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Judge: James C. Chalfant, Case: 24STCP00492, Date: 2025-03-25 Tentative Ruling

Case Number: 24STCP00492 **Hearing Date:** March 25, 2025 **Dept:** 85

Supporters Alliance for Environmental Responsibility v. City of San Gabriel et al.,

Tentative decision on petition for writ of mandate: granted in part

24STCP00492

Petitioner Supporters Alliance for Environmental Responsibility (“SAFER”) seeks a writ of mandate directing Respondents City of San Gabriel (“City”) and its City Council (collectively, “City”) to set aside the certification of a Mitigated Negative Declaration (“MND”) and associated approvals for the Rubio Village Mixed Use Project (“Project”).

The court has read and considered the moving papers, joint opposition, and reply, and renders the following tentative decision.

A. Statement of the Case

Petitioner SAFER commenced this proceeding on February 15, 2024. The verified Petition states a single mandamus cause of action^[1] for violation of the California Environmental Quality Act (“CEQA”) and alleges in pertinent part as follows.

Real Party-in-Interest Rubio Village, LLC (“Rubio Village”) is the Project applicant. Pet., ¶11. The Project consists of the construction of three two- to six-story buildings with 225 residential multi-family units and approximately 13,499 square feet (“sq. ft.”) of commercial use and 438 parking spaces. The Project site is located on 2.9 acres at 201-217 South San Gabriel Boulevard in the City. The Project site is vacant. It is bisected by the Rubio Wash on the southwest portion of

the Project site. Pet., ¶3.

On August 24, 2023, the City released for public review and comment a draft Initial Study and MND (collectively, the “MND”) for the Project. Pet., ¶30.

In September 2023, SAFER submitted written comments to the City’s Planning Commission that constituted substantial evidence supporting a fair argument that the Project would have significant, unmitigated environmental impacts requiring the preparation of an Environment Impact Report (“EIR”). Pet., ¶31.

When the City first considered the Project in 2006, it concluded that an EIR was required and certified a Final EIR on April 3, 2007. Pet., ¶44. The Project entitlements expired in 2011. Pet., ¶44. In a 2015 Addendum, the City found that most of the Project’s impacts would be the same as presented in the 2007 EIR, but with the additional necessity of implementing greenhouse gas-related mitigation measures. Pet., ¶44. Because the prior iterations of the Project required an EIR, the current Project iteration also does as it is a larger project. Pet., ¶46.

SAFER’s September 2023 comments described multiple ways the MND’s analysis and mitigation failed to comply with CEQA, supported by expert analysis from a biologist, Dr. Shawn Smallwood Smallwood (“Smallwood”). Pet., ¶39. Smallwood found the MND’s discussion of biological resources was insufficient because it failed to identify Project impacts. Pet., ¶40. Smallwood’s associate, biologist Noriko Smallwood (“Noriko”), [2] visited the Project site on September 7, 2023, at which time she identified 18 species of vertebrate wildlife, including three species with special status: Western Gull, Allen’s hummingbird, and American kestral. Pet., ¶40. Smallwood concluded that the MND mischaracterized the environmental setting, failed to account for habitat loss, failed to assess impacts on wildlife movements, failed to assess impacts on wildlife from Project-related bird-window collisions, and contained mitigation measures which inadequately addressed the Project’s impacts on biological resources. Pet., ¶41.

Noriko visited the Project site a second time on December 23, 2023, identifying 22 vertebrate species including five special-status species: Western Gull, California Gull, Allen’s hummingbird, American kestrel, and Red-shouldered hawk. Pet., ¶42. The City did not substantively address any of Smallwood’s concerns. Pet., ¶43.

SAFER’s September comments included expert written analysis by geologist Matt Hageman (“Hageman”) and Dr. Paul E. Rosenfeld (“Rosenfeld”) of Soil/Water/Air Protection Enterprise (“SWAPE”). Pet., ¶48. SWAPE found the MND failed to adequately evaluate the Project’s construction and operation emissions, particularly for Diesel Particulate Matter (“DPM”). Pet., ¶49. The Project would produce DPM emissions over a period of 25 months. Pet., ¶50. Yet, the MND did not contain a health risk assessment to evaluate the Project’s impact on human health for nearby sensitive receptors. Pet., ¶50.

The Office for Environmental Health Hazard Assessment (“OEHHA”) recommends that all short-term projects lasting two months or more be evaluated for cancer risks to nearby sensitive receptors. Pet., ¶51. OEHHA also recommends that projects lasting six months or more be evaluated for the duration of the project. Pet., ¶51. OEHHA recommends estimating with an exposure duration of 30 years. Pet., ¶51.

The MND also did not require the City to use clean construction equipment. Pet., ¶52. The MND failed to respond to SAFER’s comments or provide any mitigation for air quality impacts. Pet., ¶53.

SAFER’s September 2023 comments included expert written analysis by certified industrial hygienist Francis Offermann (“Offermann”). Pet., ¶54. Offermann found the Project’s surroundings face a baseline cancer risk of 467 per million, which is above South Coast Air Quality

Management District’s (“SCAQMD”) threshold of 10 per million. Pet., ¶55. Offermann concluded that the formaldehyde emissions from the Project would be approximately 120 per million, also well above the SCAQMD threshold of 10 per million, further exacerbating cancer risks. Pet., ¶56. Offermann recommended specific mitigation measures, including installing outdoor mechanical air ventilation systems, installing high efficiency air filters, and using materials that comply with California Air Resourced Board (“CARB”) guidance. Pet., ¶57.

The City failed to adequately address Offermann’s comments, instead asserting the MND addressed the issues by requiring compliance with CARB rules and Title 24 of the California Building Standards. Pet., ¶58. However, Offermann assumed CARB compliance in his analysis. Pet., ¶58.

On November 13, 2023, SAFER made oral comments to the Planning Commission reiterating its concerns. Pet., ¶32. The Planning Commission nonetheless adopted a resolution recommending the City Council approve the Project. Pet., ¶32.

The City provided written notice that the Project would be heard by the City Council on December 19, 2023. Pet., ¶34. SAFER submitted additional written comments providing evidence that the Project might have significant, unmitigated environmental impacts. Pet., ¶34. SAFER also provided rebuttal comments to City’s arguments from the Planning Commission hearing. Pet., ¶34. That same day, the City provided SAFER with the 2007 EIR and the 2015 Addendum referenced in the MND. Pet., ¶¶ 33-34.

On December 19, 2023, SAFER submitted supplemental written comments explaining why the MND was improper. Pet., ¶35. That evening, the City Council heard the Project, and SAFER commented orally. Pet., ¶35. The City Council voted to certify the MND. Pet., ¶35.

SAFER submitted further written comments, with additional expert opinion, reiterating its position. Pet., ¶36. SAFER also submitted oral comments to be read during the City Council hearing. Pet., ¶36.

On January 16, 2024, the City Council approved the Project and uphold the prior approval of the MND. Pet., ¶37.

On January 17, 2024, the City filed a Notice of Determination (“NOD”) with the County Clerk reflecting approval of the MND. Pet., ¶38.

SAFER contends that the City abused its discretion by failing to proceed in the manner required by law in certifying a MND that does not comply with CEQA and by failing to prepare an EIR. SAFER presented a fair argument supported by substantial evidence that the Project may have an adverse impact related to biological resources, indoor air quality, and DPM air impacts. Pet., ¶¶ 72-75.

Petitioner SAFER prays for a peremptory writ of mandate directing the City to (a) set aside the MND and any and all permits or approvals issued for the Project, (b) fully comply with CEQA prior to Project approval, and (c) prepare, circulate, and consider an EIR to address all CEQA violations related to Project approval. SAFER also prays for mandamus directing the City and Real Party Rubio Village to suspend all activities in furtherance of the Project unless and until the City brings its actions into compliance with CEQA. Prayer, ¶2. SAFER further prays for a preliminary and permanent injunction staying the City’s approval of the Project. Prayer, ¶1. Finally, SAFER prays for attorney fees, costs of suit, and other and further relief as the court deems just and proper. Prayer, ¶¶ 4-6.

B. CEQA

The purpose of CEQA is to maintain a quality environment for the people of California both now and in the future. Public Resources (“Pub. Res.”) Code §21000(a). “[T]he overriding purpose of CEQA is to ensure that agencies regulating activities that may affect the quality of the environment give primary consideration to preventing environmental damage.” Save Our Peninsula Committee v. Monterrey County Board of Supervisors, (2001) 87 Cal.App.4th 99, 117. CEQA must be interpreted “so as to afford the fullest, broadest protection to the environment within reasonable scope of the statutory language.” Friends of Mammoth v. Board of Supervisors, (1972) 8 Cal.3d 247, 259. Public agencies must regulate both public and private projects so that “major consideration is given to preventing environmental damage, while providing a decent home and satisfying living environment for every Californian.” Pub. Res. Code §21000(g).

The Legislature chose to accomplish its environmental goals through public environmental review processes designed to assist agencies in identifying and disclosing both environmental effects and feasible alternatives and mitigations. Pub. Res. Code §21002. The EIR is the “heart” of CEQA, providing agencies with in-depth review of projects with potentially significant environmental effects. Laurel Heights Improvement Assn. v. Regents of University of California, (1993) 6 Cal.4th 1112, 1123. An EIR describes the project and its environmental setting, identifies the potential environmental impacts of the project, and identifies and analyzes mitigation measures and alternatives that may reduce significant environmental impacts. Id. The EIR serves to “demonstrate to an apprehensive citizenry that the agency has in fact analyzed and considered the ecological implications of its actions.” No Oil, Inc. v. City of Los Angeles, (1974) 13 Cal.3d 68, 86. Using the EIR’s objective analysis, agencies “shall mitigate or avoid the significant effects on the environment... whenever it is feasible to do so.” Pub. Res. Code §21002.1.[3]

CEQA does not require any particular procedure for agency approval of a project. See Apartment Assn. of Greater Los Angeles v. City of Los Angeles, (2001) 90 Cal.App.4th 1162. The Guidelines establish a three-tiered process to ensure that public agencies inform their project decisions with environmental considerations. Davidson Homes v. City of San Jose, (1997) 54 Cal.App.4th 106, 112. The first tier, which is jurisdictional, requires an agency to conduct a preliminary review to determine whether CEQA applies to, or exempts, a proposed activity. Guidelines §§15060, 15061.

If the project falls within CEQA’s purview and is not exempt, the agency moves to the second step of preparing an initial study to determine if the project may have a significant effect on the environment. Guidelines §15063; Banker’s Hill, Hillcrest v. City of San Diego, (2006) 139 Cal.App.4th 249, 257-58. The initial study helps the applicant to modify a project, mitigating adverse impacts before an EIR is prepared, thereby enabling the project to qualify for a negative declaration and eliminate unnecessary EIRs. Guidelines §15063(c)(2), (c)(6).

If there is no substantial evidence of any significant environmental effect, the agency may adopt a negative declaration. Pub. Res. Code §21080(c); Guidelines §15070(b). Where the initial study shows no substantial evidence of any net significant environmental effect in light of revisions in the project that would mitigate any potentially significant effects, the agency may adopt a mitigated negative declaration. Citizens for Responsible and Open Government v. City of Grand Terrace, (“Citizens”) (2008) 160 Cal.App.4th 1323, 1331. A mitigated negative declaration states that (1) the proposed conditions avoid the effects or mitigate the effects to a point where clearly no significant environmental effect would occur and (2) there is no substantial evidence in light of the whole record before the agency that the project, as revised, may have a significant effect on the environment. Pub. Res. Code §21064.5; Citizens, supra, 160 Cal.App.4th at 1331-32.

The third tier is an EIR. Generally, an EIR is required for any project that may have a significant impact on the environment. Pub. Res. Code §21080(d), 21100(a), 21151(a); Pala Band of Mission Indians v. County of San Diego, (1998) 68 Cal.App.4th 556, 570-71. In reviewing the agency’s decision to adopt a mitigated negative declaration in lieu of an EIR, the court applies the fair

argument test. When there is substantial evidence supporting a fair argument that a proposed project may have a significant effect on the environment, an EIR is required. Citizens, supra, 160 Cal.App.4th at 1331.

The fair argument standard is a low threshold test. “[I]f a lead agency is presented with a fair argument that a project may have a significant effect on the environment, the lead agency shall prepare an EIR even though it may also be presented with other substantial evidence that the project will not have a significant effect.” Guidelines §15064(f)(1); Arviv Enterprise v. South Valley Area Planning Comm’n, (2002) 101 Cal.App.4th 1333, 1345-46. “[I]f there is a disagreement among experts over the significance of an effect, the agency is to treat the effect as significant and prepare an EIR.” Sierra Club v. Cty. of Sonoma, (1992) 6 Cal.App.4th 1307, 1317.

The petitioner bears the burden to present a fair argument based on substantial evidence that an EIR is required. Ibid. “Substantial evidence” is defined as “enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached.” Guidelines §15384(a). The term “substantial evidence” is evidence that is of a ponderable legal significance, reasonable in nature, credible, and of solid value. Stanislaus Audubon Soc’y, Inc. v. County of Stanislaus, (1995) 33 Cal.App.4th 144. Substantial evidence includes fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact. Pub. Res. Code §21080(e)(1). Argument, speculation, and unsubstantiated opinion or narrative will not suffice. Guidelines §15384(a), (b).

Statements by attorneys regarding potential environmental impacts do not constitute substantial evidence. Pala Band of Mission Indians v. County of San Diego, (1998) 68 Cal.App.4th 556, 580. Nor is testimony from lay persons regarding matters that require technical expertise. Jensen v. City of Santa Rosa, (2018) 23 Cal.App.5th 877, 894. For lay testimony to be substantial evidence, the personal observations and experiences must directly relate to and inform on the impact of the project under consideration. Newtown Preservation Society v. County of El Dorado, (2021) 65 Cal.App.5th 771, 791. In the absence of a specific factual foundation in the record, dire predictions by laypersons regarding the consequences of a project also do not constitute substantial evidence. Porterville Citizens for Responsible Hillside Development v. City of Porterville, (2007) 157 Cal.App.4th 885, 901. Substantial evidence further cannot be imputed by a lack of evidence. Gentry v. City of Murrieta, (1995) 36 Cal.App.4th 1359, 1382 (“lack of study, standing alone, does not give rise to a fair argument that the [p]roject will in fact have a significant cumulative effect”).

Whether substantial evidence exists is a question of law. *See California School Employees Association v. DMV*, (1988) 203 Cal.App.3d 634, 644; Citizens, supra, 160 Cal.App.4th at 1331. Review is *de novo* with a preference for resolving doubts in favor of environmental review. Ibid. If substantial evidence exists supporting a fair argument that an EIR was required, the court must set aside the agency’s decision to adopt a mitigated negative declaration as an abuse of discretion for failing to proceed in a manner required by law. Id. at 1332.

C. Standard of Review

A party may seek to set aside an agency decision for failure to comply with CEQA by petitioning for either a writ of administrative mandamus (Code of Civil Procedure (“CCP”) §1094.5) or of traditional mandamus. CCP §1085. A petition for administrative mandamus is appropriate when the party seeks review of a “determination, finding, or decision of a public agency, made as a result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in a public agency, on the grounds of noncompliance with [CEQA].” Pub. Res. Code §21168. This is generally referred to as an “adjudicatory” or “quasi-judicial” decision. Western States Petroleum Assn. v. Superior Court, (“Western States”) (1995) 9 Cal.4th 559, 566-67. A petition for traditional mandamus is

appropriate in all other actions “to attack, review, set aside, void or annul a determination, finding, or decision of a public agency on the grounds of noncompliance with [CEQA].” Where an agency is exercising a quasi-legislative function, it is properly viewed as a petition for traditional mandamus. Id. at 567; Pub. Res. Code §21168.5.

At issue is SAFER’s CEQA challenge to a quasi-adjudicative action taken by the City in certifying the Project’s MND and approving its entitlements. This procedural setting, where a hearing was required, is governed by administrative mandamus. In determining whether to grant a petition for either administrative or traditional mandamus in a CEQA case, the court decides whether there was a prejudicial abuse of discretion. Public entities abuse their discretion if their actions or decisions do not substantially comply with the requirements of CEQA. Sierra Club v. West Side Irrigation District, (2005) 128 Cal.App.4th 690, 698. Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence. Western States, supra, 9 Cal.4th at 568; Pub. Res. Code §21168.5.

The court must adjust its scrutiny to the nature of the alleged defect, depending on whether the claim is predominantly one of improper procedure or a dispute over the facts. Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova, (2007) 40 Cal.4th 412, 435. Challenges to an agency’s failure to proceed in the manner required by CEQA, such as an EIR’s failure to address a subject required to be covered or to disclose information about a project’s environmental effects, are subject to a less deferential standard than challenges to an agency’s substantive factual conclusions. Id. at 435. In reviewing these claims, the court must “determine *de novo* whether the agency has employed the correct procedures, ‘scrupulously enforc[ing] all legislatively mandated CEQA requirements’.” Id.; Sierra Club v. County of Fresno, (“Sierra Club”) (2018) 6 Cal.5th 502, 512. Whether issues are procedural or factual “is not always clear”. Id. at 513. Clear-cut procedural issues—such as whether “the agency provide[d] sufficient notice and opportunity to comment on a draft EIR” and whether “the agency omit[ted] the required discussion of alternatives”—are reviewed *de novo* and “courts will invalidate an EIR that fails to meet them.” Id. at 512.

D. Statement of Facts[**\[4\]**](#)

1. The Project Description

Rubio Village is the applicant for the Project. The Project consists of three buildings containing 225 residential units, approximately 13,449 sq. ft. of commercial uses, and 438 parking spaces. AR 634. Building A would be six stories tall and contain 206 residential units, residential amenities, and retail and restaurant spaces. AR 634-35. Building B would be two stories tall with three townhouses. AR 635. Building C would be four stories tall with 16 residential units and a restaurant space. AR 635. The Project would provide 43,810 sq. ft. of open space, with 27,048 sq. ft. on ground level and 16,762 sq. ft in a third-floor courtyard. AR 638. The Project will require the removal of 16 of the 44 existing trees at the Project site and the planting of 106 trees at ground level, and another 25 trees in the third-floor courtyard. AR 638. Construction would take an estimated 25 months. AR 639.

2. The Project Site

The Project site, located at 201-207 South San Gabriel Boulevard, San Gabriel, California, is undeveloped and fenced off. AR 630. Commercial uses border the Project site to the north and

east. AR 630. Commercial and high-density residential uses border the Project site to the south. AR 630. Multi-family residential uses border the Project site to the west. AR 630.

The Project site is about 2.9 acres, with the Rubio Wash, a concrete-lined water course, running through from the northwest to the southeast. AR 630. The land is relatively flat with low-lying shrubs, weeds, and non-native grasslands scattered throughout, as well as 44 trees from 13 species. AR 630. The Project site contains 12 Mature Class I Trees and five other mature trees. AR 1043, 1053-54.

The Project site is zoned as Planned Development Overlay, meaning any use that is permitted in residential, commercial, or mixed-use zoning is permitted. AR 634. The Project site was previously developed, but prior uses were demolished. AR 660.

3. CEQA Review of Prior Projects at the Project Site

On April 3, 2007, the City Council approved and certified a Final EIR for a developer's project known as the San Gabriel Center Project located at the Project site. AR 627. The San Gabriel Center Project was a mixed-used project consisting of 159 dwelling units, 14,190 sq. ft. of retail space, and 4630 sq. ft. of restaurant uses. AR 627-28. The Final EIR for the San Gabriel Center Project concluded that it would have no substantial environmental impacts. AR 531-39, 561-62.

In February 2015, a different developer proposed, relying on an addendum to the San Gabriel Project Final EIR, a substantially identical project known as the Rubio Village Project, consisting of 159 dwelling units, 10,230 sq. ft. of retail space, and 6319 sq. ft. of restaurant uses. AR 628. The Addendum for the 2015 project included mitigation measures. AR 531. In May 2016, the same developer proposed a modified version of the Rubio Village Project under a second addendum. AR 628.

In May 2022, Real Party Rubio Village proposed a four-story mixed-use project, consisting of 179 residential units, 8038 sq. ft. of residential space, and 5956 sq. ft. of restaurant use. The May 2022 project was deemed exempt from additional CEQA review as it would have no additional impacts associated with the revisions and the project was approved on May 10, 2022. AR 628.

4. The Initial Study and the MND

On July 21, 2023, the City received the Air Quality Technical Report for the Project analyzing the air quality impacts of the Project. AR 892-1011.[\[5\]](#) This report indicated that any air quality impacts would be less than significant. AR 900-01.

In an undated Initial Study Checklist, the City analyzed the potential environmental impact of the Project. AR 3243-70.[\[6\]](#) The analysis found no impact to candidate, sensitive, or special-status biological resource species. AR 3247, 3256. The analysis noted that the Project site is predominately urbanized and built out and no species that are candidate, sensitive, or special status species are known to exist in the local vicinity. AR 3256. The Project would not result in any significant adverse impacts to federal or state listed or other designated species and further analysis on this topic is not required. AR 3256.

On August 24, 2023, the City released the MND for the Project for public review and comment. AR 4208-09.

For air quality, the MND concluded that both criteria pollutant levels and air quality would not

reach significant impact levels. AR 651-52. The MND noted sensitive surrounding land uses primarily consisting of residential communities adjacent to the Project site. AR 651. The MND acknowledged that Project construction would generate DPM. AR 657. The MND stated that DPM exposure health risks are primarily linked to long-term exposure, and the DPM generated by Project construction only would be temporary and episodic. AR 657-58. The DPM would dissipate quickly, and exposure would be short. AR 658. The MND noted that the OEHHA has not identified short-term health effects from DPM. AR 658. Additionally, construction activities would comply with California regulations limiting idling of heavy-duty construction equipment to no more than five minutes, further reducing DPM emissions. AR 658.

For biological resources, the MND relied on an Arborist Report and Arborist Addendum. AR 659. The MND stated that no candidate, sensitive, or special-status species are known to exist in the area around the Project site due to its location within a built-out urbanized area. AR 660. Riparian habitats occur along riverbanks and streams. No riparian habitat or other sensitive natural communities are present at the Project site or immediate vicinity because it is in an urbanized area, is surrounded by urban uses, and was previously developed and demolished. AR 660. No areas within the Project vicinity could serve as a wildlife corridor or nursery site for native and migratory wildlife. AR 660. Further, the minimal onsite vegetation (shrubs and non-native weeds) does not provide suitable nesting habitat for migratory birds. AR 660.

There are five mature trees on the Project site. AR 660. Of these, four will be removed due to encroachment and/or poor condition. The Project must comply with the Migration Bird Treaty Act and the California Fish and Game Code, which protect migratory birds as well as non-migratory birds, resident game birds, and birds in the orders Falconiformes and Strigiformes (birds of prey). AR 660-61. The removal of the four mature trees could potentially impact nesting migratory birds. AR 661.

To address any impact on migratory birds, the Project will be subject to Mitigation Measure (“MM”) BIO-1, which addresses construction activities during the nesting season. AR 661. MM BIO-1 requires construction to occur outside of nesting season if possible. AR 661. If not possible, MM BIO-1 requires completion of a pre-construction nesting bird survey within three days prior to beginning construction activities. AR 661. Then, a qualified biologist must prepare and implement a nesting bird plan. AR 661. Compliance with the regulatory framework and MM BIO-1 will reduce this potential impact to less than significant. AR 661.

5. SAFER’s First Comment

The City received three comment letters, including SAFER’s September 22, 2023 written comment. AR 767-861. SAFER’s comment included a review of the Project’s biological impacts by biologists Smallwood and Noriko. AR 778-809; *see* AR 4131-84.

Noriko visited the Project site on September 7, 2023 for approximately two and a half hours. AR 778. Noriko observed multiple species of bird, including: (a) Allen’s Hummingbird, designated as a Bird of Conservation Concern[7] by the Fish and Wildlife Service; (b) Western Gull, also a BCC; and (c) American Kestrel, a bird of prey species. AR 780, 782, 1969. In particular, Noriko observed three American Kestrels socializing, hunting, and bathing in Rubio Wash. AR 780, 1969.

Smallwood reviewed available wildlife databases and determined that approximately 118 special-status species had been observed in the region (within 30 miles), 43 of which were within 1.5 miles of the Project site. AR 790-93. Smallwood concluded that Noriko’s survey and the modeling of her data show the Project site is valuable to wildlife, including multiple species that are listed as rare by state and federal resource agencies or protected by statute (birds of prey). AR 785.

Smallwood opined that the MND inadequately evaluated habitat loss for special-status species, interference with wildlife movement, and bird-window collisions. AR 793-801. For wildlife habitat, he noted that the Project site is one of the last remaining naturally covered open spaces in the region, and that its development would further fragment wildlife habitats. AR 793. He estimated a loss of nesting capacity, based on known nest density in Rancho Cordova, of 42 nests, which would be a significant impact and would likely result in a decrease of 139 birds per year. AR 793-94.

For wildlife movement, Smallwood emphasized that the Rubio Wash is a key, neglected feature. AR 794. He pointed out that volant wildlife would have to fly farther between stopovers if the Project eliminated this open space. AR 794. For window collisions, Smallwood predicted that many birds would die each year from collision with the windows of the Project buildings. AR 797. Smallwood finally predicted that vehicle traffic from the Project, estimated at 11,130,450 miles per year, will result in 610 wildlife fatalities per year. AR 798-800.

Smallwood added that MM BIO-1 does nothing to address impacts other than construction that disrupts nesting and would be insufficient to adequately mitigate those impacts. AR 801-02. He further opined that the MND was based on an arborist's report and an arborist is not qualified to analyze effects on wildlife biology. AR 788.

SAFER's comment also included opinions from SWAPE's Rosenfeld and geologist Hageman, and from certified industrial hygienist Offermann. AR 811-21, 843-61. Offermann assessed the Project's potential indoor formaldehyde emissions, a known human carcinogen. AR 844, 846, 884. Indoor formaldehyde emissions come primarily from composite wood products. AR 844-45. Formaldehyde quantities are limited by California law. AR 845. Offermann opined that even only using compliant construction materials, the amount of formaldehyde present can harm humans without further mitigation. AR 845. There are currently little to no current formaldehyde emissions at the Project site, but emissions will begin at levels that pose health risks once the Project is built. AR 846-47. Offermann calculated that future residents would be exposed to an increased cancer risk of 120 per one million due to inhalation of formaldehyde off-gassing from composite wood products and this risk exceeds the CEQA significant cancer risk of 10 per million. AR 846. Offermann suggested mitigation measures such as using different materials or the use of outdoor air ventilation. AR 853.

SWAPE concluded that the MND failed to adequately evaluate the Project's air quality impacts, and that the Project would result in significant human health impacts from emissions of DPM. AR 818-20. SWAPE based its conclusion on review of the MND, Rosenfeld's expertise on health risk assessments, and guidance from OEHHA. AR 818-20. SWAPE argued the City's localized significance threshold ("LST") analysis is not applicable to DPM because LST analysis only applies to "criteria air pollutants" while DPM is a "toxic air contaminant". AR 819. SWAPE pointed to OEHHA guidance on preparing health risk assessments. AR 819.

6. The City's Response to Comments

In October 2023, the City issued its response to submitted comments. AR 741-55, [8] 4194-4202.

In response to Smallwood's comments about habitat, the City asserted that the three species observed by Noriko are not considered federally or state-listed, nor are they listed as having critical habitat. AR 744. The potential for special-status species at the Project site depends on suitable habitat, habitat connectivity, and general disturbance in the area. AR 744. The Project site contains minimal habitat value for the special-status wildlife species that Smallwood asserts could inhabit it. AR 744. A species' use of a site depends on a number of factors, and detection of a species should not be based exclusively on the length of observation. AR 745. Apart from observation,

Smallwood's modeling was based on a Northern California location not similar to the Project site and therefore his modeling projections are inapplicable. AR 745.

As for wildlife movement, the City asserted that compliance with the California Fish and Game Code, the Migration Bird Treaty Act, and MM BIO-1 will bring potential impacts to migratory birds below significant thresholds. AR 745, 4195. The City reasserted that the Project site's position surrounded by urban uses and previous development and demolition left it not useful as a wildlife corridor for native and migratory wildlife. AR 744-46, 4194-96. The Project would plant 106 trees on the ground floor which would allow wildlife to continue to use the site as a stopover. AR 745, 4195. The City also specified that Rubio Wash would remain as it is. AR 746, 4196. Both could be used as a stopover and Smallwood did not present any evidence how the Project would cut wildlife off from stopping over. AR 4196.

The City stated that Smallwood's prediction of 475 annual bird fatalities from bird-window collisions is inapplicable because his data sources from multiple sources in the United States are largely environmentally distinct from the Project's environment. AR 746. The City also disagreed with Smallwood's prediction for vehicle collision fatalities as based on unrepresentative data from rural, undeveloped roadways, and therefore speculative and misleading. AR 746.

For health risk impacts, the City stated that neither SCAQMD nor other relevant agencies require an evaluation of potential health risks from indoor formaldehyde emissions. AR 4198. Offermann overstated the potential health impacts from formaldehyde emissions by making false assumptions, including (1) the Project's construction materials would not be compliant with existing regulation; (2) formaldehyde emissions from materials would be constant over 70 years; (3) residents would live in their units for 70 years; (4) residential occupants and employees would inhale 20 cubic meters of air per day; and (5) employees would work at the Project site for eight-hour days, five-day weeks, and 50-week years. AR 751-52, 4201-02.

The City contended that the correct assumptions are: (1) the materials will be compliant with regulations; (2) formaldehyde emissions decrease with time; (3) lifetime risk values for residents should be based on 350 days per year for only 30 years according to the United States Environmental Protection Agency ("EPA"); (4) the average person inhales approximate 7.57 cubic meters of air per day according to the American Lung Association; and (5) workers remain in a job a median of only 4.1 years according to the United States Bureau of Labor Statistics. AR 752, 4202.

The City further responded that future residents and employees are not considered CEQA impacts at all because CEQA does not regulate environmental changes that do not affect the public at large. AR 751, 4201. Jesse Fan ("Fan"), the CEQA project manager and the City's environmental consultant, concluded that Offermann's analysis was pure speculation, and the data, studies, and assumptions used were not relevant or credible. AR 751-52, 4201-02. Finally, the City pointed out that Offermann's own studies reflect that California's formaldehyde emissions regulations are successful at reducing emissions to safe levels. AR 4199-4201.

7. The Planning Commission Hearing

On November 13, 2023, the Planning Commission held a hearing on the Project, at which SAFER reiterated its written comments. The Planning Commission voted to recommend approval of the MND to the City Council. AR 3895, 3927, 3958-60.

8. SAFER's Second Comment

On December 14, 2023, SAFER submitted a second written comment with further arguments from Smallwood and SWAPE, and SAFER submitted a supplemental comment four days later. AR 4029-43, 4045-50, 4083-87. SAFER maintained that there was a fair argument the Project might result in significant environmental impact, requiring an EIR. AR 4083-87. Smallwood argued the City improperly narrowed the definition of special-status species to those that are threatened, endangered, or have a designated critical habitat. AR 4029-30. Yet, Guidelines section 15380 also includes “rare” in the term special-status species. AR 4030. The City’s listed factors used to conclude that the Project site has minimal value as a habitat – namely, connectivity and general disturbance -- are not how wildlife habitat is measured. In fact, special-species wildlife often use disturbed environments. AR 4032. For wildlife movement, Smallwood asserted that the City’s evidence, such as the previous usage of the Project site, is largely irrelevant. AR 4039-41, 4109.

SWAPE asserted that state health risk policies, reflected in agency guidance, require a health risk assessment because the Project’s anticipated construction and operation duration exceed two-month and six-month limits provided by agency guidance. AR 4027.

9. The City Council Hearing

On December 19, 2023, the City Council held a hearing on the Project. AR 3897-08. SAFER reiterated its concerns orally. AR 3974-76. City CEQA project manager Fan offered oral comments on the Project’s biological resources impact. AR 3987-89. Fan asserted that the birds mentioned by SAFER in its comments were Birds of Conservation Concern and birds of prey that are the “common birds” that would generally use the urbanized environment. AR 3988. They are commonly found in residential backyards and urban features such as parks and ornamental architecture. AR. 3988-89. The Project would provide more trees than currently exist onsite and those birds are going to be thriving and come back to the Project site. AR 3989.

The City Council voted to adopt Resolution 23-73 approving the MND and Mitigation Monitoring and Reporting Program, introduce Ordinance No. 700, scheduled a second reading and adoption of the Ordinance at the next regular City Council meeting on January 16, 2024, and excluded the public art requirement for the Project. AR 3933.

10. SAFER’s Third Comment

SAFER submitted a third written comment on January 12, 2024. AR 4090-184. SAFER included details from a second survey conducted by Noriko on December 23, 2023. AR 4097-98. Noriko observed the same special-status species she noted during the September 7, 2023 survey, plus two additional special-status species: the California Gull and Red-Shouldered Hawk. AR 4097-98, 4115. Combining the two surveys, Noriko detected a total of 26 vertebrate wildlife species, including five special-status species. AR4114.

Smallwood argued that wildlife, even special-status species, often make use of highly disturbed environments, and Noriko had observed special-status species on the Project site. AR 4032. Smallwood further argued that “unsuitable habitat” is an impossible concept. AR 4031-32. He explained that the 106 new trees that will be planted could provide stopover opportunities for some species of bird but may not be suitable for all types of birds, including birds adapted to open ground environments. AR 4039. For window collisions, he reviewed reports from over 200 buildings from a variety of structures and environments to estimate a mean fatalities-per-square-meter-of-glass-per year. AR 4040.

11. The City Council's Project Approval

The City Council held its regular meeting on January 16, 2024, for which SAFER again presented written comments. AR 4187-88. The City Council voted to adopt Ordinance No. 700 by a vote of 5-0. AR 3943.

The City filed a NOD with the County Clerk the next day. AR 1.

E. Analysis

Petitioner SAFER seeks to set aside certification of the MND and Project approval, and to compel the City to prepare an EIR under the fair argument standard.

1. Standing

Standing is a threshold issue necessary to maintain a cause of action, and the burden to allege and establish standing lies with the plaintiff. Mendoza v. JPMorgan Chase Bank, N.A., (“Mendoza”) (2016) 6 Cal.App.5th 802, 810. As a general rule, a party must be “beneficially interested” to seek a writ of mandate. Friends of Oceano Dunes, Inc. v. San Luis Obispo County Air Pollution Control Dist., (2015) 235 Cal.App.4th 957, 962 (citing CCP §1086). Likewise, to seek declaratory relief, a party must be an “interested person.” CCP §1060. An “interested person” means the same thing as a “beneficially interested” person in mandamus cases. Asimow, et al., Administrative Law (2018), Ch. 14, §14:6. The term “beneficially interested” has been generally interpreted to mean that one may obtain the writ only if the person has some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large. SJJC Aviation Services, LLC v. City of San Jose, (“SJJC”) (2017) 12 Cal.App.5th 1043, 1053. The beneficial interest must be direct and substantial. Ibid. A petition has no beneficial interest if he or she will gain no direct benefit from the writ’s issuance and suffer no direct detriment if it is denied. Ibid.

Respondents contend that SAFER lacks standing to pursue the CEQA claim. SAFER has no existence independent of the laborers’ union. Since its creation in 2019 by SCDCL,[9] SAFER has received virtually all of its funding from the laborers’ union, has been housed (rent free) in SCDCL’s offices, shares the same telephone number [(626)350-6900] as SCDCL, and has had no employees of its own. Opp. at 21-22.

Based on its tax returns, SAFER received a total of \$5,940,000 from the laborers’ union from 2019 through 2023, more than 95% of its total revenue over that period. In response to the IRS’s question whether SAFER is “directly or indirectly affiliated with, or related to, one or more tax-exempt organizations”, SAFER has always responded “Yes” and identified its affiliate as the SCDCL. Opp. at 22-23.

SCDCL exercises total control over SAFER. SAFER’s Bylaws dictate that SCDCL’s “Business Manager [Jon P. Preciado] shall serve as a Director and President of [SAFER], as Chairperson of the Board of Directors, by virtue of his/her position or office.” RJN Ex. 10, p. 8. The Bylaws mandate that the other members of SAFER’s Board and all of SAFER’s corporate officers shall be officers of the laborers’ union council. Ibid. That always has been the case, as reflected in the lists of directors and officers on SAFER’s tax returns. The Bylaws state that there shall be “no voting members” and the Board shall decide whether to admit any members at all. RJN Ex. 10, p. 11. Hence, SAFER is nothing more than the litigation arm of the laborers’ union. Opp. at 23.

SCDCL's express mission is "to unite the local unions within its jurisdiction in order to advance the economic and other interests of the membership and seek continued improvements in the terms of the Collective Bargaining Agreements." RJD Ex. 1. This is an economic objective, not one directed to preserving the environment for the benefit of the general public, and it is attributable to SAFER as well. Opp. at 23.

An association has standing when it has a beneficial interest in the litigation. Respect Life South San Francisco v. City of South San Francisco, ("Respect Life") (2017) 15 Cal.App.5th 449, 454. The participation of incorporated and unincorporated associations has become common in public interest-oriented litigation. McKeon v. Hastings College, (1986) 185 Cal.App.3d 877, 892-93. A petitioner in a CEQA case has a beneficial interest if the petitioner will be adversely affected by the environmental impacts of the challenged project. Bozung v. LAFCO, (1975) 13 Cal.3d 263, 272. An association suffering no harm from the challenged agency action still has standing to sue as the representative of its members (a) if at least one member of the association could have met the private interest standard if the member sued individually, (b) the interests the association seeks to protect are relevant to its purpose, and (c) neither the claim asserted nor the relief requested requires the individual members' participation in the lawsuit. San Francisco Apartment Association v. City & County of San Francisco, (2016) 3 Cal.App.5th 463, 472-74.

The Petition alleges that SAFER "has direct and beneficial interests in Respondents' compliance with laws bearing upon approval of the Project...[and these] interests will be directly and adversely affected by the Project, which...would cause substantial harm to the natural environment and the quality of life in the surrounding community." Pet., ¶17. SAFER has members who "live, work, and/or recreate near the Project site and in the City. They have been and will continue to be harmed by Respondents' failure to comply with the San Gabriel Municipal Code and to provide environmental documents that accurately and fully inform interested persons of the Project's true impacts, and mitigate those impacts." Pet., ¶28.[\[10\]](#)

SAFER argues that the City wrongly focuses on SCDCL's interests instead of SAFER's interests as stated in the Petition. Even if SAFER were a labor union (which it is not), labor unions can have standing to sue under CEQA. CEQA litigants often have competing economic interests and, so long as an association's member has standing in his or her own right, this suffices to satisfy CEQA's liberal standing requirements. Bakersfield Citizens v. City of Bakersfield, (2004) 124 Cal.App.4th 1184, 1198. Union members breathe air and enjoy a healthy environment as much as anyone else. Indeed, construction workers are exposed to higher levels of emissions from construction equipment, such as DPM, than the general public. Reply at 17-18.

While SAFER should have presented evidence that one or more members live near the Project site or will be performing construction on the Project, Respondents have not fully rebutted the allegations of the Petition, even if the court were to consider RJD Exs. 2-9. The unrebutted allegations of a petition can suffice to support standing. Respect Life, *supra*, 15 Cal.App.5th at 454. SAFER has standing to pursue its claims.[\[11\]](#)

2. The Environmental Setting

Respondents note (Opp. at 6-7) that "[a]gencies enjoy the discretion to decide, in the first instance how to realistically measure the existing physical conditions without the proposed project, and the selection of a baseline will be upheld when supported by substantial evidence." Save North Petaluma River and Wetlands v. City of Petaluma, (2002) 86 Cal.App.5th 222-23 (citations omitted). The Guidelines contemplate that the physical conditions existing when a Notice of Preparation is published "will normally constitute the baseline physical conditions" used to describe the environmental setting and to determine the significant effects of a proposed project. Id.

at 217; Guidelines §15125(a). Knowledge of the baseline conditions is “critical to the assessment of environmental impacts”, and special emphasis is “placed on environmental resources that are rare or unique to that region and would be affected by the project.” Guidelines §15125(c).

Respondents contend that SAFER improperly characterizes the Project’s environmental setting by suggesting that the Project site is laden with mature trees and bisected by a watercourse, the Rubio Wash. *See Pet. Op. Br.* at 6. This description omits important characteristics of the Project site and fails to provide any evidence of rarity or uniqueness of the environmental resources at the Project site, or how they would be affected by the Project. In fact, the Project site is more or less flat, fenced off on all sides, and the topography is low-lying shrubs, weeds, and non-native grasslands scattered throughout, as well as 44 trees from 13 species. AR 630. The site contains 12 Mature Class I Trees and five other mature trees. AR 1043, 1053-54. Additionally, commercial land uses are located to the north and east of the Project site; commercial uses and high-density residential uses are located to the south of the Project site; and multi-family residential uses are located west of the Project site. AR 630. The concrete-lined Rubio Wash drainage channel traverses the Project site from the northwest to southeast. AR 630, 634. Opp. at 7.

Thus, the Project site is a previously developed, now vacant, flat lot with low bushes, weeds, and minimal vegetation. This must be taken into account when determining whether the City’s determination is supported by substantial evidence. Opp. at 7.

3. The MND Is Not Supported by Substantial Evidence That the Project Will Not Have Significant Adverse Impacts on Biological Resources Because It Lacks an Expert Wildlife Biologist’s Opinion

SAFER argues that the MND makes numerous assertions about the Project’s impact on biological resources without substantial evidence. The record contains no evidence that any surveys of the Project site were conducted by qualified biologists to support the MND’s finding of the species that exist there. The City relied primarily on arborists’ reports from 2018 to assess impacts on biological resources (“Arborist Report”). AR 659. However, “[a]n arborist is not a wildlife biologist, and would be unqualified to survey the site as a wildlife biologist.” AR 788. Under CEQA, “opinions rendered by nonexperts” or experts without the proper credentials, do not amount to substantial evidence. *Jensen v City of Santa Rosa*, (2018) 23 Cal.App. 5th 877, 894. As such, the City’s conclusions regarding the Project’s impacts on biological resources are not supported by substantial evidence. Pet. Op. Br. at 14.

SAFER also argues that the MND concludes, without citing any sources, that “[n]o species that are identified as candidate, sensitive, or special status species are known to exist in the local vicinity due to urbanized conditions. No impact [will] occur in this regard.” AR 660. This is false. Noriko conducted surveys of the Project site on September 7 and December 23, 2023. She observed wildlife, including special-status species, using the Project site to bathe, hunt, and forage. AR 780, 4098. She saw and photographed multiples species that the City implied should not be there. Additionally, Smallwood’s analysis of databases revealed that numerous other special-status species have been identified near the Project site. Given Smallwood’s analysis and Noriko’s expert observations, it is clear that the Project site is habitat for special-status species. Pet. Op. Br. at 14-15.

Nor is the City’s attempt to reclassify special status species as “common birds” persuasive. At the December 19, 2023 City Council meeting, the City’s representative insinuated that the special-status species identified by Noriko are the “kind of common birds that would utilize the site and just kind of the general site in the urbanized environment.” AR 3988. This is misleading. The birds identified on or around the Project site are not merely common birds, and the fact that they can rarely or sometimes be found in backyards does not qualify them as common. AR 4109. Such

comments by the City do not rise to substantial evidence because they are not substantiated by facts in the record. Pet. Op. Br. at 15.

SAFER argues that the City further asserted that the Project site contains minimal habitat value for special-status species because such analysis “depends on suitable habitat types and variability, habitat connectivity, and general disturbance in the area” and implied the absence of habitat value because the site is a “vacant dirt lot with low-lying shrubs weeds, and non-native grasslands scattered throughout the Project site.” AR 744-45. This is incorrect. Noriko’s surveys clearly demonstrate that the Project site provides substantial habitat value as evidenced by the observed hunting, foraging, and bathing on the Project site. AR 780, 4098. Additionally, the City misconstrued the legal standard by minimizing the Project site’s value as habitat. Smallwood explained that, while the City’s response relies on habitat connectivity and general disturbance in the area as contributing factors to a determination of whether the site provides value to wildlife, it cites no evidence in support of these factors. In fact, special status species often make use of disturbed environments. AR 4032.

SAFER argues that CEQA compels the City to determine whether the Project will result in impacts to special status species. Noriko positively identified special-status species onsite, clearly utilizing the site as habitat. As such, the City’s conclusion that the Project site does not have either special-status species or habitat value is unsupported by substantial evidence. Pet. Op. Br. at 15.

Respondents respond that an initial study supporting a negative declaration should provide the basis for concluding that the project will not have a significant effect on the environment. Gentry v. City of Murrieta, *supra*, 36 Cal.App.4th at 1378 (citation omitted). The initial study must disclose the data or evidence upon which the person conducting the study relied. Ibid. However, the initial study is not required to disclose sufficient evidence to support each of its findings. Ibid. “There is ‘no authority...that an initial study is inadequate unless it amounts to a full-blown EIR based on expert studies of all potential environmental impacts. If this were true, the Legislature would not have provided in CEQA for negative declarations.’” “The ultimate issue is not the validity of the initial study, but rather the validity of the lead agency’s adoption of a negative declaration.” Id. at 1379. Even if the initial study fails to cite evidentiary support for its findings, it remains the petitioner’s burden to demonstrate substantial evidence supporting a fair argument of significant environmental impact. Id. “An absence of evidence in the record on a particular issue does not automatically invalidate a negative declaration. Id. ‘The lack of study is hardly evidence that there will be a significant impact.’” Id. Opp. at 11.

A specialized expert is not always necessary to support an initial study. “Sometimes, however, expert planning personnel may be entitled to conclude without additional evidence or consultation that a project will not have a particular environmental impact.” Gentry v. City of Murrieta, *supra*, 36 Cal.App.4th at 1380. Opp. at 11-12. This is not such a case. The MND discloses only an evaluation of potential biological resource impacts in an Arborist Report and Arborist Addendum. AR 659. The court agrees with SAFER that the City cannot rely on the Arborist’s Report to evaluate special-status species, wildlife movement, and habitat loss. Nor can the City rely on planning personnel to analyze these impacts.

As discussed *post*, SAFER fails to present substantial evidence to support a fair argument of significant adverse impacts to special-status species, wildlife movement, or habitat loss. Smallwood’s report focused on species hunting, foraging, and bathing in the Rubio Wash (which will remain on the Project site) and he presented no evidence that identifies that nests of these species were observed on the Project site. He further fails to show that any species observed were special-status species. At the December 19, 2023 City Council meeting, the City’s CEQA project manager Fan clarified that the birds identified by Noriko are commonly found in residential backyards, parks and on ornamental landscaping. AR 3988. Of the 44 trees onsite, 16 would be removed and 17 would be protected in place. A total of 106 trees would be planted on the ground

floor, and 25 trees would be planted on the third-floor courtyard, providing more trees than are currently located on the site. AR 638, 3989. Opp. at 12.

These facts would constitute substantial evidence that the Project will have no substantial adverse impacts to special-status species, wildlife movement, and habitat loss if an expert wildlife biologist so opined.[\[12\]](#) The City had no such expert. The MND therefore is not supported by substantial evidence that the Project will not have significant adverse impacts on biological resources.

4. The MND Lacks Substantial Evidence That MM BIO-1 Will Mitigate the Project’s Significant Adverse Impacts on Birds to Less Than Significant

The Initial Study emphasized that the Project would be required to comply with the Migratory Bird Treaty Act (“MBTA”) and California Fish and Game Code, which would protect migratory birds. The Initial Study noted that impacts would potentially be significant with respect to the removal of, and encroachment on, trees that provide a nesting habitat for migratory birds, and therefore the Project would be subject to compliance with MM BIO-1, which addresses construction activities during the nesting season. AR 661.

MM BIO-1 provides that during construction, grubbing, brushing or tree removal shall be conducted outside of the State identified nesting season for migratory birds -- *i.e.*, typically March 15-September 1, if possible. If the construction activities cannot be conducted outside the nesting season, a pre-construction nesting bird survey within and adjacent to the Project site shall be conducted by a qualified biologist within three days prior to initiating construction activities. AR 661. MM BIO-1 also requires the preparation and implementation of a nesting bird plan by a qualified biologist if active nests are found during the pre-construction nesting bird survey. AR 661.

SAFER argues that MM BIO-1 is not the cure-all for potentially significant impacts on biological resources. MM BIO-1 was designed to “address potential impacts to migratory birds,” thereby restraining the adequacy of this measure to a specific wildlife population. MM BIO-1 was not formulated to account for the numerous non-migratory wildlife species observed on or around the Project site. Pet. Op. Br. at 16.

Even if MM BIO-1 could address impacts to non-migratory wildlife, requiring preconstruction surveys without first completing a detection survey reduces the adequacy of the measure. Based on his expertise in conducting nest surveys and knowledge of survey protocols established by both state and federal wildlife departments, Smallwood found that the proposed mitigation measure of conducting preconstruction surveys would be insufficient to adequately mitigate significant impacts to nesting birds, “[r]egardless of whether construction timing avoids the nesting season.” AR 801-02. Smallwood explained: “Preconstruction surveys are only intended as last-minute, one-time salvage and rescue operations targeting readily detectable nests or individuals before they are crushed under heavy construction machinery. Because most special status species are rare and cryptic, and because most bird species are expert at hiding their nests lest they get predated, most of their nests will not be detected by preconstruction surveys without prior support of detection surveys... Locating all of the nests on site would require more effort than is committed during preconstruction surveys.” AR 801-02. Pet. Op. Br. at 16; Reply at 12-13.

SAFER adds that MM BIO-1 cannot reduce the other adverse effects on biological resources. Issues related to habitat fragmentation, impediments to wildlife movement, and the Project site’s decreased productive capacity will not be reduced to levels below significance because MM BIO-1 does not address them. AR 802. Even with implementation of MM BIO-1, unaddressed impacts to biological resources will remain significant and unmitigated. Pet. Op. Br. at 16.

Respondents responds that SAFER wrongly concludes that MM BIO-1's mitigation measures are focused on migratory birds. The Initial Study emphasized that the Project would be required to comply with the MBTA and Fish and Game Code, which would protect migratory birds. AR 661. Additionally, the Initial Study noted that the Fish and Game Code extends protection to non-migratory birds identified as resident game birds (Fish and Game Code §3500) and to any birds in the orders Falconiformes or Strigiformes (birds of prey) (Fish and Game Code §3503). AR 661. Further, City staff's October 18, 2023 response noted that the Project site was previously developed and prior uses were demolished, and no areas within the Project vicinity could function as a wildlife corridor or nursery site for native wildlife. AR 4196. The Rubio Wash would remain in place, and 106 trees would be planted on the ground floor, all of which would serve as an opportunity for birds to utilize the Project site as a stopover site. AR 4195-96. Staff further added that there was no evidence the Project would cut wildlife off from a stopover. *Id.* Accordingly, the mitigation measures proposed by the City adequately reduce potential significant impacts to wildlife movement. Opp. at 13.

The City's evidence might suffice to mitigate impacts on both migratory and non-migratory birds if (a) it was supported by a wildlife biologist and (b) the City answered Smallwood's point about the inadequacy of preconstruction surveys. It has not done so, and the MND lacks substantial evidence that MM BIO-1 is sufficient to mitigate the Project's significant adverse impacts on birds to less than significant.

5. SAFER Has Not Presented Substantial Evidence Supporting a Fair Argument that the Project May Have Significant Adverse Impacts on Biological Resources

Although the MND is not supported by substantial evidence that the Project will not have significant adverse impacts on biological resources, or that MM BIO-1 will mitigate the Projects significant adverse impacts on birds to less than significant, this does not mean that an EIR is required. SAFER must show substantial evidence supporting a fair argument that the Project may have significant adverse impacts. A lack of study alone does not give rise to a fair argument that a project will have significant impacts. But it does "enlarge the scope" of the fair argument which may be made 'based on the limited facts in the record.'" *Gentry v. City of Murrieta, supra*, 36 Cal.App.4th at 1382 (citation omitted).

SAFER contends that it has presented substantial evidence establishing a fair argument that the Project may have significant adverse impacts on biological resources. SAFER submitted comments from an expert wildlife biologist, Smallwood, who found that the Project may result in significant impacts to special-status species, wildlife habitat, and wildlife movement based on observations of the Project site, experience, and relevant scientific studies. These expert opinions and findings sufficiently qualify as substantial evidence. SAFER adds that the City made no effort to survey the Project site for wildlife in response to Smallwood's comments. Pet. Op. Br. at 10, 14; Reply at 7.

a. There Is Not Substantial Evidence Supporting a Fair Argument That the Project May Have Significant Adverse Impacts on Special-Status Species

SAFER notes that courts have repeatedly held that expert opinions qualify as substantial evidence. *City of Carmel-by-the-Sea v. Board of Supervisors*, (1986) 183 Cal.App.3d 229, 249. "[A] lead agency or court may weigh evidence on the whole record in determining the preliminary issues of whether evidence is 'substantial' and thus deserving of consideration". *Pocket Protectors v. City of Sacramento*, (2004) 124 Cal.App.4th 903, 935. This "limited weighing of evidence to determine admissibility in an environmental debate must not be confused with a weighing of some substantial

evidence against other substantial evidence.” *Id.* “[F]or example, if an expert purporting to a hold a Ph.D. testifies as to the environmental effect of a project, a lead agency or court may properly consider and ‘weigh’ evidence in the record showing that the expert never attended college and his Ph.D. is phony.” *Id.*

SAFER argues that Smallwood holds a Ph.D. in ecology and has authored numerous articles on “animal density and distribution, habitat selection, wildlife interactions with the anthrosphere, and conservation of rare and endangered species.” AR 778. Respondents do not take issue with Smallwood’s qualifications as an expert, only the substantial nature of the evidence he provided. Reply at 7-8.

Smallwood submitted comments based on biologist Noriko’s eyewitness observations of the Project site, his education and experience, review of the MND, relevant scientific studies, and records maintained by the Cornell Lab of Ornithology (eBird) and the online database iNaturalist. AR 790-93. His expert comments include opinion and reasonable inferences that a fair argument can be made that the Project may have a potentially substantial, adverse change on special-status species, despite the City’s proposed MM BIO-1. Pet. Op. Br. at 10.

During her two site surveys, Noriko observed 26 species of vertebrate wildlife, including five special-status species. AR 4114. The special-status species included (1) the Red-shouldered hawk and American kestrel, both of which are protected by Fish and Game Code section 3503.5, (2) the California gull, which is listed as a Bird of Conservation Concern by USFWS and is listed on the Watch List of DFW and (3) Allen’s hummingbird, another Bird of Conservation Concern. AR 780, 3505, 4115. Additionally, Smallwood’s review of other publicly available wildlife occurrence databases found that 118 special status species have been identified in the region of the Project, with 43 observed within 1.5 miles of the site. AR 790-93. Noriko’s eyewitness observations refute the City’s assertion that no special-status species are known to exist at or around the Project site because of its urbanized condition. AR 660. Pet. Op. Br. at 11.

The City’s responses claimed that the species identified by Noriko are not federally- or state-listed, nor are they listed as having critical habitat at the Project site. AR 744. SAFER contends this is both incorrect and misconstrues the legal standard. CEQA’s consideration of potentially significant impacts on wildlife is not limited to state- or federally-listed wildlife species or whether the Project site is identified as a critical habitat. Rather, CEQA requires an analysis of a project’s impact on “any species identified as a candidate, sensitive, or special status species...by DFW or USFWS. Guidelines App. G §(IV)(a) (emphasis added). Smallwood explained that the Allen’s hummingbird, Western gull, and California gull are all listed by USFWS as Birds of Conservation Concern. AR 780. USFWS lists such species pursuant to its directive to “identify species, subspecies, and populations of all migratory nongame birds that, without additional conservation action are likely to become candidates for listing under the Endangered Species Act”. 16 U.S.C. §2912(a)(3); *see* 86 Fed. Reg. 32056-01 (June 16, 2021). In addition, the American kestrel and Red-shouldered hawk are classified as birds of prey, a valuable resource protected under state law. *See* Fish and Game Code §§ 3503, 3503.5, 3505, 3513; *see also* 14 CCR §§ 251.1, 652, 783-786.6. The City’s representative agreed that the identified species were respectively Birds of Conservation Concern and birds of prey at the December 19, 2023 City Council meeting. AR 3988 (stating that these species are common birds). Pet. Op. Br. at 11.

In his November 28, 2023 letter, Smallwood argued that the City’s response ultimately “pigeon-hole[d] the meaning of special status species to those species listed by the state or federal governments as Threatened or Endangered or as those with designated critical habitat. However, special status species include more species than claimed in the response”; it includes rare species. A “rare species” is defined as a species not presently threatened with extinction but is small in numbers that it may become endangered if its environment worsens or is likely to become endangered in the foreseeable future throughout a significant portion of its range and may be

considered threatened. Guidelines §15380. AR 4029-30. Smallwood considers birds of prey protected by Fish and Game Code section 3503.5 necessarily to be rare. Pet. Op. Br. at 11.

Respondents argue that SAFER ignores previous environmental analyses of the Project site that did not find any impact as to special-status species. For example, the Draft EIR prepared in June 2006 by the City's environmental consultant indicates that the project would not have a substantial adverse effect on any species identified as a candidate, sensitive, or special status species. AR 263, 483-84. The Final EIR in 2007 indicated there would be no impacts to special status species, habitats, or wildlife movement, also noting that the Project site does not have an adopted habitat conservation plan, natural community conservation plan or other habitat conservation plan. AR 531-39, 561-62. Moreover, the mitigation measures adopted in connection with the approval of the San Gabriel Center Project were included in the Addendum conducted in 2015. AR 531. Other environmental analysis conducted by the City found no impacts to candidate, sensitive or special-status species. AR 3247, 3256. Opp. at 8.

Respondents notes that a species is “rare” under Guidelines section 15380(b)(2) when either (a) although not presently threatened with extinction, the species is existing in such small numbers throughout all or a significant portion of its range that it may become endangered if its environment worsens, or (b) the species is likely to become endangered within the foreseeable future throughout all or a significant portion of its range and may be considered ‘threatened’ as that term is used in the Federal Endangered Species Act. Nassiri v. City of Lafayette, (“Nassiri”) (2024) 103 Cal.App.5th 910, 925. Opp. at 9.

Of the 18 species Noriko observed on September 7, 2023, only three were noted to have been onsite: Anna’s Hummingbird (no status stated); Allen’s Hummingbird (Bird of Conservation Concern); and American Kestrel (bird of prey). AR 780. No notes were made that the Western Gull was seen onsite. *See id.* As in Nassiri, Smallwood never discussed the Guidelines definition of rare and never asserted that the species observed at the Project site are rare under Guidelines section 15380(b)(2). *Id.* Further, SAFER presented no evidence that the Project site is a critical habitat for any of these three species or how the environmental setting is unique or rare. Rather, Smallwood leapt to the conclusion that “...the project would contribute further to habitat fragmentation in an environmental setting in which wildlife would be devastated by the loss of one of the region’s last patches of naturally covered open space.” AR 793. Opp. at 9.

SAFER replies that special-status species are those which “may be protected as threatened or endangered under state or federal law or are otherwise being tracked by the California Department of Fish and Wildlife (or the United States Fish and Wildlife Service) or a private organization such as the California Native Plant Society because the species are declining at a rate that could lead to their being listed or are otherwise sufficiently rare or threatened enough to warrant monitoring.”

Practice Under the California Environmental Quality Act, (2d. ed. Cal. CEB 2024 § 20.53) (emphasis added). The Guidelines require agencies to consider whether a project may “[h]ave a substantial adverse effect . . . on any species identified as . . . special status [] in local or regional plans, policies, or regulations, or by the California Department of Fish and Wildlife or the U.S. Fish and Wildlife Service.” Guidelines App. G, §(IV)(a) (emphasis added). This is broader than the requirement to analyze potential impacts to rare species (App. G, §(XXI)(a)), which carries a definition distinct from “special status species.” Guidelines §15380(b)(2). Reply at 8-9.

According to SAFER, Respondents mistakenly conflate the meaning of “special status” and “rare” in arguing that SAFER failed to demonstrate that the Project may have a significant impact on special-status species because Smallwood “never asserted that the species observed on the Project site are rare.” SAFER is not required to demonstrate that the species Noriko observed are rare. It is sufficient that they have been identified as special status. The Allen’s hummingbird, Western gull, and California gull have been identified by USFWS as Birds of Conservation Concern. AR 780. Birds of Conservation Concern are those birds “that without additional conservation action

are likely to become candidates for listing under the Endangered Species Act.” AR 770. As such, the three species qualify as special-status species as USFWS continues to monitor these birds for conservation attention. Id. Other birds observed by Noriko, including the American kestrel and Red-shouldered hawk, similarly qualify as special-status species because they are protected by state law under the Fish and Game Code. AR 780, 4115; Fish and Game Code §§ 3503, 3503.5, 3505, 3513; *see also* 14 CCR §§ 251.1, 652, 783-86.6. Based on Noriko’s observations of the five special-status birds during her surveys, Smallwood concluded that the Project would result in significant adverse impacts on these species despite the City’s proposed mitigation measure. AR 794, 797. Reply at 9.

SAFER contends that Respondents’ reliance on Nassiri, *supra*, 103 Cal.App.5th at 910, demonstrates not only that they misunderstand the difference between rare and special-status species, but also the standard for challenging an MND. In Nassiri, the petitioner was required to provide substantial evidence that rare species habitat existed on the project site to show that the project did not qualify for CEQA’s Class 32 Infill Exemption. Id. at 924-25. Thus, the petitioner was required to first demonstrate that the species observed on the project site were rare under Guidelines section 15380(b)(2). Id. The Legislature created a statutory scheme that categorically exempts infill projects from CEQA (Pub. Res. Code § 21084(a)), which comes with limited exceptions that disqualify a project from proceeding under an exemption, including the existence of habitat value for rare species on the project site. Guidelines §15332(c). That standard does not apply to challenges to an MND where the bar for preparing an EIR is much lower. *See Meija v. City of Los Angeles*, (2005) 130 Cal.App.4th 322, 332. As an infill project is not at issue in this case, SAFER is not required to demonstrate that the species observed at the Project site are rare as that term is defined in Guidelines section 15380. Reply at 9-10.

The court agrees that the fair argument standard for an EIR is much lower than the evidence required in Nassiri and that a species need not be rare to be special status. However, SAFER’s evidence of special status is suspect. The Guidelines requires agencies to consider whether a project may “[h]ave a substantial adverse effect . . . on any species identified as a candidate...or special status” by DFW or USFWS. Guidelines App. G, §(IV)(a) (emphasis added). This may be broader than the requirement to analyze potential impacts to rare species (Guidelines App. G, §(XXI)(a); Guidelines §15380(b)(2)), but SAFER does not show that any of Allen’s hummingbird, Western gull, and the California gull is identified by either DFW or USFWS as special status.

This leaves whether DFW or USFWS has identified any these species as a “candidate”. USFWS has identified these three species as “Birds of Conservation Concern.” AR 780. SAFER argues that USFWS lists Birds of Conservation Concern pursuant to its directive to “identify species...of all migratory nongame birds that, without additional conservation action are likely to become candidates for listing under the Endangered Species Act”. 16 U.S.C. §2912(a)(3). *See* AR 770. But “likely to become candidates” is not the same as “candidates”. The species must be a candidate under Guidelines App. G, §(V)(a).

According to Smallwood, “special status species” is a term used in the scientific community for species that are sufficiently rare that they require special consideration and should be, or have been, listed as rare, threatened, or endangered by the federal or state government. AR 770. Perhaps, but the failure of DFW or USFWS to identify a Bird of Conservation Concern as special status or as a candidate is dispositive of the special status issue under Guidelines section 15380. SAFER also does not show that any of the identified species is endangered, rare, or threatened under Guidelines section 15380. Smallwood’s conclusion that Birds of Conservation Concern are necessarily rare did not mean they meet the definition of “rare” in Guidelines section 15380(b)(2). *See Nassiri, supra*, 103 Cal.App.5th at 924 (species likely to become a candidate for listing is not necessarily a species that currently meets the definition of rare in Guidelines section 15380(b)(2)).[13]

Not only are the species observed by Noriko not federally or state-listed, the City’s responses

pointed out that the Project site does not have the potential to provide habitat for special species. AR 4194. The Initial Study noted that the Project site was previously developed and prior uses demolished. It also found that no areas within the Project vicinity could function as a wildlife corridor or nursery site for native and migratory wildlife. The minimal onsite vegetation (*i.e.*, low shrubs and non-native weeds) does not provide a suitable nesting habitat for migratory birds. AR 660.

The Project site is surrounded on all sides by urban uses and contains minimal habitat value for the special-status wildlife species that Smallwood asserted could inhabit it. AR 4195. A species use of a site depends on multiple factors – *e.g.*, suitable habitat types and variability, habitat connectivity, and general disturbance in the area. AR 4195. The detection of a species should not be based exclusively on the length of the survey. AR 4195. Additionally, Smallwood’s modeling and projections do not disclose the actual presence of candidate, sensitive, or special-status species. His modeling also is based on an analysis of annual grasslands in the Altamont Pass of northern California, which is not at all similar to the Project site. AR 4195. Opp. at 10.[\[14\]](#)

Smallwood’s comments are not substantial evidence supporting a fair argument that the Project may have a potentially substantial adverse effect on special species.

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b. There Is Not Substantial Evidence Supporting a Fair Argument that the Project May Have Significant Adverse Impacts on Wildlife Habitat

SAFER argues that Smallwood identified several potential impacts to wildlife habitat that will result from the Project. AR 793-94. Habitat fragmentation and loss have been recognized as the most likely leading cause of a documented 29% decline in overall bird abundance across North America in the last 48 years. AR 793. The Project area has undergone severe habitat fragmentation, and the Project would further contribute to that fragmentation by the loss of one of the region’s last patches of naturally covered open space. AR 793. Habitat loss results in the numerical decline in existing wildlife, and also the “permanent loss of productive capacity”. *Id.*

Smallwood noted that the two means of estimating loss of productive capacity are surveys to count the number of nests and chicks and an estimate based on known total nest density elsewhere. AR 793. Smallwood chose the latter. He relied on two studies of grassland/wetland/woodland sites in other states and surveyed a site in Rancho Cordova for conditions closer to California. AR 793. He arrived at an estimate of 42 bird nests at the Project site and inferred an annual loss of productivity at the Project site of 139 birds. AR 794. SAFER notes that the City contended that impacts to wildlife habitat will fall below significance thresholds through the implementation of MM BIO-1. AR 745. However, MM BIO-1 focuses primarily on migratory bird species, not the species with habitats at the Project site. Pet. Op. Br. at 11-12.

This is not substantial evidence. As stated *ante*, the Project site contains minimal habitat value. AR 4195. The Initial Study noted that the Project site was previously developed, and prior uses were demolished. It also found that no areas within the Project vicinity could function as a wildlife corridor or nursery site for native and migratory wildlife. The minimal onsite vegetation (*i.e.*, low shrubs and non-native weeds) does not provide a suitable nesting habitat for birds. AR 660.

This is true for all birds, not just migratory birds. Of the 18 species Noriko observed on September 7, 2023, she only noted three on the Project site: Anna’s Hummingbird (no status stated); Allen’s Hummingbird (Bird of Conservation Concern); and American Kestrel (bird of prey). AR 780. The City’s responses noted that Smallwood’s reliance on other studies to calculate the loss of 42 nest sites is based on an analysis of annual grasslands of the Altamont Pass, which is in northern California and is not similar to the Project site. AR 4195. This is not substantial evidence.

Finally, MM BIO-1 requires the Project to try to avoid the nesting season for construction. If it could not, a bird survey would be performed and a nesting bird plan of buffering, monitoring, and reporting would be developed for active nests. AR 4195. Contrary to SAFER's argument, this mitigation measure would apply to all bird nests, not just migratory birds. It would not impact long-term loss of habitat but would mitigate habitat loss during construction.

SAFER replies that Respondents, citing no authority, claims that SAFER "presented no evidence as to what would constitute a critical habitat for each of these species or how this environmental setting is unique or rare". There was no need for Smallwood to opine on whether the environmental setting of the Project site constitutes critical habitat, or that it is unique or rare. Smallwood found that the Project site currently represents "one of the region's last patches of naturally-covered open space." AR 793. He also noted that "Noriko's survey proves that the site is valuable to wildlife . . . [and t]he animals she saw at the site would not be there if the site was of no value." AR 785. As a result, he predicted the loss of 42 nest sites and 139 birds per year, significantly impacting wildlife habitat. AR 794. The City disagreed, claiming that the Project site contains minimal habitat value for special-status wildlife species. AR 4195. Smallwood replied that there is no "such thing as 'unsuitable habitat'" because "habitat is defined at that part of the environment that is used by members of a species" and Noriko saw three special-status species on the Project site, thereby refuting the City's speculation that no such species would occur there. AR 4032.

SAFER concludes that the dispute between Smallwood and the City demonstrates that, at the very least, there are doubts regarding the potential for the Project to result in significant habitat loss and this "disagreement among experts" must be resolved in an EIR. *Sierra Club v. Cnty. of Sonoma*, (1992) 6 Cal.App.4th 1307, 1317 ("if there is a disagreement among experts over the significance of an effect, the agency is to treat the effect as significant and prepare an EIR"). Reply at 10-11.

Not so because Smallwood's opinion is not substantial evidence. For the reasons stated *ante*, his calculation of 42 nesting sites and 139 birds per year lost lacks an adequate foundation. The fact that Noriko saw three (and later five) bird species on the Project site does not mean they nest there. See AR 792-93.

Smallwood's comments are not substantial evidence supporting a fair argument that the Project may have significant adverse impacts on wildlife habitat.

b. There Is Not Substantial Evidence Supporting a Fair Argument that the Project May Have Significant Adverse Impacts on Wildlife Movement

(i). Stopover

SAFER notes that Smallwood addressed the Project's potential impacts on wildlife movement throughout the Project site. Smallwood noted that the MND relied on the assumption that Project site's surrounding urbanized environment, absence of designated wildlife corridors and nursery sites, and previous development to conclude that the Project will not affect wildlife movement. AR 745-46. Smallwood explained that the MND relied on a false standard. AR 794, 4039. Evidence of previous development or an urbanized surrounding is not dispositive of whether the Project site can be a corridor for wildlife movement. "Previous development does not magically prevent wildlife from incorporating the site into their movement patterns." What is relevant is the existing environmental setting at the time of the Notice of Preparation. AR 4039. Pet. Op. Br. at 12-13.

Smallwood opined that "a site such as the proposed project site is critically important for wildlife movement because it composes an increasingly diminishing area of open space within a growing expanse of anthropogenic uses, forcing more species of volant wildlife to use the site for stopover

and staging during migration, dispersal, and home range patrol . . .” AR 794 (citing three scientific studies). “The [P]roject would cut wildlife off from stopover and staging opportunities, forcing volant wildlife to travel even farther between remaining stopover sites.” Id. Smallwood underscored the significance of the Rubio Wash, a water channel that bisects the Project site and is a feature that wildlife would likely follow in moving through the region. Id. This is supported by Noriko’s observations of wildlife using the Rubio Wash. AR 780. Pet. Op. Br. at 12.

Smallwood’s conclusion is not supported by substantial evidence for the simple reason that SAFER fails to establish how the Project would prevent birds from a stopover. The City’s responses reiterated that the Project site was previously developed, prior uses were demolished, the Project site is surrounded on all sides by existing urban uses, and no areas within the Project vicinity could function as a wildlife corridor or nursery site for migratory wildlife. AR 4195. Noriko observed birds using the Rubio Wash, but the Project will not affect the Rubio Wash or the birds which stopover there. Moreover, 106 trees would be planted on the ground floor, all of which could still serve as an opportunity for birds to use as a stopover site. Id. Opp. at 10-11.

SAFER replies that Smallwood’s comments do establish how the Project would cut wildlife off from a stopover. The untouched Rubio Wash and the addition of 106 trees on the Project site would provide opportunities for migratory birds to use the Project site for stopover, but this did not change Smallwood’s opinion. AR 4039. He explained: “[t]he planting of 106 trees could provide stopover opportunities for some species of bird, but not all, and not all of the native birds that are adapted to open-ground environments . . . even with the planting of trees on the property not covered by buildings, development projects such as the proposed Project cause substantial declines in wildlife species richness and abundance.” Id. Reply at 11.

Smallwood’s generalized replies do not amount to substantial evidence. Developments may cause substantial decline in wildlife species and abundance, but Smallwood fails to present evidence that the Project will do so. He ignores the continued existence of the Rubio Wash and fails to identify any open ground birds that are also migratory, or other birds that would require a stopover. The City correctly found that Smallwood did not provide evidence how the Project would prevent stopover. AR 4039.

(ii). Bird-Window Collisions

SAFER notes that Smallwood additionally employed his expertise on impacts to avian movement from window collisions. “Window collisions are often characterized as either the second or third largest source o[f] human-caused bird mortality.” AR 795. The Project would add three buildings, one of which will be six stories, and many glass windows. AR 794. Smallwood acknowledged that glass facades differ in their hazardousness for birds based on spacing, contiguity, orientation, and other factors. AR 795. He relied on scientific literature for bird collisions from 213 buildings. AR 796-97. HE noted that the MND does not disclose the nature and extent of windows for the Project and relied on the average square meter ratio of window to floor space for 34 other California residential and mixed-used projects in his data base. AR 797. HE took the mean fatality rate from other studies and applied it to his estimate of Project glass to predict the Project’s buildings would result in about 475 annual bird deaths. AR 797.

SAFER notes that the City’s responses attempted to rebut Smallwood’s expert findings because they allegedly do not “tak[e] into account the lack of avian observations, and the preexisting urbanized landscape...” AR 746. SAFER argues that this cannot be further from the truth. Smallwood stated: “In responding to my comment, the City is obviously not examining the underlying data – the evidence that birds will collide with the windows of the buildings that would be constructed.” AR 4040. Given the numerous data points, studies, and scientific review used to reach his decision, as well as the documented observations of bird species flying directly over or

adjacent to the Project site, Smallwood's conclusions clearly constitute an "expert opinion supported by facts." Guidelines §15384(b). Pet. Op. Br. at 13.

Smallwood's conclusions regarding the bird collisions do not amount to substantial evidence. The studies he relies on were made at various locations and for structures that are not shown to be similar to the Project, including New York City, several universities, a four-story glass walkway, and unidentified sites. AR 796-97. As Respondents argues, in Save the Plastic Bag, the California Supreme Court held that the court of appeal erred in concluding there was substantial evidence to support a fair argument that Manhattan Beach's ban on plastic bags might significantly affect the environment. 52 Cal.4th at 175. The court cautioned against overreliance on generic studies and emphasized that when the scale of the project is such that the use is plainly insignificant, proper perspective must be maintained and should not be allowed to distort the evaluation of the actual impacts attributable to the project at hand. Id. Opp. at 11.

SAFER replies that substantial evidence may be based on reasonable inferences. Guidelines §15384(a). Smallwood defended his conclusions on the basis that he drew a "scientific inference drawn from many thousands of actual bird-window collisions across the USA" in concluding that the Project would result in significant bird mortality from window collisions:

"My review included reports of avian fatality monitoring at 213 buildings and facades in a wide variety of environmental settings, types of structures, and types of glass on structural facades. The variety of settings, types of structures and types of glass included in the studies lent the mean number of fatalities/m² of glass a sufficiently wide 95% confidence interval for capturing the level of collision mortality that would result from the Project. In other words, I sought out the wide variation of settings, structures, and types of glass that served the basis of my estimated mean mortality." AR 4040. Reply at 11-12.

SAFER adds that the reference to Save the Plastic Bag is irrelevant. Smallwood explained that the purpose of using bird collisions from 213 buildings was to obtain a mean number of bird fatalities that could be applied to the Project. AR 4040. Smallwood made clear that his use of this data was to infer impacts well within the Project's geographical boundaries. Reply at 12.

Smallwood's review may have included reports of bird collisions at a large number (213) of buildings, but that does not make them applicable to the Project. Substantial evidence from an expert opinion on bird collisions would be based on settings, structures, and types of glass similar to the Project. Smallwood made no such comparison and his opinion that 475 birds would die annually from collisions with the windows of three residential buildings that are six stories, two stories, and four stories tall is lacking an adequate foundation. Expert analysis based upon unrealistic and improbable assumptions may be disregarded. *See Nassiri, supra*, 103 Cal.App.5th at 930. [15]

(iii). Vehicle-Related Deaths

SAFER argues that Smallwood linked the Project's potential wildlife impacts to the role played by vehicle trips in mortality rates of wildlife. AR 798-800. Citing the scientific consensus of the impacts of wildlife road kills in California and the United States and studies in Contra Costa County quantifying wildlife fatalities from vehicle collisions, Smallwood assumed similar collision fatality rates and estimated the potential wildlife mortality that would result from the Project's estimated 11,130,450 vehicle miles travelled per year. AR 799-800. He concluded that the

Project's vehicle trips would cause about 610 annual wildlife fatalities. Id. Pet. Op. Br. at 13.

The City attempted to discredit Smallwood's opinion by explaining that the predicted impacts are misleading and speculative. AR 746. As emphasized in Smallwood's rebuttal, the City's response "conflates scientific inference with speculation, which are the same ways of making predictions.... The evidence does not support the City's insinuation that Project-generated traffic would kill no wildlife. Every study of traffic impacts to wildlife has found that traffic causes substantial wildlife mortality." AR 4041. Pet. Op. Br. at 13.

Smallwood may believe that the extrapolation of mortality from a study site to the Project "is how prediction science works" (AR 4041) but his predictions must be supported by an adequate foundation to constitute substantial evidence. They are not. It is certainly true that traffic causes substantial wildlife mortality, but whether the Project will do so is a different issue. As the City pointed out, Smallwood relies on studies of a rural, undeveloped stretch of roadway in Contra Costa County whereas the Project is an urban infill development that will not create new roadways. AR 746. The two are apples and oranges and Smallwood's attempted extrapolation is unsupported speculation.

6. SAFER Has Not Presented Substantial Evidence Supporting a Fair Argument that the Project May Have Significant Adverse Impacts on Air Quality, But the MND Lacks Substantial Evidence That the Project Will Not Cause a Significant Health Impact from DPM Exposure

a. Health Risks Due to Indoor Emissions of Formaldehyde

(i). CEQA Does Not Require Evaluation of Health Impacts from the Project Itself

SAFER notes that Certified Industrial Hygienist Offermann assessed the Project's potential indoor emissions of the toxic air contaminant formaldehyde within the proposed residences and commercial units and the resulting increased cancer risk to the Project's future residents and employees. AR 846. Formaldehyde is a toxic air contaminant and a known human carcinogen. AR 844. "The primary source of formaldehyde indoors is composite wood products manufactured with urea-formaldehyde resins, such as plywood, medium density fiberboard, and particleboard. These materials are commonly used in building construction for flooring, cabinetry, baseboards, window shades, interior doors, and window and door trims." AR 844-45. CARB has adopted a regulation that limits the levels of formaldehyde in composite wood products sold in California. AR 845. While this regulation reduces emissions from compliant composite wood products products, it does not preclude the formaldehyde still present in those products from exposing residents to cancer health risks. AR 845. Pet. Op. Br. at 16-17.

SAFER notes that the MND did not address this potential indoor air pollution health risk. Nor did the City provide any substantive response to Offermann's comments regarding the Project's formaldehyde emissions. Instead, the City attempted to discredit those comments and asserted that the Project's potentially significant impacts on future residents and employees are "not considered to be an impact under CEQA." AR 4201. That is incorrect. It is the City's duty to investigate potential environmental impacts associated with the Project. *See County Sanitation Dist. No. 2 v. County of Kern*, (2005) 127 Cal.App.4th 1544, 1597. The only substantial evidence in the record regarding the significance of these air quality impacts is SAFER's. "If the local agency has failed to study an area of possible environmental impact, a fair argument may be based on the limited facts in the record." *Gentry v. City of Murrieta, supra*, 36 Cal.App.4th at 1379. "Deficiencies in the record may actually enlarge the scope of fair argument by lending a logical plausibility to a wider range of inferences." Id. Pet. Op. Br. at 17; Reply at 13.

SAFER argues that CEQA requires lead agencies to disclose and analyze “impacts on a project’s users or residents that arise from the project’s effects on the environment.” California Building Industry Ass’n v. Bay Area Air Quality Mgmt. Dist., (“CBIA”) (2015) 62 Cal.4th 369, 387. In CBIA, the California Supreme Court held that a project’s impacts on future residents must be considered under CEQA. Id. at 377. The court distinguished “the environment’s effects on a project” from “the project’s impacts on the existing environment.” Id. at 388. Although the existing environment’s effects on a project need not be addressed, the court held that CEQA requires an analysis of “impacts on a project’s users or residents that arise from the project’s effects on the environment.” Id. at 387; *see also* Sierra Club, *supra*, 6 Cal.5th at 518 (CEQA requires analysis of project’s impacts to human health).

As applied here, SAFER concludes that the impact from emissions of formaldehyde is a direct result of construction and operation of the Project and not an existing environmental condition. The City improperly dismissed this significant impact and, as such, the City’s determination that the Project would not result in any significant air quality impacts is not supported by substantial evidence. Rather, substantial evidence in the record supports a fair argument that the Project may have significant health risk effects from the Project’s formaldehyde emissions. Pet. Op. Br. at 17-18; Reply at 15.

Respondents correctly argue that the indoor exposure to formaldehyde emissions released from composite wood products used to construct the Project is not a CEQA environmental impact. This exposure is an impact of the existing environment – namely, building materials -- on the Project and its future inhabitants, not an impact of the Project on the environment.

This point is supported by CBIA, which SAFER misreads and which is dispositive. At issue in CBIA were air pollutant thresholds of significance adopted by the Bay Area Air Quality Management District (“District”). Id. at 378-79. After CBIA challenged the thresholds, the trial court found them to be a project under CEQA and the District was required to evaluate their impact on the environment. Id. at 380. Because the District failed to conduct such a review, judgment was entered in CBIA’s favor. Id. The court of appeal reversed, and the Supreme Court granted review of the issue whether CEQA requires an analysis of how existing environmental conditions impact a project’s future residents or users. Id. at 381.

The CBIA court noted that CEQA addresses human health and safety, and public health is of great importance in the CEQA statutory scheme. Id. at 386. However, the District went too far in concluding that when existing environmental conditions on or near the project site pose hazards to humans brought to the site by the project, the project may have potentially significant environmental effects requiring evaluation. Id. at 386, 387. CEQA does not provide enough basis to suggest that “environmental effects” encompass broader considerations associated with the health and safety of a project’s future residents or users. Id. at 387. The phrase is best limited to those impacts on a project’s users or residents that arise from the project’s effects on the environment. Id. Any other reading would elide the word “environmental”. Id. Therefore, only the project’s effects on the environment need be considered. Id. at 388.

As Respondents argue (Opp. at 15), SAFER has presented formaldehyde exposure solely as an effect on the future residents and inhabitants of the Project. Formaldehyde emissions from composite wood products used to construct the buildings is an impact on the future residents of the Project rather than an effect of the Project on the environment. An initial study shall only consider the effects of the project on the environment. Pub. Res. Code §§ 21100(a), 21151(a). “Environment” is defined as the physical conditions within the area which will be affected by a project. Pub. Res. Code §21060.5. The effects of the project on the environment are “limited to... adverse changes in physical conditions which exist within the area as defined in Section 21060.5.” Pub. Res. Code §§ 21100(d), 21151(b). CBIA made clear that CEQA only requires an agency to consider the effects of the environment on a project or its users where the project will itself have an

effect on the environment that will exacerbate the environmental conditions or issues. 62 Cal.4th at 388. Opp. at 14-15.

SAFER replies that the impact from emissions of formaldehyde is a direct result of construction and operation of the Project and not an existing environmental condition – such as outdoor air quality. There are presumably few, if any, formaldehyde currently emissions at the Project site. AR 847 (“the average outdoor air concentration of formaldehyde in California is 3 ppb or 3.7 $\mu\text{g}/\text{m}^3$.”). Once the Project is built, emissions will begin at levels that pose significant health risks. AR 846-47 (the Project’s indoor formaldehyde concentration will likely be around 24.1 $\mu\text{g}/\text{m}^3$). The City improperly dismissed this potentially significant impact. Reply at 15-16.

The short answer is that CBIA forecloses SAFER from relying on human health impacts from the Project itself and not impacts on the outside environment.

(ii). The City’s Lack of Regulatory Authority Does Not Preclude Environmental Analysis

Respondents argue that the City has no legal authority to regulate building materials, as CARB has occupied the field with regard to such regulations and the California Building Standards Code (“Building Code”) has occupied the field of building construction. The City has no discretion to modify the regulations related to building materials. Opp. at 15.

Respondents rely on McCorkle Eastside Neighborhood Group v. City of St. Helena, (“McCorkle”) (2018) 31 Cal.App.5th 80, 94-95, in which petitioner challenged the city’s approval of demolition and design review permits for an eight-unit residential building. Id. at 85. The city council approved the project pursuant to a CEQA exemption and ruled that its review was limited to design issues since no use permit was required for the project, which was by right. Id. at 91-92. The court held that the design ordinance’s limitation of the city council’s discretion solely to design review did not implicate environmental effects or CEQA because the zoning permitted the multi-family housing project by-right. Id. at 92. The court rejected the petitioner’s argument that because the city had discretion over some aspects of the project, the decision was necessarily a discretionary decision subject to CEQA. Id. at 94. Opp. at 15.

Respondents admit that McCorkle is not on point because the issue was whether the project approval was a discretionary decision subject to CEQA, and that is not at issue in this action. They argue that the relevance of McCorkle is the court’s explanation that an agency only must address those effects over which the agency has discretion to regulate in complying with CEQA. Id. at 94. The state alone regulates residential building materials through the Building Code and local agencies have no authority to regulate them. Building Industry Assn. v. City of Livermore, (1996) 45 Cal.App.4th 719, 725-26. Because the City has no authority to regulate the use of building materials in construction projects, it does not have the authority to condition the Project regarding the formaldehyde content of the composite wood products used to construct the Project. Consequently, exposure to formaldehyde emissions in building materials is not an environmental impact under CEQA. Opp. at 15-17.

SAFER correctly responds that any obligation the City has to analyze the Project’s formaldehyde emissions does not require it to regulate building products. Indeed, Offermann suggested mitigation measures that would not require the use of different building products, including outdoor air ventilation that would provide for a “mechanical supply of outdoor air ventilation to allow for a habitable interior environment [even] with closed windows and doors.” AR 852-53. Such mitigation measures are fully within the City’s authority since it may use the full extent of its police powers in exercising its duties under CEQA. *See Tiburon Open Space Comm. v. Cnty. of Marin*,

(2022) 78 Cal.App.5th 700, 730. Furthermore, a lead agency cannot avoid CEQA review simply because a project may comply with the rules issued by another agency. Kings Co. Farm Bur. v. Hanford, (1990) 221 Cal.App.3d 692, 712-18 (agency erred by “wrongly assuming that, simply because the smokestack emissions would comply with applicable regulations from other agencies regulating air quality, the overall project would not cause significant effects to air quality.”). Reply at 16.

(iii). Offermann’s Opinion Is Not Substantial Evidence

Respondents correctly argue that SAFER’s claims regarding formaldehyde exposure are speculative because Offermann’s opinions are based on unrealistic assumptions and involve projects dissimilar to the Project. Opp. at 14.

Offermann’s analysis of the potential formaldehyde emissions from composite wood products used to construct the Project was based primarily on two studies he participated in preparing, one in 2004-05 and one in 2019. AR 845-53, 4200. The City’s environmental consultant reviewed Offermann’s analysis and concluded that his assumptions were not credible in the context of this Project:

“In addition, Mr. Offermann substantially overstates health impacts as his analysis is based on a series of inaccurate assumptions, including that: (1) the Project’s construction materials would not be compliant with the applicable regulations to reduce formaldehyde exposure; (2) formaldehyde daily emissions from construction materials would be constant for over 70 years for residents; (3) residents would live in their units for 70 years; 4) residential occupants and employees would inhale 20 cubic meters of air per day; and 5) employees would work at the Project site for 8 hours/day, 5 days/week, 50 weeks/year for 45 years.”

“In fact: (1) construction materials would comply with all applicable regulations; (2) the amount of formaldehyde off gassing from construction materials decreases over time; (3) per the United States Environmental Protection Agency (U.S.EPA), lifetime risk values for residents should be based on an exposure duration of 350 days per year for 30 years, not 70, and residents would not live in their units for more than a few years; (4) according to the American Lung Association, the average person inhales approximately 2,000 gallons of air per day, or roughly 7.57 cubic meters per day; and (5) based on the U.S. Bureau of Labor Statistics, the median number of years workers remain in a job is 4.1 years, not 45.13. Therefore, Mr. Offermann’s analysis is not credible.” AR 4201-02. Opp. at 17-18.

According to CARB, the Composite Wood Products (“CWP”) Regulation’s emission standards are set at low levels to protect public health. AR 4199. The CWP Regulation, adopted in 2007, established two phases of emissions standards: an initial Phase 1, and later, a more stringent Phase 2 that requires all finished goods, such as flooring and other building materials, for sale or use in California to be made using complying composite wood products. AR 4199. As of January 2014, only Phase 2 products have been legal for sale in California. Thus, all wood products installed in the Project would comply with the more stringent Phase 2 requirements and impacts with respect to formaldehyde would be less than significant. AR 4199-4200. [16]

Because Offermann’s expert analysis is based upon unrealistic and improbable assumptions,

it may be disregarded. *See Nassiri, supra*, 103 Cal.App.5th at 930. Furthermore, the City's environmental consultant noted there are no requirements or guidance from SCAQMD or relevant agencies to evaluate such risk. The Project does not represent a unique or special development for which impacts from building materials need to be addressed under CEQA. Therefore, no special analysis or mitigation is required. The Project will comply with the existing codes and regulations in California, which adequately address potential emissions and risks from formaldehyde in building materials to ensure safe practices and healthy indoor air. These include Title 24 Energy Standards, the CALGreen Code, and CARB's CWP Regulations. Opp. at 18.

SAFER replies that Offermann based his findings on information in the Initial Study, relevant scientific studies, and his extensive knowledge of formaldehyde-emitting building products to determine that the Project may have a significant cancer risk due to indoor formaldehyde emissions. AR774-76, 844-48. His evidence is not based on speculation but rather facts and reasonable inferences based on facts. Even if the Project's composite wood products will comply with CARB's regulations, Offermann calculated that future residents would be exposed to an increased cancer risk of 120 in one million due to inhalation of formaldehyde off-gassing from composite wood products. AR 846. This impact exceeds SCAQMD's CEQA significance threshold of 10 in one million, demonstrating that there is at least a fair argument of a significant impact. *Id.* Reply at 14-15.

SAFER ignores the criticisms that Offermann's assumptions are inaccurate and unwarranted because: the amount of formaldehyde off gassing from construction materials decreases over time; lifetime risk values for residents should be based on an exposure duration of 350 days per year for 30 years, not 70 years; residents would not live in their units for more than a few years; the average person inhales approximately 2,000 gallons of air per day, or roughly 7.57 cubic meters per day; and the median number of years workers remain in a job is 4.1 years, not 45. These unwarranted assumptions make Offermann's opinion less than substantial evidence.

In sum, SAFER has not presented substantial evidence supporting a fair argument that the Project may have a significant adverse impact on air quality due to indoor emissions of formaldehyde.

b. DPM Emissions

The MND provides the following factual support for its determination that there will be no significant impact from DPM exposure during construction:

(1). Construction of the Project would generate DPM emissions from the use of off-road diesel equipment required. The amount to which persons are exposed (a function of concentration and duration of exposure) is the primary factor used to determine health risk (*i.e.*, exposure to toxic air contaminant ("TAC") emission levels that exceed applicable standards). Health-related risks associated with DPM emissions are primarily linked to long-term exposure and the associated risk of contracting cancer;

(2). The use of diesel-powered construction equipment would be temporary and episodic. The duration of exposure would be short and exhaust from construction equipment would dissipate rapidly. Current models and methodologies for conducting health risk assessments ("HRAs") are associated with longer-term exposure periods of nine, 30, and 70 years, which do not correlate well with the temporary and highly variable nature of construction activities; and

(3) OEHHA has not identified any short-term health effects from DPM. The Project construction is temporary and would be transient throughout the Project site (*i.e.*, move from location to location) and would not generate emissions in a fixed location for extended periods of time. Construction activities would be subject to and comply with California regulations limiting

the idling of heavy-duty construction equipment to no more than five minutes to further reduce nearby sensitive persons' exposure to temporary and variable DPM emissions. For these reasons, DPM generated by construction activities would not expose sensitive persons to substantial amounts of air toxins, and the Project would result in a less than significant impact. AR 1846-47.

SAFER argues that the MND's conclusion that the Project's DPM emissions will not pose any significant health impacts to nearby persons is not supported by substantial evidence. The MND admitted that “[c]onstruction of the proposed Project would generate diesel particulate matter (DPM) emissions from the use of off-road diesel equipment required.” AR 651. However, the MND downplayed the cancer risks posed by DPM. AR 658. The Project will be under construction for 25 months. AR 639. The closest sensitive receptors are multi-family residences only 18 feet south of the Project site, with other sensitive land uses surrounding the Project site. AR 651. Despite acknowledging DPM emissions and nearby sensitive uses, the MND's only requires off-site trucks to comply with state regulations which limit diesel powered equipment idling to no more than five minutes at a location and minimize DPM emissions through inspections and maintenance. AR 658. Pet. Op. Br. at 18.

Furthermore, the MND did not identify the duration of short-term exposures to DPM but instead made the unsubstantiated claim that DPM can “dissipate rapidly.” AR 658. These subjective terms do not provide any means for the City or the public to gauge the health impacts of Project-related DPM emissions. The MND gives the reader no indication whether the exposure to DPM is great or small for the adjacent sensitive receptors. Nor is there an explanation how an idling limit on heavy-duty construction equipment would control DPM emissions from other equipment that will be used to construct the Project, or from the additional exhaust emissions of the approximately 1,442 vehicle trips anticipated for the Project. *See* AR 4048. Pet. Op. Br. at 18-19.

The City's responses say that it conducted no HRA because SCAQMD has not adopted guidance requiring an HRA for short-term projects and therefore no additional analysis is necessary. AR 4198. This is misleading. As Rosenfeld explained in SWAPE's December 14, 2023 comments: “[A] quantitative HRA should be prepared for the Project because, pursuant to agency guidance, the Project's anticipated construction and operation duration exceeds the 2-month and 6-month requirements provided under agency guidance. These recommendations reflect the most recent state health risk policies, and as such, an EIR should be prepared to include an analysis of health risk impacts posed to nearby sensitive receptors from Project-generated DPM emissions.” AR 4027; *see* AR 4049. The absence of an HRA cannot substantiate the MND's conclusion regarding the Project's DPM health risks. *See Berkeley Keep Jets Over the Bay Comm. v. Bd. of Port Comm'rs*, (2001) 91 Cal.App.4th 1344, 1370-71 (lack of a single precise methodology did not excuse the preparation of HRA). Pet. Op. Br. at 19.

SAFER concludes that the City bears the burden to investigate the Project's potential health impacts from its DPM emissions. *See Gentry v. City of Murrieta, supra*, 36 Cal.App.4th at 1378-79. The City's conclusory statements that the Project's DPM emissions throughout 25 months of construction would not have any impact on neighboring residences are not substantial evidence. *See McCann v. City of San Diego*, (2021) 70 Cal.App.5th 51, 97 (city's factual conclusion unsupported by substantial evidence was abuse of discretion). Had the City chosen to prepare an HRA for the Project's DPM emissions, it could have avoided using vague, undefined terms to convey its assertions that the Project's DPM emissions would result in less than ten cancers per million. Thus, the City's conclusion that the Project's DPM health impacts will not be significant is not supported by substantial evidence. Pet. Op. Br. at 19; Reply at 13.

Respondents argue that the facts cited by the MND are substantial evidence that the Project will not cause a significant health impact from exposure to DPM during construction. Respondents further argue that SAFER has not presented substantial evidence to support a fair argument to the contrary. There is no statutory requirement to prepare a HRA for short-term construction activities. *See*

Nassiri, supra, 103 Cal.App.5th at 928. SCAQMD has not promulgated any regulations requiring the preparation of HRAs for construction-related activities, and there is no basis to claim the City's analysis of potential DPM construction impacts is legally inadequate. Additionally, the Air Quality Technical Report prepared for the Project analyzed the potential localized construction air quality impacts using localized significance thresholds ("LSTs") and methodology established by SCAQMD, including potential exposure to particulate matter PM-10 and PM-2.5, and it determined any impacts would be less than significant. AR 900-01, 1843-45. Respondents conclude that the analysis contained in the Air Quality Technical Report and MND qualify as substantial evidence that the Project's construction activities would not cause significant impacts related to DPM emissions. Opp. at 19-20.

SAFER replies that Rosenfeld submitted the only substantial evidence on the significance of the health risk impact from DPM emissions. Rosenfeld reviewed the Initial Study and criticized the MND for failing to conduct a quantified construction or HRA for nearby sensitive receptors to compare the Project's cancer risk to the SCAQMD's numeric threshold of ten in one million. AR 820. His opinion was based on his expert knowledge about HRAs and their usefulness in quantifying the health risk impacts of DPM emissions. AR 818-20. Rosenfeld's opinion was based on guidance from OEHHA, which is the organization responsible for providing guidance on conducting HRAs in California. AR 819. OEHHA's guidance "describes the types of projects that warrant the preparation of an HRA," which includes the Project. AR 819-20. That guidance states that HRAs should be prepared for all short-term projects lasting at least two months and exposure from projects which, like the Project, last more than six months should be evaluated for the duration of the project. AR 819, 4049. Reply at 13-14.

Rosenfeld explained that the City's LST analysis does not support a finding of insignificance because "LST analyses are only applicable to . . . criteria air pollutants." AR 819. Criteria air pollutants are NO, CO, and PM emissions. AR 819. DPM is not a criteria air pollutant, but rather a toxic air contaminant (TAC). AR 819. The City simply failed to examine the impacts of DPM emissions because it did not conduct a HRA and did not calculate the cancer risk posed by DPM. Reply at 14.

SAFER argues that, despite Rosenfeld's assistance, the City maintained its unsubstantiated conclusion that the Project's health impacts from DPM emissions would be insignificant. The City cannot avoid analyzing short-term impacts of DPM emissions merely because SCAQMD has yet to provide guidance on how to assess them. *See Berkeley Keep Jets Over the Bay Committee v. Board of Port Com'rs, supra*, 91 Cal.App.4th at 1370. The City's dismissal of SAFER's expert evidence does not even reach the level of a disagreement among qualified experts and rather is an attempt to evade its obligations. Reply at 14-15.

The court concludes that SAFER is correct. The City's responses stated that health effects from TACs (such as DPM) for sensitive residential receptors are described in terms of cancer risk based on a long-term resident exposure duration (*i.e.*, 30 years). AR 4198. This statement is unsupported by identification of any expert, and it also contradicts Rosenfeld and his reliance on OEHHA's guidance. Without an HRA, the MND lacks substantial evidence to support its conclusion that the Project will not cause a significant health impact from exposure to DPM during construction. However, SAFER has not presented substantial evidence to support a fair argument to the contrary.

F. Conclusion

The Petition is granted in part. The MND is not supported by substantial evidence that (a) the Project will not have significant adverse impacts on biological resources because it lacks an expert

wildlife biologist's opinion, (b) MM BIO-1 will mitigate the Project's significant adverse impacts on birds to less than significant, and (c) the Project will not cause a significant health impact from exposure to DPM during construction. However, SAFER fails to present substantial evidence supporting a fair argument that an EIR is required.

A judgment and writ shall issue directing the City to set aside the certification of the MND and Project approvals and to exercise its discretion in conducting such further environmental analysis as may be required by CEQA consistent with this decision. This further analysis may consist of a new or supplemental MND or EIR as the City feels necessary.

Petitioner SAFER's counsel is ordered to prepare a proposed judgment and writ, serve them on Respondents' counsel for approval as to form, wait ten days after service for any objections, meet and confer if there are objections, and then submit the proposed judgment and writ along with a declaration stating the existence/non-existence of any unresolved objections. An OSC re: judgment is set for May 1, 2025 at 9:30 a.m.

[1] Although the Petition's caption and Prayer indicate a cause of action for declaratory relief, no CCP section 1060 cause of action is pled.

[2] The court will use Noriko's first name to distinguish her from Smallwood.

[3] As an aid to carrying out CEQA, the State Resources Agency has issued regulations called "Guidelines for the California Environmental Quality Act" ("Guidelines"), contained in Code of Regulations, Title 14, Division 6, Chapter 3, beginning at section 15000. "[C]ourts should afford great weight to the Guidelines except when a provision is clearly unauthorized or erroneous under CEQA." Laurel Heights Improvement Assn. v. Regents of Univ. of California, (1988) 47 Cal.3d 376, 391 n.2.

[4] The City and Real Party (collectively referred to herein as "Respondents") seek judicial notice of the following: (1) a webpage of the Southern California District Council of Laborers ("SCDCL") containing its mission statement and the fact that Jon P. Preciado is the Business Manager and Peter Santillan is the Secretary/Treasurer (RJN Ex. 1); (2) IRS Form 990-PF filed by SAFER for tax year 2019 reflecting that SAFER and SCDCL share the same office address, employees, and telephone number (RJN Ex. 2); (3) IRS Form 990-PF filed by SAFER for tax year 2020 (RJN Ex. 3); (4) IRS Form 990-PF filed by SAFER for tax year 2021 (RJN Ex. 4); (5) IRS Form 990-PF filed by SAFER for tax year 2022 (RJN Ex. 5); (6) IRS Form 990-PF filed by SAFER for tax year 2023 (RJN Ex. 6); (7) a face page of IRS Form 990 filed by SCDCL for tax year 2019 (RJN Ex. 7); (8) a face page of IRS Form 990 filed by SCDCL for tax year 2021 (RJN Ex. 8); (9) a face page of IRS Form 990 filed by SCDCL for tax year 2023 (RJN Ex. 9); and an Initial Registration Form for SAFER filed with the State of California on June 3, 2019 containing SAFER's Bylaws (RJN Ex. 10).

SAFER objects to RJN Ex.1 on the ground that, while the existence of a webpage can be judicially noticed, the truth of the content of the webpage cannot. This objection is overruled. The existence of a company's website may be judicially noticed. Evid. Code §452(h); Gentry v. eBay, Inc., (2002) 99 Cal.App.4th 816, 821 n.1 (taking judicial notice of the manner in which a company described its operations on its web-site). However, a court may not necessarily accept a website's contents as true. *See Ragland v. U.S. Bank Nat. Assn.*, (2012) 209 Cal.App.4th 182, 193 ("When judicial notice is taken of a document, however, the truthfulness and proper interpretation of the document are disputable."). In this case, Respondents offer SCDCL's webpage as a party admission and its contents therefore are judicially noticed. Evid. Code §1220.

SAFER objects to RJP Exs. 2-9 as tax forms that are not authenticated. The court agrees and the objections are sustained. SAFER does not object to RJP Ex. 10, which is judicially noticed. Evid. Code §452(c).

[5] Not all of these cited pages are in the Joint Appendix.

[6] Not all of these cited pages are in the Joint Appendix.

[7] Birds of Conservation Concern include migratory non-game birds that without additional conservation are likely to become candidates for listing under the Endangered Species Act. AR 770.

[8] Not all of the cited pages are in the Joint Appendix.

[9] SCDCL is an organization comprised of 14 union locals representing laborers in collective bargaining in Southern California. It is a “chartered district council of the Laborers’ International Union of North America. RJP Ex. 1.

[10] SAFER refers to RJP Ex. A, which purports to be its articles of incorporation stating that “[t]he specific purpose of this corporation shall be to contribute to the preservation and enhancement of the environment . . . including but not limited to advocating for changes to proposed projects and policies that, if adopted, would reduce air, soil and water pollution, minimize harm to wildlife, conserve wild places,” among other environmental benefits. Reply at 17. No RJP Ex. A was presented to the court for judicial notice.

[11] There is also the prospect of public interest standing. Where a plaintiff cannot satisfy the “over and above” test for private interest standing, California cases have still treated a plaintiff as beneficially interested for purposes of mandamus standing if the plaintiff satisfies the criteria of public interest standing. Asimow, et al., Administrative Law (2018), Ch. 14, §14:5. Public interest standing may be conferred “where the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty.” Save the Plastic Bag Coalition v. City of Manhattan Beach, (“Save the Plastic Bag”) (2011) 52 Cal.4th 155, 166. This type of standing “promotes the policy of guaranteeing citizens the opportunity to ensure that no governmental body impairs or defeats the purpose of legislation establishing a public right.” Green v. Obledo, (1981) 29 Cal.3d 126, 144. In determining whether public interest standing applies, the court considers (1) whether “the public duty is sharp and the public need weighty” (SJJC, supra, 12 Cal.App.5th at 1058), (2) whether the policy supporting public interest standing is outweighed by competing considerations of a more urgent nature (Reynolds v. City of Calistoga, (2014) 223 Cal.App.4th 865, 873), and (3) whether the claim of public interest standing is driven by personal objectives rather than broader public concerns (SJJC, supra, 12 Cal.App.5th at 1057).

SAFER argues that, if a plastic bag manufacturer has public interest standing to enforce CEQA, then a labor organization with members living, working, and recreating in the area, who will be directly affected by the Project, have the same right. See Rialto Citizens for Resp. Growth v. City of Rialto, (2012) 208 Cal.App.4th 899, 914. Reply at 18. SAFER provides no analysis of a sharp public duty or weighty need and has not shown public interest standing to challenge the Project.

[12] SAFER also argues that the MND failed to adequately analyze the Project’s impact on wildlife movement because it was narrowly focused on impacts to native and migratory wildlife. AR 660. CEQA requires the City to review how the Project will impact the movement of wildlife species generally. Guidelines App. G, §(IV)(d). The City did not do so for this Project and Smallwood identified several non-migratory special-status species on the Project site. AR 4115. Pet. Op. Br. at 15-16.

Respondents correctly point out that the Initial Study analyzed whether the Project would have a substantial adverse effect on any riparian habitat or other sensitive natural community identified in local or regional plans, policies, regulations, or by the California Department of Fish and Wildlife (“DFW”) or the United States Fish and Wildlife Service (“USFWS”) and concluded no such habitat or sensitive communities are present in the Project site or immediate vicinity. AR 660. Opp. at 12. This conclusion includes non-migratory wildlife movement.

[13] Smallwood argued that special-status species include rare species, defined as a species not presently threatened with extinction but is small in numbers that it may become endangered if its environment worsens or is likely to become endangered in the foreseeable future throughout a significant portion of its range and may be considered threatened. Guidelines §15380(b)(2). AR 4029-30. Smallwood contended that birds of prey necessarily are rare because their position as top predator wherever they live makes them so. Therefore, he considers all birds of prey protected by Fish and Game Code section 3503.5 to be rare. AR 4031. Pet. Op. Br. at 11.

This conclusion is unsupported by authority or analysis. The fact that birds of prey are protected from taking under Fish and Game Code section 3503.5 does not legally make them rare within the definition of Guidelines section 15380. *See Nassiri, supra*, 103 Cal.App.5th at 925.

[14] Some of these criticisms may require an expert wildlife biologist’s opinion but that does not undermine the court’s conclusion about the inadequacy of Smallwood’s special species opinion.

[15] Smallwood’s opinion also may be an example of improper extrapolation, as reflected by the expansion from the initial Klem estimate in 1990 to the ever-increasing estimates of Dunn, Loss, and Machtans. AR 795-96. Smallwood fails to adequately explain why this expansion occurred.

[16] The City’s environmental consultant noted that the 2019 research paper on which Offermann relied concludes that these CARB regulations have been effective in reducing formaldehyde concentrations in homes and that “[c]omparisons of indoor formaldehyde...levels with those from a prior study of new homes in California (conducted in 2007-08) suggest that contaminant levels are lower in recently built (after 2008) homes. California’s regulation to limit formaldehyde emissions from composite wood products appears to have substantially lowered its emission rate and concentration in new homes.” AR 4200-01. The research paper also states that “[indoor air quality] satisfaction was also similar in the newer homes as compared to homes built in years prior. These results indicate the success of standards.” AR 4201. Opp. at 18-19.



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CASE 24STCP00492

INFORMATION:

Case Title: SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY VS CITY OF SAN GABRIEL, ET AL.

Filing Courthouse: Stanley Mosk Courthouse

Filing Date: 2/15/2024

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CITY COUNCIL OF THE CITY OF SAN GABRIEL

Respondent

CITY OF SAN GABRIEL

Respondent

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Attorney for Real Party in Interest

RUBIO VILLAGE LLC

Real Party in Interest

SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY Petitioner

DOCUMENTS FILED

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12/10/2025	Judgment Second Amended	Filed by SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner)
12/10/2025	Notice of Entry of Judgment / Dismissal / Other Order	Filed by Clerk
10/27/2025	Writ - Return Return To Writ Of Mandate	Filed by RUBIO VILLAGE LLC (Real Party in Interest)
7/10/2025	Decision on motion to strike or tax costs: granted in part	Filed by Clerk
7/10/2025	Minute Order (Hearing on Motion to Tax Costs)	Filed by Clerk
7/10/2025	Order Appointing Court Approved Reporter as Official Reporter Pro Tempore Maria Curry, CSR# 14254	Filed by
7/3/2025	Notice OF REMOTE APPEARANCE	Filed by SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner)
7/3/2025	Notice OF REMOTE APPEARANCE	Filed by SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner)
7/2/2025	Declaration of John W. Fox in Support of Reply Brief Supporting Joint Motion to Strike or Tax Costs	Filed by CITY OF SAN GABRIEL (Respondent); CITY COUNCIL OF THE CITY OF SAN GABRIEL (Respondent); RUBIO VILLAGE LLC (Real Party in Interest)
7/2/2025	Reply by the City of San Gabriel, City Council of the City of San Gabriel, and Real Party in Interest Rubio Village, LLC in Support of Joint Motion to Strike or Tax Costs; Declaration of Steven T. Owens and John Fox	Filed by CITY OF SAN GABRIEL (Respondent); CITY COUNCIL OF THE CITY OF SAN GABRIEL (Respondent); RUBIO VILLAGE LLC (Real Party in Interest)
6/25/2025	Declaration OF OSHA R.MESERVE IN SUPPORT OF PETITIONERS OPPOSITION TO RESPONDENTS AND REAL PARTY IN INTERESTS JOINT MOTION TO STRIKE OR TAX COSTS	Filed by SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner)
6/25/2025	Declaration OF RICHARD DRURY IN SUPPORT OF PETITIONERS OPPOSITION TO RESPONDENTS AND REAL PARTY IN INTERESTS JOINT MOTION TO STRIKE OR TAX COSTS	Filed by SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner)
6/25/2025	Opposition PETITIONERS OPPOSITION TO RESPONDENTS AND REAL PARTY IN INTERESTS JOINT MOTION TO STRIKE OR TAX COSTS	Filed by SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner)
5/28/2025	Motion to Tax Costs	Filed by CITY OF SAN GABRIEL (Respondent); RUBIO VILLAGE LLC (Real Party in Interest)
5/6/2025	Memorandum of Costs (Summary)	Filed by SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner)

5/5/2025	Notice NOTICE OF ENTRY OF JUDGMENT	Filed by SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner)
5/1/2025	Certificate of Mailing for (Order to Show Cause Re: Judgment) of 05/01/2025, Notice of Entry of Judgment and Judgment	Filed by Clerk
5/1/2025	Judgment Amended Proposed Judgment Granting Writ of Mandate	Filed by SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner)
5/1/2025	Minute Order (Order to Show Cause Re: Judgment)	Filed by Clerk
4/17/2025	Declaration Declaration of Richard Drury re Amended Writ and Judgment	Filed by SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner)
4/17/2025	Writ of Mandate	Filed by SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner)
4/16/2025	Declaration OF CHRISTY M. GARCIA REGARDING REAL PARTY IN INTEREST RUBIO VILLAGE LLC'S OBJECTIONS TO THE PROPOSED JUDGMENT FILED BY PETITIONER ON APRIL 11, 2025	Filed by RUBIO VILLAGE LLC (Real Party in Interest)
4/11/2025	Declaration Declaration of Richard Drury in support of Writ of Mandate, Judgment Granting Writ of Mandate & Cancellation of OSC Hearing	Filed by SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner)
4/11/2025	Writ of Mandate	Filed by SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner)
3/25/2025	Decision on petition for writ of mandate: granted in part	Filed by Clerk
3/25/2025	Minute Order (Hearing on Petition for Writ of Mandate)	Filed by Clerk
3/25/2025	Order Appointing Court Approved Reporter as Official Reporter Pro Tempore	Filed by RUBIO VILLAGE LLC (Real Party in Interest)
3/21/2025	Minute Order (Court Order Re: Advancing Hearing on Petition for Writ of Mandate)	Filed by Clerk
2/18/2025	Certificate of Mailing for (Court Order Re Continuance of Hearing on Petition for Writ of Mandate) of 02/18/2025	Filed by Clerk
2/18/2025	Minute Order (Court Order Re Continuance of Hearing on Petition for Writ of Mandate)	Filed by Clerk
2/13/2025	Notice of Lodging OF TRIAL NOTEBOOK AND JOINT APPENDIX	Filed by SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner)
1/30/2025	Objection PETITIONERS OBJECTION TO RESPONDENTS REQUEST FOR JUDICIAL NOTICE	Filed by SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner)

1/30/2025	Reply PETITIONERS REPLY BRIEF	Filed by SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner)
1/10/2025	Request for Judicial Notice	Filed by RUBIO VILLAGE LLC (Real Party in Interest)
1/8/2025	Opposition Respondents City of San Gabriel, City Council of the City of San Gabriel and Real Party in Interest Rubio Village LLC's Joint Opposition Brief	Filed by CITY OF SAN GABRIEL (Respondent); CITY COUNCIL OF THE CITY OF SAN GABRIEL (Respondent); RUBIO VILLAGE LLC (Real Party in Interest)
1/8/2025	Request for Judicial Notice	Filed by CITY OF SAN GABRIEL (Respondent); CITY COUNCIL OF THE CITY OF SAN GABRIEL (Respondent); RUBIO VILLAGE LLC (Real Party in Interest)
1/7/2025	Stipulation and Order Stipulation to Extend Pagination Limitation of Parties' Briefs;	Filed by RUBIO VILLAGE LLC (Real Party in Interest)
11/22/2024	Brief PETITIONERS OPENING BRIEF	Filed by SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner)
11/5/2024	Stipulation and Order TO CONTINUE TRIAL	Filed by CITY OF SAN GABRIEL (Respondent); CITY COUNCIL OF THE CITY OF SAN GABRIEL (Respondent)
9/12/2024	Stipulation and Order Re: Stay	Filed by SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner)
8/26/2024	Answer	Filed by RUBIO VILLAGE LLC (Real Party in Interest)
8/22/2024	Notice Respondents' Statement of Issues Arising Under the California Environmental Act to be Raised in Briefs or at Hearing	Filed by CITY OF SAN GABRIEL (Respondent); CITY COUNCIL OF THE CITY OF SAN GABRIEL (Respondent)
8/16/2024	Answer	Filed by CITY OF SAN GABRIEL (Respondent); CITY COUNCIL OF THE CITY OF SAN GABRIEL (Respondent)
8/12/2024	Notice PETITIONERS? STATEMENT OF ISSUES ARISING UNDER THE CALIFORNIA ENVIRONMENTAL QUALITY ACT TO BE RAISED IN BRIEFS OR AT HEARING	Filed by SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner)
7/18/2024	Minute Order (Trial Setting Conference)	Filed by Clerk
7/18/2024	Notice Notice of Certification of Administrative Record	Filed by CITY OF SAN GABRIEL (Respondent); CITY COUNCIL OF THE CITY OF SAN GABRIEL (Respondent)
7/17/2024	Notice Notice of Remote Appearance	Filed by CITY OF SAN GABRIEL (Respondent)
7/16/2024	Notice of Remote Appearance	Filed by SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY

		(Petitioner)
7/16/2024	Notice of Remote Appearance	Filed by SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner)
6/12/2024	Stipulation - No Order to Extend Deadline to Certify and Lodge Administrative Record	Filed by SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner)
4/8/2024	Stipulation - No Order for Electronic Service of Documents	Filed by RUBIO VILLAGE LLC (Real Party in Interest)
4/8/2024	Stipulation - No Order to Extend Deadline to Certify and Lodge Administrative Record	Filed by RUBIO VILLAGE LLC (Real Party in Interest)
4/5/2024	Notice of Receipt of Notice of no Responsible Agencies	Filed by SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner)
3/20/2024	Notice of Trial Setting Conference	Filed by SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner)
3/19/2024	Minute Order (Trial Setting Conference)	Filed by Clerk
3/5/2024	Notice of Remote Appearance	Filed by SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner)
3/5/2024	Notice of Remote Appearance	Filed by SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner)
3/4/2024	Notice of Entry of Minute Order	Filed by SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner)
3/4/2024	Notice of Trial Setting Conference	Filed by SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner)
2/28/2024	Proof of Personal Service	Filed by SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner)
2/28/2024	Proof of Personal Service	Filed by SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner)
2/28/2024	Proof of Personal Service	Filed by SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner)
2/26/2024	Notice of Trial Setting Conference and Attached Orders Thereon	Filed by Clerk
2/23/2024	Certificate of Mailing for (Court Order Re Assignment of CEQA Case) of 02/23/2024	Filed by Clerk
2/23/2024	Minute Order (Court Order Re Assignment of CEQA Case)	Filed by Clerk

2/22/2024	Request for Hearing	Filed by SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner)
2/16/2024	Summons on Petition	Filed by SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner)
2/15/2024	Civil Case Cover Sheet	Filed by SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner)
2/15/2024	PETITIONERS NOTICE OF INTENT TO PREPARE ADMINISTRATIVE RECORD	Filed by SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner)
2/15/2024	VERIFIED PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF	Filed by SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner)

PROCEEDINGS HELD

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7/10/2025 09:30 AM	Department	Hearing on Motion to Tax Costs 85	Held - Motion Granted
5/1/2025 09:30 AM	Department	Order to Show Cause Re: 85	Held
3/27/2025 09:30 AM	Department	Hearing on Petition for Writ of Mandate 85	Not Held - Advanced and Continued - by Court
3/25/2025 09:30 AM	Department	Hearing on Petition for Writ of Mandate 85	Held
3/21/2025 10:30 AM	Department	Court Order 85	
2/25/2025 09:30 AM	Department	Hearing on Petition for Writ of Mandate 85	Not Held - Continued - Court's Motion
2/18/2025 1:30 PM	Department	Court Order 85	
12/10/2024 09:30 AM	Department	Hearing on Petition for Writ of Mandate 85	Not Held - Continued - Stipulation
7/18/2024 09:30 AM	Department	Trial Setting Conference 85	Held
3/19/2024 09:30 AM	Department	Trial Setting Conference 85	Held - Continued
2/23/2024 3:37 PM	Department	Court Order 1	

REGISTER OF ACTIONS

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12/10/2025 Notice of Entry of Judgment / Dismissal / Other Order; Filed by: Clerk

12/10/2025 Judgment; Signed and Filed by: SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner)

12/10/2025 Updated -- Judgment: Filed By: SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner); Result: Granted ; Result Date: 12/10/2025

12/10/2025 Updated -- Judgment Second Amended: Name Extension: Second Amended

10/27/2025 Writ - Return Return To Writ Of Mandate (); RUBIO VILLAGE LLC (Real Party in Interest); As to: SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner); Costs Credits: 0.00; Interest Credits: 0.00; Principal Credits: 0.00; Possession: No

7/10/2025 Updated -- Motion to Tax Costs: Filed By: CITY OF SAN GABRIEL (Respondent),RUBIO VILLAGE LLC (Real Party in Interest); Result: Granted in Part ; Result Date: 07/10/2025

7/10/2025 Order Appointing Court Approved Reporter as Official Reporter Pro Tempore Maria Curry, CSR# 14254; Filed by: As to: CITY OF SAN GABRIEL (Respondent); CITY COUNCIL OF THE CITY OF SAN GABRIEL (Respondent)

7/10/2025 Decision on motion to strike or tax costs: granted in part; Filed by: Clerk

7/10/2025 Minute Order (Hearing on Motion to Tax Costs)

7/10/2025 Hearing on Motion to Tax Costs scheduled for 07/10/2025 at 09:30 AM in Stanley Mosk Courthouse at Department 85 updated: Result Date to 07/10/2025; Result Type to Held - Motion Granted

7/7/2025 Address for Stephen T. Owens (Attorney) updated

7/7/2025 Address for John Fox (Attorney) updated

7/7/2025 Address for Richard Drury (Attorney) updated

7/3/2025 Notice OF REMOTE APPEARANCE; Filed by: SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner)

7/3/2025 Notice OF REMOTE APPEARANCE; Filed by: SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner)

7/2/2025 Reply by the City of San Gabriel, City Council of the City of San Gabriel, and Real Party in Interest Rubio Village, LLC in Support of Joint Motion to Strike or Tax Costs; Declaration of Steven T. Owens and John Fox; Filed by: CITY OF SAN GABRIEL (Respondent); CITY COUNCIL OF THE CITY OF SAN GABRIEL (Respondent); RUBIO VILLAGE LLC (Real Party in Interest)

7/2/2025 Declaration of John W. Fox in Support of Reply Brief Supporting Joint Motion to Strike or Tax Costs; Filed by: CITY OF SAN GABRIEL (Respondent); CITY COUNCIL OF THE CITY OF SAN GABRIEL (Respondent); RUBIO VILLAGE LLC (Real Party in Interest)

6/25/2025 Opposition PETITIONERS OPPOSITION TO RESPONDENTS AND REAL PARTY IN INTERESTS JOINT MOTION TO STRIKE OR TAX COSTS; Filed by: SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner)

6/25/2025 Declaration OF RICHARD DRURY IN SUPPORT OF PETITIONERS OPPOSITION TO RESPONDENTS AND REAL PARTY IN INTERESTS JOINT MOTION TO STRIKE OR TAX COSTS; Filed by: SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner)

6/25/2025 Declaration OF OSHA R.MESERVE IN SUPPORT OF PETITIONERS OPPOSITION TO RESPONDENTS AND REAL PARTY IN INTERESTS JOINT MOTION TO STRIKE OR TAX COSTS; Filed by: SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner)

5/28/2025 Motion to Tax Costs; Filed by: CITY OF SAN GABRIEL (Respondent); RUBIO VILLAGE LLC (Real Party in Interest)

5/28/2025 Hearing on Motion to Tax Costs scheduled for 07/10/2025 at 09:30 AM in Stanley Mosk Courthouse at Department 85

5/6/2025 Memorandum of Costs (Summary); Filed by: SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner); Total Costs: 22844.78

5/5/2025 Notice NOTICE OF ENTRY OF JUDGMENT; Filed by: SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner); As to: CITY OF SAN GABRIEL (Respondent); CITY COUNCIL OF THE CITY OF SAN GABRIEL (Respondent)

5/1/2025 Judgment Amended Proposed Judgment Granting Writ of Mandate; Signed and Filed by: SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner)

5/1/2025 Court orders judgment entered for Petitioner SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY, a California nonprofit corporation against Respondent CITY OF SAN GABRIEL, a municipality and Respondent CITY COUNCIL OF THE CITY OF SAN GABRIEL, a municipal body on the Petition filed by SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY on 02/15/2024 for a total of \$0.00.

5/1/2025 Minute Order (Order to Show Cause Re: Judgment)

5/1/2025 Certificate of Mailing for (Order to Show Cause Re: Judgment) of 05/01/2025, Notice of Entry of Judgment and Judgment; Filed by: Clerk

5/1/2025 Order to Show Cause Re: Judgment scheduled for 05/01/2025 at 09:30 AM in Stanley Mosk Courthouse at Department 85 updated: Result Date to 05/01/2025; Result Type to Held

4/17/2025 Writ of Mandate; Filed by: SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner)

4/17/2025 Declaration Declaration of Richard Drury re Amended Writ and Judgment; Filed by: SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner)

4/16/2025 Declaration OF CHRISTY M. GARCIA REGARDING REAL PARTY IN INTEREST RUBIO VILLAGE LLCS OBJECTIONS TO THE PROPOSED JUDGMENT FILED BY PETITIONER ON APRIL 11, 2025; Filed by: RUBIO VILLAGE LLC (Real Party in Interest)

4/11/2025 Writ of Mandate; Filed by: SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner)

4/11/2025 Declaration Declaration of Richard Drury in support of Writ of Mandate, Judgment Granting Writ of Mandate & Cancellation of OSC Hearing; Filed by: SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner)

3/25/2025 Order to Show Cause Re: Judgment scheduled for 05/01/2025 at 09:30 AM in Stanley Mosk Courthouse at Department 85

3/25/2025 Decision on petition for writ of mandate: granted in part; Filed by: Clerk

3/25/2025 Order Appointing Court Approved Reporter as Official Reporter Pro Tempore; Filed by: RUBIO VILLAGE LLC (Real Party in Interest)

3/25/2025 Minute Order (Hearing on Petition for Writ of Mandate)

3/25/2025 Hearing on Petition for Writ of Mandate scheduled for 03/25/2025 at 09:30 AM in Stanley Mosk Courthouse at Department 85 updated: Result Date to 03/25/2025; Result Type to

Held

3/21/2025 Minute Order (Court Order Re: Advancing Hearing on Petition for Writ of Mandate); Filed by: SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner)

3/21/2025 On the Court's own motion, Hearing on Petition for Writ of Mandate scheduled for 03/27/2025 at 09:30 AM in Stanley Mosk Courthouse at Department 85 Not Held - Advanced and Continued - by Court was rescheduled to 03/25/2025 09:30 AM

2/18/2025 Minute Order (Court Order Re Continuance of Hearing on Petition for Writ of Mandate); Filed by: Clerk

2/18/2025 Certificate of Mailing for (Court Order Re Continuance of Hearing on Petition for Writ of Mandate); Filed by: Clerk

2/18/2025 On the Court's own motion, Hearing on Petition for Writ of Mandate scheduled for 02/25/2025 at 09:30 AM in Stanley Mosk Courthouse at Department 85 Not Held - Continued - Court's Motion was rescheduled to 03/27/2025 09:30 AM

2/13/2025 Notice of Lodging OF TRIAL NOTEBOOK AND JOINT APPENDIX; Filed by: SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner)

1/30/2025 Objection PETITIONERS OBJECTION TO RESPONDENTS REQUEST FOR JUDICIAL NOTICE; Filed by: SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner)

1/30/2025 Reply PETITIONERS REPLY BRIEF; Filed by: SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner)

1/10/2025 Request for Judicial Notice; Filed by: RUBIO VILLAGE LLC (Real Party in Interest)

1/8/2025 Opposition Respondents City of San Gabriel, City Council of the City of San Gabriel and Real Party in Interest Rubio Village LLC's Joint Opposition Brief; Filed by: CITY OF SAN GABRIEL (Respondent); CITY COUNCIL OF THE CITY OF SAN GABRIEL (Respondent); RUBIO VILLAGE LLC (Real Party in Interest)

1/8/2025 Request for Judicial Notice; Filed by: CITY OF SAN GABRIEL (Respondent); CITY COUNCIL OF THE CITY OF SAN GABRIEL (Respondent); RUBIO VILLAGE LLC (Real Party in Interest)

1/7/2025 Stipulation and Order Stipulation to Extend Pagination Limitation of Parties' Briefs; (Proposed) Order; Signed and Filed by: RUBIO VILLAGE LLC (Real Party in Interest)

1/7/2025 Updated -- Stipulation and Order Stipulation to Extend Pagination Limitation of Parties' Briefs; (Proposed) Order; Filed By: RUBIO VILLAGE LLC (Real Party in Interest); Result: Granted ; Result Date: 01/07/2025

1/7/2025 Updated -- Stipulation and Order Stipulation to Extend Pagination Limitation of Parties' Briefs;; Name Extension changed from Stipulation to Extend Pagination Limitation of Parties' Briefs; (Proposed) Order to Stipulation to Extend Pagination Limitation of Parties' Briefs;

11/22/2024 Brief PETITIONERS OPENING BRIEF; Filed by: SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner)

11/5/2024 Stipulation and Order STIPULATION TO CONTINUE TRIAL; Signed and Filed by: CITY OF SAN GABRIEL (Respondent); CITY COUNCIL OF THE CITY OF SAN GABRIEL (Respondent); As to: SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner)

11/5/2024 Updated -- Stipulation and Order STIPULATION TO CONTINUE TRIAL; Filed By: CITY OF SAN GABRIEL (Respondent),CITY COUNCIL OF THE CITY OF SAN GABRIEL (Respondent); Result: Granted ; Result Date: 11/05/2024

11/5/2024 Updated -- Stipulation and Order TO CONTINUE TRIAL; Name Extension changed from STIPULATION TO CONTINUE TRIAL to TO CONTINUE TRIAL

11/5/2024 Pursuant to written stipulation, Hearing on Petition for Writ of Mandate scheduled for

12/10/2024 at 09:30 AM in Stanley Mosk Courthouse at Department 85 Not Held - Continued - Stipulation was rescheduled to 02/25/2025 09:30 AM

9/12/2024 Stipulation and Order Re: Stay; Signed and Filed by: SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner); As to: CITY OF SAN GABRIEL (Respondent); CITY COUNCIL OF THE CITY OF SAN GABRIEL (Respondent); RUBIO VILLAGE LLC (Real Party in Interest)

9/12/2024 Updated -- Stipulation and Order Re: Stay; Filed By: SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner); Result: Granted ; Result Date: 09/12/2024

8/26/2024 Answer; Filed by: RUBIO VILLAGE LLC (Real Party in Interest); As to: SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner)

8/22/2024 Notice Respondents' Statement of Issues Arising Under the California Environmental Act to be Raised in Briefs or at Hearing; Filed by: CITY OF SAN GABRIEL (Respondent); CITY COUNCIL OF THE CITY OF SAN GABRIEL (Respondent); As to: SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner)

8/16/2024 Answer; Filed by: CITY OF SAN GABRIEL (Respondent); CITY COUNCIL OF THE CITY OF SAN GABRIEL (Respondent); As to: SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner)

8/12/2024 Notice PETITIONERS? STATEMENT OF ISSUES ARISING UNDER THE CALIFORNIA ENVIRONMENTAL QUALITY ACT TO BE RAISED IN BRIEFS OR AT HEARING; Filed by: SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner)

7/18/2024 Hearing on Petition for Writ of Mandate scheduled for 12/10/2024 at 09:30 AM in Stanley Mosk Courthouse at Department 85

7/18/2024 Notice Notice of Certification of Administrative Record; Filed by: CITY OF SAN GABRIEL (Respondent); CITY COUNCIL OF THE CITY OF SAN GABRIEL (Respondent); As to: SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner)

7/18/2024 Minute Order (Trial Setting Conference)

7/18/2024 Trial Setting Conference scheduled for 07/18/2024 at 09:30 AM in Stanley Mosk Courthouse at Department 85 updated: Result Date to 07/18/2024; Result Type to Held

7/17/2024 Notice Notice of Remote Appearance; Filed by: CITY OF SAN GABRIEL (Respondent); As to: SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner)

7/16/2024 Notice of Remote Appearance; Filed by: SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner); As to: CITY OF SAN GABRIEL (Respondent); CITY COUNCIL OF THE CITY OF SAN GABRIEL (Respondent); RUBIO VILLAGE LLC (Real Party in Interest)

7/16/2024 Notice of Remote Appearance; Filed by: SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner); As to: CITY OF SAN GABRIEL (Respondent); CITY COUNCIL OF THE CITY OF SAN GABRIEL (Respondent); RUBIO VILLAGE LLC (Real Party in Interest)

6/12/2024 Stipulation - No Order to Extend Deadline to Certify and Lodge Administrative Record; Filed by: SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner); As to: CITY OF SAN GABRIEL (Respondent); CITY COUNCIL OF THE CITY OF SAN GABRIEL (Respondent); RUBIO VILLAGE LLC (Real Party in Interest)

4/8/2024 Stipulation - No Order to Extend Deadline to Certify and Lodge Administrative Record; Filed by: RUBIO VILLAGE LLC (Real Party in Interest); As to: SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner); CITY OF SAN GABRIEL (Respondent); CITY COUNCIL OF THE CITY OF SAN GABRIEL (Respondent)

4/8/2024 Stipulation - No Order for Electronic Service of Documents; Filed by: RUBIO VILLAGE LLC

(Real Party in Interest); As to: SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner); CITY OF SAN GABRIEL (Respondent); CITY COUNCIL OF THE CITY OF SAN GABRIEL (Respondent)

4/5/2024 Notice of Receipt of Notice of no Responsible Agencies; Filed by: SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner)

3/20/2024 Notice of Trial Setting Conference; Filed by: SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner); As to: CITY OF SAN GABRIEL (Respondent); CITY COUNCIL OF THE CITY OF SAN GABRIEL (Respondent)

3/19/2024 Trial Setting Conference scheduled for 07/18/2024 at 09:30 AM in Stanley Mosk Courthouse at Department 85

3/19/2024 Minute Order (Trial Setting Conference)

3/19/2024 Trial Setting Conference scheduled for 03/19/2024 at 09:30 AM in Stanley Mosk Courthouse at Department 85 Held - Continued was rescheduled to 07/18/2024 09:30 AM

3/5/2024 Notice of Remote Appearance; Filed by: SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner); As to: CITY OF SAN GABRIEL (Respondent); CITY COUNCIL OF THE CITY OF SAN GABRIEL (Respondent); RUBIO VILLAGE LLC (Real Party in Interest)

3/5/2024 Notice of Remote Appearance; Filed by: SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner); As to: CITY OF SAN GABRIEL (Respondent); CITY COUNCIL OF THE CITY OF SAN GABRIEL (Respondent); RUBIO VILLAGE LLC (Real Party in Interest)

3/4/2024 Notice of Entry of Minute Order; Filed by: SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner); As to: CITY OF SAN GABRIEL (Respondent); CITY COUNCIL OF THE CITY OF SAN GABRIEL (Respondent)

3/4/2024 Notice of Trial Setting Conference; Filed by: SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner); As to: CITY OF SAN GABRIEL (Respondent); CITY COUNCIL OF THE CITY OF SAN GABRIEL (Respondent)

2/28/2024 Proof of Personal Service; Filed by: SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner); As to: CITY COUNCIL OF THE CITY OF SAN GABRIEL (Respondent); Service Date: 02/22/2024; Service Cost: 45.00; Service Cost Waived: No

2/28/2024 Proof of Personal Service; Filed by: SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner); As to: CITY OF SAN GABRIEL (Respondent); Service Date: 02/22/2024; Service Cost: 221.10; Service Cost Waived: No

2/28/2024 Proof of Personal Service; Filed by: SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner); As to: RUBIO VILLAGE LLC (Real Party in Interest); Service Date: 02/22/2024; Service Cost: 257.40; Service Cost Waived: No

2/26/2024 Trial Setting Conference scheduled for 03/19/2024 at 09:30 AM in Stanley Mosk Courthouse at Department 85

2/26/2024 Notice of Trial Setting Conference and Attached Orders Thereon; Filed by: Clerk

2/23/2024 Certificate of Mailing for (Court Order Re Assignment of CEQA Case) of 02/23/2024; Filed by: Clerk

2/23/2024 Case reassigned to Stanley Mosk Courthouse in Department 85 - Hon. James C. Chalfant; Reason: Other

2/23/2024 Minute Order (Court Order Re Assignment of CEQA Case)

2/22/2024 Request for Hearing; Filed by: SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner)

2/16/2024 Summons on Petition; Issued and Filed by: SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner)

2/15/2024 VERIFIED PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF; Filed by: SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner); As to: CITY OF SAN GABRIEL (Respondent); CITY COUNCIL OF THE CITY OF SAN GABRIEL (Respondent); RUBIO VILLAGE LLC (Real Party in Interest)

2/15/2024 Civil Case Cover Sheet; Filed by: SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner); As to: CITY OF SAN GABRIEL (Respondent); CITY COUNCIL OF THE CITY OF SAN GABRIEL (Respondent); RUBIO VILLAGE LLC (Real Party in Interest)

2/15/2024 PETITIONERS NOTICE OF INTENT TO PREPARE ADMINISTRATIVE RECORD; Filed by: SUPPORTERS ALLIANCE FOR ENVIRONMENTAL RESPONSIBILITY (Petitioner); As to: CITY OF SAN GABRIEL (Respondent); CITY COUNCIL OF THE CITY OF SAN GABRIEL (Respondent); RUBIO VILLAGE LLC (Real Party in Interest)

2/15/2024 Case assigned in Department 1 Stanley Mosk Courthouse

2/15/2024 The case is placed in special status of: California Environmental Quality Act

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