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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

ENVIRONMENTALISM THROUGH INSPIRATION AND NON-VIOLENT ACTION et al., Plaintiffs and Appellants, v. CITY OF LOS ANGELES et al., Defendants and Respondents; PLAYA CAPITAL COMPANY, LLC, et al., Real Parties in Interest and Respondents.	B174856 (Los Angeles County Super. Ct. No. BS073182)

APPEAL from a judgment of the Superior Court of Los Angeles County, George H. Wu, Judge. Reversed with directions.

Lawrence Teeter and Sabrina Venskus for Plaintiffs and Appellants.

Rockard J. Delgadillo, City Attorney, Susan D. Pfann and Jack L. Brown, Assistant City Attorneys, for Defendants and Respondents.

Latham & Watkins, Robert D. Crockett, Kathleen O'Prey Truman and Damon P. Mamalakis for Real Parties in Interest and Respondents.

Several environmental advocacy groups and individuals challenge the adoption by the City of Los Angeles of mitigation measures in connection with the previously approved first phase of the Playa Vista development project, and challenge the city's failure to require a subsequent environmental impact report (EIR) or a supplement to the EIR. Environmentalism Through Inspiration and Non-Violent Action (ETINA), Grassroots Coalition, Spirit of the Sage Council, John Davis, and Daniel Cohen (collectively Petitioners) appeal a judgment denying their petition for writ of mandate. Real party in interest Playa Capital Company, LLC (Playa Capital), is the developer. Real parties in interest Playa Investments LLC, Playa Commercial Debt Company LLC, and Playa Phase 1 Apartments LLC are related to Playa Capital in some manner.[1]

We conclude that substantial evidence supports the city's determination with respect to certain purported new information of substantial importance that conditions requiring the preparation of a subsequent EIR or a supplement to the EIR are not present. We conclude further, however, that the city failed to determine whether groundwater dewatering in connection with methane mitigation measures approved by the city council would result in new or substantially more severe significant environmental impacts, as required. We therefore reverse the judgment with directions to the superior court to grant the petition in part and issue a peremptory writ of mandate ordering the city to vacate its approval of the mitigation measures and determine

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[1] We refer to Playa Capital alone or collectively with the other real parties in interest as Playa Capital.

whether conditions requiring the preparation of a subsequent EIR or a supplement to the EIR are present with respect to groundwater dewatering.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Playa Vista Project First Phase EIR*

The city certified an EIR for the first phase of the Playa Vista project in September 1993, approving the development of 3,426 residential units, 1.25 million square feet of office and light industrial space, 35,000 square feet of retail space, and 300 hotel rooms on 246.3 acres of land east of Lincoln Boulevard and mostly south of Ballona Creek, including 25 acres of Ballona Creek. The first phase also includes approximately 108 acres of public open space, including a freshwater marsh on 34.2 acres west of Lincoln Boulevard.

The city approved a modification to the project to reconfigure internal roads, develop additional office space for entertainment, media, and technology uses in lieu of developing 300 hotel rooms, and construct a water feature. The city certified an EIR addendum and approved the modifications in December 1995. The city also adopted a mitigated negative declaration at that time pertaining to the subdivision of land that was not included in the first phase EIR.

2. *Community Facilities District Formation, Funding, and the Methane Issue*

The city adopted an ordinance establishing a community facilities district under the Mello-Roos Community Facilities Act of 1982 (Gov. Code, § 53311 et seq.) on the project site in August 1999. The city repealed the ordinance due to a notice deficiency

and adopted a new ordinance in December 1999 establishing a community facilities district on the project site.

The city council's Budget and Finance Committee held hearings in May and June of 2000 to consider the issuance of bonds to fund public infrastructure improvements in the community facilities district. The committee considered the presence of methane and other gases on the site and a proposed methane monitoring system and expressed concerns about public safety and liability. The committee heard testimony by Victor Jones of Exploration Technologies, Inc. (ETI), a "peer reviewer" hired by the city's Department of Building and Safety to evaluate methane issues. The committee also heard testimony on the subject by John Sepich, an expert hired by Playa Capital. At the conclusion of the hearings, the committee decided to direct the city's Chief Legislative Analyst (CLA) to conduct a public hearing to discuss the issues requiring further evaluation, devise a process for consultation among various city departments and outside experts, and then make recommendations concerning mitigation of methane and other matters. The city council approved the committee's decision to proceed in that manner at a meeting on June 20, 2000, and directed the CLA to report to the city council's Planning and Land Use Management (PLUM) Committee at the conclusion of its study.

3. *Playa Vista Methane Prevention, Detection and Monitoring Program*

Sepich designed a methane mitigation system to detect and reduce methane concentrations beneath and inside the buildings. The proposed system was designated the Playa Vista Methane Prevention, Detection and Monitoring Program. Sepich

submitted the proposal to the Department of Building and Safety on January 30, 2001. ETI stated in a letter to the department dated January 31, 2001, "We have reviewed the proposed plan for the methane prevention, detection and monitoring systems . . . as defined in their report of January 30th, 2001 and outlined by their matrix table 'METHANE SYSTEM REQUIREMENTS,' and find that the proposed systems meet our recommendations, provided that the systems meet, or exceed all detail specifications as required by Department of Building and Safety." The Department of Building and Safety sent a letter to Playa Capital dated January 31, 2001, stating, "LADBS reviewed and agrees with ETI's conclusion that the proposed methane prevention, detection and monitoring systems for the Playa Vista project are adequate for safe development."

4. *CLA Report and Subsequent Events*

The CLA consulted with several city agencies and released a draft proposal for a study to investigate methane and other gases, conducted a public hearing on the proposal, expanded the proposed study in response to comments, completed the study by hiring an expert and consulting with state and city agencies, and released the study results for public comment. The CLA issued a report on its conclusions in May 2001, including responses to comments. The CLA considered the potential risks to public health and safety on the project site posed by methane and BTEX (benzene, toluene, ethyl-benzene, and xylene), hydrogen sulfide, subsidence, soil and groundwater contamination, and earthquakes, and considered appropriate mitigation. The CLA recommended the methane mitigation system designed by Sepich.

The proposed mitigation system is graduated to correspond with the level of methane concentrations detected on site. The CLA report stated, "All three levels would require a basic mitigation prevention system below the building, including a 12-inch gravel blanket, with pipes to ventilate gas from underneath the impermeable membrane, and methane detection alarm systems within the building. For Levels II and III, automatic ventilation systems triggered by elevated methane concentration levels beneath the impermeable membrane and continuous monitoring systems would . . . also be required. Additionally, Level III would require a subsurface venting system consisting of vent pipes drilled into the 50-foot gravel aquifer to extract methane gas, thereby alleviating the accumulation of methane within the aquifer and below the ground surface and also reducing the surface emissions of methane."

The CLA concluded that there was sufficient information to assess the potential risks presented by the presence of methane and that the proposed methane mitigation system was adequate, that the mitigation would not increase the risk of subsidence, and that BTEX and hydrogen sulfide emissions were insignificant, among other conclusions.

The PLUM Committee considered the CLA report on June 5, 2001. The CLA recommended to the PLUM that the city council "note and file" the report, direct the city planning department to require the project mitigation monitor to oversee implementation of the new mitigation measures, and direct other city departments to coordinate with the planning department regarding implementation of the methane mitigation system. The PLUM Committee endorsed the CLA's recommendations. The city council approved the recommendations on June 12, 2001.

The Budget and Finance Committee at a hearing on June 13, 2001, reconsidered the issuance of Mello-Roos bonds in light of the CLA report and the city council's approval of the CLA's recommendations. The committee recommended issuance of the bonds. On June 26, 2001, the city council approved the bond issuance and levy of special taxes and determined that the decision was categorically exempt under CEQA. The city filed and posted a notice of exemption on June 27, 2001.

5. *Prior Petitions for Writ of Mandate*

Grassroots Coalition, Spirit of the Sage Council, and Earthways Foundation filed a petition for writ of mandate in the superior court in April 2000 challenging the city's failure to require a subsequent EIR for the project. The first amended petition filed in June 2000 alleged that new information concerning the presence of methane and other gases on site and other matters required the preparation of a subsequent EIR and that the CLA report could not substitute for a subsequent EIR. The petitioners also alleged that the new mitigation measures were inadequate, among other allegations. The court denied the petition in November 2000 after a hearing on the merits. (*Grassroots Coalition v. City of Los Angeles (Playa Capital Company, LLC)* (Super. Ct. L.A. County, No. BS062858).) A minute order denying the petition stated that the petitioners failed to identify the administrative decision being challenged, failed to show that the decision was not supported by substantial evidence, and failed to show evidence of new information of methane seepage or any other condition that was not known and reasonably could not have been known at the time of EIR certification in 1993. There was no appeal.

Santa Monica Baykeeper filed a petition for writ of mandate in the superior court in July 2001 challenging the city's approval of the CLA report, its failure to require a subsequent EIR, its decision to issue Mello-Roos bonds and levy special taxes, and its decision that the bond issuance was categorically exempt under CEQA. The court sustained a demurrer to the petition in April 2002, concluding that the decision to issue bonds was categorically exempt and was not a discretionary project approval under CEQA, and that the petition was untimely because it was not filed within the 30-day period provided under Government Code section 53359 to commence a proceeding challenging the validity of Mello-Roos bonds. (*Santa Monica Baykeeper v. City of Los Angeles (Playa Capital Company, LLC)* (Super. Ct. L.A. County, No. BS070757).) There was no appeal.

There have been several other petitions for writ of mandate challenging other decisions made in connection with the project over the years.

6. *Superior Court Proceedings in this Case*

Petitioners filed a petition for writ of mandate in the superior court in December 2001 alleging that the city council's decision on June 12, 2001, to implement the new mitigation measures was a discretionary approval under CEQA and that in light of new information, project changes, and changes in the circumstances surrounding the project, a subsequent EIR was required. Petitioners also alleged that there was no substantial evidence to support the conclusion that the new mitigation measures would be effective. After a hearing on the merits, the court issued a minute order denying the petition and issued a lengthy statement of decision.

The court concluded that (1) the city council decided on June 20, 2000,[2] that a subsequent EIR was unnecessary, and Petitioners filed their petition challenging that decision more than 180 days later in December 2001, so the petition was untimely; (2) the city council's approval of the CLA's and the PLUM Committee's recommendations in June 2000 was not a discretionary approval under CEQA, and the city council did not approve the new mitigation measures at that time because the Department of Building and Safety had previously approved the measures; (3) there was no substantial change in the project or the circumstances surrounding the project, there is no need for major revisions of the EIR, and substantial evidence supports the conclusion in the CLA report that the mitigation measures are adequate; and (4) the purported new information identified by Petitioners concerning environmental impacts either (i) was considered in the EIR, (ii) with the exercise of reasonable diligence could have been known at the time the EIR was certified, (iii) is not supported by substantial evidence in the record, (iv) was considered after the EIR was certified and substantial evidence supports the conclusion that the impact is insignificant; or (v) was considered after the EIR was certified and substantial evidence supports the city's conclusion that the impact will be mitigated.

The court entered a judgment denying the petition in February 2004. Petitioners appealed the judgment.

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[2] The statement of decision stated that the city council meeting and decision occurred on June 23, 2000, but quoted from the transcript of the June 20 meeting.

CONTENTIONS

Petitioners contend (1) the city council's approval of the CLA report and adoption of new mitigation measures was a discretionary approval; (2) substantial changes in both the project and the circumstances surrounding the project and new information of substantial importance present the possibility of environmental impacts different from or more severe than those identified in the EIR, so a subsequent or supplemental EIR was required; (3) the city failed to determine whether a subsequent or supplemental EIR was required, so Petitioners are entitled to a writ of mandate directing the city to make that determination; and (4) the petition for writ of mandate was timely filed within the 180-day limitations period.

Playa Capital disputes these contentions and contends (1) the 180-day limitations period began to run either in June 2000 when the city council decided to direct the CLA to oversee further investigation of the environmental issues and produce a report with recommendations, or in January 2001 when the Department of Building and Safety determined that the proposed methane mitigation system was adequate, so the petition filed in December 2001 was untimely; (2) alternatively, a 35-day limitations period commenced on June 27, 2001, when the city posted a notice of exemption pertaining to the approval of Mello-Roos financing; (3) Petitioners' failure to challenge the permit decision by the Board of Building and Safety Commissioners was a failure to exhaust administrative remedies; and (4) Grassroots Coalition and Spirit of the Sage Council are collaterally estopped based on the judgment in *Grassroots Coalition v. City of Los Angeles (Playa Capital Company, LLC)*, *supra*, and the other petitioners in this

proceeding are in privity with them and therefore are also collaterally estopped. The city joins in Playa Capital's respondents' brief.

DISCUSSION

1. *CEQA Requirements*

"CEQA is a comprehensive scheme designed to provide long-term protection to the environment. [Citation.] In enacting CEQA, the Legislature declared its intention that all public agencies responsible for regulating activities affecting the environment give prime consideration to preventing environmental damage when carrying out their duties. [Citations.] CEQA is to be interpreted 'to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.' [Citation.]" (*Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 112.)

An EIR is required for any project that a public agency proposes to carry out or approve that may have a significant effect on the environment. (Pub. Resources Code, §§ 21100, subd. (a), 21151, subd. (a); Guidelines,[3] § 15064, subd. (a)(1).) An EIR must describe the proposed project and its environmental setting, state the objectives sought to be achieved, identify and analyze the significant effects on the environment, state how those impacts can be mitigated or avoided, and identify alternatives to the project,

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[3] All references to Guidelines are to the CEQA Guidelines (Cal. Code Regs., Tit. 14, § 15000 et seq.) developed by the Office of Planning and Research and adopted by the California Resources Agency. (Pub. Resources Code, §§ 21083, 21087.) "[C]ourts should afford great weight to the Guidelines except when a provision is clearly unauthorized or erroneous under CEQA." (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 391, fn. 2 (*Laurel Heights I*).)

among other requirements. (Pub. Resources Code, §§ 21100, subd. (b), 21151; Guidelines, §§ 15124, 15125.) "The purpose of an environmental impact report is to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project." (Pub. Resources Code, § 21061.)

The agency must notify the public of the draft EIR, make the draft EIR and all documents referenced in it available for public review, and respond to comments that raise significant environmental issues. (Pub. Resources Code, §§ 21092, 21091, subds. (a), (d); Guidelines, §§ 15087, 15088.) The agency also must consult with and obtain comments from other agencies affected by the project and respond to their comments. (Pub. Resources Code, §§ 21092.5, 21104, 21153; Guidelines, § 15086.) The agency must prepare a final EIR including any revisions to the draft EIR, comments received from the public and from other agencies, and responses to comments. (Guidelines, § 15089, subd. (a), 15132.) Before approving the project, the agency must certify that its decisionmaking body reviewed and considered the information contained in the EIR, that the EIR reflects the agency's independent judgment and analysis, and that the EIR was completed in compliance with CEQA. (Pub. Resources Code, § 21082.1, subd. (c); Guidelines, § 15090.)

"We have repeatedly recognized that the EIR is the 'heart of CEQA.' [Citations.] 'Its purpose is to inform the public and its responsible officials of the environmental consequences of their decisions *before* they are made. Thus, the EIR

"protects not only the environment but also informed self-government." [Citations.]' To this end, public participation is an 'essential part of the CEQA process.' [Citations.]" (*Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4th 1112, 1123 (*Laurel Heights II*).)

A subsequent EIR or a supplement to an EIR may be required in certain circumstances if an agency proposes a discretionary approval for a project after an EIR is certified. (Pub. Resources Code, § 21166; Guidelines, §§ 15162, subds. (a), (c), 15163.)[4] An approval is discretionary if it requires the exercise of subjective judgment or deliberation by the agency with regard to the wisdom of or the manner of carrying out a project, as distinguished from a ministerial approval that involves little or no subjective judgment and involves only the application of fixed standards or objective measurements.[5] (See Guidelines, §§ 15357, 15369; *Mountain Lion Foundation v. Fish & Game Com., supra,* 16 Cal.4th at p. 117.)

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[4] "Once a project has been approved, the lead agency's role in project approval is completed, unless further discretionary approval on that project is required. Information appearing after an approval does not require reopening of that approval. If after the project is approved, any of the conditions described in subsection (a) occurs, a subsequent EIR or negative declaration shall only be prepared by the public agency which grants the next discretionary approval for the project, if any. In this situation no other responsible agency shall grant an approval for the project until the subsequent EIR has been certified or subsequent negative declaration adopted." (Guidelines, § 15162, subd. (c).)

[5] " 'Approval' means the decision by a public agency which commits the agency to a definite course of action in regard to a project intended to be carried out by any person. The exact date of approval of any project is a matter determined by each public agency according to its rules, regulations, and ordinances. Legislative action in regard to a project often constitutes approval." (Guidelines, § 15352, subd. (a).)

The California Supreme Court has stated, "In the case of a certified EIR, which is a prerequisite for application of section 21166, section 21167.2 mandates that the EIR be conclusively presumed valid unless a lawsuit has been timely brought to contest the validity of the EIR. This presumption acts to preclude reopening of the CEQA process even if the initial EIR is discovered to have been fundamentally inaccurate and misleading in the description of a significant effect or the severity of its consequences. After certification, the interests of finality are favored over the policy of encouraging public comment." (*Laurel Heights II*, *supra*, 6 Cal.4th at p. 1130.) "Section 21166 is intended to provide a balance against the burdens created by the environmental review process and to accord a reasonable measure of finality and certainty to the results achieved." (*Bowman v. City of Petaluma* (1986) 185 Cal.App.3d 1065, 1074; accord, *Friends of Davis v. City of Davis* (2000) 83 Cal.App.4th 1004, 1018.)

A subsequent EIR is required only if (1) substantial changes proposed in the project require major revisions to the EIR due to new significant environmental effects or a substantial increase in the severity of effects identified in the EIR; (2) substantial changes in the circumstances surrounding the project require major revisions to the EIR for the same reasons; or (3) new information of substantial importance that was not known and with the exercise of reasonable diligence could not have been known when the EIR was certified shows that (i) the project will have a significant effect not discussed in the EIR, (ii) significant effects discussed in the EIR will be substantially more severe, (iii) a mitigation measure or alternative found to be infeasible will be feasible and would substantially reduce a significant effect, but the project proponents

have rejected the measure or alternative, or (iv) a mitigation measure or alternative considerably different from those discussed in the EIR would substantially reduce a significant effect, but the project proponents have rejected the measure or alternative. (Pub. Resources Code, § 21166; Guidelines, § 15162, subd. (a).) A new or more severe significant effect does not require the preparation of a subsequent EIR or a supplement to an EIR, however, if adopted mitigation measures will reduce the impact to a level of insignificance. (*River Valley Preservation Project v. Metropolitan Transit Development Bd.* (1995) 37 Cal.App.4th 154, 168 (*River Valley*); see *Laurel Heights II*, *supra*, 6 Cal.4th at p. 1130; 1 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act (Cont.Ed.Bar 2004) § 19.9, pp. 719-720; cf. Guidelines, § 15088.5, subd. (a)(2); but see *Mira Monte Homeowners Assn. v. County of Ventura* (1985) 165 Cal.App.3d 357, 364-365 (*Mira Monte*).)[6]

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[6] The California Supreme Court in *Laurel Heights II* stated that the conditions requiring the preparation of a subsequent or supplemental EIR under Public Resources Code section 21166 provided guidance for the interpretation of section 21092.1, which requires recirculation of an EIR prior to certification in some circumstances. The court stated that new information showing a new or more severe significant impact does not require the preparation of a subsequent or supplemental EIR if adopted mitigation measures will reduce the impact to a level of insignificance. (*Laurel Heights II*, *supra*, 6 Cal.4th at p. 1130.) *River Valley*, relying on *Laurel Heights II*, held that certain impacts did not require the preparation of a subsequent or supplemental EIR because adopted mitigation measures would reduce the impacts to an insignificant level. (*River Valley*, *supra*, 37 Cal.App.4th at pp. 168, 179.) Other opinions also have held that no subsequent or supplemental EIR was required because adopted mitigation measures would reduce the impacts to an insignificant level. (*Snarled Traffic Obstructs Progress v. City and County of San Francisco* (1999) 74 Cal.App.4th 793, 802; *Benton v. Board of Supervisors* (1991) 226 Cal.App.3d 1467, 1483; *Long Beach Sav. & Loan Assn. v. Long Beach Redevelopment Agency* (1986) 188 Cal.App.3d 249, 266-267.) In contrast, *Mira Monte* held that a substantial change in circumstances surrounding a project,

A supplement to the EIR may be prepared in lieu of a subsequent EIR if only minor changes or additions to the EIR are necessary to address the project changes, changed circumstances, or new information. (Guidelines, § 15163, subd. (a).) If a subsequent EIR or supplement to an EIR is prepared, the same notice and opportunity for public review of the document must be provided as is required for a draft EIR. (Guidelines, §§ 15162, subd. (d), 15163, subd. (c).) We review an agency's determination that the conditions requiring the preparation of a subsequent EIR or a supplement to an EIR are not present under the substantial evidence standard. (Guidelines, §§ 15162, subd. (a), 15164, subd. (e); *Santa Teresa Citizen Action Group v. City of San Jose* (2003) 114 Cal.App.4th 689, 703; *Friends of Davis v. City of Davis*, *supra*, 83 Cal.App.4th at p. 1018.)

An agency need not make an express finding that the conditions requiring a subsequent EIR or a supplement to an EIR are not present, although an express finding is preferred.[7] An implied finding is sufficient provided that the agency considered the

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discovered shortly before EIR certification, required the preparation of a subsequent or supplemental EIR despite the agency's finding that adopted mitigation measures would reduce the impacts to an insignificant level. (*Mira Monte*, *supra*, 165 Cal.App.3d at pp. 360-361, 364-365.) To the extent *Mira Monte* suggests that a subsequent or supplemental EIR is required after EIR certification despite the agency's finding that adopted mitigation measures will reduce the impacts to an insignificant level, the opinion is inconsistent with the foregoing authorities and we decline to follow it.

[7] An express finding with a brief explanation would facilitate judicial review and therefore is preferred. "A brief explanation of the decision not to prepare a subsequent EIR pursuant to Section 15162 should be included in an addendum to an EIR, the lead agency's required findings on the project, or elsewhere in the record. The explanation must be supported by substantial evidence." (Guidelines, § 15164, subd. (e).)

relevant facts and actually made a determination. (*Benton v. Board of Supervisors*, *supra*, 226 Cal.App.3d at p. 1483, 1483; *City of San Jose v. Great Oaks Water Co.* (1987) 192 Cal.App.3d 1005, 1017; see 1 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act, *supra*, §§ 19.42, 19.43, pp. 751-752.)

" 'Significant effect on the environment' means a substantial, or potentially substantial, adverse change in the environment." (Pub. Resources Code, § 21068.) The Guidelines define "significant effect on the environment" in relevant part as "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."[8] (Guidelines, § 15382.)

"Substantial evidence" under CEQA "includes fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact." (Pub. Resources Code, § 21080, subd. (e)(1); see Guidelines, §§ 15384, subd. (b), 15064, subd. (f)(5).) "Substantial evidence is not argument, speculation, unsubstantiated opinion or narrative evidence that is clearly inaccurate or erroneous, or evidence of social or economic impacts that do not contribute to, or are not caused by, physical impacts on the

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[8] " 'Environment' means the physical conditions which exist within the area which will be affected by a proposed project including land, air, water, minerals, flora, fauna, ambient noise, and objects of historic or aesthetic significance. The area involved shall be the area in which significant effects would occur either directly or indirectly as a result of the project. The 'environment' includes both natural and man-made conditions." (Guidelines, § 15360; see Pub. Resources Code, § 21060.5.)

environment." (Pub. Resources Code, § 21080, subd. (e)(2); accord, *id*. § 21082.2, subd. (c).)

2. *The City Council Decision on June 12, 2001, Was a Discretionary Approval*

The purpose of the city council's directing the CLA to devise a process for further evaluation of particular environmental issues, oversee the further evaluation, and make recommendations concerning appropriate mitigation measures was to allow the city council to determine whether the project presented an unacceptable risk to public health and safety and whether further mitigation measures were necessary. Councilmember Michael Feuer stated at the city council meeting on June 20, 2000, "what's before us today is not a vote on whether to have the Mello-Roos bonds go forward. What's before us today is a process by which to assure the safety of this site or by which we determine that it's not a safe site. The jury is out. . . . It's clear to me that there needs from everyone's perspective to be further analysis of health and safety issues at this location."

The CLA report stated, "the CLA was instructed to report back to the Planning and Land Use Management Committee and the City Council to resolve the policy issues relative to the safety of the site." The CLA report stated that of the conditions evaluated only methane presented a potentially significant risk, and that the proposed methane mitigation system described in the report would reduce the risk to an acceptable level. The PLUM Committee report to the city council for the meeting on June 12, 2001, stated that the PLUM Committee "deferr[ed] to the findings of the CLA study" and

recommended that the city council "note and file" the CLA report. At the hearing on June 12, 2001, Councilmember Hal Bernson, a PLUM Committee member, stated, "I am satisfied that to our best efforts, the safety issue has been addressed and I would ask for an approval of the committee report."

The city council on June 12, 2001, adopted the recommendations by the PLUM Committee to "note and file" the CLA report, direct the planning department to require the project mitigation monitor to oversee implementation of the mitigation measures described in the report, and direct other city departments to coordinate with the planning department regarding implementation of the new methane mitigation system. Although the CLA report and the further evaluation encompassed by the report were initiated under the aegis of a decision on Mello-Roos bonds, the record shows that the purpose and effect of the CLA process was to allow the city council to consider the information gleaned through a careful evaluation of environmental issues of concern to both the public and councilmembers and decide whether and how to proceed with the development. Moreover, the decision by the city council to "note and file" the CLA report and adopt the recommended methane mitigation measures effectively was a decision to both adopt the CLA's findings stated in the report and modify the project by adopting the recommended mitigation measures. Playa Capital's characterization of the city council's decision on June 12, 2001, as approval of Mello-Roos financing is inaccurate. We conclude that the city council's decision to adopt the mitigation measures and proceed with the project as modified by the mitigation measures involved the exercise of subjective judgment and was a discretionary approval.

We reject the argument by Playa Capital that the decision by the city council was not a discretionary approval because the Department of Building and Safety had already "approved" the methane mitigation system in its letter of January 31, 2001. The Department of Building and Safety was one of several public agencies whose recommendations the CLA considered in preparing its report, which was submitted to the city council for its approval. The approval by the city council is the operative approval because the city council was the final administrative decisionmaker. (Cf. *Tahoe Vista Concerned Citizens v. County of Placer* (2000) 81 Cal.App.4th 577, 594.)

3. *A Subsequent EIR or a Supplement to the EIR Is Not Required with Respect to Certain Purported New Information*

a. *Petitioners' Specific Contentions*

Petitioners' specific contentions with respect to the purported changes and new information giving rise to the need for a subsequent EIR or a supplement to the EIR are (i) a subsequent EIR or a supplement to the EIR is required to consider a new or more severe significant impact even if substantial evidence supports a determination that mitigation will reduce the impact to an insignificant level; (ii) the discovery of thermogenic gas on the project site was new information of substantial importance, and there is no substantial evidence that the methane mitigation measures are feasible or will be effective, (iii) the methane mitigation measures will require long-term dewatering, which may cause subsidence and expansion of an existing plume of groundwater contamination; and (iv) new information shows that "friction piles" under buildings will exacerbate the movement of methane, BTEX, and hydrogen sulfide to the surface, and

the sampling of BTEX and hydrogen sulfide performed on site was inadequate and unreliable, so there is no substantial evidence to support the conclusion that no new or more severe significant impacts will result.

b. *Thermogenic Gas*

A new or more severe significant environmental impact does not require the preparation of a subsequent EIR or a supplement to an EIR if adopted mitigation measures will reduce the impact to a level of insignificance (*River Valley, supra*, 37 Cal.App.4th at p. 168; see *Laurel Heights II*, *supra*, 6 Cal.4th at p. 1130; 1 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act, *supra*, § 19.9, pp. 719-720; cf. Guidelines, § 15088.5, subd. (a)(2)), as stated *ante* in section 1 of the Discussion. Accordingly, we reject the argument that a subsequent EIR or a supplement to the EIR was required to consider potential significant impacts even if substantial evidence supports a determination that mitigation will reduce the impacts to an insignificant level. Assuming without deciding that the discovery of thermogenic gas was new information of substantial importance,[9] we conclude that the city impliedly found that mitigation will reduce the methane impacts to an insignificant level and that substantial evidence supports that finding, as we shall explain.

The CLA reported that Camp Dresser & McGee Inc., an environmental consultant hired by Playa Capital, implemented a pilot program by installing more than

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[9] Thermogenic gas originates deep within the earth and is produced geologically in association with oil deposits. In contrast, biogenic gas originates closer to the surface and is produced biologically through decay of organic materials.

70 temporary vent wells designed for Level III methane remediation, and that the program was successful. The CLA also reported that the city's Department of Building and Safety and its "peer reviewer," ETI, concluded that the proposed methane mitigation system "would adequately protect public safety." The CLA concluded that the mitigation measures "are adequate." The city impliedly adopted the CLA's findings stated in the CLA report, as stated *ante*, and therefore determined based on the CLA report and the matters discussed in the report that the mitigation measures will reduce the methane impacts to an insignificant level. We conclude that the CLA report and the evidence cited in the report and included in the administrative record, which we need not describe in detail, constitute substantial evidence supporting the conclusion that the mitigation measures are feasible and will reduce methane concentrations to an insignificant level. Thus, substantial evidence supports the city's finding that a subsequent EIR or a supplement to the EIR is not required with respect to the purported new information. Petitioners' discussion of the difficulties and uncertainties of methane mitigation fails to show an absence of substantial evidence to support the city's finding.

c. *Building Piles*

The 1993 EIR referred to "pile support" and "driven pile foundations" as mitigation measures for potential liquefaction, but did not discuss the potential for piles to exacerbate gas emissions. The CLA report also did not mention piles in discussing the potential risks from methane, BTEX, and hydrogen sulfide emissions. Comments to the draft report that were attached to the final report considered by the city council addressed the issue, however. A comment by a local resident stated, "While many

methane problems can be contained and mitigated under normal, stable ground conditions, the proposed Playa Vista Development would be built over unstable ground conditions requiring pilings. It is impossible to create the necessary containment and mitigation methane sealants under these conditions." A comment by a coalition of environmental advocacy groups, including some of the petitioners in this proceeding, stated, "Why has the City allowed Playa Vista to proceed with massive housing construction in areas that have the highest gas leakage problems, including the insertion of over three thousand pilings and other structures into the ground which provide additional paths for these toxic gases to enter the buildings and endanger their occupants?"

The CLA stated in written responses to the comment, also attached to the final report, "Piles and stone columns and the impermeable membrane required as methane mitigation can be 'sealed' to accommodate methane mitigation systems. Stone columns and driven piles densify the soil surrounding them, decreasing soil porosity and permeability. In addition, other elements of the methane prevention system, such as vent pipes and gravel layers, will dilute and vent any methane gas, minimizing the amount of gas that can accumulate underneath the methane barrier." The CLA stated further, "Several consultants have verified that the installation of piles and stone columns will not create a long term increase of gas migration from the aquifer." Thus, the CLA concluded that the piles would not exacerbate emissions of methane and other gases.

The CLA also reported that an environmental consultant hired by Playa Capital, Geometric Consultant Inc. (Geometric), evaluated the health risks associated with BTEX and hydrogen sulfide on the site in July 2000 and concluded that the risks associated with the levels detected were insignificant. The CLA reported that the city and an environmental consultant hired by the city, Kleinfelder, had misgivings about the Geometric report and that Kleinfelder conducted a separate health risk assessment and reached the same conclusion based on "very conservative" assumptions. The CLA concluded that health risks from BTEX and hydrogen sulfide soil gas emissions on the project site are insignificant and that no further investigation or remediation is warranted.

Assuming without deciding that there was new information of substantial importance concerning the use of building piles and the potential to exacerbate the movement of gases to the surface, we conclude based on the foregoing that the city impliedly found, based on the CLA's findings stated in response to comments, that the building piles will not exacerbate the movement of significant levels of methane, BTEX, and hydrogen sulfide to the surface and that no further investigation is warranted. The CLA report and the evidence cited in the report and included in the administrative record constitute substantial evidence supporting those conclusions. Thus, substantial evidence supports the city's determination that a subsequent EIR or a supplement to the EIR is not required with respect to building piles.

4. *Groundwater Dewatering in Connection with the Methane Mitigation Measures Is a Potentially Substantial Project Change*

Correspondence from Sepich to the city's Department of Building and Safety in 1999 recommended "permanent groundwater dewatering systems at all basements" and stated, "permanent groundwater dewatering measures are also critical to insuring the proper operation of the methane mitigation systems" and "permanent groundwater dewatering measures are designed to keep the subslab methane vent piping clear." Although the document formally presenting the Playa Vista Methane Prevention, Detection and Monitoring Program proposed by Sepich in January 2001 and later adopted by the city did not discuss groundwater dewatering, correspondence from Sepich to the Department of Building of Safety in March and April 2001 stated that the methane mitigation system would include "a permanent subslab groundwater dewatering system" and "groundwater dewatering systems below all basement levels."[10]

The 1993 EIR and the conditions imposed by the city council upon approval of a tentative tract map in 1993 cautioned against dewatering in connection with a proposed sewer along Jefferson Boulevard and "long-term pumping" in connection with subterranean structures, noting the potential for subsidence and exacerbation of existing groundwater contamination. We conclude that the permanent groundwater dewatering contemplated in connection with the methane mitigation measures adopted by the city is

[10] Dewatering refers to the removal of water.

a *potentially* substantial project change because it could result in those new or substantially more severe significant impacts.[11]

A subsequent EIR is required if the agency determines, based on substantial evidence in the administrative record, that "Substantial changes are proposed in the project which will require major revisions of the previous EIR or negative declaration due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects." (Guidelines, § 15162, subd. (a)(1).) In light of the *possibility* that groundwater dewatering will result in new or substantially more severe significant impacts, the city council was required to determine whether new or substantially more severe significant impacts will result and will require major revisions to the EIR, before approving the project change. (*City of San Jose v. Great Oaks Water Co.*, *supra*, 192 Cal.App.3d at p. 1017; see 1 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act, *supra*, § 19.29, pp. 735-736.)

5. *The City Did Not Determine Whether a Subsequent EIR or a Supplement to the EIR Was Required with Respect to Groundwater Dewatering, as Required*

The CLA report described the proposed methane mitigation system and concluded that the system was adequate and that there was no evidence that the

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[11] The parties dispute whether the permanent groundwater dewatering includes dewatering both directly below the basement of each building and at the level of the so-called 50-foot aquifer, where level III mitigation is required, or only the former. The administrative record does not readily yield an answer to this question, and we need not resolve the dispute.

mitigation measures would increase the risk of subsidence. The CLA report did not mention groundwater dewatering, however, either in describing the proposed mitigation system or in the section discussing the potential for subsidence.[12] The representation at oral argument by counsel for Playa Capital that the CLA report and its appendices described in detail the methane mitigation system dewatering system is incorrect. A comment by a local resident to the draft report asked under the heading "Subsidence," "If the property is situated on a significant aquifer, and the water (and gas) are diverted, what will occur as a result?" The CLA stated in its written response to the comment, "Any dewatering of the aquifer will require a hydrogeologic report to assess and mitigate any potential for subsidence. The hydrogeologic study will ensure that groundwater withdrawal will be less than the recharge rate of the aquifer." Neither the comment nor the response expressly mentioned groundwater dewatering in connection with methane mitigation.

The record supports the conclusion that the city council impliedly adopted the CLA's findings stated in the CLA report and in responses to comments included in the final report, as stated *ante*. *The record does not support the conclusion, however, that the city council made implied findings with respect to matters not meaningfully discussed in the CLA report or in responses to comments.* The brief mention of groundwater dewatering in response to a comment is not a meaningful discussion of

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[12] The document entitled Playa Vista Methane Prevention, Detection and Monitoring Program submitted by Sepich on January 30, 2001, also failed to mention groundwater dewatering, as stated *ante*.

groundwater dewatering in connection with the methane mitigation measures when neither the CLA report nor the comment, nor the response, expressly mentioned dewatering in connection with the methane mitigation measures or described either the dewatering contemplated in connection with those mitigation measures or the potentially significant impacts.[13] We therefore conclude that the city did not determine whether a subsequent EIR or a supplement to the EIR was required with respect to groundwater dewatering, as required. The appropriate remedy in these circumstances is to order the city to make that determination and to vacate its approval of the methane mitigation measures until it makes the determination and complies with CEQA.[14] (See Pub. Resources Code, § 21168.9, subd. (a); 1 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act, *supra*, § 19.29, p. 736.)

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[13] We deny Playa Capital's request to augment the administrative record to include two reports by its consultant discussing the proposed dewatering. There is no indication that the reports, which were addressed to Playa Capital, were submitted to or considered by the CLA or city council, so the documents are not relevant to the city's council's decision on June 12, 2001. Moreover, Playa Capital cites no authority for this court to augment the administrative record on appeal. The augmentation request is essentially a request for this court to consider documents that are not part of the administrative record, without an explanation why it would be appropriate for us to do so.

[14] We granted Playa Capital permission to lodge a declaration by its vice president. The declaration provides information pertaining to sales of parts of the development to other developers and sales of individual units to end users, and discusses the extent of dewatering. Playa Capital cites no authority for this court to consider evidence that was not before the city council and is not included in the administrative record. We therefore deny permission to file the document.

6. *Petitioners Are Excused from the Exhaustion of Administrative Remedies Requirement*

A party can sue to challenge a public agency's compliance with CEQA only if the party timely objected to the project approval on any ground and the grounds for noncompliance alleged in the lawsuit were presented to the public agency "by any person" during the public comment period or prior to the close of the public hearing on the project, if any. (Pub. Resources Code, § 21177, subds. (a), (b).) The requirement of exhaustion of administrative remedies affords the agency an opportunity to address the alleged ground for noncompliance, correct any deficiency, and avoid costly litigation or reduce the scope of litigation. (*Sierra Club v. San Joaquin Local Agency Formation Com.* (1999) 21 Cal.4th 489, 501; *Westlake Community Hosp. v Superior Court* (1976) 17 Cal.3d 465, 476.) The exhaustion requirement also facilitates the development of a complete factual record and allows the agency to apply its expertise, both of which can assist later judicial review, if necessary. (*Sierra Club*, *supra*, at p. 501.) The exhaustion requirement under CEQA does not apply to an alleged ground for noncompliance if the agency provided no public hearing or other opportunity for members of the public to object prior to the project approval, or if the agency failed to give the notice required by law. (Pub. Resources Code, § 21177, subd. (e); *Endangered Habitats League, Inc. v. State Water Resources Control Bd.* (1997) 63 Cal.App.4th 227, 238.) The exhaustion requirement is excused if the notice included an incomplete or misleading project description and the public had no meaningful opportunity to address the pertinent issues. (*McQueen v. Board of Directors* (1988) 202 Cal.App.3d 1136, 1150,

disapproved on another point in *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 576 & fn. 6.)

The city council agenda for the meeting on June 12, 2001, stated that the city council would consider the CLA report and the PLUM Committee's report and recommendations based on the CLA report, and listed the PLUM Committee's recommendations. The PLUM Committee's report and recommendations, described *ante*, did not mention groundwater dewatering. The CLA report did not mention groundwater dewatering either in describing the proposed mitigation system or in discussing the potential for subsidence. The brief mention of dewatering in response to a comment did not adequately inform the public of the nature and extent of groundwater dewatering involved in the proposed mitigation measures. We conclude that the description of the proposed mitigation measures provided in the CLA report was incomplete and misleading in this respect. Moreover, there was no discussion of groundwater dewatering at the city council meeting on June 12, 2001. The public therefore had no meaningful opportunity to object to the city's failure to require a subsequent EIR or a supplement to the EIR with respect to groundwater dewatering. Petitioners therefore are excused from the exhaustion requirement on this issue.

Playa Capital contends the Department of Building and Safety approved the mitigation system, including groundwater dewatering below basement levels, and issued five building permits from November 2000 to January 2001.[15] Petitioners

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[15] The permits actually were issued in November and December of 2000.

administratively appealed the permit approvals by petitioning the city's Board of Building and Safety Commissioners, and the commissioners denied the petitions in April 2001, but Petitioners did not challenge the commissioners' decision by petitioning the city council.[16] Playa Capital contends Petitioners failed to exhaust their administrative remedy because they failed to challenge the commissioners' decision. We reject this argument. The city council decided in June 2000 that the city council would make the final administrative decision concerning the proposed methane mitigation system after considering the environmental issues addressed in the CLA report. That procedure was in place before the commissioners' decision, so there was no need for Petitioners to formally challenge the commissioners' decision in order to obtain review by the city council.

7. *The Petition Was Timely*

CEQA establishes different limitations periods depending on the nature of and circumstances surrounding the agency's decision. For example, a proceeding challenging a decision that a project will have no significant environmental impact must be commenced within 30 days after the filing and posting of a notice of determination, and a proceeding challenging a decision that a project is exempt from CEQA must be commenced within 35 days after the filing and posting of a notice of exemption.

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[16] The issues raised by Petitioners in the administrative appeals concerned whether the project adequately addressed potential sources of methane, including an adjacent Southern California Gas Company facility and abandoned oil wells, the potential earthquake hazard, subsidence, and the effectiveness of the methane mitigation system.

(Pub. Resources Code, § 21167, subds. (b), (d); Guidelines, § 15112, subd. (c)(1), (2).) In other circumstances where no formal notice is given, the 180-day limitations period of Public Resources Code section 21167, subdivision (a), generally applies. (Guidelines, § 15112. subd. (c)(5).)

Public Resources Code section 21167, subdivision (a), states that a 180-day limitations period applies to an action or proceeding challenging "an agency's decision to carry out or approve the project" that may have a significant environmental impact if the agency failed to determine whether the project may have a significant environmental impact. (Pub. Resources Code, § 21167, subd. (a).)[17] Guidelines section 15112, subdivision (c)(5)(A), states that if no more specific statute of limitations applies, the 180-day limitations period of section 21167, subdivision (a), applies to an agency's decision to carry out or approve a project. Absent a more specific statute of limitations applicable to an agency's decision whether a subsequent EIR or a supplement to an EIR is required, we construe "decision to carry out or approve the project" (Pub. Resources Code, § 21167, subd. (a)) to encompass a discretionary project approval after an EIR is certified (in the words of Guidelines section 15162, subdivision (c), a "further

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[17] "An action or proceeding alleging that a public agency is carrying out or has approved a project that may have a significant effect on the environment without having determined whether the project may have a significant effect on the environment shall be commenced within 180 days from the date of the public agency's decision to carry out or approve the project, or, if a project is undertaken without a formal decision by the public agency, within 180 days from the date of commencement of the project." (Pub. Resources Code, § 21167, subd. (a).)

discretionary approval") and conclude that the 180-day limitations period of section 21167, subdivision (a), applies here.

The limitations period began to run at the earliest when the city council decided to adopt the mitigation measures and proceed with the project as modified. (See *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 939 [held that an action challenging the failure to prepare a subsequent EIR must be filed within 180 days after the plaintiff knew or reasonably should have known that the project under way differed substantially from the one described in the EIR].) That occurred on June 12, 2001. The city council's decision on June 20, 2000, directing the CLA to evaluate the environmental impacts further was not a further discretionary approval because the city council at that time did not decide to adopt the mitigation measures and proceed with the project as modified, but only to study the issues further. In light of the city council's decision that the CLA should oversee further evaluation of the environmental issues and report to the PLUM Committee, the determination by the Department of Building and Safety in January 2001 that the methane mitigation system was adequate was only advisory and was not a final administrative decision. (Cf. *Tahoe Vista Concerned Citizens v. County of Placer*, *supra*, 81 Cal.App.4th at p. 594.)

The notice of exemption filed and posted on June 27, 2001, pertained to the decision to issue Mello-Roos bonds, not the decision to amend the project by adopting the proposed methane mitigation measures. This is clear from both the project description in the notice of exemption and the reasons stated for the exemption.

Petitioners commenced this proceeding on Monday, December 10, 2001, 181 days after June 12, 2001. The petition was timely because the 180th day fell on the preceding Sunday. (Code Civ. Proc., § 12a, subd. (a); Gov. Code, § 6700, subd. (a).)

8. *Collateral Estoppel Does Not Apply*

Collateral estoppel or issue preclusion precludes the relitigation of an issue that was previously adjudicated if (1) the issue is identical to an issue decided in a prior proceeding; (2) the issue was actually litigated; (3) the issue was necessarily decided; (4) the decision in the prior proceeding is final and on the merits; and (5) the party against whom collateral estoppel is asserted was a party to the prior proceeding or in privity with a party to the prior proceeding. (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341.) "The 'identical issue' requirement addresses whether 'identical factual allegations' are at stake in the two proceedings, not whether the ultimate issues or dispositions are the same. [Citation.]" (*Id*. at p. 342.)

The petitioners in *Grassroots Coalition v. City of Los Angeles (Playa Capital Company, LLC)*, *supra*, challenged the city's failure to require a subsequent EIR for the project after the city council had directed the CLA to oversee the further investigation but before the CLA issued its report and before the city council accepted the findings and recommendations of the CLA report. The proceeding therefore did not involve a challenge to the further discretionary approval at issue here or an evaluation of the evidence presented in the CLA report. We conclude that the issue presented and decided in that case is not identical to the issue presented here. We therefore need not decide whether the other requirements for application of collateral estoppel are present.

DISPOSITION

The judgment is reversed with directions to the superior court to grant the petition and issue a peremptory writ of mandate ordering the city to vacate its approval of the methane mitigation measures, for the purpose of determining whether a subsequent EIR or a supplemental EIR is required with respect to groundwater dewatering, and proceed accordingly as required by CEQA. Petitioners shall recover their costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CROSKEY, J.

WE CONCUR:

KLEIN, P.J.

ALDRICH, J.