



**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO**

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'E STATEMENT OF DECISION GRANTING IN PART AND DENYING

ORGANIZED TO WIN EMPLOYMENT RIGHTS et al VS. SAN FRANCISCO PLANNING DEP

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO

PEOPLE ORGANIZED TO WIN
EMPLOYMENT RIGHTS, GREENACTION
FOR HEALTH, and ENVIRONMENTAL
JUSTICE, non-profit corporations,

Petitioners,

vs.

SAN FRANCISCO PLANNING
DEPARTMENT, SAN FRANCISCO
REDEVELOPMENT AGENCY, SAN
FRANCISCO BOARD OF SUPERVISORS,
MICHAEL J. ANTONINI, in his official
capacity as Planning Commissioner, San
Francisco Planning Department, and DOES I
through V, inclusive,

Respondents,

and

CP DEVELOPMENT COMPANY, LP,

Real Party in Interest.

Case No.: CPF-10-510670

**TENTATIVE STATEMENT OF
DECISION GRANTING IN PART AND
DENYING IN PART PETITION FOR
WRIT OF MANDATE**

Hon. Ernest H. Goldsmith
Department 613

1 On March 25, 2011, this Petition for Writ of Mandate came on regularly for hearing in
2 Department 613 of the Superior Court of the City and County of San Francisco, the Honorable
3 Ernest H. Goldsmith presiding. Further hearing was held on April 18, 2011. Audrey W. Pearson
4 of the San Francisco Attorney's Office appeared on behalf of Respondents City and County of
5 San Francisco, San Francisco Redevelopment Agency, and Michael J. Antonini in his official
6 capacity as Planning Commissioner. Robert I McMurry of Gilchrist & Rutter, and Gordon E.
7 Hart of Paul, Hastings, Janofsky, & Walker, LLP appeared on behalf of Real Party in Interest,
8 CP Development Co.,LP a Delaware limited partnership. Petitioners, People Organized to Win
9 Employment Rights, and GreenAction For Heath and Environmental Justice, were represented
10 by Trent W. Orr and George M. Torgun.
11

12
13 Having considered all of the pleadings, supporting evidence, the administrative record,
14 argument by counsel, and good cause appearing therefore, the Court hereby issues this Tentative
15 Statement of Decision and GRANTS In Part and Denys In Part the Petition for Writ of Mandate.
16

17 INTRODUCTION

18 This action concerns the environmental impact report (EIR) for the Candlestick Point –
19 Hunters Point Shipyard Phase II Redevelopment Project (CP-HPS II Redevelopment). This is a
20 large scale redevelopment project that spreads across 702 acres within the Bayview-Hunters
21 Point District. Development is projected to span approximately 20 years. It encompasses
22 Candlestick Point, which includes the Candlestick Park stadium, Alice Griffith Public Housing,
23 and the Candlestick Point State Recreation Area.

24 Also included in this Redevelopment Project is the Hunters Point Shipyard Phase II area.
25 The Shipyard served as a working naval shipyard from 1941 to 1974, providing construction and
26 maintenance support for U.S. Navy ships and submarines. It was also home to the Navy's
27 radiological defense laboratory. The U.S. Navy leased the base to third-parties between 1974

1 1988. The Shipyard was closed in 1989, and was later authorized by the federal government for
2 eventual transfer to the City of San Francisco. The Shipyard site has been designated as a federal
3 superfund site by the Environmental Protection Agency for the cleanup of toxic substances.¹

4 The Redevelopment Project as proposed is a culmination of multiple redevelopment
5 plans which have been proposed over the years. The present CP-HPS II Redevelopment Plan is
6 an outgrowth of Proposition G passed by San Francisco voters in 2008. Proposition G set forth a
7 series of objectives to revitalize the Bayview Hunters Point District, which has been
8 characterized as one of the City's most blighted areas.

9 This Redevelopment Project includes plans to build a new stadium for the San Francisco
10 49ers at the Hunters Point Shipyard if the team decides to remain in San Francisco rather than
11 relocate to the South Bay. This decision has not yet been made. The Project also encompasses
12 alternative land use options for the proposed stadium should the 49ers decide to leave. These
13 include residential housing, buildings dedicated to research and development, and commercial
14 use space.

15 Development of the Candlestick Point area contemplates demolishing the existing
16 Candlestick Park stadium, renovating the Alice Griffith Public Housing facility, building
17 residential towers, and enhancing the Candlestick Park State Recreation area.

18 Real Party in interest, CP Development Co. LP (CP), is the proposed developer.
19 Together, CP and the City of San Francisco developed the plan which is the subject of this
20 lawsuit. The planning process included preparation of an EIR pursuant to the California
21 Environmental Quality Act (CEQA). After circulation for public comment and public hearings
22

23 ¹ The Navy's cleanup program is guided by section 211 of the Superfund Amendment and Reauthorization Act
24 (SARA). This Act requires the Secretary of Defense to carry out a program of environmental restoration at facilities
25 under the jurisdiction of the Secretary. (10 U.S.C. § 2701(a)(1).) This statute requires the Navy's cleanup program
26 to be conducted in accordance with the Comprehensive Environmental Response Compensation and Liability Act
27 (CERCLA). This body of regulations includes specific requirements applicable to federal facilities placed on the
28 National Priorities List which is commonly referred to as the federal "Superfund List". These regulations also
require the Navy to enter into an interagency agreement with the U.S. EPA for the cleanup of the site. The Shipyard
was placed on the Superfund list in 1989. In 1992 the Navy entered into an agreement with the U.S. EPA and the
State of California to clean up the Shipyard. Under this agreement, the Navy is required to clean up the Shipyard to
a level that is protective of human health and development prior to the transfer of the property.

1 the EIR was certified by the San Francisco Planning Commission. This certification was
2 appealed to the Board of Supervisors and the certification was upheld. Subsequently, Petitioners
3 brought this action challenging the certification. Petitioners allege the EIR fails to comply with
4 the requirements of CEQA and seek a Writ of Mandate ordering the City to vacate approvals for
5 the CP-HPS Phase II Redevelopment Plan until the City prepares an EIR that complies with
6 CEQA.

7 Respondents (City and CP Development Co. LP) oppose this action contending that the
8 Project complies with CEQA and that Petitioners mischaracterize and misunderstand the EIR as
9 approved by the City.

10 DISCUSSION

11 **A. Standard of Review**

12 In legal challenges brought under CEQA, judicial review is governed by Public Resource
13 Code §§ 21168 and 21168.5. In determining whether an EIR complies with CEQA, a reviewing
14 court must determine whether there was a prejudicial abuse of discretion committed by the
15 public agency. (CEQA § 21168.5.)² A prejudicial abuse of discretion is established if the agency
16 has not proceeded in a manner required by law or if the determination or decision is not
17 supported by substantial evidence. (*id.*) Thus, the court’s inquiry has two separate grounds to
18 determine whether an agency has committed a prejudicial abuse of discretion. (*Vineyard Area*
19 *Citizens For Responsible Growth v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435.)
20
21

22 The court reviews an agency’s factual determinations to determine whether they are
23 supported by substantial evidence. (*Western States Petroleum Assn v. Superior Court* (1995) 9
24 Cal.4th 559, 571.) Substantial evidence means “enough relevant information and reasonable
25
26

27 ² All citations to “CEQA” refer to the California Environmental Quality Act under Public Resource Code §§ 21000
et seq.

1 inferences from this information that a fair argument can be made to support a conclusion, even
2 though other conclusions might also be reached” but does not include, for example, mere
3 “[a]rgument, speculation, unsubstantiated opinion or narrative[.]” (Guidelines, § 15384(a).)³
4 Under the substantial evidence standard, a reviewing court should not second guess the
5 correctness of an agency’s conclusions within an EIR or exercise its independent judgment on
6 the evidence. The task of the court is to determine whether the agency’s acts or conclusions are
7 supported by substantial evidence in light of the whole record. (CEQA § 21168.)

9 During this inquiry, the court gives substantial deference to the agency’s determinations
10 by not reweighing the evidence, but rather resolving all reasonable doubts in the agency’s favor.
11 (*Laurel Heights Improvement Ass’n. v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 393.) In
12 applying this test, the environmental document must be presumed adequate and the challengers
13 bear the burden of proving that the agency’s factual determinations are legally inadequate. In
14 addition, challengers “must [also] lay out evidence favorable to the other side and show why it is
15 lacking. Failure to do so is fatal. A reviewing court will not independently review the record to
16 make up for [challenger’s] failure to carry his burden.” (*Defend the Bay v. City of Irvine* (2004)
17 119 Cal.App.4th 1261, 1266.)

20 By contrast, the court reviews an agency’s compliance with CEQA’s legal requirements
21 to determine whether the agency failed to proceed in a manner required by law. (*Vineyard Area*
22 *Citizens, supra*, 40 Cal.4th at p. 435.) This is a less deferential standard. With respect to an EIR,
23 an agency must strictly comply with CEQA’s informational requirements in order to proceed in a
24 manner required by law. (*id.*) In reviewing claims that an agency failed to proceed in a manner

27 ³All citations to “Guidelines” refers to the CEQA Guidelines under Title 14, California Code of Regulations §§
15000 et seq.

1 by law, the court must “determine de novo whether the agency has employed the correct
2 procedures, ‘scrupulously enforce[ing] all legislatively mandated CEQA requirements.’” (*id.*)
3 However, an agency’s certification of an EIR is presumed correct under this test as well and
4 challengers bear the burden of proving otherwise. (*Sierra Club v. County of Orange* (2008) 163
5 Cal.App.4th 523, 530 [citations omitted].) Moreover, even if portions of the record contain
6 procedural failings, the court must look to the whole record to determine whether the agency
7 substantially complied with CEQA’s legal requirements. (See, e.g. *Ebbets Pass Forest Watch v.*
8 *California Dept. of Forestry and Fire Protection* (2008) 43 Cal.4th 936, 945-50 [agency’s overall
9 analysis of cumulative impacts was proper despite procedural failure.])

10
11 In sum, The EIR is “the primary means” of achieving CEQA’s substantive environmental
12 protection goals by ensuring informed decision-making and informed public participation.
13 (*Laurel Heights, supra*, 47 Cal.3d at p. 376, 392.) Thus, the main task of the court is to determine
14 whether the EIR is sufficient as an informational document. (*Dry Creek Citizens Coalition v.*
15 *County of Tulare* (1999) 70 Cal.App.4th 20, 26.)

16
17 **B. Project Description**

18
19 Petitioners claim three deficiencies in the EIR’s project description misled the public and
20 thwarted an informed public review process under CEQA. They are: (1) that the project
21 description is misleading because the use of “project variants” make it inaccurate and unstable,
22 (2) the EIR project description is inaccurate because it does not consider the impacts from
23 hazardous contamination at the Hunters Point Shipyard site or its remediation as part of the
24 Project, and (3) the project description fails to contain an adequate statement of the objectives
25 that includes the underlying purpose of the project.
26

27 **1. Legal Requirements:**

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1 CEQA defines “project” only by the synonymous term “activity.” (CEQA § 21065; cf.
2 *Friends of mammoth v. Board of Supervisors* (1972) 8 Cal.3d 8 Cal.3d 247, 260-262.) In most
3 cases the scope and character of proposed project activities will be clear. However, when the
4 scope and character of a proposed project are not clear, as Petitioners assert in this case, they
5 must be discerned in the light of CEQA’s policy.

6
7 Accordingly, the California Legislature declared in 1970 that the maintenance of a
8 quality environment for the people of the state now and in the future is a matter of statewide
9 concern. (CEQA § 21000(a).) To address this concern, CEQA mandates that “[a]ll agencies of
10 the state government which regulate activities...found to affect the quality of the environment,
11 shall regulate such activities so that major consideration is given to preventing environmental
12 damage, while providing a decent home and satisfying living environment for every
13 Californian.” (CEQA § 21000(g).) The guiding criterion in public decisions is to ensure that the
14 long-term protection of the environment creates and maintains conditions under which man and
15 nature can exist in productive harmony to fulfill the social and economic requirements of present
16 and future generations. (CEQA § 21001(d) - (e).) Thus, the fundamental purpose of CEQA is to
17 achieve a balance between environmental protection and development so as to create a decent
18 home and living environment for every Californian.

19
20 The Legislature chose to achieve this balance through a public environmental review
21 process designed to assist agencies in identifying and disclosing both environmental effects and
22 feasible alternatives to proposed projects. (CEQA § 21002.) CEQA achieves this purpose by
23 functioning as “an environmental full disclosure statute, and the EIR is the method...[of]
24 disclosure...” (*Rural Landowners Assn. v. City Council*, (1983) 143 Cal.App.3d 1013, 1020.)

25
26 Thus, California courts have repeatedly referred to the EIR as the heart of the environmental
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1 control process. With this in mind, the EIR should function as “an environmental ‘alarm bell’
2 whose purpose is to alert the public and its responsible officials to environmental changes before
3 they have reached the ecological points of no return.” (*County of Inyo v. Yorty* (1973) 32
4 Cal.App.3d 795, 810.)

5 Thus, the EIR is an informational document with the express purpose of providing the
6 public and government decision-makers with detailed information regarding the project’s likely
7 effects on the environment; to describe ways of minimizing significant effects; and to point out
8 alternatives to the project. (CEQA §§ 21002.1, 21061, 21100; *Friends of Mammoth v. Board of*
9 *Supervisors* (1972) 8 Cal.3d 247, 263.) The EIR process facilitates CEQA’s policy by seeking
10 out citizen input and by providing analysis to decision-makers so they can make intelligent
11 judgments. (Guidelines, § 15151; see also *People v. County of Kern* (1974) 39 Cal.App.3d 830,
12 841.) By depicting the project’s unavoidable effects, mitigation measures and alternatives, the
13 EIR furnishes decision-makers with information that enables them to balance the project’s
14 benefits against its environmental costs. (See § 21100; *Environmental Defense Fund, Inc. v.*
15 *Coastside County Water Dist.* (1972) 27 Cal.App.3d 695, 705.)

16 However, an EIR need not be perfect. It must represent an adequate, complete, and good
17 faith effort at full disclosure of environmental impacts. (Guidelines, § 15151; see also *Berkeley*
18 *Keep Jets Over the Bay Committee v. Board of Port Commissioners of the City of Oakland*,
19 (2001) 91 Cal.App.4th 1344 [using scientifically outdated information, the EIR was not a
20 reasoned and good faith effort to inform decision makers and the public about impacts of an
21 airport expansion.]
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26 In evaluating an EIR’s project description, the Guidelines specify that every EIR must set
27 forth a project description that is sufficient to allow an adequate evaluation and review of the
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1 environmental impact. (Guidelines, § 15124.) The term “project” refers to the underlying
2 activity to be approved, not to the governmental approvals required for the project. (Guidelines,
3 § 15378(c).) The project description should describe the physical development that will result if
4 the project is approved. The description should be sufficiently detailed to provide a foundation
5 for a complete analysis of environmental impacts. The leading project description case is *County*
6 *of Inyo v. Los Angeles* (1977) 71 Cal.App.3d 185. In that case, the court set forth the rule and
7 rationale for requiring an accurate and stable project description. The court held:
8

9 “A curtailed or distorted project description may stultify the objectives of the reporting process. Only
10 through an accurate view of the project may affected outsiders and public decision-makers balance the
11 proposal’s benefit against its environmental cost, consider mitigation measures, assess the advantage of
12 terminating the proposal (i.e. the “no project” alternative) and weigh other alternatives in the balance. An
13 accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient
14 EIR. (*County of Inyo v. Los Angeles, supra* 71 Cal.App.3d at pp.192-93.)

15 Thus, an EIR’s project description is required to be accurate and stable to ensure that the
16 public and decision-makers can make informed decisions about the proposed project’s
17 environmental costs and weigh its alternatives.

18 2. Petitioners’ Claims

19 Petitioners argue that the EIR fails to provide a stable, comprehensible, project
20 description. Their claims regarding the adequacy of the CP-HPS II Redevelopment Plan’s
21 project description are discussed as follows:

22 (a) Project Variants

23 In this case, Petitioners assert that the inclusion of “Project Variants” render the EIR
24 internally inconsistent regarding the nature and scope of the project. Consequently, the EIR fails
25 to provide a stable and accurate project description which results in a misleading description of
26 the CP-HPS II Redevelopment within the EIR. To support this claim, Petitioners point out that
27

1 the project is described differently within the EIR. Specifically, the Chapter II “Project
2 Characteristics” subsection describes the project differently than the Comments and Responses
3 “Project Approvals” subsection. These descriptions differ because the EIR states that the project
4 up for approval is the Project identified in Chapter II of the Final EIR, *as modified by specific*
5 *project variants*. In full, the Chapter II “Projects Characteristics” subsection states:

6
7 “This section describes the Project’s development characteristics. In summary, the Project proposes
8 development of 10,500 residential units with an associated population of 24,465 residents; 885,00 gsf of
9 retail; 150,000 gsf of artist studio space and an arts center, 100,000 gsf of community and improved State
10 parkland; a 69,000-seat 49ers stadium; and a 10,000-seat performance arena. The permanent employee
11 population associated with the Project would be 10,730.” (AR 3656.)

12 By comparison, the Comments and Responses “Project Approvals” subsection states:

13 “The Project that is being proposed for approval by the San Francisco Planning Commission and the San
14 Francisco Redevelopment Agency is the Project identified in Chapter II of the Final EIR, as modified by
15 the Candlestick Point Tower Variants (Variant 3, Tower Variant D, concerning tower locations) and the
16 49ers/Raiders Shared Stadium Variant (Variant 5, concerning use of the stadium by both the Raiders and
17 the 49ers).”

18 “In addition, the Project proposed for approval would allow an alternative land use development at the
19 stadium site in the event the 49ers do not avail themselves of the stadium site at HPS Phase II. In this
20 event, in lieu of the stadium and related uses proposed for the Project at the stadium site (including Variant
21 5), two alternative uses would be allowed at the stadium site; either Variant 1, which provides for R&D use
22 at the stadium site, or Variant 2A, which provides for a mix of housing and R&D at the stadium site.
23 In sum, the Project as described in Chapter II of the Final EIR, together with Project Variants 1, 2A,
24 3(Tower Variant D), and 5 as described in Chapter IV of the Final EIR, constitute the Project that is being
25 proposed for approval.” (AR 7806-07.)

26 Based on this comparison, Petitioners contend that the inclusion of “Project Variants” in
27 the EIR has no basis in CEQA’s environmental review process and results in a highly confusing
28 and misleading project description. The variants are discussed in a separate chapter than the
29 project description and alternatives chapters. Furthermore, the variants are very different from
30 stadium, which is characterized as a major component of the Project. Therefore, the project
31 description is completely uncertain because the size and nature of the Project seems to be
32 contingent on whether the 49ers decide to stay in San Francisco.

1 Addressing these objections, Respondents explain that the EIR’s analysis of “project
2 variants” promotes CEQA’s informational goals in that the inclusion and analysis of the variants
3 provide a more complete and comprehensive set of options for decision-makers based on public
4 comment. Respondents contend that the EIR fully complies with CEQA because it analyzes the
5 impacts of a stable and accurate project description and considers feasible alternatives and
6 mitigation measures for significant effects caused by the Project.
7

8 Respondents point out that Chapter II of the EIR contains a detailed description of the
9 Project covering all components of the proposed development project, assuming the proposed
10 new stadium at the Hunters Point Shipyard site. In addition, Respondents assert that this section
11 complies with Guidelines, § 15124, which specifies what an EIR project description shall
12 contain. Chapter II maps out and describes the Project’s Site and Physical Location, states the
13 Project Objectives, and provides a general description of specific development characteristics,
14 the park and open space plan, the transportation and infrastructure improvements, the green
15 building components, the development schedule, the construction requirements, the approval
16 requirements, and intended uses of the EIR.
17
18

19 Respondents also highlight the fact that the EIR analyzes the significant impacts and
20 mitigation measures of the Project with the stadium component in Chapter III of the EIR, titled
21 “Environmental Setting, Impacts and Mitigation Measures.” Furthermore, Chapter VI analyzes
22 feasible alternatives to the Project with the stadium component. Thus, the Project with the
23 stadium component has been described, its impacts have been analyzed, and mitigation measures
24 and feasible alternatives have been considered. Therefore, the EIR complies with CEQA in this
25 regard.
26
27

1 In addition, Respondents also point out that the EIR contains a separate chapter dedicated
2 to the discussion of “Project Variants” in Chapter IV. This section explains that the variants are
3 included to provide decision-makers with additional options for development. The variants take
4 into account that the proposed stadium may not occur because the 49ers have yet to make a final
5 decision as to whether or not they will remain in San Francisco. Addressing this contingency,
6 the variants chapter considers alternative land use options for the stadium site described in
7 Chapter II. In doing so, the variants chapter provides a detailed description for each of the
8 alternative land use options. This chapter also analyzes the potential impacts for each of these
9 options and considers mitigation measures for their impacts. In addition, the variants had been
10 refined by response to public comment to include specific variants by the time the Final EIR was
11 published.
12

14 Respondents contend that such refinements are commonly made during the
15 administrative process and are entirely consistent with CEQA’s environmental review process.
16 CEQA requires that, in the course of its review, the lead agency should evaluate modifications
17 and mitigations that would avoid or reduce the impacts identified in the Initial Study that have
18 the potential to be significantly adverse. (See, e.g., CEQA §§ 21002, 21002.1(a), 21003.1;
19 Guidelines, § 15002(a).) Respondents also point out that the courts have affirmed this notion of
20 flexibility in the planning process in other project description cases. In *County of Inyo v. Los*
21 *Angeles*, the court declared, “[t]he CEQA reporting process is not designed to freeze the ultimate
22 proposal in the precise mold of the initial project; indeed, new and unforeseen insights may
23 emerge during investigation, evoking revision of the original proposal. (*County of Inyo v. Los*
24 *Angeles, supra* 71 Cal.App. at p.199.) Furthermore, in *County of Orange v. Superior Court*
25 (2003) 113, Cal.App.4th 1, 10, the court stated,

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1 “[T]he CEQA process itself...contemplates revisions, to a greater or lesser degree in any ‘project.’ That is,
2 indeed, one of the major objectives of the CEQA process-to foster better (more environmentally sensitive)
3 projects through revisions which are precipitated by the preparation of EIR’s. CEQA is an interactive
4 process of assessment of environmental impacts and responsive project modification which must be
5 genuine. It is thus the very nature of CEQA that “projects” will be “modified” to protect the environment,
6 and it is the logic of section 21167.6 that there be a record of such modifications, not just those documents
7 relating only to the finished project.”

8 The court agrees that there must be flexibility in the planning process. Accordingly, the
9 requirement for a stable project description is not intended to limit the scope analysis in an EIR
10 to exclude reasonably foreseeable development options. Here, the variants in the EIR provided
11 flexibility to decision-makers by providing a list of alternative land use options with project-level
12 environmental analysis for each option in order to address contingencies of an urban
13 redevelopment project estimated to span twenty years. These types of projects cannot be set in
14 stone. Under CEQA, projects must be firm enough to accurately inform the public and decision-
15 makers as to what the core project will be and what its environmental costs will entail. At the
16 same time, projects must also be flexible enough to allow for intelligent planning in the face of
17 contingency.

18 The court finds that the CP-HPS II Redevelopment Plan’s project description is accurate,
19 and stable. Thus, it fulfills the requirements for a stable project description. Unlike the project
20 described in *County of Inyo v. Los Angeles*, the nature and scope of the CP-HPS II
21 Redevelopment Plan in the instant case has been described accurately and consistently from start
22 to finish. This is evident by comparing how the project is characterized and described within the
23 Notice of Preparation, the EIR, the Final Approval, and the Notice of Determination.

24 At all stages, the Redevelopment Project encompasses the same geographic location,
25 involves the same major components, and contemplates alternative land use options for the
26 stadium site in the event the 49ers decide to leave San Francisco. The only difference is that
27

1 these alternative land use options are now more defined and have undergone a project-level
2 environmental impact analysis. Therefore, the the character of the core project has remained
3 consistent through the entire CEQA process. As a result, the court finds that the CP-HPS
4 Redevelopment Plan complies with CEQA in this regard.

5
6 (b) Early Transfer Activities

7 Petitioners contend that the EIR's project description is also misleading regarding the
8 ultimate remediation of the Hunters Point Shipyard site and the entities responsible for its
9 cleanup.

10 Under CEQA, a "project" means "the whole of an action" which has potential for
11 resulting in either a direct physical change in the environment, or a reasonably foreseeable
12 indirect physical change in the environment..." (Guidelines, § 15378(a); see also § 21065.) It
13 refers to underlying activity for which approval is being sought. (Guidelines, § 15378(c).) The
14 entirety of the project must be described, and not some smaller portion of it.
15

16 According to Petitioners, the EIR does not consider the Hunters Point Shipyard
17 remediation to be a part of the Project because "[t]he Navy is conducting the environmental
18 cleanup at HPS, and will do so independent of whether this project proceeds or not," pursuant to
19 the CERCLA Process. (AR 7901.) However, Petitioners point out that the EIR also states that
20 the Navy and the Redevelopment Agency envision some of the property at the Hunters Point
21 Shipyard Site will be allowed to transfer early. This entails the transfer of Shipyard parcels from
22 the Navy to the Redevelopment Agency and Project Applicant prior to the completion of the
23 CERCLA remediation process under the terms of an "Early Transfer Cooperative Agreement."⁴
24
25
26

27 ⁴ Under CERCLA, federal agencies are allowed to transfer ownership of Superfund property. (42 U.S.C. § 9620(h).)
28 Property transferred pursuant to this section must include a covenant in the deed warranting that all remedial action
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1 Consequently, it is reasonably foreseeable that work at the Shipyard site will be performed by the
2 Respondents as part of this project. Thus, these activities should have been considered as part of
3 the project and included in the project description.

4 Respondents agree with Petitioners that Early Transfer activities are reasonably
5 foreseeable. Moreover, Respondents contend that these remediation activities are considered as
6 part of the Redevelopment Project and their potential impacts are discussed within the EIR.
7

8 The court finds that remediation activities carried out by the developer under an early
9 transfer agreement are part of the “whole of the action” approved by the agency. Thus, these
10 activities should have been included within the Redevelopment Plan’s project description in
11 Chapter II of the EIR. Remediation by the developer under an early transfer agreement is a
12 reasonably foreseeable consequence of the project’s approval. As such, these activities are part
13 of the project. The court finds that the EIR does not adequately inform the public that the
14 developer proposes to remediate the shipyard instead of the Navy under an early transfer
15 agreement. Accordingly, the project description fails to inform the public of all activities
16 included in the project and therefore does not comply with CEQA. The court finds that this is an
17 abuse of discretion. Therefore, the Court orders that the development of parcels at the shipyard
18 site may not proceed until the CERCLA remediation process is complete and approved by
19 regulating agencies as safe for human health and development. A writ of mandate shall issue
20 accordingly. The remainder of the Project is compliant with the mandates of CEQA as described
21
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25 necessary to protect human health and the environment with respect to any such substances remaining on the
26 property has been taken before the date the property is transferred. (*id.*, sub. (3)(A)(ii)(I).) Under “Early Transfer
27 Cooperative Agreement, the covenant in the deed may be postponed in instances where the US EPA and the
28 Governor of a State determine that the property is suitable for transfer for the use intended by the transferee and is
consistent with the protection of human health and the environment. (*id.*, sub. (3)(C).) This method is usually
coupled with a grant of federal funds to the transferee so they may finish the CERCLA cleanup process.
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1 herein below. The effect of this is to sever the early transfer activities pursuant to CEQA §
2 21168.9.

3 According to CEQA § 21168.9, the court may order the issuance of a peremptory
4 mandate to address specific project activities found not to comply with CEQA only if the court
5 finds: (1) the portion or specific project activity are severable, (2) severance will not prejudice
6 complete and full compliance with CEQA, and (3) the court has not found the remaining aspects
7 of the project CEQA of the project to violate CEQA. The court finds that these criteria for
8 bifurcation are met.
9

10 As a result of this severance the remaining project portions found to comply with CEQA
11 may move forward.
12

13 (c) Project Objectives

14 Petitioners also argue that the EIR's project description is deficient because it fails to
15 include a statement of objectives that includes the underlying purpose of the project. According
16 to Petitioners, the Redevelopment Plan's project objectives should include Proposition P because
17 it is likely that the respondents will become responsible for the remediation of the Hunters Point
18 Shipyard under early transfer.
19

20 Respondents contend that Petitioners argument on this point is deficient for two reasons.
21 First, they provide no legal authority that requires the agency to include Proposition P into the
22 project objectives. Second, Proposition P merely urges the Navy to adopt particular cleanup
23 standards for the Hunters Point Shipyard and has nothing to do with the Redevelopment Plan.
24 By contrast, Respondents point out that Proposition G specifically outlined particular types of
25 land uses that San Francisco voters wanted the City and the Agency to develop at the
26
27

1 Redevelopment site, and the Project in no way precludes the Navy from implementing a cleanup
2 consistent with Proposition P.

3 Under CEQA, a project description must state the objectives sought by the project. The
4 statement of objectives should include the underlying purposes of the project in order to assist
5 the lead agency to develop a reasonable range of alternatives to evaluate the EIR and aid decision
6 makers in preparing findings or a statement of overriding considerations, if necessary.

7 (Guidelines, § 15124(b).)

8
9 The court finds that the project description’s statement of objectives in the instant case
10 complies with CEQA’s project objective requirements. Here, a set of project objectives is
11 included in the EIR’s project description. Implementing voter initiative City policy into a
12 development project is a discretionary function of the City. Absent legal authority, the court has
13 no jurisdiction to mandate which policies the City adopts within development projects.
14
15 Petitioners’ claims are without merit.

16 **C. Segmentation of Remediation Activities**

17
18 Petitioners argue the EIR improperly segments the Project by failing to look at the
19 impacts of the entire project.

20
21 **1. Legal Requirements**

22 In mandating environmental review of a project, CEQA requires an EIR to consider the
23 “whole of an action...which may be subject to several discretionary approvals by government
24 agencies.” (Guidelines, § 15378(a),(c).) “All phases of project planning, implementation, and
25 operation” must be addressed, including the project “characteristics...which may encourage and
26 facilitate other activities that could significantly affect the environment, either individually or
27 cumulatively.” (Guidelines, §§ 15378(a),(c); 15063(a)(1), 15126.2(d).) The purpose of this

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1 approach is to ensure that “environmental considerations do not become submerged by chopping
2 a large project into many little ones – each with a minimal potential impact on the environment –
3 which cumulatively may have disastrous consequences.” (*Bozung v. Local Formation Comm’n*
4 (1975) 13 Cal. 3d 263, 283-84.) Thus, a public agency may not subdivide a single large project
5 into smaller individual projects in order to avoid the responsibility of considering the
6 environmental impacts of the project as a whole. (*Orinda Ass’n v. Board of Supervisors* (1986)
7 182 Cal.App.3d 1145, 1171.)

8 9 10 2. Petitioners’ Claims

11 Petitioners claim that the EIR fails to consider the impacts from hazardous contamination
12 at the Hunters Point Shipyard site or the remediation of that site as part of the CP-HPS II
13 Redevelopment Project. Petitioners contend that CEQA does not allow the City to describe the
14 Project in a manner that avoids consideration of the environmental hazards posed by the
15 acquisition and use of the property, or allow delegation of responsibility for environmental
16 concerns to another property owner, even if the owner is the federal government. Petitioners
17 argue that this is particularly true in this case because the EIR states that several of the Hunters
18 Point Shipyard parcels will likely be subject to “Early Transfer” before remediation is complete,
19 shifting the responsibility for remediation to the City and Developer. Accordingly, since any
20 remediation work is reasonably foreseeable and must be completed if the proposed
21 Redevelopment Project is to be carried out, it must be considered as part of “the whole of the
22 action” in the EIR. In conclusion, Petitioners assert that it was improper for the City to fail to
23 consider the hazardous contamination at the Shipyard or its remediation as part of the
24 Redevelopment Project.

25 The court finds that the severance of early transfer activities as provided above in this
26 decision renders Petitioners’ segmentation claim moot. The Navy’s remediation of the Hunters
27 Point Shipyard Phase II area is not a part of the Redevelopment Project. A project need only

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1 include reasonably foreseeable future activities that are consequence of the approval. Here, the
2 Navy remediation pursuant to CERCLA is not a consequence of the Redevelopment Project's
3 approval. Moreover, the Navy is not carrying out the remediation of the Shipyard so the
4 Redevelopment Project can occur. The remediation has been an ongoing process throughout
5 years and has been doing so because it is a federal superfund site. The Navy cleanup is
6 independent from the project.

7
8 **D. EIR's Consideration of Significant Impacts**

9 Petitioners argue that the EIR fails to adequately consider the impacts associated with: (1)
10 hazardous materials and remediation at the Shipyard site, (2) risks of liquefaction, and (3) air
11 quality.

12 1. Legal Requirements

13 An EIR must identify and focus on the "significant environmental effects" of the
14 proposed project. (§ 21100(b); Guidelines, §§ 15126.2(a) 15126.2(a), 15143.) A significant
15 effect on the environment is defined as a substantial or potentially substantial adverse change in
16 the environment. (§§21068, 21100(d); Guidelines, § 15382.) The term "environment" refers to
17 the physical conditions that exist within the area which will be affected by the proposed project,
18 including land, air, water, minerals, flora, fauna, noise, object of historic or aesthetic
19 significance." (§ 21069.5) The "environment" is said to include both man-made and natural
20 conditions. (Guidelines §, 15360).

23 To assess the impact of a proposed project on the environment, the lead agency examines
24 the changes to existing environmental conditions that would occur in the affected area if the
25 proposed project was implemented. (Guidelines § 15126.2(a); *San Joaquin Raptor Rescue Ctr.*
26 *v. County of Merced* (2007) 149 Cal.App.4th 645, 660.) Direct and indirect significant effects of

1 the proposed project on the environment shall be clearly identified and described, giving due
2 consideration to both the short-term and long-term effects. (Guidelines, § 15126.2(a).)

3 “An EIR should be prepared with a sufficient degree of analysis to provide decision-makers with
4 information which enables them to make a decision which intelligently takes account of
5 environmental consequences. An evaluation of the environmental effects of a proposed project
6 need not be exhaustive, but the sufficiency of an EIR is to be reviewed in the light of what is
7 reasonably feasible... The courts have looked not for perfection but for adequacy, completeness,
8 and a good faith effort at full disclosure.” (Guidelines, § 15151.)
9

10 In discussing the impact findings, An EIR must set forth the bases of its findings on the
11 project’s environmental impacts; a bare conclusion without an explanation of its factual and
12 analytical basis is not a sufficient analysis of an environmental impact. (*Laurel Heights*
13 *Improvement Ass’n v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 404.) On the other hand, a
14 discussion of an environmental impact that contains an explanation that enables the public to
15 discern the analytical route the agency traveled from supporting evidence to its finding on an
16 adverse impact is sufficient to fulfill CEQA’s informational purposes. (*Association of Irrigated*
17 *Residents v. County of Madera* (2003) 107 Cal. App.4th 1383, 1398.)
18
19

20 Factual questions are subject to the substantial evidence standard. (*San Joaquin Raptor*
21 *Rescue Ctr. v. County of Merced, supra*, 149 Cal.App.4th 645, 654.) To resolve the issues raised
22 by Petitioners regarding the EIR’s consideration of significant impacts, the court must determine
23 whether the agency’s conclusions are supported by substantial evidence. Under the substantial
24 evidence test EIR is presumed adequate and reasonable doubts are resolved in favor of the
25 agency’s administrative findings. (CEQA § 21167.3; *Laurel Heights Improvement Ass’n v.*
26 *Regent of Univ. of Cal., supra*, 47 Cal.3d 376, 393.)
27

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1 2. Petitioners' Claims

2 The court applies these principles to Petitioners' inadequacy claims as follows:

3
4 (a) Impacts from Hazardous Materials & Remediation Activities

5 Petitioners argue that the EIR's discussion of impacts associated with hazardous
6 materials and remediation activities is inadequate because it concludes without substantial
7 evidence that the impacts from known contaminates, unknown contaminates, and early transfer
8 activities are less than significant with mitigation.

9
10 Respondents contend that the EIR adequately identifies and analyzes the potential
11 significant impacts associated with hazardous materials. The Court agrees.

12 This issue as it relates to impacts of early transfer activities is rendered moot by the
13 Court's severance stated above. The Court finds the EIR expressly includes analyses of potential
14 impacts from the Navy's remediation activities that may be ongoing while the Redevelopment
15 Project is implemented and all impacts that could occur from any construction activities and
16 remaining contaminates at the site. (AR 4241-4364.) The "Construction Impacts" section
17 analyzes a list of construction activities associated with the Redevelopment Project that could
18 result in adverse effects on construction workers, the public, and the environment because of
19 existing contamination at the site currently undergoing remediation by the Navy. (AR 4293-
20 4349.)

21
22 The EIR also discusses construction activities that affect worker safety (AR 4343-44),
23 and the potential for Project-wide impacts during construction. (AR 4348-49.) The conclusions
24 in the EIR's Hazardous Materials section are supported by thousands of pages of information and
25
26
27

1 reports regarding the contamination at the Hunters Point Shipyard. (See, e.g. AR 16436 -
2 112330.)

3 The EIR also contains a comprehensive and well supported discussion of potential
4 impacts of exposure to hazardous substances on human health. This includes discussion of
5 carcinogenic and non-carcinogenic hazardous materials.

6
7 As to other evidence which supports the finding that impacts of exposure to hazardous
8 materials would be less than significant with mitigation, the EIR discusses: (i) areas under going
9 remediation are required to be secured with fencing; (ii) All of the buildings and parcels have
10 been investigated by the Navy for chemical and radiological contamination; (iii) human health
11 risk assessments have been prepared to determine which locations would present a risk and at
12 any areas judged to pose an immediate risk, the Navy has either removed contaminates or
13 restricted access to those locations; and (iv) buildings, pavement and other solid surfaces cover
14 much of the site, making soil and groundwater inaccessible. (AR 4311-4319.)

15
16 The court finds that there is substantial evidence for the agency to conclude that impacts
17 associated with known and unknown contaminates will less than significant with mitigation. The
18 removal actions taken, risk assessments performed, site controls put in place, the legal
19 enforcement procedures, and the fact that much of the ground is covered by buildings and
20 pavement at the site in its current state all contribute to support the agency's conclusion reached
21 in the EIR.
22

23
24 (b) Risks of Liquefaction
25
26
27

1 Petitioners argue that the EIR fails to adequately consider the potential impacts of
2 liquefaction⁵ on contamination remedial measures such as caps and covers over hazardous
3 materials because the majority of the Project site is covered by artificial fill and has been
4 designated as “a zone of high liquefaction risk” by the California Geological Survey. (AR 4367,
5 4374, 4379, 6447, 7879.) The preliminary study does not contemplate the construction of
6 housing at the Hunters Point Shipyard site in lieu of a 49ers stadium, and ultimately finds that
7 “[a] considerable amount of additional geotechnical exploration for all portions of the site is
8 required before design-level recommendations can be provided.” (AR 6432-33.)

9
10 The Court finds that the EIR properly analyzes the risks of liquefaction. Section III.L,
11 Geology and Soils contains an analysis of the existing soils, conditions, and potential geological
12 hazards based on the Redevelopment Project’s “Preliminary Geotechnical Report.” (AR 6428-
13 90.) Respondents point out that the EIR summarizes the information, findings, and conclusions
14 from the technical report as CEQA requires. (Guidelines, §§ 15147, 15148.) Tables III.L-4
15 through 8 to point out that the section’s impacts discussion clearly and concisely provides a
16 summary of the geological conditions, design details, the grading and fill conditions, the
17 treatments for the Redevelopment site as a whole, and the geotechnical treatments for both
18 Candlestick Point and for the Shipyard geotechnical subparcels. (AR 4387-92.) The impacts
19 analysis specifically identifies and addresses potential impacts resulting from these geologic
20 conditions. (AR 4395-4427.) Thus, the EIR discusses indepth the potential impacts of
21 liquefaction at the Redevelopment site.

22
23
24
25 ⁵, Liquefaction, “is a phenomenon in which saturated, non plastic sediments temporarily lose their strength during
26 periods of strong ground shaking, such as that which occurs during earthquakes. Seismic waves traveling through
27 soils can cause deformations that collapse the loose granular structure. This collapse of void space in turn can cause
28 an increase in pore water pressure, reducing the effective stress between grains. When the pore pressures reach a
critical level at which the effective stress of the soil drops below the overburden stress, the previously solid granular
soil loses the strength to support itself and may behave like a viscous fluid” (AR 7877.)
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1 Respondents also argue that Petitioners’ assertions about that the preliminary technical
2 report is inadequate because it is only “preliminary” is misplaced. The Court agrees. The data
3 included within this report includes years of “site specific geotechnical and hazardous material
4 investigations, some of which include subsurface borings, and review of published geologic
5 reports and maps.” (AR 4387, 6453-61.) This report is the first step in identifying, evaluating,
6 and addressing the geotechnical conditions on the Redevelopment site and provides necessary
7 information and recommendations to support Project planning and conceptual-level design. Site
8 specific, design level geotechnical studies are to be completed on a parcel-by-parcel basis during
9 development of construction plans for the Redevelopment Project infrastructure and buildings.
10 (AR 4387) Thus, the study is adequate because it supplies the information necessary to
11 conceptually identify the risks liquefaction poses to the proposed project. Moreover, as more
12 detailed structure plans are formed, more detailed site-specific studies will occur.
13
14

15 The geotechnical impacts of placing housing on the stadium site are analyzed in the
16 Variants section, under Variant 2 and Variant 2a (AR 4971-5038, 10207.) Both of these variants
17 assume housing would be built at the stadium site in lieu of the stadium and they’re accompanied
18 by environmental analysis that analyzes geotechnical impacts. (AR 10234). According to this
19 section, because liquefaction is an existing condition, that potential would not change depending
20 upon the land use ultimately developed. Rather, the engineering and code requirements could
21 change depending upon the site-specific investigations conducted parcel-by-parcel for
22 preparation of construction plans and final designs. Thus, the impacts of liquefaction on housing
23 at the stadium site are analyzed in the EIR.
24
25
26
27

1 Also, the EIR addresses the impacts from the risks of liquefaction on the caps and covers
2 put in place by the Navy's remediation programs. This was addressed in the Final EIR's
3 Comments and Response section. (7881-82.)

4 Court finds that the agency's conclusion that the impacts associated with liquefaction will
5 be less than significant is based on substantial evidence found in the EIR.

6
7 (c) Air Quality Impacts

8 Petitioners argue that the EIR should have analyzed the Redevelopment Project's air
9 quality impacts in absence of proposed the proposed mitigation measure and that the cumulative
10 impacts from construction emissions are based on mischaracterized wind data.

11 Respondents emphasize that ADMPs and DCP standards are required by law and
12 established by statute⁶ specifically to ensure that health risks will be acceptable. Consequently,
13 one cannot assume that compliance will not result in sufficient mitigation. (*Tracy First v. City of*
14 *Tracy* (2009) 177 Cal.App.4th 912, 933.) According to Respondents, there can be no conceivable
15 reason to require that the air quality analysis estimate air quality impacts by ignoring legal
16 requirements, especially those that are otherwise imposed as mitigation measures.
17

18 Respondents also contend that Petitioner's mischaracterize the EIR's analysis and
19 conclusion regarding cumulative construction impacts by parsing language and selectively
20 paraphrasing from the record. The EIR actually states, "the winds in the vicinity of the Project
21 are predominantly from the west, blowing directly east. As such, only construction activities on
22 other projects directly west of the Project are *likely to combine with the Project-related*
23

24
25
26 ⁶ Compliance with ADMPs and DCPs are required by law. DCPs are required by San Francisco Health Code
27 Articles 22B and 31. ADMPs are required by Title 17 Cal. Code. of Regs. §93105 as well as by City ordinances and
28 state regulations: Cal. Health and Safety Code, § 39650(c); Title 17 Cal. Code of Regs. § 93105; San Francisco
Health Code § 1242.

1 *construction activities.*” (AR 4134; [italics indicate text omitted by Petitioners].) The EIR then
2 states, “[a]s the Project is on the San Francisco Bay shoreline, there are no addition project (sic)
3 immediately east.” (AR 4134-35.) Respondents point out that Petitioners’ narrow focus fails to
4 include winds from the northwest, west-northwest, and southwest directions. When the wind
5 data from blown from all of these directions are accounted for, the wind blows predominately
6 from the west 68% of the time. (id.) Thus, the EIR’s cumulative impacts analysis accurately
7 analyzes the cumulative effects of development activities in relation to prevailing winds. The
8 Court agrees.

10 The Court finds that the agency’s conclusion that air quality impacts will be less than
11 significant with mitigation is supported by substantial evidence. The agency reasonably
12 concluded that the asbestos and dust control measures required by law are an adequate basis to
13 determine that impacts will be less than significant with mitigation. In addition, the
14 characterization of the wind direction in the EIR’s analysis was based on sufficient data to
15 conclude that the area would not be subject to air pollution problems harmful to the public.

17 **E. Mitigation Measures**

19 Petitioners claim that the EIR fails to adequately consider feasible mitigation measures to
20 address the Redevelopment Project’s significant environmental effects, including impacts from
21 exposure to hazardous materials, liquefaction, and air pollutants. Petitioners contend that the
22 mitigation measures for these impacts amount to nothing more than compliance with existing
23 law and unformulated performance standards. On this basis, Petitioners argue that the EIR’s
24 mitigation measures for these impacts are inadequate. To resolve this issue, the court will review
25 Petitioners’ claims under relevant mitigation requirements.
26

1 1. Legal Requirements

2 One of the fundamental purposes of CEQA is to prevent significant, avoidable damage to
3 the environment by requiring changes in projects through the use of alternatives or mitigation
4 measures. (See generally, CEQA §§ 21002.1(a), 21100(b)(3); Guidelines, § 15002(a)(3).) Thus,
5 CEQA requires an EIR to propose and describe mitigation measures to minimize the significant
6 environmental effects identified within it. (CEQA §§ 21002, 21081 (a); Guidelines §15126.4.)
7 Mitigation measures must be designed to minimize significant environmental effects. However,
8 CEQA does not require mitigation measures to entirely eliminate a project’s significant effects.
9 (CEQA § 21100(b)(3); Guidelines, § 15126.4(a)(1).) Guidelines § 15126.4 provides the general
10 requirements for mitigation measures. According to this section, formulation of mitigation
11 measures should not be deferred until some future time. However, measures may specify
12 performance standards which would mitigate the significant effect of the project and which may
13 be accomplished in more than one specified way. (Guidelines, § 15126.4(a)(1)(B).) Mitigation
14 measures must also be enforceable through permit condition, agreements, or other legally
15 binding instruments. In the case of adoption of a plan, policy, regulation, or other public project,
16 mitigation measures can be incorporated into the plan, policy, regulation, or project design.
17 (Guidelines, § 15126.4(a)(2).)

18 In regards to the level of specificity required in an EIR, lead agencies should avoid
19 vague, incomplete, or untested mitigation measures. Mitigation measures should not be remote
20 and speculative. *Federation of Hillside & Canyon Ass’ns v. City of Los Angeles* (2000) 83
21 Cal.App.4th 1252, 1260.) A court may find mitigation measures to be inadequate if they are so
22 undefined that it is impossible to gauge their effectiveness. (*San Franciscans for Reasonable*
23 *Growth v. City and County of San Francisco* (1984) 151 Cal App.3d 61, 79.) Thus, adequate
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1 mitigation measures should describe the actions that will be taken to reduce or avoid an impact.
2 (Guidelines, § 15126.4(a)(1)(B).)

3 In addition, the formulation of mitigation measures should not be *improperly* deferred to
4 the future. “Impermissible deferral of mitigation measures occurs when an EIR puts off analysis
5 or orders a report without either setting standards or demonstrating how the impact can be
6 mitigated in the manner described in the EIR.” (Guidelines, § 15126.4(a)(1)(B).); *City of Long*
7 *Beach v. Los Angeles Unified Sch. Dist.* (2009) 176 Cal.App.4th 889, 915.) However, there are
8 circumstances in which some aspects of mitigation may appropriately be deferred. In this
9 situation, deferral of the specifics of mitigation is permissible where the local entity commits
10 itself to mitigation and lists the alternatives to be considered, analyzed and possibly incorporated
11 in the mitigation plan. By contrast, an agency goes too far when it simply requires the project
12 applicant to obtain a biological report and then comply with any recommendations that may be
13 made in the report. (*San Joaquin Raptor Rescue Ctr. v. County of Merced, supra*, 149
14 Cal.App.4th 645, 670.)

15
16
17 If it is not practical to define the specifics of a mitigation measure when the EIR is
18 prepared, the agency may defer formulation of the specifics pending further study if the
19 mitigation measure describes the options that will be considered and identifies performance
20 standards. (*San Joaquin Raptor Ctr. v. County of Merced, supra*, 149 Cal.App.4th at p. 671
21 [citing *Endangered Habitats League Inc. v. County of Orange* (2005) 131 Cal.App.4th 777,793;
22 see also, *Riverwatch v. County of San Diego* (1999) 76 Cal.App.4th 1428, 1448-50].)

23
24
25 Furthermore, mitigation measures that require compliance with applicable environmental
26 laws and regulations can provide a basis for determining that the project will not have a
27 significant environmental impact. (*Tracy First v. City of Tracy* (2009) 177 Cal.App.4th 912,
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1 934.) Requirements that a project comply with applicable environmental laws or regulations
2 may also serve as adequate mitigation of environmental impacts. (*Leonff v. Monterey County*
3 *Bd. Of Supervisors* (1990) 222 Cal.App.3rd 1337, 1355; *Sundtrom v. County of Menocino*
4 (1988) 202 Cal.App.3rd 296, 308.)

5 In reviewing mitigation measures, courts have generally deferred to an agency's
6 conclusion that the mitigation measure will be effective when that conclusion is supported by
7 substantial evidence. In these situations, courts apply a rule of reason and will uphold mitigation
8 measures against attacks based on alleged inadequacy. (See *Sacramento Old City Ass'n v. City*
9 *Council* (1991) 229 Cal.App.3rd 1011, 1027; *San Franciscans for Reasonable Growth v. City &*
10 *County of San Francisco* (1989) 209 Cal.App.3d 1502, 1522.) On the other hand, a reviewing
11 court will not defer to the agency's determination that mitigation measures will work when their
12 efficacy is not apparent and there is no evidence in the record showing they will be effective in
13 remedying the environmental problem. (*Gray v. County of Madera* (2008) 167 Cal.App.4th
14 1099, 1116.)

15 2. Petitioner's Arguments

16 Petitioners contend that particular mitigation measures are inadequate. Petitioners'
17 claims are discussed as follows:

18 (a) Mitigation for Exposure to Known Contaminates

19 Petitioners argue that mitigation measure HZ-1b merely consists of redundant statements
20 that require compliance with existing law and the future development of specific plans and
21 practices to deal with such impacts. As a result, Petitioners assert that this measure is
22 inadequate.
23
24
25
26
27

1 Respondents contend that this mitigation measure is adequate because the issuance of a
2 construction permit is contingent on the Project Applicant's providing documentation that
3 proposed redevelopment activities will comply with any use and activity restricts placed on the
4 property by the Navy and regulatory agencies upon transfer. (AR 4295-96.)

5 The court finds that the EIR explains that the purpose of the Navy's use restrictions and
6 the types of restrictions that are anticipated. Accordingly, compliance with measure HZ-1b will
7 result in a less than significant impact under CEQA because the Navy has committed to
8 remediating known contaminates from the Shipyard to a level that is protective of human health.
9 The Navy cannot transfer the property unless the Navy completes remediation and meets. (AR
10 4288-90.)

11
12
13 (b) Mitigation Measures for Unknown Contaminates

14 Petitioners essentially make the same argument as they did for the mitigation measure
15 previously discussed. That is, mitigation measures HZ-2a.1 and HZ-2a.2 are inadequate because
16 they improperly defer the formulation of mitigation because they would require the development
17 a contingency plan for unknown contaminates and the preparation of site-specific health and
18 safety plans in accordance with federal and state OSHA regulations. As a result, Petitioners
19 assert that these mitigation measures are inadequate. The court disagrees.

20 The court finds that HZ-2a.1 requires the applicant to develop an "unknown contaminant
21 contingency plan" and "site specific health plan" that requires anyone undertaking construction
22 at the site to demonstrate full compliance with laws already in place that regulate the releases of
23 hazardous materials, the handling, transport and disposal of those materials and provide for
24 projection of works from exposure to these hazardous materials.
25
26
27

1 Thus, the mitigation measure adds an additional layer of regulation to the existing
2 regulatory scheme to ensure compliance and cleanup of unknown contaminants. Furthermore, if
3 unknown hazardous materials are uncovered, the unknown contaminant contingency plan
4 ensures compliance with applicable federal, state, and local laws. The court finds that
5 compliance with the statutory standards in place is an adequate mitigation safeguard.
6

7 (c) Mitigation Measures for Liquefaction

8 Petitioners argue that there is no merit to the EIR's conclusion that impacts from
9 seismically induced ground failure will be less than significant with mitigation because this
10 mitigation measure merely requires the project applicant to comply with existing law by
11 conducting a site specific, design level geotechnical investigation prior to the issuance of
12 building permits for the Project.
13

14 However, the EIR identifies that the Redevelopment site could be exposed to liquefaction
15 hazards. The EIR identifies the types of soils for which liquefaction probability is high, where
16 such soils are found at the site and identifies where risks of liquefaction are most probable. (AR
17 4404-10) Furthermore, the EIR contains tables that identify each area of the site by geotechnical
18 characteristics in conjunction with proposed developments at each site and contain the proposed
19 geotechnical solutions to address liquefaction at those sites along with the recommended type of
20 structural support systems to use. (AR 4391-92.)
21

22 In addition the EIR explains the kinds of approaches that can be used to mitigate the risks
23 associated with liquefaction by reference to the San Francisco Building Code and California
24 Geologic Service Special Publication 117A, *Guidelines for Evaluating and Mitigating Seismic*
25 *Hazards in California*. This mitigation measure requires that the building applicant must
26

27 demonstrate to the Department of Building Inspection and a third party Geotechnical Peer
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1 Review Committee how the design incorporates the requirements of the Seismic Hazards
2 Mapping Act, the San Francisco Building Code and CGS Special Publication 117A for analyzing
3 and treating liquefaction hazards in construction design. (AR 4393). The measure also identifies
4 methods available to address liquefaction hazards and requires these methods as determined
5 necessary by site-specific investigation, to be incorporated in the proposed engineering design
6 and construction methods.
7

8 The court finds that this mitigation measure requires compliance with laws and guidelines
9 specifically enacted to ensure seismic stability in buildings and to reduce potential liquefaction
10 hazards. It also requires site specific geotechnical study because it is impractical to identify the
11 appropriate methods to use until a specific building is proposed at a given location. Therefore,
12 the mitigation measure does not inappropriately defer mitigation and is proper under CEQA.
13

14 (d) Mitigation for Air Pollution & Naturally Occurring Asbestos

15 Petitioners argue that this mitigation measure is inadequate because it requires the project
16 applicant to comply with existing law by developing an asbestos dust mitigation plan and a dust
17 control plan prior to soil disturbance activities and provides no new requirements to ensure
18 compliance with these plans.
19

20 Respondents contend this mitigation measure ensures compliance with air toxics and
21 associated dust emissions requirements. This is because the mitigation measure requires
22 compliance with BAAQMD regulations requiring ADMPs and the S.F. Health Code Articles
23 22B and 31 requirements to prepare a DCP for all activities that disturb soil at the Shipyard.
24

25 The court finds that this mitigation measure is adequate. The legislative purpose of both
26 ADMPs and DCPs is to protect public health through the control and reduction of the emission
27

1 of toxic air contaminants from non vehicular sources and visible dust.⁷ The EIR explains the
2 reasons why naturally occurring asbestos can be a health concern, the actions required by the
3 regulatory process, and how these actions will protect health. (AR 4338-39) Furthermore, this
4 mitigation measure requires submittal of these plans to the Health Department before
5 redevelopment activities begin and mandates that all soil disturbance activities at the Shipyard
6 prepare a DCP, even those involving less than a half-acre. Accordingly, this mitigation measure
7 is adequate under CEQA to ensure potential air quality impacts are less that significant.
8

9 **F. Planning Commissioner's Conflict of Interest**

10 Petitioners' final claim does not involve CEQA and is an alternative basis to overturn the
11 certification of the EIR. The issue is whether the Planning Commission's decision to certify the
12 EIR should be set aside due to an unacceptable probability of actual bias demonstrated by the
13 actions of Planning Commissioner Antonini.
14

15 1. Legal Requirements

16 Whether the Planning Commissioner's actions demonstrate an unacceptable probability
17 of actual bias depends upon the type of hearing the Commissioner was involved in. As a result,
18 this issue is one of procedural fairness, which is a matter of law. (*Clark v. City of Hermosa*
19 *Beach* (1996) 48 Cal.App.4th 1152, 1169-1170.) To resolve this issue, the court must look at the
20 Commissioner's actions in relation to the type of proceedings he was involved in at the time.
21 Accordingly, the California Attorney General has stated, "the common law doctrine against
22 conflicts of interest...prohibits public official from placing themselves in a position where their
23 private personal interests may conflict with their official duties." (64 Ops. Cal. Atty. Gen. 795,
24 797 (1981).) The fundamental principle underlying the common law conflict of interest is that
25
26
27

28 ⁷ See generally, Cal. Health & Safety Code §§ 39650(c); 39666; SF Health & Safety Code § 1242.
People Organized To Win Employment Rights et al. v. San Francisco Planning Dept. et al. – CPF-10-510670 – TENTATIVE
STATEMENT OF DECISION: GRANTING IN PART & DENYING IN PART PETITION FOR WRIT OF MANDATE

1 public official should not benefit personally from the performance of their duties. (*Noble v. City*
2 *of Palo Alto* (1928) 89 Cal.App.47, 51 [“a public officer is impliedly bound to exercise the
3 power conferred on him with disinterested, zeal, diligence and primarily for the benefit of the
4 public”].) Furthermore, “[w]hen public officials are influenced in the performance of their
5 public duties by improper consideration of personal advantage they violate their oath of office
6 and vitiate the trust reposed in them, and the public is injured by being deprived of their loyal
7 and honest services.” (*Breakzone Billiards v. City of Torrence* (2000) 81 Cal.App.4th 1205, 1232
8 [citing *Terry v. Bender* (1956) 143 Cal.App.2d 198, 206].)

10 Thus, a conflict of interest is established where a public official has an interest at stake in
11 the manner being decided and benefits improperly by taking advantage of the official’s position
12 as a decision-maker. The factor most often considered destructive of administrative board
13 impartiality is bias arising from pecuniary interests from board members. However, personal
14 embroilment in the dispute will also void the administrative decision as well. (*Clark v. City of*
15 *Hermosa Beach, supra*, 48 Cal.App.4th 1152, at p. 1170.) Public policy forbids the sustaining of
16 municipal action founded upon a vote of a council member in any matter before it which directly
17 affects the official individually. A finding of self-interest sufficient to set aside municipal action
18 need not be based upon actual proof of dishonesty, but may be warranted whenever a public
19 official is placed in a situation of temptation to serve his or her own private interests at the
20 expense of those the official is required to serve. (4 McQuillin, *The Law of Municipal*
21 *Corporations* (3rd ed. rev. 1992) § 13.35, pp. 840-41.)

25 There are different standards of impartiality and procedural fairness depending upon the
26 type of hearing involved. Administrative agencies can perform functions of both quasi-
27 legislative and quasi-judicial character. Quasi-legislative acts involve the adoption of rules of
28 *People Organized To Win Employment Rights et al. v. San Francisco Planning Dept. et al.* – CPF-10-510670 – TENTATIVE
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1 general application of facts on the basis of broad public policy. (*Nasha v. City of Los Angeles*
2 (2004) 125 Cal.App.4th 470, 482.) By contrast, quasi-judicial acts are adjudicative in nature
3 because the government's action affects an individual's rights and is determined by facts
4 particular to that individual case. (*Beck Development Co. v. Southern Pacific Transportation Co.*
5 (1996) Cal.App.4th 1160, 1188.[government's decision held to be quasi-judicial because it
6 affected an individual's property rights].) Accordingly, quasi-legislative actions are not subject
7 to the procedural fairness requirements due process requires. (*Horn v. City of Ventura* (1979) 24
8 Cal.3d 605, 613.) However, the procedural fairness requirements of due process do apply to
9 quasi-judicial actions. (*Nasha LLC v. City of Los Angeles, supra*, 125 Cal.App.4th 470 at p. 482-
10 83.)
11
12
13

14 2. Petitioners' Claims

15
16 Petitioners assert that Commissioner Antonini has a conflict of interest because he
17 articulated a position in support of the project prior to the City's certification of the EIR. The
18 EIR approval hearings are quasi-judicial in nature. Consequently, the Planning Commissioner's
19 public statement in support of the project violated the procedural fairness requirements of due
20 process because he demonstrated by public comment that he was an impartial decision-maker.
21 As a result, the certification of the EIR should be overturned.

22 Respondents contend the EIR hearing was a quasi-legislative hearing to because the
23 Planning Commissions' decision to certify the EIR planning documents involved the adoption of
24 rules of general application on the basis of broad public policy. As a result, due process
25 requirements do not apply and the Planning Commissioner had a right to publicly discuss and
26 state his views on issues of public importance in a public forum. In addition, the Commissioner
27 had no financial stake or personal embroilment that improperly influenced his role as a public

1 decision-maker. Therefore, Commissioner Antonini did not have a conflict of interest that
2 should vitiate the Planning Commission's certification of the EIR.

3 The court finds that Planning Commissioner Antonini did not have a conflict of interest
4 when he voted to certify the EIR at the hearing before the Planning Commission. The hearing
5 before the Planning Commission was quasi-legislative. As a result, the procedural fairness
6 requirements of due process do not apply. The Commissioner did not have a financial interest or
7 personal embroilment that improperly influenced his decision at this hearing.

8 The authority on which Petitioners base their claim is distinguishable from the instant
9 case. Both *Nasha* and *Clark* involved quasi-judicial hearings and personal embroilment by public
10 officials. In *Nasha*, the proceedings in question were quasi-judicial because the decision of the
11 public agency affected the petitioner's right to make economic use of his property. Furthermore,
12 the planning commissioner in that case was also the president of a neighborhood residents'
13 association which opposed a development project in his neighborhood. The *Clark* case involves
14 similar facts as *Nasha*. In *Clark*, the city council's decision affected the petitioner's right to
15 make economic use of his property through the denial of demolition permits. Also, one of the
16 city council members that voted to deny the permit was a neighbor whose view would be
17 affected by the new building proposed.

18 In the instant case, there is no evidence that Commissioner Antonini had any personal
19 embroilment or financial interest in certifying the Redevelopment Project in the instant case.
20 Petitioners' individual property rights were not affected by the public agency's decision like the
21 parties' were the *Nasha* and *Clark* cases. Here, the Planning Commission did not approve any
22 permits. It certified an EIR and recommended to the Board of Supervisors the approval of land
23 use plans and zoning ordinances, which were all legislative actions.

24 For these reasons, the court finds that Petitioners conflict of interest claims are without
25 merit and their request to vacate the Planning Commission's certification of the EIR and related
26 recommendation documents is denied.

1
2 **CONCLUSION**

3 **I. WRIT GRANTED**

4 The court finds that the EIR for the CP-HPS II Redevelopment Project cannot be a basis
5 for early transfer approval for Shipyard parcel. The court orders that the development of parcels
6 at the Shipyard may not proceed until the CERCLA remediation process is complete and
7 approved by regulating agencies as safe for health and development.

8 Petitioner is ORDERED to prepare a Writ of Mandate consistent with the Court's Ruling
9 herein.

10 **II. WRIT DENIED**

11 The petition for Writ of Mandate is denied as to all other claims for the reasons set forth
12 above.

13 This Tentative Statement of Decision is the Court's Proposed Statement of Decision
14 pursuant to CRC § 3.1590(g).

15
16
17
18
19 DATED: July 8, 2011


HON. ERNEST H. GOLDSMITH
Judge of the Superior Court

1 SUPERIOR COURT OF CALIFORNIA
2 County of San Francisco

3 PEOPLE ORGANIZED TO WIN EMPLOYMENT)
4 RIGHTS, GREENACTION FOR HEALTH, and)
5 ENVIRONMENTAL JUSTICE, non-profit)
6 corporations,)

Case No. CPF-10-510670

6 Petitioners,)

CERTIFICATE OF MAILING
(CCP 1013a(4))

7 vs.)

8 SAN FRANCISCO PLANNING DEPARTMENT,)
9 SAN FRANCISCO REDEVELOPMENT)
10 AGENCY, SAN FRANCISCO BOARD OF)
11 SUPERVISORS, MICHAEL J. ANTONINI, in his)
12 official capacity as Planning Commissioner, San)
13 Francisco Planning Department, and DOES I)
14 through V, inclusive,)

12 Respondents,)

13 and)

14 CP DEVELOPMENT COMPANY, LP,)

16 Real Party in Interest.)

17 I, Nancy Regas, a Deputy Clerk of the Superior Court of the County of San Francisco,
18 certify that I am not a party to the within action.

19 On July 11, 2011, I served the attached Tentative Statement of Decision Granting in Part
20 and Denying in Part Petition for Writ of Mandate by placing a copy thereof in a sealed envelope,
addressed as follows:

21 Trent W. Orr, Esq.
22 EARTHJUSTICE
23 426 – 17th Street, 5th Floor
Oakland, CA 94612

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Los Angeles, CA 90071

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and, I then placed the sealed envelopes in the outgoing mail at 400 McAllister Street,
San Francisco, CA 94102 on the date indicated above for collection, attachment of required
prepaid postage, and mailing on that date following standard court practices.

DATED: July 11, 2011

T. MICHAEL YUEN, Clerk

By: *Nancy Regas*
Nancy Regas, Deputy Clerk