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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

FRIENDS OF HIGHLAND PARK, Plaintiff and Appellant, v. CITY OF LOS ANGELES et al., Defendants and Respondents; HPTV APARTMENTS, L.P., Real Party in Interest and Respondent.	B261866 (Los Angeles County Super. Ct. No. BS145275)

APPEAL from a judgment of the Superior Court of Los Angeles County, Thomas I. McKnew Jr., Judge. Reversed with directions.

Dean Wallraff for Plaintiff and Appellant.

Cox, Castle & Nicholson, Kenneth B. Bley; Michael N. Feuer, City Attorney, Timothy McWilliams, Assistant City Attorney, and Siegmund Shyu, Deputy City Attorney, for Defendants, Real Party in Interest and Respondents.

INTRODUCTION

Plaintiff Friends of Highland Park (Friends) appeals from a judgment denying its petition for writ of mandamus and complaint for injunctive relief. Friends sought to compel defendants City of Los Angeles, Los Angeles City Council, Los Angeles Department of City Planning, and Los Angeles City Planning Commission (collectively City) to set aside the approval of a development project by real party in interest HPTV Apartments, L.P. (HPTV) and to compel the preparation of an environmental impact report.

Friends challenges the mitigated negative declaration for the development project as based on an inadequate initial study in violation of the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.) and its implementing guidelines (Guidelines; Cal. Code Regs., tit. 14, § 15000 et seq.). The City and HPTV contend the judgment must be affirmed because Friends' lawsuit was untimely under Government Code section 66499.37, the City's approval decision was supported by substantial evidence, and there is no substantial evidence in the administrative record raising a fair argument the project may have a significant adverse impact on the environment. We conclude the initial study was inadequate and reverse with directions to issue a writ of mandamus compelling the City to set aside its mitigated negative declaration and notice of determination and to prepare an initial study that complies with the requirements of CEQA.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Development Project*

The development project "involves the construction of a joint public and private development with residential housing known as the Highland Park Transit Village Project. The project will include a 20-unit residential condominium [Site 1], a 50-unit residential building, consisting of 49 affordable dwelling units and 1 manager's unit [Site

2], and a 10-unit affordable multi-family residential building [Site 3]. . . . The units will help satisfy 'The incredible need for quality low income housing in the community.'" The project is located at the 5700 block of East Marmion Way by North Avenues 56 through 59. It replaces surface parking lots.

The project required a conditional use permit for development "[t]hat is more intensive than those uses permitted in the most restrictive adjoining zone . . . ." It also required "[a] Certificate of Compatibility for the construction of a joint public and private development consisting of 80 multi-family residential units and 221 public parking spaces and 106 resident parking spaces located within the Highland Park-Garvanza Historic Preservation Overlay Zone."[1]

B. ***Administrative Proceedings***

1. *The Initial Study and Proposed Mitigated Negative Declaration*

The initial study and checklist (Guidelines, § 15063) was prepared by the City on March 13, 2013. The City found "that although the proposed project could have a significant effect on the environment, there will not be a significant effect in this case because revisions on the project have been made by or agreed to by the project proponent. A MITIGATED NEGATIVE DECLARATION will be prepared."

The initial study listed the following as environmental factors potentially affected by the development project: aesthetics, air quality, biological and cultural resources, geology and soils, green house gas emissions, land use and planning, noise, public

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[1] In the City's notice of determination (Guidelines, Cal. Code Regs., tit. 14, § 15094), the project is described as follows: "Conditional Use, Zoning Administrator's Adjustment, Project Permit Compliance, Certificate of Compatibility, Tract Map No. VTT-72147-CN, and ENV-2013-221-MND for construction of a joint public and private development of 80 multi-family residential units, 221 public parking spaces and 106 resident parking spaces located on 3 sites in the Highland Park community, Site 1: 119 N. Avenue 56; Site 2: 5712 E. Marmion Way (123 & 125 N. Avenue 57 and 5706, 5708, & 5712 E. Marmion Way); and Site 3: 124 N. Avenue 59 (124, 128, and 132 N. Avenue 59)."

services, recreation, transportation/traffic, and utilities and service systems. In particular, the initial study found potentially significant the possibility the development project would "[g]enerate greenhouse gas emissions, either directly or indirectly, that may have a significant impact on the environment[.]" The Initial Study found the project would have no impact from hazards and hazardous materials.

The City filed a proposed mitigated negative declaration on March 15, 2013. The City believed the proposed mitigation measures "will reduce any potential significant adverse effects to a level of insignificance." The mitigation measures included measures to reduce air, light, and noise pollution during construction, provisions for replacement of trees removed during construction, and measures to reduce erosion and water runoff during construction. The mitigation measures also included fire safety plans for the development project, fees for schools, parks and recreational facilities, compliance with water conservation measures, and a recycling program.

The proposed mitigated negative declaration noted that "[t]he project will result in impacts resulting in increased green house gas emissions. However, the impact can be reduced to a less than significant level" if "[o]nly low- and non-VOC-containing paints, sealants, adhesives, and solvents shall be utilized in the construction of the project."

2. *Approval of the Mitigated Negative Declaration*

The Department of City Planning issued the mitigated negative declaration on April 10, 2013.

On May 7, 2013, the Deputy Advisory Agency approved a vesting tentative tract map for the development project.

Friends filed appeals of the Deputy Advisory Agency's decision to approve the vesting tentative tract map to the City Planning Commission on May 14 and May 15, 2013. Friends challenged the development project "as a significant negative impact to the character and 'grain' of our community," and "not compatible with our Specific Plan." Friends also challenged the "disregard" of its request for an environmental impact report, complaining that the mitigated negative declaration "does not address the true

significant negative effects, and that the development threatens adverse effect on public health and safety."

At the June 13, 2013 meeting of the City Planning Commission, the commission approved the project—including adoption of the mitigated negative declaration, issuance of conditional use permits, and approval of a certificate of compatibility with the Highland Park-Garvanza Historic Preservation Overlay Zone—subject to proposed modifications and phase II environmental analyses performed prior to grading. The City Planning Commission also sustained the Deputy Advisory Agency's approval of the vesting of a tentative tract map "to permit the merger and re-subdivision of four lots into one master lot and two airspace lots."

Friends again appealed. The Planning and Land Use Management Committee of the City Council considered the appeal at its meeting on August 13, 2013. The committee recommended that the City Council find that the development project would not have a significant effect on the environment and adopt the mitigated negative declaration; adopt the findings of the City Planning Commission; and deny Friends' appeal.

The City Council considered the matter at its meeting on August 28, 2013. It adopted the recommendation of the Planning and Land Use Management Committee. On August 29, the City filed its notice of determination that the development would not have a significant effect on the environment. Mayor Eric Garcetti approved the City Council's action on September 4, 2013.

C. *Writ Proceedings*

Friends filed a petition for writ of mandamus and complaint for injunctive relief on September 27, 2013. Friends sought to compel the City to set aside the mitigated negative declaration and notice of determination and prepare an environmental impact report (EIR).

HPTV filed a demurrer to the petition on January 15, 2014. HPTV claimed that Friends' "attack on approvals granted to HPTV Apartments by the City" was barred by

the 90-day limitations period contained in Government Code sections 65009, subdivision (c)(1)(E),[2] and 66499.37,[3] and by the 20 business-day limitations period in Public Resources Code section 21167.6.5, subdivision (a).[4]

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[2] Government Code section 65009, subdivision (c)(1), provides: "Except as provided in subdivision (d), no action or proceeding shall be maintained in any of the following cases by any person unless the action or proceeding is commenced and service is made on the legislative body within 90 days after the legislative body's decision: [¶] . . . [¶] (E) To attack, review, set aside, void, or annul any decision on the matters listed in Sections 65901 and 65903, or to determine the reasonableness, legality, or validity of any condition attached to a variance, conditional use permit, or any other permit." Section 65901 addresses hearings on conditional use permits. Section 65903 governs a board of appeals review of zoning decisions. These sections are part of the Planning and Zoning Law (Gov. Code, § 65000 et seq.).

[3] Government Code section 66499.37 provides: "Any action or proceeding to attack, review, set aside, void, or annul the decision of an advisory agency, appeal board, or legislative body concerning a subdivision, or of any of the proceedings, acts, or determinations taken, done, or made prior to the decision, or to determine the reasonableness, legality, or validity of any condition attached thereto, including, but not limited to, the approval of a tentative map or final map, shall not be maintained by any person unless the action or proceeding is commenced and service of summons effected within 90 days after the date of the decision. Thereafter all persons are barred from any action or proceeding or any defense of invalidity or unreasonableness of the decision or of the proceedings, acts, or determinations. The proceeding shall take precedence over all matters of the calendar of the court except criminal, probate, eminent domain, forcible entry, and unlawful detainer proceedings." Section 66499.37 is part of the Subdivision Map Act (Gov. Code, § 66410 et seq.).

[4] Public Resources Code section 21167.6.5, subdivision (a), provides: "The petitioner or plaintiff shall name, as a real party in interest, the person or persons identified by the public agency in its notice filed pursuant to subdivision (a) or (b) of Section 21108 or Section 21152 or, if no notice is filed, the person or persons in subdivision (b) or (c) of Section 21065, as reflected in the agency's record of proceedings for the project that is the subject of an action or proceeding brought pursuant to Section 21167, 21168, or 21168.5, and shall serve the petition or complaint on that real party in interest, by personal service, mail, facsimile, or any other method permitted by law, not later than 20 business days following service of the petition or complaint on the public agency."

Public Resources Code sections 21167, 21168, and 21168.5 govern proceedings brought under CEQA.

The trial court sustained HPTV's demurrer with leave to amend. It rejected HPTV's argument based on the 20 business-day limitations period in Public Resources Code section 21167.6.5. As to the 90-day limitations period in the Government Code which is part of the Subdivision Map Act (SMA), however, the court noted that "the petition is clearly littered with requests to set aside the Tract Map." Under the SMA, a party challenging the approval of a tract map is required to serve the real party in interest within 90 days of approval of the tract map. Further, "[t]his 90-day requirement applies to all types of actions . . . under SMA, regardless of the legal basis. [Citations.]" However, the court was "uncertain whether [Friends could] bring a CEQA cause of action in this case that does not invoke relief under the SMA." For that reason, the court granted leave to amend.

Friends filed the operative first amended petition for writ of mandamus and complaint for injunctive relief on March 24, 2014. Although the original petition referred to the approval of the tract map, the first amended petition deleted those references. However, Friends' notice of commencement of CEQA action (Pub. Resources Code, § 21167.5) referenced the approval of the tract map in its description of the project.

HPTV again demurred on statutes of limitation grounds. (Gov. Code, §§ 65009, subd. (c)(1)(E), 66499.37; Pub. Resources Code, § 21167.6.5, subd. (a).) The trial court overruled the demurrer. It found that because Friends did not bring any claims under the SMA, and Friends' CEQA claims did not overlap any claim based on the SMA, Government Code section 66499.37 did not apply. Additionally, the trial court held Government Code section 65009, subdivision (c), did not state any limitations period for service of a summons on a real party in interest. The court also found compliance with Public Resources Code section 21167.5, subdivision (a).

HPTV then filed its answer to the first amended petition and complaint.

On December 11, 2014, following a hearing, the trial court entered judgment denying the petition and complaint. The trial court explained that "[a] public agency must prepare an EIR whenever SUBSTANTIAL EVIDENCE supports a 'fair argument' that a proposed project 'may have a significant effect on the environment.[' (Pub.

Resources Code, §§ 21100, 21151; Guidelines, § 15002, subd. (f)(1) & (2); *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75.)]" The court found that Friends submitted no substantial evidence supporting a fair argument that the project would cause significant greenhouse gas emissions.

The trial court rejected Friends' claim that the City admitted greenhouse gas emissions would be significant without mitigation. In the Initial Study, the City checked a box indicating that the possibility the development project would "[g]enerate greenhouse gas emissions, either directly or indirectly, that may have a significant impact on the environment" was "[p]otentially significant unless mitigation incorporated." This was not an admission "that the impact WILL be significant without mitigation." In any event, the City incorporated mitigation measures into the mitigated negative declaration, and the evidence in the record supported the finding that these measures would be adequate.

The trial court further found that Friends' "concerns about hazardous waste in the soil are not grounded on any substantiated facts." While Friends claimed "that adjacent rail lines and shops on Figueroa Street may have leaked and contaminated the Project sites," the evidence in support of this claim was "an undated report of the 'legacy of railroads,' which does not relate to this particular rail line and whether it ever contained hazardous chemicals that may have leaked." Additionally, the court noted that "the absence of investigation [of ground water or soil contamination of a bygone auto shop] does not mean the presence of toxic materials." Further, photographs showing automobile repair shops on Figueroa Street in the 1920's did not qualify as substantial evidence, given that the development project site was separated from Figueroa Street by "a wall of buildings." Friends "failed to produce evidence in the record to show that any hazardous chemicals ever migrated from the trains or the shops on Figueroa Street to the Project sites."

Friends timely appealed on February 6, 2015.

DISCUSSION

A. *Failure To Serve HPTV Within 90 Days*

Preliminarily, we address HPTV and the City's assertion that the judgment must be affirmed due to Friends' failure to validly serve HPTV within 90 days of the approval of the vesting tentative tract map, as required by the SMA (Gov. Code, § 66499.37).[5] They argue the "law is clear that a claim that actions taken by a city in granting a land use approval or a subdivision map . . . violate CEQA does no more than provide a ground for setting aside the approval; there is no cause of action for a violation of CEQA in the absence of a project approval." Therefore, they argue a CEQA claim necessarily includes a SMA challenge, and the 90-day service period applies.

In support of their position, HPTV and the City rely on *Friends of Riverside's Hills v. City of Riverside* (2008) 168 Cal.App.4th 743 (*Riverside*). In *Riverside*, the plaintiff challenged the city's approval of three tract maps without requiring the applicant to comply with the local specific plan. The trial court dismissed the plaintiff's writ petition for failure to comply with Government Code section 66499.37, which applies to "[a]ny action or proceeding to attack, review, set aside, void, or annul the decision of an advisory agency, appeal board, or legislative body concerning a subdivision . . . ." On appeal, the plaintiff challenged "only the dismissal of [its] CEQA cause of action regarding the mitigation measures. At issue [on appeal was] (1) whether the section 66499.37 service of summons requirement applies to a petition for writ of mandate alleging a CEQA cause of action, where the petitioner challenges the decision of a public body 'concerning a subdivision' under the SMA; and (2) if so, whether [the plaintiff's]

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[5] On appeal a responding party may, without having appealed from the judgment, request review of issues which would lead to affirmance of the judgment. (Code Civ. Proc., § 906; *Keep Our Mountains Quiet v. County of Santa Clara* (2015) 236 Cal.App.4th 714, 728.)

CEQA cause of action 'concern[s] a subdivision' under the SMA." (*Riverside, supra,* at p. 746, fn. omitted.)

The plaintiff argued that the CEQA "cause of action involve[d] allegations that the [c]ity violated CEQA, not the SMA, and therefore [did] not 'concern[] a subdivision'" under Government Code section 66499.37. (*Riverside, supra,* 168 Cal.App.4th at p. 754.) The court noted that both parties relied on *Legacy Group v. City of Wasco* (2003) 106 Cal.App.4th 1305, in which "the appellate court was asked to decide whether a cause of action for a city's breach of a development agreement is subject to the 90-day statute of limitations contained in Government Code section 66499.37. The plaintiffs were developers who sued to enforce development agreement provisions regarding the city's obligation to purchase improvements constructed by the developer. The appellate court held that Government Code section 66499.37 does not apply to a contract cause of action unless the claim overlaps with a claim arising under the SMA [citation] and could have been challenged under the SMA. The court found that the city's decision to invoke a particular clause of the development agreement did not overlap with a claim arising out of the SMA, and could not have been brought under the SMA. This is, in part, because the provisions of the SMA do not directly address development agreements, as these are addressed in the development agreement statute, found at [Government Code] section 65864 et seq., which is not part of the SMA. [Citation.]" (*Riverside, supra,* at p. 755.)

In the *Riverside* case, "the CEQA cause of action allege[d] that the [c]ity violated CEQA by not including certain mitigation measures, such as provisions for open space, in the conditions of approval for the Project. The SMA addresses and authorizes conditions of approval for tract maps." (*Riverside, supra,* 168 Cal.App.4th at p. 755, fn. omitted.) The other causes of action similarly challenged the conditions of approval. Thus, the court concluded, "the CEQA cause of action was merely another vehicle for challenging the [c]ity's failure to require the applicant to implement open space and other mitigation measures that were part of the Project's conditions of approval and of the Specific Plan. [The plaintiff] not only could have brought this claim under the SMA rather than CEQA, it in fact did, in causes of action two through four. Under *Legacy*

Group, then, [the plaintiff] was required to comply with the 90-day summons requirement for the CEQA cause of action, because it both overlapped with the SMA causes of action and could have been (and was) brought under the SMA." (*Id.* at p. 756.)

Here, Friends is not challenging any conditions of approval of the vesting tentative tract map. Friends is instead asserting the City failed to comply with CEQA.

The SMA does not address the adequacy of an initial study, the question of whether an EIR is required or whether the public agency may issue a negative declaration. Thus, even though Friends challenged the City's approval of the development project, it could not have made its challenge under the SMA. For this reason, the 90-day service requirement of Government Code section 66499.37 does not apply to this action. (*Legacy Group v. City of Wasco*, *supra*, 106 Cal.App.4th at p. 1312; see *Riverside*, *supra*, 168 Cal.App.4th at pp. 755-756.)

Topanga Assn. for a Scenic Community v. County of Los Angeles (1989) 214 Cal.App.3d 1348, which HPTV cited at oral argument, does not compel a different conclusion. *Topanga Assn.* involved causes of action under the SMA, not CEQA.[6] (*Id.* at p. 1355.) One of the issues raised was whether substantial evidence supported a finding under the SMA that the project was not likely to cause substantial environmental damage. (*Id*. at pp. 1356, 1357.) The issue here is the adequacy of the initial study and whether there is no substantial evidence a fair argument can be made the project may have a significant impact on the environment under CEQA, not the SMA.[7]

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[6] *Topanga Assn.* specifically noted the SMA requirements are separate and independent from those of CEQA. (*Topanga Assn. for a Scenic Community v. County of Los Angeles*, *supra*, 214 Cal.App.3d at p. 1355.)

[7] We deny HPTV and the City's request for judicial notice of a proposed CEQA Guideline that had not yet been proposed at the time the trial court entered judgment and is not relevant to our determination of this appeal. (See *Hernandez v. County of Los Angeles* (2008) 167 Cal.App.4th 12, 18, fn. 4.)

B. *CEQA*

"'"[T]he overriding purpose of CEQA is to ensure that agencies regulating activities that may affect the quality of the environment give primary consideration to preventing environmental damage."' [Citation.] Where the statute applies, the relevant governmental agency must conduct an initial study to determine '"if the project may have a significant effect on the environment."' [Citation; see Guidelines, § 15063, subd. (a).] '"Significant effect on the environment" means a substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project including land, air, water, minerals, flora, fauna, ambient noise, and objects of historic or aesthetic significance.' (Guidelines, § 15382.)" (*Keep Our Mountains Quiet v. County of Santa Clara*, *supra*, 236 Cal.App.4th at p. 729, fn. omitted.)

"If the initial study uncovers 'substantial evidence that any aspect of the project, either individually or cumulatively, may cause a significant effect on the environment,' it must prepare an EIR. (Guidelines, § 15063, subd. (b)(1).) An EIR is required whenever '"substantial evidence in the record supports a 'fair argument' significant impacts or effects may occur . . . ."' [Citation.] If, on the other hand, there is 'no substantial evidence that the project or any of its aspects may cause a significant effect on the environment,' the agency prepares a negative declaration. (Guidelines, § 15063, subd. (b)(2).) Alternatively, if '"the initial study identifies potentially significant effects on the environment but revisions in the project plans 'would avoid the effects or mitigate the effects to a point where clearly no significant effect on the environment would occur' and there is no substantial evidence that the project as revised may have a significant effect on the environment, a mitigated negative declaration may be used."' [Citation.]" (*Keep Our Mountains Quiet v. County of Santa Clara*, *supra*, 236 Cal.App.4th at p. 730; see also *Citizens for a Green San Mateo v. San Mateo County Community College Dist.* (2014) 226 Cal.App.4th 1572, 1587.)

C. *Standard of Review*

When we review an agency's action for compliance with CEQA, our "inquiry 'shall extend only to whether there was a prejudicial abuse of discretion.' (Pub. Resources Code, § 21168.5.) Such an abuse is established 'if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence.' ([*Ibid*.] . . .)" (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 426-427, fn. & citations omitted; accord, *W.M. Barr & Co., Inc. v. South Coast Air Quality Management Dist.* (2012) 207 Cal.App.4th 406, 431.) Our "review of the administrative record for legal error and substantial evidence in a CEQA case, as in other mandamus cases, is the same as the trial court's: The appellate court reviews the agency's action, not the trial court's decision; in that sense appellate judicial review under CEQA is de novo. [Citations.]" (*Vineyard Area Citizens for Responsible Growth, Inc., supra*, at p. 427; accord, *Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 151.)

In conducting our review, we are mindful that "'"'"'"'[t]he purpose of CEQA is not to generate paper, but to compel government at all levels to make decisions with environmental consequences in mind. CEQA does not, indeed cannot, guarantee that these decisions will always be those which favor environmental considerations.'" [Citations.] We may not, in sum, substitute our judgment for that of the people and their local representatives. We can and must, however, scrupulously enforce all legislatively mandated CEQA requirements.'" [Citation.]' [Citation.]" (*Citizens for a Green San Mateo v. San Mateo County Community College Dist., supra*, 226 Cal.App.4th at pp. 1586-1587.)

D. *Adequacy of the Initial Study as to Greenhouse Gas Emissions*

Friends contends the City failed to comply with CEQA Guidelines in reaching the initial study's conclusion as to the significance of environmental impacts from greenhouse gas emissions, and therefore the initial study—and subsequent mitigated

negative declaration and notice of determination—must be set aside. In particular, Friends claims the initial study failed to comply with sections 15063 and 15064.4 of the Guidelines.

Section 15063, subdivision (d), of the CEQA Guidelines provides that "[a]n initial study shall contain in brief form: [¶] . . . [¶] (3) An identification of environmental effects by use of a checklist, matrix, or other method, provided that entries on a checklist or other form are briefly explained to, indicate that there is some evidence to support the entries. The brief explanation may be either through a narrative or a reference to another information source such as an attached map, photographs, or an earlier EIR or negative declaration. A reference to another document should include, where appropriate, a citation to the page or pages where the information is found."

Section 15064.4 sets forth the manner in which the lead agency should determine the significance of impacts of greenhouse gas emissions from a development project. The section requires the lead agency to "[u]se a model or methodology to quantify greenhouse gas emissions" and "[r]ely on a qualitative analysis or performance based standards." (*Id.*, subd. (a)(1) & (2).) It also sets forth the factors the lead agency should consider, including "[w]hether the project emissions exceed a threshold of significance that the lead agency determines applies to the project." (*Id.*, subd. (b)(3).)

Appendix A of the initial study and checklist, the environmental impacts explanation table, simply states that the impact of greenhouse gas emissions "will be mitigated to a less than significant level by the proposed mitigation measures" and refers to mitigation measure VII-10. Mitigation measure VII-10 states that the impact of greenhouse gases can be reduced to a less than significant level if "[o]nly low- and non-VOC-containing paints, sealants, adhesives, and solvents shall be utilized in the construction of the project."

As Friends claims, this portion of the initial study addressing greenhouse gas emissions does not meet the requirements of sections 15063 and 15064.4 of the Guidelines. The initial study does not offer any evidence supporting the effectiveness of mitigation measure VII-10. (Guidelines, § 15063, subd. (d)(3).) The initial study also

makes no attempt to "quantify greenhouse gas emissions" and it does not set forth any "qualitative analysis or performance based standards." (Guidelines, § 15064.4, subd. (a)(1) & (2).) Given such deficiencies, the question then is whether this failure to comply with the Guidelines requires that the initial study, mitigated negative declaration, and notice of determination be vacated. We conclude it does.

In *Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151 (*Citizens*), the court ordered the trial court to issue a writ of mandate directing that the negative declaration be set aside due to the agency's failure to consider the cumulative effect of two projects. (*Id*. at pp. 167-168, 177.) The court discussed other issues to be addressed on remand, one of which was the initial study. It noted: "In the instant case the initial studies are far too conclusionary. It is for the most part impossible to determine whether the findings which ultimately resulted in negative declarations are supported by the evidence because it is unclear what raw evidence, if any, was relied upon in preparing the initial studies. . . . For the most part the specific sources and content of the data the developer relied upon in its application were not disclosed. Upon remand the evidence supporting any initial studies should be disclosed." (*Id*. at pp. 171-172.)

In *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, the plaintiff claimed "that the initial study was a pro forma exercise, involving no real investigation, that failed to disclose the need for an environmental impact report. When environmental problems were raised in proceedings before the planning commission, the County responded by adding condition upon condition to the permit" and adopted a negative declaration rather than an EIR. (*Id*. at p. 304.) In its examination of the plaintiff's claim, the court observed that "the petition for writ of mandate in the present case attacks the adoption of the negative declaration in connection with approval of the use permit. The record now extends well beyond the documents on which the initial study was based. Even if the initial study is defective, the record may be extensive enough to sustain the agency's action. Nevertheless, the legal sufficiency of the initial study has a certain relevance. In reviewing whether agency procedures comply with CEQA, the test to be

applied is 'whether an objective, good faith effort to so comply is demonstrated.' [Citation.] The completion of a proper initial study is relevant to whether the agency made such a 'good faith effort' to comply with the Act." (*Id*. at p. 305.) The court noted that "[t]he initial study in fact displayed only a token observance of regulatory requirements. It consisted of a checklist of 43 questions that loosely paralleled the longer and more searching checklist proposed by the CEQA regulations. [Citation.]" (*Ibid*.) The county improperly delegated its responsibility to make an environmental assessment to the permit applicant, deferred the environmental assessment to a future date, and removed a portion of the project from environmental review. (*Id*. at pp. 306-309.)

The court observed that "[w]hile a fair argument of environmental impact must be based on substantial evidence, mechanical application of this rule would defeat the purpose of CEQA where the local agency has failed to undertake an adequate initial study. The agency should not be allowed to hide behind its own failure to gather relevant data. . . . CEQA places the burden of environmental investigation on government rather than the public. If the local agency has failed to study an area of possible environmental impact, a fair argument may be based on the limited facts in the record. Deficiencies in the record may actually enlarge the scope of fair argument by lending a logical plausibility to a wider range of inferences." (*Sundstrom v. County of Mendocino*, *supra*, 202 Cal.App.3d at p. 311.) The record before the court permitted a fair argument that the project would have a significant effect on the environment. (*Id*. at p. 314.) The court found that the county had failed to comply with CEQA and ordered that a writ of mandate issue. (*Ibid*.)

Here, as in *Citizens*, the initial study does not reveal "what raw evidence, if any, was relied upon in preparing the initial stud[y]" with respect to greenhouse gases. (*Citizens*, *supra*, 172 Cal.App.3d at pp. 171-172.) As noted in *Citizens*, the initial study must provide "'documentation of the factual basis for the finding in [the mitigated] negative declaration that [the development] project will not have a significant effect on the environment.'" (*Id*. at p. 171, quoting Guidelines, § 15063, subd. (c)(5).) Under Code of Civil Procedure section 1094.5, subdivision (b), "'[a]buse of discretion is

established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, *or the findings are not supported by the evidence*.' (Italics added.) The Supreme Court has elaborated that '. . . implicit in section 1094.5 is a requirement that the agency which renders the challenged decision must set forth findings to bridge the analytic gap between the *raw evidence* and ultimate decision or order.' [Citations.] [¶] Therefore, although an initial study can identify environmental effects by use of a checklist (see [Guidelines], § 15063, subds. (d)-(f)), it must also disclose the data or evidence upon which the person(s) conducting the study relied. Mere conclusions simply provide no vehicle for judicial review. [Citation.]" (*Citizens*, *supra*, at p. 171.)

The lack of any supporting data supports a conclusion the City did not make an "'objective, good faith effort'" to comply with the requirements of CEQA. (*Sundstrom v. County of Mendocino*, *supra*, 202 Cal.App.3d at p. 305.) This failure on the part of the City is not cured by evidence in the record supporting the mitigated negative declaration. (*Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1379; see also *Lighthouse Field Beach Rescue v. City of Santa Cruz* (2005) 131 Cal.App.4th 1170, 1200-1201.) If anything, the evidence in the record suggests the City failed to include an area of possible environmental impact in the initial study, supporting an inference that a fair argument may be made. (See *Sundstrom*, *supra*, at p. 311.)

The administrative record here contains additional evidence on the subject of greenhouse gas emissions from Parker Environmental Consultants (Parker) which the City had before it when it adopted the mitigated negative declaration. In an April 22, 2103 letter from Parker to the City regarding its review of the mitigated negative declaration, Parker addressed comment letters submitted in response to the mitigated negative declaration. Comment 1-7, from a letter submitted by the Historic Highland Park Neighborhood Council, stated, concerning "Greenhouse Gas Emissions: The particulate matter from increased automobile traffic and greenhouse gasses from the increase in general human consumption (air conditioning, refrigeration, gardening, pet waste, etc.) will have a negative impact on the air and water quality in the area." Parker's

response 1-7 read: "The components of Mitigation Measure VII-l0 will ensure impacts with respect to Greenhouse Gas Emissions will be less than significant. In addition, it should be noted that through the required implementation of the LA Green Building Code, the Project would be consistent with local and statewide goals and policies aimed at reducing the generation of GHGs, including CARB's[8] AB 32 Scoping Plan aimed at achieving 1990 GHG emission levels by 2020. Therefore, the Project's generation of GHG emissions would not be considered cumulatively considerable and impacts would be less than significant."

The Parker letter does not supply the raw data supporting Mitigation Measure VII-10 missing from the initial study. It merely repeats the conclusionary statement regarding mitigation. It therefore does not cure the inadequacy of the initial study. (See *Gentry v. City of Murrieta*, *supra*, 36 Cal.App.4th at p. 1379; *Sundstrom v. County of Mendocino*, *supra*, 202 Cal.App.3d at p. 305.)

Moreover, the Parker letter reveals that the initial study did not address "[t]he particulate matter from increased automobile traffic and greenhouse gasses from the increase in general human consumption (air conditioning, refrigeration, gardening, pet waste, etc.)." Neither does the Parker letter contain any data to support its conclusions that these effects on greenhouse gases will not be significant.

The CEQA guidelines address the issue of greenhouse gas emissions and provide the lead agency with the discretion to determine an appropriate threshold of significance for a project. "When assessing the significance of impacts from greenhouse gas emissions on the environment the lead agency should consider the extent the project may increase or reduce greenhouse gas emissions; whether the project emissions exceed a threshold of significance that the lead agency determines applies to the project; and the extent the project complies with regulations or requirements adopted to implement a statewide, regional, or local plan for the reduction or mitigation of greenhouse gas

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8 CARB is the State Air Resources Board. (*Association of Irritated Residents v. State Air Resources Bd.* (2012) 206 Cal.App.4th 1487, 1490.)

emissions. (Guidelines, § 15064.4(b).) Thus, under [these] guidelines, lead agencies are allowed to decide what threshold of significance it will apply to a project." (*Citizens for Responsible Equitable Environmental Development v. City of Chula Vista* (2011) 197 Cal.App.4th 327, 336.)[9] Compliance with Assembly Bill No. 32, the California Global Warming Solutions Act of 2006 (Health & Saf. Code, § 38500 et seq.), is an acceptable threshold of significance. (*Citizens for Responsible Equitable Environmental Development*, *supra*, at p. 336.)

Friends argues that "[t]he City has not adopted any threshold of significance, including the CARB AB 32 Scoping Plan. There is no showing that complying with the L.A. Green Building Code will enable the City to meet CARB AB 32 Scoping Plan targets for reducing the GHG effects of new construction." Friends is correct. There is nothing in the Parker letter specifying whether the City has or has not adopted a threshold of significance, such as compliance with Assembly Bill No. 32, and how compliance with the L.A. Green Building Code will ensure that the development project has no significant environmental impact.

In *Mejia v. City of Los Angeles, supra*, 130 Cal.App.4th 322, "[t]he initial study checklist prepared in September 2002 stated that there would be a less than significant impact in response to the question whether the project would '[c]ause an increase in traffic which is substantial in relation to the existing traffic load and capacity of the street system (i.e., result in a substantial increase in either the number of vehicle trips, the volume to ratio capacity on roads, or congestion at intersections).' The explanation

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9 A "threshold of significance" assists in determining the significance of a project's environmental impacts. (*Mejia v. City of Los Angeles* (2005) 130 Cal.App.4th 322, 342.) "Each public agency is encouraged to develop and publish thresholds of significance that the agency uses in the determination of the significance of environmental effects. A threshold of significance is an identifiable quantitative, qualitative or performance level of a particular environmental effect, non-compliance with which means the effect will normally be determined to be significant by the agency and compliance with which means the effect normally will be determined to be less than significant." (Guidelines, § 15064.7, subd. (a).)

stated, 'The Los Angeles Department of Transportation has established traffic impact thresholds based on the type and intensity of land use. The threshold for single-family home developments is 40 dwelling units or more; the project involves 23 [*sic*], low-density, single-family housing units on large lots. Therefore, the project does not meet the threshold criteria for traffic impacts. Furthermore, the project will include street improvements and review by the Department of Transportation and the Bureau of Engineering.' Similarly, the advisory agency at a public hearing before the planning commission in December 2002 explained, 'The threshold for a traffic study in this case would be 40 dwelling units. This project does not meet that threshold.'" (*Id*. at pp. 341-342.) No such explanation of any threshold criteria exists here.

We briefly address Friends' claim that, in any event, there is substantial evidence in the administrative record to support a fair argument that greenhouse gases from the development project will have a significant environmental impact thereby requiring an EIR. To support its claim, Friends relies on (1) "admissions" in the initial study that the development project will increase greenhouse gas emissions and that the project may have significant greenhouse gas emission impacts unless mitigated; (2) a paper by Hal S. Knowles, III of the University of Florida regarding greenhouse gas emissions;[10] and (3) information from the National Climatic Data Center (NCDC) of the National Oceanic and Atmospheric Administration.

In the initial study checklist, the City checked a box indicating that the possibility the development project would "[g]enerate greenhouse gas emissions, either directly or indirectly, that may have a significant impact on the environment" was "[p]otentially significant unless mitigation incorporated." In "Appendix A: Environmental Impacts Explanation Table," the City explained: "The applicant is seeking to construct a 20-unit condominium project on Site 1, a 50-unit multi-family residential building on Site 2, and

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10 Although the paper in the record is undated, it appears to have been prepared for the Environmental Protection Agency's 17th Annual International Emission Inventory Conference in June 2008. (<http://www.epa.gov/ttnchie1/conference/ei17>.)

a 10-unit multi-family residential building on Site 3, with each site having a public parking component and will result in an increase generation of greenhouse gas emissions. However, this impact will be mitigated to a less than significant level by the proposed mitigation measures." As the trial court found, the City's identification on the form checklist of a potentially significant impact from greenhouse gases is not substantial evidence supporting a fair argument the development project may have a significant environmental impact. (See *Parker Shattuck Neighbors v. Berkeley City Council* (2013) 222 Cal.App.4th 768, 784.)

The Knowles paper is entitled "Realizing residential building greenhouse gas emissions reductions: The case for a Web-based geospatial building performance and social marketing tool." It states: "Within the United States, the building sector accounts for approximately 48% of annual GHG (greenhouse gas) emissions, with 36% of the direct energy related GHG emissions and an additional 8-12% of total GHG emissions related to the production of materials used in building construction . . . ." The paper goes on to discuss evidence "that the building sector can substantially reduce GHG emissions by 'using existing, mature technologies for energy efficiency that already exist.'"

This generalized statement does not provide "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion" (Guidelines, § 15384, subd. (a); *Stanislaus Audubon Society, Inc. v. County of Stanislaus, supra*, 33 Cal.App.4th at p. 152) that the development project, with the mitigation measures in place, "may have a significant effect on the environment" (Pub. Resources Code, § 21064.5; *W.M. Barr & Co., Inc. v. South Coast Air Quality Management Dist., supra*, 207 Cal.App.4th at p. 434). This is because the determination whether the project will have a significant effect on the environment must be based upon data concerning the specific effect the project will have in its setting. (See, e.g., *Taxpayers for Accountable School Bond Spending v. San Diego Unified School Dist.* (2013) 215 Cal.App.4th 1013, 1038-1040 [analysis of the project's potential for light pollution on the adjacent residences based on industry standards for limiting light trespass in urban areas and analysis of the amount of light trespass the project would create].)

The generalized statements in the Knowles paper do not contain the type of factual information necessary to gauge whether this development project will have a significant effect on the environment due to greenhouse gas emissions.

Moreover, the Knowles paper itself acknowledges "that the building sector can substantially reduce GHG emissions by 'using existing, mature technologies for energy efficiency that already exist.'" Friends points to nothing in the paper specifically addressing California building codes and what effect they may or may not have on the reduction of greenhouse gas emissions. The Knowles paper refers to the building sector "[w]ithin the United States." It is "an irrelevant generalization, too vague and nonspecific to amount to substantial evidence of anything." (*Lucas Valley Homeowners Assn. v. County of Marin* (1991) 233 Cal.App.3d 130, 157.)

Friends' reliance on information from the NCDC as support for a fair argument is also unpersuasive on this record. The NCDC website discusses greenhouse gases and states that "Volatile Organic Compounds (VOCs) also have a small direct impact as greenhouse gases . . . ." (<http://www.ncdc.noaa.gov/oa/climate/gases.html> [as of Feb. 23, 2010].) Based on this statement, Friends argues that reducing the development project's use of VOCs "will have a *de minimus* effect on the Project's overall greenhouse-gas emissions, which will come mainly from the use of energy over the lifetime of the Project. The NCDC report is substantial evidence that the greenhouse-gas mitigation required by the City will be almost totally ineffective. There is no contrary evidence in the record showing that it could significantly reduce the Project GHG effects." That the reduction in VOCs will have a small effect on the reduction of greenhouse gas emissions is not "'substantial evidence in support of a fair argument [the proposed project] may have a significant environmental impact,'" which would require the City to prepare an EIR on this record. (*Stanislaus Audubon Society, Inc. v. County of Stanislaus*, *supra*, 33 Cal.App.4th at p. 151.) Given the lack of threshold criteria from the City, there is "no vehicle for judicial review" of the mitigation measures related to a reduction in low or no VOC building materials. (*Citizens*, *supra*, 172 Cal.App.3d at p. 171.)

E. ***Adequacy of the Initial Study as to Impacts from Hazardous Materials***

Friends contends that "[g]iven the amount of information on the Project's potential hazardous-materials effects, the City should not have checked" the box on the initial study indicating "no impact" as to the likelihood the development project would "[c]reate a significant hazard to the public or the environment through reasonably foreseeable upset and accident conditions involving the release of hazardous materials into the environment[.]" In support of its contention, Friends cites the following evidence:

The August 16, 2011 development agreement for Highland Park Transit Village acknowledged the existence of lead on Site 2 and provided for remediation of the pre-existing condition.[11]

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[11] Paragraph 4.3.3.1 of the agreement provides: "Developer and City acknowledge that certain Hazardous Substances, including, but not limited to, lead, are present on Site Two (the 'Known Pre-Existing Condition') as set forth in that Phase I Report by SCA Environmental, Inc. dated August 7, 2008 (the 'Phase I Report') and that certain Phase II Report by SCA Environmental, Inc. dated September 30, 2008 (the 'Phase II Report'). The Parties further acknowledge that those *certain* Hazardous Substances referenced in the Phase I Report and Phase II Report need to be Remediated from Site Two to accommodate the construction and development of the Site Two Improvements. The Developer estimates that the cost to Remediate the Known Pre-Existing Condition will be approximately Two Hundred Fifty Thousand Dollars ($250,000). Subject to the terms of this Article 4, Developer shall cause the Remediation of the Known Pre-Existing Condition, and the City shall pay all costs and expenses of such Remediation by reimbursing the Developer for Developer's costs and expenses incurred. . . . In the event that during the Remediation of the Known Pre-Existing Condition any Hazardous Substances other than the Known Pre-Existing Condition are discovered on Site Two (each a 'Discovered Pre-Existing Condition'), Developer shall have the option to Remediate all such Discovered Pre-Existing Conditions that require Remediation in order to comply with all applicable Environmental Laws, upon receipt of written agreement from the City to pay for all costs and expenses associated with such Remediation. In the event the City is unwilling to pay for all costs and expenses associated with Remediation of the Discovered Pre-Existing Condition, or Developer is unwilling to cause the Remediation of the Discovered Pre-Existing Condition for any reason, Developer shall have the right to terminate this Agreement without penalty, and terminate the Ground Leases without penalty. . . ." (Bold omitted & italics added.)

In the March 13, 2013 initial study, the City found no likely impact from hazards and hazardous materials. At the hearing before the City Planning Commission, Friends argued that testing of soil samples from Site 1 did not include testing for "possible soil contamination for a bygone auto repair shop on Site 1, and no investigation was done for Site 2 or 3."[12] The City Planning Commission determined that the soil would be tested before excavation and removal from the site. Adoption of the mitigated negative declaration was subject to Phase II environmental analyses on Sites 1 and 2 performed prior to grading.

The foregoing evidence shows there was known lead contamination on one of the three sites on which the project was to be built and a possibility of contamination on two of the sites, for which the City determined analysis should be performed prior to grading. None of this information was set forth in the initial study.

The disturbance of soil contaminated with lead may support a fair argument that a project may have a significant environmental impact. (*Parker Shattuck Neighbors v. Berkeley City Council*, *supra*, 222 Cal.App.4th at p. 779; *Association for a Cleaner Environment v. Yosemite Community College Dist.* (2004) 116 Cal.App.4th 629, 639-640.) Data concerning the contaminated soil thus should have been included in the initial study. (*Association for a Cleaner Environment*, *supra*, at p. 640; see also *Sundstrom v. County of Mendocino*, *supra*, 202 Cal.App.3d at p. 311.) In the absence of such data, we have "no vehicle for judicial review" of the mitigation measures for possible soil contamination in the mitigated negative declaration. (*Citizens*, *supra*, 172 Cal.App.3d at p. 171; see *Parker Shattuck Neighbors*, *supra*, at pp. 774-775 [proposed mitigated negative declaration incorporating initial study, discussed soil contamination and remediation efforts and explained why the contamination posed no significant

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[12] We reject HPTV and the City's argument that this prior use issue is not properly before us as it was not raised during the approval process. It was specifically raised by Lisa Durado and Lloyd Cattro before the City Planning Commission.

environmental hazard].) Accordingly, we are unable to determine whether the findings that resulted in the mitigated negative declaration are supported by the evidence.

Friends also raises the project's proximity to a rail corridor and possible railcar leaks as substantial evidence a fair argument could be made the project may have a significant environmental impact. It relies on a 2004 article prepared by the Rails-to-Trails Conservancy, Understanding Environmental Contaminants—*Lessons Learned and Guidance to Keep Your Rail-Trial Project on Track*. The article discusses generally the types of contamination found along rail corridors. However, Friends points to no evidence regarding prior use of the Metro Gold Line tracks for transporting freight or current contamination as a result of that prior use.[13] Its claim that "[r]ail lines are frequently contaminated by hazardous-chemical leaks" and the soil in the project area is therefore "likely contaminated" is pure speculation. Accordingly, Friends has not demonstrated that, with respect to the issue of the project's proximity to the Metro Gold Line, the City "fail[ed] to gather information and undertake an adequate environmental analysis in its initial study." (*El Dorado County Taxpayers for Quality Growth v. County of El Dorado* (2004) 122 Cal.App.4th 1591, 1597; see Guidelines, § 15063, subds. (d), (g); *Plastic Pipe & Fittings Assn. v. California Building Standards Com.* (2004) 124 Cal.App.4th 1390, 1414 [discussing basis for identification of potentially significant effects in initial study]; *Gentry v. City of Murrieta*, *supra*, 36 Cal.App.4th at pp. 1376-1377 [same].)

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[13] While Friends argued in its appeal to the City Council that the "rail line was previously used to transport freight, including chemicals," it submitted no evidence supporting this statement.

DISPOSITION

The judgment is reversed. The trial court is directed to issue a writ of mandate directing the City to set aside its mitigated negative declaration and notice of determination and to prepare an initial study that complies with the requirements of CEQA, as discussed herein, and to grant any further relief that should prove appropriate. (Pub. Resources Code, § 21168.9.) Friends is to recover its costs on appeal.

BECKLOFF, J.*

We concur:

PERLUSS, P. J.

SEGAL, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.