



First District Affirms Judgment Rejecting All CEQA Challenges To Oakland A's Ballpark Development EIR Except Improper Deferral of Wind Impacts Mitigation

By [Arthur F. Coon](#) on April 11, 2023

In a 72-page published opinion filed March 30, 2023, the First District Court of Appeal (Div. 4) affirmed in full the trial court's judgment, which upheld the EIR for the Oakland Waterfront Ballpark District Project (project) with the sole exception of its wind mitigation measure. *East Oakland Stadium Alliance, et al v. City of Oakland, et al (Athletics Investment Group, et al, Real Parties in Interest)* (2023) ___ Cal.App.5th ___. In doing so, the Court's lengthy opinion touched on and analyzed numerous interesting and important CEQA topics.

The Project

The well-publicized project proposes to redevelop the 50-acre Howard Terminal site within the Port of Oakland and five contiguous acres for (1) a new 35,000-seat ballpark for the A's; (2) other extensive residential, retail, commercial and entertainment venue development; and (3) 20 acres of publicly accessible open space. The project and its site pose environmental issues involving existing soil contamination (from years of industrial use), pedestrian and vehicle traffic impacts, and impacts from relocation of the site's existing uses. The project site is currently used mostly for truck parking and container storage.

The Litigation And The Court of Appeal's Opinion

The CEQA litigation challenging the project EIR (which took 3 years to produce) consisted of three writ petitions, consolidated for hearing, making numerous challenges that were resolved by the trial court's extensive written decision and judgment, which the Court of Appeal affirmed as stated above. This post will attempt to summarize and highlight the significant and interesting parts of the Court of Appeal's lengthy opinion.

General CEQA Overview and Standard of Review

While these sections of the opinion, comprising four pages, are pretty standard in their recitation of substantive legal content familiar to most CEQA practitioners, the interesting thing about them is that they cite *only* California Supreme Court cases – six of them to be exact, five of which have been decided since 2017.

Railroad Impact Mitigation

Howard Terminal is bounded to the north by Union Pacific Railroad Company (UPRR) railroad tracks that uniquely run down the middle of an urban street (Embarcadero West) at grade, and those tracks are used by an average of 46 trains daily between 11 a.m. and 11 p.m. Only minimal protections currently exist at public street at-grade crossings to protect motor vehicles, bicycles and pedestrians who share the street with trains; the project thus presents hazards to fans who will cross the street to attend baseball games and whose access will be obstructed by the trains. The EIR proposed and City adopted numerous mitigation measures, including installation of fencing on both sides of the tracks along the length of the project site's frontage; elimination of one intersection and enhanced safety features at the others; and construction of two overcrossings, one each for bicycles and pedestrians. While these measures will improve existing conditions, the EIR still found the safety hazard impact significant and unavoidable because vehicles and pedestrians will still cross the tracks at 5 remaining intersections.

The Court rejected petitioners' challenge to a proposed multi-use path as "infeasible mitigation" because, even though the proposed path was located in the UPRR right-of-way and was rejected by UPRR, it wasn't really a mitigation measure; rather, the fencing, which UPRR accepted, was the mitigation measure and the path was merely an amenity whose loss would not reduce the effectiveness of the fencing mitigation. Accordingly, substantial evidence supported City's conclusion that the mitigation measure was feasible.

The Court also rejected petitioners' challenge to a proposed pedestrian/bicycle overcrossing tentatively located at Jefferson Street as "infeasible" on the basis that substantial evidence shows it will be ineffective. Per the Court: "Petitioner's contention misstates the applicable standard of review. The question before us is not whether substantial evidence supports a petitioner's critique of the EIR; it is whether substantial evidence supports the agency's conclusions." (Citing *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 512.) Substantial evidence supported City's determination that the measure would significantly mitigate, while not eliminating, the hazard by diverting thousands of visitors from at-grade intersections, and City adopted a statement of overriding considerations as to the remaining impact. The substantial evidence standard of review defeated petitioners' remaining overpass-related arguments as well.

Petitioners' Failure To Exhaust On Temporary Intersection Closure Argument

The Court held petitioners failed to exhaust their argument that the EIR failed to consider temporary closure of Embarcadero West intersections during ballpark events to mitigate railroad track crossing hazards. EIR comments focused on *permanent* closures, and a single "isolated and unelaborated" reference to temporary closure in one isolated sentence in one letter "was insufficient to fairly apprise the City that the [commenter] considered temporary closure to be an issue separate and apart from permanent closure."

Displacement/Relocation Impacts

Substantial evidence, in the form of a 2020 “Seaport Forecast” study of the Port’s overnight truck parking needs through 2050, supported the EIR’s assumption that displaced trucks would find sufficient alternative overnight truck parking between two other sites within the Port. Despite petitioners’ criticisms, the EIR’s approach and analysis were reasonable and supported by substantial evidence, and the lead agency has discretion to design its EIR. (Citing *Rodeo Citizens Assn. v. County of Contra Costa* (2018) 22 Cal.App.5th 214, 226.) Petitioners’ challenge to the EIR’s failure to analyze air quality impacts from displaced Howard Terminal users (primarily parking tenants) relocating to locations outside the Port was also rejected. Given its determination that no reliable methods existed for determining the number of truckers who would relocate and to what locations, the EIR correctly concluded such impacts were speculative and need not be further analyzed, and that conclusion was supported by substantial evidence. (Citing *id.* at 226-227.)

Air Quality: Emergency Generator Emissions

Petitioner’s challenge to the EIR’s air quality analysis for the project’s 17 new emergency generators (one each for the ballpark and mixed used buildings) also failed. The project site is not in a high fire risk area where regular power shut-offs requiring predictable generator use will occur. The EIR’s analysis of emissions from 50 hours of annual running time – the *maximum* permitted by California regulations for testing and maintenance – and adoption of a mitigation measure allowing only 20 hours of such use was a reasonable analysis that left a 30-hour “cushion” for emergency operation. An EIR is required to study only a project’s reasonably foreseeable consequences, and not an unlikely worst-case scenario (citing *High Sierra Rural Alliance v. County of Plumas* (2018) 29 Cal.App.5th 102, 125-126), and the EIR here passed muster by making a “reasonable estimate of likely annual use of the generators at the project site.”

Air Quality: GHG Emissions

The project’s special legislation (AB 734) set its standard of significance for GHG emissions over its 30-year life as “no net additional GHGs [beyond those]... currently emitted in connection with the A’s activities.” (Pub. Resources Code, § 21168.6.7(a)(3)(A)(ii), (b), (d)(3).) The EIR’s single mitigation measure (MM GHG-1) prohibits the City from approving any construction-related permit for the project unless the sponsor retains a qualified air quality consultant to develop a project-wide GHG reduction plan that specifies measures sufficient to meet the standard; MM GHG-1 describes the plan’s contents in detail, including how emissions are to be measured and estimated, and requires verifiable and feasible reduction measures for each project phase, monitoring requirements, and incorporation of the EIR’s air quality measures plus other on- and off-site reduction measures from a detailed 5-page list as needed to meet the standard. It further contains detailed plan implementation and monitoring instructions, including updating and annual report requirements.

Following an interesting discussion about the differences between the 2019 version of CEQA Guidelines § 15126.4 and its predecessor, the Court noted the current version expressly permits deferral of “specific details of a mitigation measure” until after project approval “when it is impractical or infeasible to include those details during the project’s environmental review.” Under those circumstances, deferral of mitigation details is authorized where the agency (1) commits to mitigation, (2) adopts specific performance standards, and (3) identifies types of potential actions that can feasibly achieve the performance standard that will be considered, analyzed, and potentially incorporated in the measure.

In a detailed discussion, the Court held MM GHG-1 passed muster under these 2019 Guidelines standards, and distinguished the cases Petitioners cited in arguing to the contrary, *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70 (“CBE”) and *POET, LLC v. State Air Resources Board* (2013) 218 Cal.App.4th 681. In particular, it rejected Petitioners’ arguments based on those cases that all mitigation measures finalized after project approval are invalid and that “no net increase” can never be an acceptable performance standard, noting that the former argument conflicted with the Guidelines and the latter misconstrued CBE’s holding, which was based on lack of a specific performance standard to meet a “generalized goal.”

Hazardous Materials Analysis And Mitigation

Contrary to petitioners’ arguments, the EIR’s hazardous substances discussion adequately recognized and addressed potential risks from project development penetrating the concrete cap that covers the site and prevents the escape of its existing soil contaminants that could pose public health risks; it did so by discussing land use covenants and risk management measures already in place on the site that adequately address cap penetration risks from construction.

The Court also rejected petitioner’s argument that the EIR’s hazardous materials description and the related Health Risk Assessment (HRA) were deficient for failing to discuss the presence of “hydrocarbon oxidation products” (HOPs). HOPs were included as a component of the EIR’s analysis of TPH, and were not shown by Petitioners to present an environmental risk sufficiently distinct from that of hydrocarbons to require separate reporting and discussion in the EIR. The Court thus also rejected the related argument that the HRA was “outdated” because based on an ecological risk assessment predating recognition of HOPs as a separate pollutant.

Recirculation of DEIR

The Court rejected Petitioners’ argument that the DEIR should have been recirculated to provide information about soil and groundwater contamination remedial measures contained in a draft Remedial Action Plan (RAP) completed after issuance of the FEIR. While the DEIR contemplated a removal action workplan (RAW) would be prepared as mitigation, and the FEIR changed the requirement and related DEIR references to refer to a RAP, a RAP and RAW serve essentially the same purposes although a RAP is more robust; essentially, a RAW is an abbreviated and less costly version of a RAP that is not subject to public comment before DTSC like a RAP. The switch from RAW to RAP in the FEIR was not significant new information added to the FEIR requiring recirculation; nor did the separate issuance of the draft RAP itself constitute such information as that document was not added to the EIR at all. Per the Court: “Petitioners provide no authority suggesting that a private party’s preparation of a draft report or plan required by a mitigation measure constitutes the addition of new information “to an environmental impact report,” as required by [Public Resources Code] section 21092.1.” And to the extent Petitioners complained that the public was entitled to review and comment on the RAP’s remedial measures, the DTSC process provided that opportunity. Further, petitioners did not suggest the draft RAP discloses or will create a new or more severe significant impact, and at most it merely clarifies or amplifies the DEIR’s discussion. Thus, substantial evidence supported the City’s decision not to recirculate.

Deferred Contaminant Mitigation

Nor was the DEIR’s deferral of formulation of the specifics of hazardous substances mitigation measures to a required, later-prepared RAP an improper deferral lacking a specific performance standard. The EIR’s first mitigation measure for handling project site contamination required preparation of a RAP, approval by DTSC, land use covenants, and “associated plans” to identify, and develop and implement

remedial measures to clean up areas with COC concentrations above the HRA's target clean up levels. The second measure required DTSC concurrence, prior to grading or construction permit issuance, that the proposed actions are consistent with the required plans. The third and final measure required preparation of Health and Safety Plans consistent with applicable regulations to protect workers and the public during remediation activities.

Per the Court: "There is little questions that these mitigation measures satisfy the requirements of [CEQA Guidelines] Section 15126.4." The HRA's target cleanup levels provided specific performance standards for the COC identified in the EIR, which are required to be met before issuance of construction permits. Further: "Although the mitigation measures do not themselves describe the type of remedial actions that are to be considered, the draft EIR's thorough discussion of past and current remediation efforts describes the most common remediation measures, and the draft EIR cites and summarizes the contents of a consultant report that contains a detailed consideration of remedial measures and alternatives for the site." The site's extensive history of remediation efforts, and DTSC's presence as a state agency with regulatory jurisdiction providing oversight under statutorily-required procedures were additional factors supporting the Court's holding.

CEQA Findings

The Court rejected petitioners' challenges to the City's CEQA finding that the impacts of Alternative 3 were adequately analyzed in the EIR. Finding that Alternative 3, requiring overpass construction, was essentially the same as the approved project, the Court agreed with respondents that petitioners' challenge was not a genuine findings challenge, but an unexhausted, and therefore barred, challenge to the adequacy of the EIR's analysis of the project's impacts. Per the Court: "Because a claim that the EIR's discussion of impacts was insufficient could have been raised during the comment period or at the public hearing, this claim is subject to the ordinary exhaustion requirement. [¶] Petitioners cannot avoid the exhaustion requirement by characterizing their claim as a challenge to the lead agency's finding that the EIR was adequate. Taken to its logical conclusion, petitioners' position would allow any challenge to the adequacy of an EIR to be raised in the absence of exhaustion, merely by framing the challenge as a critique of the agency's required finding that the EIR complied with CEQA. [citation] We will not countenance such a circumvention of CEQA's procedural requirements."

Cumulative Impacts

The Court rejected petitioners' final argument that the EIR's cumulative impacts analysis was inadequate for failure to consider impacts of the potential use of a portion of the project site by the Port to expand its turning basin for large vessels. In essence, the Port has an option until 2029 to terminate the project sponsor's rights to develop all or part of a 10-acre Maritime Reservation Area in the southwest corner of Howard Terminal for this purpose; at the time of the DEIR, the Port and Army Corps were jointly conducting a feasibility study of that possible expansion, which was scheduled to be completed by the end of 2023.

The DEIR didn't analyze that potential project, noting that it hadn't been designed or approved and that it would be analyzed as a separate project should the Port ever elect to take back a portion of the project site. While there is no single accepted definition of a "probable future project" that must be analyzed in an EIR's cumulative impacts analysis, the City's conclusion that this wasn't one was supported by substantial evidence, since it is "implausible" to deem the expansion "probable" when it hasn't even been determined "feasible." Nor were the possible expansion's details sufficiently specific for meaningful analysis. In sum, when the DEIR was prepared, the Port's potential turning basin expansion was "merely contemplated or a

gleam in a planner's eye" and thus outside the scope of the EIR's cumulative impacts analysis. (Citing *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 398.)

Respondents' Cross-Appeal/Wind Impacts Mitigation Deferral

The Court also affirmed the portion of the trial court's judgment finding the EIR's wind impact mitigation to be improperly deferred for lack of a specific performance standard. Buildings that stand alone or are much taller than surrounding buildings can capture, redirect, and increase wind speeds to an extent that may be incompatible with uses of ground-level pedestrian spaces. Project site winds average 27 mph, and the EIR's threshold of significance was creation of winds exceeding 36 mph for more than one hour during daylight hours, which speed would make walking very problematic. A wind tunnel study suggested the project could cause winds exceeding the threshold for a minimum of 100-150 hours annually and concluded wind impacts would be significant and unavoidable. Its sole mitigation measure was requiring a wind tunnel analysis for each building over 100 feet prior to building permit issuance to determine if the project would "create a net increase in hazardous wind hours or locations... compared to then-existing conditions" and, if so, to require the sponsor to "work with" a wind consultant to "identify feasible mitigation strategies, including design changes... to eliminate or reduce wind hazards to the maximum feasible extent *without unduly restricting development potential.*" (Emph. added.) While mitigation measures need not include "precise quantitative performance standards" (citing *Sierra Club, supra*, 6 Cal.5th at 523), CEQA Guidelines § 15126.4 requires a "specific" standard, which "implies a reasonably clear and objective measure of compliance," lest interested parties be unable to know its proper interpretation and application. Here, the measure's "performance standard" employed vague, subjective and undefined terms, and failed to fully identify the types of potential actions that could feasibly achieve it. Nor did the Court find support for Respondents' contention that the requirement for a specific performance standard when mitigation is deferred was obviated by the City's adoption of a statement of overriding considerations.

Conclusion and Implications

The Court's decision is pretty much a CEQA home run for the A's Howard Terminal Project, even though some more thoughtful wind impacts analysis is still required. The opinion also provides useful guidance for CEQA practitioners in numerous areas, including explaining and clarifying the standards for deferred mitigation; reinforcing application of the substantial evidence standard of review to an EIR's analysis; confirming that stray, isolated and unelaborated comments and references are insufficient to exhaust; reaffirming that reasonable, not worst-case, EIR impacts analyses are sufficient; reaffirming that recirculation is the exception, not the rule; reaffirming that speculation is not required regarding possible future projects in cumulative impacts analysis; and holding that plaintiffs cannot circumvent the exhaustion requirement by recharacterizing their substantive EIR challenges as attacks on the lead agency's CEQA findings. All in all, a very good day at the ballpark for the City of Oakland and its A's.



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