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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 and Plaintiffs,

v.

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

Respondents and Defendants.

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

Real Parties in Interest.

Case No. 19STCP00693

JOINT OPPOSITION BRIEF OF REAL PARTIES IN INTEREST CEMEX CONSTRUCTION MATERIALS PACIFIC, LLC AND PI BELL, LLC

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

Action Filed: March 7, 2019
Trial Date: November 13, 2020

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

(CONTINUED)

Page

TABLE OF CONTENTS

(CONTINUED)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF CONTENTS

(CONTINUED)

Page

TABLE OF CONTENTS

(CONTINUED)

Page

Statutes

Other Authorities

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In 2013, the City of Bell (the "City") approved a Development Agreement ("DA" or "Project") and certified an Environmental Impact Report ("EIR") for the development of four large parcels in the Cheli Industrial Zone—a heavy industrial and warehouse district that has for decades been the site of industrial uses that utilize heavy trucks. Development of three of the four parcels was completed by 2016. In 2016, Real Party In Interest CEMEX Construction Materials Pacific, LLC ("CEMEX") proposed the development of a distribution and logistics facility for building materials products (aggregates) (the "Facility") on the last remaining parcel.[1] The Facility is a by-right and permitted use under both the City's zoning code and the DA. To develop the Facility, CEMEX needed only a single entitlement: a ministerial approval by the City's Design Review Board ("DRB") of the Facility's proposed design concept. The DRB approved the design of the Facility in January 2019. The Facility is fully operational and has been since May 2019.

The Project area is located adjacent to the 710 Long Beach Freeway and near an intermodal rail terminal operated by BNSF. Because the Cheli Industrial Zone is located in and around critical shipping corridors, situated along a freeway providing direct access to the ports, and approximately eight miles from downtown Los Angeles, the City Council identified the Project area as a "prime location" for intermodal freight transport and related uses. Administrative Record ("AR") 248, § C. Upon approval of the DA, the right to develop and operate permitted uses under the DA became a ***vested right***. AR 251, § J; 261, § 4.1; 262, § 4.4; 263, § 5.1.[2]

Petitioners' Opening Brief is based upon two fundamental mistruths. First, Petitioners contend that the City approved in the 2013 DA only a "warehouse distribution center" in which freight would be distributed "via truck." Op. Br., 1:15-16. Not so. The purpose of the DA was to promote economic growth through a capital investment that attracts new "***light industrial,***

[1] The four parcels are owned by Real Party in Interest PI Bell, LLC ("PI Bell"). The parcel at issue in this case—"Parcel A"—is leased by Burlington Northern Santa Fe Railroad ("BNSF"). CEMEX subleases Parcel A from BNSF.

[2] An aerial image of the site can be found in the record at AR 3753. Parcel A is the triangular parcel at the far left, depicted as "PI Bell Parcel IV, LLC." The 710 Freeway runs adjacent to Parcel A.

warehousing or distribution uses." AR 532 (emphasis added). Thus, the DA permitted a broad range of potential uses including, specifically, "***onsite railroad service and transfer facilities***" and "***gravel sales and storage facilities***" as permitted uses. The Petitioners in this case attended the City Council meeting in 2013 when the City Council considered and adopted the DA and certified the EIR. The scope of uses was announced at the City Council meeting. AR 4606:4-6. Petitioners also submitted comments prior to the meeting acknowledging the Project authorized a wide range of uses. *See, e.g.*, AR 3674. Petitioners now come to this Court—***seven years later***—alleging that the Facility is not a permitted use under the DA. But the time to challenge CEMEX's right to establish the Facility or the adequacy of the EIR was in 2013. Petitioners' challenge comes years too late.

Second, Petitioners contend that the 2019 DRB design review approval changed the manner in which trucks access Parcel A and, specifically, that the DRB permitted the use of K Street. That is pure fiction. The DRB is a ***design review board***. It has no authority over the use of the roads in the City and took no action in respect to K Street. What's more, the DA and EIR explicitly contemplated that the formal closure of K Street access would require a process and would occur once formal access via Rickenbacker Road was secured (Parcel A obviously cannot be left without lawful access). Efforts to secure formal access via Rickenbacker Road are ongoing. In the meantime, ***CEMEX does not even use K Street for access to the Facility***—it makes use of Rickenbacker Road, just as Petitioners desire. Petitioners do not even contend otherwise. Instead, they argue only that CEMEX "threatens" to use or "may" use K Street at some point in the future (pp. 2, 14, 19). But whether CEMEX may seek to use K Street in the future, and the circumstances under which that use may or may not occur, does not present a controversy ripe for adjudication. Furthermore, the facts show that Petitioners' cooperation is necessary to formalize access to Parcel A via Rickenbacker Road, but Petitioners refuse to support the City's efforts to do so. Instead, they seek in this lawsuit to use the supposed "threat" of a ***potential*** use of K Street in the future as leverage in the hopes that the Court will enjoin CEMEX's operation of the Facility, which generates jobs and revenue for a City that sorely needs both. Petitioners' unclean hands prevent that unjust result.

Petitioners' remaining contentions fare no better. This Court's review of the DRB's design review approval is governed by the deferential substantial evidence test. The record here contains

ample evidence supporting the DRB's determination that the design of the Facility substantially conforms to the "Basic Design Concept" of the DA and the operation of the Facility falls well within the scope of the 2013 DA and EIR. The record also supports the DRB's ***alternative*** approval of a minor modification to the Project's Basic Design Concept to permit the Facility. Petitioners' CEQA arguments also fail because Petitioners ignore that the DRB ***conducts design review and nothing more***—a ministerial process that does not implicate CEQA at all. And even if the DRB did have ***some*** discretion to mitigate environmental impacts (and it did not), the record fully supports the DRB's additional finding that none of the limited circumstances triggering the need for subsequent environmental review under Public Resources Code § 21166, which includes a statutory presumption ***against*** additional CEQA review, are present.

The truth is that Petitioners are less concerned with the DRB's design review findings, than they are with trying to reopen a long-closed CEQA process they previously participated in to secure a second bite at the apple and impose unnecessary and unsupported additional conditions and mitigations upon an already-vested use. The Court should reject those efforts and deny the Petition.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. The City Approves the Bell Business Center Project in 2013

The City and the Bell Public Financing Authority entered into the DA with PI Bell in 2013. Consistent with Development Agreement law, Gov't Code §§ 65864 *et seq.*, the purpose of the DA, or "Project," was to sell the four City-owned parcels totaling approximately 40 acres to PI Bell in exchange for a ***vested right to develop certain defined "Permitted Uses"*** on the four parcels. AR 248-51, §§ B, F, G, H, J; 261, § 4.1.[3] As explained in the DA staff report, the sale of the four Project parcels was necessary to effectuate a settlement agreement the City had entered into: "If the project is not approved, the City of Bell faces the potential of being forced into bankruptcy[.]" AR 2832. The staff report also explained the City sold the four Project parcels "as entitled because buyers are

[3] A vested right under development agreement law is an "assurance that the project [will] be approved based on rules, regulations, and policies existing at the time the development agreement was approved, even if those rules, regulations, and policies changed over the course of the development project." *Mammoth Lakes Land Acquisition, LLC v. Town of Mammoth Lakes*, 191 Cal.App.4th 435, 443 (2010); Gov't Code § 65864(b).

willing to pay more since the development risks are minimized." AR 2830. Thus, PI Bell paid a premium to acquire a vested right to develop the Permitted Uses on the four Project parcels.

The DA authorized the development of up to 840,390 sq. ft. of distribution, logistics, and industrial uses on the four parcels. AR 244, § 7.b. The Cheli Industrial Zone has been used for military and industrial purposes since the 1940s, including as rail and truck staging areas. AR 727, § 3.8.1. The City Council also concurrently certified an EIR in compliance with CEQA. AR 1; 251, § L. After imposing all feasible mitigation measures, the City Council determined the Project would have significant and unavoidable air quality and traffic impacts. AR 243, § 3. The City Council adopted a Statement of Overriding Considerations finding the Project's public benefits outweighed the unavoidable impacts. *Id*. The EIR is now *presumed valid*. Pub. Res. Code § 21167.2.

1. The DA Approves the Permitted Uses Subject to Ministerial Design Review

When the DA was approved, PI Bell did not know when each of the four Project parcels would be developed. AR 263, § 5.1. Nor did PI Bell know who would be interested in leasing or purchasing the facilities that would eventually be constructed on the four Project parcels, or the specific type of facility those future tenants would need (although "24-hour delivery and shipping using large trucks" was anticipated). AR 565. Thus, the DA identified a series of "industrial, manufacturing, and warehousing" uses as "Permitted Uses" authorized for future by-right, or vested, development and operation in the Project area. AR 254, § 1.27; 255, § 1.32; *see also* Gov't Code §§ 65864; 65865.2 ["A development agreement shall specify … the permitted uses of the property"].

As relevant, the Permitted Uses include: (i) distribution; (ii) logistics; (iii) sorting, loading, and unloading of parcels and freight; and (iv) "***onsite railroad service and transfer facilities***". AR 325 [Exhibit "C2," Table of "Permitted Uses]. The Permitted Uses also include "Any use currently permitted in the [City's] M (Manufacturing) or CM (Commercial Manufacturing) zoning districts", *id*., which includes ***gravel sales and storage facilities***. Request for Judicial Notice ("RJN"), Ex. 1, Municipal Code § 17.40.020.A.20. In addition, the DA identified "Development Standards" that serve as the "prevailing land use regulations" and set the maximum height, size, and density for development on the Project parcels. AR 304, § 5.B; 249, § E; *see also* Gov't. Code § 65865.2.

Together, the Development Standards and Permitted Uses established the parameters for

future development of the four Project parcels, and authorize consistent future by-right development. AR 303, § 1, ¶ 2 (stating the Project was designed "to accommodate any of the permitted and accessory land uses"). Upon approval of the DA, the right to develop the Permitted Uses became a ***vested right***. AR 251, § J; 261, § 4.1; 262, § 4.4; 263, § 5.1.

2. The DA Establishes a Detailed Design Review Process

The development of Permitted Uses was subject to a design review process. AR 269, §§ 6.2 *et seq*. [Design Review Approvals]; AR 305, § 5.C [Design Review and Substantial Conformance]. The design review process was clearly and correctly identified in the DA as a ***ministerial*** action exempt from the CEQA. AR 305, § 5.C; 270, § 6.2.5. The design review process was to be administered by the Design Review Board ("DRB"), a board established to implement the DA. AR 253, § 1.19; 269, § 6.2.1. Upon application, the DRB reviews the aesthetic, architectural, and design elements of proposed design and landscaping plans for the four parcels "to confirm substantial conformance with the Basic Design Concept". AR 269, §§ 6.2 *et seq.*; 305 § 5.C. Design review applicants are required to submit site plans, landscaping plans, building renderings, and a color and materials board. AR 269-70, § 6.2.2(a)-(d).

B. <u>CEMEX Proposes a Rail Aggregate Distribution Facility on Parcel A</u>

CEMEX's involvement in the Project began in 2016, three years after the City's approval of the DA and certification of the EIR, and after three of the four Project parcels had already been developed. CEMEX proposed the development of a distribution and logistics facility for building materials products (aggregates) on Parcel A ("CEMEX Facility"). Parcel A is approximately 14.5 acres in size. AR 248, § B; 3753 (depicting Parcel A, identified as "PI Bell Parcel IV, LLC").

CEMEX therefore subleased Parcel A from BNSF (AR 4236-39) and undertook plans to develop the Facility given that the DA and EIR clearly authorized onsite railroad service and transfer facilities, and gravel sales and storage facilities, as by-right Permitted Uses subject only to a ministerial design review process.[4] Thus, Parcel A was an ideal location for the CEMEX Facility because CEQA review had already been completed and Parcel A for many years had been used as

[4] BNSF has been leasing Parcel A since before the sale of the Project parcels to PI Bell. AR 258, § 1.53.a. BNSF's lease expires in 2050. AR 4223-27.

a heavy truck and trailer distribution yard. AR 727, § 3.8.1 [Existing Setting]. In fact, Parcel A, like the other three Project parcels and the Cheli Industrial Zone in general, has been used for military and industrial purposes for decades. *Id*. An existing BNSF rail line is located along the northern boundary of Parcel A. *See, e.g.*, AR 4131 (rail cars along northern boundary of Parcel A).

The CEMEX Facility, as proposed, and as now built and operating, is a state of the art distribution facility. The Facility receives clean, washed construction aggregates, which are mined, crushed, and washed at CEMEX's mining quarry miles away in Victorville, and then transported to the City via the existing BNSF rail line. AR 3886-87, § IV; 3913-14, § IV. Upon delivery, the washed aggregates are unloaded into an underground conveyor system and sorted by size in preparation for delivery throughout the greater Los Angeles Area. *Id*. The aggregates are used to produce concrete to construct roads, housing, and public infrastructure. *Id*. CEMEX's operation of the Facility on Parcel A thus provides a unique opportunity to transport essential building materials to the underserved Los Angeles area market in an environmentally-friendly way via an existing rail line, instead of by heavy duty trucks traveling across long haul distances. AR 4215.

In conjunction with its plans to develop the Facility, CEMEX hired Dennis Roy of RGA Office of Architectural Design ("RGA") to prepare conceptual drawings and potential site plans consistent with the applicable DA design requirements. AR 3895-96, § I. CEMEX hired RGA to ensure the highest level of consistency with the DA because RGA had previously prepared the conceptual drawings of potential development configurations, site plans, and landscaping plans for the DA (AR 3889-90, § B), as well as drawings for the development of the three other Project parcels (AR 3893-94, §§ G, H). RGA is therefore ***the*** expert on the intended design of the development under the DA and was particularly situated to create a suitable design for the CEMEX facility consistent with the DA's Basic Design Concept. Similarly, RGA created a customized design for FedEx on Parcel F based on FedEx's specific needs. *Id*. The final CEMEX Facility drawings and site plans prepared by RGA and submitted to the DRB are available at AR 4148-51. A photograph taken during construction of the Facility is available at AR 3499.

C. Parcel A Is Served by Two Private Roads, K Street and Rickenbacker Road

There are only two streets that provide access to Parcel A: K Street and Rickenbacker Road.

K Street is a private street owned by PI Bell. Declaration of Neil Mishurda ("Mishurda Decl."), ¶ 4;[5] AR 3753. Legal access to Parcel A is provided by K Street. AR 267, § 5.4.3 ["A portion of Parcel A consists of access easements that are identified as … 'K Street'"]; 801 [K Street]. K Street has been used for heavy truck access to Parcel A for decades (including by BNSF). AR 727, § 3.8.1 ["Currently [in 2013], the diesel trucks from the existing trucking yard on Parcel A travel along K Street, as there is ***no roadway access to Rickenbacker Road for parcel A***." (Emphasis added)].

Rickenbacker Road is only a few hundred feet away from and runs parallel to K Street. AR 3753. Rickenbacker Road is owned by private parties who own land located along that road, including Petitioner Shelter Partnership. AR 267, § 5.4.2. Since CEMEX began its operations in May 2019, trucks entering and exiting Parcel A have used Rickenbacker Road for access. Declaration of Daniel Olivera ("Olivera Decl."), ¶¶ 3-4.

D. <u>The City Approves the CEMEX Facility Design Plans in 2016 and 2017</u>

In September 2016, CEMEX and PI Bell submitted an application for design review of CEMEX's conceptual drawings and site plans by the Architectural Review Board ("ARB"). AR 4214-22. The application was initially reviewed by the City's Design Review Committee ("DRC") on September 7, 2016, which found the CEMEX Facility consistent with the DA. AR 3043; 3698. The application was then reviewed by the ARB and approved in December 2016 and February 2017. AR 3700; 3710. CEMEX subsequently submitted construction plans, pulled building permits, and started construction in or around October 2017. AR 4249-93.

E. <u>East Yard Sues in 2018 Challenging Approval of the CEMEX Design Plans; the Parties Resolve the Case; CEMEX Commits to Reapply with Modifications</u>

In January 2018, current Petitioner East Yard Communities For Environmental Justice

[5] Real Parties include the Declarations of Neil Mishurda and Daniel Olivera to address certain issues regarding the status of K Street. The Declarations are admissible because they are relevant to Petitioners' traditional mandamus claim. The Olivera Declaration addresses a matter occurring after the DRB hearing and is therefore separately admissible under Code of Civil Procedure § 1094.5(e) because the facts could not have been with reasonable diligence submitted to the DRB. Finally, the Declarations are relevant to Real Parties' defenses of ripeness, laches and unclean hands and are therefore also admissible on that basis. *W. States Petroleum Assn. v. Superior Court*, 9 Cal.4th 559, 575 (1995) (extra record evidence may be admissible where relevant to affirmative defenses).

("East Yard") filed a Petition For Writ Of Mandate ("2018 Petition") challenging the City's 2016-2017 design review approvals. RJN Ex. 2. The 2018 Petition alleged that the design plans had been incorrectly approved by the ***DRC*** and ***ARB*** instead of the ***DRB***. *Id*., ¶ 17. As discussed by the City in its Opposition Brief, the ARB application was submitted at the direction of Derek Hull, a former City employee unfamiliar with the DA's specific design review process for the Project parcels. The 2018 Petition included many of the same allegations raised by Petitioners in this lawsuit, including, allegedly, (i) the Facility is not a Permitted Use; (ii) the Facility is required to have a roof; (iii) the Facility's conveyor system requires a cover; (iv) that CEMEX cannot use K Street to access the Facility; and (v) that additional environmental review is required. RJN, Ex. 2, ¶ 13. In July 2018, East Yard filed a Motion for Preliminary Injunction ("MPI") seeking to enjoin CEMEX's construction and operation of the Facility, RJN, Ex. 3, 2:3-7. Prior to a final ruling on the MPI, CEMEX, PI Bell, and the City entered into a Settlement Agreement that led to the resolution of the litigation via a stipulated dismissal in September 2018. AR 4394-4410; 4411-26.

The Settlement Agreement between CEMEX, PI Bell, and the City acknowledged that (i) CEMEX had previously submitted an application for review of the conceptual drawings and site plans prepared for the Facility; (ii) the application was approved in December 2016 and February 2017; and (iii) CEMEX subsequently submitted construction plans, pulled building permits, and started construction in October 2017. AR 4394, § B; *see* Section II.D, *supra*. To address the allegations in East Yard's 2018 Petition that the Facility required the approval of the DRB, CEMEX, PI Bell, and the City agreed to have CEMEX's application considered by the DRB. AR 4394-95, §§ C-G; 4395-97, §§ 1a-f. Moreover, prior to submission of an application to the DRB, CEMEX also agreed to make certain modifications to the Facility's design, and the underlying design plans, based on concerns raised in the 2018 Petition. In particular, CEMEX agreed to fully enclose its aggregate conveyor system based on concerns of alleged dust impacts. AR 4397, § 2a.

The parties then negotiated and filed a stipulated dismissal. AR 4411-26. CEMEX agreed in the stipulation not to begin operations until after its revised plans were considered and approved by the DRB. AR 4413:22-26; 4414-15, ¶ 2. With respect to access, the stipulated dismissal required the City, PI Bell, and CEMEX to continue their best efforts to secure formal access to Parcel A via

Rickenbacker Road. AR 4415, ¶ 4. The stipulated dismissal specifically contemplated CEMEX's potential use of K Street while those efforts were ongoing. Accordingly, CEMEX agreed to: (i) install a solar-powered radar speed sign on K Street; and (ii) address any concerns from Petitioners in the event CEMEX used K Street, "***until such truck access is obtained***". *Id* (emphasis added). In addition, CEMEX also agreed to pay East Yard's attorney's fees. AR 4415-16, ¶ 5.

Prior to entry of the stipulated dismissal in September 2018, the three other Petitioners in the subject litigation pending before this Court—*i.e.*, Shelter Partnership, The Salvation Army, and GrowGood, Inc.—sought to join the 2018 Petition as named petitioners. RJN, Ex. 4. They were also represented by East Yard's attorney, *id*., and were obviously aware of and in fact participated in the parties' negotiation of the stipulated dismissal.

F. <u>Background: The Salvation Army, Shelter Partnership, and GrowGood, Inc.</u>

Petitioners Salvation Army, Shelter, and GrowGood each operate various non-industrial uses located on K Street and Rickenbacker Road. AR 3753. The Salvation Army property is located along K Street. *Id*. The Salvation Army is authorized to use K Street, which is owned by PI Bell, pursuant to a 2017 easement granted by PI Bell to be a good neighbor and support the Salvation Army's efforts to help the homeless. Mishurda Decl., ¶¶ 9-10. The Salvation Army attended the 2013 meeting when the City Council approved the DA and certified the EIR; but, did not object to the development of the Permitted Uses, or assert that the EIR did not adequately analyze them. AR 4615:22-23; 4606:4-6 (describing permitted uses).

Shelter Partnership similarly did not object to the Permitted Uses or the EIR, although it demanded it be included as a landowner whose ***consent was necessary*** to establish Project-related access via Rickenbacker Road pursuant to DA § 5.4.2 (to which the City Council agreed). AR 3697; 4604:14-18; 4621:7-14. Shelter also explained that it runs trucks along Rickenbacker Road. AR 3697. As discussed in Section II.K, *infra*, Shelter and the other Petitioners want K Street closed, but refuse to support the City's efforts to establish Project-related access along Rickenbacker Road, which is necessary to formally close K Street.

GrowGood, which operates a garden on the Salvation Army's property directly adjacent to several longstanding railroad lines and a stone's throw from the 710 Long Beach Freeway (AR

3753), also did not object to or challenge either the 2013 DA or EIR.

G. CEMEX Re-Applies in November 2018 for Design Review Approval

In November 2018, CEMEX submitted a design review application (the "Application") to the DRB as provided by the 2018 Settlement Agreement and stipulated dismissal. AR 3878-4199; AR 4200-13 (supplemental materials). CEMEX's Application included modified design plans that fully enclosed the conveyor system, along with the following analyses in support of its Application:

1. **Design Consistency Analysis for Buildings and Landscaping prepared by Dennis Roy of RGA Office of Architectural Design**: providing evidence that the CEMEX Facility was designed consistent with and in substantial conformity to the applicable DA design requirements. AR 3896-3909, §§ VI-VII [Analysis, Conclusion].
2. **Design Consistency Analysis for Conveyor System**: providing evidence of the Facility's conveyor system consistency with and conformity to the DA's design requirements. AR 3914-20, §§ V-VI [Analysis, Conclusion].
3. **Permitted Use Conformance Analysis:** in response to the allegations raised by East Yard in the 2018 Petition, CEMEX also submitted a Permitted Use Conformance Analysis (AR 4110-47 and References at AR 3921-4109), which established that the operational impacts of the CEMEX Facility were less than and within the scope of impacts analyzed in the 2013 EIR. AR 4146 [Conclusion].

H. The Planning Department Recommends Approval in January 2019

CEMEX's Application and the supporting analyses discussed above were independently analyzed by the City's Planning Department. AR 3048-57. The Staff Report concluded that the construction and design plans for the CEMEX Facility are consistent with and in substantial conformity to the DA's design requirements. AR 3051-57 [Analysis]. In addition and *in the alternative*, Planning Staff also found that, to the extent any elements of the design plans for the CEMEX Facility modified the Basic Design Concept, the plans could be approved as an authorized "Minor Modification" under the DA. AR 3057, § C; 305-06 § 5.D [Minor Modifications to Approved Design]. Accordingly, Staff recommended DRB approval of the Application. AR 3057.

As explained in the Staff Report, and based on Petitioners' concerns regarding alleged air quality, noise, and traffic impacts associated with the CEMEX Facility, consultant Dr. Jeffrey G. Harvey worked with Planning Staff to identify the relevant 2013 DA Conditions of Approval *already in place* to reduce such impacts. AR 3054-55 [Business Operation]. Harvey recommended those Conditions be incorporated into the DRB Resolution to ensure consistency with the 2013 DA and

Project EIR. AR 3074-84. Harvey also recommended DRB adoption of one ***non-environmental*** condition—a complaint hotline—based on input from Petitioners. AR 3079-80. The complaint hotline discussed at AR 3079-80 is the only condition discussed in Harvey's memorandum at AR 3074-84 that was not included in the 2013 DA conditions at AR 328-56.

I. The DRB Approves the Design Review and Issues Detailed Findings

CEMEX's Application was considered by the DRB at a public meeting on January 31, 2019. AR 3510. The DRB considered CEMEX's Application, the RGA Design Consistency Analysis, the Design Consistency Analysis for Conveyor System, the Permitted Use Conformance Analysis, the Staff Report, and other information in the record. AR 447, § 4. The DRB also confirmed the CEMEX Facility is a Permitted Use because it is a railroad service distribution and logistics facility engaged in the sorting, loading, and unloading of freight, and the sale and storage of gravel. AR 447-48, § 4.A(2), ¶ 2 [Citing Exhibit "C2" at AR 325: Table of Permitted Uses, which includes "Any use currently permitted in the [City's] M (Manufacturing) or CM (Commercial Manufacturing) zoning districts," including gravel sales and storage facilities]; *see* RJN Ex. 1. ***In the alternative***, the DRB also found, consistent with the Staff Report, that to the extent any elements of the plans modified the Basic Design Concept, it fell within the parameters of an authorized "Minor Modification" and approved the Facility's design on that basis as well. AR 448-49, § 4.C; 305-06 § 5.D.

With respect to access, the DRB's Resolution noted that, the "City has agreed to permit the use of Rickenbacker for primary access and to restrict K Street to emergency access when Rickenbacker is available." AR 448-49, § 4.C. The Resolution also explained the current status of the parties' efforts to formalize access to Parcel A via Rickenbacker. AR 449, § 6. "The Development Agreement stated in § 5.4.2 that Developer was to reach agreement with adjacent property owners for the use and maintenance of Rickenbacker without City contribution within three years of the Effective Date. This was not accomplished." *Id.*

> Accordingly, City has initiated acquiring easement rights to make Rickenbacker a public street, subject to Developer's funding maintenance of Rickenbacker through a recorded covenant agreement. The conditions provide for mutual access of Rickenbacker while City assists Developer with making Rickenbacker the legal and primary access. If Developer fails to cooperate, or legal proceedings prohibit the use of Rickenbacker, further proceedings shall be undertaken to achieve access

consistent with the Development Agreement and EIR. *Id*.

In February 2019, the City posted a Notice of Exemption ("NOE"), which explained that the DRB's approval of the CEMEX construction and design plans was a ministerial process exempt from CEQA. AR 2. Specifically, the City explained the DRB was created under the DA to review design elements of proposed construction and landscaping plans and that it lacked discretion to impose mitigation measures to reduce environmental impacts. *Id.* (citing *San Diego Navy Broadway Complex v. City of San Diego*, 185 Cal.App.4th 924 (2010)).

The CEMEX Facility is fully constructed and began operations in May 2019. Olivera Decl., ¶ 3. Since then, trucks entering and exiting Parcel A have only used Rickenbacker Road for access by way of the roadway improvements constructed by PI Bell in accordance with the DA. *Id*., ¶ 4.

J. <u>The City Applies to Formalize Access to Parcel A Via Rickenbacker Road</u>

At the same time as it was processing CEMEX's Design Review Application, the City also sought to secure formal access to Parcel A via Rickenbacker Road by applying to the federal government for approval of a public street easement. That process, if successful, would have resolved Petitioners' concerns regarding K Street, and as such should have been embraced by Petitioners. As shown below, however, Petitioners refused to support the City's efforts, effectively pulling the rug out from under the City's attempt to formalize Rickenbacker Road access, raising questions as to Petitioners' motives with respect to the CEMEX Facility.

1. Background: the 2008 Acquisition of the Four Project Parcels by the City

All of the properties located along Rickenbacker Road were originally part of the Bell Federal Service Center owned by the U.S. Government. AR 3768-69, § A [The Property Requested]; AR 3753. In 2008, the U.S. Government transferred some of those properties; three of which were eventually acquired by the City's Public Financing Authority (the "Authority") and proposed for development in the DA. *Id.*; AR 248, § B [The Site]; AR 3753 (properties transferred in 2008 were PI Bell Parcels "I, II, and III"). The U.S. reserved access rights via Rickenbacker Road for the three properties in conjunction with the 2008 transfers. AR 3768-69, § A.

The fourth Project parcel—Parcel A, where the CEMEX Facility is located—was previously disposed of by the U.S. Government and acquired by the Authority in a separate transaction prior to

2008. AR 3768-69, § A. In an oversight, the U.S. neglected to reserve Rickenbacker Road access rights for Parcel A; thus, Parcel A does not have formal Rickenbacker Road access rights. *Id*.

2. Background: Access Provisions of the DA and Conditions of Approval

Because K Street was the only formal access route to Parcel A in 2013 when the DA was approved, the City included provisions in the DA intended to formally establish access to Parcel A via Rickenbacker Road. AR 267, § 5.4.2. Under the DA, PI Bell was required to extend Rickenbacker Road access to Parcel A. *Id*. PI Bell did so by constructing roadway improvements connecting Rickenbacker Road to Parcel A, which were completed in December 2014 and now provide physical access to the Facility. Mishurda Decl., ¶ 6; Olivera Decl., ¶ 4; AR 3753.

In addition, DA § 5.4.2 required PI Bell to exercise due diligence "to reach an agreement with the owner(s) of Rickenbacker Road for the Project's use and maintenance of the Road within three years of the Effective Date [of the DA.]" AR 267, § 5.4.2 (internal citation omitted). Despite PI Bell's best efforts to obtain a formal agreement for Parcel A-related access via Rickenbacker Road, it has been unable to do so. AR 3723-24; Mishurda Decl., ¶ 7.

3. Background: the City's August 2018 Application to U.S. General Services Administration for a Public Easement on Rickenbacker Road

Given the lack of an agreement for formal Rickenbacker Road access, the City, in August 2018, initiated efforts to obtain a public street easement from the U.S. Government consistent with DA § 5.4.2. AR 3725-29. The purpose of the City's request was to: (i) "Provide access to the West End Parcel [*i.e.*, Parcel A]; and (ii) "Reduce the vehicular traffic on K Street resulting in a safer environment for residents of The Salvation Army Oasis Apartments as well as GrowGood Garden." AR 3726(I), (IV). In December 2018, the City provided additional information requested by the U.S. General Services Administration ("GSA"), including letters of support. AR 3730-62. The GSA responded in February 2019 and requested additional information, including letters of support from "adjacent land owners" including Petitioner Shelter Partnership. AR 3764, § e.

K. <u>Petitioners Refuse to Support Formal Rickenbacker Road Access and Sue Again</u>

The DRB, in large part due to pressure from Petitioners, made a point of acknowledging that CEMEX is to use Rickenbacker Road for access to its Facility on Parcel A (AR 457, § B.4), which

CEMEX continues to do. Olivera Decl., ¶ 4. Nevertheless, and notwithstanding CEMEX's design modifications made pursuant to the August 2018 Settlement Agreement and stipulated dismissal (*i.e.*, the full enclosure of the conveyor system, among other things), Petitioners nevertheless threatened further legal action as a result of the DRB's January 2019 design review approval. To avoid litigation, and allow for the City to continue its efforts to formalize Rickenbacker Road access, the parties to this litigation discussed a potential tolling agreement. AR 3767, ¶ 1.

On March 6, 2019, the City sent Petitioners a letter explaining that a tolling agreement would allow for it to continue processing its request to GSA for a public street easement for Rickenbacker Road, so that K Street—the only formal access route to Parcel A—could be forever closed for Parcel A access. AR 3768, ¶¶ 1-2. The City also requested Petitioners' support for its efforts, which would have given Petitioners the exact relief they seek in this lawsuit. AR 3767-74.

Petitioners refused and, instead, filed this lawsuit on March 11, 2019. Petitioners subsequently filed their operative First Amended Petition on March 28, 2019 ("Petition"). The Petition includes three causes of action. Petition at 10-11. The First Cause of Action challenges the DRB's finding that the construction and design plans for the CEMEX Facility were in substantial conformity with the applicable provisions of the DA. *Id*. at 10. The Second and Third Causes of Action allege the DRB violated CEQA. *Id*. at 11. The Petition raises the same issues as the 2018 Petition filed by Petitioner East Yard, including those resolved through the stipulated dismissal.

On March 22, 2019, the City was forced to withdraw its request for a public street easement from the GSA pending the resolution of this lawsuit due to the lack of support from Petitioners and, in particular, Shelter, whose support for the Rickenbacker Road public access easement was specifically requested by the GSA. AR 3765-66; 3764, § e. As stated above, Shelter previously *demanded* that it be referenced in the DA as a landowner whose consent *was required* in connection with the establishment of Rickenbacker Road access pursuant to DA § 5.4.2. AR 3697.

III. ARGUMENT

A. The DRB's Design Review Findings Are Supported By Substantial Evidence

1. Standard of Review

Petitioners argue the DRB erred in its determination that the design of the CEMEX Facility

conformed to the 2013 EIR and DA.[6] The Court reviews the DRB's findings for substantial evidence. *Dore v. County of Ventura*, 23 Cal.App.4th 320, 327 (1994). Because the administrative agency has technical expertise to aid it in arriving at its decision, Courts may not interfere with the judgments made by the agency and "must resolve reasonable doubts in favor of the administrative findings and decision." *See id.* at 326-27. Findings are to be liberally construed to support rather than defeat the decision under review. *See 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*, 81 Cal.App.4th 880, 884 (2000); *Donley v. Davi*, 180 Cal.App.4th 447, 456 (2009). 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.*, 176 Cal.App.4th 532, 536 (2009).

Petitioners' contentions fail under these deferential standards. The DRB evaluates design review applications for consistency with the "***design requirements***" found in: (i) the "Scope of Development" at DA Exhibit "C" (AR 303-08); (ii) the "Basic Design Concept" at DA Exhibit "C1" (AR 309-23); (iii) the "Development Standards and Permitted Land Uses" at DA Exhibit "C2" (AR 324-25); (iv) the Project Conditions of Approval at DA Exhibit "D" (AR 328-56); and (v) the Project EIR. AR 270, § 6.2.3.[7] The DRB found the design plans for the CEMEX Facility consistent with the applicable design requirements and issued detailed findings explaining its reasoning and bridging the analytic gap between the evidence and its conclusions. AR 447-49. The DRB's design review findings are amply supported by the voluminous administrative record, which includes (i)

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[6] Petitioners seek to mislead the Court throughout its brief by referring to the DRB's approval of the CEMEX Facility as a "Project" or the "CEMEX Project." This is wrong. The "Project" at issue is the approval of the 2013 DA—*i.e.*, the Project that was analyzed and approved in the 2013 EIR. The design review approval of the CEMEX facility by the DRB was a subsequent approval necessary to carry out and implement the final remaining aspect of the Project—the development of Parcel A. Moreover, as noted below in Section III.A.8, *infra*, the DRB's design review approval of the CEMEX facility does not amount to a project under CEQA because that approval was ministerial.

[7] Although the DA states that the DRB evaluates design review applications for consistency with the design requirements in the EIR, the EIR did not expressly impose any such requirements. *See, e.g.*, AR 530 [Design and Appearance]; 3891-92, § 5 (discussing EIR at AR 530). Rather, as discussed below, the DA included a Basic Design Concept and authorized the development of Permitted Uses in accordance with applicable Development Standards.

the RGA Design Consistency Analysis for Buildings and Landscaping ("Buildings and Landscaping Analysis," AR 3882-09); (ii) the Design Consistency Analysis for Conveyor System ("Conveyor Analysis," AR 3910-20); and (iii) the Permitted Use Conformance Analysis (AR 4110-47, 3921-4109 (References)). The evidence before the DRB also included a detailed Staff Report addressing each of the matters before the DRB in considerable detail. AR 3048-57.

2. The DRB's Finding That the CEMEX Facility Is Consistent with the Basic Design Concept Is Supported by Substantial Evidence

The Basic Design Concept included a conceptual site plan for Parcel A depicting the proposed layout of the site—*i.e.*, where a future building and parking lot may be located on the site. AR 310-12. The DRB reasonably concluded that the layout of the site plan for the CEMEX Facility is substantially similar to the conceptual site plan. AR 447, § 4.A(1) [CEMEX Facility, like the conceptual site plans, proposes a building in the northern portion of the parcel and a parking lot in the southern part of the parcel (discussing CEMEX site plan at AR 4149)]. The DRB's findings are supported by the evidence, including the Building and Landscaping Analysis and the Staff Report, both of which include detailed discussions establishing the CEMEX Facility's consistency with the conceptual site plan. AR 3897-99, § VI.A.1.a [Architectural Consistency with Site Plans]; AR 3055-56, § A(1) ["The proposed site layout is similar to that of the conceptual plan …."].

Moreover, the Basic Design Concept also includes a conceptual drawing and a conceptual landscaping plan. AR 304 § 5.A; 321-322 [Illustrative Drawings and Elevations, Conceptual Landscaping Plan]. Like the site plan, the drawings for the CEMEX Facility appear substantially similar to the conceptual drawing and landscaping plan, with respect to both design and landscaping. AR 4148-50. The DRB thus reasonably found that the design of the CEMEX Facility "complies with the fundamental theme, idiom, and design intent of the Basic Design Concept." AR 447, § 4.A(1). The DRB also properly found that the drawings and design plans for the CEMEX Facility "emulate an industrial/warehouse building and would match the colors, materials, and architectural style of the other buildings within the Bell Business Park." *Id*.

The Buildings and Landscaping Analysis also included a detailed discussion of the Facility's consistency with the Basic Design Concept. AR 3896-3900, § VI.A.1 [CEMEX Buildings are

Consistent with the Basic Design Concept]. That discussion addressed the architectural, design, and landscaping elements required by the Basic Design Concept. *Id*. The Conveyor Analysis includes a similar discussion. AR 3915, § V.A [Conveyor System is Consistent with the Applicable Design Requirements]. The Staff Report provided additional evidence of the Facility's consistency with the required elements of the Basic Design Concept. AR 3051-3053 [Analysis]; AR 3055-3056, § A(1).

3. The DRB's Finding That the CEMEX Facility Proposed a Permitted Use Is Supported by Substantial Evidence

The DRB also confirmed the CEMEX Facility is a Permitted Use under the DA because it is a railroad service distribution and logistics facility engaged in the sorting, loading, and unloading of freight, and the sale and storage of gravel. AR 447-48, § 4.A(2), ¶ 2. That finding is supported by substantial evidence. *Id.* (citing Exhibit "C2" at AR 325 [Table of Permitted Uses, which includes "Any use currently permitted in the [City's] M (Manufacturing) or CM (Commercial Manufacturing) zoning districts," including gravel sales and storage facilities]); *see* RJN Ex. 1. The finding is also supported by the Buildings and Landscaping Analysis, which included a detailed discussion establishing the CEMEX Facility as a Permitted Use. AR 3900-3901, § VI.A.2; 3905-3906(b) [Permitted Uses]. The Conveyor Analysis provided additional evidence. AR 3915, § V.A.2; 3919-3920(b) [Permitted Uses]. The Staff Report did as well. AR 3054; 3056, § A(2).

4. The DRB's Finding That the CEMEX Facility Is Consistent with the Development Standards Is Supported by Substantial Evidence

The DRB also found the CEMEX Facility to be consistent with the applicable Development Standards. AR 447-48, § 4.A.2. The DRB's findings addressed the CEMEX Facility's consistency with the following Development Standards: (i) maximum building area; (ii) minimum lot size; (iii) maximum building height and mass, (iv) minimum parking requirements; (v) enclosing walls and fencing; and (vi) ground-mounted machinery and utilities. *Id.*.; *see* AR 304, § 5.B [Development Standards and Permitted Land Uses]; 324-25 [Exhibit "C2," listing "Development Standards" and "Permitted Uses"]. These findings are supported by the same evidence. The Buildings and Landscaping Analysis included a detailed discussion of the CEMEX Facility's consistency with the applicable Development Standards. AR 3900-04, § VI.A.2 [CEMEX buildings are consistent with

the Development Standards]. The Conveyor Analysis and Staff Report also addressed the CEMEX Facility's consistency with the applicable Development Standards. AR 3915-19, § V.A.2 [conveyor system is consistent with the Development Standards]; 3052-53 [Staff Analysis]; 3056, § A(2).

5. The DRB's Finding That the CEMEX Facility Is Consistent with the Conditions of Approval Is Supported by Substantial Evidence

Finally, the DRB found the CEMEX Facility to be consistent with the applicable design-related Project Conditions of Approval. AR 448, § 4.B. The DRB explained that some of the Conditions were not applicable, either because the Conditions did not relate to design issues within the scope of the DRB's review, or because the Conditions did not apply to Parcel A. *Id.*.; *see also* AR 3906. As to the conditions that do apply to the CEMEX Facility, both the Buildings and Landscaping Analysis and the Staff Report include detailed discussions establishing that the CEMEX Facility is consistent with the applicable Project Conditions of Approval. AR 3906-08, § VI.B [CEMEX Buildings are Consistent with the Conditions of Approval]; 3056-57, § B [Project design documents are consistent with the Conditions of Approval].

In light of the detailed findings and the substantial evidence supporting the findings, Petitioners arguments discussed below lack merit.

6. Petitioners' Arguments That the CEMEX Facility Does Not Fall Within the Parameters of the 2013 DA Fail

Petitioners contend that the CEMEX Facility "looks nothing like the Basic Design Concept." Opening Brief ("Op. Br.") at 14:27. But the "Basic Design Concept" is more than just a single drawing—it is a broad umbrella term used to discuss various architectural, design, and landscaping elements. AR 304 § 5.A. The EIR noted the City's intent in approving the DA was to provide "flexibility in design and construction of the parcels." AR 530. It noted the parties were considering at the time "one option" involving a "'condominium industrial' use", but that "other building configurations are possible". *Id.* As discussed above, the DRB provided detailed findings amply supported by substantial evidence concluding the CEMEX Facility is consistent and in substantial conformity with the Project's flexible design concept, including the conceptual drawings.

Petitioners also argue that "railroad operations were never contemplated for the site." Op.

Br. at 15:21-22. Petitioners are wrong. The conceptual site plan depicting the proposed layout of Parcel A in the Basic Design Concept specifically references a "***Rail Spur***" at the top of each page, along the northern boundary of Parcel A. AR 310-12. CEMEX's design plans included a rail spur in that exact location. AR 4149-4150. Moreover, as discussed above, the DRB explained that authorized Permitted Uses include "onsite railroad service and transfer facilities." AR 447-48, § 4.A(2), ¶ 2; *see also* AR 248, § C ["Site as Centrally Located for *Intermodal Freight Transport*" (emphasis added)]. Railroad operations were obviously contemplated for the site.

Petitioners next argue that use of conveyor belts was not contemplated in the DA. However, as the DRB explained, "the conceptual site plans were not intended to constitute an exhaustive depiction of all allowed uses". AR 447, § 4.A(1); 565 ["While the site plans have been designed with the intent to realistically describe future development, it is likely that one or more features of the plans may be altered once a tenant and property owner for the site(s) is identified."]. Moreover, the DRB found the conveyor system to be an authorized Accessory Use designed in conformity with the applicable Development Standards. AR 447, § 4.A(1); 3920 [Conveyor Analysis]; 3056, § A(2).

Petitioners also argue that the CEMEX Facility must have a roof. That too is wrong. The DA specifically allows "Any use currently permitted in the [City's] M (Manufacturing) or CM (Commercial Manufacturing) zoning districts." AR 447-48, § 4.A(2), ¶ 2 (citing Exhibit "C2" at AR 325 [Table of Permitted Uses]). As the DRB explained, that includes uses that are "are customarily conducted in the open"; and the DRB reasonably concluded that aggregate transport and transfer is "typically conducted in an unenclosed setting rather than an enclosed building." AR 447, § 4.A(1); *see also* AR 3906; 3056. The DRB's interpretation of the DA and the City's zoning ordinance is entitled to deference. *See Terminal Plaza Corp. v. City and County of San Francisco*, 186 Cal.App.3d 814, 825-26 (1986) ("We recognize that the interpretation of the resolution by the administrative agency charged with enforcing it is entitled to great weight and should be followed unless clearly wrong."). Thus, the Facility was not required to have a roof. Nor was it required to have rooftop solar, as Petitioners claim. Op. Br. at 15:13-14. However, the Office Building is solar-ready. AR 4124. The Facility also includes electric vehicle charging stations, imposes truck idling restrictions, and does not ship refrigerated products, all of which reduce energy use. *Id*.

In sum, the totality of the record supports the DRB's findings that the CEMEX Facility is consistent and in substantial conformity with the applicable DA design requirements.

7. Petitioners' K Street Arguments Fail Because the DRB Has No Authority Over K Street and Their Arguments Are Not Ripe

Petitioners devote a significant portion of their Opening Brief to discussion of access-related issues and allege that CEMEX has "threatened" to use K Street. *See, e.g.*, Op. Br. at 2:11-14. But neither the Petition nor the Opening Brief includes a single allegation that CEMEX ***has ever used K Street for truck access***. That is because since CEMEX started operations in May 2019, trucks entering and exiting Parcel A have used Rickenbacker Road for access, by way of the roadway improvements constructed by PI Bell. Olivera Decl., ¶ 4.

Moreover, Petitioners' arguments concerning the use of K Street do not implicate a design issue. Thus, the issue of K Street was not before the DRB, the role of which was limited to the aesthetic, architectural, and design elements of proposed construction and landscaping plans. AR 305 § 5.C. Accordingly, the DRB did not address K Street except to restate that access to Parcel A is taken from Rickenbacker Road in non-emergency situations and to detail the parties' ongoing efforts to formalize Rickenbacker Road access. AR 448-49, §§ 4.C, 6; 457, § B.4.

Petitioners' factual contentions regarding K Street are both baseless and misleading. For example, Petitioners inaccurately contend that K Street "was required to be closed when the site is developed." Op. Br., 5:11-13. However, for all practical purposes K Street access to Parcel A ***is*** closed and access is taken via Rickenbacker. Moreover, the DA recognized that flexibility was necessary and that K Street would be formally closed for access to Parcel A *once formal access* via Rickenbacker Road was secured. Thus, the DA provided PI Bell three years to formalize Rickenbacker Road access through a negotiated agreement. AR 267, § 5.4.2. If no agreement was reached, the DA authorized the City to undertake efforts to formalize access, as happened here. *Id.*.; AR 3725-29; 3730-62. Further, the formal closure of K Street was clearly ***contingent*** on either PI Bell or the City first securing access via Rickenbacker Road. AR 734 ["***The extension of the roadway [on Rickenbacker Road] will allow the existing driveway from parcel A onto K Street to be closed***. ***With the closure***, industrial truck traffic ***will no longer be forced*** to drive by the non-

industrial uses south of Rickenbacker…" (Emphasis added)]. It is for this very reason that the stipulated dismissal ***specifically contemplated CEMEX's potential use of K Street*** while efforts to secure Rickenbacker Road access were ongoing and "***until such truck access is obtained***", which is why CEMEX agreed to install a solar-powered radar speed sign on K Street and establish a process to address any concerns from Petitioners in the event CEMEX ever used K Street. AR 4415, ¶ 4.

In any event, Petitioners' contentions should be rejected in that they do not present a justiciable controversy because the issues are not ripe. "Ripeness" requires a current controversy. *City of Santa Monica v. Stewart*, 126 Cal.App.4th 43, 59 (2005). A ripe controversy is a "basic prerequisite to judicial review of administrative acts". *Pacific Legal Foundation v. California Coastal Comm'n*, 33 Cal.3d 158, 169 (1982). Ripeness involves a two-prong test: (1) whether the dispute is sufficiently concrete that relief is appropriate; and (2) whether withholding judicial consideration will result in hardship. *City of Santa* Monica, 126 Cal.App.4th at 64.

Petitioners' arguments concerning K Street are not ripe under these standards ***because CEMEX is not now, and never has, used K Street for access to Parcel A.*** Olivera Decl., ¶ 4. Petitioners do not contend otherwise. Rather, they argue throughout their Opening Brief that, CEMEX "threatens" to use or "may" use K Street in the future (pp. 2, 14, 19) or that CEMEX may seek to use K Street in the future if efforts fail to obtain legal access via Rickenbacker (p. 2, 11. 14, 23). Their arguments pose a "parade of horribles" that ***may*** occur ***at some unspecified time*** in the future ***if*** CEMEX begins to utilize K Street for access. To adjudicate the matter now, the Court would be asked to speculate as to how that approval may be given and what conditions may be imposed. *See Milagra Ridge Partners, Ltd. v. City of Pacifica*, 62 Cal.App.4th 108, 117 (1998) (controversy not ripe; only when a final administrative decision is made have the facts sufficiently congealed to permit judicial review). Adjudication in these circumstances would amount to an advisory opinion over events that may never occur. Petitioners' K Street arguments are not ripe.

8. The DRB's Ministerial Design Review Process Is Not Subject to CEQA

Petitioners contend the DRB's design review process is a discretionary action and requires further CEQA review. Op. Br. at 21-24. Petitioners are incorrect.

CEQA does not apply to an agency decision simply because the agency may exercise ***some***

discretion in approving an activity. *Navy Broadway*, 185 Cal.App.4th at 934. "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." *Id.* (internal quotes and alterations omitted). CEQA is intended to minimize the adverse effects of new construction on the environment; thus, an action is not considered discretionary under CEQA "unless a public agency can shape the project in a way that would respond to concerns raised in an EIR, or its functional equivalent". *Friends of Westwood, Inc. v. City of Los Angeles*, 191 Cal.App.3d 259, 266 (1987); *Mountain Lion Foundation v. Fish & Game Commission*, 16 Cal.4th 105, 117 (1997); *Protecting Our Water & Environmental Resources v. County of Stanislaus*, No. S251709, 2020 WL 5049384, at *2-*6 (Cal. Supreme Court, Aug. 27, 2020) (decision is ministerial if agency has no discretionary authority to shape the project). Thus, the touchstone is whether "the government [can] shape the project in any way which could respond to any of the concerns which might be identified in an" EIR. *Friends of Westwood*, 191 Cal.App.3d at 266-67.

A design review process does not implicate CEQA for precisely these reasons—discretion over the design and aesthetics of a building does not confer the type of discretion permitting an agency to mitigate the project's environmental impacts:

> While local design review ordinances obviously do not preempt CEQA, aesthetic issues are ordinarily the province of local design review, not CEQA....Where a project must undergo design review under local law that process itself can be found to mitigate purely aesthetic impacts to insignificance, even if some people are dissatisfied with the outcome. A contrary holding that mandated redundant analysis would only produce needless delay and expense.

Bowman, 122 Cal.App.4th at 593-94; *see also McCorkle Eastside Neighborhood Group v. City of St. Helena*, 31 Cal.App.5th 80, 94 (2019) (design review ordinance does not implicate CEQA); *Friends of Davis v. City of Davis*, 83 Cal.App.4th 1004, 1014-15 (2000) ("CEQA does not enlarge an agency's authority beyond the scope of a particular [design review] ordinance"); *Health First v. March Joint Powers Authority*, 174 Cal.App.4th 1135, 1144 (2009). The City here deems the DRB process to be ministerial and that determination "is entitled to great weight unless it is clearly erroneous or unauthorized." *Friends of Davis*, 83 Cal.App.4th at 1015.

The result in this case is dictated by the court's opinion in *Navy Broadway*, which cannot be

meaningfully distinguished. That case involved a 1992 development agreement for a redevelopment project analyzed in an EIR. *Navy Broadway*, 185 Cal.App.4th at 929. The development agreement included "urban design guidelines" for the aesthetic design of the project. *Id.* Like here, to obtain design review approval, the developer was required to submit construction plans to a nonprofit corporation ("CCDC") for consistency with the design guidelines. *Id*. The CCDC approved the developer's plans, determining in the process that "no further environmental review of the project was warranted under CEQA." *Id.* at 929. Petitioner sued under CEQA alleging that CCDC's approval of the construction plans was discretionary because its review was based upon a "subjective determination" of the plans' consistency with the design guidelines and that "[d]etermining whether such subjective standards have been met involves the exercise of judgment and deliberation…." *Id.* at 930, 938. The court of appeal disagreed. CCDC's role in performing a consistency review was limited to determining whether the plans were consistent with the development agreement's aesthetic guidelines. *Id.* at 939. "The fact that the CCDC could arguably exercise discretionary authority to alter the aesthetics of the Project so as to make the Project consistent with the development agreement does not demonstrate that the CCDC had the authority to modify the Project in accordance with a proposed updated EIR so as to reduce" the project's environmental impacts. *Id*. Accordingly, the court determined that CEQA did not apply. *Id.*; *see also Health First*, 174 Cal.App.4th at 1143-44 (similar design review process occurring after environmental review of the project had been completed did not implicate CEQA).

Here, just as in *Navy Broadway*, the source of the DRB's authority was established by the DA, and the DA declares the Design Review Approval process to be a "ministerial action." AR 305, § 5.C; 270, § 6.2.5. The NOE posted by the City in February 2019 explains:

> The [DRB] was created by the [DA] for the Bell Business Center, entered into by the City of Bell and PI Bell LLC on September 25, 2013. ***The [DRB]'s authority is limited***, as set forth in Section 6.2 of the [DA] and Section 5.C and 5.D, Scope of Development, to the [DA], ***to determining that development undertaken pursuant to the [DA] is based on the design requirements set forth in the [DA], conditions of approval of the [DA] and the [EIR] for the [DA]***. ***The [DRB] does not have the discretion to establish conditions that alleviate adverse environmental impacts***. Consequently, its decisions are exempt from CEQA pursuant to *Navy Broadway*[.]

AR 2 (emphasis added).

That conclusion was correct. Design Review Approvals are governed by DA § 6.2, which provides that, "all building and landscaping improvements in the Project" require Design Review Approval. AR 269. Design Review Approvals require the submission of site plans, landscaping plans, building elevations/renderings, and a color and materials board. AR 269-70, § 6.2.2(a)-(d). The DRB reviews the aesthetic, architectural, and design elements of proposed construction and landscaping plans. AR 269, § 6.2 ["design review is needed in order to encourage the orderly and harmonious appearance of structures and property"]; 305 § 5.C [DRB "shall review the design documents to confirm substantial conformance with the Basic Design Concept"]. To approve the design, the DRB must find that, "the Project improvement, as set forth in the proposed Future Development Approval, is based on the ***design requirements*** included in the approved Scope of Development, Conditions of Approval, and Environmental Impact Report." AR 270, § 6.2.3 (emphasis added). Thus, similar to *Navy Broadway* and *Health First*, the DA expressly restricts the DRB's authority to aesthetics and to a determination of consistency with previously-established design standards. *Id*.

Further, no provision of the DA gives the DRB any authority to impose conditions to shape environmental impacts. ***Nor did the DRB actually impose any conditions to shape impacts associated with the CEMEX Facility***. Rather, the conditions imposed by the DRB were strictly limited to design and landscaping issues. AR 459-60 [III. Design Review Board Conditions]. The remainder of the conditions in the DRB Resolution were a restatement of the ***already-applicable*** requirements of (i) CEMEX's South Coast Air Quality Management District ("SCAQMD") permits and implementing regulations (AR 458-59, ¶¶ B.8-10; AR 4106-09), and (ii) the 2013 Conditions of Approval. Indeed, the 2013 DA Conditions were reproduced *verbatim* in the DRB Resolution. *Compare* AR 451-459 [I. Required Standard Conditions; II. Required Conditions to Maintain Development Agreement And EIR Consistency]; *with* AR 328-356 [DA Conditions of Approval].

Petitioners' contention that the DRB imposed conditions to mitigate environmental impacts is baseless. Petitioners refer only to a "complaint hotline" established by the DRB. Op. Br. at 23:17-19. But a complaint hotline is not an environmental mitigation measure. Moreover, the hotline was recommended by Dr. Harvey based on input from Petitioners, as discussed above. AR 3079-80.

Petitioners also allege the DRB was "authorized to make subjective judgments". Op. Br. at 21:14-18. That precise argument was rejected by the *Navy Broadway* court. *Navy Broadway*, 185 Cal.App.4th at 930, 938-39 (rejecting argument that "subjective determination" of plans' consistency with design guidelines is subject to CEQA); *Leach v. City of San Diego*, 220 Cal.App.3d 389, 395 (1990) (CEQA not implicated by subjective decision to draft water from one reservoir to another). The question is not whether the DRB exercises "subjective judgments" over design, but whether the DRB had ***discretion to mitigate environmental impacts***. Put simply, subjective authority over a project's design raises no CEQA issue. *Bowman*, 122 Cal.App.4th at 593-94.

Petitioners unsuccessfully try to distinguish *Navy Broadway* by claiming the "DRB has discretion to address [] environmental impacts …." Op. Br. at 24, fn. 10. But, again, Petitioners cite no evidence to suggest the DRB possessed discretionary authority "to eliminate or mitigate one or more adverse environmental consequences". *Friends of Westwood*, 191 Cal.App.3d at 266-67. Similarly, Petitioners assert the DRB "has discretionary authority" (Op. Br., pp. 22-24), but only cite ***design-related discretion*** purportedly exercised by the DRB, which is not subject to CEQA. Op. Br. at 22-24; *Navy Broadway*, 185 Cal.App.4th at 939; *Bowman*, 122 Cal.App.4th at 593-594.

Petitioners also assert the DRB's "authority was augmented by the Settlement Agreement". This too is incorrect. The Settlement Agreement limited the DRB's authority to that provided under the DA. AR 4396, 1.f ["For the avoidance of doubt, all supplemental administrative proceedings of the DRB shall be in strict compliance with the provisions and requirements of the DA"].

Finally, because the DRB exercised no discretion over the Design Review Application, no CEQA review was required at all. Pub. Res. Code § 21080(a) (CEQA review required only of discretionary projects). An agency is required to prepare a subsequent or supplemental EIR only where the agency grants a "discretionary" approval. CEQA Guidelines § 15162(c) ("[o]nce a project has been approved, the lead agency's role in project approval is completed, unless further discretionary approval on that project is required…. 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***"); *Fort Mojave Indian Tribe v. Department of Health Services*, 38 Cal.App.4th 1574, 1597

(1995) (same). Petitioners' CEQA arguments are therefore wrong.[8]

B. <u>The DRB's Alternative Minor Modification Finding Is Supported by Substantial Evidence</u>

Moreover, the DRB also found, ***in the alternative***, that, to the extent any of the design plans for the CEMEX Facility could be construed as modifying the Basic Design Concept, such modification(s) constituted a design-related "Minor Modification" authorized under the DA. AR 448, § 4.C; 305-06 § 5.D [Minor Modifications to Approved Design]. The DA authorizes the DRB to approve "Minor Modifications" to the Basic Design Concept on a case-by-case basis. AR 305-06 § 5D. Examples of authorized modifications include: (i) modifications to site plans and building shape; (ii) modifications to building materials and colors; (iii) modifications to the location and number of on-site rail spurs; and (iv) modifications to building size or magnitude. *Id.*[9] Approval of a Minor Modification requires the DRB to make four (4) findings, namely that the modified design: (i) is consistent with the Project's maximum square footage (*i.e.*, the modification could not result in exceedance of the Project's maximum footprint of 840,390 sq. ft. across all four Project parcels); (ii) is in substantial compliance with the fundamental theme, idiom and design intent of the Basic Design Concept; (iii) promotes public benefits as defined in the DA; and (iv) would not require additional environmental review subject to § 15162 of the CEQA Guidelines. AR 306 § 5.D.

As discussed below, the DRB's alternative minor modification approval was also a ministerial action administered in strict compliance with the procedures of the DA and is supported by substantial evidence. Petitioners fail to demonstrate error by the DRB.

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[8] Moreover, even if there was a discretionary action (and there was not), as set forth in Section III.B.4, *infra*, "no subsequent or supplemental environmental impact report" may be required" here under Public Resources § 21166. *See Moss v. County of Humboldt*, 162 Cal.App.4th 1041, 1049–50 (2008) (after an initial EIR is certified, a "statutory presumption" arises "in favor of the developer and against further review").

[9] Notably, Petitioners fail to mention that Minor Modifications may include modifications to the "location, alignment and quantity of rail spurs on site", AR 305 § 5.D, and again misstate the facts by asserting that "railroad operations were never contemplated for the site." Op. Br. at 15:21-22. As discussed above, the conceptual site plan depicting the proposed layout of Parcel A in the Basic Design Concept specifically references a "Rail Spur" at the top of each page, along the northern boundary of Parcel A, and the CEMEX design plans include a rail spur in that very same location. *Compare* AR 310-312; *with* AR 4149-50.

1. The DRB's Finding That the CEMEX Facility Will Not Exceed the Project's Maximum Square Footage Is Supported by Substantial Evidence

As discussed above, the DA identified "Development Standards" that serve as the "prevailing land use regulations for the Project" and set the maximum height, size, and density for development on the Project parcels. AR 304, § 5.B; 249, § E; 261, § 4.1; 324-325 [DA Exhibit "C2"]. The DA authorized a "Maximum Building Area" of up to 274,860 sq. ft., with up to 20,000 sq. ft. of ancillary office space, for Parcel A. AR 324. Project buildings cannot exceed 150 feet in height. *Id*.

The CEMEX Facility consists of a main building that is 49,380 sq. ft. in size and an office building that is 1,440 sq. ft. for a total of 51,240 sq. ft. AR 3052-53; 3903-04. Further, the main building is approximately 40 feet tall and the tallest part of the conveyor system will be approximately 48 feet tall. *Id*.; AR 3916-17. Thus, the DRB reasonably found the Facility to be consistent with the Project's maximum square footage (*i.e.*, that the Facility would not result in exceedance of the Project's maximum footprint of 840,390 sq. ft. across all four Project parcels). AR 448, § 4.C (incorporating by reference certain findings "stated above").

2. The DRB's Finding That the Design of the CEMEX Facility Substantially Complies with the Fundamental Theme, Idiom and Design Intent of the Basic Design Concept Is Supported by Substantial Evidence

Next, the DRB found that the design of the CEMEX Facility is in substantial compliance with the fundamental theme, idiom and design intent of the Basic Design Concept. AR 448, § 4.C (incorporating by reference certain findings "stated above" including AR 447, § 4.A(1)). The DRB's detailed analysis in support of this finding is discussed in Section III.A.2, *supra*.

3. The DRB's Finding That the CEMEX Facility Will Promote Public Benefits Is Supported by Substantial Evidence

In addition, the DRB also found that the CEMEX Facility would promote the public benefits discussed in the DA. AR 448-49, § C. Specifically, the DRB explained that, in connection with CEMEX's Design Review Application, PI Bell had agreed to pay future costs associated with maintenance of Rickenbacker Road, alleviating the potential need for such costs to be paid by the City. *Id*. (citing the "Conditions" at AR 457, § B.4). CEMEX also agreed to provide public benefits

in the form of an annual $400,000+ Community Impact Fee and participate in a Local Hire Program, among other things. AR 4398, § 5.a-b. These funds will be "used for law enforcement, community development, parks, recreation, senior programs, and enforcement of conditions of approval." AR 3772, § F.5. The Staff Report also discussed why the CEMEX Facility's modified design would promote public benefits. AR 3057, § C. The DRB's findings are supported by substantial evidence.

4. The DRB's Finding That the CEMEX Facility Does Not Require Further Environmental Review Is Supported by Substantial Evidence

Finally, the DRB found the CEMEX Facility does not require additional environmental review under CEQA Guidelines § 15162. Courts must uphold 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*, 153 Cal.App.4th 1385, 1398 (2007).

After an initial EIR is certified, a "statutory presumption" arises "in favor of the developer and against further review." *Moss v. County of Humboldt*, 162 Cal.App.4th 1041, 1049–50 (2008). That statutory presumption is created by Public Resources Code § 21166, which provides that, after an EIR has been certified "***no subsequent or supplemental environmental impact report shall be required"*** unless substantial changes are proposed with respect to the project or the circumstances under which the project is being undertaken, or new information becomes available. Section 21166 "represents a shift in the applicable policy considerations." *Melom v. City of Madera*, 183 Cal.App.4th 41, 48–49 (2010)." The low threshold for requiring the preparation of an EIR in the first instance is no longer applicable; instead, agencies are prohibited from requiring further environmental review unless the stated conditions are met. *Id.* "[S]ection 21166 comes into play precisely because in-depth review has already occurred, the time for challenging the sufficiency of the original EIR has long since expired (§ 21167, subd. (c)), and the question is whether circumstances have *changed* enough to justify *repeating* a substantial portion of the process." *Bowman v. City of Petaluma*, 185 Cal.App.3d 1065, 1073–74 (1986) (emphases in original). "At this point, the interests of finality are favored over the policy of favoring public comment, and the rule applies even if the initial review is discovered to have been inaccurate and

misleading in the description of a significant effect or the severity of its consequences." *Friends of Davis v. City of Davis*, 83 Cal.App.4th 1004, 1018 (2000). The DRB's determination that no further environmental review is required in these circumstances must be upheld under these standards.

Notably, the DA does not require the DRB to analyze the full scope of a facility's impacts to approve a Minor Modification. Rather, the DRB is required only to consider whether *potential modifications* to the Basic Design Concept would require additional environmental review. AR 306 § 5.D. In the event the DRB denies the application, it is required to "state in writing in reasonable detail the reason for the disapproval and the changes that the City requests for correction of the submittal." AR 272, § 6.4. Thus, as with the DRB's design review process, the limited scope of the DRB's review does not confer sufficient discretion to trigger CEQA. *Sierra Club v. County of Sonoma*, 11 Cal.App.5th 11, 23 (2017); *Navy Broadway*, 185 Cal.App.4th at 933-34.

Petitioners' contention that the DRB was required to undertake additional CEQA review ignores one of the fundamental purposes of development agreements—to frontload development approvals and associated environmental review and allow for future ministerial, site-specific authorizations. Project mitigation measures and alternatives were previously evaluated in the 2013 EIR and were not permitted or required to be considered by the DRB. AR 1; 251, § L.

Moreover, substantial evidence supports the DRB's determination that the design plans for the CEMEX Facility, to the extent those plans modified the Basic Design Concept, would not require additional environmental review. The CEMEX facility is not a "substantial change" to the Project as Petitioners contend; just the opposite, it is a Permitted Use expressly authorized by the DA and now vested. AR 250-51, § J; 261, § 4.1; 262, § 4.4; 263, § 5.1. In addition, the Permitted Use Conformance Analysis compared the operational impacts of the CEMEX Facility to the scope of impacts analyzed in the 2013 EIR. AR 4110-47; 3921-4109 (References). The Conformance Analysis also included a category-by-category comparison of the CEMEX Facility's impacts to the scope of impacts analyzed in the 2013 EIR. AR 4118-46, § V [Analysis].

As set forth in Table 1 at AR 4117, the 2013 EIR concluded that impacts to air quality and transportation and circulation would be significant and unavoidable. AR 4117. The Conformance Analysis included a detailed analysis demonstrating the CEMEX Facility's impacts associated with

both air quality and transportation and circulation impacts "will not cause … impacts that exceed those analyzed in the EIR." AR 4122-28, § D [Air Quality]; 4143-46, § R [Transportation and Circulation]. Thus, the Conformance Analysis concluded that both the "development impacts" and the "cumulative development impacts" "are either less than, or within the scope of, the environmental impacts analyzed in the EIR." AR 4146 [Conclusion].

The CEMEX Facility also remains subject to the 2013 DA Conditions of Approval. As discussed above, Dr. Harvey recommended the DRB incorporate certain ***already-applicable*** DA Conditions into its Resolution to ensure consistency with the DA and Project EIR. AR 3074-84; *see also* AR 3054-55 [Business Operation]. The DRB followed that recommendation. *Compare* AR 451-59 [I. Required Standard Conditions; II. Required Conditions to Maintain Development Agreement And EIR Consistency], *with* AR 328-56 [DA Conditions of Approval]. In addition, the DRB Resolution also included (i) a restatement of the already-applicable requirements of CEMEX's SCAQMD permits and implementing regulations (AR 458-59, ¶¶ B.8-10; AR 4106-09); and (ii) conditions pertaining to various ***design-related*** issues (AR 459-60 [III. Design Review Board Conditions]). As discussed in Section II.H, *supra*, the DRB also adopted one non-environmental condition recommended by Harvey—a complaint hotline—based on input from Petitioners.

The DRB reasonably determined that, "CEMEX's use of Parcel A is subject to and substantially consistent with the [DA] and EIR certified in connection with the approval of the [DA]. Therefore, 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 substantially different mitigation measures than those established for purposes of the [DA]." AR 446 [CEQA Conclusions]. In light of the detailed findings and analysis supporting the findings, the DRB's determination that design plans for the CEMEX Facility, to the extent any of those plans modified the Basic Design Concept, would not require additional environmental review, is supported by substantial evidence.

5. Petitioners Have Not Established the DRB's Alternative Minor Modification Finding Was Not Supported by Substantial Evidence

Petitioners' challenge to the DRB's alternative Minor Modification finding is premised upon a misrepresentation of the scope of the DRB's authority and bootstrapped arguments incorporated

from other sections of the Opening Brief. None of Petitioners' arguments demonstrate error.

Petitioners first allege that minor modifications cannot result in the alteration of a Development Standards by more than 10%. Op. Br. at 16:7-9. This is incorrect. The 10% limitation applies only to ***expansions*** of Development Standards, such as expansions of a Project parcel's maximum building size. However, the DA imposes no limitation upon the DRB's authority to approve Minor Modifications resulting in ***reductions*** to Development Standards exceeding 10%. AR 306 § 5.D [explaining the DRB is authorized to approve "reductions in size" as Minor Modifications]. Accordingly, Petitioners' argument that the DRB erred because the CEMEX Facility is 80% ***smaller*** than the Basic Design Concept is meritless. Op. Br. at 16:20-21.

Next, Petitioners argue that "CEMEX's site design fundamentally changed the formation, types, sizes, and shapes of structures in the site plan." Op. Br. at 16:19-20. Petitioners also incorporate by reference their arguments that the CEMEX design plans are not in substantial conformance with the Basic Design Concept. Op. Br. at 16:22-25. However, as discussed in Section III.A.2, *supra*, the DRB reasonably found the design plans for the CEMEX Facility are substantially similar to the Basic Design Concept, including the conceptual site plan. AR 447, § 4.A(1).

Lastly, Petitioners misrepresent the status of the rail spur throughout the Opening Brief. As discussed above, the rail spur was not only contemplated in the Basic Design Concept for location on Parcel A but also depicted in the CEMEX design plans in the same location. *Compare* AR 310-12, *with* AR 4149-50. Accordingly, because the DRB was only required to consider whether ***modifications*** to the Basic Design Concept required further environmental review, no such finding was required with respect to the rail spur, which was not modified.

C. Petitioners' CEQA Causes of Action Are Time-Barred in Any Event

Petitioners allege that subsequent or supplemental environmental review "is required to analyze – for the first time – the CEMEX" Facility. Op. Br. at 19:4-5. But Petitioners ignore the EIR certified in 2013 analyzed the entire "Project," including all Permitted Uses authorized under the DA. Thus, Petitioners' deadline to challenge whether the EIR adequately analyzed the impacts associated with all Permitted Uses expired in 2013.

1. The 2013 NOE Started a 30-Day Statute of Limitations Deadline

The City issued the Notice of Preparation of the EIR in April 2013. AR 463. "The City's intent [was] to approve individual entitlements for each of the four building sites and to consider the environmental impacts of the entire project in a single EIR." *Id.*; AR 485. The DA identified a series of "industrial, manufacturing, and warehousing" uses as "Permitted Uses" authorized for development. AR 254, § 1.27; 255, § 1.32; Gov. Code § 65865.2. The Project was comprised of "industrial buildings to accommodate ***any of the permitted and accessory land uses*** enumerated in the Development Standards and Permitted Land Uses ('Development Standards') attached hereto as Exhibit C2." AR 303, § 1, ¶ 2 (emphasis added). The use of heavy-duty trucks and 24-hours per day was specifically contemplated. AR 565. On August 22, 2013, the City posted a Notice of Determination ("NOD") announcing the City Council's certification of the Project EIR. AR 1. That started a 30-day time period to challenge the adequacy of the EIR, including whether the EIR adequately analyzed the impacts associated with all Permitted Uses. Pub. Res. Code § 21167(c).

2. Petitioners Cannot Challenge the Scope or Adequacy of the 2013 EIR

It cannot be credibly disputed that the CEMEX Facility is a Permitted Use under the DA. The DRB confirmed the CEMEX Facility is a Permitted Use because it is a railroad service distribution and logistics facility engaged in the sorting, loading, and unloading of freight, and the sale and storage of gravel. AR 447-448, § 4.A(2). That finding is entitled to deference. *Terminal Plaza*, 186 Cal.App.3d at 825-26 ("the interpretation of the resolution by the administrative agency charged with enforcing it is entitled to great weight and should be followed unless clearly wrong."). Petitioners argue, superficially, that "the Board's findings that the CEMEX project constitutes an allowed use under the Manufacturing zone are insufficient to support its consistency finding". Op. Br. at 15:8-10. But Petitioners provide no facts or analysis and therefore concede the issue.

Furthermore, because the EIR certified in 2013 analyzed the entire "Project," Petitioners' deadline to challenge the adequacy of the EIR, including whether the EIR *adequately analyzed* the impacts associated with all Permitted Uses, was 30 days after the City's posting of the NOD in 2013. AR 1; Pub. Res. Code § 21167(c). Thus, the EIR is no longer subject to legal challenge.

D. <u>The March 22, 2019 Letter Does Not Establish a Violation of the DA or CEQA</u>

Petitioners argue that the DRB has ministerial duties under Code of Civil Procedure § 1085

to conduct further proceedings as a result of the City's March 22, 2019 letter. 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.*, 112 Cal.App.4th 185, 195 (2003). Petitioners do not come close to meeting this exacting standard.

1. The March 22, 2019 Letter Requires No Additional DRB Proceedings

Petitioners' contention that the March 22, 2019 letter somehow triggers a new design review board process lacks any merit whatsoever. As set forth in Section III.A.7, *supra*, nothing in the DA gives the DRB authority over the use of K Street. Its authority is limited to design review and ensuring consistency with the design requirements in the 2013 DA. The authority of the DRB also depends upon the submittal of an application for a Future Development Approval. AR 269, § 6.2.1.

2. The March 22, 2019 Letter Requires No Additional CEQA Review

Similarly, Petitioners' arguments that the March 22, 2019 letter triggers subsequent environmental review is also baseless. As set forth above, an agency is required to conduct supplemental CEQA review only where the agency grants a "discretionary" approval. CEQA Guidelines §§ 15162(c), 15163; *Fort Mojave*, 38 Cal.App.4th at 1597. The March 22, 2019 letter was not a discretionary project entitlement. CEQA has no relevance to the letter at all.

E. <u>Petitioners Are Guilty of Laches and Unclean Hands and Their Action Is Moot</u>

Petitioners have known about the scope of Permitted Uses since 2013. AR 4606:4-6; 4614:21-22; 4615:22-23; 3674; 3696-3697. Five years later, East Yard moved to enjoin CEMEX's development of a Permitted Use (RJN, Ex. 3), and the three other Petitioners sought to join the 2018 Petition as named petitioners. RJN, Ex. 4. But the parties—*all of them*—reached a deal, and filed a stipulated dismissal. AR 4411-26.

The stipulated dismissal recognized the circumstances under which CEMEX would begin operations. AR 4414-15, ¶ 1 [discussing CEMEX's ability to begin receiving rail shipments and distributing building materials in exchange for CEMEX's agreement to install "Retrofits"—*i.e.*, conveyor covers]. Now, seven years after the approval of the DA, and two years after Petitioners withdrew their effort to enjoin construction, Petitioners have the unmitigated gall to ask this Court

to enjoin CEMEX's vested, by-right operations that have been ongoing since May 2019. However, Petitioners' request for relief should be rejected because Petitioners have sat on their rights, failed to take action to prevent either the construction or operation of the Facility, and are therefore guilty of laches. *People v. Koontz*, 27 Cal.4th 1041, 1087-1088 (2002) (laches is "unreasonable delay plus … the plaintiff's acquiescence in the act complained of…"); *Akley v. Bassett*, 68 Cal.App 270, 292-293, 295 (1924) (holding it was "impossible" to return parties to status quo due to petitioner's laches). Moreover, CEMEX's completion of construction in May 2019 renders Petitioners' challenge moot. *Parkford Owners for a Better Community v. County of Placer*, No. C087824, 2020 WL 5542986, *4 (Ct. App., Third Dist., Sep. 16, 2020) [petitioner's challenge to permit "can no longer be effective" because the challenged facility is "fully constructed and is up and running"].

Furthermore, courts will refuse to impose equitable relief where the party seeking such relief has unclean hands. *Kendall-Jackson Winery, Ltd. v. Superior Court*, 76 Cal.App.4th 970, 978 (2000). "Any conduct that violates conscience, or good faith, or other equitable standards of conduct is sufficient cause to invoke the doctrine." *Id.* at 979. Regardless of the merits of their claims, Petitioners should be denied relief here on account of their unclean hands.

First, Petitioners sued the City and Real Parties in 2018. When CEMEX agreed to incorporate various changes to the design of the Facility and re-apply for design review approval through the DRB, the parties then negotiated the stipulated dismissal, which obligated CEMEX to make the design changes, required CEMEX to apply for a new design review approval by the DRB, and obligated CEMEX to pay Petitioners $200,000 in attorney's fees. AR 4414-15. The stipulated dismissal *specifically contemplated* the potential use of K Street "***until such truck access is obtained***" via Rickenbacker Road. AR 4415, ¶ 4. Petitioners even demanded and CEMEX agreed to implement measures to address any concerns in the event it was necessary for CEMEX to use K Street. *Id*. Yet, two years later, Petitioners now stand before this Court as if that never occurred.

What is more, Petitioners themselves have experienced similar access-related complications due to the government's piecemeal dispositions of property in the area. Three years ago, the Salvation Army ("TSA") requested that PI Bell grant TSA an easement so that TSA could lawfully use K Street. Mishurda Decl., ¶ 9. As TSA's counsel explained, TSA had no legal right to use K

Street, which is the only source of access to TSA's properties, due to "legal technicalities" caused by the government's disposition of the properties to TSA. *Id.* But PI Bell did not sue or challenge TSA's operation of a residential use in an industrial zone. Instead, PI Bell granted the requested easement. *Id.*, ¶ 10. Now, TSA, GrowGood (which operates on TSA's property), and Shelter (which runs trucks of its own down Rickenbacker, AR 3697, and ***demanded*** it be included in DA § 5.4.2 as a landowner ***whose permission was required*** to establish Rickenbacker Road access, *id.*), have returned the favor by suing PI Bell, the City, and CEMEX due to a "legal technicality" (TSA's words) regarding Parcel A's use Rickenbacker Road.

The worst part of the story, however, is that the GSA specifically requested support from Shelter and other "local stakeholders" to process of the City's application for a public access easement on Rickenbacker so that K Street could be forever closed for access to Parcel A. AR 3764, § e; 3726(I), (IV). Instead of supporting the City's efforts to provide the very relief requested in this litigation, Petitioners unreasonably withheld their support and sued, biting the very hand that allows them to operate their non-industrial uses in the Cheli Industrial Zone. But Petitioners are not entitled to relief they themselves are preventing from occurring. *Kendall-Jackson,* 76 Cal.App.4th at 978 (unclean hands prevents "wrongdoer from enjoying the fruits of his transgression"); *Estates of Collins & Flowers*, 205 Cal.App.4th 1238, 1249 (2012) (challenge barred because plaintiffs were "creating [the] problem"). Petitioners' request for relief should be barred by their unclean hands given their refusal to establish access via Rickenbacker Road.

IV. CONCLUSION

For the foregoing reasons, the Petition should be denied.

September 29, 2020

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PROOF OF SERVICE

The Salvation Army v. City of Bell; PI Bell, LLC
LASC 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 1900 Avenue of the Stars, 7th Floor, Los Angeles, CA 90067-4308.

On September 29, 2020, I served true copies of the following document(s) described as **JOINT OPPOSITION BRIEF OF REAL PARTIES IN INTEREST CEMEX CONSTRUCTION MATERIALS PACIFIC, LLC AND PI BELL, LLC** as follows:

SEE ATTACHED SERVICE LIST

BY CM/ECF NOTICE OF ELECTRONIC FILING: I electronically filed the document(s) with the Clerk of the Court by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. Participants in the case who are not registered CM/ECF users will be served by mail or by other means permitted by the court rules.

BY E-MAIL: I caused a copy of the document(s) to be sent from e-mail address sj2@jmbm.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 Los Angeles, California.

Sheila Jimenez

JMBM | Jeffer Mangels Butler & Mitchell LLP

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