AIDS HEALTHCARE FOUNDATION v. CITY OF LOS ANGELES
Case Number: 19STCP05445
Hearing Date: March 3, 2021

ORDER GRANTING PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR INJUNCTIVE RELIEF

Through its Verified Petition for Writ of Mandate and Complaint for Injunctive Relief (the petition) Petitioner, AIDS Healthcare Foundation, challenges the certification of an environmental impact report (EIR) by Respondent, the City of Los Angeles. Petitioner seeks an order requiring the City to "vacate and withdraw the certification of the EIR and all Project Entitlements . . . ." (Pet., Prayer ¶ A.) Petitioner contends it is entitled to relief because the City violated the California Environmental Quality Act (CEQA) (Pub. Resources Code §§ 21000 *et seq.*).

Both the City and Real Party in Interest, Southern California Flower Growers, Inc. (Flower Growers) oppose the petition.

The petition is granted.

STATEMENT OF THE CASE[1]

The Project:

The project is a mixed-use development located on just under four acres in the downtown area of the City.[2] The site is currently the Southern California Flower Market, a wholesale market owned and occupied by the Flower Growers. (AR 778, 810, 866-67.) The project site contains two buildings; the South Building, which was built in 1962 or 1963, and the North Building, which was built as part of the flower market's expansion in 1981. (AR 778, 866-868.) The buildings are two stories with a parking deck above. (AR 868.)

The project renovates and upgrades the North building, which will continue to operate as a flower market. The project will demolish the South Building and replace it with a new twelve story, mixed-use development comprised of 323 residential units and 167,248 square feet of non-residential uses—retail, office, restaurant, wholesale storage and event space (the Project). (AR 719, 4462-4463.)

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[1] AR refers to the administrative record.

[2] The site is bounded by 7th Street, 8th Street, Maple Avenue, and Wall Street. (AR 748, 791.)

The City's Approval of the Project:

On May 22, 2017, the City issue a notice of preparation for the Project. On September 20, 2018, the City released a 600-page Draft EIR (DEIR) for the Project. (AR 4086-4087, 1321.) The City issued the Final EIR[3] on April 12, 2019. (AR 4087.) The City conducted a public hearing on the EIR in May 2019. (AR 5-156, 4410-11.) Thereafter, on June 3, 2019, the City's Advisory Agency, certified the EIR, adopted the CEQA findings and a mitigation, monitoring and reporting program (MMRP), and approved the Project.[4] (AR 5-156, 4410-11.)

Two entities appealed the Advisory Agency's decision on June 13, 2019.[5] (AR 6715, 6869.) The appeals raised concerns about the Project's construction noise and air quality impacts. (AR 3574-77, 6869-80.) The City Planning Commission (CPC) heard and denied the appeals on August 26, 2019. The CPC certified the EIR and affirmed the Advisory Agency's Project approval. (AR 157-312, 4412-4420, 4425-4427, 4429-4531.)

On September 5, 2019, Petitioner appealed the CPC's decision. (AR 8457-8464.) On October 29, 2019, after holding another public hearing, the City's Planning and Land Use Management Committee voted unanimously to recommend that the full City Council deny the appeals and approve the Project. (AR 440-445, 4543-4547, 4548- 4602.) At a public meeting on November 12, 2019, the City Council voted unanimously to deny the appeals and approve the Project. (AR 709-710, 4603-4623.)

The writ petition ensued.

STANDARD OF REVIEW

In reviewing an agency's compliance with CEQA during the course of its legislative or quasi-legislative actions, the trial court's inquiry during a mandamus proceeding " 'shall extend only to whether there was a prejudicial abuse of discretion,' " which is established " 'if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence.' " (*Vineyard Area Citizens for Responsible Growth Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 426 [citing Pub. Resources Code § 21168.5].) "In evaluating an EIR for CEQA compliance, . . . a reviewing court must adjust its scrutiny to the nature of the alleged defect, depending on whether the claim is predominantly one of improper procedure or a dispute over the facts." (*Id.* at 435.)

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[3] The court refers to the Final EIR herein as the EIR. The court designates any specific references to the Draft EIR as DEIR herein.

[4] The Advisory Agency also approved the tract map on June 3, 2019. (AR 4299.) The City issued three errata to the EIR during the administrative review process: Erratum No. 1 on July 26, 2019; Erratum No. 2 on August 7, 2019; and Erratum No. 3 on October 18, 2019. (AR 4326.)

[5] American Florists Exchange, Ltd. and the Coalition for Responsible Equitable Economic Development appealed the Advisory Agency's decision.

CEQA requires an EIR to "be prepared with a sufficient degree of analysis to provide decision makers with information which enables them to make a decision which intelligently takes account of environmental consequences." (Guidelines[6] § 15151; *Sierra Club v. County of Fresno* (*Friant Ranch*) (2018) 6 Cal.5th 502, 516.) "An EIR's designation of a particular environmental effect as 'significant' does not excuse the EIR's failure to reasonably describe the nature and magnitude of the adverse effect." (*Id.* at 514.) "[T]here must be a disclosure of the 'analytic route the . . . agency traveled from evidence to action.' " (*Laurel Heights Improvement Assn. v. Regents of the University of California* (1988) 47 Cal.3d 376, 404.) "[A] conclusory discussion of an environmental impact that an EIR deems significant can be determined by a court to be inadequate as an informational document without reference to substantial evidence." (*Friant Ranch, supra,* 6 Cal.5th at 514.) If the deficiencies in an EIR preclude "informed decisionmaking and public participation, the goals of CEQA are thwarted and a prejudicial abuse of discretion has occurred." (*Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 128.)

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

With respect to "all substantial evidence challenges, an appellant challenging an EIR for insufficient evidence must lay out the evidence favorable to the other side and show why it is lacking. Failure to do so is fatal. A reviewing court will not independently review the record to make up for appellant's failure to carry his burden." (*Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1266.) Moreover, "the reviewing court 'may not set aside an agency's approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable,' for, on factual questions, our task 'is not to weigh conflicting evidence and determine who has the better argument.' " (*Vineyard Area Citizens for Responsible Growth Inc. v. City of Rancho Cordova, supra,* 40 Cal.4th at 435.)

"Regardless of what is alleged, an EIR approved by a governmental agency is presumed legally adequate, and the party challenging the EIR has the burden of showing otherwise." (*Chico Advocates for a Responsible Economy v. City of Chico, supra,* 40 Cal.App.5th at 846.)

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[6] The CEQA Guidelines are found at Title 14 Cal. Code Regs §§ 15000 *et seq.*

ANALYSIS

Petitioner contends the EIR analysis of the Project's environmental impacts is flawed as to greenhouse gas (GHG) emissions, air quality and noise. The court addresses the claims in turn.

GHG Impacts:

Petitioner claims the City's analysis under the "first significance threshold"[7] does not comply with CEQA. Petitioner's arguments arise in three general categories that are all related in some way to the City's selection of a significance threshold for GHG impacts. First, Petitioner contends the EIR's GHG analysis is inaccurate, confusing and misleading. Second, Petitioner asserts the City selected an inappropriate significance threshold. Third, Petitioner argues the EIR fails as an informal document for decisionmakers and informed public participation because it omits any analysis of Senate Bill (SB) 32 codified at Health and Safety Code section 38566.

Guidelines section 15064.4, subdivision (a) provides: "A lead agency shall have discretion to determine, in the context of a particular project, whether to: (1) Quantify greenhouse gas emissions resulting from a project; and/or (2) Rely on a qualitative analysis or performance based standards." Thus, under the Guidelines, the City had the option of selecting a quantitative or qualitative significance threshold for GHG emissions "based to the extent possible on scientific and factual data." (Guidelines § 15064, subd. (b).)

Further, "California's CEQA Guidelines . . . recognize that an agency's adoption of a threshold of significance requires an exercise of reasoned judgment." (*Mission Bay Alliance v. Office of Community Investment & Infrastructure* (2016) 6 Cal.App.5th 160, 206.) A city's choice of a significance threshold "will be upheld if founded on substantial evidence." (*Ibid.*)

First, Petitioner argues the City's "*discussion* of the GHG *significance thresholds* violates CEQA" because "it is inaccurate and confusing." (Reply 5:33 [emphasis added].) The court disagrees. A reasonable reading of the EIR and the City's selection of a significance threshold does not support Petitioner's claim.

The City explained because the California Air Resources Board (CARB), the South Coast Air Quality Management District (SCAQMD) and the City "have yet to adopt project-level significance thresholds for GHG emissions that would be applicable to the Project," the City obtained its primary direction for GHG emissions analysis from the Guidelines. (AR 917.) The City reported a project could have a significant environmental impact if the project generated GHG emissions that may have a significant impact on the environment, or if the project would conflict with "an applicable plan, policy, or regulation adopted for the purpose of reducing the emissions" of GHG. (AR 14:917.) After a straight-forward plain language discussion in plain in

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[7] Petitioner contends the City has relied upon two significance thresholds for GHG emissions. As discussed herein, the court disagrees. The EIR provides a single threshold of significance for GHG emissions.

the EIR concerning the selection of significance thresholds, the City reported "the Project would not have a significant effect on the environment if it is found to be consistent with the applicable regulatory plans and policies to reduce GHG emissions." (AR 920.)

The City thereafter set forth the applicable plans and policies for which it considered consistency in the context of GHG emissions. (AR 14:920.) The EIR methodically discusses the Project and the applicable plans and policies. Petitioner has not demonstrated the EIR's significance threshold discussion would mislead or confuse decisionmakers or public participants.

Second, without expressly so stating, much of Petitioner's argument related to GHG emissions theorizes the City abused its discretion in deciding not to use a *quantitative* threshold of significance for the Project. Petitioner contends the SCAQMD quantitative thresholds of significance should have been used for the Project as they are "the most appropriate . . . to apply because the Project is a mixed-use project." (Opening Brief 14:17-18.)

Petitioner thus contends the City engaged in "threshold shopping" for the Project. Petitioner speculates the City uses the SCAQMD's recommended thresholds of significance "to analyze projects where emissions are below the threshold." (Opening Brief 14:32-35.) Petitioner cites three such projects in the City's downtown area where the City used SCAQMD's thresholds of significance to find a project's GHG emissions had less than significant impacts. (AR 6495-6496.)

The City explained it elected not to rely on SCAQMD's 2008 draft guidance (as revised in 2010) because neither the City nor SCAQMD "has adopted numeric thresholds for greenhouse gas emissions for land use development projects (e.g., residential/commercial projects) such as the Project." (AR 2820.) The City elaborated:

> As further explained in the Draft EIR, in 2008, the SCAQMD convened a GHG CEQA Significance Threshold Working Group to provide guidance to local lead agencies on determining significance for GHG emissions in their CEQA documents. In December 2008, the SCAQMD Governing Board adopted interim GHG significance thresholds for projects where the SCAQMD is the lead agency. That threshold uses a tiered approach to determine a project's significance, with 10,000 metric tons of CO_2 equivalent ($MTCO_2e$) per year as a screening numerical threshold for stationary sources. In September 2010, the Working Group released additional revisions that recommended a screening threshold of 3,500 $MTCO_2e$ for residential projects, 1,400 $MTCO_2e$ for commercial projects, and 3,000 $MTCO_2e$ for mixed use projects. The SCAQMD has not since adopted those thresholds, nor has the SCAQMD provided a timeline for formal consideration of those thresholds. In the meantime, the thresholds in the SCAQMD's guidance document are used as a non-binding guide. A lead agency is not required under CEQA to rely on draft regulatory standards that have not been adopted as significance thresholds. (AR 2820-2821.)

While the City may have chosen to use the SCAQMD's guidance as thresholds of significance (as it apparently has done with at least three other projects) in the past, the City was not required to do so. (Guidelines § 15064.7, subd. (c). See also Guidelines § 15064.4, subd. (b)(3).) The Guidelines do "not mandate the use of absolute numerical thresholds to measure the significance of greenhouse gas emissions." (*Center for Biological Diversity v. Department of Fish & Wildlife* (2015) 62 Cal.4th 204, 221.) Accordingly, Petitioner has not met its burden of demonstrating the City's selection of the significance threshold is not supported by substantial evidence.

Third, Petitioner contends the EIR's GHG emissions analysis is inconsistent with SB 32. That is, Petitioner attacks the City's finding the Project is "consisten[t] with the policies in SB 32 and Executive Order B-30-15, which includes the GHG reduction goals codified in SB 32." (Opposition Brief 17:2-3.) Petitioner contends "[t]he EIR includes compliance with Executive Order B-30-15 on the list of measures it must comply with for the Project's GHG emissions to be considered insignificant . . . and the Project does not comply with that executive order." (Reply 8:22-25.) Petitioner is correct to the extent there is no substantial evidence to support the City's position on Executive Order (EO) B-30-15.

As an initial matter, the City and Flower Growers argue Petitioner failed to exhaust its administrative remedies on the issue of "CARB's 2017 Scoping Plan, which provides strategies to achieve the 2040 GHG emission goals set in SB 32." (Opposition Brief 17:12-14.) The court disagrees. The broader issue of overall compliance with SB 32—however that might be achieved—was squarely presented to the City during the administrative proceedings.

SWAPE[8] specifically raised the issue of SB 32 in its written comments to the DEIR. (AR 2900, 2922.) SWAPE wrote:

> AB 32 requires California to reduce GHG emissions to 1990 levels by 2020. However, in September 2016, prior to the release of the IS/MND, Governor Brown signed Senate Bill 32, enacting Health and Safety Code § 38566. [] This statue ("SB 32") requires California to achieve a new, more aggressive 40% reduction in GHG emissions over the 1990 levels by 2030. 'This 40 percent reduction is widely acknowledged as a necessary interim target to ensure that California meets its longer-range goal of reducing greenhouse gas emissions to 80 percent below 1990 levels by the year 2050.' Therefore, by failing to demonstrate consistency with the reduction targets set forth by SB 32, the Project may conflict with an applicable plan, policy, or regulation adopted for the purpose of reducing GHG emissions. As a result, the Project may have a potentially significant impact that was not previously addressed in the DEIR, and as such, a revised EIR should be prepared. (AR 2922.)

[8] SWAPE is an acronym for Soil Water Air Protection Enterprises. SWAPE provides technical consultation, data analysis, and litigation support for the environment. (AR 2927.)

SWAPE also advised the City—with expert opinion—"to reach the statewide goal of 259 $MTCO_2e$, California would have to reduce its emissions by 49 percent below the 'business-as-usual' levels. This reduction target indicates that compliance with these more aggressive reduction goals, beyond what is mandated by AB 32, will be necessary." (AR 2923.)

As acknowledged by the City and Flower Growers, the legislature codified EO B-30-15 at SB 32. (Opposition Brief 17:3.) Executed by Governor Brown on April 29, 2015, two years before the notice of preparation, EO B-30-15 provides in part:

> "A new interim statewide greenhouse emission reduction target to reduce greenhouse gas emissions to 40 percent below 1990 levels by 2030 is established in order to ensure California meets its target of reducing greenhouse gas emissions to 80 percent below 1990 levels by 2050."

SB 32, codified at Health and Safety Code section 38566, effective January 1, 2017 (prior to the City's notice of preparation) provides:

> "In adopting rules and regulations to achieve the maximum technologically feasible and cost-effective greenhouse gas emissions reductions authorized by this division, the state board shall ensure that statewide greenhouse gas emissions are reduced to at least 40 percent below the statewide greenhouse gas emissions limit no later than December 31, 2030."

The EIR reports the Project's GHG emissions are "consistent"[9] with EO B-30-15. (AR 926.) The EIR's discussion of EO B-30-15 in its "Consistency Analysis" reports the order's target of reducing GHG emissions to 40 percent below 1990 levels by 2030. (AR 926-927.) In fact, the EIR suggests the Project is actually consistent and compliant with EO B-30-15: "As such, given the reasonably anticipated decline in Project emissions once fully constructed and operational, the Project is consistent with the Executive Order's horizon-year goal."[10] (AR 926.)

The issue raised by Petitioner is whether there is substantial evidence for the EIR's claim to decisionmakers and public participants the Project does not conflict with E0 B-30-15—"an applicable plan, policy, or regulation adopted for the purpose of reducing the emissions" of GHG. (AR 14:917.) The City's position of consistency with EO B-30-15 requires substantial evidence.

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[9] "Consistent" means "marked by harmony, regularity, or steady continuity" and "marked by agreement." (www.merriam-webster.com/dictionary/consistent.)

[10] The EIR's use of a singular possessive form as opposed to a plural possessive form makes the analysis where the EIR discusses two executive orders unclear. In any event, the statement implies quantitative compliance with required GHG emission reductions by 2030. The City's findings, however, make clear the City intended the statement to apply to both executive orders. (AR 235.)

Certainly, the EIR acknowledges a 2030 GHG emissions target exists under the law; in its Consistency Analysis, however, the EIR provides no information about that target or how the Project's GHG emissions are consistent with it. The EIR's claim "the Project's post-2020 emissions trajectory is expected to follow a declining trend, consistent with the 2030 and 2050 targets and Executive Order . . . B-30-15" appears to be unsupported by substantial evidence. (AR 927.)

Moreover, the EIR reports "[m]any of the emission reduction strategies recommended by CARB would serve to *reduce the Project's post-2020 emissions level to the extent applicable by law* . . . ." (AR 927 [emphasis added].) The EIR, however, provides no analysis to support the claim the Project's GHG emissions comply with Health and Safety Code section 38566. That is, "applicable law."[11] In fact, the only evidence on the issue suggests otherwise. (AR 2923 [49 percent reduction required for compliance versus Project's 33 percent reduction].)

During argument the Flower Growers directed the court to evidence the City could have considered to find the Project is consistent with EO B-30-15. The evidence, however, is not substantial evidence supporting the claim the Project's post-2020 emissions will be reduced to the level required by EO B-30-15 as reported in the EIR.

For example, the EIR's discussion of EO B-30-15 explains "a statewide GHG reduction target of 40 percent below 1990 levels by 2030." (AR 902.) Citing a "recent study," the EIR reports "the state's existing and proposed regulatory framework will allow the state to reduce its GHG emissions level to 40 percent below 1990 levels by 2030 (consistent with Executive Order B-30-15), and to 60 percent below 1990 levels by 2050." (AR 903.) While the City cited the study by footnote, the study did not address the Project and its GHG emissions.[12] Thus, the discussion and study are not substantial evidence of the Project's compliance with EO B-30-15.

In addition, the Project's reduction in GHG emissions related to design features (AR 924-925) does not address compliance with EO B-30-15. The order sets forth a quantitative standard. The EIR's general reference to design features and GHG does not inform on consistency with that quantitative standard.

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[11] The City found, "As such, the Project's post-2020 emissions trajectory is expected to follow a declining trend, *consistent with the 2030* and 2050 *targets* and *Executive Order* S-3-05 and *B-30-15.*" (AR 235 [emphasis added].) The statement is misleading because it implies the Project meets EO B-30-15's emissions target when there is no substantial evidence to support the City's position.

[12] The court does not have access to the study cited in the footnote. The EIR's narrative suggests the study concerned "various combinations of policies" to assist emission levels to "remain very low through 2050 . . . ." (AR 903.) In the unlikely event the general study addressed the Project, the court notes "a report 'buried in an appendix,' is not a substitute for 'a good faith reasoned analysis . . . .' " (*Banning Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal.5th 918, 941 [citation omitted].)

The EIR's discussion of the Regional Transportation Plan/Sustainable Communities Strategy of Southern California Association of Governments (SCAG) does address GHG emission reductions. (AR 911, 930-931.) The discussion, however, does not inform on the Project's consistency with EO B-30-15.

Finally, relying on *Cleveland National Forest Foundation v. San Diego Assn. of Governments* (2017) 3 Cal.5th 497, the City argues it had no obligation to consider EO B-30-15. In *Cleveland National Forest Foundation*, the petitioners argued the agency "should have evaluated the plan's impacts against an executive order signed" by the governor. (*Id.* at 503.) The Supreme Court disagreed. The agency in *Cleveland National Forest Foundation,* however, did not adopt a significance threshold of express consistency with an executive order as the City did here. (See *id.* at 507 [three measures of significance].) That is, the agency in *Cleveland National Forest Foundation* did not represent the project was consistent with a particular executive order and establish its significance threshold in part on such consistency.

Based on the foregoing, the court finds the EIR's claim of consistency with EO B-30-15 and the policies therein is not supported by substantial evidence. Thus, the EIR's conclusions that GHG emissions do not exceed the City's chosen significance threshold is unsupported. The City abused its discretion in finding GHG emissions would not have a substantial environmental impact. "[A] conclusory discussion of an environmental impact that an EIR deems significant can be determined by a court to be inadequate as an informational document without reference to substantial evidence." (*Friant Ranch, supra,* 6 Cal.5th at 514.) Petitioner is entitled to relief based on the EIR's incomplete discussion of GHG emission impacts.[13]

Air Quality Impacts:

The EIR reports the Project's construction emissions would cause significant regional and local air quality impacts based on nitrogen oxides (NOx) and fine particulate matter (PM2.5). (AR 843.) Thus, the Project required mitigation measures for air quality impacts. (AR 843.)

Petitioner contends the EIR fails to adequately analyze and mitigate construction-related impacts on air quality.

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[13] During argument, the parties argued about the meaning of Table 4.F-5. (AR 922.) The City contended the table calculations demonstrated compliance with EO B-30-15 while Petitioner argued it did not. The narrative accompanying the table indicates the Project is consistent with the 2014 Revised AB 32 Scoping Plan because of a reduction target of 15.3 percent. There is no discussion of EO B-30-15. Whether the table's information is consistent with EO B-3-15—and the court could not determine one way or the other even after the aid of argument—is unclear and does not inform decisionmakers or public participation.

1. Mitigation Measure (MM) C-1

MM C-1 requires "[a]ll off-road construction equipment greater than 50 horsepower" satisfy United States Environmental Protection Agency (EPA) "Tier 4 emissions standards to reduce NOx and PM2.5 emissions at the Project Site." (AR 849.) The EIR states "[a]ny emissions control device used by the contractor shall achieve emissions reductions that are no less than what could be achieved by a Level 3 diesel emissions control strategy for a similarly sized engine as defined by CARB regulations." (AR 849.)

"For projects for which an EIR has been prepared, where substantial evidence supports the approving agency's conclusion that mitigation measures will be effective, courts will uphold such measures against attacks based on their alleged inadequacy." (*Sacramento Old City Assn. v. City Council* (1991) 229 Cal.App.3d 1011, 1027.) A reviewing court, however, will not defer to the agency if there is no substantial evidence in the record showing the mitigation measure is feasible and effective, or if the feasibility or effectiveness of the mitigation measure "def[ies] common sense." (*Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1116-1117.)

Petitioner contends MM C-1 is both ineffective and infeasible.

The parties' argument here centers on the meaning of Tier 4 standards for the construction equipment to be used for the Project. Petitioner contends there are two Tier 4 standards—an interim standard and a final standard.[14] Petitioner reports the CalEEMod calculations are based on a Tier 4 final standard—an assumption all construction equipment used for the Project with a horsepower greater than 50 comply Tier 4 final standards. (AR 2908 [citing Appendix E-1]; see also AR 1475-1478, 1507-1510, 1544-1547.) Therefore, to the extent MM C-1 permits the Flower Growers to use equipment with a Tier 4 interim standard, the required mitigation will not be achieved. That is, the CalEEMod calculation on which the effectiveness of MM C-1 is based assumes a Tier 4 final standard for all construction equipment exceeding 50 horsepower. MM C-1, however, does not require all equipment to be Tier 4 final compliant.

The City dismisses Petitioner's claim as nothing more than a "red herring." (Opposition 21:18.) The City reasons Tier 4 "interim" standards were only in effect for a short period of time for certain manufacturers. The interim period ended in 2018 well before the City issued the EIR in 2019. (AR 2803, 4303-4304.) The EIR explains:

> "Tier 4 engines have been phased in nationwide since 2008 for all engine types. While some manufacturers were given limited flexibility to phase in compliant engines under the Transition Program for Equipment Manufacturers (TPEM), this provided up

[14] There seems to be no dispute Tier 4 final standards are more stringent (allow less emissions) than Tier 4 interim standards. (AR 2909, 2803.)

> to seven years of additional time to offer such equipment. For engines less than 56 horsepower (hp), this TPEM period ended at the end of 2014. Engines between 56-130 hp had until the end of 2018, while larger engines of 130 hp or more ended at the end of 2017. As a result, Tier 4 equipment is commercially available from all manufacturers, *especially for common types of equipment to be used during the construction phases for this Project*." (AR 2803 [emphasis added].)

The City sidesteps and avoids the issue. (See AR 6621-6622.) MM C-1 relies on Tier 4 equipment. CalEEMod calculations—demonstrating effective mitigation—are based on Tier 4 final standards for construction equipment exceeding 50 horsepower. The City does not require, however, that all equipment exceeding 50 horsepower used for construction have been manufactured in 2019 and later—that is, when Tier 4 final standards were required. Thus, MM C-1 permits, for example, construction equipment with 130 horsepower manufactured in 2018 under the Tier 4 interim standard to be used on the Project. To the extent the City permits such equipment to be used, it would be inconsistent with CalEEMod calculations and undermine the mitigation.

During argument, the City suggested its interpretation of MM C-1 requires equipment for the Project to use Tier 4 final standards. The City contends its CalEEMod calculations support its intent. That is, if the City did not intend for all equipment to meet such standards it would not have used such a setting in its CalEEMod calculations.[15] The City also noted the Flower Growers concede MM C-1 requires Tier 4 final standard engines and so advised the City: "It should be noted that the measure refers to the use of Tier 4-certified engines, not the less effective Tier 4-interim certified engines." (AR 10136.)

The MMRP will require compliance with Tier 4 final standards for MM C-1. Whether the Project is complying with MM C-1 will not turn on the good faith of an "on-the-hood-of-a-truck" analysis of the mitigation measure by a contractor, as suggested by Petitioner during argument. Instead, the MMRP requires:

> "[S]pecifically during the construction phase and prior to the issuance of building permits, the [Flower Growers] shall retain an independent Construction Monitor (either via the City or through a third-party consultant), approved by the City of

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[15] Additionally, the City differentiated between Tier 4 standards (which the City considers final standards) and Transition Program for Equipment Manufacturers (TPEM) standards in the EIR. Thus, the City's language in MM C-1 would not support two Tier 4 standards, final and interim. Under the City's view, there is a Tier 4 standard and a TPEM standard. If the City had intended to include an "interim" Tier 4 standard in the MM, it would have used TPEM. In any event, this distinction provides additional support to the City's intent and the enforceable performance standard used for the MM.

> Los Angeles Department of City Planning, who shall be responsible for monitoring implementation of Project design features and mitigation measures during construction activities consistent with the monitoring phase and frequency set forth in this [MMRP]." (AR 143.)

Thus, while MM C-1 could have been more precise, the City's intent is clear, and the MM contains a specific performance standard. Moreover, the Flower Growers have acknowledged MM C-1 requires construction equipment with Tier 4 final standards (or its equivalent) be used for the Project. The MMRP will "ensure compliance during project implementation." (Pub. Resources Code § 21081.6, subd. (a).)

While Petitioner contends the City uses a performance standard addressing only particulate but not NOx emissions (Opening Brief 18:14-19), the court is unpersuaded. MM C-1 requires any construction equipment meet both standards—Tier 4 final and a Level 3 diesel emission control strategy. (AR 849 ["In addition"].)

Based on the foregoing, the court finds the City's determination MM C-1 will be effective at mitigating air quality impacts to a less-than-significant level during construction is supported by substantial evidence.

a. Feasibility and Enforceability of MM C-1

According to Petitioner, MM C-1 "does not provide either feasible or enforceable means to ensure significant air quality impacts will be avoided." (Opening Brief 19:5-6.) Petitioner argues MM C-1 is inadequate to ensure avoidance of significant impacts to the air quality "because of practical obstacles in obtaining the required technology." (Opening Brief 19:10-11.)

Petitioner reports while Tier 4 standards have been phased in for construction equipment manufactured since 2008 (Tier 4 interim) and 2014 (Tier 4 Final), "a large portion of the construction equipment currently in use was manufactured to lower standards." (Opening Brief 19:16-17 [citing AR 2910-2911].)[16] Petitioner contends the City's claim Tier 4 standards construction equipment is readily available is unsupported by substantial evidence. Thus, Petitioner claims the EIR's conclusion supporting feasibility—the availability of equipment—fails.

Petitioner's argument alleging a lack of appropriate construction equipment is based on speculation. Petitioner's reliance on a seven-year-old report from 2014—just after Tier 4 final

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[16] "In 2014, 25% of all offroad equipment in the state of California were equipped with Tier 2 engines, approximately 12% were equipped with Tier 3 engines, approximately 18% were equipped with Tier 4 Interim engines, and only 4% were equipped with Tier 4 Final engines."

standards phased in—does not meet Petitioner's burden on the issue. The City's position "it is reasonable to conclude that the market has produced many more Tier 4-compliant engines" since 2014 is reasonable and appropriate given Petitioner's speculation. (Opposition 23:2-3.) This is especially true given the passage of time and such equipment being available from all manufacturers. (AR 2806.)

More importantly, if Flower Growers cannot secure specific Tier 4 equipment as required by MM C-1, Flower Growers will be required to "work with the City's Building and Safety Department on equivalent alternatives that minimize tailpipe emissions from off-road equipment." (AR 2803.) The term "equivalent" means the Flower Growers must demonstrate the proffered alternative "meets or exceeds" Tier 4 standards thereby meeting necessary emission reductions in NOx and PM2.5. (AR 4303-4304.)

Based on the speculative nature of Petitioner's claim concerning feasibility, the court finds Petitioner did not meet its burden of demonstrating the City abused its discretion when it found MM C-1 is feasible.[17]

2. Air Quality Impacts to Sensitive Receptors

Petitioner takes issue with the City's selection and identification of sensitive receptors and their proximity to the Project. The flaw, according to Petitioner, undermines the EIR's air quality analysis.

Petitioner notes the EIR identifies the "nearest" sensitive receptors at distances of 220 (school), 240 (apartment building), 440 (apartment building) and 700 (apartment building) feet from the Project. (AR 836.) Petitioner reports there is an apartment building within 55 feet of the Project and another closer than 240 feet. (AR 778, 3173, 6874-6875.) Petitioner argues that these omissions are misleading by creating the impression for decisionmakers and the participating public there are few sensitive uses in close proximity to the Project.[18]

To the extent selection of a group of sensitive receptors is a methodology issue, the City is entitled to deference on its methodology.[19] Thus, the decision is subject to substantial evidence review. (*City of Long Beach v. Los Angeles Unified School Dist.* (2009) 176 Cal.App.4th 889, 898.)

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[17] The court's finding MM C-1 is effective sufficiently responds to Petitioner's claim concerning enforceability.

[18] Additionally, Petitioner argues the EIR's air quality impacts on sensitive receptors is inadequate because it relies on the MM C-1 to render the impact less than significant. Of course, the court's earlier analysis of MM C-1 would be equally applicable here.

[19] That said, the court is not persuaded the issue is, in fact, a methodology issue.

The City's use of SCAQMD guidance on the issue does not actually support selection issues. That is, nothing in the SCAQMD guidance instructs on selection of sensitive receptors over others. (AR 832-848, 845.) Thus, the SCAQMD guidance is not substantial evidence.

In the EIR, the City "disclose[d] the location of a number of representative sensitive receptors near the Project Site" including residential and non-residential uses. (AR 7232.) The City's response to public comment is instructive:

> "Almost all of the other residential uses identified by the commentor are at the same distance from the Project site as the Santee Court Apartments (i.e., the Santee Village Apartments) or even a further distance away from the Project site (i.e., the Garment Lofts are 40 feet further away than the Santee Court Apartments and the Santee Village Lofts are 60 feet further away than the Santee Court Apartments). Moreover, compliance with SCAQMD's thresholds of significance will avoid any significant impact to any of these sensitive receptors and the EIR demonstrates that mitigated construction emissions would be less than all the SCAQMD's thresholds of significance. (Refer to Draft EIR, pages 4.C-19 through 23.) This conclusion would apply regardless of the location of any receptor pursuant to SCAQMD guidance." (AR 7232; see also AR 3570-3571.)

The court finds Petitioner has not met its burden of demonstrating a prejudicial abuse of discretion even assuming the City abused its discretion in its selection of sensitive receptors. Petitioner has not suggested any legal requirement that every sensitive receptor within close proximity of a Project must be identified. "CEQA requires only that the agency 'use its best efforts to find out and disclose all that it reasonably can' (Guidelines, § 15144), and that the EIR display 'adequacy, completeness, and a good faith effort at full disclosure' (Guidelines, § 15151)." (*Planning & Conservation League v. Castaic Lake Water Agency* (2009) 180 Cal.App.4th 210, 253.)

Further, Petitioner fails to demonstrate the City sampling is misleading—other than to the extent the City did not include every single sensitive receptor in close proximity to the Project. The City's expert concluded the Project would avoid significant impacts to all receptors in the vicinity because the Project's mitigated construction emissions will fall below SCAQMD's thresholds measured at the source of the emissions. (AR 3570-3571, 4068, 7232.) Petitioner does not suggest with evidence the EIR's analysis and conclusions would be different with respect to the omitted sensitive receptors as opposed to the receptors the City considered and analyzed. Accordingly, Petitioner shows no prejudicial abuse of discretion.

3. *Disclosure of Health Risks Associated with Air Quality Impacts*

Petitioner argues the Project fails to adequately discuss the connections between potential pollutant emissions and resulting human health impacts. Such analysis, Petitioner contends, is required by Guidelines section 15126.2, subdivision (a).

Petitioner asserts the EIR failed to discuss the health risks related to the estimated level of construction and operational emissions. (AR 827-850.) The EIR therefore does not comply with the Supreme Court's direction in *Friant Ranch* that a "[p]roject's health effects must be "clearly identified" and the discussion must include "relevant specifics" about the environmental changes attributable to the Project and their associated health outcomes." (*Friant Ranch, supra,* 6 Cal.5th at 518.)

Further, Petitioner argues the City's 2019 Health Risk Assessment (HRA) does not "fill the gap in the EIR's analysis." (Opening Brief 23:28.) The HRA contains no analysis of operational emissions and merely addresses construction-related emissions of diesel particulate matter. (AR 846.)

Under SCAQMD guidance, an HRA is recommended for "substantial sources of diesel particulate emissions (e.g., truck stops and warehouse distribution facilities) . . . ." (AR 846.) The City determined—and there is no challenge to the City's finding—the "Project would not result in any substantial emissions of toxic air contaminants (TAC) during the construction or operations phase." (AR 846.)

The EIR explains:

> "The Project would not result in any substantial emissions of toxic air contaminants (TACs) during the construction or operations phase. During the construction phase, the primary air quality impacts would be associated with the combustion of diesel fuels, which produce exhaust-related particulate matter that is considered a toxic air contaminant by CARB based on chronic exposure to these emissions. However, construction activities would not produce chronic, long-term exposure to diesel particulate matter. During long-term project operations, the Project does not include typical sources of acutely and chronically hazardous TACs such as industrial manufacturing processes and automotive repair facilities. As a result, the Project would not create substantial concentrations of TACs. In addition, the SCAQMD recommends that health risk assessments be conducted for substantial sources of diesel particulate emissions (e.g., truck stops and warehouse distribution facilities) and has provided guidance for analyzing mobile source diesel emissions. The Project would not generate a substantial number of truck trips. Based on the limited activity of TAC sources, the Project would not

warrant the need for a health risk assessment associated with on-site activities. Therefore, Project impacts related to TACs would be less than significant." (AR 846; see also AR 2964-66.)

Contrary to Petitioner's position, *Friant Ranch*, does not require more from the City. The Project does not exceed any SCAQMD significance threshold for air quality impacts or trigger any criteria requiring an HRA.

Petitioner has not met its burden of demonstrating a prejudicial abuse of discretion based on a failure to adequately discuss the connections between potential pollutant emissions and resulting human health impacts.[20]

Noise Impacts:

Petitioner contends the EIR fails to adequately analyze and mitigate construction-related environmental impacts as to noise.

1. ***Disclosure of Impacts to Sensitive Receptors***

Petitioner takes issue with the EIR's purported failure to analyze the construction-noise impacts at the Textile Building Lofts, a location merely 55 feet from the Project. The EIR does not contain any noise analysis to any sensitive receptors at this location. In fact, the first discussion by the City about the noise impacts to the Textile Building Lofts is contained in Erratum No. 3. (AR 3173, 3342-3343.)

Petitioner contends the City's analysis is flawed. Petitioner believes the daytime ambient noise level of 64.8 dBA, based on measurements on Maple Avenue, is overstated for the Textile Building Lofts. (AR 3343.) The City's inaccurate 64.8 dBA daytime noise level assumption, according to Petitioner, led to a conclusion of only a 1.3 dBA daytime noise level increase such that the Project's construction-noise impacts did not exceed the 5 dBA level noise increase significance threshold. (AR 3343.)

Based on expert opinion, however, Petitioner reports the City's ambient noise level determination failed to take into account the 12-story height of the Textile Building Lofts. Higher stories have lower ambient noise levels. (AR 10085-10086 [identifying ambient noise is as low as 58.5 for the twelfth floor].) The daytime ambient noise levels are not the same "for all floors of the Textile Building [Lofts] because the higher floors are farther from the road traffic than lower floors." (AR 10085.) Thus, the City's conclusion construction-noise related impacts

[20] Petitioner appears to have abandoned the argument in reply.

to the Textile Building Lofts is flawed—it is based on an "unsupported assumption about existing ambient noise levels." (Opening Brief 25:15-16.)

The City's expert does not address the ambient daytime noise level for the higher floors of the Textile Building Lofts. The City's expert did consider the building, however, using the same methodology used in the DEIR. (AR 4305.) The City's expert determined the Textile Building Lofts would experience an increase in noise based on construction of 1.3 dBA (or less). (AR 3173-74, 7229.)

Further, Project construction-related noise impacts are expected to remain below the City's 5 dBA significance threshold. (AR 3343, 7229.) In a June 19, 2019 memorandum, the City's noise expert explained:

> "[T]his [Maple Street for the Textile Building Lofts] baseline noise level is far greater than the 50.8 dBA L_{eq} noise level used to represent baseline conditions at the Santee Court Apartments receptor. Utilizing the same construction source and mitigation assumptions that were used for the Santee Court Apartments analysis, as Textile Building Lofts would benefit from the same mitigation measures intended to reduce construction noise impacts at Santee Court Apartments, Textile Building Lofts would be projected to experience a construction-related noise increase of just 1.3 dBA L_{eq}, similar to but less than the 1.6 dBA L_{eq} impact that would occur at Santee Court Apartments. The noise impact at Textile Building Lofts would not exceed the 5 dBA noise increase threshold; in fact, it would not exceed the 3 dBA L_{eq} threshold of perceptibility that represents when noise conditions may be noticeably louder." (AR 7229.)

While Petitioner relies expert opinion to dispute and contradict the City's expert technical report, Petitioner has not demonstrated the City's expert studies are so "clearly inadequate or unsupported" as to be "entitled to no judicial deference." (See *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 409 fn. 12. ["A clearly inadequate or unsupported study is entitled to no judicial deference."]) "When an agency is faced with conflicting evidence on an issue, it is permitted to give more weight to some of the evidence and to favor the opinions of some experts over others. (*Association of Irritated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1397.)

Accordingly, Petitioner failed to meet its burden of demonstrating a prejudicial abuse of discretion related to the City's analysis of construction-related noise impacts. (See *State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 795. ["The party challenging the EIR, however, bears the burden of demonstrating that the studies on which the EIR is based 'are clearly inadequate or unsupported.' "])

2. *Feasibility and Effectiveness of MM I-1 and I-2*

Petitioner argues MM I-1 and I-2 are vague, ineffective and unenforceable.

a. *MM I-1*

"To ensure that the Project's construction-related noise levels do not exceed 75 dBA and that construction-related noise increases at Santee Court Apartments do not exceed 5 dBA," the City adopted MM I-1. MM I-1 provides "[a]ll capable diesel-powered construction vehicles shall be equipped with exhaust mufflers or other suitable noise reduction devices." (AR 1011.)

Petitioner contends MM I-1 does not establish a performance standard because nothing in the mitigation measure sets a required noise level reduction. Petitioner argues muffler use alone does not ensure MM I-1 will achieve any particular level of mitigation. Petitioner asserts "the fact that exhaust mufflers should or could reduce equipment noise by 3 dBA or more doesn't address the fact that the measure, as written, does not require mitigation at that level and therefore does not ensure that level of mitigation will be achieved, as is necessary to support the finding of no significant impacts from construction noise." (Opening Brief 28:18-22.)

As noted earlier, "For projects for which an EIR has been prepared, where substantial evidence supports the approving agency's conclusion that mitigation measures will be effective, courts will uphold such measures against attacks based on their alleged inadequacy." (*Sacramento Old City Assn. v. City Council*, *supra*, 229 Cal.App.3d at 1027.)

The City contends MM I-1 as written will be effective. The use of mufflers to abate noise impacts is considered "best practices" and recommended under the City's CEQA threshold guide. (AR 2773, 2786-2787, 7299, 10131-10132 [EPA's Office of Noise Abatement and Control Study], 10139.)[21] In addition, the City's noise expert confirmed the use of mufflers as required by MM I-1 would achieve a 3 dBA noise reduction. (AR 3085-3086, 10139-10140.) The expert explained "aftermarket mufflers reduce noise by over 3 dBA. (AR 10139.) In addition, the Project's MMRP requires the Flower Growers to retain an independent Construction Monitor, approved by the City, responsible for: (a) ensuring that "capable" mufflers are used during construction; and (b) documenting compliance. (AR 2848-2849.)

While the court agrees MM I-1 does not contain a specific performance standard, it does mandate the use of certain equipment that does have performance standards. Substantial evidence supports the City's conclusion the use of mufflers will be effective at reducing noise levels by at least 3 dBA. The City's noise expert reviewed aftermarket muffler manufacturer

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[21] The EPA study, upon which the City's CEQA Threshold Guide relies, shows that "equipment mufflers should reduce excavation and grading phase noise levels by 3 dBA. (AR 10131.)

specification materials to reach his conclusion mufflers result in noise reductions exceeding 3 dBA. An EPA study also supports the City's conclusion.

Accordingly, the City's conclusion MM I-1 will be effective with a sufficiently clear performance standard (by virtue of the equipment used) is supported by substantial evidence. (Guidelines § 15384, subd. (b).)

b. MM I-2

"To ensure that the Project's construction-related noise levels do not exceed 75 dBA and that construction-related noise increases at Santee Court Apartments do not exceed 5 dBA," the City adopted MM I-2. MM I-2 requires "[t]emporary sound barriers capable of achieving a sound attenuation of at least 15 dBA shall be erected along the Project's boundaries facing Santee Court Apartments. Temporary sound barriers capable of achieving a sound attenuation of at least 6 dBA shall be erected along all other Project construction boundaries." (AR 1011.) MM 1-2 requires sound barriers at the Project's boundaries.

Again, Petitioner contends the MM is vague, ineffective and unenforceable.

First, Petitioner asserts achieving a sound attenuation of 15 dBA is so vague it is ineffective; the mitigation measure does not specify from where the sound attenuation is to be judged. As written, the mitigation measure would allow sound attenuation to be evaluated at the Project boundaries instead of a sensitive receptor's location. To the extent sound attenuation is to be measured at the sensitive receptor, it may allow measurement from street level ignoring impacts at higher floors. Higher floor sound attenuation is important as the efficacy of sound barriers to shield higher floors in a building is questionable.[22]

Second, Petitioner argues sound barriers erected along the Project boundaries will be ineffective as they would be too far from construction equipment to effectively reduce noise.[23]

The City dismisses Petitioner's arguments as "wordsmithing." (Opposition Brief 35:5.) The City explains the EIR supports the conclusion that noise barriers with a transmission loss value of 25 dBA are capable of achieving the required noise reduction of 15 dBA at the identified sensitive receptors. (AR 2787, 3085-3086.) Moreover, the City's noise expert explains:

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[22] Petitioner reports sound is most audible when it travels by direct line of sight. Sound barriers are largely ineffective if they do not break the line of sight between the source and receiver. (AR 992.) The City does not seem to dispute this notion.

[23] Petitioner explains sound barriers are most effective when they are very close to either the source or the receiver and become less effective with greater distance from the noise-producing equipment. (AR 10082.)

> "The level topography of the South Building site and single proposed sub-grade level would allow for the easy positioning and movement of these barriers to shield construction activities, no matter where they may occur on-site. There are numerous free-standing temporary noise barrier systems used in the industry up to 24 feet in height that may be positioned manually or by vehicles such as construction forklifts and/or loaders." (AR 10140; see also AR 7299.)

The City's response actually concedes the flaw in the efficacy of MM I-2 as it is written. Effective mitigation to sensitive receptors requires the noise barrier systems to be moved. The City argues MM I-2 is effective because "the noise barriers are *moveable*, meaning that they move in concert with any piece of construction equipment to ensure the equipment does not operate with an unobstructed line of sight to a receptor." (Opposition Brief 35:15-17.) The City recognizes the barriers must be moveable "to shield construction activities, no matter where they occur onsite." (Opposition Brief 35:18-19.)

Despite the City's recognition the noise barriers must be moved throughout the Project during construction to effectively mitigate construction-related noise, MM I-2 does not require such movement. It is not about wordsmithing—it is about enforceability and efficacy. The City's attempts to distinguish between "Project boundaries" and "property boundaries" is unpersuasive.[24] Such a distinction—if there is one—does not resolve the ambiguity. Nothing in MM I-2 requires any noise barriers to be moved.[25]

Accordingly, the court finds substantial evidence does not support the City's conclusion MM I-2 is an effective mitigation measure.

CONCLUSION

Based on the foregoing, the petition is granted.

During argument, the Flower Growers suggested the court should address remedies if the court granted the petition. "In most cases, when a court finds that any agency has violated CEQA in approving a project, it issues a writ of mandate requiring the agency to set aside its CEQA determination, to set aside the project approvals, and to take specific corrective action before it considers approving the project." (*King & Gardiner Farms, LLC v. County of Kern* (2020) 45 Cal.App.5th 814, 896.)

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[24] In the EIR, the City defines the Project boundaries as approximately 3.87 acres consisting of one block. It would seem the "Project boundaries" are, in fact, the property boundaries. (AR 748.)

[25] Given the comments raised concerning the barriers and the timing of the comments, there are issues of feasibility given barrier mobility issues. (AR 10076.)

The court believes an order consistent with most CEQA writ petition cases is appropriate. Flower Growers, however, may submit an objection to the judgment if it has an objection to the usual order of requiring the City to set aside the project approvals.

Petitioner shall submit a proposed form of judgment with service on all parties.

IT IS SO ORDERED.

April 5, 2021

Hon. Mitchell Beckloff
Judge of the Superior Court