the Project conflicts with the City's General Plan land use designation. The Project requires a General Plan amendment to change the General Plan land use designation for part of the properties from Open Space to Light Industrial. (AR 4:39, 4:130, 65:10634.) Petitioners contend the MND incorrectly asserts the Project is consistent with the desired NI designation. (AR 4:130.)

In response, the City acknowledges a small portion of the Trust Property is designated Open Space. (AR 4:39, 50:9289.) The City argues, however, no development plans have been submitted for the Trust Property and the MND's reference to a General Plan amendment is therefore incorrect. (AR 4:130; OB 15:20-28.) The City explains any future development plans will need to show planning and zoning consistency. (AR 50:9289.) Thus, the City contends it need not make any analysis of a General Plan amendment as to the Trust Property.

The City's position contradicts the MND's project description. The Project description describes improvements on the Trust Property—"a single-story building with up to 77,000 square feet of building area consisting of 73,500 square-feet warehouse space and 3,500 square-feet of office space, and a proposed vacated roadway easement adjacent to the self-storage, care wash, and RV parking facility on four parcels totaling approximately 5.5 acres (i.e., McDonald Trust parcels) . . . ." (AR 1:1.) In addition, the MND consistently evaluates environmental effects to the Trust Property. (See, e.g., AR 4:66, 4:67, 4:75, 4:77-78.)

To the extent the City contends the MND is not required to evaluate a project for the Trust Property, the project description is inaccurate. Alternatively, the City's failure to evaluate a General Plan Amendment to change the General Plan land use designation from Open Space to Light Industrial for part of the Trust Property does not comply with CEQA. Finally, leaving the issue for future study is prohibited piecemealing—especially where that portion of the Project was specifically identified in the project description.

Based on the foregoing, the court finds the City failed to proceed as required by law because it did not undertake an adequate analysis of the Project's environmental impacts on land use plans and policies.

Biological Impacts

Southern Tarplant:

The MND reported the Project would impact the southern tarplant, a special status species on the Project site. (AR 4:85.) Southern tarplant is considered a California Rare Plant Rank List 1B species, which indicates that it is considered rare, threatened, or endangered within California by the California Native Plant Society (CNPS). (AR 4:86.) Approximately 830 southern tarplant individuals were located on the site. (AR 4:85 [Artesia Property].)

Petitioners claim the southern tarplant did not survive after removal for surcharge testing, and the failure to survive must be deemed a significant environmental impact. Petitioners' position, however, appears unsupported by substantial evidence. (*Pocket Protectors v. City of Sacramento, supra,* 124 Cal.App.4th at 928; AR 135:17489 [no southern tarplant reference].) In fact, California's trustee agency for fish and wildlife (AR 135:17487), the California Department of Fish and Wildlife (CDFW) opined 830 southern tarplants "would" be impacted by the Project, not that they had already been impacted.[4] (AR 135:17493 [issued after surcharge testing].) Other evidence relied upon by Petitioners appears to have no foundation and therefore does not constitute substantial evidence. (AR 265:21766 [attorney letter].)

The CDFW reported vegetated area "was removed before adequate surveys were conducted" and that plant species studies revealed on August 12, 2020 "that an on-site area having vegetation that had not been surveyed on August 7 had been cleared." (AR 265:22366-23367.) The CDFW's letter indicates it is unclear whether there were any special status species located in the area. (AR 265:22366.) The CDFW explained an impact occurred "[b]ecause vegetation removal activities took place before adequate surveys were conducted, [and] there is no longer

[4] The CDFW "provide[s], as available, the requisite biological expertise to review and comment on environmental documents and impacts arising from project activities, as those terms are used in the California Environmental Protection Act (Division 13 (commencing with Section 21000) of the Public Resources Code." (Fish & G. Code, § 1802.)

an opportunity to determine if there were special status species located in that area."[5] (AR 135:17488.) The CDFW opined the impact would be significant based on the potential for other "species that thrive in these habitats." (AR 135:17489.) The CDFW recommended the City find "[t]he vegetated area that was removed before adequate surveys were conducted . . . be identified as a significant impact." (AR 135:17489.)

The MND noted impacts from the Project on the southern tarplant "would be potentially significant." (AR 4:87.) The City's biologist agreed with the CDFW that the 850 southern tarplant individuals would be impacted by the Project. (AR 50:9520.) The City's biologist also noted there was an area within the Project site (1,500 square feet)[6] "that was cleared prior to [the City biologist's] completion of the Special Status Plant Survey . . . ." (AR 50:9520.) The City's biologist acknowledged the area "likely supported additional southern tarplant individuals . . . based on observation of remnant southern tarplant in the duff." (AR 50:9520.) The City biologist nonetheless labeled the impact "less than significant based on the analysis" contained in the MND. (AR 50:9520.)

The MND does not support the City's biologist's claim the Project's impact to southern tarplant would be less than significant. There is no dispute between experts that the Project's impact on the southern tarplant would be significant. (AR 50:9520, 135:17489.) The MND, however, finds the mitigation program (BIO-1) would sufficiently "offset potential impacts to the southern tarplant." (AR 4:89.) BIO-1, however, depends upon a survey "to determine the extent which southern tarplant occurs in the survey area." (AR 4:89.) The survey "shall be conducted . . . prior to construction activities . . . ." (AR 4:89.) BIO-1 requires avoidance where the "species is observed." (AR 4:89.)

BIO-1 provides "[m]itigation for special status plants could consist of seed or salvage prior to project construction." (AR 4:89.) BIO-1 also requires "preserving in place those southern tarplant individuals not impacted by the proposed project" and "translocate[ing] those southern tarplant individuals to be impacted to a suitable location . . . ." (AR 4:89.)

As noted earlier, the City's biologist observed "remnant southern tarplant in the duff" based on construction activities. (AR 50:9520.) BIO-1 cannot mitigate environmental impacts for southern tarplants to less than significant where southern tarplant has not been avoided and has already been destroyed in an area not surveyed before construction. Under such circumstances, BIO-1's avoidance and "seed or salvage of individuals prior to project construction," cannot mitigate environmental effects to less than significant.

[5] The City's biologist opined "duff" from the clearing supported a finding southern tarplant individuals had been removed. (AR 50:9520.)

[6] The CDFW agreed 1,500 square feet of the Project site was not surveyed before removal. (AR 135:17488.)

Based on the foregoing, the court finds substantial evidence supports a fair argument the Project (and its pre-approval surcharge testing) will have a significant impact on the southern tarplant.

Mitigation Measures:

The MND reports the Project would have a less than a significant impact on a special status species with mitigation. (AR 4:87.)

Through BIO-1, the MND proposes conducting a future survey for special status plant species noting, "If this species is observed, the population shall be avoided, if possible. If the population would be impacted, mitigation may be required . . . ." (AR 4:89.) The MND then proposes two mitigation alternatives: payment of an in lieu fee at a 1:1 mitigation ratio, or in the absence of this option, translocation that will require a translocation plan. (AR 4:89.)

Petitioners argue the mitigation measure is vague, deferred and unenforceable. (*Save the Agoura Cornell Knoll v. City of Agoura Hills* (2020) 46 Cal.App.5th 665, 692-93, 701-02 [*Agoura Hills*]) [in lieu fee program, surveys, and sensitive plant restoration conducted after project approval insufficient mitigation].)[7]

The translocation plan contains the following performance standards:

> "The performance standards are considered met when both of the following are satisfied:
>
> 1. A minimum of 830 southern tarplant individuals (the maximum number of individuals observed in the development area by LSA during previous focused surveys) are identified in the receptor site at any time following the first 2 years after completion of the seeding and/or soil relocation of the receptor site.
>
> 2. During performance monitoring in at least 2 different years, not to include the first 2 years following translocation, the total number of southern tarplant individuals observed in the receptor site in each year is at least 80 percent of the number of individuals observed in a comparable southern tarplant reference population of that same year.

[7] In fact, *Agoura Hills* concerned a challenge to a similar mitigation measure. The Court found, "While CS-BIO-1 calls for future surveys during the blooming period, there was no showing that it was infeasible for the City to perform these surveys prior to project approval so that the MND could provide an accurate assessment of the sensitive plant populations that may be impacted. (CEQA Guidelines, § 15126.4, subd. (a)(1)(B).)" (*Id.* at 692.)

> The second criterion presented above is intended to demonstrate some relative consistency with another known occurrence of the southern tarplant of essentially equivalent size in the event that climatic conditions adversely or beneficially affect the relative abundances of the southern tarplant in the region." (AR 80B:12289.)

Accordingly, the court finds the City has committed itself to the mitigation, and the mitigation measure properly identifies an objective performance standard. (See Guidelines, § 15126.4, subd. (a)(1)(B).)

As to the identified mitigation measures (in-lieu fee or translocation), the in-lieu fee option may not exist. (AR 4:89 ["[p]rovided the following mitigation opportunity exists"].) Where the in-lieu fee option does not exist, the developer would be required to translocate the tarplants to a suitable location. (AR 4:89.)

Importantly, the CDFW expressly opined, "Translocation is not adequate for [sic] mitigate impacts to southern tarplant. Therefore, the Project may result in population declines or local extirpation of the species." (AR 135:17493-17494.) The CDFW labeled translocation as "experimental in nature" and admonished translocation "should not be viewed as a primary mitigation strategy to mitigate below a significant level . . . ." (AR 135:17494.) CDFW also expressed concern over the proposed translocation area. (AR 135:17494.)

The translocation plan is dated August 2020. (AR 80-B:12274 [revised].) The CDFW provided its comments to the plan on November 17, 2020. (AR 135:17487.) The City's consultant then responded on December 7, 2020. (AR 50:9519.) The City's consultant did not respond to the CDFW's opinion translocation is not adequate mitigation and experimental; the City provided no response to the comment. (AR 50:9521.)

Accordingly, while BIO-1 "sets standards for measuring the success of the restoration plan, it does not provide for any feasible alternatives if those salvage and replanting efforts fail." (*Agoura Hills, supra,* 46 Cal.App.5th at 693.) Given the CDFW's expert opinion concerning the experimental nature of transplantation, the possibility of population declines, and transplantation as an inadequate mitigation measure (AR 135:17493-17494), there is a fair argument BIO-1 may be ineffective at offsetting the loss of southern tarplant at the Project site. (See *Agoura Hills, supra,* 46 Cal.App.5th at 693.)

As to Crotch's bumble bees, it appears the City's biologist recommended incorporating CDFW's mitigation measures 1 and 2 to ensure the potential environmental impacts to biological resources remain less than significant.[8] (AR 50:9521.) The same is true for bats (AR 50:9521)

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[8] Given that "vegetation removal and/or grading" occurred in connection with the surcharge testing, it appears the CDFW's mitigation measure 1—a survey "within one year prior to vegetation removal and/or grading" is no longer possible. (AR 135:17490.) The CDFW made its recommendation on December 7, 2020, after the late season survey by the City's biologist. (AR 135:17489.)

and burrowing owl (AR 50:9521).[9] As to nesting birds, the City's biologist recommended incorporating the CDFW's mitigation measure 1 and included additional provisions to address the CDFW's concerns. (AR 50:9522.)

Based on the foregoing, substantial evidence supports a fair argument the MND's mitigation measures (in particular BIO-1) may be inadequate to mitigate the potential impacts to special status species.

Hazardous Impacts and Water Quality Impacts

Petitioners argue there a fair argument the Project may cause significant environmental impacts relating to hazardous materials and water quality as a result of the Project's location on a former oil production site. (Opening Brief 18:18-21.) Petitioners contend the MND reveals improper deferral of mitigation measures.

Contaminated Soil

Petitioners argue the Project would exacerbate the already environmentally overburdened conditions surrounding the Project site by "bringing development and people into the area affected." (Guidelines, § 15126.2, subd. (a); *California Building Industry Assn. v. Bay Area Air Quality Management Dist.* (2015) 62 Cal.4th 369, 388.) As to soil, Petitioners assert "due to the heavy presence of contaminants, disturbance of the property in order to develop and operate the Project Site will lead to further surface and groundwater contamination in the vicinity of the Project Site." (Opening Brief 19:14-17.) Petitioners specifically argue despite twelve areas of elevated concentration of hazardous toxins in the soil (AR 4:119, 76:11066), the City made no evaluation of the potential impact from the toxins to Los Cerritos Elementary School, a public park, and multiple residences adjacent to the Project site. (Opening Brief 19:21-23.)

As noted by Petitioners, *Citizens for Responsible Equitable Environmental Development v. City of Chula Vista* (2011) 197 Cal.App.4th 327, 332 makes clear a project "may have a significant environmental impact by disturbing contaminated soils." The issue here, however, is whether Petitioners have demonstrated with substantial evidence there is a fair argument the Project may have a substantial impact on the environment based on toxins in the soil.

The parties do not dispute the physical condition of the property. The City demonstrates it fully considered the impacts of toxins in the soil. Specifically, the MND reports extensive investigation shows impacted soil and soil vapor are located away from and are unlikely to

[9] The burrowing owl raises issues similar to those of the Crotch's bumble bee. The City indicated on December 7, 2020 additional surveys should be conducted prior to construction activities "to avoid the potential take of the species if found present on site." (AR 50:9521.) The surcharge testing occurred prior to any further surveys. Additionally, there is no discussion concerning the CDFW's mitigation measure 2 for the burrowing owl—a conservation easement in perpetuity. (See AR 135:17493.)

affect sensitive receptors or require any further testing. (AR 80-A:11381-11383, 11412, 11428, 11439.)

Petitioners rely on community comment to meet their burden to show a fair argument of a substantial environmental impact. (Opening Brief 19:14.) Petitioners do not rely on any technical evaluation of the evidence.[10]

As a preliminary matter, "[a] lay person's opinion based on technical information that requires expertise does not qualify as substantial evidence." (*Newtown Preservation Society v. County of El Dorado* (2021) 65 Cal.App.5th 771, 789; *Joshua Tree Downtown Business Alliance v. County of San Bernardino* (2016) 1 Cal.App.5th 677, 690-691.) "Even cases that rely on community opposition as a basis to find substantial evidence supporting a fair argument recognize that 'a few stray comments' or 'expressions of concern by one or two people' are not enough to constitute substantial evidence." (*McCann v. City of San Diego* (2021) 70 Cal.App.5th 51, 88.)

The MND considered soils and toxins and sensitive receptors. There is no substantial evidence in the record of a significant impact upon sensitive receptors.

In response to public comments, the City explained:

> "[The Department of Toxic Substances Control] acknowledges your concern regarding the health of the school children and nearby residents. Community safety during soil movement activities is a priority to [Department of Toxic Substances Control]. Surficial soils impacted with total petroleum hydrocarbons (TPH), arsenic and lead were found at a limited number of sampling locations during comprehensive environmental investigations conducted at the Site. Those locations are generally away from the property boundary along the Los Cerritos Elementary School (school) and residential neighborhood and/or at 5 feet below ground surface or deeper, and they will be managed in accordance with the Site's Soil Management Plan. All previous investigations under [Department of Toxic Substances Control] oversight were performed in accordance with applicable state and federal requirements, and soil sampling results are presented in the 2009 Remedial Investigation Report, the 2019 Phase I Environmental Site Assessment, and the 2020 Site Assessment Plan/Report of Findings (SAP/ROF) and an Addendum to SAP/ROF. Based on the above investigations, there is no evidence for contaminated soil affecting surrounding areas." (AR 80-A:11381-11382.)

Petitioners do not challenge the City's underlying investigations (except as to the improper mitigation deferral argument below). By ignoring the basis for the City findings, Petitioners have failed to undermine the City's substantial evidence or demonstrate the existence of their own substantial evidence to support their fair argument challenge.

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[10] That an individual is an architect does not establish his/her expertise concerning soils and contaminants. (Opening Brief 19:12-13.)

Mitigation Measures

Petitioners contend the City inappropriately delegated its review of hazardous materials to the Department of Toxic Substances Control (DTSC). More specifically, Petitioners argue "the City deflected concerns by stating that approval of the Response Plan from DTSC would 'ensure the site is suitable and safe for development.' " (Opening Brief 19:27-29.) Petitioners argue "DTSC's review of a Response Plan does not obviate the need for the City to perform its own CEQA analysis of the Project's hazardous impacts, as the City is the lead agency." (Opening Brief 19:30-32.)

The court finds the City did not delegate its hazardous materials review to the DTSC. The City provided a fulsome review of hazardous materials in the MND. (AR 4:114-124.) (See Pub. Resources Code, § 21081.6, subd. (c).) The City properly relied upon and coordinated with DTSC for its analysis. That the City relied upon guidance from DTSC does not suggest the City abdicated its responsibility for environmental review.

Petitioners also suggest—without analysis—that the primary component of the Response Plan is to install a cap over the site. (AR 265:21900.) The court disagrees. Mitigation measure HAZ-1 includes response actions with various features. (AR 4:120.) HAZ-1 includes an engineered cap[11] and liner across the Project site; vapor probes and barriers to capture, treat and safely vent volatile hazardous substances; a Soil Management Plan to ensure safe handling of impacted soils; a land use covenant to restrict future activities; an Operation and Maintenance Plan requiring ongoing inspection and maintenance and regular soil vapor and groundwater sampling. (AR 4:120-121, 80-A:11384, 11387-11388, 11390-11392, 11504-11505, 50:9427.)

The City—as part of its environmental review—more specifically explained:

> "Due to the type and nature of contamination at the Site, the remedy includes an 'alternative engineered cap.' The alternative engineered cap includes an asphalt concrete pavement section with a waterproof mat (in paved parking areas) and a geosynthetic clay liner (in greenbelt areas) to provide a separation layer for protection of human health and the environment, prevent infiltration of water, and prevent releases of gases (methane/volatile organic compounds [VOCs]) to the surface. Furthermore, the Site had approximately up to 17 feet of soil cover on top of the waste material. The proposed development will use the existing on-Site soils for grading and development activities. Additional soil material may be imported to supplement the existing soil material. All imported soils or fill material will be required to be tested and be certified as "clean" per DTSC's Clean Fill Advisory requirements. A Soil Management Plan (SMP) will include guidance

[11] "The Project's engineered cap will prevent run off from entering the impacted material and groundwater below, and thus will have no impact on the existing condition." (Opposition 21:16-17; See AR 80-A:11384.)

concerning the proper monitoring, sampling, handling, transport, and disposal of potentially impacted soils if encountered during the development plan activities. Following DTSC's approval of the draft Response Plan, a Remedial Design and Implementation Plan (RDIP) will be prepared and submitted. After the Response Plan and RDIP are implemented, a Post-Response Plan Human Health Risk Evaluation (Final Risk Evaluation), based on final confirmation sampling data, will calculate the risk to the future users of the Site and community as required by DTSC. The construction of the remedial documenting the completion of the RDIP activities will be included in Remedial Action Completion Report (RACR). A Land Use Covenant will restrict any future activities that may disturb or impede the functionality of any part of the cap or mitigation system. Groundwater monitoring wells and perimeter soil vapor monitoring probes will be constructed to monitor the Site for long term protection." (AR 80-A:11387-11388; see also 4:120.)

Petitioners have not presented substantial evidence suggesting MM HAZ-1 will not reduce hazardous impacts from toxins in the soil to less than significant. "DTSC oversight confirmed that all primary contaminants of potential concern [] are known and understood and the Site can be developed in a manner that's protective of human health and environment."[12] (AR 4:120.)

Water Quality Impacts

Petitioners argue the Project may have significant water quality impacts as a result of surface water flowing into the highly contaminated Project site as well as the Los Angeles River. Petitioners note "the high levels of contamination at the Project site, and issues with the site's hydrology and substandard infrastructure" are cause for adverse impacts. (Opening Brief 20:9-10.) DTSC commented, "The existing Site does not drain into the stormwater system and in fact subject to dangerous sheet flow off the Site and into both the LA River and the larger stormwater conveyance system." (AR 265:22171.)

Petitioners argue the MND "improperly concludes" the Project will not "increase the rate or amount of surface runoff . . ." (AR 4:129), and "does not acknowledge the that heavy metals, oil, grease, trash, and other contaminants typical of urban runoff will inevitably be generated in the normal operation of the Project." (Opening Brief 20:27-29.) Petitioners argue runoff from the surcharge and cleanup operations must be considered. (Opening Brief 20:29-30.) (AR 188:18021.)

First, the MND acknowledges the Project site's pollutants and reports the Project's development phases will generate certain pollutants. The MND also discusses regulations applicable to the Project and stormwater runoff. (AR 4:124.)

[12] As Petitioners waited until their Reply Brief to raise the issue of deferred mitigation based on the design of the engineered cap, the court finds the issue waived. The City had no opportunity to provide briefing on the issue. (Compare Opening Brief 19:24-20:7 with Reply 14:6-30.)

"Potential impacts of construction activities on water quality focus on sediments, turbidity, and pollutants associated with sediments. Construction-related activities that are primarily responsible for sediment releases are related to exposing soils to potential mobilization by rainfall, runoff, and wind. These activities include grading and other earth-disturbance activities. Non-sediment related pollutants that are also of concern during construction include waste construction materials and chemicals, liquid products, and petroleum products used in building construction or the maintenance of heavy equipment. Construction impacts from implementation of the Project would be minimized through compliance with the Statewide General Construction Permit. This permit requires the development and implementation of a SWPPP [Stormwater Pollution Prevention Plan] for the proposed Project site, which must include erosion- and sediment-control BMPs [Best Management Practices] that meet or exceed measures required by the NPDES [National Pollutant Discharge Elimination System] Construction General Permit, as well as BMPs that control the other potential construction-related pollutants. A SWPPP would be developed, as required by and in compliance with, the NPDES Construction General Permit. Erosion-control BMPs are designed to prevent erosion, whereas sediment controls are designed to trap sediment once it has been mobilized.

. . .

Project operation is expected to generate the same categories of pollutants that project construction would. A conceptual low-impact development (LID) plan, prepared for the Project in accordance with the City's MS4 [Municipal Separate Storm Sewer System] Permit,[13] specifies BMPs that would be implemented during Project design and operation to minimize stormwater pollution." (AR 4:124-125.)

The City may "rely on generally applicable regulations to conclude an environmental impact will not be significant and therefore does not require mitigation." (*San Francisco Beautiful v. City and County of San Francisco* (2014) 226 Cal.App.4th 1012, 1033.) Petitioners fail to address the applicable regulations and the City's conclusion of less than significant impacts based on the applicable regulations.

Instead, Petitioners' claims related to runoff and the inadequacy of the stormwater system to capture runoff rely on public comment for support. (See AR 75:11035-52[14] [Historic Equestrian Trail Association of Southern California appeal], 265:21764 (findings in unrelated proceeding], 265:22335-22358.)

The MND addresses stormwater runoff issues:

[13] The MS4 Permit is a City permit and is therefore enforced by the City. (See AR 4:126.)
[14] Photographs contained in the appeal are undated and the location is unknown.

"The Project would include construction of a storm drainpipe from near the north corner of the Artesia Parcels to a proposed detention system, consisting of three underground storage pipes, in the west side of the Artesia parcels. That detention system would discharge to another proposed storm drainpipe connecting to a proposed biofiltration system near the southwest corner of the Artesia parcels. A second detention system, to be installed near the east side of the Artesia parcels, would discharge to a short storm drainpipe leading to a biofiltration system just east of the proposed self-storage building. The two detention systems combined would have capacity for approximately 373,350 gallons, greater than the 363,000 gallons required by the City of Long Beach. The stormwater quality design volume required by the City is the runoff from a 0.75-inch, 24-hour rain event; or from the 85th-percentile, 24-hour storm, whichever is greater (LARWQCB 2020). After a storm, stormwater would be released from the detention systems into the biofiltration units, and then into existing municipal storm drains, over approximately 72 hours. Biofiltration systems are highly effective at removing sediment (CASQA 2012). Thus, Project development would not cause erosion or siltation on- or offsite."

Thus, the MND generally addresses stormwater runoff and collection. The MND does not address Petitioners' claim the "detention basins to reduce impacts from discharge of these contaminants into the Los Angeles River and nearby properties does not address the possibility that a storm event might overwhelm existing basins." (Opening Brief 21:10-12.)

Petitioners' unaddressed claim, however, is based on public comment and lacks technical foundation. (AR 233:18170.) Nothing in the comment suggests the basis for opinion. The public comment is therefore not substantial evidence. (Guidelines, § 15384, subd. (a).)

Petitioners also contend the surcharge testing damaged the Project site's existing stormwater drainage infrastructure. (Opening Brief 21:13-14.) Petitioners contend surcharge testing has potentially damaged a drainpipe—displacement of the segments that comprise the storm drain—and two abandoned oil wells on the site. (Opening Brief 21:13-27.) The claims again are unsupported opinion and do not constitute substantial evidence. (See AR 76:11058 ["probably being crushed"], 120:17449 [architect's opinion], 120:17449-17450 [architect's opinion re: oil wells], 265:21768 [attorney's opinion].)

Petitioners' assertions the City's storm drainpipes are undersized for purposes of the Project is not supported by substantial evidence. That the City indicated in 2017 a different project (a public equestrian rest area) in a different location (south of the Project site and the 405 Freeway) could not be approved does not inform on stormwater drainage from the Project. (AR 75:11039-11044.)

The court finds Petitioners have not provided substantial evidence of a fair argument the Project will have a substantial environmental impact relating to hazardous materials or water quality.

Impacts to Water Resources and Public Utilities

Petitioners argue—based on their unsupported opinion the drainpipe running under the Project site had been damaged by surcharge testing and the inadequacy of the stormwater draining system tying into the existing storm drain—the "Project will have additional significant impacts to stormwater infrastructure." (Opening Brief 22:10.) The court has previously rejected the foundation for Petitioners' claims as lacking substantial evidence.

Petitioners also assert the Project needs further evaluation because "the Project's high-density design and surcharge action will create high west-facing slopes that form a 'funnel effect.' This funnel effect will run over mostly impermeable surfaces such as asphalt and concrete, channeling runoff more rapidly than before." (AR 188:18022.) The statement is unsupported by substantial evidence; the Federal Emergency Management Agency flood map does not establish the claim. Thus, there appears to be no foundation for the conclusion flooding risks will increase with implementation of the drainage system.

Finally, Petitioners contend removing "permeable earth [which] absorbs much of the rain and some sheet-flow to the west" will "exacerbate flooding issues by removing the permeable surface that is so crucial for proper storm drainage in the area." (Opening Brief 23:2-4.) The MND, however, expressly addresses the replacement of permeable surface and collection of surface runoff:

> "The Project would include construction of a storm drainpipe from near the north corner of the Artesia Parcels to a proposed detention system, consisting of three underground storage pipes, in the west side of the Artesia parcels. That detention system would discharge to another proposed storm drainpipe connecting to a proposed biofiltration system near the southwest corner of the Artesia parcels. A second detention system, to be installed near the east side of the Artesia parcels, would discharge to a short storm drainpipe leading to a biofiltration system just east of the proposed self-storage building. The two detention systems combined would have capacity for approximately 373,350 gallons, greater than the 363,000 gallons required by the City of Long Beach. The stormwater quality design volume required by the City is the runoff from a 0.75-inch, 24-hour rain event; or from the 85th-percentile, 24-hour storm, whichever is greater (LARWQCB 2020). After a storm, stormwater would be released from the detention systems into the biofiltration units, and then into existing municipal storm drains, over approximately 72 hours. Biofiltration systems are highly effective at removing sediment (CASQA 2012). Thus, Project development would not cause erosion or siltation on- or offsite.
>
> Development of the McDonald Trust parcels is expected to include construction of storm drainpipes and a detention system. The locations and diameters of the storm drains, and the capacity of the detention system, would be determined

during project engineering design in accordance with requirements of the City of Long Beach Department of Public Works and the City's LID Manual." (AR 4:128.)

The court finds Petitioners have not provided substantial evidence of a fair argument the Project will have a substantial environmental impact on water resources and public utilities.

Impacts to Air Quality

Petitioners contend the MND contains a faulty air quality analysis as it fails to adequately analyze "*the Project's* impact on the already pollution-burdened community and nearby sensitive receptors, and asserts without evidence that 'the majority of the populace can overcome short-term air quality health concerns.' (AR 4:72.)" (Opening Brief 23:25-27.)

The City relied on the California Emissions Estimator Model (CalEEMod) to estimate Project emissions and evaluate the Project's environmental impacts on air quality. (AR 4:70, 6:182-360.)

The MND reports the Project will not exceed the South Coast Air Quality Management District (SCAQMD) thresholds. (AR 4:77-79 [construction], 4:79-80 [operational], 4:81-82 [combined construction and operation including particulate matter], 65:10625 [construction and operations].) The MND evaluated air quality impacts under SCAQMD's CEQA Air Quality Handbook "developed [in 1993] at a time when air quality conditions were subsequently worse than they are today and developed to determine whether a project would impair the region's progress toward attainment of health protective State and National ambient air quality standards." (AR 65:10626.) The MND also evaluated the Project's impacts under Localized Significance Thresholds (LSTs) "to assess the potential for air quality impacts of proposed projects to the local communities proximate to the project site." (AR 65:10626.) The MND used the LST for the "local community" where the Project is located. (AR 65:10626.) The MND reports the Project's "air pollutant emissions occurring at the Project site were quantified based on methodologies developed by SCAQMD and were found to be below the LSTs."[15] (AR 65:10626.)

Petitioner argues the City improperly and insufficiently relied on SCAQMD's regulatory standards "to demonstrate there is no fair argument of a significant air quality impact." (Opening Brief 24:2-3 [citing *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 110-114].)

Petitioners' reliance on *Communities for a Better Environment v. California Resources Agency, supra*, 103 Cal.App.4th at 98 is misplaced—the case does not suggest the City could not rely on SCAQMD's regional and local CEQA significance thresholds. Instead, *Communities for a Better*

[15] Although LSTs are applicable to sites less than five acres (and the Project is 20 acres), LSTs may nonetheless inform on a larger project's emissions where that larger project's emission rates are less than five-acre site emission limits. (AR 4:78.)

Environment v. California Resources Agency determined a provision contained in former section 15064 of the CEQA Guidelines was invalid as it was inconsistent with controlling law allowing an agency to look beyond regulatory standards when evaluating effects on the environment. The Court explained:

> "If a proposed project has an environmental effect that complies with a subdivision (h)(3) regulatory standard, the lead agency is *directed* under subdivision (h)(1)(A) . . . to determine that the effect is not significant, regardless of whether other substantial evidence would support a fair argument that the effect may be environmentally significant. This direction relieves the agency of a duty it would have under the fair argument approach to look at evidence beyond the regulatory standard, or in contravention of the standard, in deciding whether an EIR must be prepared." (*Id.* at 112-113.)

As explained in *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1108 "[t]he invalidation of former Guidelines section 15064, subdivision (h), was not a repudiation of the use of thresholds of significance altogether." Such thresholds, however, "cannot be used to determine automatically whether a given effect will or will not be significant . . . . In each instance, notwithstanding compliance with a pertinent threshold of significance, the agency must still consider any fair argument that a certain environmental effect may be significant." (*Id.* at 1108-1109.)

Moreover, Guidelines section 15064.7, subdivision (c) and Appendix G of the Guidelines expressly permit an agency to "consider thresholds of significance previously adopted or recommended by other public agencies or recommended by experts, ..." and "significance criteria established by the applicable air quality management district or air pollution control district" to make significance determinations. (Guidelines, § 15064.7, subd. (c), Appendix G.)

There was no legal error in the City's reliance on SCAQMD's regulatory standards as a threshold of significance.

Petitioners also argue the MND contains an inadequate "analysis of emissions from Volatile Organic Compound (VOC) and Nitrogen Oxide (NOx) emissions, and health impacts from the Project's use of diesel-powered trucks and earth-moving machinery over highly contaminated soil." (Opening Brief 24:8-10.) Petitioners do not specifically explain the alleged flaw in the analysis conducted by the City with any technical critique. (See AR 265:21778-21781.)[16] (See *Joshua Tree Downtown Business Alliance v. County of San Bernardino, supra,* 1 Cal.App.5th at 690-691.)

[16] Petitioners label the analysis as "vague and too conclusory." (AR 265:21780.) Petitioners do point out there is no analysis of the future warehouse project on the Trust parcel. (AR 265: 21779 [no consiceration of diesel particulate matter impacts from operations of warehouse].)

Petitioners additionally contend the "surcharge pile" that was required to be covered, but has actually remained uncovered, demonstrates a "likelihood of fugitive dust." (Opening Brief 24:17.) DTSC previously explained the Project's dust could be controlled with watering, soil stabilizers and/or wind/dust barriers pursuant to SCAQMD rules and a DTSC approved Ambient Air Monitoring Plan. (AR 80-A:11542-43.) Petitioners assert there will not be strict compliance with the watering regimen described in the MND. (Opening Brief 24:20-21.) Petitioners' assertion concerning a complete lack of watering, however, is speculative and not supported by substantial evidence. (AR 265:21781 [generalized complaint, unidentified neighbors, unclear foundation].)

Finally, the MND acknowledges "refrigerated trucks or other trucks with internal combustion auxiliary power systems" will frequent the warehouse facility on the Trust parcel.[17] (AR 4:141.) Such trucks, according to the state's Attorney General, "emit significantly higher levels of toxic diesel particulate matter [], nitrogen oxides [], and greenhouse gas emissions . . . ." (AR 171:17823-17824.) The City does not dispute higher emissions and appears to concede the issue.[18] (AR 65:10628 ["air quality impact would remain the same in the unlikely event that all 134 daily vehicle trips would be refrigerated trucks"].) The City contends, however, refrigerated trucks' use of the facility does not impact the City's air quality analysis.

Petitioners note the City made no analysis of the "types of vehicles that will visit the warehouse beyond stating that there will be '134 daily vehicle trips' despite the planned service to trucks." (Opening Brief 24:23-25.) While the City labels Petitioners' claims "unfounded" (AR 65:10628), the court disagrees.

While the City explains its operational air quality analysis (with no exceedance of the threshold of significance) would be unchanged if the 134 daily trips were made by refrigerated trucks (AR 65:10628), there is no foundation for the statement. The trip generation report (AR 65:10626 [Psomas April 27, 2020]) contains no analysis of the types of vehicles, only the number of vehicles. The information in the MND (AR 65:10625-10627 [response to comments 65.2 and 65.4]) would not inform decision makers or the public about air quality impacts of refrigerated trucks. Thus, the City's statement "air quality impact would remain the same in the unlikely event that all 134 daily vehicle trips would be refrigerated trucks" is unsupported and the City has made no operational analysis based on the types of vehicles visiting the warehouse.

The City offers no response to Petitioners' claim concerning refrigerated trucks. (See Opposition 26:29-29:26.)

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[17] The City asserts the warehouse on the Trust parcel is not part of the Project. The MND indicates the "Project would allow for construction of a single-story building with up to 77,000 [square feet] of building area . . . ." (AR 48.) The City's position again raises concerns about an inaccurate project description.

[18] California Air Resources Board (CARB) guidance reports refrigerated trucks have higher emissions than ordinary trucks. (See City RJN, Ex. D, p. 92 [comparison of 100 trucks to 40 refrigerated trucks].)

Based on the foregoing, the court finds the City failed to proceed as required by law because it did not undertake an adequate analysis of the Project's environmental impacts on air quality.

Impacts to Transportation

Petitioners challenge the City's determination a Traffic Impact Analysis (TIA) or Transportation Impact Study (TIS) was not required for the Project—deferring the TIA until after the Project's approval. Petitioners contend such deferral is improper.

The City's threshold guidelines adopted in June 2020 provide that any project "which generates fewer than 500 daily trips is considered to have less-than-significant transportation impact." (AR 80-B:12929, 50:9413.) Thus, a traffic study is not required where the average daily trips (ADT) associated with a proposed project is less than 500. (AR 4:146, 36:8492.)

The City determined the Project would generate up to 302 ADT. (AR 4:146.) Petitioner does not appear to dispute ADTs for the Project of less than 500. (See Opening Brief 26:14.) Accordingly, under the City's applicable thresholds of significance, consideration of the Project did not require a traffic study.[19]

As for a comment by a former City Traffic Engineer made in 1993 concerning "an unacceptable level of service" near the Project site, the comment is not substantial evidence. (AR 173:17843.) The engineer made the comment in the context of an unrelated project analyzed under the formerly applicable level of service standards nearly 30 years ago in 1993 and is irrelevant particularly since the Project is presumed to have a less than significant impact under the currently applicable vehicle miles traveled standards. (AR 173:17841-42. ["I have attached a March 12, 1993, email from the then-City Traffic Engineer saying that the intersection of Wardlow Rd. and Pacific Place was **already** operating at an unacceptable level of service (E or worse) during the afternoon peak period."] See also AR 174:17843 [City Traffic Engineer Attachment], 177:17848, 4:145-148, 50:9413, 50:9445.)

Petitioners also contend substantial evidence supports a fair argument the Project may have substantial traffic impacts. Petitioners argue the "MND does not analyze the adequacy of truck access to the site or even how the trucks will access the site." (Opening Brief 26:14-15.) Petitioner supports its claims with comments from neighborhood residents detailing descriptions of existing traffic conditions and hazards. (AR 65:10633, 173:17841, 180:17851; 174:17843.)

Petitioner contends *Keep Our Mountains Quiet v. County of Santa Clara* (2015) 236 Cal.App.4th 714, 735 provides public comments can constitute substantial evidence. The court agrees. In

[19] The City explains the reference to a TIA in conditions attached to a conditional use permit was in error. The City's position is consistent with its thresholds of significance. Contrary to the stated condition, a TIA is not required. (AR 43:8824.)

Keep Our Mountains Quiet v. County of Santa Clara, both neighbor commentary and expert opinion supported a design feature hazards claim. (*Id.* at 735.) Despite the expert opinion, the Court noted and relied upon public comments that did not simply *conclude* that the roadway would be unsafe but were based on "facts about road conditions based upon their personal knowledge." (*Id.*)

To be sure, "unsubstantiated conclusions about traffic being dangerous" or mere "[c]omplaints, fears, and suspicions" do not establish a fair argument that significant environmental impacts will occur. (*Joshua Tree Downtown Business Alliance v. County of San Bernardino, supra*, 1 Cal.App.5th at 690; *Leonoff v. Monterey County Board of Supervisors* (1990) 222 Cal.App.3d 1337, 1352.)

Here, as in *Keep Our Mountains Quiet v. County of Santa Clara*, the public comments concerning traffic hazards flowing from the Project constitute substantial evidence because they are based on percipient knowledge and not mere conclusions. For example, one public commenter stated:

> "There is no analysis of southbound traffic leaving the site. Pacific Place is currently a one lane wide street from the site to south of the 405 freeway where the street then widens to two lanes. This section of street goes under the 405 and will create a very dangerous situation. Slow moving semi trucks, RV's, moving trucks and numerous cars must cross Pacific Place at the freeway entrance ramp as vehicles are picking up speed to enter the 405 and 710. As 50 foot long semi trucks and RV's exit the site during rush hour a very hazardous situation will be created." (AR 180:17851; see also AR 88:16996 ["tractor trailers and RV's, will be interacting with vehicles accessing both the 405 and 710 freeways northbound as well as conflicting with traffic exiting the 405 and heading south on Pacific Place"].)

Substantial evidence demonstrates the proximity of the Project's ingress and egress to the freeways and their entrances actually create a greater roadway hazard. (AR 9:397 [map photograph]; see also 88:16996.) That is, the Project creates a potentially dangerous turnout immediately across freeway on-ramps.

The MND ignores this potential traffic hazard and does not specifically address the comments raised. (AR 4:143-149.)

The court finds substantial evidence supports a fair argument the Project may have a significant impact on transportation safety.

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Impacts to Aesthetics

Petitioners contend substantial evidence supports a fair argument the Project may have a significant negative aesthetic impact. Petitioners argue:

> "The Project will replace open space along the LA River with asphalt, metal, bare concrete, and a 150,000 square foot, three-story industrial and commercial building, and will attract large vehicles entering and exiting the storage center. [] The Project will block access and public views of the LA River, and will negatively change the character of the nearby Los Cerritos neighborhood." (Opening Brief 27:15-19. See also 265:21788.)

The environmental checklist found at Appendix G to the Guidelines instructs lead agencies to consider the following issues to determine a project's impact on aesthetics:

> ". . . would the project:
>
> a) Have a substantial adverse effect on a scenic vista?
> b) Substantially damage scenic resources, including, but not limited to, trees, rock outcroppings, and historic buildings within a state scenic highway?
> c) In non-urbanized areas, substantially degrade the existing visual character or quality of public views of the site and its surroundings? (Public views are those that are experienced from publicly accessible vantage point). If the project is in an urbanized area, would the project conflict with applicable zoning and other regulations governing scenic quality?
> d) Create a new source of substantial light or glare which would adversely affect day or nighttime views in the area?" (CEQA Guidelines, Appendix G, § I.)

Petitioners rely on public comment from the Los Cerritos Neighborhood Association to support their fair argument position. (Opening Brief 27:30.) The neighborhood association reported to the City:

> "*We believe* the self-storage facility would be visible from our neighborhood, particularly from Los Cerritos Park. We can find no analysis of the impact of this on the neighborhood. The residents deserve to know specifically what they will view on the project site. Directly to the east of this site, the land is at a higher elevation and residents will be above the property looking directly down onto the project site. Further clarification and analysis of visual impacts, the border wall and proposed landscaping need to be provided." (AR 64:10317 [emphasis added].)

The City noted "the Project site is fenced vacant land and is not considered a scenic feature; thus, Project development would not eliminate public vistas related to conversion of the Project site to a developed use." (AR 4:66.) The City reported "[d]ue to the limited height of the proposed structure and the setback from public viewpoints, the proposed self-storage building

would not substantially detract from scenic vistas of the San Gabriel Mountains as seen from the I-405." (AR 4:66.) With further analysis, the MND concludes "Project development would not detract from scenic vistas, and no impact would occur." (AR 4:66.)

The court recognizes "[p]ersonal observations on . . . nontechnical issues [like aesthetics] can constitute substantial evidence." (*Ocean View Estates Homeowners Assn., Inc. v. Montecito Water Dist.* (2004) 116 Cal.App.4th 396, 402.) Nonetheless, the neighborhood association's comments concerning aesthetics do not establish the Project will interfere with scenic vistas.[20] (See AR 4:37-38, 9:399-400 [photographs].) While the Project will be visible to surrounding areas thereby somewhat altering the general landscape (AR 77-11080), Petitioners' evidence does not conflict with the City's conclusion mountain views—what the City labels scenic vistas—will not be impacted.

The evidence before the City reveals:

> ". . . the Property is naturally isolated and buffered from public viewpoints due to its remote location. The existing Los Angeles River bicycle and pedestrian path is nearly 200 feet to the west, separated from the Property by the vacant LAFCD property including a berm and natural landscaping. To the east, the Los Cerritos residences, elementary school and park are also nearly 200 feet away. Importantly, those uses are separated physically and visually from the site by the active Metro light rail tracks, which are on a raised berm, as well as Del Mar Ave., which is lined on both sides with tall trees and landscaping. Most of Del Mar Ave. that is adjacent to the Metro tracks also has a solid wall and a chain link fence, further separating the Property visually and physically from the neighborhood. Finally, the Property is at a lower grade than the Metro tracks and Los Cerritos area, rendering it unseen by the Los Cerritos community." (AR 80-A:11357.)

Moreover, other statements in the record consistently report the project site is "completely buffered and screened." (AR 37:8502, 38:8529.) Petitioners do not present substantial evidence otherwise.

The court recognizes that "[t]he significance of an environmental impact is . . . measured in light of the context where it occurs." (*Bowman v. City of Berkeley* (2004) 122 Cal.App.4th 572, 589.) That is, the environmental impact of a proposed project is measured by the proposed project's surroundings. (*See ibid.* [comparing housing project on "a virgin hillside" to "an area that is

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[20] There appears to be no support for Petitioners' assertion "[t]he Project will be visible from the park and elementary school, in contravention of the MND's claims." (Reply 22:27-28.) The neighborhood association's comments are unsupported. The photograph at AR 64:10249 (represented during argument to be the intersection of Terrylynn Place and Del Mar Avenue [see AR 4:35]) does not establish a view from the park and may inform on the view from the school's parking lot. (AR 4:35.)

already highly developed"]. See also *Friends of College of San Mateo Gardens v. San Mateo Community College Dist.* (2017) 11 Cal.App.5th 596, 610.)

Petitioners argue the undeveloped land and the views of the mountains beyond are a scenic public vista. During argument, the City labeled the Project site a "contaminated eyesore and nuisance" and nothing more than "an overgrown lot." The City recognizes the Project's overall visibility will be "different," but such a difference does not automatically establish an adverse impact.

The neighborhood association's *belief* of the Project's visibility from the neighborhood, school or park is not substantial evidence.[21] While the single photograph of the intersection of Terrylynn Place and Del Mar Avenue supports the claim a visible and open field will be replaced with the Project (AR 64:10249), considering the context and the undisturbed mountain views,[22] Petitioners have not met their burden of showing substantial evidence to support a fair argument the Project will result in aesthetic impacts.

Whether the City Abused its Discretion When it Granted the Variance:

The Project requires a variance from the City's height restrictions to allow for a building height of 40 feet, almost 16 feet over the 28 foot maximum allowable height for the site's current zoning and 12 feet over the maximum allowable height for the proposed commercial storage zoning. (AR 4:52, 37:8500, 43:8816, 62:10081.) Petitioners contend the City's approval of a variance for the Project from the municipal code's height restriction was procedurally and substantively flawed.

Standard of Review:

The challenge to the City's variance decision is pursuant to Code of Civil Procedure section 1094.5. The court must determine whether the City "proceeded in the manner required by law." (Code Civ. Proc., § 1094.5, subd. (b).) (See Opening Brief 28:20-21.)

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[21] Additionally, the neighborhood association's comment's vague reference to "residents" is inadequate as it fails to generally identify the number of residents' with potentially affected views. The court notes "obstruction of a few private views in a project's immediate vicinity is not generally regarded as a significant environmental impact." (*Bowman v. City of Berkeley, supra* 122 Cal.App.4th at 586.)

[22] Nothing in the administrative record suggests the Los Angeles River is visible from outside the Project site. (AR 9:399-400.)

Procedural Issues:

Petitioners argue the City failed to erect story poles for the Project as required by law for any variance application. (Pets' RJN, Ex. F p. 54 [LBMC, § 21.21.302 (B)(5)(b)].) Petitioners are correct.

There is no dispute story poles, as required under the municipal code, were not constructed at least 14 days prior to the public hearing (and as none were constructed, they could not have been left in place during the appeal). (*Ibid.*) The municipal code's requirement for story poles is considered a notice provision. (*Ibid.* ["Noticing requirements for hearings."])

Nonetheless, Petitioners identify no *prejudicial* error based on a failure to erect story poles. (See Reply 23:16-17.) (See *Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899, 919. ["Neither prejudice, substantial injury, nor the probability of a different result may be presumed on a showing of error alone."])

While Petitioners suggest the absence of story poles deprived the public and decision makers of "essential information" about the Project, the City was well aware of community concerns centered on the height variance and claims of incompatibility with the surrounding neighborhood. (AR 67-A:10812.) There is no evidence of insufficient notice to the community of the height variance application as part of the Project. (AR 37:8504 [public hearing notice requirements satisfied], 38:8531.) While story poles would have provided additional information about the height of the Project, Petitioners provide no evidence suggesting a different outcome would have resulted if the story poles had been properly erected prior to the hearing.

Substantive Issues:

Petitioners argue the City permitted a height variance for the Project without the justification for a variance required under the municipal code. Petitioners contend without a justification "there is no basis for granting a variance" for the Project. (Opening Brief 28:15.)

Under the City's municipal code, a variance may not be granted unless:

> "The unique situation causes the applicant to experience hardship that deprives the applicant of a substantial right to use of the property as other properties in the same zone are used and will not constitute a grant of special privilege inconsistent with limitations imposed on similarly zoned properties or inconsistent with the purpose of the zoning regulations." (Pets' RJN, Ex. E p. 51 [LBMC § 21.25.306 B].)

A standards variance should be related to the site itself such that compliance would result in an "undue hardship on the owner (as distinguished from a mere inconvenience or desire to make more money)." (Pets' RJN, Ex. D p. 49 [LBMC § 21.15.2890].)

Here, as noted by Petitioners, the Project exceeds the height limit of commercial storage zoning, as well as the light industrial General Plan land use designation. (AR 37:8500, 43:8816.) Petitioners argue the excessive height is "a self-imposed hardship related to the building design" desired by the developer. (Opening Brief 28:13-14.)

"The standards for granting variances and exceptions must be sufficiently broad and flexible to provide municipalities with the necessary discretion to address a wide variety of circumstances." (*Committee to Save the Hollywoodland Specific Plan v. City of Los Angeles* (2008) 161 Cal.App.4th 1168, 1183.) "[T]he special circumstances pertaining to the property must be such that the property is distinct in character from comparable nearby properties." (*Ibid.*)

The City noted the Project site:

> "is bounded to the south by the 405 freeway, to the west by the 710 freeway and Los Angeles River, and to the north and west by the Los Angeles County Metropolitan Transportation Authority (Metro) A-line light rail tracks. The site's containment within the freeways, right and light rail tracks create a natural buffer from neighboring properties in each direction. Access to the site is available only through a single point from Pacific Place, which dead-neds into Ambeco Road (a cul-de-sac) and the subject site. The natural buffering of the site, in tandem with its limited vehicular access, results in an isolated property tucked away from surrounding activity." (AR 43:8815.)

The City made findings about the Project site and its special circumstances to support its decision to grant the height variance. (See AR 22:8816. ["Due to the heavy contamination on the site, it is limited in the type of development and active uses that are appropriate, creating a hardship."] See also AR 38:8529. ["The physical uniqueness of the project site relates to its location and levels of contamination based on previous activities. . . . Due to heavy contamination on the site, it is limited in the type of development and active uses that are appropriate, creating a hardship. Although the project site is significant in its overall size, it is an irregular shape and has limited street frontage and access which poses a substantial challenge for the development of the site."]) Based on the special circumstances pertaining to the Project site, the City concluded a self-storage facility "is among the most appropriate uses to operate at the project site." (AR 43:8816.)

The court finds the City properly supported its finding and properly justified a height variance for the Project based on the Project site's unique characteristics—the limitation on the Property site's ongoing uses based on prior heavy contamination and limitations concerning ongoing use, its irregular shape, limited street frontage and limited vehicular access.

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CONCLUSION

Based on the foregoing, the petition is granted. The court orders the City to set aside its approvals for the Project. Respondents are enjoined from taking any action to construct the Project unless and until the City complies with CEQA.

IT IS SO ORDERED.

October 19, 2022

Hon. Mitchell Beckloff
Judge of the Superior Court