

EXHIBIT 1

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Superior Court of California
County of San Bernardino
247 W. Third Street, Dept. S26
San Bernardino, California 92415-0210

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN BERNARDINO
SAN BERNARDINO DISTRICT

SEP 16 2021

BY 
JESSICA MORALES, DEPUTY

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN BERNARDINO, SAN BERNARDINO DISTRICT**

City of Hesperia, a municipal corporation,

Petitioner and Plaintiff,

Lake Arrowhead Community Services
District, a public body corporate and
politic, Board of Directors of Lake
Arrowhead Community Services District;
and DOES 1 through 50, inclusive,

Respondent and Defendant.

Southern California Edison; Sunpower
Corporation Systems; and Stiffel, Nicolaus
& Company, Incorporated

Real Parties in
Interest.

Case No.: CIVDS2019176

RULING ON SUBMITTED MATTER:

PETITION FOR WRIT OF MANDATE
DENIED

Hearing Date: September 3, 2021
Dept: S-26, Judge David Cohn

Introduction

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Petitioner City of Hesperia (the "City") seeks a writ of mandate to prevent Respondent Lake Arrowhead Community Services District (the "District")¹ from building a solar energy project on land the District owns in an area of the City known as Hesperia Farms. The City contends the project violates the City's general plan and zoning ordinances. The District, however, contends it is statutorily exempt from compliance pursuant to Government Code section 53096, subdivision (a), which provides an exemption for projects related to the "storage or transmission" of electricity when there is "no feasible alternative."

The project is intended to generate electricity pursuant to the Local Government Renewable Energy Self-Generation Bill Credit Transfer program ("RES-BCT"),² which allows local governments, under specified circumstances, to generate electricity on one site, export it to the electrical grid, and apply the resulting energy credits against electricity bills incurred on a different site. (Pub. Util. Code, § 2830.) To comply with the requirement for exemption from the City's general plan and zoning ordinances, the District determined that there is "no feasible alternative" to the Hesperia Farms site, because other sites would not be suitable for the District's intended purpose—generating electricity under the RES-BCT program.

¹ The Board of Directors of Lake Arrowhead Community Service District is named as an additional respondent.

² The acronym RES-BCT is used with due respect to Aretha Franklin and her anthem, RESPECT.

1 **A. The Original Tentative Ruling**

2 The court's tentative ruling, filed July 12, 2021, was to *grant* the City's petition on
3 the ground that the District's premise underlying the selection of the site in Hesperia
4 Farms—that the site qualified for the RES-BCT program—was mistaken. The court
5 tentatively found that the site did not qualify for the program because it is not located
6 "within the geographical boundary" of the District, as required by section 2830,
7 subdivision (a)(4)(C). Although other sites were infeasible because they were unusable
8 for the RES-BCT program, or for other reasons, the court determined that this site was
9 *also* infeasible because it was not within the geographical boundary of the District.
10 Therefore, the court tentatively found that the statutory exemption from the City's
11 general plan and zoning ordinances did not apply. Accordingly, the court's original
12 tentative ruling was to *grant* the City's petition for a writ of mandate.³ After oral
13 argument, however, the court continued the hearing to allow further briefing on several
14 issues.
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18 **B. The Revised Ruling After Further Briefing and Argument**

19 The parties submitted supplemental briefing, and the court held a further hearing
20 on September 3, 2021. With one exception, the additional arguments are unpersuasive
21 for a different ruling from the tentative. As explained below, however, the court finds
22 that the City is barred by the doctrine of laches from relying on an argument that the site
23 does not qualify for the RES-BCT program. Accordingly, the court's ruling is to *deny* the
24 petition.
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28 ³ Other grounds for the petition were denied. While the tentative ruling's conclusion on page 33 erroneously stated that the petition was denied, the caption properly reflected a tentative decision to grant based on the RES-BCT issue.

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II

Background

A. The Former Version of the Project

In 2016, the City brought a similar writ petition challenging an *earlier* decision by the District to approve a *similar* solar project in the same general area. (*City of Hesperia v. Lake Arrowhead Community Services District et al.*, San Bernardino County Superior Court Case No. CIVDS1602017.) As in this case, the City contended that the project did not comply with the City's general plan and zoning ordinances. Also as in the case, the District contended that the project was statutorily exempt from compliance. The trial court agreed with the City and granted the petition. The Court of Appeal affirmed the judgment in *City of Hesperia v. Lake Arrowhead Community Services District* (2019) 37 Cal.App.5th 734, finding that the project was not exempt from the City's general plan and zoning ordinances.

The Court of Appeal began its analysis with the observation that "the Legislature has attempted to achieve a balance between the state's interest in allowing local agencies to produce, generate, store, and transmit water or electrical energy and the cities' and counties' control over local building and zoning." (*City of Hesperia, supra*, at p. 739.) The specific issue before the Court was whether the District's solar project was "exempt from—or whether the District must comply with—the zoning ordinances" of the City. (*Ibid.*) The Court summarized the statutory scheme, which balances the competing interests:

Our analysis begins with the statutory requirement that, for purposes of a proposed solar energy project, a local agency must comply with the zoning ordinances of the city and county in which the project's facilities are to be constructed

1 or located. (Gov. Code, § 53091, subd. (a)) Then, as
2 potentially applicable here, section 53091, subdivision (e)
3 (§ 53091(e)), and section 53096, subdivision (a)
4 (§ 53096(a)), each provides the agency with an exemption
5 for the location and construction of certain types of
6 facilities. Section 53091(e) provides an *absolute*
7 exemption for "the location or construction of facilities ... for
8 the production or generation of electrical energy"—unless
9 the facilities are "for the storage or transmission of electrical
10 energy," in which event the zoning ordinances apply. Section
11 53096(a) provides a *qualified exemption* for an agency's
12 proposed use upon, first, a showing that the development is
13 for facilities "related to storage or transmission of water or
14 electrical energy" and, second, a resolution by four-fifths of
15 the agency's members that "there is no feasible alternative to
16 [the agency's] proposal."

17 (*City of Hesperia, supra*, 37 Cal.App.5th at pp. 739-740, italics in original.)

18 Although the parties agreed that the project qualified as a solar farm under
19 Hesperia Municipal Code ("HMC") section 16.16.063, which addresses "[a]lternative
20 energy technology standards," the *zoning* of the property presented an obstruction.

21 HMC section 16.16.063.B, provides:

22 Solar farms shall only be allowed on *nonresidential and*
23 *nonagricultural designated properties* with approval of a
24 conditional use permit by the planning commission. Solar
25 farms *shall not be permitted within six hundred sixty (660)*
26 *feet of a railway, spur, any interstate, highway, or major*
27 *arterial, arterial, or secondary arterial roadway; or any*
28 *agricultural or residentially designated property.*

(AR 76:6892, italics added.)

29 The property where the District intended to build the project was zoned "Rural
30 Residential," and the solar project was to be located within 660 feet of property to the
31 south, zoned for agricultural use. (*City of Hesperia, supra*, at pp. 741-742.) Therefore,
32 the project was prohibited under HMC section 16.16.063.B, unless an exemption
33 applied—either the absolute exemption under Government Code section 53091,

1 subdivision (e), or the qualified exemption under Government Code section 53096,
2 subdivision (a).

3 Attempting to address this problem, the District adopted a Resolution determining
4 that the project met the criteria for both the absolute exemption and the qualified
5 exemption. First, the District found that the absolute exemption applied because the
6 District was a generator of electricity. Second, the District found that the qualified
7 exemption applied because there was "no feasible alternative" to the location of the
8 project. (*City of Hesperia, supra*, 37 Cal.App.5th at pp. 743-744.)
9

10 The City sued and the trial court found that the proposed project did not fall within
11 the absolute exemption, because the project included the *transmission* of electrical
12 energy, which is excluded from the exemption provided by section 53091, subdivision
13 (e), for generation or production of electrical energy. The trial court also found that the
14 qualified exemption based on infeasibility was not supported by substantial evidence.
15 Therefore, the trial court found that the project was not exempt from the City's general
16 plan and zoning ordinances.
17

18 The District appealed.
19

20 In 2017, the parties agreed to stay the appeal while the District applied for a
21 General Plan Amendment to change the land use designation of Hesperia Farms to
22 Public (i.e., not Rural Residential) and for approval of a Conditional Use Permit ("CUP")
23 to construct a solar farm on the property. (AR 4:20-21; AR 36:2568-2569; AR 44:3121-
24 3123.) The project was the same as the original version except for moving it 660 feet to
25 the north to comply with HMC section 16.16.063.B (prohibiting solar projects within 660
26 feet of property zoned for agricultural use). If the City granted the District's application,
27 the issues on appeal would be moot and the project could go forward.
28

1 On January 16, 2018, however, the City denied the District's applications and on
2 March 20, 2018, adopted Resolution No. 2018-09, denying the General Plan
3 Amendment, and adopted Resolution No. 2018-10, denying the CUP. (AR 51:4160; AR
4 61:4292-4296; AR 62:4297-4300.)

5 The District did not challenge the City's denials. Instead, the appeal proceeded,
6 resulting in the *City of Hesperia* decision in favor of the City, filed July 19, 2019.⁴
7

8 The appellate court affirmed the trial court's ruling that the proposed project did
9 not fall within the *absolute* exemption because the project included the *transmission* of
10 electrical energy. (*City of Hesperia, supra*, at pp. 740, 749-759.) The appellate court
11 also affirmed the trial court's conclusion that the proposed project did not fall within the
12 *qualified* exemption, because substantial evidence did not support the District's
13 conclusion that there was "no feasible alternative" to the location chosen for the project.
14 (*City of Hesperia, supra*, at pp. 740, 760-766.) In determining feasibility, the Court
15 found guidance in the application of feasible alternatives and feasible mitigation
16 measures in the California Environmental Quality Act, Public Resources Code section
17 21000 *et seq.* ("CEQA"). (*City of Hesperia, supra*, at pp. 762-764, 767.)
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20 **B. The Current Version of the Project**

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22 Shortly after the appellate court issued its ruling, the District arranged for
23 consultants to prepare two technical reports, which had not been prepared for the
24 original project. The first was entitled RES-BCT Project Review (the "Sage Report").
25 The second was entitled Technical Memorandum for Feasibility Evaluation of Potential
26 Photovoltaic System Sites (the "Tidewater Memorandum"). Based on these studies, the
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28 ⁴ The appeal considered the project as *originally* conceived, located within 660 feet of agriculturally designated property. (*City of Hesperia, supra*, at p. 742.)

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District's staff prepared a report entitled "Alternatives to Proposed Solar Photovoltaic System on Hesperia Farms Property (the "Alternatives Report").

On June 23, 2020, the District held a public hearing on the solar project as it was described in the earlier General Plan and CUP applications, which the City had denied.

The District then adopted Resolution 2020-04, finding that there is *no feasible alternative* to the proposed project, pursuant to the qualified exemption of Government Code section 53096. (AR 3:11-14.) The Resolution stated:

The District's determination is based on [the] Alternatives Report, including but not limited to the Tidewater Memorandum and the Sage Report, and the remaining administrative record for such determination, the District's approval of the Original Site, and the District's approval of the Alternative Site (the Proposal).

(*Id.* at p. 12.) The Resolution found that the District's determination rendered the City's general plan and zoning ordinances inapplicable based on the newly supported qualified exemption. (*Ibid.*)

The City, however, contends that the District's determination that it is statutorily exempt from compliance with the City's general plan and zoning ordinances is still invalid because the site does not qualify for the RES-BCT program and because the District's determination is unsupported by substantial evidence in other respects as well.

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III

**The City's Argument that the Project Does not Qualify
for the RES-BCT Program is Barred by the Doctrine of Laches.⁵**

A. Unreasonable Delay and Prejudice Supports the District's Laches Defense.

The District asserts that laches bars the City's challenge to its right to use the Hesperia Farms property under the RES-BCT program. It argues that it is prejudiced by the City's five-year delay in asserting that the site does not qualify for the RES-BCT program because the District incurred substantial financial resources and further delay in considering alternative project sites under Government Code section 53096. The District reasonably believed that if it satisfied the alternatives analysis, the project could be built. In support, the District cites the June 2020 report that the District made reasonable efforts to reach a resolution with the City regarding the project. (AR 4:20-21.) It also cites the Tidewater Cost Proposal that discloses \$14,874.80 was spent on Tidewater's feasibility analysis. (AR 90:7656-7659.)

The City argues that it submitted a comment letter before the June 2020 hearing on the solar project and timely filed its challenge. Therefore, the City argues, the suit was not a surprise and there was no unreasonable delay in taking legal action. It also contends that there is no prejudice because after the appellate decision, the District still needed to comply with the City's zoning or conduct an alternatives analysis. Therefore, there was no material change in the *status quo*. Finally, it argues that the mere expenditure of money or effort is insufficient to show prejudice.

⁵ The court's analysis of the RES-BCT program, absent the application of laches, is set forth in the court's original tentative ruling. The court has not altered its opinion of the statutory requirements for the program as set forth in the tentative ruling. (Tent. Ruling, pp. 8-11.) Rather, the court simply finds that the City cannot challenge it at this late stage.

1 "A plaintiff who has unduly delayed seeking equitable relief to the prejudice of a
2 defendant may be barred by the doctrine of laches. Administrative mandamus is a
3 proceeding in which equitable principles are applicable and in which the defense of
4 laches may be invoked. Laches is ordinarily a question of fact, and the trial court
5 exercises considerable discretion in deciding whether the defense should be sustained.
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7 (*Concerned Citizens of Palm Desert v. Bd. of Supervisors* (1974) 38 Cal.App.3d 257,
8 265, citations omitted.)

9 It is well-established doctrine that the defense of laches does
10 not rest entirely upon lapse of time, nor require any specific
11 period of delay, as does the statute of limitations. In order to
12 constitute laches, there must be something more than mere
13 delay by the plaintiff, accompanied by an expenditure of
14 money or effort on the part of the defendant. It must also
15 appear that it will be inequitable to enforce the claim. "The
16 reason upon which the rule is based is not alone the lapse of
17 time during which the neglect to enforce the right has
18 existed, but the changes of condition which may have arisen
19 during the period in which there has been neglect." It is said
20 that the cases on the subject "proceed on the assumption
21 that the party to whom laches is imputed has knowledge of
22 his rights and an ample opportunity to establish them in the
23 proper forum; that by reason of his delay the adverse party
24 has good reason to believe that the alleged rights are
worthless or have been abandoned; and that, because of the
change in conditions during this period of delay, it would be
an injustice to the latter to permit the" claimant now to assert
his rights. The acquiescence which will bar a complainant
from the exercise in his favor of the discretionary jurisdiction
by injunction must be such as proves his assent to the acts
of the defendant, and to the injuries to himself which have
flowed, or can reasonably be anticipated to flow, from those
acts."

25 (*Verdugo Canon Water Co. v. Verdugo* (1908) 152 Cal. 655, 674-675, citations omitted.)

26 In *Holt v. County of Monterey* (1982) 128 Cal.App.3d 797, at issue was a
27 development that developers first applied for in January 1975. The county approved the
28 specific plan for the project in January 1977. In June 1979, plaintiff filed his lawsuit after

1 the county granted the use permit and approval of the tentative subdivision map in
2 March 1979. Plaintiff sought to have the specific plan adopted in 1977, and the more
3 recent approvals set aside based on the county's failure to establish an adequate
4 general plan. The Court noted that during the period between the January 1977
5 approval and the June 1979 lawsuit, the developers had expended over \$4 million in
6 development costs in reliance on the county's earlier approval of the plan. It affirmed
7 the trial court's finding of laches in which the trial court found: (1) plaintiff knew of the
8 project as early as 1976, (2) the delay of over two and one-half years before instituting
9 the lawsuit was unreasonable, and (3) the developers substantially and justifiably relied
10 to their detriment on the adoption of the specific plan. (*Id.* at pp. 799-801.)
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13 When the circumstances of the history of the project, including the prior litigation,
14 are considered, the City has unreasonably delayed raising the issue that the Hesperia
15 Farms site does not qualify for the RES-BCT program to the prejudice of the District.
16

17 The City was aware of the District's intent to proceed under the RES-BCT
18 program to construct the solar project on the Hesperia Farms site since at least
19 November 18, 2014, when District staff met with the City Manager and the Planning
20 Department to discuss the solar facility. (AR 4:19.) In August 2015, the District entered
21 into the agreement with Southern California Edison (SCE) to export electricity energy
22 under the RES-BCT program. (AR 26:1777-1838.) In December 2015, the District
23 determined it qualified for the absolute exemption under Government Code section
24 53091, and the project fell within the qualified exemption under section 53096. The City
25 filed suit in February 2016. (AR 4:19-20.) The history of that litigation is detailed in this
26 Ruling and the Tentative Ruling, attached as Exhibit A for reference. The 2016 action,
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1 despite settlement attempts, continued until July 19, 2019, when the appellate court
2 issued its decision. (AR 4:20.)

3 Although the specific issue of the site's eligibility was not raised to the trial court,
4 the City was aware of the issue and could have raised it as evidenced by its argument
5 submitted on appeal. (AR 64:4390-4391.) In its opposition to the District's appeal, the
6 City asserted that the District's project does not fall within the scope of the RES-BCT
7 program because the solar farm is not within the geographical boundaries of the District.
8 (AR 64:4390-4391.) On reply, the District argued that the City was raising this issue for
9 the first time on appeal. (AR 65:4434-4435.) The appellate decision did not discuss the
10 City's eligibility argument.⁶

11
12 The City argues here that there was no material change in the *status quo*
13 because the District still needed to conduct the alternative analysis. But the City offers
14 no explanation for the delay in raising the eligibility issue that could have been raised
15 and addressed as part of the 2016 litigation. The trial court's decision in the 2016 action
16 noted that the City did not offer any argument that the project did not satisfy the
17 requirements of the RES-BCT program under Public Utilities Code section 2830. (City's
18 RJN Ex. B, pp. 5-6.)

19
20 By failing to raise the issue earlier, the District has been prejudiced in treating the
21 solar project under the RES-BCT program at the Hesperia Farms site as feasible, with
22 the only issue being whether substantial evidence supported a finding that there was
23 "no feasible alternative" to that location under Government Code section 53096.
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28 ⁶ The general rule is that issues raised for the first time on appeal are deemed waived, which rule the appellate court has discretion to apply. (*Franz v. Board of Medical Quality Assurance* (1982) 31 Cal.3d 124, 143; *Redevelopment Agency v. City of Berkeley* (1978) 80 Cal.App.3d 158, 167.)

1 *Goleta Valley v. Board of Supervisors* (1988) 197 Cal.App.3d 1167, 1177-1178, fn.
2 omitted in original.)

3 As under CEQA, for purposes of section 53096, the "rule of reason" requires
4 consideration of alternatives." (*Ibid.*) *City of Hesperia* found:

5 For section 53096(a)'s qualified exemption to apply, section
6 53096, subdivision (c)'s definition of "feasible" requires the
7 necessary finding to be there is no alternative to the
8 agency's proposal that is "capable of being accomplished in
9 a successful manner within a reasonable period of time"; and
10 that necessary finding must be supported by substantial
evidence of the "economic, environmental, social, and
technological factors."

11 (*City of Hesperia, supra*, at p. 764.) The court stated:

12 [I]n order for the District to have properly determined that
13 "there is no feasible alternative" to the proposed location of
14 the Solar Project for purposes of section 53096(a), the
15 District was required to have: (1) considered alternative
16 locations; (2) taken into account economic, environmental,
17 social, and technological factors associated with both the
18 Project Site and the alternative locations; and (3)
19 determined—i.e., exercised discretion based on substantial
evidence in the administrative record—that, at the alternative
locations, the proposal was not capable of being
accomplished in a successful manner within a reasonable
period of time.

20 (*Id.* at p. 767.) Therefore, under *City of Hesperia*, this is the standard to apply when
21 determining whether substantial evidence supports the District's feasibility finding.⁹

22 **B. The District's Purpose in Choosing the Project Site is Irrelevant.**

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24 In *City of Lafayette v. East Bay Municipal District* (1993) 16 Cal.App.4th 1005,
25 1017, the Court wrote:

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28 ⁹ The District's argument that "even under CEQA an agency is not required to provide the public with an opportunity to review and comment or debate an agency's economic feasibility analysis" (Opp. Br. p. 21:7-9, citing *Sierra Club v. County of Napa* (2004) 121 Cal.App.4th 1490, 1505-1506), is irrelevant. Government Code section 53096, subdivision (a), requires a public hearing with at least ten days' notice.

1 The primary objective of the statutory scheme is to maintain
2 local control of land use decisions (§ 53091), with carefully
3 specified exceptions where necessary to *further*
4 *countervailing interests*.

(Italics added.)¹⁰

5 Relying on *Lafayette*, the City argues that the project does not "further
6 countervailing interests" such as placing water or electricity facilities that are necessary
7 and indispensable to the agency's authorized functions, because the District's *purpose*
8 in building the project is merely to reduce its own electricity costs.

9
10 This argument directed to the agency's purpose was previously rejected in *City of*
11 *Hesperia* in connection with the Court's discussion of the absolute exemption. The
12 Court found, contrary to the City's argument, that the exemption is based "on the
13 purpose of *the proposed facilities*, not ... on the purpose of *the agency developing the*
14 *proposed facilities*." (*City of Hesperia, supra*, at p. 755, italics in original; footnote
15 omitted.) The City argued that the exemption should not apply because the project was
16 not "integral" or "directly related" to the District's authorized function to provide water
17 and wastewater treatment. The Court found this to be irrelevant to the application of the
18 absolute exemption.
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20
21 The City fails to provide any different analysis for the qualified exemption that
22 would distinguish it from the argument already rejected by the Court of Appeal in
23 connection with the absolute exemption. The project is related to the transmission of
24 electrical energy to which section 53096 applies. The District's *purpose* for the project
25 is irrelevant. This ground for a writ is denied.
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28 ¹⁰ *Lafayette* addressed the legislative intent of the statutory scheme with respect to *water*. *City of Hesperia*
found the same legislative intent when "proposed facilities are for the production or generation of *electrical energy*."
(*City of Hesperia, supra*, at p. 752, italics in original.)

1 **C. Procedures Under CEQA are Irrelevant to the Alternatives Analysis.**

2 The City argues that the alternatives standards under CEQA, including the time
3 given to review and comment on a draft Environmental Impact Report ("EIR"), should
4 apply to the alternatives analysis under Government Code section 53096. This
5 argument apparently relates to a claimed *procedural* defect in the District's
6 proceedings—that it did not proceed as it would proceed under CEQA. "Where the
7 alleged defect is that the agency has failed to proceed in the manner required by law,
8 the court determines de novo whether the agency has employed the correct
9 procedures, scrupulously enforcing all legislatively mandated requirements." (*Chico*
10 *Advocates for a Responsible Economy v. City of Chico* (2019) 40 Cal.App.5th 839, 845,
11 citation omitted.) Therefore, this court considers the argument de novo.

14 The City has failed to demonstrate that the CEQA requirements applicable to
15 public notice and the notice period for review of an EIR are relevant to the notice period
16 required for a hearing on the qualified exemption under section 53096. Section 53096,
17 subdivision (a), sets forth the minimum public notice period of at least ten days. The
18 District complied with the notice requirement. This ground for a writ is denied.

20 **D. The Methodology Employed for the Analysis of Alternatives is Not Shown**
21 **to be Inadequate.**

23 Much of the City's argument about the District's feasibility determination amounts
24 to a criticism of the parameters used in the Tidewater Memorandum, which the District's
25 Alternatives Report relies on. The City complains that there is no evidence of the
26 "analytic route the administrative agency traveled from evidence to action" in
27 determining why the particular sites received the particular scores they received. The
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1 City complains about the twenty parameters used, asserting that they are different from
2 those used in studies of different solar projects that the Tidewater Memorandum
3 referenced as a basis for the parameters. It argues that the large number of parameters
4 used by Tidewater invites and facilitates manipulation.

5 The City's argument is insufficient to demonstrate that substantial evidence does
6 not support the feasibility findings in light of the whole record. The City's burden is
7 discuss *all* relevant evidence on the issue of the feasibility findings and to demonstrate
8 that substantial evidence does not support the District's findings in light of the whole
9 record. (*Latinos Unidos de Napa v. City of Napa* (2013) 221 Cal.App.4th 192, 206.)¹¹

10 Concerning judicial review of administrative findings on feasible alternatives, the
11 Court in *City of Hesperia* wrote:

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14 "The reviewing court, like the trial court, may not reweigh the
15 evidence, and is "bound to consider the facts in the light
16 most favorable to the Board, giving it every reasonable
17 inference and resolving all conflicts in its favor."" There is a
18 presumption that the agency's findings are supported by
19 substantial evidence; and since the party challenging those
20 findings has the burden of demonstrating otherwise, here the
21 City must establish that the administrative record does not
22 contain substantial evidence to support the Board's finding
23 that there is no feasible alternative to the Project Site.

24 (*City of Hesperia, supra*, 37 Cal.App.5th at p. 761, citations omitted.) This standard
25 applies with equal force to this case.

26 While the City complains about the Tidewater parameters used for environmental
27 and technical criteria and the scoring, it does not provide any reason for the court to

28 ¹¹ "[S]ubstantial evidence has been defined in two ways: first, as evidence of "ponderable legal significance ... reasonable in nature, credible, and of solid value" [citation]; and second, as "relevant evidence that a reasonable mind might accept as adequate to support a conclusion" [citation]." (*County of San Diego v. Assessment Appeals Bd. No. 2* (1983) 148 Cal.App.3d 548, 555.) "[W]hen applying the substantial evidence test, 'Courts may reverse an agency's decision only if, based on the evidence before the agency, a reasonable person could not reach the conclusion reached by the agency.' [Citation.] (*Italics in original.*)" (*Greenebaum v. City of L.A.* (1984) 153 Cal.App.3d 391, 401-402.)

1 conclude that deviation from other studies' methodologies was without any foundation,
2 not credible, or unreasonable. The City argues that Tidewater did not provide any
3 support for its scoring and weight methodology, but the City fails to discuss the
4 analytical route taken by Tidewater in choosing the parameters that were evaluated and
5 the basis for assigning the scoring ranges for particular parameters, and weighing
6 factors as it did. (AR 4:54-59.)¹²

8 The City also fails to address the Tidewater discussion that subjective weighting
9 factors were determined according to relative importance for a successful system
10 location. The Tidewater Memorandum explained that the reason "technical parameters"
11 were given the largest weighted factor was the ability to produce the requisite, annual
12 electrical output needed for a viable system. (AR 4:42, 61.)

14 In making its arguments, the City also fails to discuss all the relevant evidence on
15 which the District's findings rely, including the RES-BCT Project Review prepared by
16 Sage Energy Consulting, Inc. (AR 4:634-635, 637.)¹³

18 ¹² The Tidewater Memorandum evaluated the following criteria for a solar system producing similar quantities
19 of electricity as the previously approved system: economic, environmental, social, and technical. Within each criteria,
20 specific parameters were established. (AR 4:54-59.) For example, "technical" included parameters such as shading,
elevation, and average annual cloudy days. (AR 4:54.) With respect to elevation, the Tidewater Memorandum
provided the following discussion:

21 Atmosphere thickness and composition influence the availability of both short
22 and longwave energy of the sun and earth, respectively. The lower the elevation
23 of a region from sea level, the greater the atmosphere thickness; therefore, a PV
24 system's site location with respect to elevation influence the system efficiency
(Noorollahi et al., 2016). Those site locations located at less than 2,500 feet
amsl were assigned a value of 0. Those site locations ranging from 2,500 to
5,000 feet amsl were assigned a value of 5, and those site locations greater than
5,000 amsl were assigned a value of 10. (AR 4:58.)

25 ¹³ Sage evaluated six possible sites for location of solar systems consistent with the District's goal to offset
26 electrical costs. It also reviewed the project proposal at Hesperia Farms, "including the impact of the changes in the
27 RES-BCT tariff on the projected savings in electrical costs over the life of the Project." (AR 4:634.) In doing so, it
28 "evaluated the amount of RES-BCT bill credits generated and associated Benefiting Account credit capacity." (*Ibid.*)
Sage also considered different systems, including "wind speed data for potential wind energy systems in the area of
[the District's] potential project sites." (*Ibid.*) It did so in relation to the District's intent to proceed with a project to
"offset the electrical energy cost of the operation of their water treatment, pumping, and management facilities."
(*Ibid.*) Sage discussed the reasons that other systems, such as a wind energy, were not feasible. (AR 4:634-635.)
Sage also reviewed the Tidewater Memorandum and found that it adequately identified potential RES-BCT project
sites. (AR 4:637.)

1 The District's report provided a detailed discussion of its investigation of
2 renewable energy options "to offset costs and energy requirements associated with
3 current and projected water and wastewater demands." (AR 4:17-22.) Evaluation was
4 based on project objectives related to substantially offsetting existing and future
5 electricity costs. (AR 4:16, 22-23.) The District considered other alternative forms of
6 renewable energy, including solar thermal, hydroelectric energy, wind, geothermal, and
7 digester gas, and provided reasons for selecting solar technology and rejecting other
8 alternatives based on the project objective to substantially offset existing and future
9 electricity costs. (AR 4:29-32.)
10

11 The District considered the following alternatives: no project, reapplying to the
12 City for approval of the project, and alternative locations. (AR 4:32-42.) The District
13 provided a reasoned discussion and analysis why the "no project" and "re-apply"
14 proposals were determined infeasible in terms of the project objectives. (AR 4:32-34.)
15 For example, with the re-apply option, the District discussed that an alternative must be
16 "capable of being accomplished in a successful manner within a reasonable period of
17 time" and, given the history of the project, every indication was that a new application to
18 the City would be denied and a waste of further time and resources. (AR 4:34, quoting
19 Gov. Code § 53096, subd. (c).) Substantial evidence supports the District's conclusion.
20
21

22 In considering alternative sites, the District discussed the feasibility of acquiring
23 new sites and evaluated the use of other existing sites. (AR 4:35-42.) Its analysis,
24 including a discussion of the findings in the Tidewater Memorandum and Sage Report,
25 concluded that there was no feasible alternative that met the project objective to
26 substantially reduce the District's existing and future energy costs within a reasonable
27 period. (AR 4:35-42.) The analytical route for the conclusion was provided. The City's
28

1 attacks on the Tidewater parameters are insufficient to demonstrate that substantial
2 evidence does not support the District's feasibility finding, assuming that the project
3 qualifies for the RES-BCT program.

4 The City also argues that the Tidewater analysis did not take into account the
5 new analysis of the Mojave River Dam by the Army Corps. of Engineers. But the City
6 failed to present this evidence at the public hearing. There is no basis to take judicial
7 notice of this document, and the City did not move to augment the administrative record
8 to include it. Therefore, the City's argument on this issue is disregarded.

9
10 The City asserts that the Sage report's economic analysis of the different sites
11 fails to show how the comparison numbers were set and why size limitations were
12 placed on alternatives. The City takes issue that the alternative at "the Flats" site is
13 sized smaller at roughly one third the size of the proposed project even though the Flats
14 is a 4.45-acre site. (Reply, pp. 5:16-6:7.)

15
16 The District has not had an opportunity to respond, because the City first raised
17 the argument in its Reply brief. Nevertheless, the argument does not demonstrate that
18 substantial evidence fails to support the District's findings. Five acres is minimum
19 acreage for the proposed project. (AR 4:37, 47.) The Flats site is 4.45 acres. (AR
20 4:51.) The Sage Report discussed that to be economically viable, an RES-BCT system
21 needs to be at least 350 kW DC and requires 3.0 acres. (AR 4:636.) Related to the
22 Flats, the Sage Report states:

23
24
25 Although the Flats site is currently intended for use in the
26 construction of a new operations building and yard, we
27 evaluated it in its current condition as raw land. The Flats
28 site is not large enough to accommodate a PV system large
enough to generate significant electricity cost savings. Sage
found that a 365 kW-DC single-axis tracking PV system at
the site would provide less than \$37,000 of annual savings,

1 6.5% of LACSD annual energy costs. In addition, the Flats
2 site has potential issues with soils and interconnection that
3 could jeopardize the viability of the site to host solar. An
4 annotated SCE DRPEP map is shown in Figure 1 below with
5 nearest access to distribution approximately 1/3 of a mile
6 which would add ~\$250,000 to interconnection costs, which
7 would render the project financially unviable. Photographic
8 evidence shows a potential 12kV spur along Hospital Road
9 to the corner of Rouse Ranch Road that is not indicated on
10 the DRPEP map. (AR 4:638.)

11 The Tidewater Memorandum discussed that the Flats site has been committed to
12 the new Field Operations Department building and corporate yard. The Flats was
13 included "in its current condition as existing vacant land; however, once construction
14 begins, the site would only be appropriate for potential rooftop and partial use." (AR
15 4:51.) In rejecting the Flats site as a viable alternative, the District noted that it has
16 committed the site "to its Field Operations Department building and corporate yard and
17 has already incurred costs in pursuit of that use." (AR 4:39.) When taken as a whole,
18 substantial evidence supports rejection of the Flats site as a feasible alternative in light
19 of project objectives.

20 Finally, the City asserts that the studies lack credibility because there was not an
21 adequate process to give the public time to review the studies and hire their own
22 consultants. But the District followed the public notice hearing requirements of
23 Government Code section 53096, subdivision (a), which provides for at least ten days
24 prior notice. The City's argument about the notice period and procedures needs to be
25 addressed with the Legislature, not the court. (*Estate of Horman* (1971) 5 Cal.3d 62,
26 77.)
27
28

1 **E. Institutional Bias as an Improper Influence is Not Shown by the Record.**

2 The City contends that "institutional bias" influenced the feasibility finding,
3 because the District had an ongoing relationship with the consultant it hired to conduct
4 the analysis. But there is no basis to take judicial notice of the contracts the City relies
5 on to support this argument. The court's inquiry under Code of Civil Procedure section
6 1094.5 is limited to the administrative record. (*City of Hesperia, supra*, 37 Cal.App.5th
7 at p. 766.)
8

9 The City also argues that the District's decision is particularly vulnerable to
10 charges of "institutional bias" because its decision is to proceed with essentially the
11 same project that was previously struck down. Citing *Residents Ad Hoc Stadium*
12 *Committee v. Board of Trustees of the California State University and Colleges* (1979)
13 89 Cal.App.3d 274, 284, the City argues that there is a *post hoc* rationalization, given
14 that the District had spent \$800,000 on the project by March 2018. (AR 63:4319.) The
15 City's institutional bias argument is speculative, not based on evidence.
16
17

18 In *Residents Ad Hoc Stadium Committee, supra*, 89 Cal.App.3d at p. 285, the
19 court discussed that CEQA assumes as inevitable an institutional bias within an agency
20 proposing a project, and that Public Resources Code sections 21000 and 21100 impose
21 procedural requirements to insure that the decision maker does not fail to note the facts
22 and understand arguments advanced by opponents. The City's argument that the
23 precise process detailed in CEQA must be followed to avoid an "institutional bias" claim
24 is without legal support. As previously explained, the requirements for the District's
25 feasibility consideration are set forth in *City of Hesperia*. The City does not provide any
26 legal analysis why the public hearing requirements of Government Code section 53096,
27
28

1 In general, once an EIR or negative declaration has been adopted for a project,
2 the lead agency is not required to prepare a subsequent or supplemental EIR unless
3 one of the following exists:

4 (a) Substantial changes are proposed in the project which
5 will require major revisions of the environmental impact
6 report.

7 (b) Substantial changes occur with respect to the
8 circumstances under which the project is being undertaken
9 which will require major revisions in the environmental
10 impact report.

11 (c) New information, which was not known and could not
12 have been known at the time the environmental impact
13 report was certified as complete, becomes available.

14 (Pub. Resources Code, § 21166; see also Guidelines, § 15162, subds. (a) and (b).)

15 Guidelines section 15162, subdivision (c) provides: "Once a project has been
16 approved, the lead agency's role in project approval is completed, unless further
17 discretionary approval on that project is required." The CEQA review process is not
18 complete until all discretionary approvals are granted.

19 "Whether an initial environmental document remains relevant despite changed
20 plans or circumstances ... is a predominately factual question" for the agency to first
21 answer. (*Friends of College of San Mateo Gardens v. San Mateo County Community*
22 *College Dist.* (2016) 1 Cal.5th 937, 953.) "A court's task on review is then to decide
23 whether the agency's determination is supported by substantial evidence; the court's job
24 ""is not to weigh conflicting evidence and determine who has the better argument.""
25 [Citation.]" (*ibid.*)

26 In 2017, in an effort to obtain the City's approval of a General Plan Amendment
27 and CUP, the proposed solar farm project was moved 660 feet north to comply with City
28 zoning requirements that preclude solar farms within 660 feet of an agricultural or

1 residentially designated property. (AR 41:2636-3103; AR 42:3104-3106; AR 44:3121-
2 3123; AR 48:3654-3656.) As moved, the project has the same design and layout, but
3 requires additional trenching to install electrical conduit to connect to SCE facilities. (AR
4 82:6966.) As part of seeking a General Plan Amendment and CUP, the District adopted
5 an Addendum to the IS/MND. (AR 42:3104-3114; 44:3122.) Under the Addendum, the
6 District found the change in the project site would not result in any new significant
7 environmental effects triggering the need for further environmental review. In August
8 2017, the District filed and posted the Notice of Determination. (AR 1:1-3; 42:3105-
9 3106.)
10

11 The current project involves essentially the same solar farm project proposed in
12 2017, with the issue being the qualified exemption under Government Code section
13 53096, subdivision (a). The District's June 2, 2020, Notice of Public Hearing stated that
14 the Board was holding a public hearing to consider adopting a Resolution that there is
15 no feasible alternative to the Hesperia Farms project pursuant to Government Code
16 section 53096. (AR 100:7677-7679.) The Agenda listed a similar description of the
17 public hearing related to adopting Resolution No. 2020-04. (AR 81:6961.) In the
18 District's June 2020 Resolution, the District noted that a CEQA review was completed
19 for the project in 2017. (AR 3:11-12.)
20

21 On July 2, 2020, following the feasibility hearing, the District filed and posted a
22 Notice of Determination stating that the same project approved in August 2017 was fully
23 analyzed in the prior MND and Addendum, concluding that the project would not have a
24 significant effect on the environment. (AR 2:7-9.)
25

26 The Staff Report regarding Resolution No. 2020-04 discussed that on August 8,
27 2017, the Board adopted Resolution No. 2017-15 approving and adopting Addendum
28

1 No. 1 to the Final MND for the alternative site under CEQA and approving the
2 alternative site. It discussed the finding that the change in location would not result in
3 any new significant environmental effect triggering the need for further environmental
4 review under Public Resources Code section 21166 or State CEQA Guidelines section
5 15162. It also stated that the alternative site is subject to the same mitigation measures
6 as the original site. (AR 82:6966.) The June 2020 Alternatives Report discussed the
7 prior environmental review process and adoption of the Addendum in 2017. (AR 4:19,
8 21.)
9

10 The City's comments, submitted before the public hearing, raised an issue about
11 the environmental document failing to address "feasible alternatives." (AR 101:7707-
12 7708.) But the City's argument in its Opening Brief is not based on the failure to
13 address alternatives as part of CEQA review. Instead, the City's challenge is based on
14 significant new information that requires further environmental review.
15

16 The City now claims that the District's Addendum to the MND is deficient
17 because it did not consider significant new information about the risk of the Mojave
18 River Dam failing. It asserts that the record lacks a discussion of this new information
19 published in November 2019, in which the Army Corps' News Release warned of
20 greater risk from the Mojave River Dam failing. The City contends the District is
21 proceeding in a manner not required by law because it failed to consider this new
22 information and instead relied on the 2017 Addendum.
23
24

25 The District argues that it complied with CEQA when it adopted the 2017
26 Addendum. The District contends that the City fails to demonstrate the existence of
27 "new information" under Public Resources Code section 21166 and Guidelines section
28 15162, subdivision (a). According to the District, the City failed to exhaust its

1 administrative remedies; judicial notice cannot be taken of the information on which the
2 City relies; and even if the City's claim is not barred by the failure to exhaust, there are
3 no subsequent discretionary approvals to trigger CEQA review.

4 **B. The City Failed to Exhaust Administrative Remedies.**

5 The District is correct that the City failed to exhaust its administrative remedies
6 on this issue.

7
8 The City argues in its Reply that the District's decision to find alternatives
9 infeasible and approve the project under Government Code section 53096 is a
10 discretionary approval triggering the need for a CEQA determination. But this was not
11 the argument raised in the City's Opening Brief. The argument raised in the Opening
12 Brief was directed to asserting that the District failed to consider new significant
13 information, rendering reliance on the 2015 MND and 2017 Addendum deficient.

14
15 The court considers the City's argument made on reply only as it relates to the
16 District's exhaustion of administrative remedies defense. In other words, to the extent
17 the City asserts in its Reply that the District failed to make required CEQA findings in
18 approving the project, that argument is waived. But to the extent it is offered as a
19 reason that the significant new information argument was not raised earlier, it is
20 considered.

21
22 The 2020 approval is a discretionary approval to which CEQA applies, requiring
23 consideration whether one of the three triggering events for a supplemental or
24 subsequent EIR exists. Substantial evidence supports a conclusion that the solar
25 energy project as described and considered in the 2017 Addendum is the same project
26 approved in 2020. The only change in circumstance was the manner under which
27 project approval was sought: the District's finding that the qualified exemption under
28

1 Government Code section 53096 applied rather than the City approving the District's
2 application for a General Plan Amendment and CUP. The question then is whether the
3 "significant new information" factor of Public Resources Code section 21166,
4 subdivision (c), and Guidelines section 15162, subdivision (a)(3), triggers subsequent
5 CEQA review.
6

7 Nothing in CEQA requires an agency to make an explicit finding that the original
8 environmental document retains some degree of relevance. (*San Mateo Gardens*,
9 *supra*, 1 Cal.5th at p. 953, fn.4.) "When an agency considers a subsequent
10 discretionary action on a project, it will know whether changes are proposed in the
11 project but may be unaware of changes in circumstances or new information of
12 importance to the project. Nothing in CEQA or the Guidelines requires the agency to
13 conduct an investigation to ferret out changes in circumstances or new information. If
14 the agency becomes aware of such factors, however, it should then consider all the
15 relevant facts and explicitly decide whether conditions exist that necessitate further
16 environmental review. If a project opponent is aware of changed circumstances or new
17 information, bringing that material to the agency's attention might obligate the agency to
18 conduct an investigation to determine whether further environmental review is required."
19 (Kostka & Zischke, *Practice Under the California Environmental Quality Act* (2d ed Cal
20 CEB) § 19.37.)
21
22

23 The District made an implied finding of no changes to the project that require
24 further environmental review under Public Resources Code section 21166. The
25 District's 2020 Alternatives Report states: "No legal challenges were filed under CEQA
26 against the Original Site or the Alternative Site where the Proposal would be located.
27
28

1 Thus, the Final MND and Addendum are presumed valid under Public Resources Code
2 sections 21080.1 and 21167.2 and State CEQA Guidelines section 15231." (AR 4:29.)

3 "CEQA does not set forth any particular procedure to support an agency's
4 decision that a new EIR [or MND] is not required. CEQA does not require an initial
5 study or public hearing in these circumstances." (*Committee for Re-Evaluation of T-*
6 *Line Loop v. San Francisco Municipal Transportation Agency* (2016) 6 Cal.App.5th
7 1237, 1256.) As explained in Kostka & Zischke, Practice Under the California
8 Environmental Quality Act, *supra*, § 19.48: ""There is no specific requirement in CEQA
9 or the CEQA Guidelines that public notice and an opportunity to comment be provided
10 in connection with a determination of whether a subsequent or supplemental EIR is
11 required for a project." (Citing Pub. Resources Code, § 21166; Guidelines, § 15162; *A*
12 *Local & Regional Monitor (ALARM) v. City of Los Angeles* (1993) 12 Cal.App.4th 1773,
13 1804 ["holding that CEQA does not require a public hearing or public comment before a
14 determination whether a subsequent or supplemental EIR is required"]; *Concerned*
15 *Citizens of South Central L.A. v. Los Angeles Unified School Dist.* (1994) 24
16 Cal.App.4th 826, 845.)

17
18
19
20 In *Santa Teresa Citizen Action Group v. City of San Jose* (2003) 114 Cal.App.4th
21 689, 701-702, the Court found the exhaustion requirement of Public Resources Code
22 section 21177 did not apply where "there was no clearly defined administrative
23 procedure for petitioners to resolve their concerns about the project as it was finally
24 configured." But in several other cases, the Court has come to a contrary conclusion.
25 (*ALARM, supra*, 12 Cal.App.4th at p. 1804 ["At no time during the administrative
26 process did anyone ... suggest that a separate public hearing was required."]; *Mani*
27 *Brothers Real Estate Group v. City of Los Angeles* (2007) 153 Cal.App.4th 1385, 1394-

1 1395 [finding the exhaustion requirement applied where regularly schedule meetings
2 open to the public were held, even if not "duly noticed public hearings under CEQA"].¹⁴
3 In *Bridges v. Mt. San Jacinto Community College District* (2017) 14 Cal.App.5th 104,
4 117, the Court followed *Mani Brothers*, concluding that the CEQA exhaustion
5 requirement was triggered even though there was not a public hearing held under
6 CEQA, where there was a regularly scheduled meeting that was open to the public.
7

8 There is no dispute that a public hearing on the District's consideration of the
9 qualified exemption was posted as required. While the City argues that the District
10 failed to provide adequate notice that an environmental decision would be made, a
11 public hearing is not required for an implied finding of no subsequent environmental
12 review. In addition, the City was able to comment and generally asserted that the
13 CEQA document failed to address feasibility alternatives. (AR 101:7707-7708.) The
14 City had an opportunity during the administrative proceeding to raise its CEQA objection
15 that significant new information existed but failed to do so. It has failed to show CEQA's
16 exhaustion exception applies. This issue is barred by the failure to exhaust
17 administrative remedies.
18
19

20 **C. There is No Basis for Finding the Existence of Significant New Information.**

21 In *Bridges*, even though the Court found the failure to exhaust, the Court went on
22 to evaluate the merits of the CEQA claim as if exhaustion did not apply. (*Bridges*,
23 *supra*, 14 Cal.App.5th at pp. 118-126.) Here, even if the exhaustion conclusion did not
24 preclude the City's claim, the CEQA argument lacks merit.
25
26

27
28 ¹⁴ Public Resources Code section 21177, setting forth the exhaustion requirement, provides at subdivision (e):
"This section does not apply to any alleged grounds for noncompliance with this division for which there was no public
hearing or other opportunity for members of the public to raise those objections orally or in writing before the approval
of the project, or if the public agency failed to give the notice required by law."

1 First, there is no statutory basis for the City's request for judicial notice of the
2 November 2019 News Release, and the City does not explain why it failed to seek to
3 augment the administrative record prior to briefing on the merits.

4 But even if the court were to consider the News Release, it is insufficient to
5 trigger subsequent environmental analysis. "CEQA analysis is concerned with a
6 project's impact on the environment, rather than with the environment's impact on a
7 project and its users or residents." (*California Building Industry Association v. Bay Area*
8 *Air Quality Management District* (2015) 62 Cal.4th 369, 378.) CEQA does not require
9 analysis of the impact of existing environmental conditions on a project's future users or
10 residents. (*Id.* at p. 377.) Guidelines section 15126.2, subdivision (a), is consistent with
11 the ruling in *California Building Industry Association*.
12

13
14 Given that an MND is at issue, the News Release's discussion of a new
15 assessed increased risk of flooding during an extreme flood event does not constitute
16 substantial evidence in favor of a fair argument that a new significant environmental
17 impact from the project may occur. (*San Mateo Gardens, supra*, 1 Cal.5th at p. 959.)
18 The increased flood assessment risk is not new information of substantial importance
19 because it does not constitute substantial evidence that the project may exacerbate the
20 existing flooding risk. Therefore, the City's CEQA argument is without merit.
21

22 VI

23 Conclusion

24 For the reasons explained above, the petition for a writ of mandate is denied.

25 Dated: September 16, 2021

26
27 

28

David Cohn
Judge of the Superior Court

EXHIBIT A

1 Superior Court of California
County of San Bernardino
2 247 W. Third Street, Dept. S26
San Bernardino, California 92415-0210
3
4
5

6
7
8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **COUNTY OF SAN BERNARDINO, SAN BERNARDINO DISTRICT**
10

11 City of Hesperia, a municipal corporation,
12
13 Petitioner and Plaintiff,

Case No.: CIVDS2019176
RULING ON PETITION FOR WRIT OF
MANDATE: GRANTED

14 Lake Arrowhead Community Services
15 District, a public body corporate and
16 politic, Board of Directors of Lake
17 Arrowhead Community Services District;
and DOES 1 through 50, inclusive,

Date: July 12, 2021
Time: 1:30 p.m.
Dept: S-26

18 Respondent and Defendant.
19

20 Southern California Edison, Sunpower
21 Corporation Systems, and Stffel, Nicolaus
& Company, Incorporated

22 Real Parties in
23 Interest.
24
25
26
27
28

Introduction

Petitioner City of Hesperia (the "City") seeks a writ of mandate to prevent Respondent Lake Arrowhead Community Services District (the "District")¹ from building a solar energy project on land the District owns in an area of the City known as Hesperia Farms. The City contends the project violates the City's general plan and zoning ordinances. The District, however, contends it is statutorily exempt from compliance pursuant to Government Code section 53096, subdivision (a), which provides an exemption for projects related to the "storage or transmission" of electricity when there is "no feasible alternative."

The project is intended to generate electricity pursuant to the Local Government Renewable Energy Self-Generation Bill Credit Transfer program ("RES-BCT"),² which allows local governments, under specified circumstances, to generate electricity on one site, export it to the electrical grid, and apply the resulting energy credits against electricity bills incurred on a different site. (Pub. Util. Code, § 2830.) To comply with the requirement for exemption from the City's general plan and zoning ordinances, the District determined that there is "no feasible alternative" to the Hesperia Farms site, because other sites would not be suitable for the District's intended purpose—generating electricity under the RES-BCT program.

However, the District's premise underlying the selection of the site in Hesperia Farms—that the site qualifies for the RES-BCT program—is mistaken. The site does not

¹ The Board of Directors of Lake Arrowhead Community Service District is named as an additional respondent.

² The acronym RES-BCT is used with respect to Aretha Franklin and her anthem, RESPECT.

1 qualify for the program because it is not located “within the geographical boundary” of
2 the District, as required by section 2830, subdivision (a)(4)(C). Although other sites
3 may be infeasible because they are unusable for the RES-BCT program, or for other
4 reasons, this site is *also* infeasible because it is not within the geographical boundary of
5 the District. Therefore, the statutory exemption from the City’s general plan and zoning
6 ordinances does not apply. Accordingly, the City’s petition for a writ of mandate is
7 granted.³

II

Background

A. The Former Version of the Project

13 In 2016, the City brought a similar writ petition challenging an *earlier* decision by
14 the District to approve a *similar* solar project in the same general area. (*City of*
15 *Hesperia v. Lake Arrowhead Community Services District et al.*, San Bernardino County
16 Superior Court Case No. CIVDS1602017.) As in this case, the City contended that the
17 project did not comply with the City’s general plan and zoning ordinances. Also as in
18 the case, the District contended that the project was statutorily exempt from compliance.
19 The trial court agreed with the City and granted the petition. The Court of Appeal
20 affirmed the judgment in *City of Hesperia v. Lake Arrowhead Community Services*
21 *District* (2019) 37 Cal.App.5th 734, finding that the project was not exempt from the
22 City’s general plan and zoning ordinances.

25 The Court of Appeal began its analysis with the observation that “the Legislature
26 has attempted to achieve a balance between the state’s interest in allowing local
27

28

³ Other grounds for the petition are denied as addressed *infra*, in § IV.

1 agencies to produce, generate, store, and transmit water or electrical energy and the
2 cities' and counties' control over local building and zoning." (*City of Hesperia, supra*, at
3 p. 739.) The specific issue before the Court was whether the District's solar project
4 was "exempt from—or must comply with—the zoning ordinances" of the City. (*Ibid.*)

5 The Court summarized the statutory scheme, which balances the competing interests:
6

7 Our analysis begins with the statutory requirement that, for
8 purposes of a proposed solar energy project, a local agency
9 must comply with the zoning ordinances of the city and
10 county in which the project's facilities are to be constructed
11 or located. (Gov. Code, § 53091, subd. (a) ... Then, as
12 potentially applicable here, section 53091, subdivision (e)
13 (§ 53091(e)), and section 53096, subdivision (a)
14 (§ 53096(a)), each provides the agency with an exemption
15 for the location and construction of certain types of
16 facilities. Section 53091(e) provides an *absolute*
17 *exemption* for "the location or construction of facilities ... for
18 the production or generation of electrical energy"—unless
19 the facilities are "for the storage or transmission of electrical
20 energy," in which event the zoning ordinances apply. Section
21 53096(a) provides a *qualified exemption* for an agency's
22 proposed use upon, first, a showing that the development is
23 for facilities "related to storage or transmission of water or
24 electrical energy" and, second, a resolution by four-fifths of
25 the agency's members that "there is no feasible alternative to
26 [the agency's] proposal."

19 (*City of Hesperia, supra*, 37 Cal.App.5th at pp. 739-740, italics in original.)

21 Although the parties agreed that the project qualified as a solar farm under
22 Hesperia Municipal Code ("HMC") section 16.16.063, which addresses "alternative
23 energy technology standards," the *zoning* of the property presented an obstruction.

24 HMC section 16.16.063.B, provides:

25 Solar farms shall only be allowed on *nonresidential and*
26 *nonagricultural designated properties* with approval of a
27 conditional use permit by the planning commission. Solar
28 farms *shall not be permitted within six hundred sixty (660)*
feet of a railway, spur, any interstate, highway, or major

1 arterial, arterial, or secondary arterial roadway; or any
2 agricultural or residentially designated property.

3 (Italics added; AR 76:6892.)

4 The property where the District intended to build the project was zoned "Rural
5 Residential," and the solar project was to be located within 660 feet of property to the
6 south, zoned for agricultural use. (*City of Hesperia, supra*, at pp. 741-742.) Therefore,
7 the project was prohibited under HMC section 16.16.063.B, unless an exemption
8 applied—either the absolute exemption under Government Code section 53091,
9 subdivision (e), or the qualified exemption under Government Code section 53096,
10 subdivision (a).
11

12 Attempting to address this problem, the District adopted a Resolution determining
13 that the project met the criteria for both the absolute exemption and the qualified
14 exemption. First, the District found that the absolute exemption applied because the
15 District was a generator of electricity. Second, the District found that the qualified
16 exemption applied because there was "no feasible alternative" to the location of the
17 project. (*City of Hesperia, supra*, 37 Cal.App.5th at pp. 743-744.)
18

19 The City sued and the trial court found that the proposed project did not fall within
20 the absolute exemption, because the project included the *transmission* of electrical
21 energy, which is excluded from the exemption provided by section 53091, subdivision
22 (e), for generation or production of electrical energy. The trial court also found that the
23 qualified exemption based on infeasibility was not supported by substantial evidence.
24 Therefore, the trial court found that the project was not exempt from the City's general
25 plan and zoning ordinances.
26

27
28 The District appealed.

1 In 2017, the parties agreed to stay the appeal while the District applied for
2 General Plan Amendment to change the land use designation of Hesperia Farms to
3 Public (i.e., not Rural Residential) and for approval of a Conditional Use Permit (“CUP”)
4 to construct a solar farm on the property. (AR 4:20-21; AR 36:2568-2569; AR 44:3121-
5 3123.) The project was the same as the original version except for moving it 660 feet to
6 the north to comply with HMC section 16.16.063.B (prohibiting solar projects within 660
7 feet of property zoned for agricultural use). If the City granted the District’s application,
8 the issues on appeal would be moot and the project could go forward.

9
10 On January 16, 2018, however, the City denied the District’s applications and on
11 March 20, 2018, adopted Resolution No. 2018-09, denying the General Plan
12 Amendment, and adopted Resolution No. 2018-10, denying the CUP. (AR 51:4160; AR
13 61:4292-4296; AR 62:4297-4300.)

14
15 The District did not challenge the City’s denials. Instead, the appeal proceeded,
16 resulting in the *City of Hesperia* decision in favor of the City, filed July 19, 2019.⁴

17
18 The appellate court affirmed the trial court’s ruling that the proposed project did
19 not fall within the *absolute* exemption because the project included the *transmission* of
20 electrical energy. (*City of Hesperia, supra*, at pp. 740, 749-759.) The appellate court
21 also affirmed the trial court’s conclusion that the proposed project did not fall within the
22 *qualified* exemption, because substantial evidence did not support the District’s
23 conclusion that there was “no feasible alternative” to the location chosen for the project.
24 (*City of Hesperia, supra*, at pp. 740, 760-766.) In determining feasibility, the Court
25 found guidance in the application of feasible alternatives and feasible mitigation
26

27
28 ⁴ The appeal considered the project as *originally* conceived, located within 660 feet of agriculturally designated property. (*City of Hesperia, supra*, at p. 742.)

1 measures in the California Environmental Quality Act, Public Resources Code section
2 21000 *et seq.* ("CEQA"). (*City of Hesperia, supra*, at pp. 762-764, 767.)

3 **B. The Current Version of the Project**

4
5 Shortly after the appellate court issued its ruling, the District arranged for
6 consultants to prepare two technical reports, which had not been prepared for the
7 original project. The first was entitled RES-BCT Project Review (the "Sage Report").
8 The second was entitled Technical Memorandum for Feasibility Evaluation of Potential
9 Photovoltaic System Sites (the "Tidewater Memorandum"). Based on these studies, the
10 District's staff prepared a report entitled "Alternatives to Proposed Solar Photovoltaic
11 System on Hesperia Farms Property (the "Alternatives Report").

12
13 On June 23, 2020, the District held a public hearing on the solar project as it was
14 described in the earlier General Plan and CUP applications, which the City had denied.
15 The District then adopted Resolution 2020-04, finding that there is *no feasible*
16 *alternative* to the proposed project, pursuant to the qualified exemption of Government
17 Code section 53096 (AR 3:11-14.) The Resolution stated:

18
19 The District's determination is based on [the] Alternatives
20 Report, including but not limited to the Tidewater
21 Memorandum and the Sage Report, and the remaining
22 administrative record for such determination, the District's
23 approval of the Original Site, and the District's approval of
24 the Alternative Site (the Proposal).

25 (*Id.* at p. 12.) The Resolution found that the District's determination rendered the City's
26 general plan and zoning ordinances inapplicable based on the newly supported
27 qualified exemption. (*Ibid.*)

28 The City, however, contends that the District's determination that it is statutorily
exempt from compliance with the City's general plan and zoning ordinances is still

1 invalid because the site does not qualify for the RES-BCT program and because the
2 District's determination is unsupported by substantial evidence in other respects as well.

3
4 **III**

5 **The District's Reliance on the RES-BCT Program is Misplaced.**

6 **A. Whether the Project Qualifies for the RES-BCT Program is a Question of**
7 **Statutory Interpretation, Subject to De Novo Review.**

8 The City's first cause of action seeks a writ of mandate under Code of Civil
9 Procedure section 1085 (a "traditional" writ) directing the District not to proceed with the
10 project on the ground that the project site fails to meet the requirements for the RES-
11 BCT program under Public Utilities Code section 2830. (Petition, ¶¶ 46-49; Prayer for
12 Relief, ¶1.)

13
14 The City's third cause of action seeks a writ of mandate under Code of Civil
15 Procedure section 1094.5 (an "administrative writ") and under section 1085, also
16 directing the District not to proceed with the project without complying with the City's
17 general plan and zoning ordinances. (Petition ¶¶ 58-63; Prayer for Relief, ¶ 3.) The
18 third cause of action alleges that the District's determination that there was "no feasible
19 alternative" to the site is unsupported by substantial evidence. (Petition ¶ 61.) The City
20 argues that because the project site fails to meet the requirements of the RES-BCT
21 program, the site is not a "feasible" site for the project.⁵

22
23
24 Usually, the standard of review for a traditional writ is whether the agency's
25 action was "arbitrary, capricious, entirely lacking in evidentiary support, or failed to
26 follow the procedure required by law." (*Martis Camp Community Assn. v. County of*
27

28

⁵ Other grounds for the City's contention that the District's determination of "no feasible alternative" is unsupported are discussed *infra*, at § IV.

1 *Placer* (2020) 53 Cal.App.5th 569, 594.) For an administrative writ, the standard of
2 review usually is whether the agency's decision is supported by substantial evidence.
3 (*City of Hesperia, supra*, 37 Cal.App.5th at pp. 747-748, 761-762.) But the question
4 whether the City's reliance on the RES-BCT program is proper involves a question of
5 statutory interpretation. Whether an agency's decision is reviewed under traditional or
6 administrative mandamus, the interpretation and application of a statute to undisputed
7 facts involves a question of law. In such circumstance, the court exercises independent
8 judgment and reviews the issue de novo, relying on settled rules of statutory
9 construction. (*Department of Health Care Services v. Office of Administrative*
10 *Hearings* (2016) 6 Cal.App.5th 120, 139-141.)

13 As explained below, under the de novo standard of review (or, for that matter,
14 under the "arbitrary and capricious" or "substantial evidence" standards), the District's
15 selection of the project site for the RES-BCT program is improper.

16 **B. The Project Does Not Qualify for the RES-BCT Program Because it is Not**
17 **Located Within the "Geographical Boundary" of the District, as Required**
18 **by Public Utilities Code Section 2830.**

19 Under specified circumstances, Public Utilities Code section 2830 allows a "local
20 government" to generate electricity on one site it owns, export it to the electrical grid,
21 and apply resulting energy credits against bills for electricity used by the local
22 government on another site it owns. There is no dispute that the District qualifies as a
23 "local government" pursuant to section 2830, subdivision (a)(6), defining a "local
24 government" to include a "special district." There is also no dispute that the District
25 owns the project site and owns other property to which credits could be applied.
26
27
28

1 On August 27, 2015, the District entered into a Generator Interconnection
2 Agreement for the project with Southern California Edison Company (SCE) pursuant to
3 section 2830. (AR 26:1777-1838.)

4 To be eligible for the program, however, a "generation facility," such as the one
5 contemplated for this project, is subject to other requirements as well. Section 2830,
6 subdivision (a)(4), provides in relevant part:
7

8 "Eligible renewable generating facility" means a generation
9 facility that meets *all* of the following requirements:

10 ...
11 (C) *Is located within the geographical boundary of the local
12 government*

13 (Italics added.)

14 The geographical boundary of the District is shown on a map set forth in a report
15 by the Local Agency Formation Commission for the County of San Bernardino
16 (LAFCO). (2016 AR 77:2316).⁶ The geographical boundary encloses the area depicted
17 in yellow on the map. The project site is not located within this boundary, but is some
18 eight miles north of Lake Arrowhead. (AR 4:49.) The project site, geographically, is
19 within the boundary of the City, not within the boundary of the District.

20 The District, however, contends that the project site satisfies the requirement that
21 the project be located within the geographical boundary of the District, because LAFCO
22 has determined that the site is within the District's "sphere of influence."⁷ But a "sphere
23 of influence" is a separate concept from a "geographical boundary."
24

25
26
27 ⁶ Citation to "2016 AR" refers to the administrative record from the 2016 litigation that was made part of the
28 certified administrative record.

⁷ Presumably, SCE took the same view or it would not have entered into a contract for the RES-BCT program
with the District.

1 A special district “is an entity of limited powers, and it has specifically
2 circumscribed geographic and ‘sphere of influence’ boundaries.” (*Modesto Irrigation*
3 *Dist. v. Pacific Gas & Electric Co.* (N.D. Cal. 2004) 309 F.Supp.2d 1156, 1159, fn.
4 omitted.)⁸

5 Government Code section 56076 defines “sphere of influence” as a “*plan for the*
6 *probable physical boundaries* and service area of a local agency, as determined by the
7 commission [LAFCO].” (Italics added.) “In this sense, a ‘sphere of influence’ is a
8 prospective measure, charting what a ... district’s boundaries might be at some future
9 point. A district’s ‘sphere of influence’ is not necessarily coextensive with its existing
10 service area.” (*Modesto Irrigation, supra*, at p. 1159, fn. 4, citations omitted.)

11 LAFCO specifically noted the distinction: “Any sphere modifications would not
12 affect any agency’s current boundary ...” (2016 AR 77:2316; see also 2016 AR
13 77:2317-2318, 2344-2345 [discussing that since 1983, the District’s boundary and
14 sphere of influence had been coterminous and including map showing that the Hesperia
15 Farms property is not coterminous with the District’s boundary].)

16 Although Government Code section 56076 uses the term “physical boundaries,”
17 rather than the term “geographical boundary,” the District’s “sphere of influence” is
18 distinct from its “geographical boundary.” LAFCO’s determination that the project site is
19 a “*plan for the probable physical boundary*” indicates that another step is required
20
21
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23

24
25 ⁸ Government Code section 56036 defines a “district” and “special district” as synonymous and as “an agency
26 of the state, formed pursuant to general law or special act, for the local performance of governmental or proprietary
27 functions within limited boundaries and in areas outside district boundaries when authorized by the commission
28 pursuant to Section 56133.” Section 56133 allows a district to provide new or extended services outside its
jurisdictional boundary and within its sphere of influence with LAFCO’s authorization. Jurisdictional boundaries are
“*de facto less expansive than ‘spheres of influence.’*” (*Modesto Irrigation, supra*, 309 F.Supp.2d at p. 1167 fn. 21; see
also *Community Water Coalition v. Santa Cruz County Local Agency Formation Com.* (2011) 200 Cal.App.4th 1317,
1325, fn. 3.) Section 56133’s use of the term “jurisdictional boundary” is not demonstrated to be relevant to the issue
whether a “sphere of influence” is within the District’s “geographical boundary.”

1 before the site is within the geographical boundary, namely annexation. (See 2016 AR
2 77:2317, 2344 [discussing that annexation would avoid property tax].) Annexation is
3 “the inclusion, attachment, or addition of territory to a city or district.” (Gov. Code, §
4 56017.)⁹ That has not occurred.

5 Therefore applying the de novo standard of review, the District’s selection of the
6 project site for use under the RES-BCT program was improper.¹⁰

7
8 As a result, the District’s reliance on the RES-BCT program is impermissible
9 because the project site is not located within the District’s geographical boundary, as
10 required by Public Resources Code section 2830, subdivision (a)(4)(C). The District’s
11 finding that there are no feasible alternative sites is based in large part on the operation
12 of an economically viable RES-BCT system to generate bill credits. (AR 4:22-23, 42-
13 43.) But the District cannot rely on the qualified exemption from the City’s general plan
14 and zoning ordinances under Government Code section 53096, subdivision (a), if the
15 RES-BCT program is not viable on the site.¹¹ The District must first comply with the
16 City’s general plan and zoning ordinances.
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22

23 ⁹ Bringing property within a sphere of influence facilitates annexation. (*City of Agoura Hills v. Local Agency*
24 *Formation Com.* (1988) 198 Cal.App.3d 480, 491.)

25 ¹⁰ In the prior litigation, the trial court discussed the RES-BCT program and the Agreement entered into on
26 August 27, 2015, rejecting the City’s argument that the District had no authority to enter into the Agreement under
27 Government Code sections 61000, et seq. (City’s Request for Judicial Notice, Exh. B, Ruling at p. 4:12-6:3.) The
28 appellate court noted this finding, stating: “Deciding that the District has authority under the RES-BCT Program (Pub.
Util. Code, § 2830) to produce electricity for Edison, the trial court denied the writ of mandate under the first cause of
action. (*City of Hesperia, supra*, 37 Cal.App.5th at p. 745.) The District here does not argue that principles of res
judicata or collateral estoppel preclude the City’s new attack on the District’s qualification for the RES-BCT program.
Therefore, these principles are not considered.

¹¹ The absolute exemption, at issue in the prior litigation, is not at issue here.

1 **C. The City Has Standing to Challenge the District's Reliance on the RES-BCT**
2 **Program.**

3 The District argues, however, that the City lacks standing to challenge the
4 District's agreement with SCE for the RES-BCT program. First and foremost, the City's
5 argument is not an attack on the agreement *per se*; it is an attack on the District's *use of*
6 the agreement to establish that the Hesperia Farms site is the only "feasible" location for
7 the project.
8

9 Furthermore, Code of Civil Procedure section 1086 provides: "The writ must be
10 issued in all cases where there is not a plain, speedy, and adequate remedy, in the
11 ordinary course of law. It must be issued upon the verified petition of the *party*
12 *beneficially interested.*" (Italics added.) "The term 'beneficially interested' generally
13 means that the person "has some special interest to be served or some particular right
14 to be preserved or protected over and above the interest held in common with the public
15 at large. [Citations.]" (*Save the Plastic Bag [Coalition v. City of Manhattan Beach*
16 (2011)] 52 Cal.4th [155], 166.) In addition, the beneficial interest must be substantial
17 and direct. (*Ibid.*) If the writ sought would enforce only a technical, abstract or moot
18 right, the interest is not substantial for purposes of the beneficial interest requirement.
19 (*Braude v. City of Los Angeles* (1990) 226 Cal.App.3d 83, 87 [276 Cal. Rptr. 256].)"
20 (*Consolidated Irrigation Dist. v. City of Selma* (2012) 204 Cal.App.4th 187, 205.)
21

22 In *Consolidated Irrigation District*, the Court discussed that a public agency may
23 be beneficially interested if its "resources or programs administered ... may be affected
24 by the project. [Citations.] [Citations.]" (*Ibid.*) The Court found that the special
25 district's operation of a groundwater recharge program gave it a beneficial interest to
26
27
28

1 challenge an environmental impact report because the project could affect the district's
2 efforts to add to local groundwater. (*Id.* at p. 206.)

3 The City demonstrates it has a special interest in the enforcement of its zoning
4 ordinances. The use of Hesperia Farms as a solar farm project under the RES-BCT
5 program implicates the City's ability to enforce its zoning ordinances as a result of
6 Government Code section 53096, subdivision (a). Therefore, the City has a special
7 interest in the operation of the project under the RES-BCT program within the City's
8 limits. The District's qualification for the program is tied to the feasibility analysis.
9 Therefore, the City has standing to challenge the District's finding that the project site is
10 the only feasible alternative because the District's intended use of the site is not allowed
11 when the site has not been annexed within the District's "geographical boundary."
12

13
14 **D. The District Has Not Demonstrated a Statute of Limitations Bar to the City's**
15 **Challenge.**

16
17 The District argues that the City's challenge to the District's use of the RES-BCT
18 program is barred by the statute of limitations, whether the thirty-day limitations period
19 of Government Code section 11523, applicable to challenges to agencies subject to the
20 Administrative Procedure Act, or the four-year "catch-all" limitations period of Code of
21 Civil Procedure section 343.
22

23 The court cannot consider the District's argument under these statutes, because
24 the District's Answer did not place these limitations periods in issue. The District's
25 Eleventh Affirmative Defense asserted that the Petition is barred by the applicable
26 statute of limitations "including but not limited to California Public Resources Code
27 section 21167 and Code of Civil Procedure section 1094.6." Public Resources Code
28 section 21167 applies to CEQA and is not applicable to whether the District is eligible

1 for the RES-BCT program. As for Code of Civil Procedure section 1094.6, the District
2 does not argue it applies. Because the District's Answer failed to plead the *specific*
3 statutes of limitation argued in the District's opposition, they cannot be considered.
4 (See *Martin v. Van Bergen* (2012) 209 Cal.App.4th 84, 91.)

6 IV

7 The City's Other Grounds for Challenging 8 the Feasibility Finding are Unsupported.

9 A. *City of Hesperia* Requires a Consideration of Alternative Locations.

10 As discussed above, Government Code section 53091, subdivision (a), provides:
11 "Each local agency shall comply with all applicable building ordinances and zoning
12 ordinances of the county or city in which the territory of the local agency is situated."
13 Also discussed above, Government Code section 53096, subdivision (a), provides a
14 qualified exemption for a local agency's use of property for facilities "related to storage
15 or transmission of ... electrical energy" when there is no "feasible alternative."
16

17
18 *City of Hesperia* considered CEQA as "guidance" for analyzing the definition of
19 "feasible" in section 53096, subdivision (c), given the lack of other authority.¹² (*City of*
20 *Hesperia, supra*, 37 Cal.App.5th at p. 762.) Under CEQA, "[t]he range of alternatives is
21 governed by the "rule of reason," which requires an analysis of the alternatives
22 necessary to permit a reasoned choice. An [environmental impact report] need not
23 consider an alternative, the effect of which cannot be reasonably ascertained and the
24 implementation of which is remote and speculative." (*Id.* at p. 763, quoting *Citizens of*
25

26
27
28 ¹² "Feasible" means "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors." (Gov. Code, § 53096, subd. (c).)

1 *Goleta Valley v. Board of Supervisors* (1988) 197 Cal.App.3d 1167, 1177-1178, fn.
2 omitted in original.)

3 As under CEQA, for purposes of section 53096, the “rule of reason’ requires
4 consideration of alternatives.” (*Ibid.*) *City of Hesperia* found:

5 For section 53096(a)’s qualified exemption to apply, section
6 53096, subdivision (c)’s definition of ‘feasible’ requires the
7 necessary finding to be there is no alternative to the
8 agency’s proposal that is ‘capable of being accomplished in
9 a successful manner within a reasonable period of time’; and
10 that necessary finding must be supported by substantial
11 evidence of the ‘economic, environmental, social, and
12 technological factors.’

11 (*City of Hesperia, supra*, at p. 764.) The court stated:

12 [[I]n order for the District to have properly determined that
13 “there is no feasible alternative” to the proposed location of
14 the Solar Project for purposes of section 53096(a), the
15 District was required to have: (1) considered alternative
16 locations; (2) taken into account economic, environmental,
17 social, and technological factors associated with both the
18 Project Site and the alternative locations; and (3)
19 determined—i.e., exercised discretion based on substantial
20 evidence in the administrative record—that, at the alternative
21 locations, the proposal was not capable of being
22 accomplished in a successful manner within a reasonable
23 period of time.

20 (*Id.* at p. 767.) Therefore, under *City of Hesperia*, this is the standard to apply when
21 determining whether substantial evidence supports the District’s feasibility finding.¹³

22 **B. The District’s Purpose in Choosing the Project Site is Irrelevant.**

23
24 In *City of Lafayette v. East Bay Municipal District* (1993) 16 Cal.App.4th 1005,
25 1017, the Court wrote:

26
27
28 ¹³ The District’s argument that “even under CEQA an agency is not required to provide the public with an opportunity to review and comment or debate an agency’s economic feasibility analysis” (Opp. Br. p. 21:7-9, citing *Sierra Club v. County of Napa* (2004) 121 Cal.App.4th 1490, 1505-1506), is irrelevant. Government Code section 53096, subdivision (a) requires a public hearing with at least ten days’ notice.

1 The primary objective of the statutory scheme is to maintain
2 local control of land use decisions (§ 53091), with carefully
3 specified exceptions where necessary to *further*
4 *countervailing interests*.

(Italics added.)¹⁴

5 Relying on *Lafayette*, the City argues that the project does not “further
6 countervailing interests” such as placing water or electricity facilities that are necessary
7 and indispensable to the agency’s authorized functions, because the District’s *purpose*
8 in building the project is merely to reduce its own electricity costs.

9 This argument directed to the agency’s purpose was previously rejected in *City of*
10 *Hesperia* in connection with the Court’s discussion of the absolute exemption. The
11 Court found, contrary to the City’s argument, that the exemption is based “on the
12 purpose of *the proposed facilities*, not on the purpose of *the agency developing the*
13 *proposed facilities*.” (*City of Hesperia, supra*, at p. 755, italics in original; footnote
14 omitted.) The City argued that the exemption should not apply because the project was
15 not “integral” or “directly related” to the District’s authorized function to provide water
16 and wastewater treatment. The Court found this to be irrelevant to the application of the
17 absolute exemption.
18

19 The City fails to provide any different analysis for the qualified exemption that
20 would distinguish it from the argument already rejected by the Court of Appeal in
21 connection with the absolute exemption. The project is related to the transmission of
22 electrical energy project to which section 53096 applies. The District’s *purpose* for the
23 project is irrelevant. This ground for a writ is denied.
24
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28 ¹⁴ *Lafayette* addressed the legislative intent of the statutory scheme with respect to *water*. *City of Hesperia*
found the same legislative intent when “proposed facilities are for the production or generation of *electrical energy*.”
(*City of Hesperia, supra*, at p. 752, italics in original.)

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C. Procedures Under CEQA are Irrelevant to the Alternatives Analysis.

The City argues that the alternatives standards under CEQA, including the time given to review and comment on a draft Environmental Impact Report (“EIR”), should apply to the alternatives analysis under Government Code section 53096. This argument apparently relates to a claimed *procedural* defect in the District’s proceedings—that it did not proceed as it would proceed under CEQA. “Where the alleged defect is that the agency has failed to proceed in the manner required by law, the court determines de novo whether the agency has employed the correct procedures, scrupulously enforcing all legislatively mandated requirements.” (*Chico Advocates for a Responsible Economy v. City of Chico* (2019) 40 Cal.App.5th 839, 845, citation omitted.) Therefore, this court considers the argument de novo.

The City has failed to demonstrate that the CEQA requirements applicable to public notice and the notice period for review of an EIR are relevant to the notice period required for a hearing on the qualified exemption under section 53096. Section 53096, subdivision (a), sets forth the minimum public notice period of at least ten days. The District complied with the notice requirement. This ground for a writ is denied.

D. If the Project Site Were Qualified for the RES-BCT Program, the Methodology Employed for the Analysis of Alternatives is Not Shown to be Otherwise Inadequate.

Because the project does not qualify for the RES-BCT program, the analysis of alternatives is fundamentally flawed, and the selection of the project site in Hesperia

1 Farms is unsupported by substantial evidence. *The discussion below assumes*
2 *arguendo that the project qualifies for the RES-BCT program.*

3 Much of the City's argument about the District's feasibility determination amounts
4 to a criticism of the parameters used in the Tidewater Memorandum, which the District's
5 Alternatives Report relies on. The City complains that there is no evidence of the
6 "analytic route the administrative agency traveled from evidence to action" in
7 determining why the particular sites received the particular scores they received. The
8 City complains about the twenty parameters used, asserting that they are different from
9 those used in studies of different solar projects that the Tidewater Memorandum
10 referenced as a basis for the parameters. It argues that the large number of parameters
11 used by Tidewater invites and facilitates manipulation.
12

13
14 The City's argument is insufficient to demonstrate that substantial evidence does
15 not support the feasibility findings in light of the whole record. The City's burden is
16 to discuss *all* relevant evidence on the issue of the feasibility findings and to demonstrate
17 that substantial evidence does not support the District's findings in light of the whole
18 record (*Latinos Unidos de Napa v. City of Napa* (2013) 221 Cal.App.4th 192, 206.)¹⁵

19
20 Concerning judicial review of administrative findings on feasible alternatives, the
21 Court in *City of Hesperia* wrote:

22 "The reviewing court, like the trial court, may not reweigh the
23 evidence, and is "bound to consider the facts in the light
24 most favorable to the Board, giving it every reasonable
25 inference and resolving all conflicts in its favor." [Citations
omitted.] There is a presumption that the agency's findings

26 ¹⁵ "[S]ubstantial evidence' has been defined in two ways: first, as evidence of "'ponderable legal significance
27 ... reasonable in nature, credible, and of solid value'" [citation]; and second, as "'relevant evidence that a reasonable
28 mind might accept as adequate to support a conclusion'" [citation]." (*County of San Diego v. Assessment Appeals Bd. No. 2* (1983) 148 Cal.App.3d 548, 555.) "[W]hen applying the substantial evidence test, 'Courts may reverse an agency's decision only if, based on the evidence before the agency, a reasonable person could not reach the conclusion reached by the agency.' [Citation.] (Italics in original.)" (*Greenebaum v. City of L.A.* (1984) 153 Cal.App.3d 391, 401-402.)

1 are supported by substantial evidence; and since the party
2 challenging those findings has the burden of demonstrating
3 otherwise, here the City must establish that the
4 administrative record does not contain substantial evidence
to support the Board's finding that there is no feasible
alternative to the Project Site.

5 (*City of Hesperia, supra*, 37 Cal.App.5th at p. 761.) This standard applies with equal
6 force to this case.

7 While the City complains about the Tidewater parameters used for environmental
8 and technical criteria and the scoring, it does not provide any reason for the court to
9 conclude that deviation from other studies' methodologies was without any foundation,
10 not credible, or unreasonable. The City argues that Tidewater did not provide any
11 support for its scoring and weight methodology, but the City fails to discuss the
12 analytical route taken by Tidewater in choosing the parameters that were evaluated and
13 the basis for assigning the scoring ranges for particular parameters, and weighing
14 factors as it did. (AR 4:54-59.)¹⁶

15
16
17 The City also fails to address the Tidewater discussion that subjective weighting
18 factors were determined according to relative importance for a successful system
19 location. The Tidewater Memorandum explained that the reason "technical parameters"
20

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23 ¹⁶ The Tidewater Memorandum evaluated the following criteria for a solar system producing similar quantities
of electricity as the previously approved system: economic, environmental, social, and technical. Within each criteria,
24 specific parameters were established. (AR 4:54-59.) For example, "technical" included parameters such as shading,
elevation, and average annual cloudy days. (AR 4:54.) With respect to elevation the Tidewater Memorandum
25 provided the following discussion:

26 Atmosphere thickness and composition influence the availability of both short
and longwave energy of the sun and earth, respectively. The lower the
27 evaluation of a region from sea level, the greater the atmosphere thickness;
therefore, a PV system's site location with respect to evaluation influence the
28 system efficiency (Noorollahi et al., 2016). Those site locations located at less
than 2,500 feet amsl were assigned a value of 0. Those site locations ranging
from 2,500 to 5,000 feet amsl were assigned a value of 5, and those site
locations greater than 5,000 amsl were assigned a value of 10.

(AR 4:58.)

1 were given the largest weighted factor was the ability to produce the requisite, annual
2 electrical output needed for a viable system. (AR 4:42, 61.)

3 In making its arguments, the City also fails to discuss all the relevant evidence on
4 which the District's findings rely, including the RES-BCT Project Review prepared by
5 Sage Energy Consulting, Inc. (AR 4:634-635, 637.)¹⁷

6
7 The District's report provided a detailed discussion of its investigation of
8 renewable energy options "to offset costs and energy requirements associated with
9 current and projected water and wastewater demands." (AR 4:17-22.) Evaluation was
10 based on project objectives related to substantially offsetting existing and future
11 electricity costs. (AR 4:16, 22-23.) The District considered other alternative forms of
12 renewable energy, including solar thermal, hydroelectric energy, wind, geothermal, and
13 digester gas, and provided reasons for selecting solar technology and rejecting other
14 alternatives based on the project objective to substantially offset existing and future
15 electricity costs. (AR 4:29-32.)¹⁸

16
17
18 The District considered the following alternatives: no project, reapplying to the
19 City for approval of the project, and alternative locations. (AR 4:32-42.) The District
20 provided a reasoned discussion and analysis why the "no project" and "re-apply"
21 proposals were determined infeasible in terms of the project objectives. (AR 4:32-34.)
22
23

24 ¹⁷ Sage evaluated six possible sites for location of solar systems consistent with the District's goal to offset
25 electrical costs. It also reviewed the project proposal at Hesperia Farms, "including the impact of changes in the
26 RES-BCT tariff on the projected savings in electrical costs over the life of the Project." (AR 4:634.) In doing so, it
27 "evaluated the amount of RES-BCT bill credits generated and associated Benefiting Account credit capacity." (*Ibid.*)
28 Sage also considered different systems, including "wind speed data for potential wind energy systems in the area of
[the District's] potential project sites." (*Ibid.*) It did so in relation to the District's intent to proceed with a project to
"offset the electrical energy cost of the operation of their water treatment, pumping, and management facilities."
(*Ibid.*) Sage discussed the reasons that other systems, such as a wind energy, were not feasible. (AR 4:634-635.)
Sage also reviewed the Tidewater Memorandum and found that it adequately identified potential RES-BCT project
sites. (AR 4:637.)

¹⁸ Insofar as the RES-BCT is not available for the Hesperia Farms site, the analysis of these alternative forms
of renewable energy may well be different.

1 For example, with the re-apply option, the District discussed that an alternative must be
2 “capable of being accomplished in a successful manner within a reasonable period of
3 time” and, given the history of the project, every indication was that a new application to
4 the City would be denied and a waste of further time and resources. (AR 4:34, quoting
5 Gov. Code § 53096, subd. (c).) Substantial evidence supports the District’s conclusion.
6

7 In considering alternative sites, the District discussed the feasibility of acquiring
8 new sites and evaluated the use of other existing sites. (AR 4:35-42.) Its analysis,
9 including a discussion of the findings in the Tidewater Memorandum and Sage Report,
10 concluded that there was no feasible alternative that met the project objective to
11 substantially reduce the District’s existing and future energy costs within a reasonable
12 period. (AR 4:35-42.) The analytical route for the conclusion was provided. The City’s
13 attacks on the Tidewater parameters are insufficient to demonstrate that substantial
14 evidence does not support the District’s feasibility finding, assuming that the project
15 qualifies for the RES-BCT program.
16

17
18 The City also argues that the Tidewater analysis did not take into account the
19 new analysis of the Mojave River Dam by the Army Corps. of Engineers. But the City
20 failed to present this evidence at the public hearing. There is no basis to take judicial
21 notice of this document, and the City did not move to augment the administrative record
22 to include it. Therefore, the City’s argument on this issue is disregarded.
23

24 The City asserts that the Sage report’s economic analysis of the different sites
25 fails to show how the comparison numbers were set and why size limitations were
26 placed on alternatives. The City takes issue that the alternative at “the Flats” site is
27 sized smaller at roughly one third the size of the proposed project even though the Flats
28 is a 4.45-acre site. (Reply, pp. 5:16-6:7.)

1 The District has not had an opportunity to respond, because the City first raised
2 the argument in its Reply brief. Nevertheless, the argument does not demonstrate that
3 substantial evidence fails to support the District's findings. Five acres is minimum
4 acreage for the proposed project. (AR 4:37, 47.) The Flats site is 4.5 acres. (AR 4:51.)
5 The Sage Report discussed that to be economically viable, an RES-BCT system needs
6 to be at least 350 kW DC and requires 3.0 acres. (AR 4:636.) Related to the Flats, the
7 Sage Report states:
8

9 Although the Flats site is currently intended for use in the
10 construction of a new operations building and yard, we
11 evaluated it in its current condition as raw land. The Flats
12 site is not large enough to accommodate a PV system large
13 enough to generate significant electricity cost savings. Sage
14 found that a 365 kW-DC single-axis tracking PV system at
15 the site would provide less than \$37,000 of annual savings,
16 6.5% of LACSD annual energy costs. In addition, the Flats
17 site has potential issues with soils and interconnection that
18 could jeopardize the viability of the site to host solar. An
19 annotated SCE DRPEP map is shown in Figure 1 below with
20 nearest access to distribution approximately 1/3 of a mile
21 which would add ~\$250,000 to interconnection costs, which
22 would render the project financially unviable. Photographic
23 evidence shows a potential 12kV spur along Hospital Road
24 to the corner of Rouse Ranch Road that is not indicated on
25 the DRPEP map. (AR 4:638.)

26 The Tidewater Memorandum discussed that the Flats site has been committed to
27 the new Field Operations Department building and corporate yard. The Flats was
28 included "in its current condition as existing vacant land; however, once construction
begins, the site would only be appropriate for potential rooftop and partial use." (AR
4:51.) In rejecting the Flats site as a viable alternative, the District noted that it has
committed the site "to its Field Operations Department building and corporate yard and
has already incurred costs in pursuit of that use." (AR 4:39.) When taken as a whole,

1 substantial evidence supports rejection of the Flats site as a feasible alternative in light
2 of the project objective.

3 Finally, the City asserts that the studies lack credibility because there was not an
4 adequate process to give the public time to review the studies and hire their own
5 consultants. But the District followed the public notice hearing requirements of
6 Government Code section 53096, subdivision (a), which provides for at least ten days
7 prior notice. The City's argument about the notice period and procedures needs to be
8 addressed with the Legislature, not the court. (*Estate of Horman* (1971) 5 Cal.3d 62,
9 77.)
10

11 **E. Institutional Bias as an Improper Influence is Not Shown by the Record.**
12

13 The City contends that "institutional bias" influenced the feasibility finding,
14 because the District had an ongoing relationship with the consultant it hired to conduct
15 the analysis. But there is no basis to take judicial notice of the contracts the City relies
16 on to support this argument. The court's inquiry under section 1094.5 is limited to the
17 administrative record. (*City of Hesperia, supra*, 37 Cal.App.5th at p. 766.)
18

19 The City also argues that the District's decision is particularly vulnerable to
20 charges of "institutional bias" because its decision is to proceed with essentially the
21 same project that was previously struck down. Citing *Residents Ad Hoc Stadium*
22 *Committee v. Board of Trustees of the California State University and Colleges* (1979)
23 89 Cal.App.3d 274, 284, the City argues that there is a *post hoc* rationalization, given
24 that the District had spent \$800,000 on the project by March 2018. (AR 63:4319.) The
25 City's argument is speculative, not based on evidence.
26
27

28 In *Residents Ad Hoc Stadium Committee*, the court discussed that CEQA
assumes as inevitable an institutional bias within an agency proposing a project, and

1 that Public Resources Code sections 21000 and 21100 impose procedural
2 requirements to insure that the decision maker does not fail to note the facts and
3 understand arguments advanced by opponents. The City's argument that the precise
4 process detailed in CEQA must be followed to avoid an "institutional bias" claim is
5 without legal support. As previously explained, the requirements for the District's
6 feasibility consideration are set forth in *City of Hesperia*. The City does not provide any
7 legal analysis why the public hearing requirements of Government Code section 53096,
8 subdivision (a), and the procedures set forth in *City of Hesperia* are insufficient to
9 address "institutional bias" claims and to avoid *post hoc* rationalization.

10
11
12 Nothing in Government Code section 53096, subdivision (a), precludes using a
13 paid consultant to prepare the feasibility analysis. The administrative record
14 demonstrates that the District performed an independent review of the consultants'
15 reports in drafting its Alternatives Report. (AR 4:15-43.)

16
17 Finally, the City asserts that the self-serving nature of the studies relied on by the
18 District is demonstrated by Tidewater's introduction and background sections that
19 advocate for the site chosen in 2014. The City argues, "There is no questioning of the
20 analytical gaps in the facts, criteria used for comparison, and the ultimate conclusions."
21 (Opening Br. p. 16:9-10.) But the City does not provide any analysis of what statements
22 were made in the introduction and background that demonstrate "institutional bias." Its
23 conclusory argument is without support. (*Citizens for Responsible Equitable*
24 *Environmental Development v. City of San Diego* (2011) 196 Cal.App.4th 515, 529
25 ["[A]n attack on the evidence without a fair statement of the evidence is entitled to no
26 consideration when it is apparent that a substantial amount of evidence was received on
27 behalf of the respondent." [Citation.]".])
28

The City's CEQA Challenge is Unsupported.

A. Further Environmental Review is Not Required Due to Significant New Information.

The City asserts that new information requires supplemental environmental review under Public Resources Code section 21166 and Guidelines section 15162.

In general, once an EIR or negative declaration has been adopted for a project, the lead agency is not required to prepare a subsequent or supplemental EIR unless one of the following exists:

(a) Substantial changes are proposed in the project which will require major revisions of the environmental impact report.

(b) Substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the environmental impact report.

(c) New information, which was not known and could not have been known at the time the environmental impact report was certified as complete, becomes available.

(Pub. Resources Code, § 21166; see also Guidelines, § 15162, subs. (a) and (b).)

Guidelines section 15162, subdivision (c) provides: "Once a project has been approved, the lead agency's role in project approval is completed, unless further discretionary approval on that project is required." (Guidelines, § 15162, subdivision

(c).) The CEQA review process is not complete until all discretionary approvals are granted.

"Whether an initial environmental document remains relevant despite changed plans or circumstances ... is a predominately factual question" for the agency to first answer. "A court's task on review is then to decide whether the agency's determination

1 is supported by substantial evidence; the court's job "is not to weigh conflicting
2 evidence and determine who has the better argument." [Citation.] (*Friends of College*
3 *of San Mateo Gardens v. San Mateo County Community College Dist.* (2016) 1 Cal.5th
4 937, 953.)

5
6 In 2017, in an effort to obtain the City's approval of a General Plan Amendment
7 and CUP, the proposed solar farm project was moved 660 feet north to comply with City
8 zoning requirements that preclude solar farms within 660 feet of an agricultural or
9 residentially designated property. (AR 41:2636-3106; AR 42:3104-3106; AR 44:3121-
10 3123; AR 48:3654-3656.) As moved, the project has the same design and layout, but
11 requires additional trenching to install electrical conduit to connect to SCE facilities. (AR
12 82:6966.) As part of seeking a General Plan Amendment and CUP, the District adopted
13 an Addendum to the IS/MND. (AR 42:3104-3114; 44:3124-3128.) Under the
14 Addendum, the District found the change in the project site would not result in any new
15 significant environmental effects triggering the need for further environmental review. In
16 August 2017, the District filed and posted the Notice of Determination. (AR 1:1-3;
17 42:3105-3106.)

18
19
20 The current project involves essentially the same solar farm project proposed in
21 2017, with the issue being the qualified exemption under Government Code section
22 53096, subdivision (a). The District's June 2, 2020, Notice of Public Hearing stated that
23 the Board was holding a public hearing to consider adopting a Resolution that there is
24 no feasible alternative to the Hesperia Farms project pursuant to Government Code
25 section 53096. (AR 100:7677-7679.) The Agenda listed a similar description of the
26 public hearing related to adopting Resolution No. 2020-04. (AR 81:6961.) In the
27
28

1 District's June 2020 Resolution, the District noted that a CEQA review was completed
2 for the project in 2017. (AR 3:11-12.)

3 On July 2, 2020, following the feasibility hearing, the District filed and posted a
4 Notice of Determination stating that the project approved in August 2017 was fully
5 analyzed in the prior MND and Addendum, concluding that the project would not have a
6 significant effect on the environment. (AR 2:7-9.)

7
8 The Staff Report regarding Resolution No. 2020-04 discussed that on August 8,
9 2017, the Board adopted Resolution No. 2017-15 approving and adopting Addendum
10 No. 1 to the Final MND for the alternative site under CEQA and approving the
11 alternative site. It discussed the finding that the change in location would not result in
12 any new significant environmental effect triggering the need for further environmental
13 review under Public Resources Code section 21166 or State CEQA Guidelines section
14 15162. It also stated that the alternative site is subject to the same mitigation measures
15 as the original site. (AR 82:6966.) The June 2020 Alternatives Report discussed the
16 prior environmental review process and adoption of the Addendum in 2017. (AR 4:19,
17 21.)

18
19
20 The City's comments, submitted before the public hearing, raised an issue about
21 the environmental document failing to address "feasible alternatives." (AR 101:7707-
22 7708.) But the City's argument in its Opening Brief is not based on the failure to
23 address alternatives as part of CEQA review. Instead, the City's challenge is based on
24 significant new information that requires further environmental review.

25
26 The City now claims that the District's Addendum to the MND is deficient
27 because it did not consider significant new information about the risk of the Mojave
28 River Dam failing. It asserts that the record lacks a discussion of this new information

1 published in November 2019 in which the Army Corps' News Release warned of greater
2 risk from the Mojave River Dam failing. The City contends the District is proceeding in a
3 manner not required by law because it failed to consider this new information and
4 instead relied on the 2017 Addendum.

5 The District argues that it complied with CEQA when it adopted the 2017
6 Addendum. The District contends that the City fails to demonstrate the existence of
7 "new information" under Public Recourses Code section 21166 and Guidelines section
8 15162, subdivision (a). According to the District, the City failed to exhaust its
9 administrative remedies; judicial notice cannot be taken of the information on which the
10 City relies; and even if the City's claim is not barred by the failure to exhaust, there are
11 no subsequent discretionary approvals to trigger CEQA review.
12

13
14 **B. The City Failed to Exhaust Administrative Remedies.**

15 The District is correct that the City failed to exhaust its administrative remedies
16 on this issue.

17
18 The City argues in its Reply that the District's decision to find alternatives
19 infeasible and approve the project under Government Code section 53096 is a
20 discretionary approval triggering the need for a CEQA determination. But this was not
21 the argument raised in the City's Opening Brief. The argument raised in the Opening
22 Brief was directed to asserting that the District failed to consider new significant
23 information, rendering reliance on the 2015 MND and 2017 Addendum deficient.
24

25 The court considers the City's argument made on reply only as it relates to the
26 District's exhaustion of administrative remedies defense. In other words, to the extent
27 the City asserts in its Reply that the District failed to make required CEQA findings in
28 approving the project, that argument is waived. But to the extent it is offered as a

1 reason that the significant new information argument was not raised earlier, it is
2 considered.

3 The 2020 approval is a discretionary approval to which CEQA applies, requiring
4 consideration whether one of the three triggering events for a supplemental or
5 subsequent EIR exists. Substantial evidence supports a conclusion that the solar
6 energy project as described and considered in the 2017 Addendum is the same project
7 approved in 2020. The only change in circumstance was the manner under which
8 project approval was sought: the District's finding that the qualified exemption under
9 Government Code section 53096 applied rather than the City approving the District's
10 application for a General Plan Amendment and CUP. The question then is whether the
11 "significant new information" factor of Public Resources Code section 21166,
12 subdivision (c) and Guidelines section 15162, subdivision (a)(3), triggers subsequent
13 CEQA review.
14
15

16 Nothing in CEQA requires an agency to make an explicit finding that the original
17 environmental document retains some degree of relevance. (*San Mateo Gardens*,
18 *supra*, 1 Cal.5th at p. 953, fn.4.) "When an agency considers a subsequent
19 discretionary action on a project, it will know whether changes are proposed in the
20 project but may be unaware of changes in circumstances or new information of
21 importance to the project. Nothing in CEQA or the Guidelines requires the agency to
22 conduct an investigation to ferret out changes in circumstances or new information. If
23 the agency becomes aware of such factors, however, it should then consider all the
24 relevant facts and explicitly decide whether conditions exist that necessitate further
25 environmental review. If a project opponent is aware of changed circumstances or new
26 information, bringing that material to the agency's attention might obligate the agency to
27
28

1 conduct an investigation to determine whether further environmental review is required.”
2 (Kostka & Zischke, Practice Under the California Environmental Quality Act (2d. ed. Cal.
3 CEB) § 19.37.)

4 The District made an implied finding of no changes to the project that require
5 further environmental review under Public Resources Code section 21166. The
6 District’s 2020 Alternatives Report states: “No legal challenges were filed under CEQA
7 against the Original Site or the Alternative Site where the Proposal would be located.
8 Thus, the Final MND and Addendum are presumed valid under Public Resources Code
9 sections 21080.1 and 21167.2 and State CEQA Guidelines section 15231.” (AR 4:29.)

10
11 “CEQA does not set forth any particular procedure to support an agency’s
12 decision that a new EIR [or MND] is not required. CEQA does not require an initial
13 study or public hearing in these circumstances.” (*Committee for Re-Evaluation of T-*
14 *Line Loop v. San Francisco Municipal Transportation Agency* (2016) 6 Cal.App.5th
15 1237, 1256.) As explained in Kostka & Zischke, Practice Under the California
16 Environmental Quality Act, supra, § 19.48, “There is no specific requirement in CEQA
17 or the CEQA Guidelines that public notice and an opportunity to comment be provided
18 in connection with a determination of whether a subsequent or supplemental EIR is
19 required for a project.” (Citing Pub. Resources Code, § 21166; Guidelines, § 15162; *A*
20 *Local & Regional Monitor (ALARM) v. City of Los Angeles* (1993) 12 Cal.App.4th 1773,
21 1804 (holding that CEQA does not require a public hearing or public comment before a
22 determination whether a subsequent or supplemental EIR is required); *Concerned*
23 *Citizens of South Central L.A. v. Los Angeles Unified School Dist.* (1994) 24
24 Cal.App.4th 826, 845.)

1 In *Santa Teresa Citizen Action Group v. City of San Jose* (2003) 114 Cal.App.4th
2 689, 701-702, the Court found the exhaustion requirement of Public Resources Code
3 section 21177 did not apply where "there was no clearly defined administrative
4 procedure for petitioners to resolve their concerns about the project as it was finally
5 configured." But in several other cases, the Court has come to a contrary conclusion.
6 (*ALARM, supra*, 12 Cal.App.4th at p. 1804 ["At no time during the administrative
7 process did anyone ... suggest that a separate public hearing was required."]; *Mani*
8 *Brothers Real Estate Group v. City of Los Angeles* (2007) 153 Cal.App.4th 1385, 1394-
9 1395 [finding the exhaustion requirement applied where regularly schedule meetings
10 open to the public were held, even if not "duly noticed public hearings under CEQA"].)¹⁹
11 In *Bridges v. Mt. San Jacinto Community College District* (2017) 14 Cal.App.5th 104,
12 117, the Court followed *Mani Brothers*, concluding that the CEQA exhaustion
13 requirement was triggered even though there was not a public hearing held under
14 CEQA, where there was a regularly scheduled meeting that was open to the public.
15

16
17
18 There is no dispute that a public hearing on the District's consideration of the
19 qualified exemption was posted as required. While the City argues that the District
20 failed to provide adequate notice that an environmental decision would be made, a
21 public hearing is not required for an implied finding of no subsequent environmental
22 review. In addition, the City was able to comment and generally asserted that the
23 CEQA document failed to address feasibility alternatives. (AR 101:7707-7708.) The
24 City had an opportunity during the administrative proceeding to raise its CEQA objection
25

26
27 ¹⁹ Public Resources Code section 21177, setting for the exhaustion requirement, provides at
28 subdivision (e): "This section does not apply to any alleged grounds for noncompliance with this division
for which there was no public hearing or other opportunity for members of the public to raise those
objections orally or in writing before the approval of the project, or if the public agency failed to give the
notice required by law."

1 that significant new information existed but failed to do so. It has failed to show CEQA's
2 exhaustion exception applies. This issue is barred by the failure to exhaust
3 administrative remedies.

4 **C. There is No Basis for Finding the Existence of Significant New Information.**

5 In *Bridges*, even though the court found the failure to exhaust, the court went on
6 to evaluate the merits of the CEQA claim as if exhaustion did not apply. (*Bridges*,
7 *supra*, 14 Cal.App.5th at pp. 118-126.) Here, even if the exhaustion conclusion did not
8 preclude the City's claim, the CEQA argument lacks merit.

9 First, there is no statutory basis for the City's request for judicial notice of the
10 November 2019 News Release, and the City does not explain why it failed to seek to
11 augment the administrative record prior to briefing on the merits.

12 But even if the court were to consider the News Release, it is insufficient to
13 trigger subsequent environmental analysis. "CEQA analysis is concerned with a
14 project's impact on the environment, rather than with the environment's impact on a
15 project and its users or residents." (*California Building Industry Association v. Bay Area*
16 *Air Quality Management District* (2015) 62 Cal.4th 369, 378.) CEQA does not require
17 analysis of the impact of existing environmental conditions on a project's future users or
18 residents. (*Id.* at p. 377.) Guidelines section 15126.2, subdivision (a), is consistent with
19 the ruling in *California Building Industry Association*.

20 Given that an MND is at issue, the News Release's discussion of a new
21 assessed increased risk of flooding during an extreme flood event does not constitute
22 substantial evidence in favor of a fair argument that a new significant environmental
23 impact from the project may occur. (*San Mateo Gardens, supra*, 1 Cal.5th at p. 959.)
24 The increased flood assessment risk is not new information of substantial importance

1 because it does not constitute substantial evidence that the project may exacerbate the
2 existing flooding risk. Therefore, the City's CEQA argument is without merit.

3 **VI**

4 **Conclusion**

5 For the reasons explained above, the petition for a writ of mandate is denied.
6

7
8 Dated: October 1, 2021

9
10 _____
11 David Cohn
12 Judge of the Superior Court

TENTATIVE

1 *City of Hesperia v. Lake Arrowhead Community Services District, et al.*
2 San Bernardino County Superior Court No. CIVDS2019176

3 **PROOF OF SERVICE**

4 I, the undersigned, am a citizen of the United States and employed in San Diego County,
5 California. I am over the age of eighteen years and not a party to the within-entitled action. My
6 business address is 655 West Broadway, 15th Floor, San Diego, California 92101. On
7 October 1, 2021, I served a copy of the within document(s):

8 **[PROPOSED] JUDGMENT DENYING PETITION FOR WRIT OF MANDATE AND
9 CAUSES OF ACTION FOR DECLARATORY AND INJUNCTIVE RELIEF**

- 10 by transmitting via facsimile the document(s) listed above to the fax number(s) set
11 forth below on this date before 5:00 p.m.
- 12 by placing the document(s) listed above in a sealed envelope with postage thereon
13 fully prepaid, the United States mail at San Diego, California addressed as set forth
14 below.
- 15 by placing the document(s) listed above in a sealed FedEx envelope and affixing a
16 pre-paid air bill, and causing the envelope to be delivered to a FedEx agent for
17 delivery.
- 18 by personally delivering the document(s) listed above to the person(s) at the
19 address(es) set forth below.
- 20 by transmitting via e-mail or electronic transmission the document(s) listed above
21 to the person(s) at the e-mail address(es) set forth below.

22 June S. Ailin, Esq.
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I declare under penalty of perjury under the laws of the State of California that the above
is true and correct. Executed on October 1, 2021, at San Diego, California.



Wanda Roybal