Filed 2/26/18 Sunset Coalition v. City of Los Angeles CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

SUNSET COALITION et al., Petitioners and Appellants, v. CITY OF LOS ANGELES, Respondent; THE ARCHER SCHOOL FOR GIRLS, Real Party in Interest and Respondent.	B279644 (Los Angeles County Super. Ct. No. BS157811)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mary Strobel, Judge. Affirmed.

Chatten-Brown & Carstens, Douglas P. Carstens, Joshua R. Chatten-Brown, and Michelle Black for Petitioners and Appellants.

Michael N. Feuer, City Attorney, Terry Kaufmann Macias, Assistant City Attorney, and Jennifer K. Tobkin, Deputy City Attorney; Remy Moose Manley, Andrea K. Leisy and Laura M. Harris for Respondent.

Latham & Watkins, James L. Arnone, Benjamin J. Hanelin and Jennifer K. Roy for Real Party in Interest.

I. INTRODUCTION

Real party in interest, The Archer School for Girls (Archer), received approval from the City of Los Angeles (the city) to make campus improvements that included the construction of three new buildings and an underground parking structure. Sunset Coalition, Brentwood Residents Coalition, Brentwood Hills Homeowners Association, and David and Zofia Wright (plaintiffs) challenge the city's certification of the environmental impact report (EIR) and approval of the project. The trial court denied their petition for writ of mandate and entered judgment for the city and Archer.

On appeal, plaintiffs argue the city violated its municipal code and charter by approving deviations from the floor area and height limits through a conditional use permit rather than a variance. They also contend defendants violated the California Environmental Quality Act (CEQA; Pub. Resources Code, § 21000 et seq.) by not using a public agency's updated guidance on age-specific health risk assessments when analyzing the toxic air contaminant impact. They further argue the city was required to recirculate the EIR after Archer compressed the construction schedule from 75 months to 36 months, and after the public

agency updated its health risk assessment guidance. We affirm the judgment.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The Project Site

In December 1998, the city granted Archer a conditional use permit to operate a private school for girls, grades 6 through 12, on a 6.2-acre parcel located at 11725 Sunset Boulevard (the campus) in Brentwood, Los Angeles. The city permitted a 95,500-square foot main building and a 12,000-square foot proposed gymnasium that was never built. Later, Archer acquired two adjacent residential properties located at 11728 Chaparal Street (Chaparal parcel) and 141 North Barrington Avenue (Barrington parcel). The two houses on the parcels are currently used as the head of school residence and storage.

The 7.31-acre project site comprises the campus and the Barrington and Chaparal parcels. The existing school buildings are a historic main building with a later-built attached north wing, and two houses located on the Barrington and Chaparal parcels. The school is in two residential zones— RE11 (very low residential) and R3 (medium residential)— in the Brentwood-Pacific Palisades community plan area. The project site is bound by Chaparal Street to the north, Sunset Boulevard to the south, Barrington Avenue and residences to the east, and residences to the west.

B. The Project

On October 17, 2011, Archer submitted an application to the city for a site plan review and a vesting conditional use permit. Archer initially proposed a six-year, three-phase project to improve and expand the existing campus. The original project included an expansion of the north wing and construction of four new buildings: a multipurpose facility; a performing arts center; a visual arts center; and an aquatics center. In addition, the existing surface parking would be removed and a new underground parking structure would be constructed underneath new regulation-sized soccer and softball fields. The two houses on the Barrington and Chaparal parcels would be removed to accommodate the temporary classrooms and restrooms.

In response to public comments during circulation of the draft EIR, the refined project eliminated the proposed aquatics center and reduced the size of the proposed north wing, multipurpose facility, performance arts center and underground parking structure. Under the refined project, the visual arts center would be located on a portion of the Barrington parcel while the rest of the lot would be for residential use. Instead of three construction phases, renovation of the north wing would be concurrent with construction of the new buildings and underground parking structure. The concurrent construction of the facilities and reduced scope of the project compressed the proposed six-year construction period to three years.

C. The EIR

The city published the draft EIR on February 27, 2014 and circulated it for an extended 61-day public comment period. The city released a final EIR for the project on November 13, 2014. The final EIR responded to 548 comments on the draft EIR received from the public and other agencies. The final EIR found the project would result in significant and unavoidable construction noise, construction vibration, operational noise, and construction-related traffic. Construction-related emissions and intersection traffic, which were previously found significant and unavoidable in the draft EIR, were found to be less than significant with mitigation.

The draft and final EIRs noted that "the [South Coast Air Quality Management District (SCAQMD)] CEQA guidance does not require a health risk assessment for short-term construction emissions." Nonetheless, the EIRs analyzed the health risk from exposure to toxic air contaminants released by diesel-powered heavy equipment during grading and excavation. The EIRs concluded the project-related toxic air contaminant impact from diesel particulate emissions fell under the significance threshold.

Although Archer initially proposed a 75-month construction timeframe, both the draft and final EIR also analyzed the air quality, noise, and traffic impacts under an accelerated construction schedule. The EIRs found concurrent construction of the facilities would not increase the use of onsite equipment or the daily number of trucks. The accelerated schedule would increase the intensity of the construction but the impacts would not exceed the maximum daily construction impacts under the six-year construction schedule.

Following the final EIR's release, the city prepared six errata to correct the final EIR and clarify issues raised during the public hearings. Errata 1, dated December 2014, discussed the project's elimination of the proposed aquatics center, maintenance of a portion of the Barrington parcel as a residential lot, and a five-year construction schedule. Errata 2, dated April 2015, responded to public comments regarding the project's floor area and a future lot line adjustment to the Barrington and Chaparal parcels. Errata 2 also discussed the project's three-year construction schedule, which Archer proposed in response to additional comments made after the final EIR's release. Errata 2 analyzed the air quality, noise, and traffic impacts under the three-year construction schedule. Errata 3, dated June 2015, discussed project refinements relating to the maximum number of special events and family and academic events, the annual trip cap, and noise from the temporary classrooms. Errata 4, dated June 2015, corrected an error in the final EIR regarding cumulative traffic impacts. Errata 5, dated July 2015, explained a refined health risk assessment was provided in the final EIR based on the 2003 Guidance issued by the Office of Environmental Health Hazard Assessment (OEHHA). The final EIR was revised to require Archer to prepare an updated health risk assessment based on the most current OEHHA guidance, and to impose measures that would reduce constructed-related diesel emissions. Errata 6, dated August 2015, corrected the health risk assessment calculations in the final EIR. In addition, Errata 6 explained recirculation of the EIR was not warranted because the impacts of the three-year construction schedule had already been addressed in the draft EIR.

D. The City's Approval of the Project

At the April 23, 2015 public hearing, the city planning commission (the commission) certified the EIR (including the six errata) and adopted the related mitigation monitoring program, CEQA findings, and statement of overriding considerations. In addition, the commission approved: a vesting conditional use permit; a site plan review; determinations relating to height and area modifications; and adjustments to the height regulations for fences, gates, and walls. The commission made the required vesting conditional use findings under Los Angeles Municipal Code (LAMC) section 12.24.E.

On June 30, 2015, the city council's planning and land use management (PLUM) committee held a public hearing on six appeals submitted by the project's opponents. At the hearing, Archer agreed to additional conditions including an updated heath risk assessment prior to heavy construction. The PLUM committee recommended the city council partially grant two of the appeals to add the new conditions. The PLUM committee recommended denial of the remaining four appeals. The PLUM committee approved the conditional use findings and recommended approval of a vesting conditional use permit with revised conditions of approval.

On August 4, 2015, the city council certified the EIR and adopted the CEQA findings and statement of overriding considerations. The city council also approved the vesting conditional use permit with revised conditions of approval, and adopted the conditional use findings. Among other conditions, the new conditional use permit continued the current enrollment

cap at 518 students for at least 20 years, and increased the mandatory student bus ridership from 50 to 76 percent.

III. DISCUSSION

A. The Municipal Code and Charter Claims

1. Plaintiffs Exhausted Their Administrative Remedies for the Municipal Code and Charter Claims

Before addressing the merits of the claims that the city violated its municipal code and charter, we first consider whether plaintiffs have exhausted their administrative remedies. In an action or proceeding challenging local zoning and planning decisions made at a public hearing, "the issues raised shall be limited to those raised in the public hearing or in written correspondence delivered to the public agency prior to, or at, the public hearing." (Gov. Code, § 65009, subd. (b)(1); *Park Area Neighbors v. Town of Fairfax* (1994) 29 Cal.App.4th 1442, 1447-1448.) "The purpose of the exhaustion doctrine is to ensure public agencies are given the opportunity to decide matters within their expertise, respond to objections, and correct any errors before the courts intervene." (*Bridges v. Mt. San Jacinto Community College Dist.* (2017) 14 Cal.App.5th 104, 115 (*Bridges*).) Plaintiffs bear the burden of demonstrating that the issues raised in the judicial proceeding were first raised at the administrative level. (*Id.* at p. 116.) Plaintiffs exhaust their administrative remedies if they fairly apprise the city of their concerns about the project. (*Santa Clarita Organization for Planning the Environment v. City of Santa Clarita* (2011) 197

Cal.App.4th 1042, 1052.) Exhaustion of administrative remedies is a legal question that we review de novo. (*Defend Our Waterfront v. State Lands Com.* (2015) 240 Cal.App.4th 570, 580.)

The city contends no one, including plaintiffs, claimed a variance was required or that the city violated its charter prior to the city council's approval of the project. Although plaintiffs did not argue a variance was required, several public comments challenged the height and floor area modifications granted under the conditional use permit. A December 8, 2014 letter from Brentwood Hills Homeowners Association argued the "residential floor area" in LAMC section 12.03 applied to all buildings on residential lots, including nonresidential buildings. An April 20, 2015 comment letter to the city planning commission stated, "While educational institutions are a permitted conditional use on RE-zoned properties, the municipal code contains no exemption from the generally applicable height and floor area restrictions for the residential zone in which the school use is constructed." In addition, at the April 23, 2015 city planning commission hearing, a neighbor argued the project violated the floor area limits in the RE11 zone and the Baseline Mansionization Ordinance. Further, in the May 27, 2015 appeal to the city council, Brentwood Residents Coalition objected to the issuance of a conditional use permit because the project included "taller buildings" and "more floor area" than permitted by code. These objections fairly apprised the city of plaintiffs' objections to the height and floor area modifications in the conditional use permit. We conclude plaintiffs have exhausted their administrative remedies.

2. Standard of Review

The issuance of a conditional use permit is a quasi-judicial administrative act that is reviewable under the administrative mandamus procedures pursuant to Code of Civil Procedure section 1094.5. (*Essick v. Los Angeles* (1950) 34 Cal.2d 614, 623 (*Essick*); *Neighbors in Support of Appropriate Land Use v. County of Tuolumne* (2007) 157 Cal.App.4th 997, 1005 (*Neighbors*).) We review the administrative record to determine whether the city's decision and findings are supported by substantial evidence. (*BreakZone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205, 1244.)

Plaintiffs challenge only the city's interpretation of its municipal code and charter. When interpreting municipal ordinances, we apply the same rules used to interpret statutes. (*Eskeland v. City of Del Mar* (2014) 224 Cal.App.4th 936, 942.) We exercise independent judgment and are not bound by any legal interpretation made by the city or the trial court. (*Id.* at p. 942.)

However, the city's interpretation of its own ordinance and charter is accorded some degree of judicial deference based on the context and circumstance. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 12 (*Yamaha*) [weight given to an agency's statutory interpretation is situational]; *Stolman v. City of Los Angeles* (2003) 114 Cal.App.4th 916, 928 [applying *Yamaha* in reviewing zoning administrator's interpretation of city charter and municipal code].) Greater weight is given to an agency's interpretation where "'the agency has expertise and technical knowledge, especially where the legal text to be interpreted is technical, obscure, complex, open-ended,

or entwined with issues of fact, policy, and discretion.'" (*Yamaha, supra*, 19 Cal.4th at p. 12; *Citizens for Beach Rights v. City of San Diego* (2017) 10 Cal.App.5th 1301, 1312.) Some deference is warranted where there are "indications of careful consideration by senior agency officials" or "the agency 'has consistently maintained the interpretation in question.'" (*Yamaha, supra*, 19 Cal.4th at p. 13; *Citizens for Responsible Equitable Environmental Development v. City of San Diego* (2010) 184 Cal.App.4th 1032, 1041-1042.) However, deference to an agency's statutory interpretation is limited because determining a statute's "meaning and effect is a matter 'lying within the constitutional domain of the courts.'" (*Center for Biological Diversity v. Department of Fish & Wildlife* (2015) 62 Cal.4th 204, 236, quoting *Yamaha, supra*, 19 Cal.4th at p. 11.)

3. The Conditional Use Permit Allows the Project to Exceed the Height and Floor Area Limits

The Los Angeles Municipal Code allows public and private schools to operate on residential properties, including in the RE and R3 zones, through a conditional use permit. (LAMC, §§ 12.24.T.3(b) [vesting conditional use permit], 12.24.U.24 [conditional use permit for schools].) Conditional use permits are granted for uses that are essential or desirable to the public convenience or welfare. (*Essick, supra*, 34 Cal.2d at p. 662; *Wheeler v. Gregg* (1949) 90 Cal.App.2d 348, 363.) A conditional use permit allows uses that would not otherwise be permitted as a matter of right under the applicable zoning regulations. (*Neighbors, supra*, 157 Cal.App.4th at p. 1006; *Sounhein v. City of San Dimas* (1996) 47 Cal.App.4th 1181, 1187; see *IT Corp. v.*

Solano Bd. of Supervisors (1991) 1 Cal.4th 81, 89 ["A zoning ordinance may allow conditional uses, pursuant to permit, for particular parcels within a zone."].)

City of Los Angeles (L.A.) Charter section 563 authorizes the city council to "prescribe by ordinance the procedure for the granting of conditional use permits." The city council has done so by providing procedures in LAMC section 12.24 for conditional use permits. Pursuant to LAMC sections 12.24.U24(b) and 12.24.T.3(b), the city planning commission approved the Archer vesting conditional use permit as the initial decisionmaker on April 23, 2015. The commission's conditional use permit approval was subject to appeal to the city council. At the June 30, 2015 hearing, the city council's PLUM committee heard six appeals and revised some conditions of approval to address the concerns of Archer's nearby neighbors. The city council later approved the vesting conditional use permit with revised conditions of approval on August 4, 2015.

To ensure the conditional use is compatible with the surrounding neighborhood, LAMC section 12.24.E requires the city planning commission to make the following findings: "1. that the project will enhance the built environment in the surrounding neighborhood or will perform a function or provide a service that is essential or beneficial to the community, city, or region; [¶] 2. that the project's location, size, height, operations and other significant features will be compatible with and will not adversely affect or further degrade adjacent properties, the surrounding neighborhood, or the public health, welfare, and safety; and [¶] 3. that the property substantially conforms with the purpose, intent and provisions of the General Plan, the applicable community plan, and any applicable specific plan."

The city planning commission made the section 12.24.E findings, which were later adopted by the city council.

Plaintiffs argue the city violated its municipal code because the project exceeded the LAMC's floor area and height limits in the RE11 zone.[1] They contend the proposed performance arts center exceeded the floor area ratio limit in LAMC sections 12.21.1.A.1 and 12.07.01.C.5. Under section 12.21.1.A.1, "'the total Residential Floor Area' shall comply with the Floor Area restrictions for each zone." For the RE11 zone, section 12.07.01.C.5 applies the residential floor area ratio of either 35 or 40 percent of the lot area: "the maximum residential floor area contained in all buildings . . . shall not exceed the following standards for each RE Zone: RE9 and RE11 - 40 percent of the lot area, except that when the lot is 15,000 square feet or greater then the residential floor area shall not exceed 35 percent of the lot area. . . ."[2] Plaintiffs contend the performance arts center exceeds the section 12.07.01.C.5 limit with a floor area ratio of 79 percent: 17,758 square feet on a 22,492-square foot lot.

The 35 percent floor area ratio limit in LAMC section 12.07.01.C.5, however, applies only to *residential* floor area. Under LAMC section 12.03, "Floor Area, Residential" is broadly defined as "[t]he area in square feet confined within the exterior walls of a Building or Accessory Building on a Lot in an RA, RE,

---

[1] Lots in the RE11 (Residential Estate) zone must have a minimum width of 70 feet and a minimum area of 11,000 square feet. (LAMC, § 12.07.01.C.4.)

[2] A 20 percent floor area bonus is allowed if the project meets certain design features or green building standards. (LAMC, § 12.07.01.C.5.)

RS or R1 Zone." However, the city council made findings to clarify that the residential floor area limits in LAMC section 12.07.01.C.5 do not apply to nonresidential uses. The residential floor area limits were established by the Baseline Mansionization Ordinance (BMO, Ordinance No. 179,883), which became effective on June 29, 2008. Two days later on July 1, 2008, Councilmembers Jack Weiss and Wendy Greuel introduced a motion calling for clarification of the BMO's impact on non-residential projects. On February 25, 2009, the city council adopted the following findings to clarify the BMO: "There are several uses (schools, religious institutions, police/fire stations, etc.) in single-family zones that are only allowed with approval of a discretionary entitlement such as a Conditional Use Permit or Public Benefit Project. These types of uses are a completely different type of development from single-family homes, and have entirely different scales. The Baseline Mansionization Ordinance was never intended to address the size of non-residential structures which were already permitted through these types [of] discretionary reviews. Moreover, the issues that go along with the construction of the types of facilities are typically addressed through the required public hearing processes and conditions of approval which help to mitigate potential impacts on surrounding properties."[3]

Since Archer does not propose any residential buildings, the project is not subject to LAMC section 12.07.01.C.5, but to section 12.21.1.A.1. The project is in Height District No. 1, and,

---

[3] These city council findings are consistent with LAMC section 12.07.01.A.7, which allows for "conditional uses enumerated in Section 12.24" in the RE zone.

under LAMC section 12.21.1.A.1, "the total floor area contained in all the main buildings on a lot in Height District No. 1 shall not exceed three times the buildable area of said lot."[4] Under this 3:1 floor area ratio, the total allowable development on the project site is 704,399 square feet. The project totals 148,995 square feet, which is 21 percent of this total allowable floor area. Thus, the project's floor area ratio calculated as a whole is below the 3:1 ratio in LAMC section 12.21.1.A.1.[5]

Plaintiffs also argue the proposed multipurpose facility and north wing exceeded the height limit in LAMC section 12.21.1. Under LAMC section 12.21.1, "no building or structure shall exceed 36 feet in height" in the RE11 zone. The conditional use permit allows a maximum height of 41 feet, 4 inches for the north wing renovation. But in the undisputed conditional use findings, the city determined the north wing renovation would visually appear an average of 31 feet, 4 inches from adjacent properties

---

[4] We grant plaintiffs' request for judicial notice of the following documents pursuant to Evidence Code sections 452, subdivision (b) and 459: LAMC sections 11.00, 12.21, and 12.21.1; Ordinance No. 161,684; Ordinance No. 181,624; and Ordinance No. 184,802.

[5] The city did not calculate the floor area ratio for each of the lots that comprised the project site. The parties disagree on whether the floor area ratio can be calculated based on the entire project site or must be calculated for each individual lot. As the city notes, the trial court found the record supported the conclusion that the 3:1 ratio would not be exceeded even if calculated per lot. We do not see specific support for this conclusion in the record, but we also have no reason to conclude otherwise, particularly where the project's total for the combined lot was so far below the allowable floor area.

and would not be visible from Sunset Boulevard. Likewise, the multipurpose facility, which measures 46 feet under LAMC section 12.03, "would measure 36 feet in height from [the] grade but appear 28 feet in height from most public vantage points." The conditional use findings explained: "Due to the sloping nature of the site's natural topography, when measured along Chaparal Street, the Multipurpose Facility, will only present as 28 feet high relative to Chaparal Street, which is lower than the permitted height for the surrounding neighborhood homes and is lower than many of the existing street trees."

Even if the project exceeded the height and floor area limits in the RE zone, the city was allowed under LAMC section 12.24.F to permit these modifications. Section 12.24.F provides in part: "In approving the project, the decision-maker may impose conditions related to the interests addressed in the findings set forth in Subsection E. The decision may state that the height and area regulations required by other provisions of this Chapter shall not apply to the conditional use approved." Consistent with this provision, the city planning commission stated, "the height and area regulations required by other provisions of the LAMC governing shall not apply to this Conditional Use approval." The city planning commission and city council also made the required findings under LAMC section 12.24.E that "the project's location, size, height, operations and other significant features will be compatible with and will not adversely affect or further degrade adjacent properties, the surrounding neighborhood, or the public health, welfare, and safety."

Notwithstanding LAMC section 12.24.F, plaintiffs argue the height and area regulations in sections 12.07.01.C.5 and 12.21.1 are controlling because they were established by

ordinances, enacted in 2008 and 2011, whereas section 12.24.F was enacted in 2000. We agree "a statute enacted later in time controls over an earlier-enacted statute." (*Cross v. Superior Court* (2017) 11 Cal.App.5th 305, 322; accord, *State Dept. of Public Health v. Superior Court* (2015) 60 Cal.4th 940, 960-961.) But this rule only applies when conflicting statutes cannot be reconciled. (*Id.* at p. 960.)

General principles of statutory interpretation require us to first "'harmonize statutes, reconcile seeming inconsistencies in them, and construe them to give force and effect to all of their provisions.'" (*Pacific Palisades Bowl Mobile Estates, LLC v. City of Los Angeles* (2012) 55 Cal.4th 783, 805.) We read the municipal code sections together and find no inconsistency between LAMC section 12.24.F and sections 12.07.01.C.5 and 12.21.1. LAMC section 12.24.F is clear and unambiguous—it permits the decisionmaker to state that the height and area regulations in other sections of the zoning code, including sections 12.07.01.C.5 and 12.21.1, do not apply to a project approved under a conditional use permit. Applying plaintiffs' construction of section 12.24.F would render some of its words superfluous. (*Ennabe v. Manosa* (2014) 58 Cal.4th 697, 719 ["'Courts should give meaning to every word of a statute if possible, and should avoid a construction making any word surplusage.'"]

Furthermore, even if we apply the statutory construction rule that a later-enacted ordinance controls over an earlier-enacted one, section 12.24.F would still be the controlling code section. The latest version of section 12.24.F was amended by Ordinance No. 183,581, which became effective on July 4, 2015. The 2015 amendment did not change the language of section

12.24.F that "[t]he decision may state that the height and area regulations required by other provisions of this Chapter shall not apply to the conditional use approved." We conclude the city did not violate the municipal code by allowing the project to exceed the height and area limits because it had authority to do so under LAMC section 12.24.F.

4. No Area or Height Variance Was Required Under the Municipal Code or City Charter

Plaintiffs argue both a conditional use permit and a variance were required because the project deviated from the height and floor area regulations. A conditional use permit differs from a variance. (*Essick, supra*, 34 Cal.2d at p. 623; *Safe Life Caregivers v. City of Los Angeles* (2016) 243 Cal.App.4th 1029, 1047 (*Safe Life Caregivers*).) "Conditional use approvals refer to uses of land in zones 'when not permitted by right,' . . . and are addressed in section 563 of the L.A. Charter and section 12.24 of the Municipal Code. (LAMC, § 12.24, subd. A.)" (*West Chandler Boulevard Neighborhood Assn. v. City of Los Angeles* (2011) 198 Cal.App.4th 1506, 1513 (*West Chandler*).) "A conditional use may be permitted if it is shown that its use is essential or desirable to the public convenience or welfare and at the same time that it will not impair the integrity and character of the zoned district." (*Tustin Heights Assn. v. Board of Supervisors* (1959) 170 Cal.App.2d 619, 626.) The applicant does not have to demonstrate hardship to obtain a conditional use permit. (*Ibid.*) By contrast, a variance requires the applicant to show "that strict enforcement of the zoning limitations would cause unnecessary hardship." (*Id.* at p. 627.) A variance grants

an individual exception to the zoning ordinances and is addressed in L.A. Charter section 562 and LAMC section 12.27. (*Safe Life Caregivers, supra*, 243 Cal.App.4th at p. 1047; *West Chandler, supra*, 198 Cal.App.4th at p. 1513.)

Plaintiffs contend allowing the project to exceed the height and floor area limits through LAMC section 12.24.F without going through the variance procedure creates conflicts with section 12.28.A. We disagree. LAMC section 12.28.A provides in part: "The Zoning Administrator shall have the authority to grant adjustments in the Yard, area, Building line and height requirements of Chapter 1 of this Code. . . . A request for an increase of 20 percent or more shall be made as an application for a variance pursuant to Section 12.27 of this Code, except as may be permitted by other provisions of Chapter 1 of this Code." By its terms, section 12.28.A does not require a variance application for height adjustments if it is permitted under other provisions in chapter 1 of the municipal code. LAMC section 12.24.F, which is part of chapter 1 of the municipal code, allows the decisionmaker to state that the height and area regulations required by other provisions of the code do not apply to the conditional use project. There is no inconsistency between LAMC section 12.24.F and section 12.28.A.

LAMC section 12.24.F also does not conflict with section 12.24.X.10. LAMC section 12.24.X.10 allows the zoning administrator to permit an applicant to exceed the height limit in section 12.21.1 after making specified findings. Plaintiffs argue section 12.24.X.10 applies to the project because section 12.24.E requires the decisionmaker to make "any additional findings required by Subsections U.,V., and X., and shall determine that the project satisfies all applicable requirements in those

subsections." We disagree. LAMC section 12.24.X authorizes the zoning administrator to approve certain specified uses and activities as the initial decisionmaker, with the area planning commission as the appellate body. This provision is inapplicable because the zoning administrator did not act on the Archer conditional use permit. Under section 12.24.U.24, it is the city planning commission— not the zoning administrator— who has authority to grant conditional use permits for schools. Notably, LAMC section 12.24.U.24 does not require the city planning commission to make any additional findings, other than those enumerated in section 12.24.E, before issuing the Archer conditional use permit. There is no inconsistency between section 12.24.F and section 12.24.X.10 because the latter provision does not apply to the Archer conditional use permit.

Plaintiffs also contend the city's approval of the project violates L.A. Charter section 562. Subdivision (c) of that section requires the zoning administrator to make five enumerated findings before granting a variance.[6] Furthermore, L.A. Charter

---

[6] L.A. Charter section 562, subdivision (c) provides: "The following findings shall be made before a variance may be granted: [¶] (1) that the strict application of the provisions of the zoning ordinance would result in practical difficulties or unnecessary hardships inconsistent with the general purposes and intent of the zoning regulations; [¶] (2) that there are special circumstances applicable to the subject property such as size, shape, topography, location or surroundings that do not apply generally to other property in the same zone and vicinity; [¶] (3) that the variance is necessary for the preservation and enjoyment of a substantial property right or use generally possessed by other property in the same zone and vicinity but which, because of the special circumstances and practical difficulties or unnecessary hardships, is denied to the property in

section 562, subdivision (c) specifies: "A variance shall not be used to grant a special privilege or to permit a use substantially inconsistent with the limitations upon other properties in the same zone and vicinity." Plaintiffs contend the city failed to comply with the variance requirements in L.A. Charter section 562. They also claim permitting Archer to have a non-conforming use on its property in the RE zone is a "special privilege" prohibited by L.A. Charter section 562. But L.A. Charter section 562 governs only variances. Conditional use permits are governed by L.A. Charter section 563, which authorizes the city council to prescribe the conditional use permit procedures. Under L.A. Charter section 563, there is no requirement that the city make variance findings in connection with the conditional use permit process.

Plaintiffs argue L.A. charter 562 is applicable because variances and conditional use permits are often required for the same project. They argue such was the case in *West Chandler, supra*, 198 Cal.App.4th at page 1511, where the city granted both a conditional use permit and a parking variance to a synagogue in a residential zone.[7] Some conditional use projects may require

---

question; [¶] (4) that the granting of the variance will not be materially detrimental to the public welfare, or injurious to the property or improvements in the same zone or vicinity in which the property is located; and [¶] (5) that the granting of the variance will not adversely affect any element of the General Plan."

[7] The zoning administrator is the initial decisionmaker for conditional use permits for churches. (LAMC, § 12.24.W; *West Chandler, supra*, 198 Cal.App.4th at p. 1514.) In *West Chandler*, the zoning administrator denied a height variance and later the

variances, such as the parking variance in *West Chandler*. But here, no area variance was necessary because the floor area was within the allowable non-residential limit. In addition, no height variance was required because the city planning commission permitted the project to exceed the height regulations in the RE11 zone pursuant to LAMC section 12.24.F.

We conclude no height or area variance was required under the municipal code and the city charter in conjunction with the Archer conditional use permit. Our view is consistent with the history of LAMC section 12.24. Since 1950, the city has granted authority to the city planning commission to state that the area and height regulations required by other zoning provisions do not apply to a project approved under a conditional use permit.[8] Ordinance No. 96,222, which was adopted by the city council on February 28, 1950, amended section 12.24 to state in part: "[T]he Commission shall determine the Height and Area regulations for the 'Conditional Uses' under its jurisdiction, including those

---

synagogue agreed to build a religious facility that complied with the height limit for the R-1 zone. (*Id.* at pp. 1510-1511.) Because the revised project did not exceed the height limit, the *West Chandler* court did not discuss LAMC section 12.24.F.

[8] We grant the city's request for judicial notice of the following documents pursuant to Evidence Code sections 452, subdivisions (b) and (c), and 459: Ordinance No. 96,222 (effective April 20, 1950); February 21 and 28, 1950 city council meeting minutes [discussing and later adopting Ordinance No. 96,222]; January 24, 1949 city planning commission report to the city council; January 13, 1949 summary of proposed changes in the conditional use regulations; April 29, 1948 staff report to the city planning commission; April 23, 1948 city planning commission report; and February 20, 1948 city planning commission report.

'Conditional Uses' lawfully existing on the date these regulations become effective. The Height and Area regulations required by other provisions of this Chapter, shall not apply to said 'Conditional Uses.'"

Prior to the 1950 version of LAMC section 12.24, the city planning commission and the zoning administrator had dual authority over approvals of some projects' height and area for conditional uses under the commission's jurisdiction. On April 23, 1948, the commission recommended that the city council eliminate that dual authority.

The commission report explained the commission and city council had approved a large-scale housing project under a conditional use permit. But the applicant was unable to proceed with the project because "the Zoning Administrator in granting an area variance permitting a reduction in the area requirements conditioned it upon there being two units less than the number originally intended in each of the 21 buildings proposed in said housing project."

Following the commission's recommendation, the 1950 version of LAMC section 12.24 eliminated the zoning administrator's authority to grant or deny height and area variances for conditional use projects under the commission's jurisdiction. The provision gave the city planning commission sole authority to determine the height and area regulations for conditional use permits under its jurisdiction and provided that "[h]eight and [a]rea regulations required by other provisions of this chapter, shall not apply to said 'Conditional Uses.'" According to a January 13, 1949 summary of proposed changes to the conditional use regulations, the purpose of adding this language was "to eliminate [the] dual authority of the City

Planning Commission and Zoning Administrator in connection with 'Conditional Use' matters now handled by the Commission." The summary explained this would be accomplished by "[a]uthorizing the Commission to determine the height and area regulations for the uses under its jurisdiction in lieu of action by both the Commission and the Administrator which is now necessary in some cases."

Consistent with the text of LAMC section 12.24 and its history, we conclude neither the municipal code nor the city charter requires Archer to obtain a height or area variance from the zoning administrator in conjunction with the conditional use permit.

B. The CEQA Claims

1. Standard of Review

In an action challenging compliance with CEQA, the court reviews the agency's decision for a prejudicial abuse of discretion. (Pub. Resources Code,[9] § 21168.5; *Cleveland National Forest Foundation v. San Diego Assn. of Governments* (2017) 3 Cal.5th 497, 511 (*Cleveland National*).) "Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence." (§ 21168.5.) We determine de novo whether the agency has employed the correct procedures but review for substantial evidence the factual determinations. (*Banning Ranch Conservancy v. City of Newport Beach* (2017) 2

---

[9] Further statutory references are to the Public Resources Code.

Cal.5th 918, 935.) "'Substantial evidence' . . . means enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might be reached." (Cal. Code Regs., tit. 14, § 15384, subd. (a) (Guidelines).)

"An agency's determination not to recirculate an EIR is given substantial deference and is presumed to be correct. A party challenging the determination bears the burden of showing that substantial evidence does not support the agency's decision not to recirculate." (*Beverly Hills Unified School Dist. v. Los Angeles County Metropolitan Transportation Authority* (2015) 241 Cal.App.4th 627, 661 (*Beverly Hills Unified*).)

2. The EIR Adequately Analyzed the Toxic Air Contaminant Impact

"An environmental impact report is an informational document" that provides "public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project." (§ 21061.) "'An EIR is required to evaluate a particular environment impact only to the extent it is "reasonably feasible" to do so.'" (*Cleveland National, supra*, 3 Cal.5th at p. 512.) "'[T]he agency is not required to conduct every recommended test or perform all requested research or analysis.'" (*Ibid.*) "'We do not review the correctness of the EIR's environmental conclusions, but only its sufficiency as an informative document.'" (*Save Round Valley Alliance v. County of Inyo* (2007) 157

Cal.App.4th 1437, 1447, citing *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564.)

Plaintiffs argue the EIR's analysis of the toxic air contaminant impact was inadequate. A toxic air contaminant is "an air pollutant which may cause or contribute to an increase in mortality or in serious illness, or which may pose a present or potential hazard to human health." (Health & Saf. Code, § 39655, subd. (a).) The city's CEQA Threshold Guide looks to the SCAQMD's 1993 CEQA Air Quality Handbook for guidance on the screening criteria, significance thresholds, and analysis methodologies when evaluating a project's air quality impacts.[10] Under the city's CEQA Threshold Guide, a project will have a significant toxic air contaminant impact if the project "emits carcinogenic or toxic air contaminants that exceed the maximum incremental cancer risk of 10 in one million or an acute or chronic hazard index of 1.0."

The draft EIR determined that "a detailed assessment of potential Project [toxic air contaminant] emissions during construction was required based on the overall length of proposed construction activities."[11] The EIR found: "The greatest potential for [toxic air contaminant] emissions during construction would be related to diesel particulate emissions associated with heavy equipment operations during grading and excavation activities." The EIR noted that "the SCAQMD CEQA

---

[10] We grant Archer's request for judicial notice of excerpts of the 2006 L.A. CEQA Threshold Guide pursuant to Evidence Code sections 452, subdivision (c) and 459.

[11] Archer originally proposed a 75-month construction schedule.

guidance does not require a health risk assessment for short-term construction emissions."

Only facilities which manufacture, formulate, use, or release toxic air chemicals are required to conduct a health risk assessment under the Air Toxics "Hot Spots" Program. (Health & Saf. Code, §§ 44301, 44320, 44360.) The health risk assessment must be prepared in accordance with the guidelines established by the OEHHA. (Health & Saf. Code, § 44360, subd. (b)(2).) Errata 5 to the final EIR explained: "The Air Toxics 'Hot Spots' Program requires stationary sources to report the types and quantities of certain substances routinely released into the air. The goals of the Air Toxics 'Hot Spots' Act are to collect emission data, to identify facilities having localized impacts, to ascertain health risks, to notify nearby residents of significant risks, and to reduce those significant risks to acceptable levels." According to Errata 5, the purpose of the OEHHA guidance manual is "to provide health risk assessment procedures for use in the Air Toxics Hot Spots Program or for the permitting of new or modified stationary sources." But the guidance manual also "provides recommendations related to cancer risk evaluation[s] of short-term projects." These recommendations are made because "'[t]he local air pollution control districts sometimes use the risk assessment guidelines for the Hot Spots program in permitting decisions for short-term projects such as construction or waste site remediation.'"

Here, a health risk assessment was conducted in accordance with the OEHHA's 2003 Air Toxics Hot Spots Program Guidance Manual (2003 Guidance) to evaluate the

cancer risk exposure to diesel particulate matter.[12] The health risk assessment found the maximum incremental cancer risk for students, staff, and surrounding residents was below the city's toxic air contaminant significance threshold. Errata 6 to the final EIR stated: "Based on refined assessment, the [health risk assessment] demonstrates that health risks from the Project would be 5.7 in a million for offsite receptors, which is below the applicable significance threshold (10 in one million). For potential onsite student and staff exposure at the School, the maximum mitigated cancer risk is 9.4 and 5.6 in a million, respectively, which is below the applicable significance threshold."

Plaintiffs contend the EIR violates CEQA because the health risk assessment is based on the scientifically outdated

---

[12] Pursuant to Evidence Code sections 452, subdivision (c) and 459, we grant plaintiffs' request for judicial notice of the following documents: excerpts of OEHHA's Air Toxics Hot Spots Program Guidance Manual for Preparation of Health Risk Assessments, dated August 2003; excerpts of OEHHA's 2009 Technical Support Document for Cancer Potency Factors; excerpts of OEHHA's 2012 Technical Support Document for Exposure Assessment and Stochastic Analysis for the Air Toxics Hot Spots Program Risk Assessment Guidelines; and excerpts of the OEHHA's Guidance Manual for Preparation of Health Risk Assessments, dated February 2015. Although the 2009 and 2012 technical support documents and the 2015 Guidance were not part of the administrative record before the city, extra-record evidence may be admitted in unusual circumstances, including for background information. (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 578-579 (*Western States Petroleum*).) Here, we take judicial notice of these documents in order to evaluate plaintiffs' claims.

2003 Guidance. They argue the health risk assessment should have used new information in the 2009 and 2012 technical support documents issued by the OEHHA. The 2009 document discusses the age sensitivity factors to be used when estimating cancer risk. The 2012 document presents age-specific breathing rates for use in health risk assessments. But plaintiffs fail to show they brought these documents to the city's attention during the administrative process. Thus, they did not exhaust their administrative remedies and cannot raise this issue now. (§ 21177, subd. (a) [exhaustion of administrative remedies requirement for CEQA actions]; *Bridges, supra*, 14 Cal.App.5th at p. 116 ["CEQA's exhaustion provision requires a party to inform an agency of an alleged CEQA violation orally or in writing before filing a CEQA action in court."]

Plaintiffs also argue the health risk assessment should have used the OEHHA's 2015 Guidance Manual for Preparation of Health Risk Assessments (2015 Guidance). They claim that had the age sensitivity factors and age-specific breathing rates from the 2015 Guidance been used in the health risk assessment, the analysis "would have clearly revealed significant toxic air contaminant cancer risks to children on and off the Archer campus posed by Project construction activities." In response, Archer contends an updated health risk assessment was not required because the 2015 Guidance was not adopted by OEHHA until March 6, 2015, almost four months after the November 13, 2014 release of the final EIR. (*Bay Area Citizens v. Association of Bay Area Governments* (2016) 248 Cal.App.4th 966, 1017 (*Bay Area Citizens*) [agencies were not required to consider new standards issued four months before the draft EIR].) But we need not decide whether the city would be obligated to prepare a

new health risk assessment based on a guidance that postdates the final EIR because, here, the existing methodology had not been updated to incorporate the new guidance even by mid-2015.

In July 2015, the city prepared Errata 5 in response to comments raised at the June 30, 2015 PLUM committee hearing. Errata 5 noted SCAQMD was still evaluating the new guidance. The administrative record shows that as of June 17, 2015, the SCAQMD had not developed recommendations for use of the 2015 Guidance when analyzing a construction project's toxic air contaminant impact.[13] There is no evidence that SCAQMD

---

[13] Plaintiffs attempt to refute this evidence by relying on extra-record evidence that shows SCAQMD incorporated the 2015 Guidance into its rules and procedures for SCAQMD's permitting program and Hot Spots Program, on June 5, 2015. But this extra-record evidence is not admissible. (*Western States Petroleum, supra*, 9 Cal.4th at p. 579 ["[E]xtra-record evidence can never be admitted merely to contradict the evidence the administrative agency relied on in making a quasi-legislative decision or to raise a question regarding the wisdom of that decision."].) Accordingly, we deny plaintiffs' August 9, 2017 judicial notice request of the following documents: SCAQMD staff May 2014 presentation; excerpts of SCAQMD's opening and reply briefs in *Fastlane Transportation v. City of Los Angeles* (Super. Ct. Contra Costa County, Case No. CIV.MSN14-0300); excerpts of SCAQMD June 5, 2015 Resolution and SCAQMD Board June 5, 2015 Hearing Minutes. Because we do not admit these documents, we need not rule on Archer's conditional judicial notice request. We also deny plaintiffs' September 9, 2017 judicial notice request because the documents are inadmissible extra-record evidence. (*Western States Petroleum, supra*, 9 Cal.4th at p. 578; *Cadiz Land Co. v. Rail Cycle* (2000) 83 Cal.App.4th 74, 120 [applying same rule to administrative mandate action brought under Code of Civil Procedure section

recommended use of the 2015 Guidance for health risk assessments of construction-related diesel particulate emissions. Moreover, although SCAQMD had not revised the existing methodology, Archer agreed to prepare an updated health risk assessment based on the 2015 Guidance. Errata 5 added this condition to the final EIR in response to public concern that the city and SCAQMD would update the health risk assessment methodology to incorporate the 2015 Guidance, prior to the issuance of a building permit for the project.

Plaintiffs argue the EIR must assess the health impacts caused by a project's construction and operation, citing *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1219-1220 (*Bakersfield Citizens*). In *Bakersfield Citizens*, the EIRs failed to analyze the health problems that would be caused by the adverse air quality impacts from two large-scale projects' construction and operation. (*Id.* at p. 1220.) The Court of Appeal held Guidelines section 15126.2, subdivision (a) required the EIRs to discuss the "'health and safety problems caused by the physical changes'" that the projects will precipitate. (*Id.* at p. 1219.)

Bakersfield Citizens is inapposite. In *Bakersfield Citizens*, the EIRs did not analyze the health impacts, but, here, a health risk assessment was prepared as part of the environmental

---

1094.5.) In addition, we deny Archer's September 12 and November 22, 2017 requests for judicial notice of the 1997 health risk assessment and related addendum. These documents are not relevant to the disposition of this appeal. (*Defend Our Waterfront v. State Lands Com., supra,* 240 Cal.App.4th at p. 591; *Golden Gate Land Holdings LLC v. East Bay Regional Park Dist.* (2013) 215 Cal.App.4th 353, 366 ["Only relevant evidence is admissible by judicial notice."].)

review process. From the EIRs in *Bakersfield Citizens*, "the public would have no idea of the health consequences" from the construction and operation of the proposed shopping centers that were to be 370,000 square feet and 700,000 square feet. (*Bakersfield Citizens, supra,* 124 Cal.App.4th at pp. 1193-1194, 1220.) Here, the EIR analyzed the health consequences from the construction of a smaller, 148,995-square foot project, giving the public a meaningful basis for evaluating the health consequences of the project.

Plaintiffs also contend CEQA requires use of the most current, scientifically accurate information available to assess health risks, relying on *Berkeley Keep Jets Over the Bay Com. v. Board of Port Cmrs.* (2001) 91 Cal.App.4th 1344, 1364-1367 (*Berkeley Jets*). But *Berkeley Jets* is not analogous. In *Berkeley Jets*, the port estimated toxic air contaminant emissions from jets using a 1991 speciation profile published by the California Air Resources Board (CARB), instead of a 1994 speciation profile. (*Id.* at pp. 1364-1365.) The 1991 speciation profile identified only two types of toxic air contaminants for jet exhaust, but the 1994 speciation profile listed six more toxic air contaminants. (*Id.* at p. 1365.)

In response to a public comment that criticized the use of the "outdated" 1991 information and analyzed the project's jet exhaust emissions using the 1994 speciation profile, the port stated that "'CARB staff has expressed concern regarding the accuracy of some of the particular compounds'" and "'has not determined what speciation profile will be included for jet exhaust.'" (*Berkeley Jets, supra,* 91 Cal.App.4th at p. 1365.) In this respect, the EIR was "misleading" because it failed to disclose that a CARB staff member had recommended that the

port use the 1994 speciation profile because it was more accurate information than the 1991 profile. (*Id.* at p. 1366.) In contrast with *Berkeley Jets* where CARB recommended use of updated data, here, SCAQMD confirmed it had not yet developed recommendations regarding whether the 2015 Guidance should be used for health risk assessments of construction projects.

Furthermore, in *Berkeley Jets*, the dispute over data concerned the types of toxic air contaminants in jet exhaust. (*Berkeley Jets, supra*, 91 Cal.App.4th at pp. 1364-1367.) By failing to use the updated profile, the agency did not address certain contaminants at all. Here, there is no dispute that the toxic air contaminant from diesel exhaust was evaluated by the EIR. Instead, the dispute involves which methodology, the 2003 or 2015 Guidance, should be used in the health risk assessment. An agency's choice of scientific methodology is entitled to deference when supported by substantial evidence. (*North Coast Rivers Alliance v. Marin Municipal Water Dist. Bd. of Directors* (2013) 216 Cal.App.4th 614, 642; *City of Long Beach v. Los Angeles Unified School Dist.* (2009) 176 Cal.App.4th 889, 898 ["the methodology used for studying an impact, and the reliability or accuracy of the data upon which the EIR relied . . . involve factual questions" that are reviewed for substantial evidence]; *State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 795 [methodology used in study was entitled to deference].)

In *Berkeley Jets*, there was a dispute about methodology to the extent that the EIR stated the health impact of the toxic air contaminant emissions was unknown because there was no approved, standard protocol to assess the risk associated with mobile source emissions of toxic air contaminants. (*Berkeley Jets, supra*, 91 Cal.App.4th at pp. 1367-1368.) The Court of Appeal

held the port was not excused from preparing a health risk assessment simply because there were different methodologies to analyze the risk from toxic air contaminant exposure. (*Id.* at p. 1370.) Notably, the *Berkeley Jets* court did not direct the port to use a particular methodology for the health risk assessment.

Here, substantial evidence supports the city's decision to prepare a health risk assessment based on the 2003 Guidance. The city has selected the SCAQMD CEQA Handbook for guidance on the screening criteria, significance threshold, and analysis methodology when evaluating a project's toxic air contaminant impact. Consistent with this approach, the health risk assessment was prepared using the SCAQMD's 2005 risk assessment procedures, which incorporated the 2003 Guidance. The 2015 Guidance was not adopted by the OEHHA until almost four months after completion of the final EIR. Prior to certification of the EIR, the city considered the 2015 Guidance in Errata 5 and explained the guidance had not been incorporated into the existing methodology for construction projects. As of June 17, 2015, SCAQMD was still evaluating whether the 2015 Guide should be used for health risk assessments of construction projects. The EIR's health risk assessment adequately informed the decisionmakers and the public about the cancer risk from toxic air contaminant emissions from diesel-powered construction equipment.

3. The Updated Health Risk Assessment Was Not a Deferred Mitigation Measure

At the June 30, 2015 PLUM committee hearing, Archer agreed to prepare an updated health risk assessment as an approval condition in response to public comments. Project Design Feature B-2 (Feature B-2) requires Archer to prepare an updated health risk assessment using "the most current version" of the OEHHA guidance prior to the start of heavy construction. Further, Feature B-2 requires Archer to incorporate four additional measures to reduce diesel emissions to the extent necessary based on the updated health risk assessment.

Plaintiffs argue this is an impermissible analysis and mitigation of the project's toxic air contaminant impact. Not so. Feature B-2 is not a mitigation measure under CEQA because the EIR does not disclose any significant health risk from the project's diesel exhaust emissions. (Guidelines, § 15126.4, subd. (a)(3) ["Mitigation measures are not required for effects which are not found to be significant."]; *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 794 (*Endangered Habitats*) [postponement of study is not deferred mitigation where EIR found impacts were less then significant before and after mitigation].) Even if Feature B-2 is a mitigation measure, it is not an impermissible deferral because it identifies additional measures to reduce diesel exhaust emissions. (*Endangered Habitats, supra*, 131 Cal.App.4th at pp. 793-794; *Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1275 ["Deferral of the specifics of mitigation is permissible where the local entity commits itself to mitigation and lists the alternatives to be

considered, analyzed and possibly incorporated in the mitigation plan."].)

4. The City Was Not Required to Recirculate the EIR

When significant new information is added to an EIR after completion of the public comment period, but prior to certification, the public agency must issue a new notice and initiate a new comment period. (§ 21092.1; *Mount Shasta Bioregional Ecology Center v. County of Siskiyou* (2012) 210 Cal.App.4th 184, 217.)[14] "[T]he addition of new information to an EIR after the close of the public comment period is not 'significant' unless the EIR is changed in a way that deprives the public of a meaningful opportunity to comment upon a *substantial* adverse environmental effect of the project or a feasible way to mitigate or avoid such effect (including a feasible project alternative) that the project's proponents have declined to implement." (*Laurel Heights Improvement Assn. v. Regents of*

---

[14] "'Significant new information' requiring recirculation include, for example, a disclosure showing that: [¶] (1) A new significant environmental impact would result from the project or from a new mitigation measure proposed to be implemented. [¶] (2) A substantial increase in the severity of an environmental impact would result unless mitigation measures are adopted that reduce the impact to a level of insignificance. [¶] (3) A feasible project alternative or mitigation measure considerably different from others previously analyzed would clearly lessen the significant environmental impacts of the project, but the project's proponents decline to adopt it. [¶] (4) The draft EIR was so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded." (Guidelines, § 15088.5, subd. (a).)

University of California (1993) 6 Cal.4th 1112, 1129 (*Laurel Heights*); accord, *Beverly Hills Unified, supra*, 241 Cal.App.4th at p. 660.) "Recirculation is not required where the new information added to the EIR merely clarifies or amplifies or makes insignificant modifications in an adequate EIR." (Guidelines, § 15088.5, subd. (b); *Laurel Heights, supra*, 6 Cal.4th at pp. 1129-1130.) "The requirement in Public Resources Code section 21092.1 that an EIR be recirculated when 'significant new information' is added is not intended 'to promote endless rounds of revision and recirculation of EIR's. Recirculation was intended to be an exception, rather than the general rule.'" (*Save Our Peninsula Committee v. Monterey County Board of Supervisors* (2001) 87 Cal.App.4th 99, 133-34 (*Save Our Peninsula*), quoting *Laurel Heights, supra*, 6 Cal.4th at p. 1132.)

a. The Three-Year Construction Schedule

In response to public comments after the release of the final EIR, the six-year construction schedule was compressed to three years. The construction schedule was accelerated by reducing the size of the project and overlapping the construction activities. Plaintiffs argue the city was required to recirculate the EIR because it did not analyze the impacts of a three-year construction schedule.

Plaintiffs rely on *Save Our Peninsula, supra,* 87 Cal.App.4th at page 131 in support of their argument. But *Save Our Peninsula* is not analogous. In *Save Our Peninsula*, the EIR indicated increased groundwater pumping would need to be mitigated; but, the applicants did not identify an offsetting pumping location until after the close of the comment periods.

(*Id.* at p. 128.) In addition, the EIR did not discuss the use of water credits to offset increased pumping at the project site. (*Id.* at pp. 130-131.) The Court of Appeal held recirculation was required because the offset pumping site was not identified in the EIR and the use of offsite water credits as mitigation had not been subjected to public scrutiny. (*Id.* at p. 131.) Here, no recirculation is required because the EIR adequately analyzed the impacts under an accelerated construction schedule.

Although the EIR did not specifically analyze the impacts of a three-year construction schedule, it considered the impacts of an accelerated construction schedule. The EIR analyzed the air quality, noise, traffic, access, and parking impacts under an accelerated construction schedule. The draft EIR included a summary of the accelerated construction schedule assumptions and a detailed analysis of the construction traffic based on the accelerated schedule. The EIR found the concurrent construction of the facilities would not increase the use of onsite equipment or the number of trucks on a daily basis. The EIR concluded the accelerated schedule would increase the intensity of the construction activities, but such impacts would not be greater than the maximum daily construction impacts under the six-year construction schedule.

The city expanded on the EIR's discussion of the accelerated construction schedule in Errata 2 and 6. Errata 2 explained the three-year construction schedule was similar to the accelerated construction schedule in the draft EIR. Errata 2 analyzed the air quality, noise, traffic, and access impacts under the three-year construction schedule. Errata 2 concluded: "During the 3-year construction period, the number of days on which peak construction activities occur could be greater than

under the 6-year construction period, but, construction and its related impacts would occur over only a 3-year timeframe as opposed to a 6-year period. The change in the number of peak construction days would not result in new impacts under CEQA as construction-related impacts are determined based on a peak day and the intensity of construction would not change under the 3-year construction schedule." Errata 6 explained that "the assumptions for the maximum construction activity, and therefore the peak construction impacts, would remain the same as that evaluated in the Draft EIR" because the maximum construction activity was limited by the project's location, design, and the required construction sequencing. Errata 6 concluded: "[B]ecause the maximum assumptions for construction activities would not be increased beyond those already in the Draft EIR, the Draft EIR construction analysis fully analyzed the peak impacts of the three-year construction schedule." Errata 2 and 6 clarified the information already in the EIR. They are not new information that require recirculation of the EIR. (Guidelines, § 15088.5, subd. (b); *Laurel Heights, supra*, 6 Cal.4th at pp. 1129-1130.)

Plaintiffs argue the increase in the number of peak activity days would create more severe construction impacts. They contend the construction overlap creates greater traffic and air pollution impacts, citing to their experts' analysis. But plaintiffs' experts' conclusions were refuted by the city's traffic and air quality experts. The city's traffic expert explained: "While certain aspects of the construction phases will overlap . . . , the three-year construction schedule has been designed to ensure that the number of construction trucks and workers on any given day will not exceed the level of activity evaluated in the Draft

EIR. As discussed . . . in the Final EIR, the level of activity on the Project Site was always expected to vary throughout each construction phase, and the analysis in the Draft EIR was conducted for the absolute worst-case day within each construction phase." In addition, the city's air quality expert stated that the overlapping construction activities "would not result in emissions that exceed the peak days."

Plaintiffs claim the EIR failed to provide any analysis of the severity of the construction impacts under the three-year schedule. We disagree. Errata 2 and 6 explained that the intensity of the peak construction days remained the same under three-year construction schedule. Errata 2 stated: "'[T]he intensity of the construction activities during peak construction days would be similar to that evaluated in the Draft EIR under the 3-year construction schedule compared to the original 6-year construction schedule evaluated for the Project." Errata 6 explained: "The six-year construction schedule already compressed the excavation and haul to the quickest time possible given the Project design and site constraints. It is not possible to increase the maximum number of truck trips or the use of heavy-equipment on-site that would occur during the peak day because of constraints such as the size of the Project Site, the time it takes to load a haul truck, the restrictions on haul hours, and traffic in the surrounding area." Errata 6 concluded: "While the number of peak days could be greater under the three-year construction schedule than under the six-year construction schedule, the intensity of the peak construction days (and thus the determination of the significance level) is unchanged from what was analyzed in the Draft EIR."

Plaintiffs argue *Beverly Hills Unified, supra*, 241 Cal.App.4th at pages 665-666, supports their contention that recirculation is required when the construction schedule is compressed. Not so. In *Beverly Hills Unified*, the Court of Appeal upheld the agency's decision not to recirculate the EIR after the project's construction duration increased from 48 to 84 months. (*Id.* at p. 666.) The court reasoned no reirculation was required because the final EIR did not increase the size of the project, the construction work remained the same, and the significance conclusions did not change because they were based on the intensity of the impacts rather than their duration. (*Ibid.*) Here, Archer shortened the construction schedule after reducing the project's size and overlapping the construction activities. Like the situation in *Beverly Hills Unified*, the three-year construction schedule did not change the significance conclusions, which were based on the intensity of the impacts rather than their duration.

By disputing the EIR's significance conclusions, plaintiffs in effect are challenging the city's significance threshold for construction-related impacts. Under the city's significance threshold guide, the air quality impacts are based on an evaluation of the emissions from all construction-related activities— including equipment, earth moving, and worker travel— using the worst-case day. Similarly, construction traffic impacts are determined based on peak traffic periods for the worst-case day. Likewise, construction noise impacts are analyzed based on maximum construction activities on a single day. The city's significance threshold is entitled to deference and will be upheld if supported by substantial evidence. (Guidelines, § 15064, subd. (b); *Mission Bay Alliance v. Office of Community*

Investment & Infrastructure (2016) 6 Cal.App.5th 160, 206 (*Mission Bay Alliance*) ["'CEQA grants agencies discretion to develop their own thresholds of significance' and an agency's choice of a significance threshold will be upheld if founded on substantial evidence."]; *Save Cuyama Valley v. County of Santa Barbara* (2013) 213 Cal.App.4th 1059, 1068.)

Plaintiffs fail to show the city's significance thresholds for construction-related air quality, traffic, and noise impacts were unreasonable. They do not proffer alternative significance thresholds for construction-related air quality, noise, and traffic impacts. Plaintiffs suggest federal air quality regulations consider the frequency and severity of a project's air quality impact, citing a definition in 40 Code of Federal Regulations part 93.152 (2017).[15] Plaintiffs rely on this definition to support their contention that the increased number of peak activity days under the three-year construction schedule will intensify the air quality impact. But this definition in the federal regulation is not a significance threshold. Here, the city's air quality significance threshold is based on the SCAQMD's significance threshold. The city reasonably adopted the SCAQMD's significance threshold given that the agency "is charged with regulating nonvehicular air pollution emissions" in Los Angeles. (*American Coatings Assn. v. South Coast Quality Management Dist.* (2012) 54 Cal.4th 446, 451.)

---

[15] "Increase the frequency or severity of any existing violation of any standard in any area means to cause a nonattainment area to exceed a standard more often or to cause a violation at a greater concentration than previously existed and/or would otherwise exist during the period in question, if the project were not implemented." (40 C.F.R. § 93.152 (2017) [Definitions].)

The draft EIR analyzed the city's significance threshold for construction traffic, air quality, and noise based on a worst-case day.[16] Reducing the six-year construction schedule to three years does not result in new or more severe impacts under the city's significance thresholds. We conclude substantial evidence supports the city's decision not to recirculate the EIR. (*Beverly Hills Unified, supra*, 241 Cal.App.4th at p. 661; *Center for Biological Diversity v. Department of Forestry & Fire Protection* (2014) 232 Cal.App.4th 931, 949 (*Center for Biological Diversity*) [recirculation not required when the new information "disclosed no new environmental impacts nor any substantial increase in the severity of an environmental impact"].)

---

[16] Plaintiffs argue the city's significance threshold fails to address the cumulative impact of the additional peak days under the three-year construction schedule. Plaintiffs cite *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1109 (*Protect Waterways*), for the proposition that "the agency must consider and resolve every fair argument that can be made about the possible significant environmental effects on a project, irrespective of whether an established threshold of significance has been met with respect to any given effect." But *Protect Waterways* is inapposite. In *Protect Waterways*, the EIR was inadequate because it made no reference to any standards of significance and failed to explain its significance conclusion. (*Id.* at pp. 1111-1112.) Here, the EIR analyzed the construction impacts under its significance threshold as it was entitled to under CEQA. (Guidelines, § 15064, subd. (b); *Mission Bay Alliance, supra,* 6 Cal.App.5th at p. 206.)

b. The 2015 Guidance

Plaintiffs argue the city was required to recirculate the EIR because the OEHHA's adoption of the 2015 Guidance in March 2015 was significant new information. But as of June 17, 2015, the SCAQMD was still evaluating the 2015 Guidance and had not developed recommendations for its use for health risk assessments of construction projects. Furthermore, there is no evidence the SCAQMD or the city had incorporated the 2015 Guidance into the health risk assessment methodology for construction projects prior to certification of the EIR. At that time (and, indeed, even today) there was no reason to conclude that a health risk assessment using the 2015 Guidance would be "considerably different" from the health risk assessment that the city performed. (*South County Citizens for Smart Growth v. County of Nevada* (2013) 221 Cal.App.4th 316, 329-330 [recirculation of EIR not required where "EIR includes a reasonable range of alternatives" and subsequent additional alternative not discussed was not considerably different from those included].) Because the final EIR contained a health risk assessment using existing methodology under then-current standards, and Errata 5 required an updated health risk assessment to address public concerns raised in response to the final EIR, we do not believe that "meaningful public comment was thwarted." (*Citizens for a Sustainable Treasure Island v. City and County of San Francisco* (2014) 227 Cal.App.4th 1036, 1064-1065 [no duty to recirculate EIR that required further consultation with Coast Guard].) Substantial evidence supports the city's determination that the 2015 Guidance was not

significant new information requiring recirculation of the EIR.[17] (*Beverly Hills Unified, supra*, 241 Cal.App.4th at p. 661; *Center for Biological Diversity, supra,* 232 Cal.App.4th at p. 949.)

IV. DISPOSITION

The judgment is affirmed. The City of Los Angeles and The Archer School for Girls shall recover their costs on appeal from Sunset Coalition, Brentwood Residents Coalition, Brentwood Hills Homeowners Association, and David and Zofia Wright.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

RAPHAEL, J.*

We concur:

KRIEGLER, Acting P.J.

BAKER, J.

---

[17] We declined to take judicial notice of the 1997 health risk assessment, which was prepared using the 2015 Guidance. Thus, we do not address the parties' contentions concerning the 1997 health risk assessment's conclusions.

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