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CITY OF BELL

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES, CENTRAL DISTRICT

THE SALVATION ARMY, a California non-profit religious corporation; EAST YARD COMMUNITIES FOR ENVIRONMENTAL JUSTICE, a non-profit corporation; GROWGOOD INC., a non-profit corporation; and SHELTER PARTNERSHIP, a non-profit corporation,

Petitioners/Plaintiffs,

v.

CITY OF BELL, CALIFORNIA, a public entity; and Does 1-100, Inclusive,

Respondents/Defendants.

CEMEX CONSTRUCTION MATERIALS PACIFIC, LLC, a Delaware corporation; and PI BELL, LLC, a Delaware corporation,

Real Parties in Interest.

Case No. 19STCP00693

Assigned for All Purposes to:
Hon. John A. Torribio, Dept. G

RESPONDENT/DEFENDANT CITY OF BELL'S OPPOSITION BRIEF

Date:	November 13, 2020
Time:	9:00 AM
Dept.:	G
Action Filed:	March 7, 2019

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I. INTRODUCTION

Petitioners, the Salvation Army, East Yard Communities For Environmental Justice, Growgood Inc., and Shelter Partnership ("**Petitioners**"), have been trying to deliberately block the development of a commercially zoned industrial parcel in the City of Bell ("**City**") for years, despite the City's compliance with all applicable laws and good faith efforts to address the Petitioners' concerns. This lawsuit is the second bite of the apple in their attempt to impede development of the parcel, which would create new jobs for the community and promote economic growth.

The facility at issue is located on the commercially zoned industrial parcel known as Parcel A, which is one of four parcels that comprise the Bell Business Center Project. AR 248.[1] In 2013, the City certified a final environmental impact report ("**FEIR**") and executed a development agreement ("**DA**") for the development of warehouse, distribution, logistics, and light industrial land uses in compliance with the City's General Plan and Zoning Ordinance. AR 1, 103-106, 242-246, 247-244, 475-930, 2473-2569. Historically, access to Parcel A has been through "K St.," a private road owned by Real Party In Interest, PI Bell LLC. AR 267, 3768. K St. also provides access to the Salvation Army's homeless shelter and Growgood Inc.'s community garden. AR 3768. Rickenbacker Rd. also borders Parcel A, but is also privately owned.[2] AR 267.

In 2016, CEMEX proposed to develop an aggregate material storage facility on Parcel A. Construction aggregate would be brought to the site by rail, stored for resale, then leave the facility by truck. AR 3049. A City employee, without a good understanding of the DA, did not convene the Design Review Board ("**DRB**") created by the DA for such purpose, and approved the facility. AR 3049. In 2018, Petitioner East Yard Communities for Environmental Justice ("**EYCEJ**"), filed suit against the City challenging the 2016 approval. AR 3049. A Settlement Agreement was entered into between the City and CEMEX, which required the CEMEX development on Parcel A to undergo

[1] Citations to the Administrative Record are denoted by "AR" followed by the record page number.

[2] The General Services Administration did not include reciprocal easements for private, non-exclusive rights of ways and utilities for Parcel A when it was transferred prior to 2008. AR 4533.

review by the DRB per the DA. AR 3050. Subsequently, the City and EYCEJ also entered into a stipulation to dismiss the 2018 lawsuit, without prejudice. AR 3050. Representatives of the Salvation Army and Shelter Partnership participated in at least one meeting regarding settlement of the prior lawsuit. Declaration of June S. Ailin, ¶ 3.

In November of 2018, CEMEX submitted a design application for a storage facility to stow aggregate material in Parcel A, which included modifications to the 2016 facility design to address the Petitioners' concerns. AR 3878-4199. The DRB reviewed and approved the application, finding the design substantially conforms with the DA and the FEIR. AR 445-460.

As further explained below, the facility proposed in CEMEX's design application is the type of logistics use contemplated in the DA. The DRB findings and determinations that it conforms with the standards set forth in the DA and FEIR are supported by substantial evidence. The DRB's design and aesthetic review is a ministerial decision not subject to the California Environmental Quality Act ("**CEQA,**" Pub. Res. Code §§ 21000 et seq.). Therefore, the City was not required to conduct further environmental analysis. The City respectfully requests that the Court deny the Petition.

II. FACTUAL BACKGROUND

A. The Beginnings of the Bell Business Park Project.

In 2008, the U.S. Government determined it no longer needed the Bell Federal Service Center and transferred certain portions of it, which became known as Parcels F, G and H ("**Three Parcels**") to the City, while retaining others. AR 360, 3768. To finance the purchase, the City issued $35 million in bonds, which were purchased by Dexia, secured by a lease on the Three Parcels. AR 18, 3770. When the bonds matured on November 1, 2010, the City defaulted. AR 18. On October 14, 2011, Dexia filed suit against the City alleging $38 million in damages, and sought to foreclose on the Three Parcels. AR 18, 2829. On June 10, 2013, the City entered into a court approved Stipulated Judgement with Dexia, under which the Three Parcels would be sold to a purchaser for at least $28.7 million to be paid to Dexia. AR 18, 2829.

Adjacent to the Three Parcels, the City also owned approximately 15 acres of land, later known as Parcel A. AR 2830. The Three Parcels and Parcel A (the "**Bell Business Center Project**" or "**Project**") were listed for sale. AR 2830. Pacific Industrial ("**PI Bell**") was selected based on the

ability to meet the Dexia settlement agreement terms, strength in their financial backing, and commitment to the community, among other factors. AR 2830. In 2013, the City and PI Bell entered into a Purchase and Sale Agreement for a purchase price of $44.5 million. AR 18-102, 2834. The successful sale of the Project to PI Bell was critical to meeting the terms of the stipulation, eliminating the potential for a deficiency in payment of the debt owed to Dexia, increasing property values, and creating new jobs in the City. AR 2838.

B. <u>The City and PI Bell Enter Into a Development Agreement.</u>

In conjunction with the execution of the Purchase and Sale Agreement, the City and PI Bell entered into a DA for the development of up to 840,390 sq. ft. of building area to accommodate warehouse, distribution, logistic, and light industrial uses. AR 242-246, 304. The DA is consistent with the General Plan and Zoning Code of the City; however, in case of a conflict, the DA will prevail over any other regulations. AR 262.

The DA describes the eligible uses on the Project as "industrial, manufacturing, and warehouse" (AR 255), and specifically outlines the following eligible uses: (1) any use currently permitted in the Manufacturing ("**M**") or Commercial Manufacturing ("**C-M**") zoning districts; (2) warehousing; (3) distribution; (4) logistics; (5) loading and unloading of parcels and freight; (6) parcel and freight forwarding; (7) general office uses; and (8) onsite railroad service and transfer facility (AR 325). The DA also permits "onsite, exterior storage of trailers, shipping containers, or other materials used in support of a principal use and subject to adequate screening from public view," as accessory uses. AR 325.

The DA also created the DRB, comprised of the Community Development Director, City Engineer, one member of the Planning Commission, and one member of the City Council to be selected by the City Council. AR 253. The parties to the DA acknowledge "that design review is needed in order to encourage the orderly and harmonious appearance of structures and property upon and around the Site, to maintain the public health, safety and welfare and to maintain the property and improvement values throughout the City and to encourage the physical development of the City." AR 269. The DRB is charged with design review approval for all buildings and landscape improvements. AR 269. To grant design review approval, the DRB must find and

determine the improvements are consistent with the requirements in the Scope of Development, Basic Design Concept, Conditions of Approval, and FEIR. AR 270. The DA's Scope of Development provides that the design of the project must be of substantially similar character, architecture, and style to the Basic Design Concept. AR 303.

The DRB also has limited authority to administratively approve minor modifications to the Basic Design Concept. AR 305. What constitutes a minor modification is determined on a case-by-case basis at the discretion of the DRB. AR 306. Approval of any minor modification is contingent upon the DRB finding that such modification: (1) is consistent with the maximum total square footage for the project; (2) is in substantial compliance with the fundamental theme, idiom, and design intent of the Basic Design Concept; (3) promotes the Public Benefits outlined in the DA; and (4) would not require additional environmental review subject to Section 15162 of the CEQA Guidelines. AR 306.

In regards to the development of each parcel within the Project, the DA provides scenarios that are approved by virtue of approval of the DA, as long as the combination of building area, use and trip generation are within the parameters of the FEIR. AR 261. Parcel A may be developed according to one of three scenarios depicted in the DA's Site Plans. AR 264, 310-312. The City intended that the configurations would change depending on the tenants using the site. AR 4606.

The Development Standards provide the maximum building area allowed on Parcel A as follows: 274,860 sq. ft. for industrial/warehouse space and 20,000 sq. ft. for an ancillary office space. AR 324. The maximum building height is 150 feet if not adjacent to residential zoned property, or 50 feet if it is adjacent to residential zone property. AR 324. The nearest residential area is over 2,231 feet to the west of Parcel A. AR 588. The Development Standards further provide that the development will be reviewed to ensure that it does not exceed the maximum building area for industrial, warehouse, and logistic use, office use or total building size. AR 324.

C. <u>The City Prepared and Certified a Final Environmental Impact Report for the Bell Business Center Project.</u>

In 2013, the City also prepared and certified a FEIR for the Bell Business Center Project in accordance with CEQA. AR 1, 10-17, 475-930, 2473-2569. The FEIR anticipated the development

of the four parcels for warehouse distribution and logistics land uses. AR 531. The DA did not propose any buildings as part of the Project, but it did include site plans and potential building footprints for each of the four parcels. AR 485, 529-531. The City intended to allow for flexibility in design and construction on the parcels. AR 530. One of the Project's objectives was to "promote economic growth and strengthening of the city's industrial area, through capital investment that attracts new light industrial, warehousing or distribution uses and results in the creation of new jobs, the establishment of new businesses, and the expansion of the city's tax base….Allow flexibility of building size and location for warehousing, distribution, or light industrial projects that create new jobs and promote quality development." AR 532.

The area in which the Project is located is designated Industrial in the land use element of the City's General Plan and is zoned C-M, under the City's Zoning Ordinance. AR 728. Except as restricted by the DA, the uses permitted in the Project include any of the permitted uses in Section 17.36.020 of the Bell Municipal Code, which includes "warehousing, distribution and storage facilities." AR 735-736. Uses within the C-M zone district must be conducted within a completely enclosed building, except for those uses which are customarily conducted in the open. AR 735.

The FEIR recognizes that the overall Project is ideal for warehousing because of its adjacency to Interstate 710, which will eliminate heavy-duty truck traffic on the local road network. AR 652. On August 22, 2013, the City posted a Notice of Determination for the Project in compliance with Public Resources Code §§ 21108 or 21152. AR 1, 251. The City Council determined the Project would nevertheless have significant and unavoidable air quality and traffic impacts. AR 13. The City Council adopted a Statement of Overriding Considerations finding the Project's public benefits outweighed the unavoidable impacts. AR 14.

D. <u>Parcel A.</u>

Parcel A is a 14.5 acre lot able to accommodate 274,860 sq. ft. of industrial/warehouse space and 20,000 sq. ft. ancillary office space for a total building space of 294,860 sq. ft. ("**Site**"). AR 324, 530. As an example of potential development, the DA shows a development footprint which is the largest total building area. AR 310-312, 324, 529-530, 537. The FEIR notes the DA showed

possible building configurations for the Site, but takes into account that other site designs could be put in place that would result in less total building area and therefore less overall impact. AR 530.

When the FEIR was prepared, diesel trucks from Parcel A traveled along K St. because there was no legal access to Rickenbacker Rd. AR 727. The DA and FEIR contemplated an extension of Rickenbacker Rd., which will allow the existing driveway from Parcel A onto K St. to be closed. AR 734. The DA states the developer of Parcel A shall notify the City of its intent to either relocate or abandon the 1st St/Secondary access way on the east to connect to K St. AR 334.

E. <u>The 2016 CEMEX Design</u>

1. City Employee Misconstrues Application of the DA to the CEMEX Facility.

In 2016, CEMEX[3] submitted an "Architectural Review Board Application" to the City for a "transfer facility for building materials" on Parcel A ("**2016 Design**"). AR 4214-4222. CEMEX was to add a new storage facility with an open conveyer system, replace existing office trailers, provide parking, and close entry at K St. on Parcel A. AR 4219. The 2016 Design would be surrounded by concrete tilt-up walls similar to the building walls of the adjacent buildings. AR 4219. The walls would screen the stored building material received. AR 4219. The facility would occupy approximately 71,000 sq. ft. (AR 4219), and would be used to transfer, load, unload, and distribute construction aggregate received by rail (AR 4220). Aggregate material would arrive at the Site by rail cars and conveyer belts would then move it to the storage facility. For distribution, aggregate would be loaded onto trucks from six silos 14 feet in diameter by 21 feet high, mounted on a steel structure 20 feet high. AR 4220. Access to the Site would be from Rickenbacker Rd. AR 4221.

The 2016 Design was reviewed by an ad-hoc administrative body created by then-City employee, Derek Hull ("**Mr. Hull**"), not the DRB contemplated in the DA. AR 3049, 4632- 4633, 3698, 3700. In short, the real DRB never reviewed the 2016 Design. AR 4633-4634. Through a

[3] Burlington Northern Santa Fe Railroad ("**BNSF**") had been leasing Parcel A from the City prior to the sale of the parcel to PI Bell. AR 258. In 2017, PI Bell and BNSF extended the lease for 33 years. AR 4223-4235. CEMEX entered into a 32-year sublease of Parcel A with BNSF. AR 4236-4248.

letter dated December 15, 2016 Mr. Hull approved the 2016 Design. AR 3700. Thereafter, CEMEX obtained building permits for the facility, and began construction on the Site. AR 3049.

2. 2018 Lawsuit and Settlement of Said Lawsuit.

On January 22, 2018, EYCEJ and Mark Lopez filed a lawsuit challenging the City's approval of the 2016 Design. AR 3049, 4394. After Mr. Hull's departure from City employment, it became evident that he simply was not familiar with the DA and he had not consulted with the City Attorney about the design of the CEMEX facility. AR 4635. The City never defended Mr. Hull's handling of the 2016 Design, as is evident from the March 23, 2018 letter to CEMEX's legal counsel from the City Attorney critiquing approval of the 2016 Design. AR 4635, 4395.

Following extensive negotiations, which included all Petitioners named in this lawsuit even though some of them were not parties to the 2018 case, the City and CEMEX identified a course of action to comply with the DA. AR 4395. A Settlement Agreement was executed between the City and CEMEX to permit administrative review by the DRB, to the extent appropriate, in strict compliance with the terms of the DA. AR 4396. The Settlement Agreement also required the enclosure of all ground mounted equipment, a dust control and storm water plan in accordance with all local and state regulations, and adherence to guidelines in the 2013 FEIR Transportation and Circulation plan to manage truck distribution routes. AR 4397. CEMEX also agreed to pay the City an annual $400,000 community impact fee for the enhancement of public benefit upon the issuance of a Final Certificate of Occupancy, which is not a payment for approval, as alleged by Petitioners. (Opening Brief ("OB") 8:15; AR 4398.) The community impact fee would be used to pay for law enforcement, community development, parks, recreation, senior programs, and enforcement of the conditions of approval. AR 3772. The City also recognized that the <u>*use*</u> of the facility, not the sum, would pay more than any other business in the City and help alleviate the City's balance of payment issues. AR 3772. Further, CEMEX agreed to support a local hire program and the City agreed to consider a future proposal from CEMEX to develop a ready mix concrete plan subject to full CEQA review. AR 4398.

On September 13, 2018, the City, EYCEJ, Mark Lopez, CEMEX and PI BELL entered into a stipulation to dismiss the litigation without prejudice. AR 4411-4426.

F. The 2019 CEMEX Design

1. CEMEX Submits an Application to the Design Review Board.

On November 9, 2018, CEMEX submitted an application for design review to the DRB for an aggregate distribution facility on Parcel A ("**2019 Design**"). The 2019 Design is described as a logistics and distribution facility that will support the transport of construction materials (i.e. aggregate) via the onsite railroad services, and subsequently transfer the materials to customers by truck. AR 3886. Similar to the 2016 Design, the 2019 Design states that aggregate will arrive to Parcel A by rail and a covered conveyer belt will move the material to the facility for storage. AR 3886, 3918.

The application does not contemplate a facility with a roof because the use typically occurs in an unenclosed setting. AR 3886. From there, four silos, as opposed to six silos, will move the aggregate from the facility to the trucks. AR 3886. The main building will be 49,380 sq. ft., the office building will be 1,440 sq. ft., and a guard booth will be 420 sq. ft., for a total building area of 51,240 sq. ft. AR 3903. The main building will be 40 ft. tall (AR 3903), the tallest portion of the conveyer system is 49 ft. tall (AR 3916), and the silos will be approximately 48 ft. tall (AR 3914).

2. The DRB Finds the 2019 Design is Consistent and Substantially Conforms to the DA and FEIR.

On January 24, 2019 the DRB held a noticed public meeting to hear public testimony, and consider whether the 2019 Design was consistent with the DA and FEIR. AR 3047, 3641. The public meeting was continued to January 31, 2019 to allow Petitioners and the City to discuss a resolution regarding the only outstanding issue at the time; the use of K St. and Rickenbacker Rd. AR 3564-3565. Petitioners, CEMEX, PI Bell and the City were negotiating a tolling agreement to address the parties concerns regarding K St. and obtain legal rights for Rickenbacker Rd., while preserving Petitioners' legal rights. AR 3576-3578, 3583-3584. The parties extensively negotiated the Tolling Agreement, but ultimately the Petitioners backed out and refused to sign. AR 3767.

On January 31, 2019, the DRB reconvened and adopted "Resolution 2018-23 DRB" ("**Resolution**"), finding the following: (1) the design documents were consistent with the Scope of Development in the DA, which includes the Basic Design Concept and Development Standards and

Permitted Land Uses; (2) the design documents are consistent with the Conditions of Approval for the Bell Business Park Project; and (3) to the extent any of the foregoing findings were overturned, in the alternative, any deviations by the 2019 Design are found to be minor and the 2019 Design promotes the public benefits outlined in the DA. AR 447-449.

3. 2019 Lawsuit.

Petitioners filed suit on March 7, 2019, alleging the City failed to comply with CEQA. Complaint.

4. Petitioners' Fail to Support City's Efforts to Obtain Legal Access to Rickenbacker Rd.

The DA states that the developer must exercise "all due diligence" in an attempt to reach an agreement with the owners of Rickenbacker Rd. for the use and maintenance of the road within three years of the DA's effective date. AR 267. If after the developer is unable to negotiate such arrangement, it may ask the City to consider establishing an assessment district for the purposes of transferring ownership of Rickenbacker Rd. to the City, subject to an objection right by adjacent land owners, including Shelter Partnership. AR 267. PI Bell has been unable to secure the easement. AR 3768. The owners of Rickenbacker Rd. are opposed to the assessment district. AR 449.

On January 24, 2018, PI Bell recommended the City attempt to obtain an easement from the owners of Rickenbacker Rd. and then once the City obtains legal access, the City could then grant an easement to CEMEX for the use of Rickenbacker Rd.. AR 3723. On August 29, 2018, the City wrote to the General Services Administration ("**GSA**") formally requesting an easement for the use of Rickenbacker Rd. AR 3725. During an October 21, 2018 conference call, the GSA asked the City to provide additional information, which the City submitted to the GSA on December 21, 2018. AR 3730, 3763. Due to a government shutdown, the GSA did not respond until February 14, 2019. AR 3763. The GSA requested letters of support from the adjacent property owners, including Shelter Partnership. AR 3764. The City asked Petitioners for their support, but on March 22, 2019, by an email from their attorney, Petitioners advised the City they would not support the City's application with the GSA. AR 3765. Absent Petitioners' support, the City's request for an easement to use

Rickenbacker Rd. was doomed, so the City withdrew the request AR 3765. Neither Petitioners nor their counsel have written to the City contradicting the statements made in the letter. AR 3766.

After failing to support the City's request with the GSA, Petitioners filed a First Amended Complaint on March 28, 2019.

III. STANDARD OF REVIEW

Petitioners argue that the DRB abused its discretion in determining the CEMEX facility conformed to the FEIR and DA. The Court reviews the DRB's findings for substantial evidence. *Dore v. County of Ventura* (1994) 23 Cal.App.4th 320, 326-327. Findings are to be liberally construed to support rather than defeat the decision under review. *Id*. The court may not "disregard or overturn a finding that would have been equally or more reasonable" or substitute its own deductions for that of the agency. *Craik v. County of Santa Cruz* (2000) 81 Cal.App.4th 880, 884; *Donley v. Davi* (2009) 180 Cal.App.4th 447, 456. Unless the finding, viewed in the light of the entire record, is so lacking in evidentiary support as to render it unreasonable, it may not be set aside. *Sasco Elec. v. Cal. Fair Employment & Housing Comm'n.* (2009) 176 Cal.App.4th 532, 536.

Under the substantial evidence standard of review, courts "must affirm [the agency's] finding if there is any substantial evidence, contradicted or uncontradicted, to support it." *Id*. at 1114. Substantial evidence includes a "fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact." Pub. Res. Code § 21080(e); CEQA Guidelines § 15384 (b). "Unsubstantiated fears and desires of project opponents do not constitute substantial evidence." *Porterville Citizens for Responsible Hillside Development v. City of Porterville* (2007) 157 Ca1.App.4th 885, 901. A court must "resolv[e] all evidentiary conflicts in the agency's favor and indulg[e] . . . all legitimate and reasonable inferences to uphold the agency's finding . . ." *World Bus. Acad. v. California State Lands Comm'n* (2018) 24 Cal.App.5th 476, 499. The Court must give the lead agency "the benefit of the doubt on any legitimate disputed issues of credibility." *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1996) 42 Cal.App.4th 608, 617.

Petitioners also argue that the City was required to undertake subsequent environment review of the CEMEX facility. In a challenge to a public agency's determination that an agency action is exempt from CEQA review, a court applies the substantial evidence standard to review the

agency's finding. *CREED-21 v. City of San Diego* (2015) 234 Cal.App.4th 488, 510-1. The substantial evidence standard of review also applies to an agency's decision that further environmental review is not required so long as the record, viewed in a light most favorable to the agency's decision, is supported by substantial evidence. CEQA Guidelines § 15064(f)(7); *Mani Bros. Real Estate Group v. City of Los Angeles* (2007) 153 Cal.App 4th 1385, 1398.

Finally, Petitioners argue the DRB had a ministerial duty to conduct further proceedings due to the City's March 22, 2019 letter, citing Code of Civil Procedure § 1085. Courts exercise limited review in ordinary mandamus proceedings and "uphold an agency action unless it is arbitrary, capricious, lacking in evidentiary support, or was made without due regard for petitioner's rights." *Sequoia Union High Sch. Dist. v. Aurora Charter High Sch.* (2003) 112 Cal.App.4th 185, 195.

IV. ARGUMENT

The 2019 Design contemplates the type of warehouse, distribution and storage facility contemplated in the DA. Further, the DRB properly made findings and determinations that the 2019 Design conforms with the standards set forth in the DA. The DRB's design review of the 2019 Design is a ministerial decision not subject to CEQA. Therefore, the City is not required to conduct a subsequent or supplemental environmental analysis. The City did not allow the use of K St. and has made a good faith effort to obtain access to Rickenbacker Rd. Instead, Petitioners' actions and failure to support the City's efforts to gain legal access to Rickenbacker Rd. have prevented the City from doing the very thing Petitioners insist must be done. Now, Petitioners come before this Court with unclean hands, asking for relief for self-inflicted claimed harms.

A. THE 2019 DESIGN IS CONSISTENT WITH AND SUBSTANTIALLY CONFORMS TO APPLICABLE STANDARDS; THE DRB DID NOT ABUSE ITS DISCRETION IN DETERMINING THAT THE 2019 DESIGN CONFORMED TO THE FEIR AND DA.

Petitioners allege four reasons the 2019 Design does not conform with the FEIR and DA. OB, § IV.A.i. However, Petitioners' do not explain why they contend the evidence relied on by the City in support of its determinations was lacking.

First, Petitioners inaccurately allege the DRB's decision allows trucks to use K St. OB 14: 20-21. The FEIR recognizes that the use of K St. has been the status quo since 2013. AR 727 ["currently, the diesel trucks from the existing trucking yard on Parcel A travel along K St., as there is no roadway access to Rickenbacker Rd. for parcel A."]. Therefore, the City did not "*allow*" trucks down K St. as suggested by Petitioners. Instead, the Resolution adopted by the DRB states "the City has agreed to permit the use of Rickenbacker for primary access and restrict K St. to emergency access when Rickenbacker is available." AR 449. In other words, the DRB recognized access would be from Rickenbacker Rd., and only in the event of an emergency, or if Rickenbacker access is not available, may K St. be used.

Further, the DA only requires that (1) the developer notify the City of its relocation or abandonment of the K St. easements, prior to the termination of the lease between BNSF and PI Bell (AR 267, 334), and (2) the City consider establishing an assessment district for the purposes of transferring ownership of Rickenbacker Rd. to the City (AR 267). Petitioners do not identify any evidence in the record showing the 2019 Design does not conform to either one of the above mentioned requirements outlined in the DA.

Second, Petitioners claim the 2019 Design does not "look" like the Basic Design Concept. OB 14:27. But the Basic Design Concepts are just that -- basic concepts, and not exact renderings of plans for the Site. AR 304. The FEIR did not examine any specific buildings as part of the Project, but it included potential site plans and building footprints for each of the four parcels. AR 485, 529, 531. Further, the DA authorizes and tasks the DRB to review the design documents to confirm substantial conformance with the Basic Design Concept. AR 305. As authorized, the DRB found that the 2019 Design substantially conforms with the Scope of Development in that the design document are consistent with: (1) the Basic Design Concept; (2) the development standards and permitted land uses; and (3) the Conditions of Approval. AR 445-460. The DRB's findings are supported by substantial evidence in the DRB's staff report and attachments. AR 3048-3509

The DRB determined that the design documents are consistent with the Basic Design Concept because Parcel A, zoned C-M, specifically allows the sale and storage of sand, gravel, fill, dirt and topsoil in the zone. AR 447, 3051. Next, the proposed layout of the 2019 Design is similar

to the conceptual site plans where it is shown that the northern half of the parcel is occupied by an industrial building, and the southern half is the parking lot. AR 447, 3051. The facility matches all neighboring buildings. AR 447, 3899. Overall, when the 2019 Design is viewed from street level, it is architecturally consistent with the rest of the Bell Business Center Project. AR 3899. Further, when viewed from above, the facility, office, and parking lot are located in the general areas contemplated by the DA. AR 310, 3051.

The facility does not have a roof, but a roof is not required because the operations are typically conducted in an unenclosed building. AR 3052. Indeed, the 2019 Design provides greater enclosure than is typically found with this type of use. The DRB relies on the FEIR p. 3.9-9, ¶ 3.8.2 and the RGA Office of Architectural Design, "Parcel A Design Consistency Analysis for Building and Landscaping," which confirms that all permitted uses "be conducted within a completely enclosed building, except for those uses which are customarily conducted in the open." AR 3223-3250. Petitioners reliance on Bell Municipal Code Section 17.36.030 is misplaced. Section 17.36.030 provides "[a]ll uses shall be conducted within a completely enclosed building *except for those uses which are customarily conducted in the open*, such as the sale of cars, boats and recreational vehicles, as determined by the planning commission." The Municipal Code may require a determination by the planning commission. The DRB's interpretation of the DA and references to the City's zoning ordinance set forth therein is entitled to deference. See *Craik v. County of Santa Cruz* (2000) 81 Cal.App.4th 880, 884. Regardless, the DA supersedes the Municipal Code and therefore such a determination by the planning commission is not required.

The DRB determines the 2019 Design documents are also consistent with the Development Standards and Permitted Land Uses in the DA. The staff report to the DRB states the 2019 Design will have a total building area of 51,240 sq. ft. comprised of the main building 49,380 sq. ft., an office building 1,440 sq. ft., and a guard booth 420 sq. ft., which is less than the maximum building area of 294,860 sq. ft. AR 447, 3052, 3903. The main building will be 40 ft. tall (AR 3903), the tallest portion of the conveyer system will be 49 ft. tall (AR 3916), and the silos will be approximately 48 ft. tall (AR 3914), which is also less than the 150 ft. height restriction in the DA.

AR 324. Table 1, titled Project Summary, in the staff report provides an overview of the standards outlined and those proposed for the 2019 Design. AR. 3054.

The DA does not prohibit a smaller facility, rather it sets maximum dimensions. AR 324. The DA requires that developments be reviewed to ensure that they "do not exceed the *maximum* building area" for industrial, warehouse, logistics use, office use of total building size for their parcel. AR 324 [emph. added]. Petitioners allege that the reduction in facility size was not contemplated for the Project, but present no evidence that a facility that is within the maximum standard is not consistent with the DA. OB 15:4-5.

The DRB also determined that the conveyer system is an allowed "accessory use" relying on the Lilburn Corporation's "Parcel A Design Consistency Analysis for Conveyor System." ("**Lilburn Report**") AR 447, 3251-3261. The conveyer system will be consistent with the color design requirement, maximum building area, maximum height and mass, enclosed and screened, including the conveyer system. AR 448, 3053, 3256–3261. Although the conceptual plans did include a conveyer system, the DA did not attempt an exhaustive depiction of all allowed uses and facilities. AR 447, 3051.

Third, Petitioners claim that the 2019 Design omits mitigation measures such as rooftop solar mitigation and LEED Gold Design standards. OB 15:13. The use of the 2019 Design does not contemplate a roof and therefore it cannot accommodate rooftop solar panels. However, the office building in the 2019 Design is solar-ready. AR 4124. The DRB requires that the 2019 Design comply with the California Green Building Standard Code, which is comparable to LEED certification and solar mitigation. AR 3067.

Finally, Petitioners allege that CEMEX proposes new uses not contemplated by the site designs such as railroad operation and conveyer belts. OB 15:22. Petitioners are plainly wrong. The DA *explicitly* permits an "onsite railroad service and transfer facility," as one of the eligible uses. AR 325. The site plan depicting the proposed layout of Parcel A in the Basic Design Concept shows a "Rail Spur" at the top of each page. AR 310-312. Further, the FEIR recognizes that historically Parcel A was used for military, industrial, and *rail* or truck staging areas since 1940's until about 2006. AR 734, 680-682 [emph. added].

Nevertheless, the DRB relied on Technical Memorandum No. PIB-1 by Jefferey G. Harvey, Ph.D, recommending a number of conditions related to the Design Review Approval to ensure compliance with the already adopted Mitigation Monitoring and Reporting Program ("**Harvey Report**"). AR 3074-3084. Also before the DRB was the Evaluation of Emissions Report by Associates Environmental (AR 3427), which found that NOx emissions from operation of the 2019 Design, along with adjacent Parcels F, G, and H, would continue to cause the Bell Business Center Project NOx emissions to be significant, as determined in the FEIR. AR 3435. However, overall combined NOx, CO, SO2, PM10, *and* OM2.5 emissions, associated with Project, will remain below the significant thresholds. AR 3435. Finally, the DRB considered that CEMEX would need to adhere to the conditions established by the South Coast Air Quality Management District permits, which limit the volume of material that may be moved in and out of the site. AR 3447-3450.

Petitioners erroneously characterize the conveyer system as a use, when the DRB determined the conveyer belt is an accessory use to the primary use. AR 325, 3251-61. The use of the conveyer system is like any other machinery used by neighboring facilities to move goods. The DRB relies on the analysis in the Lilburn Report, which states that the conveyer system, which is enclosed and screened, meets all Development Standards, and complies with ground mounted machinery or utility requirements set forth in the DA. AR 3251-61.

In short, Petitioners have failed to show why the DRB's approval and determination that the 2019 Design is consistent and substantially conforms with the DA and FEIR, is not supported by substantial evidence in the record.

B. THE DRB'S DETERMINATION THAT DEPARTURES FROM THE BASIC DESIGN ARE MINOR MODIFICATIONS IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

Petitioners claim that the DRB's alternative finding that any deviation from the basic design is a minor modification of the Basic Design Concept is unsupported. OB 16:5-6. First, Petitioners mistakenly define the term "minor modification" by looking to Section 7.4.2 of the DA. That section pertains to minor modifications to the DA itself, as evident by the heading of the Section, "Amendment and Modification of Development Agreement." AR 272.

Per the DA, the DRB has the authority to administratively approve minor modifications to the Basic Design Concept subsequent to approval by the Bell City Council. AR 305. A minor modification may include: (1) modification of site plan, on-site circulation, building shape, and articulation that do not include a change in the number of primary structures or their location; (2) modification of building materials, finishes and colors must be consistent with and complementary to the approved materials, finishes and colors in the Basic Design Concept; (3) variances from the Development Standards, including building size or magnitude, not more than 10%, except that reductions in size may be subject to approval of the DRB, except where the DRB believes such approval should be within the discretion of the City Council; (4) modification to infrastructure connection points and performance standards; and (5) ultimate location, alignment and quantity of rail spur lines on site. AR 305. Approval of any minor modification is contingent upon the DRB finding that such modification: (1) is consistent with the maximum total square footage for the Project; (2) is in substantial compliance with the fundamental theme, idiom, and design intent of the Basic Design concept; (3) promotes the Public Benefits outlined in Section K of the Development Agreement and; (4) would not require additional environmental review subject to Section 15162 of the CEQA Guidelines. AR 305-306.

The DRB made a finding in the *alternative* that to the extent their findings were overturned, any departure by the 2019 Design is a minor modification within the meaning of the DA. AR 448. The DRB adopts the findings it already made and determines that the 2019 Design promotes the public benefits outlined in the DA. AR 448, 3061. The DRB made this finding in the alternative and only if the aforementioned findings in the Resolution have been overturned. AR 448. To date, the DRB's findings have not been overturned, and therefore Petitioners' argument is premature.

Assuming the DRB's findings were overturned, Petitioners allege the "switch" from Rickenbacker to K St. is not "minor." OB 16:17-19. Petitioners do not demonstrate that the use of K St. is a modification of any of the design elements of the Basic Design Concept. First, the use of K St. is not a modification of the site plan, on-site circulation, building shape, or articulation that results in a change in the number of primary structures or their location. Second, the use of K St. does not modify the building materials, finishes and colors in the Basic Design Concept. Third, the

use of K St. is not an increase to the Development Standards for building size or magnitude greater than 10%. Next, the use of K St. is not a modification to infrastructure connection points and performance standards. Finally, the use of K St. does not change rail spur lines on site.

Further, as clarified above in Section IV, Subsection A, of this Brief, the City did not permit or switch access from Rickenbacker Rd. to K St., which has been used since 2013 because it is the only street from which CEMEX has legal access. AR 727. Moreover, CEMEX is actually using Rickenbacker anyway. Accordingly, Petitioners fail to demonstrate why the use of K St. is a modification.

Next, Petitioners once again allege the change in use, formation, types, sizes, and shape of the structure are not minor modifications. OB 16:19-21. As previously discussed, the Development Standards in the DA are described as "maximums" and the developments must be reviewed to ensure that they "do not *exceed* the maximum building area." AR 324 [emph. added]. The 2019 Design will have a total building area of 51,240 sq. ft. comprised of the main building (49,380 sq. ft), an office building (1,440 sq. ft.), and a guard booth (420 sq. ft.), which is below the maximum building area of 294,860 sq. ft. AR 447, 3052, 3903. The main building will be 40 ft. tall (AR 3903), the tallest portion of the conveyer system will be 49 ft. tall (AR 3916), and the silos will be approximately 48 ft. tall (AR 3914), which is also less than the 150 ft. height restriction in the DA. AR 324, 3244.

Petitioners incorrectly interpret the statement that minor modifications are "variances to the Development Standards including building size or magnitude not more than 10%, except that reductions in size may be subject to approval of the Design Review Board…" This provision was meant to address *increases* of more than 10%, and specifically exempts reductions, which may be subject to the review and approval of the DRB. AR 305.

Petitioners' reliance on the City Attorney's analysis in its March 23, 2018 letter is misplaced. The City Attorney's letter was written in reference to the 2016 Design, not the 2019 Design at issue here. Further, the views of the City Attorney in the March 23, 2018 letter were preliminary and subject to further review and analysis. AR 4395.

Next, Petitioners fail to show how the use, formation, types, sizes, and shape of the structure has been modified. The DRB determined that the project design documents are consistent with the Basic Design Concept because Parcel A, zoned C-M, allows for the sales and storage of sand, gravel, fill, dirt and topsoil in the zone. AR 447, 3051. The proposed layout of the 2019 Design is similar to the conceptual site plans where it is shown that the northern half of the parcel is occupied by an industrial building, and southern half is the location of the parking lot. AR 447, 3051.

Nevertheless, even if it were determined that a minor modification had occurred, the DRB's conclusion that those minor modifications were within the scope of the DA is supported by substantial evidence in the record. Finally, the DRB also made findings that the 2019 Design promoted public benefits relying on the Conditions of Approval which require the installation of water, sewer, fire hydrants, streetlights, curb, gutter, street drainage improvements, and street pave-out for Rickenbacker Street and 6th Street as necessary. AR 448.

C. THE CITY IS NOT REQUIRED TO CONDUCT A SUBSEQUENT OR SUPPLEMENTAL ENVIRONMENTAL ANALYSIS BECAUSE THE DRB'S DECISION IS NOT SUBJECT TO CEQA.

CEQA includes a strong presumption against requiring any further environmental review once an FEIR has been prepared for a project. Pub. Resources Code, § 21166; see also *San Diego Navy Broadway Complex Coalition v. City of San Diego* (2010) 185 Cal.App.4th 924; see also *Moss v. County of Humboldt* (2008) 162 Cal.App.4th 1041, 1049-50 ["after a project has been subjected to environmental review, the statutory presumption flips in favor of the developer and against further review"].) This presumption implements the legislative policy favoring "prompt resolution of challenges to the decisions of public agencies regarding land use." *Citizens for a Megaplex-Free Alameda v. City of Alameda* (2007) 149 Cal. App. 4th 91, 111.

The scope of the CEQA review process is limited by the scope of the agency's entitlement discretion. *Sierra Club v. County of Sonoma* (2017) 11 Cal.App.5th 11, 23; *San Diego Navy Broadway, supra,* 185 Cal.App.4th at 933-34; *Health First v. March Joint Powers Authority* (2009) 174 Cal.App.4th 1135, 1144; *Friends of Davis v. City of Davis* (2000) 83 Cal.App.4th 1004 at 1014-

15 ("CEQA does not enlarge an agency's authority beyond the scope of a particular [design review] ordinance").

When a lead agency considers modifications to, or further approvals for, a project for which a FEIR has already been prepared, the lead agency may not require preparation of a further FEIR unless one of three triggers specified in Section 15162 of the CEQA Guidelines occurs.

1. The DRB Review of the 2019 Design was a Ministerial Process.

CEQA generally applies only to discretionary projects proposed to be carried out or approved by public agencies. Ministerial activities are not subject to CEQA. Pub. Resources Code § 21080 (a) and (b)(1). A discretionary project is one which "requires the exercise of judgment or deliberation when the public agency or body decides to approve or disapprove a particular activity, as distinguished from situations where the public agency or body merely has to determine whether there has been conformity with applicable statutes, ordinances, or regulations." CEQA Guidelines tit. 14, § 15357. "CEQA does not apply to an agency decision simply because the agency may exercise some discretion in approving the project or undertaking. Instead to trigger CEQA compliance, the discretion must be of a certain kind; it must provide the agency with the ability and authority to mitigate ... environmental damage to some degree." *San Diego Navy Broadway, supra,* 185 Cal. App. 4th at 934 [citing *Leach v. City of San Diego* (1990) 220 Cal. App. 3d 389, 394]; *see also Friends of Westwood, Inc. v. City of Los Angeles* (1987) 191 Cal. App. 3d 259, 272.

The purpose of CEQA is to minimize the adverse effects of new construction on the environment. *Friends of Westwood, Inc. supra,* 191 Cal.App.3d at 266. Thus, CEQA requires environmental review only where "government has the power through its regulatory powers to eliminate or mitigate one or more adverse environmental consequences," and the touchstone is "whether the approval process involved allows the government to shape the project in any way which could respond to any of the concerns which might be identified in an environmental impact report." *Id*. at 266-67.

"The statutory distinction between discretionary and purely ministerial projects implicitly recognizes that unless a public agency can shape the project in a way that would respond to concerns raised in an EIR, or its functional equivalent, environmental review would be a meaningless

exercise." *Mountain Lion Foundation v. Fish & Game Commission* (1997) 16 Cal.4th 105, 117; see also *Protecting Our Water & Environmental Resources v. County of Stanislaus*, No. S251709, 2020 WL 5049384, at *2-*6 (Cal. Supreme Court, Aug. 27, 2020) [a decision is ministerial if the agency has no discretionary authority to deny or shape the project].

Petitioners claim the design review process was a discretionary action subject to CEQA, rather than a CEQA-exempt ministerial process, because (1) the DRB has discretionary authority and (2) the DRB's approval of the 2019 Design was based on subjective findings and conditions of approval to address environmental impacts. OB 21:13 – 19.

The DRB's review of the 2019 Design is a ministerial process specifically characterized in the DA as such. AR 270, 305. The NOE posted by the City explains precisely why the DRB's Design Review Approval was exempt from CEQA. AR 2. The City's determination "is entitled to great weight unless it is clearly erroneous or unauthorized." *Friends of Davis, supra,* 83 Cal.App.4th at 1015.

Further, the DRB's review is practically identical to that in *San Diego Navy Broadway, supra,* 185 Cal. App. 4th at 941, where the Court held that the reviewing agency does not have discretionary authority. There, the City of San Diego entered into a development agreement with another party for the redevelopment of a certain property. (*Id*. at 929.) The development agreement contemplated the development of an office space of a certain size, development plans, and guidelines related to the aesthetics of the development. (*Ibid*.) The development agreement required that the plans be submitted to the a reviewing agency to determine whether the submittals were consistent with aesthetic criteria and design guidelines. (*Ibid*.) As in *San Diego Navy Broadway*, the DRB's review is limited to design review of the 2019 Design to determine conformity with the design requirements listed in the Development Agreement, Basic Concept Drawings, Conditions of Approval and FEIR. AR 270. Per the DA, a developer is required to submit (1) site plans, (2) landscaping plans, (3) building elevation renderings, and (4) color and material boards. AR 270. Review of such documents indicates the DRB will only be reviewing the design and aesthetics of the facility. Then the DRB is tasked with reviewing whether such documents meet the very specific

standards established in the Scope of Development, which include maximum building area, minimum area, maximum heights, among others. AR 324.

Also similar to the review process in *San Diego Navy Broadway*, the DRB reviewed the 2019 Design to ensure it satisfies design criteria, not to consider the environmental impacts as alleged by the Petitioners. OB 21:18-19. The DRB Resolution determines and declares under Section 3, CEQA Conclusions, that design or aesthetic review of a project is not a decision that is subject to CEQA. AR 2, 446. While the Resolution goes on to declare, "CEMEX's use of Parcel A does not result in new significant environmental impacts, a substantial increase in impacts identified in the DA, EIR, or require different mitigation measures than those established for purposed of the DA" (AR 446), mere mention of the FEIR does not mean the DRB reviewed the 2019 Design for environmental impacts. Careful review of the Resolution and staff report shows the DRB only reviewed the design of the parcel. AR 448, 3048-3509.

Petitioners allude to a number of sections in the DA that they claim demonstrate the DRB had "discretion." OB 22: l9-16. Such discretion is limited to aesthetics and design issues, which is within the scope of *San Diego Navy Broadway, supra*, 185 Cal. App. 4th at 937-941. Petitioners refer to the minor modification authority which is describe as "subjective authority" to approve minor modifications "on a case-by case basis." Here, the DRB has subjective authority to administratively approve minor modifications related to design and esthetics of the development *only*, such as modifications to the site plan, building shape, building materials, finished and colors, size, and location. AR 305. Again, such discretion is allowed pursuant to *San Diego Navy Broadway, supra,* 185 Cal. App. 4th at 937-941, because it is not an environmental impact.

Petitioners' allegations that the DRB's authority was augmented by the Settlement Agreement is exaggerated. OB 23:11-12. The Settlement Agreement specifically limits such review by the DRB. For example, the Settlement Agreement provides "*to the extent appropriate*, supplemental information for further consideration by the City's Design Review Board ("DRB") will be submitted to and/or will be prepared by, the City related to the issue of substantial conformance…with the Basic Design Concept in the DA." AR 4394. While it is true that the Settlement Agreement permits the DRB to add conditions, it may only add conditions to "implement

the Settlement Agreement," not to mitigate environmental impacts. AR 4396. Further, Petitioners do not cite any evidence the Settlement Agreement in fact augmented the DRB's authority.

Petitioners also argue that the DRB approved additional conditions to mitigate the 2019 Design's environmental impacts, by pointing to the complaint hotline and use of K St. OB 23:17-21. First, the DRB's conditions of approval are simply applicable restatements of the conditions of approvals in the DA. City staff copied and pasted applicable conditions from the DA to the 2019 Design conditions of approval. Compare AR 3063-3073 to AR 329-356.

Second, as explained above, the City did not permit the use of K St. AR 449. Neither the hotline and nor use of K St. is a mitigation measure to address environmental consequences or impacts. The use of K St. arises from concerns by Petitioners related to the safety of pedestrians. On January 31, 2019, Steve Lytle, director of the Salvation Army, provided public testimony regarding his concerns related to pedestrian traffic on K St., and the safety risk posed to those individuals. AR 3588-3589.

In regards to the complaint hotline, CEMEX agreed to continue to coordinate with the neighbors of Parcel A to address their concerns, as far back as the signing of the Stipulation to Dismiss the litigation challenging the 2016 Design. AR 4415. The Harvey Report references noise and dust concerns of neighboring property owners. AR 3079. During the January 31, 2019 meeting, Steve Lytle specifically tells the DRB that "he would like to see a little more public and transparent way to monitor the project, at least in the first few years so that the – the parties to the tolling agreement, the public in general can participate in a process where the operation is reviewed, any *complaints* are reviewed, any issues are reviewed and it's an open transparent forum." AR 3589 [emph. added]. As a result of neighbors' requests, including some of the Petitioners, a complaint hotline was added to the conditions of approval, but not to address environmental impacts. Ironically, the same individuals who requested the condition now attempt to use it to challenge the 2019 Design. Petitioners do not provide any facts to suggest the DRB possessed and actually used discretionary authority "to eliminate or mitigate one or more adverse environmental consequences." *Friends of Westwood, supra,* 191 Cal.App.3d at 266-67.

Based on the aforementioned, the DRB's actions were ministerial and the City's Notice of Exemption did not violate CEQA because it accurately describes the course of action taken.

2. There Have Been no Changes that Result in Significant Adverse Impacts that Require Mitigation.

Where an environmental impact report was previously adopted, a subsequent or supplemental environmental impact report is ***only*** required where:

> (1) Substantial changes are proposed in the project which will require major revisions of the previous EIR . . . due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects;
>
> (2) Substantial changes occur with respect to the circumstances under which the project is undertaken which will require major revisions to the previous EIR . . . due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects; or
>
> (3) New information of substantial importance, which was not known and could not have been known with the exercise of reasonable diligence at the time the previous EIR was certified as complete…

CEQA Guidelines, § 15162(a).

Petitioners allege the 2019 Design proposes new operations that were not analyzed in the FEIR and "project elements" that conflict with the Project. OB 18:7-8. However, as discussed above, the design review of the 2019 Design was a ministerial process not subject to CEQA. Accordingly, the DRB lacked authority to shape the project, and for the other reasons set forth below, the Court should summarily reject Petitioners' arguments regarding further environmental review.

Petitioners claim that the 2019 Design will send trucks down K St. OB 19:7-14. Again, the DRB is not permitting the use of K St. Historically, K St. has been used since 2013. AR 727. The FEIR describes K St. as "a two-lane local roadway that extends from 3rd Street to Mansfield Way. There are both on-street parking and developed parking areas along this route. K St. provides the only access to the existing industrial uses on parcel A…" AR 801. Further the FEIR projected the number of trips generated by the Parcel at the time the FEIR was prepared. AR 807. Petitioners'

position is unsupported by any evidence. Nevertheless, the DRB's determinations specifically provide that Rickenbacker Rd. will be used for primary access, not K St. AR 449.

Petitioners' argument that FEIR did not analyze the proposed "gravel transloading facility," is simply incorrect. The 2019 Design falls within the permitted uses for the development in the DA and FEIR. AR 447, 3051. Petitioners continue to take issue with the lack of a roof and the covered conveyer system. OB 20:20-26. As previously discussed, the 2019 Design does not require a roof because the DA recognizes and permits certain unenclosed uses. AR 3052. The conveyer system satisfied all development standards in the DA to be deemed an accessory use and is covered. AR 448, 3053, 3256-3259.

D. THE CITY'S CERTIFICATION OF THE FEIR FOR THE BELL BUSINESS CENTER PROJECT WAS A DISCRETIONARY ACTION THAT CAN NO LONGER BE CHALLENGED UNDER CEQA.

As previously discussed above, the design review of the 2019 Design was a ministerial process, thus not subject to CEQA. For the purposes of CEQA, the discretionary project was the approval of the DA and certification of the FEIR, in 2013. On August 22, 201, the City issued a Notice of Determination, which started a 30-day statute of limitation to challenge the City's actions. (AR 1) Petitioners cannot challenge the FEIR on CEQA grounds now.

E. THE MARCH 22, 2019 LETTER DOES NOT TRIGGER A NEW DESIGN REVIEW BOARD PROCESS.

Petitioners claims regarding the March 22, 2019 letter are not merely meritless; they qualify for a "chutzpah award." *Thayer v. Wells Fargo Bank, N.A.* (2001) 92 Cal. App. 4th 819, 845, citing *Dainippon Screen Mfg. Co., Ltd. v. CFMT, Inc.* (Fed.Cir. 1998) 142 F.3d 1266, 1271 [noting "chutzpah" describes "the behavior of a person who kills his parents and pleads for the court's mercy on the ground of being an orphan"]. Petitioners have the audacity to allege the City's March 22, 2019 letter to the GSA withdrawing its request for a public easement on Rickenbacker Rd. triggers a new DRB process because it reversed the City's commitment to making efforts to secure legal access to Rickenbacker Rd. and substantially changes the 2019 Design. OB 24-25; 19-2. Petitioners' argument related to K St. and Rickenbacker must be completely disregarded because the City's

alleged reversal was a direct result of Petitioners' lack of support for obtaining legal access to Rickenbacker Rd. AR 3765.

As mentioned before, the City wrote to the GSA to formally request an easement for the use of Rickenbacker Rd. AR 3725. The City and GSA held a conference call where the GSA asked the City to provide additional information, which the City subsequently submitted to the GSA. AR 3730, 3763. The GSA requested that the City submit additional information, importantly, letters of support from the adjacent property owners including Shelter Partnership. AR 3764. The City asked Petitioners for their support, per the GSA's requirement, but Petitioners advised the City they would not support the City's application with the GSA. AR 3765. Since the City did not have Petitioners' support, the City withdrew its request for an easement on Rickenbacker Rd. AR 3765. Neither Petitioners nor their counsel have written to the City contradicting the statements made in the letter. AR 3766. Yet Petitioners come before the Court now asking for relief from consequences to their own actions. This is the very definition of chutzpah.

Importantly, access on K St. was not permitted by the City. Access on K St. has existed since 2013. The City has no legal obligation to obtain access to Rickenbacker Rd., but nevertheless was committed to alleviating Petitioners' concerns in good faith. The City's efforts in that regard were undermined by Petitioners themselves. Petitioners should not be granted relief based on the City's failure to achieve something which Petitioners themselves made impossible.

V. CONCLUSION

For the foregoing reasons, this Court should deny the Petitioners' Petition in its entirety and enter judgment in favor of the City on all causes of action.

DATED: September 29, 2020

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PROOF OF SERVICE

The Salvation Army, et al. v. City of Bell, et al.
Case No. 19STCP00693

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 2361 Rosecrans Ave., Suite 475, El Segundo, CA 90245.

On **September 29, 2020**, I served true copies of the following document(s) described as **RESPONDENT/DEFENDANT CITY OF BELL'S OPPOSITION BRIEF** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused a copy of the document(s) to be sent from e-mail address cevans@awattorneys.com to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **September 29, 2020,** at El Segundo, California.

Lilia Madrid

Lilia Madrid

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