



FILED  
ALAMEDA COUNTY

NOV 16 2007

CLERK OF THE SUPERIOR COURT  
By R. Bennett Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

OAKLAND HERITAGE ALLIANCE,  
Plaintiffs/Petitioners,

vs.

CITY OF OAKLAND, et al.  
Defendants/Respondents,

And

OAKLAND HARBOR PARTNERS, LLC,  
et al.

Real Parties In Interest.

COALITION OF ADVOCATES FOR  
LAKE MERRITT, JOYCE ROY  
Petitioners and Plaintiffs,

vs.

CITY OF OAKLAND, et al.  
Respondents and Defendants.

And

OAKLAND HARBOR PARTNERS, LLC,  
et al.

Real Parties In Interest.

No. RG06-280345 and RG06-  
280471 (coordinated for hearing)

ORDER GRANTING IN PART  
AND DENYING IN PART  
WRITS OF MANDATE

The Petitions of Oakland Heritage Alliance ("OHA") and Coalition Of  
Advocates For Lake Merritt and Joyce Roy (collectively, "CALM") For Writ Of  
Mandate And Injunctive Relief And Attorneys Fees came on regularly for hearing

on August 23, 2007 in Department 518 of the above-entitled court, the Honorable Jo-Lynne Q. Lee presiding.

Petitioners appeared by Arthur D. Levy and Brian Gaffney. Respondent City of Oakland et al. ("City") appeared by Kevin D. Siegel. Real Parties in Interest Oakland Harbor Partners LLC, et al. ("OHP") appeared by Steven M. Bernard and Paul Campos.

The Court has considered all the papers filed on behalf of the parties, as well as the arguments presented at the hearing, and, good cause appearing, **GRANTS** Petitions for Writ of Mandate and Declaratory Relief challenging the Environmental Impact Report ("EIR") cumulative impact analysis, incremental traffic impact analysis and seismic risk mitigation measures and findings, and **DENIES** all other claims, for the reasons that follow.

#### **SUMMARY OF FACTS AND CASE**

##### **I. THE PROJECT**

Real Parties In Interest OHP, a joint venture between Signature Properties, Inc. and Reynolds & Brown, propose to purchase<sup>1</sup> and develop a 64.2-acre site along Oakland's Inner Harbor (the Oak to Ninth Mixed Use Development Project or "Project"). (AR<sup>2</sup> 544). This waterfront property lies east of Jack London Square along the Oakland Estuary and the Embarcadero, south of the Nimitz Freeway (Interstate 880), between Oak Street and Ninth Avenue. (AR 544; 594).

Historically, the Port of Oakland used the site as a break bulk facility but its existing uses include manufacturing, outdoor storage, a concrete manufacturing plant, a dechlorination facility, warehouses, a metal recycling facility, marine related repair and storage, the 7.7 acre Estuary Park (including the Jack London Aquatic Center), two marinas, a wetland restoration area, and a structure of

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<sup>1</sup> The project site is owned by the Port of Oakland and is proposed to be sold to Oakland Harbor Partners upon approval of the project.

<sup>2</sup> "AR" references are to the Administrative Record.

historical significance, the Ninth Avenue Terminal Building ("Terminal"). (AR 592-597).

The project purpose is to convert this maritime and industrial area into a mixed-use neighborhood (predominantly residential) with approximately 3,100 dwelling units (a mix of flats, town homes, and lofts), approximately 200,000 square feet of ground-floor retail/commercial space, a minimum of 3,950 parking spaces, 29.9 acres of parks and open space, two renovated marinas, shoreline improvements, improvements to the Embarcadero along the project site, and other infrastructure improvements. (AR 105, 544). The design concept consists primarily of constructing low-rise, wood frame structures and a few mid to high-rise concrete or steel structures. Building heights will range from six to eight stories, with high-rise tower elements of up to 24 stories on certain parcels. (AR 544, 7925). A continuous public pedestrian trail and Class I bicycle facility along the entirety of the project's waterfront will also be created as a segment of the Bay Trail. (AR 544). All existing buildings on the site are slated to be demolished, with the exception of the Jack London Aquatic Center and a portion of the Terminal building and wharf structure. (AR 105). Specifically as to the historic Terminal the project proposes to demolish all but 20,000 square feet of the 180,000 square-foot Terminal building and a portion of its existing wharf to create 9.7 acres of interconnected parks and waterfront space. (AR 105, 544).

The project is not consistent with existing land use classification or the existing zoning. Thus it requires a General Plan Amendment to the Estuary Policy Plan component of the Oakland General Plan, amendments to the Central City East Redevelopment Plan and Central District Urban Renewal Plan, a new zoning district to accommodate proposed densities and residential uses and amendments to the zoning map, and a Development Agreement between the project sponsor (Real Parties In Interest here). The project will be developed in eight phases over a period of approximately 11 years. (AR 105, 545).

## II. SUMMARY OF THE CASE

On May 28, 2004 the City issued its Notice of Preparation of an EIR for the project. (AR 1168-70). OHP conducted a "public participation process" during which its private consulting firm surveyed public attitudes toward the project in small group meetings. (AR 9311-9483). Participants expressed various concerns, including loss of the Terminal. (AR 9320-9330).

The draft EIR was released for public review and comment on August 31, 2005. (AR 9027-28). Comments were received from the public, including Petitioner. (AR 1605-1677). The comments, responses to the comments, changes to the Draft EIR, and additional information were published in a Final EIR (FEIR) on January 31, 2006. (AR 106, 8457-8486). On March 15, 2006 the Planning Commission conducted a hearing to consider the certification of the FEIR and other project-related measures, after which it passed 12 resolutions necessary for project approval including adopting amendments to the Estuary Policy Plan, adopting the Planned Waterfront Zoning District-4, adopting amendments to zoning maps, and approving the Development Agreement between the City and project proponents (Real Parties here). (AR 4474,4529-4530). Following the Planning Commission certification of the FEIR, the City prepared an Addendum to examine certain Project modifications and to address correspondence received after publication of the FEIR. (AR 106).

On March 24, 2006 Petitioner appealed the approvals to the City Council. (AR 7968-8044). On March 28, 2006 the City Council heard testimony at a workshop conducted in the City Council chambers organized by the League of Women Voters of Oakland. (AR 6334-6478). No vote was taken that evening. (*Id.*)

On June 20, 2006, the City Council held a hearing on the Oak to Ninth project. (AR 6180-6333). It approved the project as proposed with various modifications and certified the FEIR. With regard to the Terminal, the City Council modified the project to increase the minimum area to be saved for the

Terminal head house from 15,000 to 20,000 square feet. (AR 124, 312). The Council conditioned approval on a formal process to seek proposals for preservation and reuse of between 40,000 and 90,000 square feet of the 1930 portion of the Terminal (Condition 25) and a \$500,000 contribution to the City's historic preservation efforts (Condition 26), among numerous other conditions. (AR 302-323). Additionally, the City imposed all of the EIR mitigation measures in the 57 page mitigation monitoring and report plan (AR 245-301), adopted 35 pages of Findings and a Statement of Overriding Considerations pursuant to the California Environmental Quality Act ("CEQA") (AR 105 -124, 224-244; 324-336),<sup>3</sup> and denied all appeals from the Planning resolutions. (AR 7-9).

On June 23, 2006 the City filed its Notice of Determination related to the EIR, the CEQA Findings and Statement of Overriding Considerations, and the Mitigation Monitoring and Reporting Program. (AR 5-6).

On July 18, 2006 the City Council conducted a hearing on its consent calendar for the required second reading of the ordinances passed on June 20. (AR 6166-6179). The ordinances were passed without any significant discussion or amendment. (AR 30-35; 40-65; 66-72; 83-88, 6176-6179).

On July 21, 2006, OHA filed the instant Petition for writ of mandate and prohibition and for injunctive relief challenging the Oakland City Council's approval of the demolition of the Terminal as part of the Oak to Ninth Project on the grounds that the findings of infeasibility and overriding considerations relied upon by the City are insufficient under CEQA and are not supported by the substantial evidence in the public record in violation of CEQA. Additionally, OHA contends the City improperly certified the FEIR which, it claims, contains improper, erroneous and unfounded statements that the project will have "less than significant" impacts upon traffic, noise, school facilities, public viewpoints,

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<sup>3</sup> The Council also adopted the General Plan amendment and two redevelopment plan amendments, approval for rezoning of the site, approval of the Development Agreement, and other project approvals. (AR 224-244).

seismic risk, wetlands, and unknown cultural resources; that the City abused its discretion and failed to proceed in a manner required by law by failing to identify and assess potential impacts on air quality and parking, approving a Development Agreement in violation of Government and Planning Code, and approving the project without first determining if the project violates Public Trust restrictions on the site.

On July 24, 2006 CALM petitioners filed the instant Petition for writ of mandate and for injunctive relief also challenging the certification of the FEIR, the CEQA Findings, the Mitigation and Monitoring Program, the Development Agreement and all approvals relative to the Oak to Ninth Avenue Project. The CALM petition contains three causes of action with claims similar to those raised by OHA (except that it does not single out the demolition of the Terminal and instead specifically addresses alleged inadequacies in the cumulative impact analyses) and with similar, almost identical, prayers for relief.

The Court, pursuant to agreement of the parties, coordinated the OHA and CALM petitions for hearing and determination.<sup>4</sup>

## **DISCUSSION**

### **I. THE NINTH AVENUE TERMINAL**

Petitioners claim<sup>5</sup> the City failed to comply with CEQA because: (1) the City failed to make a finding, as required under PRC § 21081(a), that full reuse of the Terminal was not feasible; (2) the EIR failed to identify a feasible alternative

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<sup>4</sup> Respondent City filed a motion to augment the administrative record concerning documents relative to the Development Agreement. Petitioners' objected to the petition to augment, but later determined to withdraw their challenges to the Development Agreement in this writ thus making a ruling on said motion and issue moot. Further, petitioners have withdrawn their claim that the traffic optimization findings are not supported by substantial evidence.

<sup>5</sup> The summary of the argument here is taken from OHA's Opening Brief (see page i). In the Consolidated Reply the arguments are framed somewhat differently (infeasibility findings are insufficient "as a matter of law"; the alternatives treatment is insufficient "as a matter of law", etc.) but raise the same basic issues.

which would incorporate the Terminal in the Project, contrary to CEQA Guidelines 15126.6(a); and (3) the infeasibility finding is not supported by substantial evidence. For the reasons set forth below, Petitioners' challenges to the analysis of and findings for the Ninth Avenue Terminal are rejected, and as to these claims the writs are DENIED.

**A. The Ninth Avenue Terminal – Factual Background**

The Terminal is located in the Brooklyn Basin at the easternmost portion of the project site, between 9<sup>th</sup> and 10<sup>th</sup> Avenues. (AR 817). Construction began on the Terminal in 1929 and was completed in October 1930<sup>6</sup> as a state of the art harbor improvement. It was one of three municipal terminals funded under a 1925 voter-approved harbor bond; the others were the Grove Street Terminal and Outer Harbor Terminal, both of which have since been demolished. (AR 829). Initially the Terminal was 504 feet long, then a 500-foot addition in 1951 extended its length to 1004 feet. The interior floor space is measured at 178,530 square feet, or about 4-acres of enclosed space, and the ceiling height is 47 feet at the center and 27 feet at the sides. (AR 829). There are 21 cargo doors along the length of the transit shed on the waterfront, each door 16 feet by 16 feet. Along the length of the transit shed on the landside there are 18 cargo doors, each 14 feet by 10 feet. At both ends of the building there is a cargo door, 24 feet by 18 feet. (AR 829).

Design of the terminal has been attributed to Arthur A. Abel, who served as Assistant Chief Engineer and Assistant Port Manager from 1926 to 1932, and Chief Engineer and Port Manager from 1932 to 1952. According to the Oakland

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<sup>6</sup>In 1935, further waterfront improvements were made using over 500 laborers supplied through work relief programs during the Great Depression, the Public Works Administration (PWA) and Works Progress Administration (WPA). (AR 817). More improvements followed during the 1930s, including the purchase of 20 acres of waterfront land adjacent to the Terminal (1936), a 506 foot wharf extension and other additional projects completed by the WPA (1937), and more improvements funded by the PWA in 1938, such as the construction of roadways and installation of sewer lines. (AR 817-818).

Landmark and S-7 Preservation Combining Zone Application<sup>7</sup> ("landmark application") for this structure:

"The Beaux-Arts style of the building, while very simple stylistically represents an important phase in Oakland architecture and city planning during this period... The Ninth Avenue Terminal in its simple paneled pilasters, symmetrical facade, and other detailing represents these ideals very well. Other notable examples of this style and movement are Oakland City Hall, the bulkhead buildings along San Francisco's waterfront, and the Courthouse on St. James Park in San Jose."

(AR 829).

The Terminal has been in continuous use from October 1930 to the present. The Transmeridian Cotton Warehouse, Inc. currently uses it as a storage facility. (AR 595, 629, 964; 1383-85).

The Terminal is considered to be historically significant because it is "an intact, original wharf and transit shed constructed 1929-1930 as part of the Port of Oakland's state of the art harbor improvements during the period 1925-1932" and the last survivor of the City of Oakland's three Municipal Terminals. (AR 825). "The transit shed as a whole – [is] the only existing utilitarian, industrial municipal building on which the Beaux-Arts derived architectural style was applied to create monumental imagery." (AR 829).

The entire Terminal building and its related wharf appear to be individually eligible for listing on the National Register of Historic Places (NRHP) and the California Register of Historic Resources (CRHR) based on its significance in the areas of architecture, commerce, maritime commerce and harbor terminal (association with historic events and characteristics of the style, type or period). (AR 830, 1157). Because major additions to the structure in 1951 were in keeping with the original design and intent and of the original 1930 structure, the entire Terminal building and wharf retain an overall high level of historical integrity per

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<sup>7</sup> Prepared by Cynthia L. Shartzter and accepted by the City of Oakland's Landmark Preservation Advisory in May, 2004.



NRHP and CPHR. The structure also is considered to be listed on the City of Oakland's Local Register of Historic Resources by virtue of its status as a Potential Designated Historical Property with an "A" rating (primary importance). (*Id.*) As a result of the foregoing, the original 1920's portion of the building, the 1951 addition, and the related wharf form an intact historic resource and would result in a significant and unavoidable impact if removed, wholly or partially. Removal of the 1951 addition alone would substantially alter the integrity of the resource, such that it would probably no longer qualify as a federal, state, and local historic resource.<sup>8</sup> (*Id.*)

The Project originally proposed that 165,000 square feet of the 180,000 square foot Ninth Avenue Terminal (and a portion of its wharf) would be demolished for open space use, reducing the length of the building from 1004 feet to approximately 100 feet with the remaining "head house" to be adaptively reused. (AR 597-598, 607). Ultimately the Project was modified to increase the minimum area saved from 15,000 to 20,000 square feet. (AR 312). The Final EIR provides that in mitigation for the demolition, OHP will set aside 200 square feet of the Terminal bulkhead building to house a maritime museum and community center with an exhibit depicting the Oakland Municipal Terminals. (AR 125, 1539). OHP will photograph and document the building per Historic American Building Survey (HABS) standards for archiving. (AR 839-840). A condition of the Project also requires the Project sponsor contribute \$500,000.00 to the City for use in connection with historic preservation efforts. (AR 124). Notwithstanding such mitigation measures and conditions, the EIR concludes that "[b]y removing the majority of the building, its ability to convey its historic significance would be permanently altered and materially impaired" and "the retention [of a portion of

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<sup>8</sup> None of the remaining 14 buildings on the project site are considered historic resources for purposes of CEQA. Further, the project site does not appear to be eligible for inclusion on the Local Register of Historic Resources as a local Preservation District. (AR 830).

the head house] would be insufficient to offset the loss of physical characteristics that qualify this building as a federal, state, and local historic resource." Therefore, the EIR acknowledges that the proposed project will result in "significant and unavoidable" impact even with implementation of mitigation measures calling for Historic American Building Survey (HABS) documentation and adaptive reuse and rehabilitation of the Bulkhead Building.<sup>9</sup> (*Id.*; see also, Carey & Co. Inc. Historic Resource Evaluation at AR 1410).<sup>10</sup>

**B. The Alternatives Analysis.**

After determining that the Project would result in significant and unavoidable impacts to the Terminal as well as other resources and conditions (traffic, noise, air quality, etc.), an extensive "scoping" process (AR 1121) was performed by the City<sup>11</sup> resulting in four identified alternatives to the Project for examination and a so-called "Sub-Alternative" that could be included in the

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<sup>9</sup> The EIR further determined that mixed use, multi-story development proposed for the site may not be architecturally compatible with the Terminal and there was a cumulative impact to historic resources given the previous loss of the other Oakland Municipal Terminals. (AR 841, 843).

<sup>10</sup> The Project also proposes to retrofit the wharf to improve its structural capacity, and a portion of its southern and western edges will be eliminated, thus reducing its current width and length and replacing the historically paved surface with lawn area. The Project envisions this space as open public space – a "shoreline park" – with a walkway constructed along the waters' edge, new retaining walls, light standards, and pavement. By removing the edges and western portion of the pier structure and transforming it into a park, the wharf would be substantially altered and would no longer maintain its industrial character resulting in an additional "significant and unavoidable impact." (AR 841).

<sup>11</sup> The Draft EIR acknowledges that many other alternatives to the project could have been formulated for purposes of the EIR, noting that a number of suggested alternatives emerged during the EIR scoping process, during other non-EIR related public input opportunities paralleling the EIR process, and from educational study outside the City's processes. These suggestions are listed in Appendix B of the DEIR. (AR 1121).

Project or any of the development alternatives.<sup>12</sup> The alternatives selected for discussion in the EIR were: (1) No Project; (2) No Project - Estuary Policy Plan; (3) Enhanced Open Space/Partial Terminal Preservation and Adaptive Reuse; (4) Reduced Development/Ninth Avenue Terminal Preservation; and (5) "Sub-Alternative: Full Ninth Avenue Terminal Preservation and Adaptive Re-Use." (AR 1121).

Under the "No Project" alternative (Alternative 1A)<sup>13</sup> none of the development proposed would occur and the site would remain in its current state for the foreseeable future. Specifically the Terminal would continue to be used for bulk and container storage and barge docking activities. (AR 1130).

With the "No Project/Estuary Policy Plan" alternative (Alternative 1B), future development of the project site would be consistent with the Estuary Policy Plan. As envisioned in the Estuary Plan, the areas south of the Embarcadero would be converted into a network of large-scale open spaces, including an assemblage of parkland that would create the "major open space resource in Oakland" and a "recreational asset of regional significance." The Fifth Avenue Point would remain with approximately 35,000 square feet of additional artisan studio space for work-live and work-only uses and development would include about 35,500 square feet of restaurant, retail and marina-related uses, a 250 room hotel, a 400 room hotel with a 50,000 square feet conference facility, and 70,000 square feet for educational, cultural and recreational facilities, such as a museum, community retention center, or gallery space. Under this alternative, there would

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<sup>12</sup> An off-site alternative was also considered but not analyzed in any detail because, among other reasons, it would not fulfill the basic objective of redeveloping the Oak-to-Ninth District of the Oakland Estuary. (AR 1160).

<sup>13</sup> The EIR denominates the No Project Alternative as Alternative 1A, the No Project/Estuary Plan as Alternative 1B, the Enhanced Open Space as Alternative 2 and the Reduced Development as Alternative 3. But in some of the documents in the Administrative Record and in parties' briefs, these alternatives are also referred to as the first, second, third and fourth alternatives, respectively. The Sub-Alternative is also referred to as the "fifth" alternative.

be a total of approximately 41.5 acres of open space compared to 28.4 acres with the Project. The Terminal would be completely demolished to allow for a new major park (Crescent Park). (AR 1130).

The "Enhanced Open Space/Partial Terminal Preservation" alternative (Alternative 2) would provide for reduced housing (1,800 residential units) and less commercial retail/restaurant space (95,000 square feet) but increased parks and open space (40.6 acres) and partial preservation of the Terminal (the bulkhead and 1920's portion of the building comprising approximately 88,000 square feet). The Terminal would be devoted to community space (e.g. educational, cultural, and or /recreational uses). Under this alternative, the wharf would be partially removed consistent with Tidelands Trust land use restrictions. This project would be a mixed-use residential neighborhood that would be designed and configured similar to the Project. (AR 1138). This alternative would not avoid the significant unavoidable impact on historic resources by the Project and it would increase existing hazardous wind conditions in the open space areas, but otherwise its impacts would be generally similar to the Project. (AR 1138).

The "Reduced Development/Ninth Avenue Terminal Preservation" alternative (Alternative 3) considered significantly reduced development (540 residential units, 10,000 square feet of retail/restaurant use), 39.9 acres of park and open space, and preservation and reuse of the entire Terminal (except for partial removal of the wharf). The Terminal building would contain a 50,000 square foot conference center and about 70,000 square feet of educational, cultural, and /or recreational uses, totaling 120,000 square feet of community use (consistent with the Estuary Plan). Fifth Avenue Point would not be incorporated into this proposal. New buildings would be about 4-5 stories (50 feet) tall. (AR 1148). This alternative would have the same potentially significant impacts with respect to creating substantial change in the existing environmental and existing land uses although less development would occur compared to the Project (and each of the other alternatives, except the No Project alternatives). This alternative would also

more fully support policies that call for the creation of new waterfront open spaces along the Estuary than the Project would, primarily given the increased size of Channel Park. (AR 1152-1156). This alternative would reduce a number of significant and unavoidable project impacts identified in the EIR regarding traffic, air quality, and demolition of historic resource (the latter impact would be wholly avoided with implementation of the Sub-Alternative). (AR 1159-1160).

Finally, the EIR identified and considered a "Sub-Alternative – Full Ninth Avenue Terminal Preservation and Adaptive Use" which proposed full retention of the Terminal and wharf. The Draft EIR states: "This alternative is considered a stand-alone alternative that could be combined with the proposed project and other alternatives. Full preservation of the Ninth Avenue Terminal that avoids the significant and environmental impact is addressed in this Sub-Alternative only and is not addressed elsewhere in the EIR." (AR 1157). It further notes: "[c]oupling this Sub-Alternative with any of the alternatives analyzed in this EIR, or with the project, would avoid the significant and unavoidable impacts (project and cumulative) that would occur with demolition or substantial alteration of the Ninth Avenue Terminal building and its associated wharf, pursuant to CEQA and the Historic Preservation Element of the General Plan." (AR 1158).

The EIR determined that the No Project alternative was the environmentally superior alternative, even though existing conditions on the site might be more adverse than would occur with the Project, or other alternatives. (AR 1158). However, CEQA requires that a second alternative be identified in the EIR when the "no project" alternative emerges as the "environmentally superior alternative." Thus, the EIR determined that the "Reduced Development/Preservation" alternative combined with the full preservation Sub-Alternative was the environmentally superior alternative under CEQA Guidelines

15126.6(e).<sup>14</sup> (AR 118, 1158). All alternatives, including the Sub-Alternative, were rejected by the City as infeasible.<sup>15</sup> (AR 119-121).

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<sup>14</sup> The comparative impacts of the alternatives and the Project are set forth in the text (AR 1121-1160) and illustrated in a chart (Table V-5, AR 1161-1186). Chapter VI of the draft EIR contains an "Impact Overview" summarizing the significant, unavoidable impacts of the Project, the cumulative impacts, the "growth-inducing" impacts, including project implications for growth, additional spending and new commercial development, housing demand, construction related business activity and employment, and nearby effects on growth. (AR 1187-1193).

<sup>15</sup> The No Project alternative was rejected by the City as infeasible for the following reasons: it would not attain any of the objectives of the Project, would not increase open space, parks, public access, or views called for in the Estuary Policy Plan, the Clinton Basin Marina would remain functionally obsolete, current contamination threats to the Estuary would remain, remediation would not occur, none of the fiscal or economic benefits from the Project (e.g. increased jobs, tax revenue, etc.) would occur, and over 3100 new housing opportunities would be lost. (AR 118-119, 1124).

The No Project/Estuary Plan alternative was rejected because, similar to the No Project Alternative, it would result in a loss of housing opportunities. Furthermore, this alternative was determined to be financially infeasible because the estimated cost of construction would exceed revenues, resulting in a shortfall of \$257,267,076, thus requiring significant public subsidies. This alternative could not support the open space maintenance, security, management and insurance costs associated with development of the site. (AR 119).

The Enhanced Open Space/Partial Terminal Preservation and Adaptive Reuse alternative was rejected by the City because it (1) substantially reduced the number of new housing thereby impeding the City's ability to meet its housing goals; (2) realigned the Embarcadero thereby inappropriately placing a major thoroughfare along a new open space area and new residential area causing land use conflicts and separating the new open space from other uses on the site; (3) was determined to be financially infeasible because the costs of development would exceed revenues by an estimated \$172,126,631 thus making it difficult to obtain conventional financing and requiring significant public subsidy; and (4) would reduce the ability to provide new open space and access to the waterfront near the Terminal. (AR 119-120).

The Reduced Development/Terminal alternative was rejected for the same reasons as the "Enhanced Open Space/Partial Terminal Preservation" (it would not support project objectives to provide a range of housing opportunities, help address existing jobs/housing imbalance, or provide alternative modes of

Specifically, as relates to the claims herein, the Sub-Alternative was rejected for two reasons: (1) it would preclude use of the Terminal area for open space and park uses and preclude views of the waterfront from the Terminal location contrary to the Estuary Policy Plan and (2) it was determined to be financially infeasible. (AR 121).

**C. Standard of Review**

In reviewing a petition for writ of mandate where, as here, the lead agency has certified the project EIR, the court's inquiry extends solely to whether the agency has committed a prejudicial abuse of discretion. Such prejudicial abuse occurs when the agency has not proceeded in the manner required by CEQA, or when the agency has reached factual conclusions and determinations not supported by substantial evidence. (Public Resources Code ("PRC") § 21168.5; *Vineyard Area Citizens for Responsible Growth, Inc. et al. v. City of Rancho Cordova* (2007) 40 Cal.4<sup>th</sup> 412, 435). Substantial evidence is "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. Whether a fair argument can be made . . . is to be determined by the whole record before the lead agency." (*Gilroy Citizens for Responsible Planning v. City of Gilroy* (2006) 140 Cal.App.4<sup>th</sup> 911, 918). The substantial evidence standard "is applied to conclusions, findings and determinations. It also applies to challenges to the scope of an EIR's analysis of a topic, the methodology used for studying an impact and the reliability or accuracy of the data upon which the EIR relied because these types of challenges involve factual questions." (*San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4<sup>th</sup> 645, 654) (internal quotations and citations omitted). In applying the substantial evidence standard, "the agency is the finder of fact and a court must indulge all reasonable inferences

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transportation), although under this alternative the estimated financial shortfall was estimated to be approximately \$308,132,863. (AR 120).

from the evidence that would support the agency's determination and resolve all conflicts in the evidence in favor of the agency's decision." (*Id.* at 654).

Petitioners challenge the EIR's analysis of the Terminal alternatives and the City's findings (or lack thereof) as a "failure to proceed according to law" and as "insufficient as a matter of law" suggesting that the substantial evidence standard only applies to the review of the evidence supporting the City's infeasibility findings. In this Court's opinion, the appropriate standard to review all issues raised by Petitioners relating to the Terminal is "substantial evidence." Petitioners' essentially argue that the EIR should have included the full retention and reuse of the Terminal as part of the overall proposed project (not just a stand-alone project) as an alternative and because it did not do so, the City never actually determined that preserving the Terminal was infeasible.<sup>16</sup> Additionally, they claim that the EIR should have considered reuse of the 1930's portion of the Terminal building in the 3,100-unit project (project density). These arguments, no matter how couched, are attacks on the adequacy of the range of alternatives considered in the EIR.

The California Supreme Court has noted that "[t]he core of an EIR is the mitigation and alternatives sections." (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564-565) ("*Goleta II*"). In determining what alternatives to consider, CEQA Guidelines § 15126.6(c) provides that "[t]he range of potential alternatives to the proposed project shall include those that could feasibly accomplish most of the basic objectives of the project while substantially lessening one or more significant effects." However, as the Supreme Court has noted: "CEQA establishes no categorical legal imperative as to the scope of

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<sup>16</sup> Specifically they argue that the only alternative that addressed the feasibility of retaining the entire Terminal was the Sub-Alternative thus the only relevant finding is Finding 33. Finding 33, it is asserted, does not state that "it is financially infeasible to retain the Terminal (period); merely that it is infeasible as a stand-alone project." Thus, it is claimed, Finding 33 is "insufficient to allow demolition of 160,000 square feet of the Terminal." (OHA Opening Brief, p.10).



alternatives to be analyzed in an EIR. Each case must be evaluated on its facts, which in turn must be reviewed in light of the statutory purpose. Informed by that purpose, we here reaffirm the principle that an EIR for any project subject to CEQA review must consider a reasonable range of alternatives to the project, or to the location of the project, which: (1) offer substantial environmental advantages over the project proposal (Public Resources Code, § 21002) and (2) may be 'feasibly accomplished in a successful manner' considering the economic, environmental, social and technological factors involved. (citations)." (*Goleta II, supra*, 52 Cal.3d at 566) (*italics deleted*). Finally, "[t]he statutory requirements for consideration of alternatives must be judged against a rule of reason." (*Id.* at 565 citing *Foundation for San Francisco's Architectural Heritage v. City and County of San Francisco* (1980) 106 Cal.App.3d 893, 910). In *Goleta II* the Supreme Court employed the substantial evidence standard, as we do here.

**D. The EIR Studied A Reasonable Range Of Alternatives.**

The purpose of an alternatives analysis is to provide information that will allow the decision makers and the public to make reasoned decisions and understand the consequences of those choices. (CEQA Guidelines § 15126.6(f); *Goleta II, supra*, 52 Cal.3d at 564; *Mira Mar Mobile Community v. City of Oceanside* (2004) 119 Cal.App.4<sup>th</sup> 477 at 487). "An evaluation of the environmental effects of a proposed project need not be exhaustive...The courts have looked not for perfection but for adequacy, completeness, and a good faith effort at full disclosure. Further, in determining whether substantial evidence supports a finding, the court may not reconsider the evidence present to the administrative agency. (Public Resources Code, § 21168). All conflicts in the evidence and any reasonable doubts must be resolved in favor of the agency's findings and decision." (*Citizens of Goleta Valley v. Board of Supervisors* (1988) 197 Cal.App.3d 1167, 1177 ("Goleta P").)

Here the City considered alternatives that would preserve the entire Terminal (the No Project Alternative and Sub-Alternative), preserve a portion of

the Terminal (the Enhanced Open Space alternative and the Project) and preserve none of the Terminal (No Project/Estuary Plan Alternative). (AR 1130–1160). The EIR also looked at “coupling the Sub-Alternative” with each of the alternatives and the Project, concluding that do so would not “avoid the significant and unavoidable impacts (project and cumulative) that would occur with demolition or substantial alteration of the Ninth Avenue Terminal building and its associated wharf, pursuant to CEQA and the Historic Preservation Element of the General Plan.” (AR 1157). It also concluded that “coupling” the Sub-Alternative with each of the alternatives or the Project would reduce the overall amount of new open space that would occur (with the Project or either of the alternatives) because the paved wharf area would remain under the Sub-Alternative. (AR 1158). Thus, the EIR analysis concluded that the environmentally superior alternative was the Reduced Development/Preservation (Alternative 3) *with the Full Preservation Sub-Alternative* because it not only eliminated the significant and unavoidable impacts to historical resources but would also avoid (or reduce to the greatest extent) other significant and unavoidable impacts that would occur with the Project. (AR 1121-1123, 1158).

Petitioners’ complaint that the EIR did not consider the impact of full preservation of the Terminal and wharf as part of the Project is not supported by the record here. (The argument that the City failed to consider and make a feasibility finding as to this scenario is a different argument and is addressed below).

It is true that the EIR apparently did not consider reuse of the 1930’s portion of the Terminal building at project density. However, in light of the record as a whole, this Court cannot say that the failure to include one more iteration of Alternative 2 was unreasonable. It is not required that an agency consider every possible permutation of a proposed project or, in this case, every possible combination involving full and partial preservation of the Terminal at various project densities and uses. (*Mira Mar Mobile Community, supra*, 119 Cal.App.4<sup>th</sup>

at 487-492; *Village Laguna of Laguna Beach, Inc. v. Board of Supervisors* (1982) 134 Cal.App.3d 1022, 1029).

In determining the range of alternatives it is appropriate for the agency to be guided by the objectives of the project. [CEQA Guidelines § 15126.6(c)]. In this case the EIR expressed multiple objectives embraced in the Project, including: providing housing and access to alternative modes of transportation; correcting the jobs/housing imbalance existing in the city; creation of a clear and continuous system of public access along the estuary shoreline and a shoreline promenade punctuated with parks and large open spaces; developing and encouraging mixed use areas along estuary shoreline; maximizing waterfront views; transforming the current maritime and marine industrial uses at the site to public-oriented waterfront activities; balancing the value of retaining the historic resources with the value of maximizing public access and views of the estuary. (AR 548, 632, 635-636). On this record this Court cannot say the five plus alternatives chosen for consideration in the EIR was not "a reasonable range of alternatives" or was too narrow.

**E. Substantial Evidence Supports The Finding of Infeasibility.**

Subdivision (3) of PRC § 21081(a) requires a finding that "[s]pecific economic, legal, social, technological, or other considerations...make infeasible the mitigation measures or project alternatives identified in the EIR."

"Feasible" for purposes of CEQA review, is defined as "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors" (PRC §21061.1; Guidelines § 15364) and "[t]he statutory requirements for consideration of alternatives must be judged against a rule of reason." (*Goleta II, supra* 52 Cal.3d at 565.)

The administrative record may be studied to "assess the degree of discussion any particular alternative deserves, based on the alternative's feasibility and the stage in the decision-making process it is brought to the attention of the

agency.” (*Goleta II, supra*, 52 Cal.3d at 569 and citations therein). Thus, “where potential alternatives are not discussed in detail in the EIR because they are not feasible, the evidence of infeasibility need not be found within the EIR itself. Rather, a court may look at the administrative record as a whole to see whether an alternative deserved greater attention in the EIR [citations omitted] and where the circumstances warrant, a reviewing court may consult the administrative record to assess the sufficiency of the range of alternatives discussed in an EIR.” (*Id.*)

In this case, Petitioners challenge the infeasibility findings in the EIR in two ways. First, it is argued that the EIR did not in fact contain a “finding,” as required under CEQA, that rehabilitation and reuse of the Terminal, as part of the Project, was infeasible. Rather, they argue the City merely determined it was infeasible as a stand-alone project. Citing *Goleta I, supra*, 197 Cal.App.3d 1167 and *Uphold Our Heritage v. Town of Woodside* (2007) 147 Cal.App.4<sup>th</sup> 587, they contend this was error because the Sub-Alternative did not establish that the “marginal costs of the alternative as compared to the cost of the proposed project” was so great that a “reasonably prudent property owner would not proceed with the rehabilitation.” In other words, Petitioners contend that CEQA required the City to demonstrate that the cost of saving the Terminal would “sink the Project” before it could reject the Sub-Alternative as financially infeasible. This Court does not agree that CEQA mandates any set formula of financial infeasibility for all cases.

Initially it is noted that Petitioners’ argument presumes that the only basis for the infeasibility finding for the Sub-Alternative was economic infeasibility. This is incorrect. The Sub-Alternative – which considered only the Terminal – was rejected for two reasons: (1) it was determined to be financially infeasible *and* (2) it would preclude use of the Terminal area for open space and park uses and preclude views of the waterfront from the Terminal location, contrary to the Estuary Policy Plan. Petitioners contend that the City’s stated non-economic reason was not a “finding” under CEQA but simply a declaration of a policy

preference. However, CEQA specifically provides that the agency may consider "legal, social, technological or other considerations", as well as economic factors, in making infeasibility determinations. (PRC § 21081(a).) CEQA Guidelines § 15126.6(c) further provides that the range of potential alternatives to the proposed project shall include those that could feasibly accomplish most of the basic objectives of the project and among the factors that may be used to eliminate alternatives from detailed consideration in an EIR is the failure to meet most of the basic objectives. In this case the project's objectives specifically included, among other goals, maximizing waterfront views, transforming the current maritime and marine industrial uses at the site to public-oriented waterfront activities, and balancing the value of retaining the historic resources with the value of maximizing public access and views of the estuary. (AR 548, 632, 635-636). Thus, the City properly could find that the Sub-Alternative did not meet proper project objectives and was thus not "feasible" for CEQA purposes.<sup>17</sup>

Petitioners contend that the City violated what Petitioners call the "*Goleta I*" standard because it did not determine that the costs of the Sub-Alternative (full reuse of the Terminal) would be so costly that it would "sink the project." (Petitioners Consolidated Reply, p. 8).

This Court does not agree that *Goleta I* imposes a rigid rule that is applied reflexively in all cases. Rather, the *Goleta I* court itself has stated: "Situations differ: what is reasonable in one case may be unreasonable in another. It is necessary to examine the particular situation presented ..." . (*Goleta I, supra*, 197 Cal.App.3d at 1179, discussing what constitutes reasonable range of alternatives). *Goleta I* involved a proposed hotel project on Haskell's Beach, a property that

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<sup>17</sup> Further, when the Sub-Alternative is incorporated with other alternatives, many of the non-economic considerations emerge. Hence, the Reduced Development with the Sub-Alternative was deemed infeasible because of financial reasons but also because it would not support project objectives to provide a range of housing opportunities, help address existing jobs/housing imbalance, or provide alternative modes of transportation, among other considerations. (AR 120).

contained sensitive habitats and species (despite past use as a oil processing plant and tank farm). The Court of Appeal declined to uphold the agency's EIR certification and approval of the hotel project because, among other things, it determined that the county had failed to support, with substantial evidence, its finding that it was financially infeasible to construct a down-sized hotel on the same site. Reviewing the record, the *Goleta I* court concluded that none of the figures the county had relied upon – estimated annual revenues, infrastructure costs and overall project costs – even purported to relate to estimated costs, projected income or expenses for the scaled down alternative. In other words, there was no *comparative* analysis done between the project and the environmentally superior alternative. Thus the appellate court concluded that “in the absence of such comparative data and analysis, no meaningful conclusions regarding the feasibility of the alternative could have been reached.” (*Id.* at 1180-1181). Moreover, in *Goleta I*, the respondent suggested that the economic infeasibility could be *inferred* from the fact that construction costs per room may go up as project size is reduced. The court rejected that argument noting this was an unsupported assumption but even if valid, was not sufficient to demonstrate infeasibility. Therefore, *under the facts of that case*, the court held: “What is required is evidence that the additional costs or lost profitability are sufficiently severe as to render it impracticable to proceed with the project. The scant figures contained in the administrative record are not sufficient to support such a conclusion.” (*Id.* at 1181.)

*Goleta I* does not establish the inflexible standard for determining financial infeasibility as Petitioner argues; rather it establishes a “rule of reason.” (See, *Goleta I, supra*, 197 Cal.App.3d at 1177). It requires that a reasonable range of alternatives be identified and that the EIR actually consider and compare the various alternatives with the Project. Substantial evidence could not support the infeasibility finding in that case because the agency failed to do a meaningful comparison between the Project and the alternative.

Similarly *Uphold Our Heritage v. Town of Woodside, supra*, also cited by Petitioners, merely holds that the feasibility analysis must be based on facts, not just contain conclusory statements that have no support in the record.

In this case, the feasibility analysis in the EIR compared the relative costs of construction and estimated revenues for the five alternatives identified in the EIR and concluded that all would result in a shortfall, ranging between \$172,126,631 and \$308,132,863. But the City also relied upon several other studies, in addition to the EIR, for its finding of infeasibility including: (1) feasibility and fiscal impact reports prepared by EPS that examined seven different scenarios for adaptive reuse, including reuse of the Terminal, or portions of it, as a conference/special events center (the "Conference Center" alternative), community center with ancillary uses and parking (the "Fort Mason" alternative), a 47,400 square foot public market, maritime history center, artists' spaces, cafe/restaurants, and combinations thereof (AR 3016 et seq.; 3562-3603); (2) a memorandum prepared by PFM Group, which reviewed the EPS reports and financial data from project sponsors (AR 2773-2775); (3) an EPS report on the subsidization of the Chelsea Piers and the Torpedo Factory Adaptive Reuse Project (AR 2979); and (4) a report from Novogradac & Company, certified public accountants, that studied the potential impact of tax credits on the economic feasibility of preserving the Terminal (AR 3083 et. seq.). The EPS and PFM analyses, in turn, relied upon reuse cost estimates provided by Rutherford & Chekene for structural upgrades needed and construction cost estimates provided by Devon Construction, Inc. (AR 121-124). In sum, the City met the requirements demanded in *Goleta I, supra* and *Uphold Our Heritage v. Town of Woodside, supra*.

In regards to the analyses relied upon by the City to support its infeasibility finding, Petitioners complain that, except for the Novogradac report, the consultants' only considered the full Terminal reuse alternatives and options as "stand-alone" projects. But this was not unreasonable. In its "Findings Regarding

Project Alternatives And Options For Reuse Of The Ninth Avenue Terminal", the City explains that the Terminal was examined "...as a stand-alone project because the Terminal would be owned and operated by a governmental or other entity, not by the project sponsor." (AR 121). Parks and public spaces would also be the City's responsibility to maintain and service.<sup>18</sup> Thus, if the Sub-Alternative was elected, the City needed to consider not only the construction and site development costs related to preserving all or some portion of the Terminal but also the economic risks involved in owning and operating it, including the possibility of having to subsidize some portion of the development costs. In this regard, the EPS report describing the subsidization of Chelsea Piers and Torpedo Factory projects was relevant information for the City Council members to consider when determining the economic feasibility of saving the Terminal.

Finally, Petitioners argue that the finding of financial infeasibility is based upon incorrect, erroneous, and unreliable opinion evidence in the expert reports submitted to the City. Petitioners attack the design specifications and the construction cost calculations made by Rutherford & Chekene because they believe that Rutherford & Chekene erroneously failed to apply the Historic Building Code. They challenge the EPS feasibility report, including its conclusions of the comparative "shortfalls" among the alternatives and reuse options considered for the Terminal as incorrect. They claim that the shortfall differential between the closest financial alternative to the Project (the reuse of the 1920's portion of the Terminal) and the Project should be \$3.0 million, after taking tax credits into account. They argue this differential would not make that alternative infeasible. Petitioners also fault EPS for failing to consider construction costs that would be avoided by using the Terminal, rather than

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<sup>18</sup> The 20,000 square feet remaining of the building and the public spaces and parks on this parcel as contemplated by the Project will be owned and maintained by the City. In response to comments, the EIR advises that the developer and residents association would not have "control" of the open space and historic building. (AR 1726).



demolishing it. They argue that the experts' opinion that it would be difficult to insure the Terminal is demonstrably incorrect because the National Trust for Historic Preservation has a special insurance program for historic buildings. They claim that EPS relied upon the wrong pier retrofit cost, which could dramatically alter its conclusions. The cumulative errors, suggest Petitioners, demonstrate that the financial infeasibility finding made by the City is insufficient. Indeed, they suggest that if the math were done right (no double counting, EPS construction costs and rehab estimates corrected in Novogradac report) and other adjustments made, the rehabilitation of the 1930s portion of the Terminal would put the Project \$4.0 million ahead. (Petitioners Opening Brief, pp.18-19).

Respondents have argued that Petitioners are wrong on all counts in their analysis of the alleged errors made by the City's experts and approaches used by these experts. For instance, the City argues that it was appropriate for the consultants to use FEMA standards that would make the building safer and satisfy both the regular and historic building code standards at this site. It contests claims that consultants failed to take into account construction costs that could be avoided by converting the Terminal to another use rather than demolishing it, noting that the EPS report demonstrated that costs would increase from \$18.4 million under the Project to \$34.9-52.0 million under the alternatives. The City argues that pier retrofit cost would be \$10.6 million irrespective of how much of the Terminal is retained. They dispute that tax credits were not considered and point to the Novogradac report that analyzed the availability of tax credits. They deny that there was double counting or the wrong data was used by EPS. (Respondent's Opposition Brief, pp. 17- 19).

Clearly, there is a significant debate between the City and Petitioners as to the facts and assumptions in the expert reports relied upon by the City. This Court does not pretend to possess the expertise to determine if the expert reports provided to the City are faulty in the methodologies employed, the assumptions made, or in their opinions. While Petitioners may be correct with regard to one or

more of their criticisms, there is nothing in the record before this Court, such as a report by a construction estimator, an accountant, a tax expert, etc. that supports the various mathematical and other errors argued by Petitioners, nor does the record contain any conflicting expert opinion that preserving the Terminal is financially feasible. According to the parties, no person or entity has come forward in response to a Request For Proposal for preservation and reuse that was issued by the City following certification of the EIR and approval of this project (Condition of Approval No. 25). The record does include reference to the National Trust insurance program and the Court can take judicial notice of the State Historic Building Code. But this Court cannot say whether the failure to apply the State Historic Building Code to this building (which Petitioners point to as the starting point for alleged accumulated errors)<sup>19</sup> was plainly improper or erroneous; nor can this Court assume that the feasibility finding would have been different. Similarly, this Court cannot assume that just because insurance exists for historical buildings that this particular building would not be difficult to insure.

In applying the substantial evidence standard, the agency is the finder of fact and a court must indulge all reasonable inferences from the evidence that would support the agency's determination and resolve all conflicts in the evidence in favor of the agency's decision. (See *San Joaquin Raptor Rescue Center, supra*, 149 Cal.App.4<sup>th</sup> at 652-654). The Court declines to re-crunch the numbers or to substitute its own, inexperienced opinion for those of the City's experts. In this case the City Council was apparently well aware of Petitioners' criticisms of the expert reports relied upon yet chose to accept the conclusion and opinions of those experts. "A reviewing court may neither substitute its views for those of the agency whose determination is being reviewed, nor reweigh conflicting evidence presented to that body. [Citations.] The decisions of the agency are given substantial deference and are presumed correct. The parties seeking mandamus

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<sup>19</sup> See Exhibit A to Petitioners Consolidated Reply.

must bear the burden of proving otherwise, and the reviewing court must resolve reasonable doubts in favor of the administrative findings and determination.” (*Sierra Club v County of Napa* (2004) 121 Cal.App.4<sup>th</sup> 1490, 1497 and cases cited therein.) Petitioners have simply not met their burden here.

Finally, Petitioners take issue with the PFM letter of June 1, 2006 to the Oakland Redevelopment Agency and OHP. The PFM letter reviewed the EPS reports and financial data from the project sponsors and concluded that a significantly larger Terminal than proposed by the Project would reduce rates of return to infeasible levels for the overall project. (AR 12773-2775). This letter was cited by the City in its finding of infeasibility. (AR 240). Petitioners point out that PFM did not do an independent analysis of the data, rather it accepted EPS “at face value” and more important, it relied upon OHP financials that were submitted to it under a non-disclosure agreement with OHP. PFM refused to disclose that information, specifically rate of returns, to the City Council (AR 6258) and the City refused to provide that information in response to OHA’s Public Records Act request (AR 7521-23).

PRC § 21061 states, in pertinent part, that: “The purpose of an [EIR] is to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project may be minimized; and to indicate alternatives to such a project.” (See also, CEQA Guidelines § 15003 (d)). Thus, “...a paramount consideration is the right of the public to be informed in such a way that it can intelligently weigh the environmental consequences of any contemplated action and have an appropriate voice in the formulation of any decision.” (*Environmental Planning and Information Council v. County of El Dorado* (1982) 131 Cal.App.3d 350, 354.) The policy of citizen input that underlies CEQA supports the requirement that the responsible public officials set forth in detail the reasons why the economic and social value of the project, in their opinion, overcomes significant environmental objections raised by the public.

(*People v. County of Kern* (1974) 39 Cal.App.3d 830.) This Court would agree with Petitioners that the refusal to share data allegedly supporting the consultant's opinion hinders the ability of the public to "intelligently weigh" that opinion, comment upon it or to raise objections. However, PRC § 21160 provides that an agency may require trade secret information be submitted to enable it to determine if a proposed project may have a significant effect or to prepare an EIR but if it does so, that trade secret information "shall not be included in the impact report or otherwise disclosed by the public agency." Rates of return and associated data are trade secret under Government Code § 6254.7(d) and thus protected. At issue is whether the failure to disclose information "made a meaningful assessment of the potentially significant impacts ... impossible." (*Friends of Eel River v. Sonoma County Water Agency* (2003) 108 Cal.App.4<sup>th</sup> 849, 882.)<sup>20</sup> Even Petitioners do not appear to argue that the City was bound to disregard the PFM report solely because it relied upon confidential information to determine rate of return. Rather, Petitioners state: "Because PFM's opinion is erroneous and inaccurate as to its basis and on its face<sup>21</sup>, because it is not based on facts in the record, *and* because the secrecy agreement violates CEQA, the PFM opinion should be disregarded." (Petitioners Opening Brief, p. 21 (*italics inserted*).)

There is no question that the PFM report was relied upon by the City in its ultimate finding of infeasibility. But, as noted above, the PFM opinion was not the sole basis for the infeasibility finding made by the City. The City not only

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<sup>20</sup> CEQA does not require the public be provided with a detailed analysis of a project's economic feasibility because such a holding would "be inconsistent with the court's recognition that it is the administrative agency, and not the public, that weighs the benefits of a project against its effects, and bears responsibility for the decision to approve or reject the project." (*Sierra Club v. County of Napa* (2004) 121 Cal.App.4<sup>th</sup> 1490, 1505.)

<sup>21</sup> Petitioners claim the PFM letter used the wrong table in the EPS reuse report, erroneously assigned a zero value to the capacity of the Terminal to ameliorate cash flow through financing; ignored available tax credits, and was deficient in other respects. (See Petitioners Opening Brief, pp. 20-21.)

relied upon the EIR and five other expert analyses, it also rejected the Sub-Alternative because it is inconsistent with the project goals calling for open space and parks and interferes with the Estuary Policy Plan for new waterfront views at this site. (AR 120-21; 240).

In sum, in this case the EIR satisfied CEQA's mandate to identify and discuss a reasonable range of potentially feasible alternatives and compare their environmental impacts with those of the proposed Project. Here, in addition to the EIR, the City and the public were provided a number of reports specifically comparing the project and identified alternatives for the Terminal insofar as their relative market potential, leasing capabilities, estimated costs of construction and development and expected revenues. These analyses were available to the public for comment and to the City and its agencies to evaluate, and the issue was vigorously debated, before the ultimate decision to certify the EIR and approve the project was made. CEQA does not require more. Moreover, the City could properly consider non-economic considerations – such as the inconsistency with the Estuary Policy Plan and project goals for waterfront views, parks and public access – in making its infeasibility finding.

As stated by the California Supreme Court: “[The court’s] limited function is ... to compel government at all levels to make decisions with environmental consequences in mind. CEQA does not, indeed cannot, guarantee that these decisions will always be those which favor environmental considerations.” (*Goleta II, supra*, 52 Cal.3d at 564, citations and quotation marks omitted; accord, *Preservation Action Council v. City of San Jose* (2006) 141 Cal.App.4<sup>th</sup> 1336, 1350.) The court will not pass upon the City’s wisdom in adopting findings where, as here, that determination and decision is supported by substantial evidence in the record. (See *Mani Brothers Real Estate Group v. City of Los Angeles* (2007) 153 Cal.App.4<sup>th</sup> 1385, 1403.)

The petitions for writ challenging the analyses and findings on the Terminal are **DENIED**.

## II. CUMULATIVE IMPACT

### A. Petitioners Have Exhausted Administrative Remedies.

Respondents and Real Parties contend that Petitioners failed to establish the jurisdictional prerequisite of exhaustion as to challenges to the cumulative impact analyses and determinations in the EIR.

The requirement of exhaustion is based upon the rationale that the agency "is entitled to learn the contentions of interested parties before litigation is instituted [so that the agency] will have had its opportunity to act and to render litigation unnecessary, if it had chosen to do so." (*Mani Brothers Real Estate Group, supra*, 153 Cal.App.4<sup>th</sup> at 1394, citing *Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151, 162-163). While the issue must have been presented to the administrative agency to satisfy the exhaustion requirement, less specificity is required to preserve an issue for appeal in an administrative proceeding than in a judicial proceeding. (*Id.*)

Petitioners here argue that the cumulative impact analysis in the EIR was deficient in four ways: (1) it failed to analyze past and current projects; (2) it improperly isolated the project's incremental impacts, rather than focusing on the combined effects of closely related projects; (3) it failed to define the geographic scope of the area effected by each cumulative impact; and (4) it failed to provide any analysis of cumulative land use, population, or housing impacts. Respondent and Real Parties contend that these specific arguments were not raised during the administrative process and therefore they are waived.

In this case, the record reflects that comments submitted during the administrative process questioned the wisdom of increasing housing in this area given the current state of alleged "insufferable air quality and traffic" (AR 1857, 6240), questioned whether "[traffic] data included the cumulative effect from the four new construction projects underway in the Jack London District (AR 1886-1887); and raised issues regarding cumulative population and housing impacts

(AR 6445). (See also, AR 1752, 1924, 1942, and 6240). Responses to comments suggest the City was aware of these concerns and attempted to address them. (AR 1888 – comments raised issues as to “the inclusion of cumulative effects of proposed and approved developments in the City of Oakland.”)

While it is true that the comments did not contain the specificity of the allegations of the instant Petition, they are more than the merely “bland and general references to environmental matters” decried in *Coalition for Student Action v. City of Fullerton* (1984) 153 Cal.App.3d 1194, 1198, cited by Respondent and Real Parties. It is not required that Petitioners have raised the “precise legal inadequacy upon which the trial court’s ruling ultimately rested.” (*Save Our Residential Environment v. City of West Hollywood* (1992) 9 Cal.App.4<sup>th</sup> 1745, 1750). In *Mani Brothers Real Estate Group, supra*, 153 Cal.App.4<sup>th</sup> 1385, petitioners simply raised concerns that new and substantial environmental effects, such as the impact on public services, traffic, shade and shadow, required preparation of a supplemental EIR. That was considered sufficient. Here, the record reflects that the City understood that community members, including Petitioners, were concerned that the EIR was fundamentally flawed because of a perceived failure to consider the impact resulting from the substantial additional residential housing contemplated in this Project (and its attendant increase of population in this area) on traffic, parking, and air quality in light of developments in the Jack London Square district and other approved developments in Oakland. Indeed, it appears that the City anticipated the legal arguments now raised, indicating in its response, for instance, that the EIR “not only considers future build-out growth in Jack London Square, but of all other foreseeable development in the city of Oakland and surrounding areas per the Oakland Cumulative Growth Scenario.” (AR 1867).

It is not required that Petitioners specify the exact legal challenges, now articulated, at the administrative hearings. Their comments were sufficient to put

the City on notice and satisfy the exhaustion requirement. The Court addresses each of Petitioners contentions in turn below.

**B. The EIR Failed To Analyze The Impact Of Past and Current Projects.**

In analyzing the cumulative impact of a proposed project, an EIR should analyze the impact in terms of past projects, current projects, and anticipated future development. (See Public Resources Code § 21083(b)(2) and CEQA Guidelines § 15355.) Petitioners contend that Respondents failed to analyze the impact of past or current projects, focusing only on future projects.

In particular, Petitioners point to the "Cumulative Impacts" section of the Draft EIR that misquotes CEQA Guidelines § 15355 as requiring an analysis of "the impact of the project when added to other, closely related past, present or reasonably foreseeable projects", rather than "the incremental impact of the project when added to other, closely related past, present and reasonably foreseeable projects" [emphasis added]. Petitioners contend this misapplication of the Guidelines is evident in the EIR where the cumulative impact analysis specifically discusses impacts of the project, together with other foreseeable developments, but does not discuss past projects and/or other current projects. In specific, Petitioners argue that the following identified impacts were not properly analyzed for cumulative impact: Impact C.7 - Air Quality (AR 773); Impact D.9 - Hydrology & Water Quality (AR 811); Impact F.8 - Geology & Seismicity (AR 867); Impact G.5 - Noise from Traffic (AR 897); Impact H.7 - Hazardous Materials (AR 923); Impact I.8 - Biological Resources (AR 957); Impact K.5 - Visual Quality (AR 1072); Impact L.6 - Public Services & Recreation Facilities (AR 1093); and Impact M.6 - Utilities (AR 1093). In addition, as to visual quality Petitioners contend that the analysis failed to consider future projects as well.

In determining whether an EIR has analyzed the cumulative effects of all past, present, and reasonably foreseeable development, the Court looks at the Administrative Record as a whole, rather than Petitioners' "extractions of isolated



text”. (See *Environmental Council of Sacramento et al. v. City of Sacramento* (2006) 142 Cal.App.4<sup>th</sup> 1018, 1038.) Respondents contend that, despite the sections of the EIR cited by Petitioners that discuss future (but not past or other current) projects, the Administrative Record as a whole contains sufficient analysis of past, current, and future projects. In support of this contention, Respondents refer generally to the “Cumulative Analysis Context” section of the EIR (AR 623-624). That section refers to Appendix D.4 of the EIR (AR 1291-1300), discussing Oakland’s “cumulative growth scenario” based on various past, current, and future projects in the area.

The section of the EIR cited by Respondents, however, merely describes the physical environmental conditions in the vicinity of the proposed project, based on past and current projects approved for that area, as required by CEQA Guideline § 15125(a). Appendix D.4 does not contain any analysis of the impact of the proposed project when viewed in connection with past or current projects, or even with future projects, as required by Public Resources Code § 21083(b). In fact, Appendix D.4 instructs that it is to be used “for analyzing the project’s environmental impacts” (AR 1291), not that Appendix D.4 in fact constitutes that analysis. A summary of projections, as set forth in Appendix D.4, is not the same as an analysis of the cumulative impacts of a project. (See CEQA Guidelines § 15130(b)(1) and (b)(5), which differentiate the summary of projections from the analysis of cumulative impacts.) If the EIR’s conclusions concerning the effects of cumulative development are not supported by analysis, the EIR is inadequate. (See *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4<sup>th</sup> 713, 741.)

The Court concludes, therefore, the draft EIR does not in fact analyze the impact of the proposed project when added to other closely related past or present projects, as required by Public Resources Code § 21083(b) and CEQA Guidelines § 15355. However, with regard to air quality, even assuming the true extent of the cumulative impact was not properly assessed, the EIR determined that Impact C.7

was “significant and unavoidable” and, as discussed in Part III(C) below, this Court finds that substantial evidence supports that determination. Similarly, with regard to hydrology, the EIR found Impact D.9 to be beneficial, not adverse, and as discussed in Part II(C)(3) below, this court finds that substantial evidence supports that determination. Therefore, with the exception of the Impact C.7 and Impact D.9, petitions for writ are **GRANTED** as to this claim.

**C. The EIR Improperly Isolated Incremental Impacts.**

In determining the cumulative impact of the proposed project, Respondents purportedly used a two-step approach. First, Respondents analyzed the project, together with reasonably foreseeable future projects, to assess if this would result in a significant impact. Second, Respondents claim they then determined whether the incremental impact was cumulatively considerable. (AR 1188).

Petitioners argue that, in addition to Respondents’ analysis being improperly limited in the first instance to the impact of the proposed project with reasonably foreseeable future projects, it then improperly relied on a “ratio theory” for determining whether the incremental impact was cumulatively considerable. CEQA Guidelines requires that when analyzing the cumulative impact of a project, the EIR shall examine the impact created as a result of the combination of the project together with other projects causing impacts. (CEQA Guideline § 15130(a)(1).) It is improper to use a “ratio theory” that focuses solely on the increased effect of the proposed project, rather than the cumulative impact of the proposed project along with past projects, other current projects, and future projects. (See *Los Angeles Unified School Dist. v. City of Los Angeles* (1997) 58 Cal.App.4<sup>th</sup> 1019, 1024-1028.) The relevant issue is not whether a project contributes more than a certain percentage to any projected environmental impact, but whether any additional increase attributable to the project should be considered significant given conditions in the project area. (*Id.*; see also *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 718.)

### 1. Analysis of Traffic Impacts

In analyzing traffic impacts, the EIR states that the project's contribution to cumulative impacts will be deemed "considerable" if the project contributes more than five percent to any cumulative traffic increase, as measured by the difference between existing and cumulative traffic. (AR 681, 713). The EIR does not address whether, given traffic conditions in the area, any additional traffic should be considered significant. Petitioners argue the EIR thus improperly uses a "ratio theory" to evaluate cumulative impacts.

Respondents deny that they used a "ratio theory" in evaluating cumulative traffic impact of the project. They argue that it was proper to analyze the cumulative impact of the project by first assessing existing traffic conditions (see AR 668-677 and 713-719) and then assessing whether the project would cause a substantial increase in relation to the baseline traffic load. (See AR 680-681).

The EIR explicitly states that the project would be determined to have a "significant impact" if it would contribute "five percent or more to the traffic growth at deficient intersections." (AR 713; see also AR 681). Respondents explain that this was done because "day-to-day traffic volumes can fluctuate by as much as ten percent, and therefore a variation of five percent is unlikely to be perceptible to the average motorist." (AR 681, note 10).

Respondents contend that their methodology is different than the prohibited "ratio theory" because the "ratio theory" would compare the number of trips generated by the project with the baseline volume, and conclude that if the project's total trip volume is less than 5% of the baseline, the impact is not cumulatively considerable. By contrast, the EIR assessed the project's total share of any projected increase in traffic, and found the impact cumulatively considerable if the project contributed more than 5% to the projected increase. (See Real Parties in Interests' Opposition, page 35 n. 23.) But this is a distinction without a difference. Whether a cumulative impact is determined based on a 5% increase in the present baseline volume (which Respondents identify as the "ratio

theory”) or a 5% contribution to future traffic increases (which Respondents acknowledge is the method used in the EIR), the result is essentially the same. A determination of cumulatively considerable impact would be made solely based on the percentage increase in traffic as compared to if the project were not implemented. This is precisely the “ratio theory” for analyzing cumulative impact of the type repudiated in *Kings County Farm Bureau, supra*, 221 Cal.App.3d at 718-721, and *Los Angeles Unified School District, supra*, 58 Cal.App.4<sup>th</sup> at 1024-1028. The Court agrees that Respondents analyzed the proposed project’s cumulative effect on traffic using an improper “ratio theory”, and petitions for writ are **GRANTED** on this issue.

## **2. Analysis of Park and Recreation Impacts**

Petitioners argue that in analyzing park and recreation impacts, the EIR analyzed the project’s contribution to the existing ratio of parkland per resident, rather than whether the project’s impact on parks and recreation, when viewed in conjunction with past, other current, and future projects would be significant. (AR 1095).

In fact, the EIR concluded that 20.4 acres of open space would be added to the City, which would result in a ratio of 4.1 acres of parkland per 1000 residents. Because the current Citywide ratio of open space is 1.33 acres per 1000 residents, and the City’s target standard is 4.0 acres per 1000 residents, the proposed project would increase park and recreation space available in the City and exceed the City’s open space goals.

In short, the EIR determined that the proposed project would have a beneficial effect on the City’s park and recreational goals. There would be no negative impact on such goals whatsoever, much less a significant impact. On this issue, Respondents’ method of analysis of the impact on parks and recreation was appropriate. (See, e.g., *Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4<sup>th</sup> 1261, 1267, holding that the City could properly determine a project had no adverse cumulative impact because, even though it created more jobs in a City that

lacked sufficient housing, the City-wide imbalance of jobs to housing would be ameliorated by the project.)

The petitions for writ are **DENIED** as to this issue.

### **3. Analysis of Storm Water Drainage**

In analyzing storm water drainage, Petitioners argue, the EIR also improperly analyzed the project's contribution to cumulative increases in the demands on the storm drain system. (AR 1116, 1575). As with the EIR's analysis of parks and recreation, however, the EIR actually found that the project would result in a decrease in impervious surfaces compared to existing conditions, and that therefore the amount of runoff from the site would be the same or less than existing conditions. (AR 1116). If, as here, the effect of a project is to ameliorate existing conditions, there is no adverse cumulative impact. (See *Defend the Bay*, *supra*, 119 Cal.App.4<sup>th</sup> at 1267.) Respondent's method of analysis of the impact on storm water drainage was also appropriate.

Petitions for writ are **DENIED** as to this issue.

### **D. Geographic Area**

Petitioners argue that the EIR failed to define the geographic scope of the area affected by each cumulative impact, or to provide a reasonable explanation for the geographical limitation used in the analysis, as required by CEQA Guideline § 15130(b)(3). Specifically, Petitioners claim that the EIR fails to adequately define the geographical area when discussing the proposed project's cumulative effect on transportation (AR 713), air quality (AR 773), cultural resources (AR 843-844), and population and housing (AR 989-991).

Petitioners' challenge is not well taken. For traffic impacts, the draft EIR identifies the geographic scope of the area affected by the proposed project's traffic impacts by identifying 52 intersections so affected (AR 673), 18 of which would have significant impacts (AR 713-714). For air quality, again, the draft EIR clearly identifies the affected geographical area, i.e., the nine counties comprising the Bay Area Air Basin. (AR 748, 773.) For cultural resources, the draft EIR

clearly identifies the affected geographic area as the "Project Vicinity," which is specifically delineated in that document on AR 832. For population and housing, the draft EIR identifies the geographic area included in the analysis on AR 1298-1299. The petitions for writ are **DENIED** as to this issue.

**E. Cumulative Land Use, Population, and Housing Impacts Analysis**

Finally, Petitioners argue that Respondents failed to provide any analysis of cumulative impacts of the proposed project on land use, population, and housing.

As to land use, Respondents contend that the EIR does discuss the land use impacts of the proposed project in AR 658-665. That section of the EIR discusses three potentially significant land use impacts of the project: (1) it could physically divide an existing community; (2) conflict with an applicable land use plan, policy, or regulation; and (3) conflict with an applicable habitat conservation plan. After analyzing the effects of the proposed project in these areas, the EIR concluded that the impact after mitigation was less than significant.

Petitioners' point, however, is not that the EIR didn't analyze the impact of the proposed project on land use, but that it didn't analyze the impact when combined with other past, present, and foreseeable projects. Even if Respondents are correct that this analysis would be a "non sequitur" as to whether the proposed project would physically divide an existing community, such an analysis would be required in determining the cumulative impact of the proposed project's possible conflicts with applicable land use plans, policies, or regulations, or with an applicable habitat conservation plan.

Similarly, as to population and housing impacts, Respondents argue that the EIR does discuss the cumulative impact of the proposed project on population and housing at AR 989-991, finding less than significant impacts. But again, that section of the EIR does not address the cumulative effect of the proposed project on population and housing when combined with other past, present and foreseeable projects. Therefore, petitions for writ are **GRANTED** on this issue.

### III. MITIGATION MEASURES

Petitioners argue that as to certain impacts, the EIR failed to identify feasible mitigation measures or to adequately evaluate feasible mitigation measures.

PRC § 21002 requires agencies to adopt mitigation measures that substantially lessen or avoid otherwise significant adverse environmental effects. [PRC § 21002 and § 21081(a); Guidelines § 15002(a)(3), 15021(a)(2), 15091(a)(1)]. To effectuate this requirement, the EIRs must set forth mitigation measures that decision makers can adopt at the findings stage of the CEQA process. (Guidelines § 15126(e) and § 15126.4.) In formulating a mitigation measure the agency is subject to the “rule of reason.” (*Concerned Citizens of South Central Los Angeles v. Los Angeles School District* (1994) 24 Cal.App.4<sup>th</sup> 826, 841). Courts will uphold mitigation measures against attacks based on their alleged inadequacy where substantial evidence supports the approving agency’s conclusion that the measures will be effective. (*Laurel Heights Improvement Assn. v. Regents of the University of California* (1988) 47 Cal. 3d 376, 407 (“*Laurel Heights I*”).

#### A. Mitigation Measures For Traffic Impacts

Petitioners assert that Respondents failed to identify potentially feasible mitigations for traffic impacts at the intersection of 5<sup>th</sup> and Broadway in the project area (Impacts B.1b, B.2c and B.3c). Rather than identify measures that could “minimize, reduce, rectify or compensate for” the project’s traffic impact, they argue that the EIR merely determined that no feasible mitigation measures are available that would “fully improve operations to acceptable levels.” (See e.g. AR 696, 703-704, and 714-715).

An examination of the record reflects that the EIR specifies two potential mitigation measures: reconfiguring lanes on Broadway and adding directional signage. It discusses those possible measures but concludes that even if adopted, they will not avoid the substantial backups and delays at the intersection, which are created by bottlenecks into the Webster Tube. The constrained capacity of the Webster Tube thus is the crux of the problem with traffic at this intersection. The

EIR notes that the Webster Tube presents a “multi-jurisdictional concern” and despite discussion of solutions with affected jurisdictions (including the City of Alameda, Caltrans, and the Alameda County Congestion Management Agency) no feasible measures have been identified to increase the tunnel’s capacity. (AR 696,703,714). Thus the EIR was not obligated to adopt as mitigation measures that lanes on Broadway be reconfigured or that directional signage be installed. (See *Napa Citizens for Honest Government v. Napa County Board of Supervisors* (2001) 91 Cal.App.4<sup>th</sup> 342, 353, 365).

The substantial evidence standard is applied not only to the scope and methodology employed by an EIR but also to conclusions, findings and determinations because these types of challenges involve factual questions. (*San Joaquin Raptor Rescue Center, supra*, 149 Cal.App.4<sup>th</sup> 645.) In applying the substantial evidence standard, “the agency is the finder of fact and a court must indulge all reasonable inferences from the evidence that would support the agency’s determination and resolve all conflicts in the evidence in favor of the agency’s decision.” (*Id.* at 652-654). In this case, the EIR presents a reasoned analysis of the core problem at the intersection and has determined that there are no feasible mitigation measures to increase the capacity of the Webster Tube. On this record the Court cannot say that the EIR is deficient in failing to identify other mitigation measures and its finding, that the impact is substantial and unavoidable, is supported by substantial evidence.

Petitions for writ are **DENIED** on this issue.

## **B. Mitigation Measures For Noise Impacts**

### **1. Outdoor Noise Exposure**

Petitioners also argue that the EIR failed to describe feasible measures for mitigating noise. The EIR identifies outdoor noise exposure as a potentially significant impact (Impact G.4) stating: “The project would locate noise-sensitive multi-family residential uses and public parks in a noise environment where outdoor noise levels are above what is considered ‘normally acceptable’



according to the City of Oakland General Plan Noise Element. (Potentially Significant).” Elevated noise levels are primarily due to the proximity of the project site to the Embarcadero and freeway I-880. (AR 897). The EIR identifies two mitigation measures: constructing berms and soundwalls. It determined that sound barriers are not feasible given the height of the barriers that would be required to effectively block the line of sight of the Embarcadero and I-880 traffic. Further, sound barriers would detrimentally impact the area’s aesthetic character.

Petitioners complain that the EIR’s analysis is “truncated” but offer nothing in the record to support their argument that there were other feasible measures that might mitigate this impact, which deserved some consideration. As above, the indulging all reasonable inferences in favor of the agency’s determination, there is substantial evidence in the record to support its finding that outdoor noise is an unavoidable and significant impact.

Petitions for writ are **DENIED** as to this issue.

## **2. Construction Noise**

Petitioners contend that the mitigation measures adopted in the EIR to reduce construction noise impacts are deficient because they only require mitigation “wherever feasible” or “to the extent feasible” without indicating what conditions would make the mitigation measures “feasible.” Thus, it is argued that the EIR deprives decision makers of necessary information to evaluate the environmental consequences of the project. (See *King’s County Farm Bureau, supra*, 221 Cal.App.3d at 728, holding that an EIR was insufficient because, *inter alia*, it lacked findings showing (1) what evidence was considered in determining that a project would not have a significant impact on groundwater supply, and (2) whether or not the EIR based that finding on plans to purchase alternate sources of groundwater that might not, in fact, be available.)

In this case Impact G.1 states: “Project construction activities would intermittently and temporarily generate noise levels above existing levels in the project vicinity. Project construction noise levels could exceed City of Oakland

standards and cause disturbances in noise-sensitive areas, such as residential areas. (Potentially Significant).” Expected levels of project-generated noise levels during construction –which will be built out over eleven years – is analyzed and discussed in the EIR. The noise levels will vary with the type of construction, the time of day, other activities occurring at the site or nearby, whether impact tools (especially for pile driving) are being used, and so forth. (AR 886-889). Four mitigation measures (M.M.G.1b through M.M.G.1d) are proposed and adopted. Petitioners contend that these mitigation measures are insufficient because they provide no certainty and only require mitigation “where feasible.”

A review of the mitigation measures reflects that the only measure that is not conditioned on implementation “when feasible” or “where feasible” is M.M.G.1a. That mitigation measure merely requires that the project applicant shall require construction contractors to limit standard construction activities to standard hours generally required by the City of Oakland Building Services Division (7 a.m. to 7 p.m. on weekdays, pile-driving and other extreme noise generating activities between 8 a.m. and 4 p.m. and no activities on weekends, except for interior work.) M.M.G.1b provides that, to reduce day time noise, “best available noise control techniques” shall be used “wherever feasible”; impact tools shall be hydraulically or electrically powered “wherever feasible;” stationary noise sources shall be located as far from adjacent receptors “as possible” and muffled “to the extent possible”; and the noisiest phases of construction will comply with local noise ordinances (requiring a 10 day limit) “if feasible.” M.M.G.1c requires a set of site-specific noise attenuation measures be completed and lists a number of such measures that might be included “as feasible.” Finally, M.M.G.1d requires the project applicant submit a list of measures to track and respond to complaints. (AR 889-893.)

While it is true that an EIR is not required to set forth the precise extent to which mitigation measures will be implemented, (see *Sacramento Old City Association v. City Council of Sacramento* (1991) 229 Cal.App.3d 1011, 1036-

1037), deferring the specifics of the mitigation measure is only permissible where the local entity commits itself to mitigation and lists the alternatives to be considered and possibly incorporated in the mitigation plan. (*Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4<sup>th</sup> 1261, 1275.) Here, the EIR lists alternatives that could be incorporated into the mitigation plan albeit (with the exception of M.M.G.1a and M.M.G.1d) they are only called for “to the extent feasible”, “whenever feasible”, “wherever feasible” or “if feasible.” However, the EIR acknowledges that implementation of all the mitigation measures “to the extent feasible” will not adequately reduce the potential construction related noise impacts given the significant number of piles to be driven at the site over the 11-year construction period. Thus, the EIR determined that the impact, after mitigation, remains “significant and unavoidable.” Substantial evidence supports that finding.

The petitions for writ are **DENIED** on this issue.

### **C. Mitigation Measures For Air Quality Impacts**

Petitioners’ argument concerning air quality mitigation is similar to their argument on mitigation measures for construction noise, *supra*. The EIR identifies several possible measures to mitigate air pollution resulting from the project, including ridesharing measures, transit and shuttle measures, and bicycle and pedestrian measures. (AR 773-774). However, the EIR states that the project sponsor shall implement those measures “as feasible and practical”, without identifying the circumstances under which the measures would be considered feasible and practical.

As discussed above, it is not necessary for an EIR to set forth the precise extent to which mitigation measures will be implemented, and deferral of the specifics is permissible where the local entity commits itself to mitigation and lists the alternatives to be considered and possibly incorporated in the mitigation plan. There is no question that the air pollution mitigation measures discussed at AR 773-774 can be implemented if necessary. In addition, as with the noise impacts,

the EIR acknowledges that, even with these mitigation measures, the project's impact on air pollution will be "significant and unavoidable". (AR 774). Substantial evidence supports that conclusion.

The petitions for writ are **DENIED** on this issue.

#### **IV. RESPONSE TO COMMENTS AND FINDINGS OF INSIGNIFICANCE**

CEQA requires a "good faith, reasoned analysis" in response to comments to the draft EIR. Conclusory statements unsupported by factual information will not suffice. (CEQA Guidelines 15088(c).) While an EIR need not analyze "every imaginable alternative or mitigation measure", it should "respond to specific suggestions for mitigating a significant environmental impact unless the suggested mitigation is facially unfeasible". Furthermore, "while the response need not be exhaustive, it should evince good faith and a reasoned analysis." (*Los Angeles Unified School District, supra*, 58 Cal.App.4<sup>th</sup> at 1029.)

With regard to the findings made by an agency, it has been stated: "There is no 'gold standard' for determining whether a given impact may be significant." (*Protect the Historic Amador Waterfront v. Amador Water Agency* (2004) 116 Cal.App.4<sup>th</sup> 1099, 1107.) CEQA Guidelines reflect the range of meanings attached to the concept of "significance", noting: "An ironclad definition of significant effects is not always possible because the significance of an activity may vary with the setting. For example, an activity which may not be significant in an urban area may be significant in a rural area." (CEQA Guidelines § 15064(b).)

Whatever the agency's significance determination, it must be supported by credible analysis and substantial evidence. (See e.g. *Kings County Farm Bureau, supra*, 221 Cal.App.3d at 711-712.) Differing opinions as to potential impacts or the effectiveness of mitigation measures proposed do not prevent an agency from relying on evidence it finds most credible, or from determining that the impacts

are less than significant. (*Association of Irrigated Residents v. County of Madera* (2003) 107 Cal.App.4<sup>th</sup> 1383, 1390-1391.)

In this case, the Petitioners argue that as to certain impacts, the EIR's responses to comments were inadequate and certain CEQA findings are not supported by a credible analysis or substantial evidence in the record. The court addresses each of these claims below.

**A. Traffic Stream Findings**

Petitioners argue that the EIR did not adequately respond to comments from the California Public Utilities Commission (CPUC) and Capitol Corridor suggesting mitigation measures for traffic stream impacts and, its conclusion that the mitigation measures proposed will reduce those impacts to a less than significant level is not supported by substantial evidence.

As the site maps indicates, train tracks parallel the I-880 freeway east from Jack London Square past the project site.<sup>22</sup> (AR 593, Figure IV.B-4 at 725). There rail line is operated by the Union Pacific Railroad (UPRR) and it carries freight and Amtrak passenger train service. At-grade crossing of these tracks occurs at 5<sup>th</sup> Avenue, a principal access point for cars, pedestrians, and bicyclists to cross north of the freeway. (AR 598).

The Amtrak services out of Jack London Square station operate three lines: the Capitol Corridor with 24 trains per day, the San Joaquin with 12 trains per day, and the Coast Starlight with 2 trains per day. (AR 727). Amtrak trains are traveling up to 60 m.p.h. along this corridor. (AR 1655). In addition, freight rail service operates with no set or published schedule. Observations made on one day noted that six freight trains passed by the project site in 10 hours but because no set schedule exists, more or fewer trains might be expected on any given day

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<sup>22</sup> The EIR notes that "[g]iven the location of the project site [next to the freeway] it is expected that much of the project traffic would access the site from I-880. (AR 668).

and the EIR concluded that “[t]he only certainty is that UPRR will continue to use these tracks for freight operations in the foreseeable future.” (AR 727).

The primary concern raised by petitioners is at-grade-rail crossing safety. This potential impact with regard to site access and circulation was recognized as significant and is set forth as Impact B.7 of the EIR: “The project would increase the potential for conflicts among different traffic streams. (Significant).”<sup>23</sup>

Following issuance of the draft EIR, the CPUC wrote the City<sup>24</sup> that “[t]he EIR fails to recognize that at-grade highway-rail crossings present safety hazards due to the potential for collisions of trains with motorists, bicyclists, and pedestrians.” (AR 1665). Noting that the only proposed mitigation measures set forth in the draft EIR were to widen roadways, signalize intersections, and optimize timing between the signals, the CPUC expressed that even these mitigations would be insufficient. (AR 1655). The CPUC recommended, among other measures, improvements or closure of at-grade crossings, constructing grade-separated crossings, constructing fencing to limit the access of trespasses, specifically fencing along the railroad right of way; and installing arms and gates. At Oak and 5<sup>th</sup>, the CPUC had specific recommendations for installing un-mountable medians, flashing light signals, prohibiting parking, refurbishment of warning signs and markings, putting up a DO NOT STOP ON TRACKS signs, and other measures. (AR 1656).

Capitol Corridor also wrote a letter echoing some of the concerns raised by the CPUC, noting “the EIR is silent on the impacts of pedestrian safety with respect to having this project so close to active railroad tracks.” (AR 1648).

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<sup>23</sup> Additionally Impact B.10 identifies a potentially significant impact due to project construction that would temporarily affect traffic flow and circulation, parking, and pedestrian safety. (AR 732).

<sup>24</sup> The CPUC wrote three letters to the City: on September 20, 2005 (Letter A), October 18, 2005, and December 22, 2005 (Letter M)

In response to the CPUC and Capitol Corridor letters, and other comments, the City issued Master Response "F".<sup>25</sup> (AR 1594-1596). In Master Response F the EIR considered "Pedestrian Activity At Nearby Rail Crossings." It conceded that the draft EIR did not specifically address this issue because "there are existing safety measures (i.e. crossing gates, warning lights, and chain link fencing along the Embarcadero) that would limit the ability of pedestrians from the project to cross the tracks." It agreed that additional pedestrian safety improvements could be installed at the existing at grade crossing at 5<sup>th</sup> Avenue, specifically, "additional directional signage and some channelization" but it rejected installation of arms and gates because such devices could trap pedestrians along the tracks. It also discussed planned Measure DD improvements for pedestrian access and bicycles that are designed to encourage travel along the Lake Merritt Channel to the waterfront area (although it acknowledges such improvements have not been started). It concluded that installing additional signage and refurbishing advance warning signs and markings should be added as mitigation. It noted that fencing already exists at areas of concern. (AR 1594- 1596).

In response to Letter M, the City further noted that closure of at-grade crossings would require agreement of the UPRR and Caltrans but, as to identified areas for possible removals, it rejected the suggestion as inadvisable for various reasons including lack of alternative routes, limiting access, reducing emergency vehicle access and limiting connectivity with the remaining areas of Oakland.

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<sup>25</sup> Respondent and Real Parties have also referred the Court to the Transportation, Circulation and Parking section of the DEIR to support their position that the response to comments and findings are supported by substantial evidence. (AR 668-719). Having read this document the Court must agree with Petitioners that it does not at any point discuss how MM B.7 addresses the safety hazard impact from rail traffic. The section is a fairly comprehensive analysis of the impact of the project on traffic congestion at rail crossings, emergency response and air quality. The portion of the EIR analysis recommending MM B.7 concerns "internal project site design elements" for spacing of intersections, cross-section elements, and design of curb ramps within the site (e.g. that they are to be ADA compliant). (AR 728-729).

(AR 1664). It rejected grade-separated crossings as impracticable due to various topographic, engineering and environmental constraints and again opined that installing arms and gates could create a hazard by trapping persons or automobiles between tracks. (AR 1664-1666).

The result was that Mitigation Measure B.7 was slightly modified. It calls for reconfiguring certain intersections for right-in/right out movements only; installation of traffic signals to minimize queuing up; design of pedestrian facilities (including sidewalks, cross walks, and curb ramps) to comply with ADA standards; maintenance or reconstruction of the fence along the Embarcadero adjacent to the Project site to limit access to the railroad tracks, and installation of additional bicycle and pedestrian warning signage at existing at-grade crossing along 5<sup>th</sup> Avenue. (AR 110, 729, 1548). The EIR determined that, after mitigation, the impact of traffic stream conflict is "less than significant."

As noted above, CEQA requires a "good faith, reasoned analysis" in response to comments to the draft EIR. Conclusory statements unsupported by factual information will not suffice. (CEQA Guidelines 15088(c).) However, at least one court has held that responses that may not in certain respects be wholly thorough may suffice if the agency's responses to comments, viewed *as a whole*, evidence good faith and reasoned analysis *and* "adequately serves the disclosure purposes which is central to the EIR process." (*Twain Harte Homeowners Assn. v. County of Tuolumne* (1982) 138 Cal.App.3d 664, 686.)

In this case, the Court cannot say that the City's response to the CPUC and Capitol Corridor comments was not in good faith or that the City failed to engage in a reasoned analysis. Indeed, in its Reply Brief, Petitioners acknowledge that two responses (those regarding closing grade crossings and grade separations) were "adequate" and the response to "pedestrian swing gates and barriers" was "possibly adequate". Their complaint is limited to the lack of specific response to CPUC suggestions for traffic signal preemption, unmountable medians, flashing



red signals, parking prohibitions, and improved sidewalk surfacing. The rejection of those measures, and adoption of others, was within the purview of the City.

Where there are disagreements as to appropriate mitigation measures or dispute as to the effectiveness of a particular mitigation measure, the agency may choose to accept one side over the other. Further, that there is a debate as to the effectiveness of the mitigation measure does not prevent it from determining that the impact, after mitigation, will be less than significant. (*Association of Irrigated Residents, supra*, 107 Cal.App.4<sup>th</sup> at 1391.) Here, the City considered the recommendations of CPUC and Capitol Corridor and others, and despite opinions to the contrary made the determination that the impact was less than significant after mitigation. On this record there is sufficient evidence to support that determination.

The petitions for writ are **DENIED** as to this issue.

**B. Seismic Risk Findings**

The EIR advises that the project site, which was part of the San Francisco Bay before filling operations created the area in the mid to late 1800s and early 1900s "...is at risk for experiencing at least one major earthquake within the next 30 years. (AR 848, 860). Because the Project will construct 3,100 housing units including residential towers up to 24 stories in height, it is acknowledged that the Project "would result in increased population and development in an area subjected to seismic risks and hazards." (AR 867). In the event of a major earthquake in the region, two specific substantial impacts were identified in the EIR: (1) seismic ground shaking that could potentially injure people and cause collapse or structural damage to proposed structures [Impact F.(1)] and (2) liquefaction and earthquake-induced settlement [Impact F.(2)]. (AR 112,1558). The EIR determined that these impacts, however, are "less than significant" after mitigation. Petitioners argue that the EIR contains no meaningful analysis to support these findings and they are not supported by substantial evidence in the record. The Court agrees.

The mitigation measures (M.M.F.1 and M.M.F.2, respectively) call for a site specific, design level geo-technical investigation for each site area and each building. (AR 1558). M.M.F.1 (addressing potential collapse or structural damage at the site) explains that the geo-technical investigation shall include an analysis of ground motions at the site from known active faults and shall be consistent with the most recent version of the California Building Code "which requires structural design that can accommodate ground accelerations expected from known active faults." This mitigation measure states that final design parameters for the walls, foundations, foundation slabs, and surrounding related improvements shall be determined following investigation. Those final designs are then to be reviewed and approved by a registered geo-technical engineer. All recommendations from the project engineer and geo-technical engineer shall be included in the final design and incorporated into the Project.

Mitigation measures to reduce the impact of potential liquefaction and settlement are set forth in M.M.F.2. This mitigation measure calls for "an updated site specific design level geo-technical investigation for each building site to consider the particular project designs and site specific engineering recommendations for mitigation of liquefiable soils." Mitigation of these soils are to be addressed using "various proven methods," specifically including subsurface soil improvement, deep foundations, structural slabs, and soil cover. M.M.F.2 calls for site-specific methods for addressing liquefaction and indicate they could include dynamic compaction, compaction grouting, jet grouting, and vibroflotation that "can significantly reduce the risk of liquefaction." The mitigation measure mentions various techniques utilized for reducing damage due to liquefaction and references the California Geological Survey's Guidelines For Evaluating and Mitigating Seismic Hazards for other suggestions. M.M.F.2 states that measures will be evaluated and "the most effective, practical and economical measures should become part of the project." (AR 1559). Before incorporation into the

project, the measures are to be reviewed for compliance with the CGS Geology Guidelines.

Neither the impact statements or mitigation measures as set forth above provide any analysis as to what mitigation techniques will actually be used and how those mitigation measures will, in fact, reduce the impacts of a major earthquake to less than significant. For instance, while M.M.F.1. states that *analysis* for expected ground motions shall be "consistent" with the California Building Code "which requires structural design that can accommodate" seismic ground shaking, the mitigation measure does not require that the measures finally approved shall meet or exceed the structural design requirements set forth in the Building Code or what "accommodate" means in the context of reducing the impact to less than significant. M.M.F.2 also does not require that the final design and engineering specifications for buildings at the site meet a particular standard or that any of the methodologies mentioned in the mitigation measure to reduce liquefaction impacts *shall* be employed at the site. Instead M.M.F.2 only provides that "the most effective, practical and economical methods *should* become part of the project." [Italics added.] (AR 1559). It is unclear whether "should" means "shall" or "may" in this context. Again, even if sufficient, there is no analysis of how this mitigation measure will reduce the impact to less than significant.

Nor does the Treadwell & Rollo geo-technical report provide the analysis that allows the agency to reach the conclusion that the significant impacts from a major earthquake (that is predicted will occur within the next 30 years) will be reduced to "less than significant" by virtue of the stated mitigation measures. That report does render various opinions about the potentials at the site for ground rupture (very low), strong ground shaking (variable depending upon magnitude of earthquake and other factors); cyclic densification (less than ½ inch); liquefaction (variable); lateral spreading (of concern); and seismic slope stability (limited). Various building methodologies to reduce potential earthquake-induced impacts are discussed and recommended in the report. (AR 7951-7986). Treadwell &

Rollo therefore conclude that "from a geo-technical standpoint, the site can be developed as planned." (AR 7955). But that conclusion is not equivalent to a determination that the impacts, after mitigation proposed, will be less than significant. It is possible, perhaps even likely, that implementation of some or all of the techniques for reducing liquefaction and structural collapse described in the Treadwell & Rollo Report and also in M.M.F.1 and M.M.F.2, if implemented, would reduce the seismic risks to insignificance. But, that analysis has not been done. Furthermore, as written, the measure does not commit the City to implementing any particular building technique, to follow any specified standard (other than Building Code requirements), or incorporate the recommendations made by Treadwell & Rollo. (See CEQA Guidelines § 15226.4(a)(1)(B) and (a)(2)(1).)

This case is in contrast to *Federation of Hillside & Canyon Associations v. City of Los Angeles* (2000) 83 Cal.App.4<sup>th</sup> 1252 where the court rejected petitioners' claim that the city's finding that water supply would exceed demand in the year 2010 was not supported by the evidence. The court disagreed because the EIR's projection of an increased water supply to serve the projected increase in demand did not rely on expected water surplus; rather it relied on specifically identified mitigation measures to reduce the significant impact to less than significant level that included conservation programs, infra-structure improvements, measures to encourage alternative water supplies, measures to reduce consumption and increase supply. Thus, substantial evidence supported the city's findings that the impact of the projected growth from the project on water supplies would be less than significant. In this case, possible techniques and methods are described as available but none are actually included or incorporated as a mitigation measure and the substantial evidence that these measures will reduce the impact to less than significant is absent from the record.

Petitions for writ are **GRANTED** as to this claim.

### **C. Jurisdictional Wetlands Findings**

Petitioners argue that the wetlands mitigation measures constitute deferred mitigation because no permit conditions or other objective performance criteria are contained in the mitigation measures. The court disagrees.

In contrast to the seismic findings and mitigation measures just discussed, the mitigation addressing the impacts to wetlands commit the City to take specific actions and meet specified standards and goals. The EIR identifies "substantial adverse effects on potentially jurisdictional wetlands or waters of the U.S. under the jurisdiction of the Corps, waters of the State under the jurisdiction of the Regional Water Quality Assurance Board (RWQCB), and wetlands under the jurisdiction of BCDC" which would occur during construction activities (Impact I.2) The first measure provided to reduce this impact is the creation of "a verified wetland delineation" prior to the submittal of regulatory permit applications. With regard to this mitigation measure, the EIR notes that the project sponsor has already submitted draft delineation to the Corps. The second mitigation requires wetland avoidance and the use of best management practices in areas that are avoided. Those practices "shall" include installation of slit fencing, straw wattles or other appropriate erosion and sediment control methods or devices. Mandatory procedures are delineated for equipment and construction operations. The mitigations specify the particular regulatory permits, agency approvals or certificates that will be required to be in place before the start of construction activities. Best management practices are mandated to comply with the NPDES permit requirements, the Long-Term Management Strategy for the Placement of Dredged Material In San Francisco Bay Region, and specified measures are described and identified throughout.

In *Riverwatch v. County of San Diego* (1999) 76 Cal.App.4<sup>th</sup> 1428 petitioners challenged the adequacy of an EIR prepared for development of a rock quarry and widening of a state route to accommodate increased traffic from the quarry. The Court of Appeal rejected the claim that the EIR was defective

because it deferred preparation of a more detailed realignment of State Route 76 until Caltrans had conducted a study as part of the required permit to encroach on the San Luis River floodplain. The appellate court explained that the deferral was appropriate because there was nothing in the record that suggested the impact could not be mitigated in the manner described in the final EIR even though the entire extent and precise detail of the mitigation that would be required was not known. Further, a mitigation measure or condition of approval that simply requires "appropriate engineering and design criteria" is sufficient where evidence supports that the criteria are "well established". (*Dry Creek Citizens Coalition v. County of Tulare* (1999) 70 Cal.App.4<sup>th</sup> 20, 34-36.)

In this instance the mitigation measure does not improperly defer analysis of environmental effects or improperly defer mitigation merely because necessary permits and certificates will be required from other agencies before any construction begins. The mitigation measure requires compliance with specific standards and permit requirements of the Corps, RWQCB and other regulatory agencies entrusted with protection of wetlands. Hence, the less than significant finding, with mitigation, is supported by substantial evidence in the record.

The petitions for writ are **DENIED** as to this claim.

#### **V. STATEMENT OF OVERRIDING CONSIDERATIONS**

After adopting appropriate findings pursuant to PRC 21081 (a) an agency may adopt a "statement of overriding considerations" as a means to approve a project with unmitigated significant environmental impacts. Such a statement focuses on the larger, more general reasons for approving a project such as the need to create jobs, provide more housing, generate taxes and the like. (*Sierra Club v. Contra Costa County* (1992) 10 Cal.App.4<sup>th</sup> 1212, 1222.) Although the EIR need not itself address the possible benefits that may justify project approval, the statement of overriding considerations must be supported by substantial evidence in the administrative record. (CEQA Guidelines 15093(b); *Koster v. County of San Joaquin* (1996) 47 Cal.App.4<sup>th</sup> 29, 32.) In this case, the Court has

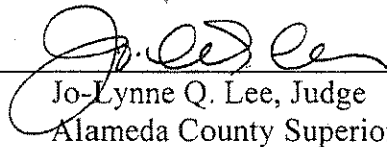
granted petitions for writ of mandate in part, thus further analysis may result in modification of some findings and reconsideration or modification of the statement of overriding considerations. Hence, this Court cannot fairly nor does it need to address this issue at this time.<sup>26</sup>

**WHEREFORE, IT IS HEREBY ORDERED:**

A writ of mandamus shall issue directing the respondent City of Oakland void its certification of the Environmental Impact Report, CEQA Findings and Statement of Overriding Considerations and approval of the Project. The writ shall include a directive that the matter be remanded to the City for further action as set forth herein. This Court will retain jurisdiction over respondent's proceedings, by way of return to this peremptory writ, until the Court has determined that Respondents have complied with the provisions of the California Environmental Quality Act. Petitioners are ordered to prepare and submit proposed writs and judgments for the Court's approval no later than December 17, 2007.

SO ORDERED.

11/16/07  
Date

  
Jo-Lynne Q. Lee, Judge  
Alameda County Superior Court

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<sup>26</sup> The Court notes that Respondents argue that Petitioners failed to exhaust administrative remedies with regard to their challenge to the adequacy of the Statement of Overriding Considerations. The record reflects that at least one citizen questioned the adequacy of the statement of overriding considerations. (AR 6173). However, as noted, the court does not reach this issue in light of its other determinations.

Superior Court of California, County of Alameda  
Hayward Hall of Justice

Case Number: RG06280345  
Order After Hearing Re: of 11/16/2007

**DECLARATION OF SERVICE BY MAIL**

I certify that I am not a party to this cause and that a true and correct copy of the foregoing document was mailed first class, postage prepaid, in a sealed envelope, addressed as shown on the foregoing document or on the attached, and that the mailing of the foregoing and execution of this certificate occurred at 24405 Amador Street, Hayward, California.

Executed on 11/16/2007.

Executive Officer / Clerk of the Superior Court

By *R. Bonetti* digital  
Deputy Clerk



SHORT TITLE:

OAKLAND HERITAGE ALLIANCE VS City of Oakland

CASE NUMBER:

RG06280345

ADDITIONAL ADDRESSEES

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Order