Superior Court of California
County of San Bernardino
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San Bernardino, CA 92415-0210

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COUNTY OF SAN BERNARDINO
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BY Monica Real-Ramos
MONICA REAL-RAMOS, DEPUTY

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN BERNARDINO, SAN BERNARDINO DISTRICT

THE INLAND OVERSIGHT COMMITTEE and CREED-21, Plaintiffs, v CITY OF CHINO, et al, Defendants	Case No.: CIVDS1501357 **RULING ON PETITION FOR WRIT OF MANDATE (CEQA)**

This matter came before the court for a hearing on a Petition for Writ of mandate CEQA by Petitioners The Inland Oversight Committee and Creed-21. The court has reviewed and considered the briefs of the parties as well as the oral arguments of counsel and issues its ruling as follows:

PROCEDURAL/FACTUAL BACKGROUND

On February 2, 2015, petitioners, The Inland Oversight Committee ("IOC") and CREED-21 (collectively, "Petitioners"), filed a Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief pursuant to the California Environmental Quality Act ("CEQA"). On July 14, 2015, Petitioners filed the operative Verified First

Amended Petition and Complaint alleging causes of action for: (1) Violation of CEQA; (2) Violation of Govt. C. § 65358; and (3) Violation of the Chino Municipal Code. Respondent is the City of Chino ("City"), and the Real Parties in Interest are RV Storage Associate, LLC and RVSA, LLC (collectively, "RVSA").

The writ challenges the development of a recreational vehicle ("RV") storage facility on the northwest corner of Edison and Mountain Avenues in the City of Chino ("Project"). The Project is located on approximately 7.19 acres of vacant land which sits under, and is traversed by, three sets of Southern California Edison ("SCE") high-voltage electrical transmission lines. [AR 28:1888.][1] This vacant land has been used as an easement by SCE, and is bordered by industrial uses to the north, vacant land and single-family homes to the northeast, vacant land to the south, and a nursery to the west. [*Id.*] The Project includes approval of a general plan amendment, specific plan amendment, special conditional use permit ("SCUP"), site approval, and certification and adoption of an environmental impact report ("EIR"). [AR 12:36-40; 13:41-52; 14:53-55; 15:56-50.]

The application for the Project was first submitted to City in July 2007. [AR 53:3167.] On August 15, 2011, City's Planning Commission recommended that the City Council approve the Project, and adopt a Mitigated Negative Declaration ("MND") in lieu of an EIR. [AR 4:7.] The Project was placed on the Council's April 3, 2012 agenda. However, prior to the meeting, City received a letter wherein it was advised that the Project would violate the California Fire Code because structures could not be built within the easement, and only non-combustible materials could be stored under electrical transmission lines. [AR 30:2221.] At the Council meeting, City's mayor stated the Project would be sent back to City's staff for reconsideration. [AR 37:2781.] The mayor also "reminded" the members of the public that if they spoke about the Project during the public comments portion of the meeting, they would not be allowed to speak on the subject when it came back before the Council. [AR 37:2781.] During the public

[1] All citations to the Administrative Record ("AR") identify the tab number and sequential page number, such that "AR 68:4303-4305" refers to tab no. 68, pages 4303 through 4305.

comments, many members of the public verbally echoed the concerns raised by the letter regarding the Fire Code violations. [AR 37:2780-2787.]

On August 21, 2012, the Project was brought back for consideration before the Council. [AR 31:2226.] Prior to the meeting, Council received a letter reiterating the concerns regarding violation of the Fire Code, and advising that approval of the Project violated CEQA because there was a fair argument that the Project would result in several significant adverse environmental impacts which necessitated the preparation of an EIR. [AR 68:4114-4121.] Council decided to continue discussion on the Project to September 4, 2012, and then again to October 16, 2012. [AR 32:2228; AR 38:2790-2791; AR 39:2797.] City was then informed that the applicant agreed to prepare an EIR. [AR 40:2804.] As a result, City postponed discussion on the Project until after completion of the EIR. [*Id.*]

On June 26, 2014, the Notice of Availability of the Draft EIR was issued. [AR 74:4472.] On December 15, 2014, City's Planning Commission recommended the City Council certify the EIR, and approve the general plan and specific plan amendments. [AR 33:2236; AR 41:2821-2822.] In making its recommendation, the Planning Commission noted it was relying on an exception in the Fire Code for the storage of combustible materials under high-voltage transmission lines, wherein an applicant could submit a storage plan to the Chino Valley Fire District for review and approval. [AR 33:2223-2235.] In addition, the Planning Commission stated that the structure to be built by the Project's applicant was designed to be removed within 24 hours' notice. [AR 33:2233.]

On January 6, 2015, the City Council certified the Project's EIR, and approved the general plan and specific plan amendments. [AR 34:2249; AR 43:2833.] During the meeting, a couple of the council members expressed concerns about the Project's compliance with the Fire Code. [AR 43:2830-2833.] Council then voted 4-1 to certify the EIR, and approve the general plan and specific plan amendments. [AR 43:2833.] On February 4, 2015, City filed a Notice of Determination. [AR 1:1.]

On April 20, 2015, City's Planning Commission approved the Project's SCUP and site approval. [AR 35:2278; AR 45:2867.] On April 28, 2015, Petitioners appealed the Planning Commission's decision to the City Council on the grounds the Project violated CEQA, the Planning and Zoning Law, and the CMC. [AR 96:4566-4569.] On June 16, 2015, the Council denied Petitioners' appeal, and approved the Project's SCUP and site approval. [AR 48:2887; AR 104:4589.] City filed another Notice of Determination on June 18, 2015. [AR 3:5.]

On January 29, 2016, Petitioners filed their opening brief, wherein they contend the Project's EIR fails to properly identify and analyze significant environmental impacts, including, but not limited to: (a) hazards and hazardous materials; (b) air quality; (c) general plan consistency; (d) traffic and transportation; (e) hydrology and water quality; (f) greenhouse gas emissions; (g) aesthetics; and (h) biological. Petitioners argue the EIR fails to adequately identify and analyze a reasonably range of alternatives, as well as mitigation measures for the Project's impact on burrowing owls. In addition, Petitioners contend there is no substantial evidence to support the findings underlying City's approval of the Project, and that City's approval qualifies as unlawful piecemealing under CEQA because City failed to consider the environmental impacts of the site approval and SCUP together with the general plan and special plan amendments.

Petitioners also argue that City violated the Government Code by failing to make a finding that the general plan is in the public interest, and that any such finding was not supported by substantial evidence. Lastly, Petitioners contend that in approving the Project, City violated Chapters 20.23.040, 20.23.050, 20.23.080, and 20.23.090 of the Chino Municipal Code ("CMC"). [FAP, ¶¶ 35-41.]

Petitioners now seek a determination that the EIR is void, that City must prepare a sufficient EIR and certify it in accordance with CEQA, and that City must comply with the Planning and Zoning Law, as well as the CMC before final approval of the Project is granted. City and RVSA jointly oppose, and Petitioners reply.

DISCUSSION

I. Statement of the Law

A. Governing Statute Under CEQA

CEQA provides two statutes governing the standard of judicial review – Public Resources Code sections 21168 and 21168.5.[2] A case is governed by Section 21168 if it seeks review of a "determination, finding or decision made as a result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in a public agency." Section 21168 provides:

> Any action or proceeding to attack, review, set aside, void or annul a determination, finding, or decision of a public agency, made as a result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in a public agency, on the grounds of noncompliance with the provisions of this division shall be in accordance with the provisions of Section 1094.5 of the Code of Civil Procedure.
>
> In any such action, the court shall not exercise its independent judgment on the evidence but shall only determine whether the act or decision is supported by substantial evidence in the light of the whole record.

(*Pub. Res. C.*, § 21168.)

When a challenge to an agency's CEQA determination is governed by Section 21168, the agency's action on the project is reviewable under Code of Civil Procedure section 1094.5.

Code of Civil Procedure section 1094.5(a) vests authority in the court to review the validity of any final administrative order or decision made as a result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in the inferior tribunal. The court's inquiry "shall extend to the questions of whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion." (*Code Civ. Proc.*, §1094.5(b); *Environmental*

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[2] It has been held that the distinction between Sections 21168 and 21168.5 is rarely significant, and in either case, the issue before the court is whether the agency abused its discretion. (*Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1374.)

Protection & Info. Ctr. v. Cal. Dept. of Forestry & Fire Protection (2008) 44 Cal.4th 459, 520-21.)

Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the evidence does not support the findings. (*Code Civ. Proc.,* §1094.5(b); *Sierra Club v. State Board of Forestry* (1994) 7 Cal.4th 1215, 1236.) If the petitioner claims that the evidence does not support the findings, then in cases where the court is authorized by law to exercise its independent judgment on the evidence, the abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence. In all other cases, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in light of the whole record. (*Code Civ. Proc.,* §1094.5, subd. (c).)

The court in its review can enter judgment either denying the writ or commanding the respondent to set aside the order/decision. However, the judgment cannot limit or control in any way the discretion legally vested in the respondent. (*Code Civ. Proc.,* §1094.5, subd. (f).)

B. Substantial Evidence – Standard of Review

"When a trial court reviews an administrative determination by writ of administrative mandate, the appropriate standard of review depends on both the type of agency rendering the decision and the nature of the right involved." (*Rodriguez v. City of Santa Cruz* (2014) 227 Cal.App.4th 1443, 1451.) "[I]f the administrative decision maker is a local agency, the substantial evidence standard of review applies only if 'the administrative decision neither involves nor substantially affects a fundamental vested right.' [Citation.]" (*Id.*)

The reviewing court is not permitted to make its own factual findings. (*Burbank-Glendale-Pasadena Airport Authority v. Hensler* (1991) 233 Cal.App.3d 577, 590.) As stated in *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, at 721-722:

> "[T]he ultimate decision of whether to approve a project, be that decision right or wrong, is a nullity if based upon an EIR that does not provide the decision-makers, and the public, with the information about the project that is required by CEQA." [Citation omitted.] The error is prejudicial "if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process." [Citation omitted.]
>
> "[T]he substantial evidence test applies to the court's review of the agency's factual determinations." [Citation omitted.] 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." (State CEQA Guidelines, § 15384, subd. (a); see also *Laurel Heights* [*Improvement Assn. v. Regents of University of California* ("*Laurel Heights I*") (1988) 47 Cal.3d 376, 393.])

Therefore, in applying the substantial evidence standard, the court must view the record "in a light most favorable to the decision of the [agency] and its factual findings must be upheld if they are supported by substantial evidence." [Citation.]' [Citation.]" (*Pollack v. State Personnel Bd.* (2001) 88 Cal.App.4th 1394, 1404; see also, *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 514.) The court does not reweigh the evidence, but rather, it indulges all presumptions and resolves all conflicts in favor of the agency's decision. (*California Youth Authority v. State Personnel Bd.* (2002) 104 Cal.App.4th 575, 584.)

It is well-settled that "'[s]ubstantial evidence' is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. [Citation.] Such evidence must be reasonable, credible, and of solid value." (*California Youth Authority, supra,* 104 Cal.App.4th at 584-585.) Under the substantial evidence test, the inquiry "*begins* and *ends* with the determination as to whether, *on the entire record*, there is substantial evidence, contradicted or uncontradicted, which will support the determination, and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court. *If such substantial evidence be found, it is of no consequence that the trial*

court believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion. [Citations omitted.]" (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874 (*italics in original*).)

In assessing whether substantial evidence exists, the court considers all evidence presented, including that which fairly detracts from the evidence supporting the Board's determination. (*California Youth Authority, supra,* 104 Cal.App.4th at 586.) However, issues regarding the failure to include relevant information in the EIR "normally will rise to the level of a failure to proceed in a manner required by law only if the analysis in the EIR is clearly inadequate or unsupported. [Citation.]" (*Barthelemy v. Chino Basin Municipal Water District* (1995) 38 Cal.App.4th 1609, 1620.) These issues present legal questions that are reviewed *de novo.* (*City of Marina v. Bd. of Trustees of California State Univ.* (2006) 39 Cal.4th 341, 355.)

II. Requests for Judicial Notice

A. Petitioners' Request

Petitioners seek judicial notice of the following documents pursuant to Evidence Code sections 452 (b) and (c): (1) Chino Municipal Code Section 20.23 – Administration; and (2) South Coast Air Quality Management District Final Localized Significance Threshold Methodology.

Pursuant to the statute, judicial notice is taken of CMC Section 20.23 because it is a citation to materials that are published, and the section is part of the administrative record in this litigation. Judicial notice is also taken of the South Coast Air Quality Management District document because it is referenced in the DEIR.

B. RVSA's Request

Pursuant to Evidence Code sections 452 and 453, Respondent RVSA seeks judicial notice of the following: "The Fact Sheet for Applying CalEEMod to Localized Significance Thresholds (the 'Guidance Document')" developed by the South Coast Air Quality Management District ("SCAQMD"). RVSA contends the Guidance Document is

an official act of the SCAQMD – a regional agency created by the California State Legislature. According to RVSA, the SCAQMD is a subdivision of the State of California, and as a result, its publications and the official acts of its Board of Directors are judicially noticeable.

However, under CCP § 1094.5(e), judicial review of a CEQA decision subject to Pub. Res. Code § 21168 is limited to the record of the agency proceedings. (*Sierra Club v. California Coastal Comm'n* (2005) 35 Cal.4th 839.) This rule is subject to two exceptions under Section 1094.5: (1) the evidence was improperly excluded at the hearing before the agency; and (2) the evidence could not, with the exercise of reasonably diligence, have been produced before the agency. Neither exception applies here. Therefore, judicial notice is denied. The document is extra-record evidence that does not fall under the exceptions set forth in CCP § 1094.5.

C. Petitioners' Reply Request

In reply, Petitioners seek judicial notice of Section 315 of the California Fire Code (2007), pursuant to Evidence Code section 452(b). As discussed above, the California Fire Code is published material, and therefore, citation to the material is sufficient.

III. Analysis

A. Exhaustion of Administrative Remedies

Petitioners contend they have exhausted their administrative remedies. According to Petitioners, the alleged grounds for non-compliance with CEQA were asserted prior to City's approval of the Project, and they objected to the EIR prior to its certification. In addition, Petitioners note they submitted a detailed comment letter to City wherein they stated their opposition to the Project. [AR 68:4114-4305.] Therefore, Petitioners contend they meet the prerequisites for maintaining this action, as set forth in the Public Resources Code. Petitioners also argue, however, they were not required to personally raise every objection to the Project in order to maintain this action, and that they may seek relief based on objections raised by other participants in the proceedings before City.

Respondents contend Petitioners failed to exhaust their administrative remedies as to the Project's mitigation measures for hazardous material impacts, the EIR's air quality analysis, City's findings under the CMC and Planning and Zoning Law regarding the general plan and specific plan amendments, and City's findings under the CMC as to the SCUP and site approval. According to Respondents, at the August 2012 public hearing on the Project's plan amendments, Petitioners' counsel submitted a 192-page letter objecting to the Project on behalf of Charlie McBride – a person who is not believed to be a member of Petitioners' organizations. [AR 68:4114-4305; AR 33:2232-2233.] Respondents argue that in the August 2012 letter, Petitioners did not even mention the SCAQMD's air quality analysis methodology at all, nor did they argue that the methodology was inappropriate. [AR 68:4114-4123.]

Moreover, Respondents note that the August 2012 letter was submitted before the completion of the Draft EIR, and therefore, it cannot fulfill the exhaustion requirement. Similarly, Respondents contend that after City's June 2014 circulation of the Draft EIR for public review, Petitioners did not submit any comments on any of the now-challenged portions of the Draft EIR or Final EIR. [AR 29:2158; AR 29:2162-2191.]

Regarding the Planning Commission hearings on the Project, Respondents contend Petitioners did not provide any written comments in response to the proposed general plan and specific plan amendments, nor did they attend the December 2014 hearing. [AR 13:41; AR 33:2230.] Nevertheless, after the Planning Commission approved the amendments and sent them to the City Council for consideration, Petitioners purportedly submitted a letter to City in January 2015 objecting to the Project. [AR 43:2828; 79:4488-4492.] However, Respondents assert that Petitioners' letter did not comment upon the Council's draft findings, which were publicly available prior to the January 2015 hearing, nor did Petitioners claim the City's findings violated the CMC or the Planning and Zoning Law. [AR 79:4492; AR 34:2249-2256.]

Similarly, Respondents contend that although City received a written objection

from Petitioners prior to the April 2015 Planning Commission hearing on the site approval and the SCUP, the letter only generally asserted that the Project "would violate the California Environmental Quality Act, the Planning and Zoning Law, the Subdivision Map Act, and [City's] ordinances and policies." [AR 92:4526; AR 36:2315-2316.] Respondents note that the letter did not provide any supporting argument or evidence, and Petitioners did not attend the hearing on the subject. [AR 36:2315.] Respondents assert that, as a result, Petitioners' subsequent appeal of the approvals was rejected by the City Council because the appeal did not raise the same issues that had been raised before the Planning Commission hearing. [AR 15:56; AR 96:4566-4569.] Specifically, the appeal asserted there was no substantial evidence to support the Planning Commission's findings, the Planning Commission had abused its discretion in finding the approvals were within the scope of the EIR, and the Planning Commission had failed to proceed in a manner prescribed by law for CEQA review. [AR 96:4566-4569.] Respondents also contend Petitioners did not exhaust their challenge to the mitigation measures set forth in the DEIR, and that Petitioners did not raise this issue during City's administrative review of the Project. [AR 29:2176-2177; AR 79:4488-4492.]

It has long been the general rule that the failure to exhaust administrative remedies is a bar to relief in a California court. (*Sierra Club v. San Joaquin Local Agency Formation Comm.* (1999) 21 Cal.4th 489, 495.) Public Resources Code section 21177 codifies the exhaustion doctrine in CEQA cases, and this statutory requirement has two aspects: (1) an action may not be brought unless the alleged grounds for non-compliance with CEQA were presented to the agency orally or in writing; and (2) the petitioner must have objected to approval of the project orally or in writing. (*Pub. Res. C.*, § 21177, subd. (a).) Petitioner bears the burden of demonstrating that it exhausted its administrative remedies. (*Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 536.)

The determination of whether the alleged grounds for a project's non-compliance with CEQA were adequately raised turns on whether the agency had the "'opportunity

to receive and respond to articulated factual issues and legal theories *before* its actions are subjected to judicial review.' [Citation.]" (*North Coast Rivers Alliance v. Marin Mun. Water Dist.* (2013) 216 Cal.App.4th 614, 623.) " 'The purposes of the [exhaustion] doctrine are not satisfied if the objections are not sufficiently specific so as to allow the Agency the opportunity to evaluate and respond to them.' [Citation.]" (*Id.*) The same standard applies in cases involving challenges to planning and permitting decisions – i.e., objections must be specific enough to give the agency an opportunity to respond. (*Id.* at p. 631.)

The grounds for CEQA noncompliance need only be raised with enough specificity that the administrative agency has a fair opportunity to consider the legal and factual questions before a petitioner raises those questions in court.[3] (*Porterville Citizens for Responsible Hillside Development v. City of Porterville* (2007) 157 Cal.App.4th 885, 909.) As set forth in *CREED v. City of San Diego*:

> "To advance the exhaustion doctrine's purpose '[t]he "exact issue" must have been presented to the administrative agency ... .' [Citation.] While '"less specificity is required to preserve an issue for appeal in an administrative proceeding than in a judicial proceeding" because, ... parties in such proceedings generally are not represented by counsel ..." [citation]' [citation], 'generalized environmental comments at public hearings,' 'relatively ... bland and general references to environmental matters' [citation], or 'isolated and unelaborated comment[s]' [citation] will not suffice. The same is true for '"[g]eneral objections to project approval ... ." [Citations.]' [Citation.] '"[T]he objections must be sufficiently specific so that the agency has the opportunity to evaluate and respond to them."' [Citation.] (*CREED v. City of San Diego* (2011) 196 Cal.App.4th 515, 527.)

Generally, public comments are submitted to challenge the analysis in an EIR. Under Section 21177, comments submitted prior to the public comment period on a draft EIR

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[3] When an objecting party has evidence the agency has not reviewed, the exhaustion doctrine requires that such additional evidence be presented to the agency for its consideration during the course of the proceedings. (*Barthelemy v. Chino Basin Mun. Water Dist.* (1995) 38 Cal.App.4th 1609, 1620.) Documentary evidence submitted by an objecting party must be accompanied by a sufficient explanation so as to inform the agency of the specific issues related to the evidence. (See, e.g., *Citizens for Responsible Equitable Envt'l Dev. v. City of San Diego* (2011) 196 Cal.App.4th 515.) Technical deficiencies and issues of procedural noncompliance not raised during the administrative process cannot later be asserted in court. (*Temecula Band of Luiseño Mission Indians v. Rancho Cal. Water Dist.* (1996) 43 Cal.App.4th 425, 434.)

do not satisfy the requirements of the statute because, if comments are submitted before that analysis is prepared, then, by definition, the comments are not directed to the adequacy of that analysis. (*Sierra Club v. City of Orange, supra,* 163 Cal.App.4th at 537.) Courts have held, however, that a petitioner does not waive any claims relating to the sufficiency of the EIR if it fails to participate in the public comment period for a draft EIR. (*Bakersfield Citizens for Local Control v. City of Bakersfield, supra,* 124 Cal.App.4th at 1199; *Galante Vineyards v. Monterey Peninsula Water Mgmt. Dist.* (1997) 60 Cal.App.4th 1109, 1120.)

Under Public Resources Code section 21177(b), only a person who objected to the project approval may maintain an action challenging a CEQA decision. (*California Aviation Council v. County of Amador* (1988) 200 Cal.App.3d 337.) Judicial review is limited to parties who have objected to project approval during the agency's administrative proceedings, but any party who has objected may assert any issues that were timely raised by any person or entity during the administrative proceedings. (*Preserve Poway v. City of Poway* (2016) 245 Cal.App.4th 560, 573-574; *Citizens for Clean Energy v. City of Woodland* (2014) 225 Cal.App.4th 173, 191; *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1199.)

Generally, an organizational petitioner must comply with the exhaustion requirement, and an organization cannot avoid this requirement by bringing the action on behalf of its members. (See, e.g., *Maintain Our Desert Env't v. Town of Apple Valley* (2004) 124 Cal.App.4th 430, 438.) However, an action may be filed on behalf of a group if the group was not organized at the time of the agency's proceedings, and one or more of its members timely objected to the project approval. (*Pub. Res. C.*, § 21177, subd. (c); *Preserve Poway v. City of Poway, supra,* 245 Cal.App.4th at 573; *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 267.) The exhaustion requirement is met if the member of the later-formed organization either directly objected during the proceedings, or supported the comments of another person. (See, *Maintain Our Desert Env't v. Town of Apple Valley, supra,* 124 Cal.App.4th at p. 438-439.)

In the current action, Petitioners' counsel, on behalf of Charlie McBride, raised several objections via a letter dated August 21, 2012, to City's proposed adoption of a Mitigated Negative Declaration ("MND") in lieu of an EIR.[4] [*See*, AR 4:7; AR 24:1253-1273; AR 68:4114-4305.] In the letter, counsel asserted there was a fair argument that there was substantial evidence the Project would result in significant environmental impacts, and raised the issue of the Project's violation of the Fire Code and the attendant impacts due to the risk of fire. [AR 68:4119-4120.] In addition, counsel noted the fire danger associated with the open storage of RVs under transmission lines [AR 68:4116], and that there was no approved plan within the meaning of the exception stated in Fire Code section 316.6.2.[5] [AR 68:4119, 4121.] In light of these concerns, City continued discussion on the Project to a future meeting, but in the interim, the applicant, RVSA, informed City that it would prepare an EIR for the Project. [AR 32:2228; 41:2809-2810.] However, these comments were submitted prior to the public comment period on the DEIR, and therefore, do not fulfill the exhaustion requirement.

McBride and/or the Petitioners did not submit any comments during the public comments period for the DEIR, which was made publicly available on June 26, 2014. [AR 74:4472-4473 (Notice of Availability of DEIR).] Instead, Petitioners did not submit any comments until January 6, 2015 – hours before the City Council meeting was held to certify the EIR and approve the project. [AR 79:4488-4492; *see also*, AR 43:2828.] Although, under CEQA, a comment period on the final EIR before project approval is optional with the lead agency, City, in this instance, noticed a public hearing on the general plan and specific plan amendments, as well as the final EIR. [*See*, AR 75:4474; AR 76:4475-4476; AR 77:4481-4482; AR 78:4487.] Moreover, the Public Hearing Notice for the January 6, 2015 City Council meeting stated that "[w]ritten comments will be accepted by the City Clerk through January 6, 2015, 5:30 p.m., or at the

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[4] McBride had also raised his concerns regarding violations of the Fire Code, as well as the general and specific plans, in a letter dated March 30, 2012. [AR 30:2221-2224.]

[5] Petitioners also subsequently referred to these objections in their January 6, 2015 letter to City, wherein they stated the Project should be denied on the grounds it would violate CEQA, as well as the other grounds provided in the August 2012 letter. [AR 79:4488.]

hearing." [AR 77:4482.] Petitioners' letter, sent by their counsel, Cory Briggs, is date-stamped January 6, 2015, at 2:04 p.m. [AR 79:4488.] Therefore, the letter was timely since it was submitted during the public comment period provided by City, and as defined by CEQA under section 21177. (See, e.g., *Center for Biological Diversity v. California Dept. of Fish and Wildlife* (2015) 62 Cal.4th 204, 237-239.)

In the January 2015 letter, Petitioners' counsel, Cory Briggs, stated he was writing the letter on behalf of Petitioners, and he also directly referenced the August 2012 letter written on behalf of Mr. McBride. [AR 79:4488.] Attached to the letter was a 4-page recitation of objections to specific portions of the EIR, including: (1) objections to the inadequacy and unenforceability of the mitigation measures generally; (2) concerns about the lack of discussion regarding the Site Approval or SCUP in the EIR; (3) violations of the Fire Code [with reference to the August 2012 letter]; (4) failure to adequately analyze the public safety risks associated with violations of the Fire Code, including the reliance on the 2004 Dillon Report [*see below*], and failure to address changes in SCE and California Public Utilities Commission ("CPUC") policies and requirements; (5) EIR does not list SCE approval of the any aspect of the Project, and nothing in EIR to indicate Project will be designed to satisfy SCE's requirements; (6) no mitigation measure requiring compliance with SCE's requirements, including no measure to ensure vehicles containing combustible materials are stored in a certain manner; and (7) lack of language regarding proposed amendment to General Plan renders CEQA analysis inadequate because there is no finite description of the Project. [AR 79:4490-4492.]

Petitioners were not alone in stating objections to the EIR. Clarion Partners, owners of property adjacent to the Project site, also presented their written objections to the DEIR via a letter dated August 11, 2014. [AR 29:2171-2177.] Among their objections, Clarion Partners referred to the inadequate and vague Project description, and the resulting failure to fully analyze the potentially significant impacts of the Project. [AR 29:2172.] Relevant to the current litigation, Clarion Partners objected to the DEIR's failure to provide sufficient information regarding the Project's design and

operational standards, the lack of information regarding the calculations for the air quality impacts, and the inadequacy of the mitigation measures pertaining to the air quality impacts. Regarding this latter issue, Clarion Partners stated in relevant part:

> GHG-1 states that certain measures will reduce potential GHG emissions, but that such measures are only applicable "to the extent feasible and to the satisfaction of the City of Chino ..." (Emphasis added.) While CEQA recognizes the concept of feasibility of mitigation measures, it does not permit mitigation measures to be ignored if they are not "satisfactory." The underlined language allows the City to ignore the measures set forth in GHG-1, in contravention of CEQA's mandate regarding implementation of mitigation measures. GHG-1 should be modified to delete the underlined language, and to the extent that any finding of insignificance was based on potentially unsatisfactory measures, the analysis should be revised. [AR 29:2176.]

In addition, Clarion Partners objected to the inadequacy of the mitigation measures for hazardous materials impacts, and stated:

> Page 4.2-11 of the DEIR sets forth requirements for the on-grade open storage of recreational vehicles under transmission lines proposed by Southern California Edison ("SCE"), and concludes that they will contribute to reducing the potential impacts of hazards to a level of insignificance. Although the DEIR discusses these measures as self-imposed by SCE, since they deal with what types of recreational vehicles can be stored and where, and what types of materials may be stored in those vehicles, they should actually be imposed as mitigation measures and/or conditions to the operation of the Proposed Project. [AR 29:2176-2177.]

Although this comment does not directly refer to any of the three hazardous materials mitigation measures stated in the DEIR, it alludes to Clarion Partners' concern that the only specific requirements set forth in the DEIR – and which are cited as contributing to the reduction of hazardous materials impacts to an insignificant level – are not presented as actual mitigation measures for the Project. While Clarion Partners did not use the phrase "deferred mitigation measures," their objection placed Respondents on notice that the only stated requirements for open storage of RVs should be imposed

upon RVSA by City as mitigation measures, rather than leaving the self-imposition of these requirements to RVSA.

Based on the above, the Court concludes Petitioners have exhausted their administrative remedies. As held in *Galante Vineyards,* "any alleged grounds for noncompliance with CEQA provisions may be raised by any person prior to the close of the public hearing on the project before the issuance of the notice of determination," and "any party may bring an action ... if it has raised an objection to the adequacy of an EIR prior to certification." (*Galante Vineyards, supra,* 60 Cal.App.4th at 1121.)

Here, although Petitioners did not present comments to the DEIR, they did present objections prior to the certification of the final EIR. Between their objections, and those stated by Clarion Partners, City was fairly apprised of specific concerns about the inadequacy of the EIR's analysis of the hazardous materials impacts and the air quality impacts, as well as the inadequacy of the mitigation measures for same. In addition, the objections also placed City on notice that Petitioners had specific concerns regarding the inadequate Project description due to the lack of information regarding the site approval, the SCUP, and the proposed amendments to the general plan. These objections sufficiently meet the specificity element of the exhaustion requirement as to all of the issues currently raised by Petitioners in this writ petition.

B. Analysis of Hazardous Materials Impact

Petitioners argue that the EIR fails to adequately analyze the Project's hazardous materials impacts on the environment, and that the EIR's conclusions in this regard are not supported by substantial evidence. [AR 68:4114-4123 (issue raised at administrative level).] Petitioners point to the EIR's conclusion that "potential on-site conditions involving hazardous impacts of the proposed project will be reduced to less than significant levels," and contend it is not supported by substantial evidence, in part because it is based upon a 2004 report by Dillon Consulting Engineers ("Dillon Report") [AR 28:1923; AR 28:2142-2149; AR 79:4492], which was drafted before the most recent updates in information regarding fire hazards and the storage of materials under high-voltage transmission lines.

According to Petitioners, in 2007 – three years after the Dillon Report – SCE decided to reverse a policy allowing structures on property beneath transmission lines. [AR 68:4303.] Petitioners contend SCE changed this policy after several California firefighters were killed while battling fires under high-voltage transmission lines, and fire officials became "increasingly outspoken about the safety of allowing structures on the wide rights of way that in the past [had] been left empty for safety reasons or used for farm fields, horse stables, and plant nurseries." [AR 68:4303.] In addition, Petitioners note that in January 2012, the CPUC "established new rules to reduce fire hazards associated with overhead power lines" after dozens of wildfires burned 780 square miles of land in Southern California, which resulted in the deaths of 17 people and the destruction of thousands of homes and other structures. [AR 68:4300; AR 79:4492.] Allegedly, some of the worst fires were ignited by power lines. [AR 68:4300.] Petitioners contend that due to the staleness of the Dillon Report, and its lack of current information regarding the Fire Code prohibitions against the storage of flammable and combustible materials under high-voltage transmission lines, the EIR's conclusion that the Project will have a less-than-significant hazardous materials impact is not supported by substantial evidence.

Respondents argue that Petitioners have failed to demonstrate the Dillon Report is "stale," or that City lacked substantial evidence to support its findings. According to Respondents, the Dillon Report was prepared at the request of SCE to examine the "practical considerations which may be associated with [RV storage beneath high-voltage transmission lines] and the hazards of fighting fires involving them." [AR 28:2145.] Respondents contend the Dillon Report concluded the proposed RV storage arrangements were adequate and sufficient to provide reasonable safeguards to public health and safety [AR 28:2149], and the DEIR simply summarized the analysis and conclusions set forth in the Dillon Report. [AR 28:1923-1924.]

Respondents further note the EIR explained that the CPUC granted public utilities, such as SCE, permitting authority for use and occupancy on their property. [AR 28:1923; 49:2889-2890.] According to Respondents, the CPUC requires

compliance with the National Electric Safety Code's mandates for vertical clearances for transmission lines, and SCE requires even greater clearances on their properties. [AR 28:1927, 2148.] In addition, Respondents contend that SCE policy sets forth certain requirements regarding RV storage under their transmission lines. [AR 28:1927; 29:2184.] Respondents assert that based on this substantial evidence, the DEIR concluded there were no significant public safety or health hazards associated with the Project. [AR 29:1924.]

Regarding Petitioners' assertion, Respondents argue that Petitioners only cite to "non-expert news articles," and misconstrue the content of the articles. According to Respondents, Petitioners' citation to the 2007 Los Angeles Times article is inadequate because it does not support Petitioners' assertion that SCE changed policies relevant to the open storage of RV vehicles. Respondents note the article refers to changes in SCE's policies regarding the placement of permanent buildings and structures under the transmission lines. [*See*, AR 68:4303.] As a result, Respondents contend the news article relied upon by Petitioners does not call into question the evidence, analysis, or conclusions set forth in the DEIR. Similarly, Respondents assert that Petitioners' citation to a different news article regarding the CPUC's establishment of new rules is inapposite because the change in rules pertained to "aerial communication facilities located in close proximity to power lines" – not to open storage of RVs under transmission lines. [AR 68:4300.]

In reply, Petitioners contend that, although the Project primarily pertains to outdoor RV storage, it only includes construction of a leasing office. [AR 28:8122.] Moreover, Petitioners cite to a concern raised by a member of the City Council, who pondered the difficulty in quickly moving more than 300 RVs off the site if a fire emergency arose. [AR 43:2830-2831.] Petitioners further contend that the Project's purported compliance with SCE's proposed requirements does not equate to City complying with its duty under CEQA to disclose the environmental impacts of the Project. Once again, Petitioners reiterate that the DEIR does nothing more than parrot the findings in the 2004 Dillon Report – findings that were made several years before

SCE reversed its policy of allowing structures to be built on transmission line easements, and before CPUC established regulations regarding development under transmission lines. [AR 28:1924; 28:2149; 68:4300-4303.]

As noted above, the hazardous materials impact analysis in the DEIR is based, in part, on the 2004 Dillon Report, which was prepared for SCE. [AR 28:1923-1924, 2142-2149.] The Dillon Report was commissioned to examine the "open storage of recreational vehicles beneath high voltage electrical transmission lines," as well as "the practical considerations which may be associated with such storage and the hazards of fighting fires involving them." [AR 28:2145.]

In the "Significant Impacts" section of the analysis of hazards and hazardous materials, the DEIR acknowledges that "[p]otentially hazardous materials such as gasoline and diesel fuels and other petroleum products would be present within the stored RVs...," as well as "other household hazardous products such as solvents and cleaning products ...." But it concludes that since "[t]hese hazardous materials are expected only to be stored and transported" to and from the Project site, and there will be no "[m]anufacturing and other chemical processing" as part of the RV storage operations, then "impacts associated with environmental and health hazards related to an accidental release of hazardous materials are less than significant." [AR 28:1922.]

However, despite this initial finding, the DEIR then acknowledges that "the siting of RVs beneath high voltage electrical lines creates three potential safety concerns," and identifies them as: (1) the integrity of the electrical network; (2) emergency responder safety; and (3) the safety of stored vehicles, employees, and vicinity population. [AR 28:1923.] In citing to the Dillon Report in addressing these concerns, the DEIR first notes the Dillon Report was written after "an extensive review of literature from: the Code of Federal Regulations (CFR); the California Vehicle Code; the California Code of Regulations (CCR); Los Angeles County ordinances; National Fire Protection Association (NFPA) codes, standards and guidelines; Electric Power Research Institute (EPRI) publications; Edison Electric Institute (EEI) publications; and Institute of Electrical and Electronic Engineers (EEE) standards and guides." [AR 28:1923, 2145-

2146.] However, the Dillon Report determined there were no relevant federal, state, or local codes or policies which governed the on-grade open storage of recreational vehicles beneath high-voltage transmission lines.[6] [AR 28:1923.]

The Dillon Report also discussed certain situations which could occur under the transmission lines. [AR 28:2147-2148.] In an extensive summary of the findings in the Dillon Report, the DEIR provides, in relevant part:

> ...when a voltage is high enough and the insulating value between the line carrying such voltage and a grounded object is low enough, arcing will occur. An additional concern is structural failure of the overhead lines caused by wind, seismic activity, or deliberate action. This is in part resolved by compliance with the [National Electric Safety Code] and its requirements for the equipment of ground fault sensing devices on overhead transmission lines. These requirements address not only wind and seismic forces, but also heat and other factors that can result in line sag. The maximum distance a transmission line can drop before being de-energized is less than 10 inches.
>
> Flames from a significant fire could also affect overhead conductors. Based on the maximum vehicle size that would be stored at the site, the [Dillon Report] determined that it is not reasonable to have a fire greater than 5 megawatts in size for metal-clad motor home or 17 megawatts for fiber-reinforced plastic hulled boats or similarly clad motor homes. The larger of these two fires would have a flame height of less than 27 feet, which would mean the top of the flame would not extend above the lowest point of the conductor above ground (35 feet). With the restrictions identified later, the flames would always stay well below the lowest sag point of the lowest conductor.
>
> [AR 28:1923-1924.]

The DEIR further noted that the Dillon Report also determined "that flames from an RV that has caught on fire would reach no more than 27 feet height [*sic*], which means the top of the flame would not reach the height of the transmission lines (35 feet above ground)."[7] [AR 28:1924.]

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[6] The DEIR did note that the CPUC had granted public utilities, such as Southern California Edison, the authority to issue "permits for use and occupancy on, over, or under any portion of the operative property of said utilities." [AR 28:1923; CPUC General Order No. 69.]

[7] The Dillon Report considered Southern California Edison's proposed requirements for the on-grade open storage of RVs under transmission lines, as follows: "(A) Only vehicles meeting the length, width and height restrictions set

Accordingly, the DEIR concluded:

> Based on the height of the transmission lines, the built in ground fault sensing devices equipped on the transmission lines, the requirements contained in the [National Electric Safety Code], and the self-imposed storage requirements of [Southern California Edison], the storage of recreational vehicles under the high-power transmission lines would not affect the integrity of [Southern California Edison]'s electrical system, would not create an electrical hazard to emergency personnel responding to fires on site and below the overhead lines, and would not create an electrical or fire hazard to customers, employees, or individuals in the immediate project vicinity. [AR 28:1924.]

Based on these findings in the Dillon Report, there was enough relevant evidence to support City's conclusion that, with the implementation of certain mitigation measures, the hazardous materials impact of the Project would be reduced to less-than-significant levels. [AR 28:1925.]

In support of their assertion that the Dillon Report is "stale," Petitioners only point to a 2007 Los Angeles Times article attached to the letter they submitted in response to the proposed Mitigated Negative Declaration. [*See*, AR 68:4303-4305.] Petitioners contend it demonstrates that SCE changed their policy regarding open storage of vehicles after the Dillon Report was issued, and thus, the information in the Dillon Report is outdated and should not have been relied upon in the DEIR.

However, this article is not sufficient to establish that SCE changed its policies, or that any such changes would have applied to the Project. Indeed, the article, dated November 18, 2007, only states that SCE was cancelling its program which allowed commercial buildings under high-voltage transmission lines. Notably, the article also states that it was not clear when the program was cancelled, and notes that SCE had filed an application with CPUC just a few days earlier to lease several acres under

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forth in the California Highway Vehicle Code will be permitted to be stored; (B) All vehicles will be stored in a fully mobile condition; (C) The interiors of the vehicles will not be used for any supplemental storage; (D) Vehicles fully enclosed by metal and glass will be spaced no closer than 40" from each other in a chevron pattern; (E) Vehicle having combustible exteriors such as fiber-reinforced plastic or wood will be spaced no closer than 72" from each other or will have a noncombustible radiation shield placed between them; (F) Vehicles fully enclosed by metal and glass will not be placed closer than 72" to vehicles having combustible exteriors." [AR 28:2148-2149.]

transmission lines in Chino to a storage firm. [AR 68:4303.] Petitioners do not provide any other evidence of changes in the SCE policy, or that any purported changes would be "grandfathered" in to apply to the Project.

Regarding the California Fire Code section cited by Petitioners, it provides:

> Outdoor storage within the utility easement underneath high-voltage transmission lines shall be limited to noncombustible material. Storage of hazardous materials, including, but not limited to, flammable and combustible liquids is prohibited.
> Exception: Combustible storage, including vehicles and fuel storage for backup power equipment serving public utility equipment, is allowed, provided that a plan indicating the storage configuration is submitted and approved.
>
> (Cal. Code Regs., tit. 24, § 316.6.2.)

No legislative history is provided, and the parties do not cite to any cases which cite to this code section.

As discussed above, Petitioners contend the storage of "up to 313 RVs" equates to the storage of "significant amounts of both combustible and flammable liquids" under the transmission lines, and this is "strictly prohibited" by the Fire Code. [Pet. Op. Brief, 10:10-12.] However, Section 316.6.2 clearly sets forth an exception for "combustible storage, including vehicles ...." (Cal. Code Regs., tit. 24, § 316.6.2.)

In their August 12, 2012 letter to the City Council, Petitioners argued that the exception did not apply to the Project because it does not allow for the storage of "flammable materials" under the transmission lines – only "combustible storage." [AR 68:4120-4121.] In addition, Petitioners asserted there was no approved "plan" for the Project within the meaning of the exception. [AR 68:4121.] According to Petitioners, RVs contain both combustible and flammable liquids in the form of gasoline or diesel fuel, and motor oil. Petitioners assert diesel fuel and motor oil are combustible liquids, whereas gasoline is a flammable liquid, and therefore does not fall under the exception to Section 316.6.2. [8] [AR 68:4120, 4287-4299.]

[8] Under the Fire Code, a "combustible liquid" is defined as: "A liquid having a closed cup flash point at or above 100°F (38°C). Combustible liquids shall be subdivided as follows: **Class II.** Liquids having a closed cup flash point at or above 100°F (38°C) and below 140 °F (60°C). **Class IIIA.** Liquids having a closed cup flash point at or above 140°F

However, the documents relied upon by Petitioners in making these assertions cannot be viewed as supporting "evidence". Indeed, in their Opening Brief, Petitioners' citations to the administrative record direct the Court to: (1) an article published on the website NewRVer.com; (2) an article written by a maritime safety program analyst with the U.S. Coast Guard; (3) a document promulgated by the Ohio Environmental Protection Agency; and (4) a data sheet issued by CITGO Petroleum Corporation. [*See*, AR 68:4284-4299.] None of this information addresses Petitioners' contention that certain liquids contained in a recreational vehicle, such as fuel and motor oil, have certain "flash points" which would classify them as either combustible or flammable materials. Therefore, this information is disregarded.

It is noted that Respondents' contention regarding the Fire Code exception is not entirely accurate either. According to Respondents, the exception allows for "fuel storage," as long as the applicant submits a storage configuration plan. However, as set forth in Section 316.6.2, the exception does not contemplate unqualified "fuel storage," but rather, fuel storage "for backup power equipment serving public utility equipment." (Cal. Code Regs., tit. 24, § 316.6.2.) As a result, the plain meaning of the exception does not include fuel storage related to recreational vehicles.[9]

(60°C) and below 200°F (93°C). **Class IIIB.** Liquids having closed cup flash points at or above 200°F (93°C). The category of combustible liquids does not include compressed gases or cryogenic fluids." (Cal. Code Regs., tit. 24, § 202.)

"Noncombustible" means "a material which, in the form in which it is used, is either one of the following: 1. Material of which no part will ignite and burn when subjected to fire. Any material passing ASTM E 136 shall be considered noncombustible. 2. Material having a structural base of noncombustible material as defined in Item 1 above, with a surfacing material not over 1/8 inch (3.2 mm) think which has a flame-spread index of 50 or less. 'Noncombustible' does not apply to surface finish materials. Material required to be noncombustible for reduced clearances to flues, heating appliances or other sources of high temperature shall refer to material conforming to Item 1. No material shall be classed as noncombustible which is subject to increase in combustibility or flame-spread index, beyond the limits herein established, through the effects of age, moisture or other atmospheric condition." (Cal. Code Regs., tit. 24, § 202.)

"Flammable liquid" is defined as, "A liquid having a closed cup flash point below 100°F (38°C). Flammable liquids are further categorized into a group known as Class I liquids. The Class I category is subdivided as follows: **Class IA.** Liquids having a flash point below 73°F (23°C) and having a boiling point below 100°F (38°C). **Class IB.** Liquids having a flash point below 73°F (23°C) and having a boiling point at or above 100°F (38°C). **Class IC.** Liquids having a flash point at or above 73°F (23°C) and below 100°F (38°C). The category of flammable liquids does not include compressed gasses or cryogenic fluids." (Cal. Code Regs., tit. 24, § 202.)

[9] The "key to statutory interpretation is applying the rules of statutory construction in their proper sequence...as follows: 'we first look to the plain meaning of the statutory language, then to its legislative history and finally to the reasonableness of a proposed construction.'" (*MacIsaac v. Waste Management Collection & Recycling, Inc.* (2005) 134 Cal.App.4th 1076, 1082, quoting *Riverview Fire Protection Dist. v. Workers' Comp. Appeals Bd.* (1994) 23 Cal.App.4th 1120, 1126.) The first step looks to the words of the statute, and if the interpretive issue is not resolved, then the next step is to look to secondary rules of interpretation, "such as maxims of construction, 'which serve as aids in the sense that they express familiar insights about conventional language usage.'" (*Alejo v. Torlakson* (2013)

Yet, despite Respondents' misinterpretation of this portion of Section 316.6.2, it does appear that the exception allows for the storage of combustible materials, including vehicles, as long as a storage configuration plan is submitted and approved by the Chino Valley Fire District, which has already agreed the Project falls within the exception under Section 316.6.2.[10] [AR 41:2818-2819.] Petitioners have not demonstrated that such a plan cannot be approved, or that a possible plan was not considered by City in conducting its hazardous materials impacts analysis.

Accordingly, the Court denies the writ petition as to the adequacy of the hazardous materials impacts analysis. Petitioners have not met their burden of demonstrating that City's findings are not supported by substantial evidence, or that the underlying Dillon Report was fatally flawed.

Mitigation Measures of Hazardous Materials Impacts

Petitioners contend the EIR fails to identify enforceable mitigation measures to address the Project's potentially significant hazardous materials impacts. According to Petitioners, although the EIR lists "proposed" requirements for RV storage, there is nothing stating these proposals will become enforceable requirements. [AR 28:1924; 13:49.] Moreover, Petitioners contend the "proposals" only address the issue of combustible materials, and ignore the issue of flammable liquids. Petitioners argue these "proposals" are not part of City's mitigation monitoring program.

Nevertheless, even as to the mitigation measures approved by City, Petitioners argue there is no substantial evidence demonstrating these measures will actually mitigate the Project's hazardous materials impacts to an insignificant level. In support, Petitioners point to mitigation measure HAZ-1, which purportedly states that the Project's applicant must submit to the Chino Valley Fire District, for review and approval, a storage plan that is in compliance with the Fire Code. Petitioners argue, however, that future submission of a storage plan is in violation of CEQA's requirement that "[f]ormulation of mitigation measures should not be deferred until some future

212 Cal.App.4th 768, 786-787.) The third step is to apply "reason, practicality, and common sense to the language at hand." (*Id.*)

[10] SCE has also stated its approval of this use of the land under the transmission lines. [AR 41:2817.]

time." (14 Cal. Code Regs., § 15126.4(a)(1)(B).) As a result, Petitioners assert that the public was denied the ability to evaluate the effectiveness of the mitigation measure because it had not been formulated at the time of the Project's approval by City. In addition, Petitioners note the mitigation measure does not include any performance metric to ensure the hazardous materials impact will be reduced to an insignificant level.

Petitioners argue the EIR improperly concludes that the storage plan will comply with the Fire Code [AR 28:1925], and that this conclusion is based on a purported exception in the Fire Code which allows for the storage of combustible material under transmission lines. (*See*, Cal. Code Regs., tit. 24, § 316.6.2.) According to Petitioners, there is no "approved" plan within the meaning of the exception, and therefore, the exception does not apply in this case. In addition, Petitioners argue that the exception does not allow for the storage of flammable liquids under these same transmission lines, and since recreational vehicles contain flammable liquids, the exception does not apply. Again, Petitioner asserts there is no substantial evidence demonstrating that the hazardous materials impacts will be mitigated to an insignificant level.

Respondents note, however, that despite the DEIR's conclusion, certain mitigation measures were recommended in the EIR to "ensure the project is in compliance with the California Fire Code and the Chino Valley Fire District's storage requirements." [AR 28:1924-1925 (Mitigation Measures HAZ-1 through HAZ-3).] Respondents contend the implementation of these mitigation measures reduces the Project's hazard impacts to a less-than-significant level, and therefore, City has met the applicable CEQA requirements. [AR 28:1925.]

In addition, Respondents contend that, contrary to Petitioners' assertions, the Project will be in compliance with the Fire Code. Respondents point to the explicit exception in Section 316.6.2 of the Fire Code, wherein vehicle and fuel storage is allowed under the transmission lines if a storage plan is submitted to, and approved by, the proper agency. According to Respondents, the Chino Valley Fire District has agreed the Project falls within the exception to Section 316.6.2, and has stated it will only

approve the Project's storage plan if it complies with the Fire Code. [AR 41:2818-2189; 43:2828.] Respondents also note that SCE agrees the Project falls within the stated exception to Section 316.6.2. [AR 41:2817.]

Regarding the mitigation measures, Respondents contend that CEQA permits agencies to postpone the formulation of mitigation measures if the mitigation measure establishes a performance standard, and commits to meeting said standard. According to Respondents, compliance with the Fire Code is an adequate performance standard under CEQA, and Mitigation Measure HAZ-1 in the EIR does not impermissibly defer mitigation because it commits the Project to meeting the stated performance standard – namely, compliance with Section 316 of the Fire Code. [AR 13:49; 28:1925.] Respondents argue that the EIR adequately disclosed and analyzed the potential hazard impacts of the Project, and set forth Mitigation Measure HAZ-1 in the DEIR for public comment. Respondents contend HAZ-1 is not vague, but rather, is specific in ensuring the Project will comply with the Fire Code. In support, Respondents cite to *Oakland Heritage Alliance v. City of Oakland* (2011) 195 Cal.App.4th 884, *Clover Valley Foundation v. City of Rocklin* (2011) 197 Cal.App.4th 200, *Center for Biological Diversity v. Dept. of Fish and Wildlife* (2015) 234 Cal.App.4th 214, and *Coastal Hills Rural Preservation v. County of Sonoma* (2016) 2 Cal.App.5th 1234.

As noted above, the DEIR discussed, in detail, the scenario of a significant fire under the transmissions lines, and the probable outcomes based on the projected height of the flames, the presence of ground fault sensing devices, the de-energizing of the transmission lines under certain conditions, and SCE's storage requirements. Based on these findings, the DEIR concluded the storage of RVs under the transmission lines would not create an electrical or fire hazard to individuals within the immediate vicinity of the Project. [AR 28:1924.] Yet, despite this conclusion – which mirrors the conclusion stated in the Dillon Report – the DEIR went on to set forth the following three mitigation measures to ensure the Project was in compliance with the Fire Code, as well as Chino Valley Fire District's storage requirements:

> Mitigation Measure 4.2.6.1A – "the applicant shall submit to the Chino Valley Fire District a storage plan for review and approval that is in compliance with the California Fire Code, Chapter 3, Section 316";
> Mitigation Measure 4.2.6.1B – "[a]dditional fuel storage, other than the fuel in the vehicle's gas tank, shall be prohibited within vehicles stored on site"; and
> Mitigation Measure 4.2.6.1C – "[n]o fueling facilities shall be allowed as an ancillary use on the project site." [AR 28:1924-1925.]

The DEIR concluded that with these mitigation measures in place, the hazard impacts of the Project would be reduced to less than significant levels. [AR 28:1925.]

In the EIR, these same three mitigation measures were set forth, as HAZ-1, HAZ-2, and HAZ-3, respectively. [AR 29:2204.] The EIR provides that City's Community Development Director will be responsible for monitoring these mitigation measures, and these measures are to be verified prior to the issuance of any building permits by City. [AR 29:2204.] Regarding Mitigation Measure HAZ-1, the EIR provides that verification will be demonstrated by evidence that Chino Valley Fire District approved the applicant's storage plan – a plan that is in compliance with Section 316 of the Fire Code. [AR 29:2204.] No other performance standard is provided with regard to this mitigation measure. As for Mitigation Measures HAZ-2 and HAZ-3, the EIR merely states that compliance will be verified by "Plan Check." [AR 29:2204.]

Regarding the primary mitigation measure – HAZ-1 – Petitioners are correct that it fails to adequately mitigate the Project's hazardous materials impact. It is well-settled that lead agencies should avoid vague, incomplete, or untested mitigation measures, and such measure must not be remote and speculative. (*Federation of Hillside & Canyon Ass'ns v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1260.) Mitigation measures identified in an EIR may be found legally inadequate "if '[t]he success or failure of mitigation efforts ... may largely depend upon management plans that have not yet been formulated, and have not been subject to analysis and review within the EIR.' [Citation.]" (*Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 281.) A mitigation plan is sufficient if it identifies methods that will be used to mitigate

the impact and sets out standards that the agency commits to meet. (See, e.g., *North Coast Rivers Alliance v. Marin Mun. Water Dist., supra,* 216 Cal.App.4th at 647.)

Under the CEQA Guidelines, mitigation measures should describe the actions that will be taken to reduce or avoid an impact, and it is improper to defer formulation of a mitigation measure to the future. (14 Cal. Code Regs., § 15126.4(a)(1)(B).) However, courts and the Guidelines recognize certain exceptions to this rule. (See, e.g., *POET, LLC v. State Air Resources Board* (2013) 218 Cal.App.4th 681, 735.) For instance, at the time of project approval, an agency may defer committing to a specific mitigation measure if, in addition to demonstrating some need for the deferral, the agency commits itself to mitigation, and the EIR describes possible mitigation measures that would meet specific performance criteria contained in the report. (*Sacramento Old City Ass'n v. City Council* (1991) 229 Cal.App.3d 1011, 1027-1029 [mitigation plan upheld when court reasoned that when it is known mitigation is feasible, but it is impractical to devise specific measures during planning process, agency can commit itself to eventually devising measures that will satisfy specific performance standards articulated at time of project approval].)

In *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, the appellate court added another requirement for the deferred formulation of mitigation measures, and held:

> "Deferral of the specifics of mitigation is permissible where the local entity commits itself to mitigation and lists the alternatives to be considered, analyzed and possibly incorporated in the mitigation plan. [Citation.] On the other hand, an agency goes too far when it simply requires a project applicant to obtain a ... report and then comply with any recommendations that may be made in the report. [Citation.]" [Citation.] If mitigation is feasible but impractical at the time of a general plan or zoning amendment, it is sufficient to articulate specific performance criteria and make further approvals contingent on finding a way to meeting them. [Citation.] (*Endangered Habitats, supra,* 131 Cal.App.4th at 793.)

In *Endangered Habitats*, the court found there was no improperly deferred mitigation where the EIR included several mitigation measures that required the developer to conduct studies and develop plans for regulating the fuel used during construction, tree restoration, and water runoff, subject to specified criteria and the approval of appropriate local agencies. (*Ibid.*)

Coastal Hills Rural Preservation v. County of Sonoma followed the reasoning in *Endangered Habitats League*. In *Coastal Hills*, the court examined whether the agency improperly deferred study of fire impacts until after adoption of the subsequent mitigated negative declaration. One of the conditions of the MND required the applicant to coordinate with the county fire marshal and the fire protection district to review the previously approved and existing onsite firefighting infrastructure for the challenged structures, and "to install any additional onsite infrastructure deemed appropriate by the [county fire marshal]." (*Coastal Hills Rural Preservation v. County of Sonoma, supra,* 2 Cal.App.5th at 1258.) The court concluded the mitigation measure was proper because it required the applicant to comply with all fire-related conditions, and did not defer the implementation of any of the requirements. Instead, the court found that the mitigation measure granted the agency the right to impose new, stricter requirements if such requirements were deemed necessary, without first having to initiate an enforcement action. (*Id.* at p. 1259.)

A mitigation plan is sufficient if ample information is provided regarding the standards that will be applied, the techniques used, and the oversight provided by the agency in determining that the impact will be mitigated. (*Citizens for a Sustainable Treasure Island v. City & County of San Francisco* (2014) 227 Cal.App.4th 1036, 1059; *Friends of Oroville v. City of Oroville* (2013) 219 Cal.App.4th 832, 838.) Although "loose or open-ended criteria" is impermissible, a requirement that mitigation be developed based on the standards used by regulatory agencies can be sufficient to ensure that potential impacts will be adequately mitigated. (*Citizens for a Sustainable Treasure Island, supra,* 227 Cal.App.4th at 1059-1060.)

Here, in the current litigation, the so-called mitigation measure set forth as HAZ-1 fails to identify any criteria or specific performance standard City will use to determine that the hazardous materials impacts will be mitigated. As stated above, HAZ-1 merely states that RVSA must submit to the Chino Valley Fire District "a storage plan for review and approval that is in compliance with the California Fire Code, Chapter 3, Section 316." However, as also noted above, regarding outdoor storage within a utility easement, Section 316.6.2 of the Fire Code only provides that combustible storage is allowed if a storage configuration plan is submitted and approved.[11]

This presents a rather circular performance standard. Indeed, all HAZ-1 requires is that RVSA submit a storage plan to Chino Valley Fire District that complies with the Section 316.6.2 requirement that a storage configuration plan be submitted and approved. However, this "mitigation measure" under HAZ-1 does not set forth any specific performance criteria for evaluating the reduction of the identified potential hazardous materials impacts to a level of insignificance. Respondents have not cited to any specific ordinances, regulations, or other policies which would govern the Chino Valley Fire District's review and/or approval of any storage configuration plan submitted by RVSA. In fact, the DEIR, in citing to the Dillon Report, acknowledges that there are no relevant codes, statutes, or standards adopted at the federal, State, or local level that regulates the open storage of recreational vehicles under high-voltage transmission lines. [*See*, AR 28:1923-1924.] Although the DEIR refers to SCE's proposed requirements for such storage [AR 28:1924], these policies are only proposals. Furthermore, there is nothing in the stated mitigation measures which requires that these SCE proposals be adopted, or that compliance with these proposals is required.

Respondents contend "HAZ-1 commits the Project to meeting the requirements of the Fire Code ...." [Opp. Brief, 18:24-25.] Although this assertion is correct – RVSA

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[11] Although Mitigation Measure HAZ-1 refers to compliance with Section 316 of the California Fire Code, the only provision that pertains to outdoor storage under high-voltage transmission lines is Section 316.6.2. The other provisions of Section 316 pertain to trapdoors and scuttle covers (§ 316.1), shaftway marking (§ 316.2), exterior access to shaftways (§ 316.2.1), interior access to shaftways (§ 316.2.2), the prohibition against the design or alteration of buildings to disable or kill intruders (§ 361.3), obstructions on roofs (§ 316.4), prohibition of security devices that obscure egress in a building (§ 316.5), compliance of structures and outdoor storage under transmission lines with Sections 316.6.1 and 316.6.2 (§ 316.6), and prohibition of structures under high-voltage transmission lines (§316.6.1).

is committed to submitting a storage configuration plan to the Chino Valley Fire District – Respondents' contention that the Fire Code represents a "reasonable performance standard" is not well taken. [*See,* Opp. Brief, 18:25-26.] As noted above, the only performance standard stated in Section 316.6.2 is submission of a storage configuration plan for review and approval by an agency. Nothing in Section 316 of the Fire Code sets forth any guidelines by which the review is to be conducted by the agency, or any requirements for approval of the storage plan. Moreover, other than the SCE proposals, there is nothing in the DEIR or the EIR which discusses any statutes, ordinances, or regulations aimed at mitigating what Respondents identified as the threshold of significance – i.e., a "significant hazard to the public or environment through reasonably foreseeable upset and accident conditions involving the release of hazardous materials into the environment." [AR 28:1922.] This amounts to impermissible deferred mitigation. (See, e.g., *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 794 [mitigation measure found inadequate when it did no more than require report be prepared and followed, or allow approval by agency without setting any standards].)

Accordingly, on the issue of hazard materials mitigation measures, the Court grants the petition for writ of mandate on the ground there is no substantial evidence to support City's finding that the mitigation measure will reduce the impact to a less than significant level, and the mitigation measure is impermissible deferred mitigation because it fails to identify any specific performance criteria. The error is prejudicial because it hinders the accomplishment of CEQA's objectives.

C. Air Quality Impacts

Petitioners make similar assertions regarding the EIR's conclusion that the Project will have less-than-significant air quality impacts. [AR 68:4115.] Petitioners contend the conclusion is improperly based on the use of an inappropriate threshold of significance. According to Petitioners, the EIR uses the South Coast Air Quality Management District's ("SCAQMD") Final Localized Significance Threshold Methodology ("LST Methodology") in concluding that the Project will not result in significant

operational and construction-related air quality impacts, and will not expose sensitive receptors to substantial pollutant concentrations. [AR 28:1868-1869.]

However, Petitioners contend the LST Methodology was created for 1, 2, and 5 acre proposed projects – not a 7.19 acre project like the one at issue here. [Pet. RJN, Exh. 1, Preface; AR 28:2089.] In addition, Petitioners note the LST Methodology only assumes construction-related emissions occurring over an eight-hour period – not a 13-hour period, as will occur with the Project. [Pet. RJN, Exh. 1, p. 2-2; AR 28:1850.] Petitioners argue that the EIR's use of the LST Methodology for the Project contravenes the SCAQMD's specific instruction that a site-specific localized significance analysis must be performed for proposed projects that exceed the LST Methodology's limitations. [Pet. RJN, Exh. 1, p. 3-4.] As a result, Petitioners contend that since the EIR's use of the LST Methodology is not supported by substantial evidence, it then follows that the EIR's conclusions premised on the LST Methodology's significance threshold are also not supported by substantial evidence.

In opposition, Respondents state that the DEIR concluded the Project will not cause any significant, localized air quality impacts because the short- and long-term emissions are "well below" the localized significance thresholds ("LSTs") adopted by SCAQMD. [AR 28:1868-1869.] According to Respondents, the SCAQMD recommends that when using the CalEEMod Land Use Model for an air quality analysis – as was done for this Project – a project's acreage should be calculated by the maximum daily disturbed acreage on the project site. [Resp. RJN, Exh. A, p. 1 (Fact Sheet for Applying CalEEMod to Localized Significance Thresholds).] Respondents contend that based on this calculation, the Project's acreage – i.e., the maximum acreage disturbed – is only 1.5 acres.[12] [*Id.*] Respondents assert that, as a result, the Project's acreage falls within the limits of the LST Methodology.

As for Petitioners' assertions regarding the number of hours in a construction day, Respondents contend Petitioners improperly assume the construction equipment

[12] Respondents note that the Project proposes to use on excavator, one grader, and one bulldozer, and based on the recommendation to calculate the maximum number of acres disturbed, this equates to 1.5 acres, with each piece of equipment counting for 0.5 acres per 8-hour day. [Opp. Brief, p. 22, fn. 10.]

will be in operation during the entire 13-hour period. According to Respondents, the record shows the equipment will be operated for only 6 to 8 hours each day. [AR 28:2032.] Therefore, Respondents contend Petitioners have failed to demonstrate that City's findings regarding the air quality impacts are not supported by substantial evidence.

In reply, Petitioners contend Respondents are wrong about the calculation of maximum acres disturbed on the Project site. In pointing to the SCAQMD Fact Sheet, Petitioners note that the document only applies to construction emissions – not operational emissions. [Resp. RJN, Exh. A, p. 1.] However, according to Petitioners, the EIR also uses the LST Methodology for the Project's operational emissions. [AR 28:1987.] In addition, Petitioners argue that there is nothing in the administrative record supporting Respondents' assertion that, based on the maximum acres disturbed calculation, the Project's acreage is only 1.5 acres. [AR 28:2032.] Instead, Petitioners contend that Respondents improperly used the LST Methodology in contravention of SCAQMD's explicit direction that projects over a certain size should use a site-specific localized significance analysis to determine air quality impacts. Therefore, Petitioners assert there is no substantial evidence to support the EIR's conclusion that the Project will have less-than-significant air quality impacts.

CEQA Guidelines § 15064.4 provides in relevant part:

> (a) The determination of the significance of greenhouse gas emissions calls for a careful judgment by the lead agency consistent with the provisions in section 15064. A lead agency should make a good-faith effort, based to the extent possible on scientific and factual data, to describe, calculate or estimate the amount of greenhouse gas emissions resulting from a project. A lead agency shall have discretion to determine, in the context of a particular project, whether to:
>
> (1) Use a model or methodology to quantify greenhouse gas emissions resulting from a project, and which model or methodology to use. The lead agency has discretion to select the model or methodology it considers most appropriate provided it supports is decision with substantial evidence. The lead agency should explain the limitations of the particular model or methodology selected for use; and/or
>
> (2) Rely on a qualitative analysis or performance based standards.

(14 Cal. Code Regs., § 15064.4, subd. (a).)

"Section 15064.4 was not intended to closely restrict agency discretion in choosing a method for assessing greenhouse gas emissions, but rather 'to assist lead agencies' in investigating and disclosing 'all that they reasonably can' regarding a project's greenhouse gas emissions impacts." (*Center for Biological Diversity v. Cal. Dept. of Fish & Wildlife, supra,* 62 Cal.4th at 221.) In addition, "the section does not mandate the use of absolute numerical thresholds to measure the significance of greenhouse gas emissions." (*Id.*)

Here, in the current litigation, the DEIR purported to use "the SCAQMD model, CalEEMod Version 2011.1.1 ... to estimate project-related mobile and stationary sources emissions in this Climate Change Analysis." [AR 28:2026 (LSA Associates, Inc., Greenhouse Gas Emissions and Global Climate Change Study, Appx. A to Environmental Checklist in Initial Study, February 2012).] The DEIR goes on to state: "The Climate Change Impact Analysis includes estimated emissions associated with short-term construction and long-term operation of the proposed project. Greenhouse Gasses with regional impacts would be emitted by project-related vehicular trips, as well as by emissions associated with stationary sources used on site." [*Id.*]

In analyzing the construction impacts, the DEIR first asserts that GHG emissions from construction activities arise from site grading, vehicles transporting the construction crew, and the use of on-site heavy duty construction vehicles, and the use of construction equipment on the Project site would result in localized exhaust emissions. [AR 28:2031.] Tables showing the anticipated construction schedule, and the typical equipment to be used in each phase of the construction, are provided. [AR 28:2031-2032, Tables B and C.] However, no explanation is provided as to how this information is used in calculating localized exhaust emissions. Notably, despite Respondents' assertion in their opposition brief, there is no mention in the DEIR of calculations based on maximum daily disturbed acreage.

The DEIR then provides that the California Emissions Estimator Model ("CalEEMod") was promulgated by the SCAQMD "to more accurately calculate air quality

and GHG emissions from direct and indirect sources and quantify applicable air quality and GHG reductions achieved from mitigation measures." [AR 28:2032.] This model was purported used to calculate the construction emissions for the Project, and the emissions rates used in the calculations were derived from the CalEEMod "Mitigation Construction" output tables attached to the DEIR. [AR 28:2032, Table D; 28:2044-2082.] The DEIR asserts that "[d]etails of the emission factors and other assumptions are included" in these output tables. [AR 28:2032.]

However, an examination of these output tables does not clearly set forth any details regarding the emission factors and assumptions used in calculating the figures in the tables. [*See*, AR 28:2044-2082.] Indeed, under the section entitled "User Entered Comments," the "Vehicle Emission Factors" are only stated to be "most medium trucks and RVs," and the tables are entirely devoid of any explanation of the assumptions used in reaching the calculated figures. [*See,* AR 28:2045-2082.] Contrary to Respondents' contentions in their opposition brief, even if the Court considered the non-judicially noticeable Guidance Document proffered by Respondents, there is no discussion or explanation regarding the limitations of the LST Methodology, or the purported calculation of "maximum acreage disturbed on the Project site" in the use of the CalEEMod Land Use Model. [*See*, Opp. Brief, 21:25-27; *see also*, AR 28:2032.]

Similarly, for the calculation of long-term regional air quality impacts, it is not clear what methodology was used by Respondents since the DEIR only provides that the analysis "is based on methodologies and information available to the City and the applicant at the time this analysis was prepared." [AR 28:2033.] Notably, the DEIR goes on to state: "While information is presented below to assist the public and the decision-makers in understanding the project's potential contribution to [global climate change] impacts, the information available to the City is not sufficiently detailed to allow a direct comparison between particular project characteristics and particular climate change impacts, nor between any particular proposed mitigation measure and any reduction in climate change impacts." [AR 28:2033.] After setting forth a summary of some of the activities which could directly or indirectly contribute to the generation of

GHG emissions on the Project, the DEIR then provides GHG emission estimates, and again points to the CalEEMod modeling output tables attached as Appendix A. [AR 28:2034-2035, Table E.] Ultimately, the DEIR concludes that climate change impacts to the Project "are expected to be less than significant." [AR 28:2041.]

However, the EIR's conclusion that climate change impacts will be less than significant lacks substantial supporting evidence because the administrative record does not establish the methodology and assumptions used by Respondents in reaching this determination. As noted by Petitioners, to the extent Respondents use the LST Methodology promulgated by the SCAQMD, the Project exceeds the 5-acre limitation of that methodology. [Pet. RJN, Exh. 1, p. 1-1.] Moreover, even if the Court considered the SCAQMD Fact Sheet referenced by Respondents in their opposition brief, the document states that the information contained therein pertains only to how construction mitigation measures from the CalEEMod Land Use Model may be applied to the LST Methodology. [Resp. RJN, Exh. A.] Therefore, to the extent Respondents used the calculation of maximum daily acreage disturbed to determine operational emissions, their reliance on the Fact Sheet was misplaced.

Public Resources Code section 21005, subdivision (a), provides in relevant part: "[I]t is the policy of the state that noncompliance with the information disclosure provisions of this division which precludes relevant information from being presented to the public agency, or noncompliance with the substantive requirements of this division, may constitute a prejudicial abuse of discretion within the meaning of Sections 21168 and 21168.5, regardless of whether a different outcome would have resulted if the public agency had complied with those provisions." (*Pub. Res. C.*, § 21005, subd. (a).) In deciding whether a failure to comply with CEQA is prejudicial error, the court does not determine whether the agency's ultimate decision would have been different if the law had been followed. Instead, the court must focus on whether the violation prevented informed decisionmaking or public participation. (See, *Neighbors for Smart Rail v. Exposition Metro Line Constr. Auth.* (2013) 57 Cal.4th 439 (plurality opinion).)

In applying this principle to claims that an EIR is deficient, it must be shown that the agency abused its discretion by omitting information required by law, and that the error was prejudicial because "it deprived the public and decision makers of substantial relevant information about the project's likely adverse impacts." (*Neighbors for Smart Rail, supra,* 57 Cal.4th at 463.) "Insubstantial or merely technical omissions are not grounds for relief." (*Id.*) A failure to comply with CEQA's substantive requirements is not prejudicial error if there is no basis to conclude that a properly conducted analysis "would have produced any substantially different information." (*Id.*; see also, *Sierra Club v. State Board of Forestry* (1994) 7 Cal.4th 1215, 1237 [agency violated CEQA by failing to obtain site-specific information about biological impacts; error was prejudicial because absence of information "made any meaningful assessment of the potentially significant environmental impacts of timber harvesting and the development of site-specific mitigation measures impossible"].) However, there is no presumption that an error is prejudicial, and an error may be found nonprejudicial if it did not deprive the decisionmakers and the public of substantial relevant information. (See, e.g., *Rominger v. County of Colusa* (2014) 229 Cal.App.4th 690, 709.)

Here, in the current litigation, based on the information in the administrative record, the Court cannot "discern the contours of a logical argument" regarding Respondents' conclusions as to the air quality impacts. (See, *Center for Biological Diversity v. Cal. Dept. of Fish & Wildlife, supra,* 62 Cal.4th at 227.) The analytical gap left by the DEIR's failure to establish, through substantial evidence and reasoned explanation, the methodology and assumptions used to determine air quality impacts and the conclusion the impacts are less than significant deprives the EIR of its "'sufficiency as an informative document.'" (*Ibid.*, quoting *Laurel Heights Improvement Assn. v. Regents of University of California, supra,* 47 Cal.3d at 392.)

"A lead agency enjoys substantial discretion in its choice of methodology. But when the agency chooses to rely completely on a single quantitative method to justify a no-significance finding, CEQA demands the agency research and document the quantitative parameters essential to that method. Otherwise, decision makers and the

public are left with only an unsubstantiated assertion that the impacts ... will not be significant." (*Center for Biological Diversity v. Cal. Dept. of Fish & Wildlife, supra,* 62 Cal.4th at 228, citing to 14 Cal. Code Regs., § 15064, subd. (f)(5) [substantial evidence to support a finding on significance includes "facts, reasonable assumptions predicated upon facts, and expert opinion support by facts," but not "[a]rgument, speculation, [or] unsubstantiated opinion"].) This failure to provide substantial evidentiary support for its "less than significant" air quality impact conclusion is prejudicial, "in that it deprived decision makers and the public of substantial relevant information about the [P]roject's likely impacts." (*Id.* at 228; see also, *Neighbors for Smart Rail, supra,* 57 Cal.4th at 463.) In the absence of substantial evidence to support the EIR's conclusion, the readers of the report have no way of knowing whether the Project's likely air quality impacts will actually be significant, and, if so, what mitigation measures are required to reduce them. (*Id.* at 228.)

Accordingly, the Court finds that City abused its discretion by making the determination, without the support of substantial evidence, that the Project's air quality impacts would be less than significant. The Court also finds that the error was prejudicial because it hinders CEQA's objectives.

D. Violations of Chino Municipal Code, and Planning and Zoning Law

Besides the CEQA violations, Petitioners argue City violated its own municipal code by approving a general plan amendment, specific plan amendment, SCUP, and site approval while failing to make the requisite findings under the Chino Municipal Code ("CMC"), or making findings not supported by substantial evidence.

Petitioners also contend City's approval of the Project violates Government Code section 65358 – i.e., the Planning and Zoning Law. Again, Petitioners argue that before City approved the Project, City was required to make a finding that the general plan amendment for the Project was in the public interest. Petitioners note, however, that City only found the Project would not be detrimental to the public interest – not that the Project was "in the public interest." [AR 14:53.] According to Petitioners, City's findings are not supported by substantial evidence because the Project does involve

significant fire hazards and air quality impacts which have not been fully analyzed in the EIR.

Petitioners contend that CMC § 20.23.040(G) requires City to make specific findings before approving a general plan amendment – including a finding that the proposed amendment "will not be detrimental to the public interest, health, safety, convenience or welfare of the City ...." According to Petitioners, however, although City found the Project's general plan amendment will not be detrimental to the public health and safety, the Project will actually result in a fire hazard which has not been fully analyzed and/or mitigated in the EIR. In addition, Petitioners argue that City did not consider the fire hazard posed by the Project, but only considered the Project's impacts on noise, odor, and vehicle trips in determining the Project would not be detrimental to the public. [AR 14:53-54.] As a result, Petitioners contend City's findings are not supported by substantial evidence.

Similarly, Petitioners contend City was required to make certain findings under CMC §20.23.050 before approving the Project's specific plan amendment. Petitioners argue, however, that City failed to consider the Project's fire-hazard impact. [AR 12:37.] Accordingly, Petitioners assert City's conclusion that the Project will not be detrimental to the public is not supported by substantial evidence.

Regarding City's approval of the SCUP, Petitioners contend City did not make the requisite findings under CMC § 20.23.080. Petitioners also contend City did not make the requisite findings under CMC § 20.23.090 before issuing the site approval. According to Petitioners, the proposed use is not compatible with the uses on the adjacent properties – with some of the nearest residential properties lying only 100 feet from the Project. [AR 28:1927, 2092.] Petitioners argue that due to the EIR's failure to adequately analyze and mitigate the Project's air quality and fire hazard impacts, there is not substantial evidence to support City's finding that the Project will not be detrimental to the public. In addition, Petitioners assert City's findings that the Project will not have a significant adverse impact on the environment, and that minimum

safeguards are in place to protect the public health and safety are not supported by substantial evidence.

In opposition, Respondents contend Petitioners have failed to establish that City's conclusions that the Project would not be detrimental to public health and safety are arbitrary and capricious, and unsupported by substantial evidence. According to Respondents, there is nothing in the CMC, or the Planning and Zoning Law, which requires City to expressly address the fire hazard identified in City's findings. Respondents argue that City is only required to find that the proposed general plan amendment "will not be detrimental to the public interest, health, safety, convenience or welfare of the city." [AR 105:4593.]

In referring to Petitioners' assertions, Respondents contend its conclusion that the Project will not cause significant hazards impacts is supported by substantial evidence, and challenge the notion that City is required to set forth, in detail, the reasons supporting its findings. According to Respondents, City's findings need only "bridge the analytic gap between the raw evidence and ultimate decision or order."[13] In this regard, Respondents argue that the Planning Commission explicitly found the Project's impacts had been mitigated and conditioned to ensure there are no safety impacts, and expressly referenced the DEIR's conclusions that the Project will not cause significant environmental impacts. [AR 17:82-83; 12:37; 14:53-54.]

Regarding the alleged violations of the Planning and Zoning Law, Respondents contend Government Code section 65358 does not create a findings requirement because the adoption of a general plan amendment is a legislative act. Instead, Respondents assert that City adopted express findings for the general plan amendment because such findings are required under the CMC. [AR 105:4593.] In addition, Respondents argue that the record clearly states the City Council deemed the general plan amendment to be in the public's interest. According to Respondents, the Council's findings explain that the "proposed land use designation change would facilitate the

[13] In support, Respondents cite to *Environmental Protection Information Center v. California Dept. of Forestry and Fire Protection* (2008) 44 Cal.4th 459, 516 (*EPIC*).)

construction of a recreational vehicle storage facility, taking these vehicles off of streets and driveways in residential neighborhoods, thereby preserving the quality of life and aesthetics of the neighborhoods." [AR 14:53-54.] Respondents also note that several other explicit findings are made by City. [AR 14:53; 28:1893.]

In reply, Petitioners argue that, in light of the Project's numerous hazardous materials impacts, it was incumbent on City to at least consider the impacts prior to making a finding that the Project would not endanger the public. Petitioners assert, however, that such a finding would still be impossible because of the EIR's numerous deficiencies, as well as City's disregard of its duty to keep its citizens safe through compliance with the Fire Code. According to Petitioners, City's finding that the general plan amendment is not detrimental to the public interest is not supported by substantial evidence. In addition, Petitioners contend City failed to make the requisite public interest findings under Government Code section 65358.

Respondents contend that, although the substantial evidence standard applies to Petitioners' CEQA claims under CCP §1094.5, Petitioners' challenges under the CMC and the Planning and Zoning Law to City's approvals of the general plan and specific plan amendments are governed by the "arbitrary and capricious" standard under CCP § 1085.[14] Petitioners do not address this issue in reply.

Respondents are correct. Agency decisions regarding consistency with a general plan are considered quasi-legislative acts which are reviewed by ordinary mandamus under Code of Civil Procedure section 1085.[15] It is well-settled that the court reviews these decisions to determine whether they are "arbitrary, capricious, entirely lacking in evidentiary support, unlawful, or procedurally unfair." (*Endangered Habitats League, Inc. v. County of Orange, supra,* 131 Cal.App.4th at 782; *Mitchell v. County of Orange* (1985) 165 Cal.App.3d 1185, 1191-1192.) Under this standard, the court defers to the agency's factual finding of consistency, unless no reasonable person could have reached

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[14] Respondents agree that Petitioners' challenge to City's approval of the SCUP and site approval is also governed by CCP § 1094.5, and is reviewed under the "substantial evidence" standard.

[15] Government Code section 65301.5 provides: "The adoption of the general plan or any part or element thereof or the adoption of any amendment to such plan or any part or element thereof is a legislative act which shall be reviewable pursuant to Section 1085 of the Code of Civil Procedure."

the same conclusion on the evidence presented.[16] (*Mitchell v. County of Orange, supra*, 154 Cal.App.3d at 1338.)

Regarding the Planning and Zoning law at issue, the parties did not discuss the applicable standard. Nevertheless, Government Code section 65010, subdivision (b) also applies in this litigation, and it provides, in relevant part:

> No action, inaction, or recommendation by any public agency ... 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 ... by reason of any error, irregularity, informality, neglect, or omission (...) as to any matter pertaining to ... findings ..., 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.[17] (*Govt. C.*, §65010, subd. (b), emphasis added.)

"[T]his title" in section 65010 refers to Title 7 of the Government Code, otherwise known as the Planning and Zoning Law (§ 65000, *et seq.*), which includes sections related to general and specific plans, as well as general and specific plan amendments. In addition, it includes Government Code sections 65300, *et seq.*, and 65350, *et seq.*, found in Division 1 (Planning and Zoning). The fact the requirements of CMC provisions related to general and specific plans are at issue should not affect the applicability of

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[16] Some cases review consistency with a general plan under the abuse of discretion standard applicable to administrative mandamus. Under this standard, the court inquires whether the agency has proceeded as required by law, and its decision supported by substantial evidence. Under the substantial evidence prong, the inquiry generally is whether a reasonable person could have reached the same conclusion on the evidence. (See, e.g., *Families Unafraid To Uphold Rural El Dorado County v. Board of Supervisors* (1998) 62 Cal.App.4th 1332, 1338.) However, since this is the same test used under the arbitrary and capricious standard for factual findings, there is no inconsistency. (*Endangered Habitats, supra*, 131 Cal.App.4th at 782, fn. 3.)

[17] Government Code § 65010(b) provides:

> **(b)** No action, inaction, or recommendation by any public agency or its legislative body or any of its administrative agencies or officials on any matter subject to this title shall be held invalid or set aside by any court on the ground of the improper admission or rejection of evidence or by reason of any error, irregularity, informality, neglect, or omission (hereafter, error) as to any matter pertaining to petitions, applications, notices, findings, records, hearings, reports, recommendations, appeals, or any matters of procedure subject to this title, unless the court finds that the error was prejudicial and that the party complaining or appealing suffered substantial injury from that error and that a different result would have been probable if the error had not occurred. There shall be no presumption that error is prejudicial or that injury was done if the error is shown.

this section to the issues raised in the current litigation, given plan amendments are at issue.

Therefore, even if error in the approval is found, Petitioners must also demonstrate that such error was prejudicial in "that a different result would have been probable if the error had not occurred." (*Gov. C.*, § 65010, subd. (b); see also, *Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899, 919-923 [concluding error must result in prejudice and substantial injury, and that a different result was probable had the error not occurred].)

Under CMC § 20.23.040(G), the following requirements exist for approval of a general plan amendment:

> G. *Findings.* In reviewing a general plan amendment application, the recommending and approving authorities shall consider and clearly establish the following findings of fact, giving specific reasons as to how each of the findings has been met:
>
> 1. The proposed amendment is internally consistent with the general plan;
>
> 2. The proposed amendment will not be detrimental to the public interest, health, safety, convenience or welfare of the city;
>
> 3. The proposed amendment will maintain the appropriate balance of land uses within the city; and
>
> 4. In the case of an amendment to the general plan land use map, the subject site is physically suitable, including, but not limited to, parcel size, shape, access, availability of utilities and compatibility with adjoining land uses, for the requested land use designation and anticipated development. [AR 105:4593 (CMC § 20.34.040(G)).]

The provision pertaining to approval of a specific plan amendment, CMC §20.23.050(G), is identical.

Similarly, under CMC § 20.23.080(G), the following requirements exist for approval of special conditional use permits:

> **G. *Findings.***
>
> 1. The proposed use is consistent with the goals and policies of the city's adopted general plan and/or applicable specific plan(s);

2. The subject site is physically suitable, including, but not limited to, parcel size, shape, access and availability of utilities, for the type and intensity of sue proposed;
3. The subject site relates to streets and highways properly designed, both as to width and type of pavement to carry the type and quantity of traffic generated by the proposed use;
4. The proposed use is compatible with those on abutting properties and in the surrounding neighborhood;
5. The proposed location, size, and operating characteristics of the proposed use will not be detrimental to the public interest, health, safety or general welfare;
6. The proposed use will not have a significant adverse impact on the environment; and
7. The minimum safeguards necessary to protect the public health, safety and general welfare have been required of the proposed use. [AR 105:4600.]

In a substantially similar provision under CMC § 20.23.090(G), the following requirements exist for site approvals:

G. *Findings.* In reviewing a site approval application, the approving authority shall consider and clearly establish the following findings of fact, giving specific reasons as to how each of the findings has been met:

1. The proposed project is consistent with the goals and policies of the city's adopted general plan and/or specific plan(s);
2. The proposed project is permitted within the zoning district in which it is proposed and complies with all applicable provisions of the city's zoning code;
3. The subject site is physically suitable, including, but not limited to, parcel size, shape, access and availability of utilities, for the type and intensity of development proposed;
4. The subject site relates to streets and highways properly designed, both as to width and type of pavement to carry the type and quantity of traffic generate by the proposed project;
5. The proposed project is compatible with those on abutting properties and in the surrounding neighborhood;
6. The proposed location, size, and operating characteristics of the proposed project will not be detrimental to the public interest, health, safety or general welfare;
7. The proposed project will not have a significant adverse impact on the environment; and

> 8. The minimum safeguards necessary to protect the public health, safety and general welfare have been required of the proposed project. [AR 105:4602-4603 (CMC § 20.23.090(G).]

Here, in the resolution approving the general plan amendment, City found the proposed amendment would "not be detrimental to the public interest, health, safety, convenience, or welfare of the City." [AR 14:53.] The resolution approving the specific plan amendment made a similar finding. [AR 12:37.] However, the resolutions do not address the unmitigated hazards impacts, even though the hazards/hazardous materials impact was deemed "significant" in the EIR. Indeed, the resolution approving the general plan amendment only provides that: "The proposed project will not generate noise, odor, or frequent vehicle trips. Potential light impacts from parking lot lights will be mitigated by light detectors that will keep light from spreading to adjacent properties." [AR 14:53.] The approval of the specific plan amendment made similar findings, but also did not address the hazards/hazardous materials, or the mitigation measures for same.

Regarding the air quality impacts, the City's finding is also necessarily unsupported. As discussed above, the EIR's conclusion that the air quality / climate change impacts would be less than significant is not supported by substantial evidence, and the failure to establish the methodology and assumptions used to reach this conclusion left an analytical gap which deprived the EIR of is sufficiency as an informational document. As a result, it was not possible for City to fulfill the requirement under the CMC of finding that the proposed general plan amendment and specific plan amendment would "not be detrimental to the public interest, health, safety, convenience or welfare of the city." (*See*, CMC §§ 20.23.040(G)(2), 20.23.050(G)(2).)

As discussed thoroughly above, City violated CEQA because the mitigation measures for the hazards impacts are impermissible deferred, and substantial evidence does not support the EIR's finding that the air quality impacts would be less than significant. As a result, as noted above, the Court finds that City's CEQA violations

constitute a prejudicial abuse of discretion that hindered accomplishment of CEQA's objectives.

Unlike CEQA violations, violations under the Planning and Zoning law must not only demonstrate prejudicial error and substantial injury, but also that "a different result was probable had the error not occurred." (*Rialto Citizens for Responsible Growth, supra,* 208 Cal.App.4th at 919.) Regarding the general plan and specific plan amendments, City's failure to make specific findings resulted in prejudice and substantial injury, and it is reasonable to find that a different result (i.e., disapproval of the ordinance) was probable in light of the omitted and unsupported findings. (*Id.* at 922; see also, *Govt. C.,* §65010, subd. (b).)

Accordingly, the writ petition is granted as to the alleged violations of the CMC and the Planning and Zoning Law.

DISPOSITION

1. DENY Petitioners' First Amended Petition for Writ of Mandate as to the adequacy of the hazardous materials impacts analysis. Petitioners have not met their burden of demonstrating there is no substantial evidence to support City's findings, or that the underlying Dillon Report was fatally flawed.
2. GRANT Petitioners' First Amended Petition for Writ of Mandate as to the alleged violations of the CMC and the Planning and Zoning Law. City's failure to make specific findings resulted in prejudice and substantial injury, and a different result was probable in light of the unsupported and omitted findings.
3. GRANT Petitioners' First Amended Petition for Writ of Mandate on the ground there is no substantial evidence to support City's finding that the hazards/hazardous materials mitigation measure will reduce the impact to a less than significant level, and the mitigation measure is impermissible deferred because it fails to identify any specific performance criteria. The error is prejudicial because it hinders the accomplishment of CEQA's objectives.

4. GRANT Petitioners' First Amended Petition for Writ of Mandate on the ground that City abused its discretion by making the determination, without the support of substantial evidence, that the Project's air quality impacts would be less than significant. The error was prejudicial because it hinders CEQA's objectives.
5. The Court finds Petitioners exhausted their administrative remedies as to all issues raised in the petition.
6. GRANT Petitioners' Opening and Reply Requests for Judicial Notice.
7. DENY Respondents' Request for Judicial Notice.

Dated this 31 day of October, 2016

DONALD ALVAREZ
Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN BERNARDINO SAN BERNARDINO SUPERIOR COURT JUSTICE CENTER 247 W. Third Street San Bernardino, CA 92415	CASE NUMBER CIVDS1501357
THE INLAND OVERSIGHT COMMITTEE and CREED-21, Plaintiffs, vs. CITY OF CHINO, et al, Defendants.	Donald Alvarez, Judge Department S23

I, Nicci Martinez, certify that: I am not a party to the above-entitled case; that on the date shown below, I served the following document(s):

RULING ON PETITION FOR WRIT OF MANDATE (CEQA)

on the parties shown below by placing a true copy in a separate envelope, addressed as shown below; each envelope was then sealed and, with postage thereon fully prepaid, deposited in the United States Postal Service at San Bernardino, California.

REMY MOOSE MANLEY LLP 555 Capitol Mall, Suite 800 Sacramento, CA 95814	BAKER MANOCK & JENSEN, PC 5260 North Palm Ave., Suite 421 Fresno, CA 93704
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NANCY EBERHARDT
Interim Court Executive Officer

Dated: 11-1-14

By: _____
NICCI MARTINEZ

CLERK'S CERTIFICATE OF SERVICE BY MAIL