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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

THE SIERRA CLUB, et al., Petitioners and Plaintiffs, vs. CITY AND COUNTY OF SAN FRANCISCO, et al., Respondents and Defendants,	Case No.: CPF-12 512566 **PETITIONERS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF MANDATE** Assigned for All Purposes to Hon. Teri L. Jackson
SAN FRANCISCO RECREATION AND PARKS DEPARTMENT, et al.; AND CITY FIELDS FOUNDATION AS INTEVENOR Real Parties in Interest and Defendants and Intervenors.	Hearing: August 16, 2013 Time: 9:45 a.m. Dept: 503 (CEQA CASE)

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I. INTRODUCTION

There is no dispute that children need safe, good quality athletics fields. The question presented in this case is not whether children need athletic fields, but rather: (1) whether the City should be building new fields using the most highly toxic materials possible, when non-toxic alternatives are available and in widespread use throughout the country; and (2) whether the City should be building a project that will have admittedly significant impacts on the historic values of Golden Gate Park when an alternate, environmentally superior location is available only eight blocks away.

This case concerns the decision of the City and County of San Francisco ("City") to use the most highly toxic form of artificial turf – styrene butadiene crumb rubber ("SBR" or "SBR Turf") – at the Beach Chalet Athletic Fields ("Beach Chalet Project" or "Project"), and its refusal even to consider either natural grass or many less toxic artificial turf alternatives in wide use in New York, Los Angeles, Piedmont, San Carlos, Utah and hundreds of other locations. AR7938, 9563, 9688, 26039. The City ignored expert evidence presented by some of the world's leading scientists and scientific journals concluding that SBR turf exposes children to significant levels of highly toxic chemicals, and refused to consider non-toxic alternatives being used at hundreds of fields throughout the country. Although SBR has been rejected in New York, Los Angeles and many other areas, AR1636, 7938, 26039, San Francisco stubbornly refuses even to consider non-toxic alternatives. CEQA may allow agencies to make "bad" decisions, but it requires them to do so in public. CEQA requires the agency to disclose all significant impacts to the public, and analyze all feasible alternatives and mitigation measures in the EIR so the public can know the environmental values of its decision-makers if they chose not to implement an environmentally superior alternative.. The City failed do so in this case and therefore abused its discretion as matter of law because it failed to disclose the fact that SBR turf exceeds CEQA significance thresholds for toxicity.

This case also challenges the refusal of the City to consider the environmentally superior "Hybrid Alternative" involving restoration of the Beach Chalet with natural grass, good drainage, and gopher-mesh, removal of over 150,000 watts of night lights from the plans, preservation of trees, and retention of many significant historic elements of the site, and installation of safe, non-toxic artificial turf at the West Sunset Playground only 8 blocks away. The Hybrid Alternative would meet all of the project objectives while reducing admittedly significant environmental impacts.

This case also challenges the decision of the City to defer mitigation of significant impacts of the Project. The City admits that the SBR turf is so highly toxic that stormwater run-off will have to be

captured and treated so that the toxic chemicals will not leach into groundwater or surface water, risking harm to fish, wildlife and drinking water. While the City will allow children to be directly exposed to the toxic SBR, it admits that soil and drinking water must be protected from toxic rain-water that will run-off of the SBR playing fields. The City also admits that the SBR turf is so highly toxic that there is no known way to recycle it. Despite this, the City defers its decision for up to seven years on how the toxic turf will be recycled or disposed, and defers decisions on how to treat the toxic run-off. CEQA prohibits such deferred mitigation.

Finally, the City failed to maintain an adequate administrative record to support its decision. CEQA requires that all documents considered by the City in relation to the Project be included in the administrative record. Here, the City lost or destroyed numerous emails and other documents related to the Project, rendering the administrative record legally inadequate. This violates both CEQA and Government Code §34090, which requires government to retain all documents for at least two years.

For all of these reasons, the City's decision to certify the EIR and approve the Project should be set aside and the City should be directed to prepare a legally adequate environmental impact report ("EIR") analyzing all Project impacts, alternatives and mitigation measures. The City has abused its discretion by failing to proceed in a manner required by law.

II. FACTUAL BACKGROUND

With the assistance of Intervenor City Fields Foundation, ("City Fields") the City has embarked upon a campaign to replace many of its natural grass athletic fields with artificial turf, including the large fields at the Beach Chalet, adjacent to the Pacific Ocean, at the Western end of Golden Gate Park. The Beach Chalet Project would replace the existing naturally-growing grass athletic fields and adjacent trees with artificial turf. The Project includes the installation of 150,000 watts of stadium lighting on ten 60-foot tall towers and seating for up to 1,000 spectators. The Project would also expand the existing parking lot, replace dirt and grass paths with pavement, renovate a building on site, and install additional amenities for visitors, including night-lighting of paths. AR166-7.

The City initially proposed to approve the Project with absolutely no CEQA review, stating it was merely a renovation to an existing sports field. (a categorical exemption). AR101. In response to community opposition from major environmental organizations, including the Sierra Club, Northern California Chapter and Golden Gate Audubon Society, the City agreed to prepare an Environmental Impact Report. The Project raised many issues, including the following: over 7 acres of natural grass would be replaced with toxic artificial turf; stadium lighting with over 150,000 watts of lights would be

shining on the Park and the adjoining Ocean Beach until 10:00 pm every night of the year; the project is inconsistent with the Golden Gate Master Plan; the Project would endanger local wildlife; the historical nature of this area of Golden Gate Park would be permanently altered. In sum, the Project far exceeded a simple renovation, and instead proposed a significant construction project involving extensive excavation and replacement of the existing soil with layers of engineered fill and drainage pipes and the addition of sports lighting. Not only that, the Project called for extensive paving of other natural surfaces, the addition of concrete bleachers and a significant enlargement of a parking lot.

On October 26, 2011, the City published the Draft EIR for the Beach Chalet Athletic Fields Renovation Project. AR150. The EIR admitted that the Project would have significant, unavoidable environmental impacts on historic resources of Golden Gate Park. AR168. The comment period for the Draft EIR was between October 26, 2011 and December 12, 2011. On December 1, 2011, the Planning Commission held a public hearing on the Draft EIR. AR4311-4493. On May 7, 2012, the City released Comments and Responses for the Draft EIR, also known as the Final EIR (FEIR) . AR1028. On May 24, 2012, the San Francisco Planning Commission and the San Francisco Recreation and Park Commission ("Rec & Park") held a joint hearing to review the Project. The Planning Commission reviewed the Draft EIR and the Comments and Responses for the Draft EIR for Final EIR certification. AR4516-4792. The Planning Commission: (1) adopted findings of fact related to the certification of a Final EIR (Planning Commission Motion No. 18637; Case No. 2010.0016E); (2) adopted findings under CEQA including findings rejecting alternatives as infeasible and adopting a statement of overriding considerations (Planning Commission Motion No. 18638; Case No. 2010.0016E); (3) adopted findings of consistency with the General Plan and other policies and CEQA findings (Planning Commission Motion No. 18639; Case No. 2010.0016R); and (4) adopted findings related to the approval of a Coastal Zone Permit application (Planning Commission Motion No. 18640; Case No. 2010.0016P). AR53-80.

At this May 24, 2012, joint hearing the San Francisco Recreation and Park Commission adopted CEQA findings and the statement of overriding considerations set forth in Planning Commission Motion 18637 to approve the conceptual plan for the Project (Recreation and Park Commission Resolution No. 1205-020; Case No. 2010.0016R). On July 10, 2012, the Board of Supervisors affirmed the certification by the San Francisco Planning Commission of the Final EIR (File No. 120692). AR81-86. On August 1, 2012, the Board of Appeals denied appeals protesting the May 24, 2012 approval of the Coastal Zone Permit granted to Recreation and Park Department and made the following findings (among others): (1) there are no project changes or new information that would

change the conclusions of the Planning Commission's CEQA determination; and (2) the Project is consistent with the San Francisco Local Coastal Program. AR97. On September 12, 2012, the Board of Appeals denied a rehearing request. On September 12, 2012, the City issued a Notice of Determination ("NOD") that was filed with the San Francisco Clerk on September 13, 2012. AR1.

Petitioners and over one hundred other interested groups and individuals participated in the administrative proceedings leading up to the Respondents' approval of the Project and certification of the EIR, either by participating in hearings thereon or by submitting letters commenting on Respondent's Draft EIR and Final EIR. AR1042-1050. Petitioners attempted to persuade Respondents that its environmental review and approvals did not comply with the requirements of CEQA, to no avail. Petitioners submitted extensive public comment letters supported by expert testimony from some of the nation's leading experts in toxic chemical health risks, and peer-review scientific journal articles. AR7854-8144; 9424-9785; 11094-11136; 11162-11408; 11436-11440; 11457; 11463-11476; 15584-15641; 052515-052520.

Hundreds of public comment letters and e-mails were submitted commenting on the Project. The majority of public comments were in opposition to the Project. AR4538. Organizations including Petitioner Sierra Club, Audubon Society, Center for Environmental Health, Golden Gate Park Preservation Alliance, Planning Association for the Richmond, San Francisco Ocean Edge, Sunset Parkside Education and Action Committee, AR1043,4531, 4812, and many other nationally-recognized organizations opposed the Project and raised concerns about many elements of the Project, including the toxicity of artificial turf with SBR infill ("SBR Turf"), unwillingness to consider the win-win hybrid alternative at nearby West Sunset Playground; night sports lighting; removal of trees; inconsistency with the Golden Gate Park Master Plan; and impact on the historical nature of this part of the Park . Support for the Project came almost entirely from the organized soccer community. AR4570, et seq. This action was timely filed on October 12, 2012.

III. LEGAL STANDARD

In 1970 the California Legislature enacted the California Environmental Quality Act (CEQA) (Public Resources Code § 21000 et. seq.) as a means of establishing a framework for the evaluation and documentation of the environmental impacts of proposed projects by lead agencies. CEQA requires that public agencies fully inform the public and decision-makers of the significant environmental impacts of proposed projects. Disclosure of relevant information is a cornerstone of CEQA. (14 Cal.

Code of Regs. ("Guidelines")[1] § 15002 (a), 15003 (b)-(e) 2). CEQA also imposes the requirement that agencies shall adopt feasible mitigation measures and alternatives to lessen the significant effects of such projects. Pub.Res.Code ("PRC") §§ 21000 (a), (g), 21002, 21002.1; Guidelines § 15002 (a)(3).

The Environmental Impact Report (EIR) is the primary means of achieving the California Legislature's declaration that it is the policy of the state to "take all action necessary to protect, rehabilitate, and enhance the environmental quality of the state." Pub.Res.Code § 21001(a).

CEQA has two primary purposes. First, CEQA is designed to inform decision makers and the public about the potential, significant environmental effects of a project. Guidelines § 15002(a)(1). CEQA requires the preparation of an EIR for any project which may have a significant environmental effect. PRC § 21100 (a); Guidelines § 15002 (f)(1). A "significant" effect is defined as a "substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project…" and includes direct and reasonably foreseeable indirect effects of proposed projects. Guidelines §§ 15382, 15064 (d)(1), (2). The lead agency may deem a particular impact to be insignificant only if it produces rigorous analysis and concrete substantial evidence justifying the finding. *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 732.

The analysis and disclosure of impacts through an EIR must be done before a Project is approved. An EIR is an "environmental 'alarm bell' whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return." *Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 822; Guidelines § 15003 (e). The purpose of an EIR is "to inform the public and its responsible officials of the environmental consequences of their decisions before they are made." *Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.* (1993) 6 Cal. 4th 1112, 1123.

"There is a sort of grand design in CEQA: Projects which significantly affect the environment can go forward, but only after the elected decision makers have their noses rubbed in those environmental effects, and vote to go forward anyway." *Woodward Park v. Fresno* (2007) 150 Cal. App. 4th 683, 720, quoting, *Vedanta Society of So. California v. California Quartet, Ltd*. (2000) 84 Cal.App.4th 517, 530. In this way, CEQA holds decision-makers politically accountable since it subjects them to "public awareness and possible reaction to the individual members' environmental and economic values." *Kleist v. City of Glendale* (1976) 56 Cal. App. 3d 770, 779.

[1] Courts are to award the CEQA Guidelines "great weight." *Laurel Heights Improvement Assn v. Regents of Univ. of Cal*. (1988) 47 Cal. 3d 376, 391, fn 2.

Second, CEQA requires public agencies to avoid or reduce environmental damage when "feasible" by requiring "environmentally superior" alternatives and all feasible mitigation measures. CEQA Guidelines § 15002(a)(2) and (3); See also, *Berkeley Jets*, 91 Cal. App. 4th 1344, 1354; *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564. In accordance with CEQA's policy that the agency identify ways to avoid or significantly reduce environmental damage, the mitigation and alternative sections have been described as the "core" of a legally adequate EIR. *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564. Importantly the lead agency under CEQA may not approve a proposed project if feasible alternatives exist. PRC § 21002. "Our Supreme Court has described the alternatives and mitigation sections as the 'core' of an EIR ... In furtherance of this policy, section 21081, subdivision (a) contains a 'substantive mandate' requiring public agencies to refrain from approving projects with significant environmental effects if 'there are feasible alternatives … that can substantially lessen or avoid those effects'." *Uphold Our Heritage v. Town of Woodside* (2007) 147 Cal.App.4th 587, 597.

The EIR serves to provide the public with information about the environmental impacts of a proposed project and to "identify ways that environmental damage can be avoided or significantly reduced." Guidelines §15002(a)(2). If the project will have a significant effect on the environment, the agency may approve the project only if it finds that it has "eliminated or substantially lessened all significant effects on the environment where feasible" and that any unavoidable significant effects on the environment are "acceptable due to overriding concerns." PRC § 21081; Guidelines § 15092(b)(2)(A) & (B).

A Court's inquiry in an action to set aside an agency's decision under CEQA shall extend to whether there was a prejudicial abuse of discretion. *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1197. Abuse of discretion is established if ***either***: (1) the agency has not proceeded in a manner required by law, ***or*** (2) the determination is not supported by substantial evidence. PRC § 21168.5. In reviewing a project for compliance with CEQA, Courts are guided by the policy that the Legislature intended CEQA "to be interpreted in such a manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal. 3d 247, 259. When applying the substantial evidence test, the Court may not substitute its independent judgment for that of the people or their local representatives. "Substantial evidence" includes facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts. Guidelines § 15384 (b). However, a claim that an agency failed to act in a manner required by law presents other considerations. Noncompliance with the

substantive requirements or information disclosure provisions of CEQA "which precludes relevant information from being presented to the public agency … may constitute a prejudicial abuse of discretion within the meaning of [CEQA] regardless of whether a different outcome would have resulted if the public agency had complied with those provisions." PRC § 21005 (a). The failure to comply with the law subverts the purposes of CEQA if it omits material necessary to informed decision making and informed public participation. *Kings County*, 221 Cal.App.3d at 712. In such cases, the error is prejudicial. *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 946. Stated differently, "[T]he ultimate decision of whether to approve a project, be that decision right or wrong, is a nullity if based upon an EIR that does not provide the decision-makers, and the public, with the information about the project that is required by CEQA." *Friends of the Eel River v. Sonoma County Water Agency* (2003) 108 Cal.App.4th 859, 872.

In this case, the City has abused its discretion by failing to proceed in a manner required by law. In determining whether the agency has proceeded according to the law "the court must scrupulously enforce all legislatively mandated CEQA requirements." *Citizens of Goleta Valley, supra,* 52 Cal. 3d at 564. These are questions of law and not fact. "Although the agency's factual determinations are subject to deferential review, questions of interpretation or application of the requirements of CEQA are matters of law." *Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 118. "In evaluating an EIR for CEQA compliance, then, a reviewing court must adjust its scrutiny to the nature of the alleged defect, depending on whether the claim is predominately one of procedure or a dispute over the facts." *Vineyard Area Citizens For Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435.

In light of these standards, Plaintiff is entitled to a writ of mandate directing the City to prepare a new CEQA document because the City refused entirely to disclose the toxicity of SBR, refused even to consider feasible non-toxic turf materials, and refused to consider the feasible "hybrid alternative" of improving Beach Chalet with natural grass and gopher-proofing and West Sunset with non-toxic turf. Additionally, the City improperly deferred development of mitigation measures for dealing with toxic stormwater run-off and disposal of the artificial turf . The EIR therefore fails as an informational document.

IV. ARGUMENT

A. The EIR Failed to Disclose that SBR Turf Exceeds CEQA Toxicity Standards.

1. The City Failed to Proceed in a Manner Required by Law Because it Failed to Disclose that there is no Dispute that SBR Turf Exceeds the CEQA Acute Hazard Index by More Than Double.

The EIR explains that under CEQA the significance threshold for Acute Hazard Index is 1.0. AR774. Thus, if an acute hazard exceeds 1.0, it is significant under CEQA, and if it is below that level, it is insignificant. When an impact exceeds a CEQA significance threshold, the agency must disclose in the EIR that the impact is significant. *Communities for a Better Environment v. Cal. Resources Agency* (2002) 103 Cal.App.4th 98, 110-111 ("A 'threshold of significance' for a given environmental effect is simply that level at which the lead agency finds the effects of the project to be significant"); *Schenck v. County of Sonoma* (2011) 198 Cal.App.4th 949, 960 (County applies BAAQMD's "published CEQA quantitative criteria" and "threshold level of cumulative significance"); *Communities for a Better Environment v. So. Coast Air Quality Man. Dist.* (2010) 48 Cal.4th 310, 327 (impact is significant because it exceeds "established significance threshold for NOx … constitute[ing] substantial evidence supporting a fair argument for a significant adverse impact"). The EIR must then analyze mitigation measures and alternatives to reduce the impact. *CBE v. SCAQMD*, supra.

The City's Final Staff Report to the Board of Supervisors, and the Final EIR stated, "When tested using a gastric simulation, which is considered more representative of actual conditions, ***the hazard index was 2.2,*** sufficiently close to a hazard index of 1." AR3665; AR1671 (emphasis added). Of course, ***2.2 is not "close to" 1.0***. ***An acute hazard index of 2.2 is more than double the undisputed CEQA significance threshold of 1.0.*** Since there is no dispute that the Acute Hazard risk of SBR Turf is more than double the CEQA significance threshold, the City abused its discretion and failed to proceed in a manner required by law because the EIR failed to disclose this significant impact. See, *Endangered Habitats League, Inc. v. Orange* (2005) 131 Cal.App.4th 777, 783-4 (when impact exceeds significance threshold, EIR must disclose impact).

The City therefore abused its discretion by failing to proceed in a manner required by law. CEQA required the City to acknowledge that SBR Turf poses a significant risk of acute toxicity, since the City admits that the Acute Hazard Index exceeds the CEQA significance threshold by more than double. The EIR is therefore legally inadequate for its failure to disclose that SBR Turf will have

significant risks related to acute toxicity, and for its resultant failure to consider feasible alternatives and mitigation measures to reduce these risks.

The Acute Hazard Index, measures non-cancer health risks. AR774. The EIR explains, "To address potential additive noncancer effects, the individual hazard quotient for each chemical and exposure route is summed to calculate a hazard index." *Id*. The EIR explains that under CEQA the significance threshold for Acute Hazard Index is 1.0. AR774. Thus, if an acute hazard exceeds 1.0, it is significant under CEQA, and if it is below that level, it is insignificant.

Petitioners presented expert testimony to the City concluding that children playing on SBR will be exposed to Acute Hazard Index of 6.9 -- far above the 1.0 CEQA significance threshold. Mathew Hagemann, C. Hg., former director of the United States Environmental Protection Agency's West Coast Regional Superfund program, AR7926, concluded that:

> Non-cancer risks also exceed the acute hazard index of 1.0, the level which is typically considered to be significant. OEHHA found that a one-time ingestion of a 10g piece of shredded tire resulted in a non-cancer risk of 6.9, almost 7 times the threshold. Ingestion of infill material may occur as players contact the synthetic turf surface. Zinc is the chemical which is the primary driver of the risk. Ingestion of zinc, even for a short time, can result in stomach cramps, nausea, and vomiting. The Connecticut Department of Public Health warns that children are likely to swallow infill material. The acute hazard index, based on all chemicals, is 2.2, more than twice the 1.0 threshold. Although the non-cancer risks exceed the hazard index and pose potentially significant impacts to human health, the DEIR does not identify these findings nor provide adequate mitigation.

AR7920-1.

In response to Mr. Hagemann's expert comments that the Acute Hazard Index is 6.9, the final staff report to the Board of Supervisors, and the Final EIR stated, "When tested using a gastric simulation, which is considered more representative of actual conditions, the hazard index was 2.2, sufficiently close to a hazard index of 1." AR3665; AR1671. However, since the City admits that the Acute Hazard Index is 2.2, which is more than double the significance threshold of 1.0, the City has failed to proceed in a manner required by law since the EIR failed to disclose that SBR Turf has significant toxic risks exceeding the CEQA significance threshold.

2. The City Failed to Proceed in a Manner Required by Law Because it Failed to Disclose that there is no Dispute that SBR Turf Exceeds the CEQA Cancer Risk Significance Threshold.

The EIR states, "Cancer health risks are defined in terms of the probability of an individual developing cancer as the result of exposure to a given chemical at a given concentration. To address

potential additive effects, the estimated cancer risks for each chemical and exposure route are summed to estimate the total excess cancer risk for the exposed individual. The U.S. Environmental Protection Agency (USEPA) considers estimates of theoretical excess cancer risk of less than 1 in 1,000,000 (1 x 10-6) [one per million] to be de minimis, or acceptable." AR774-5. Thus, the City relies upon a 1 x 10-6, or one per million CEQA significance threshold. AR775.

The Final EIR ultimately concludes, "The only cancer risk that exceeded the de minimus level of one in a million was the increased cancer risk of 2.9 in a million related to hand-to-surface-to-mouth activity." AR1671. Of course, this is almost ***three times*** above the CEQA significance threshold of 1.0 per million. Thus, by the City's own admission, the EIR should have disclosed that SBR Turf poses a significant cancer risk. The final EIR also admits cancer risks of up to 8 per million have been found in outdoor fields. AR1670. The City therefore abused its discretion and failed to proceed in a manner required by law since it failed to disclose that SBR Turf exposes children to cancer risks at least three to eight times above the CEQA significance threshold. Furthermore, as explained by expert testimony the actual cancer risk of SBR Turf is 19 per million.

The SBR Turf the City will use consists of plastic blades of grass interspersed with infill material that cushions the turf. AR773-4. The infill material the City will use is highly toxic material – styrene butadiene crumb rubber ("SBR"). AR7920. SBR artificial turf infill contains a large array of toxic and cancer-causing chemicals including polycyclic aromatic hydrocarbons ("PAHs"), carbon black, dioxin, phthalates, antioxidants, benzothiazole and derivatives, heavy metals, benzene, formaldehyde, naphthalene, nitromethane, and styrene, among other chemicals. AR7920; 9738-9, 11468-76.. Most of these chemicals are listed by the California Office of Environmental Health Hazard Assessment ("OEHHA") as chemicals known to cause cancer. AR7920, 7952.

SBR infill consists of tiny, loose pellets of ground-up rubber tires of an almost talcum-powder-like consistency. AR7936-7. The SBR is placed ***on top*** of the plastic grass – not underneath. *Id*. Thus, children playing on the artificial turf are directly exposed to the SBR. *Id*. Rubber crumbs get into children's mouths, lungs, shoes, ears, eyes, hair and clothing, and is tracked into cars and homes. *Id*. When balls and feet hit the surface of the turf, clouds of black SBR rise in the air and are inhaled and swallowed. When children slide on the turf, they come in direct contact with the SBR. *Id*. AR7948-54.

Petitioners submitted expert testimony on the health risks of SBR infill. Certified hydrogeologist Matthew Hagemann, C. Hg., the former Director of the U.S. Environmental Protection Agency's West Coast Superfund Program, calculated that a child playing on SBR crumb rubber as few

as 30 times per year (less than once per week) would experience a cancer risk of 19 per million – almost 20 times higher than the CEQA significance threshold of 1 per million. AR7920.

Dr. Phillip Landrigan, M.D., epidemiologist and Director of the Mount Sinai School of Medicine Children's Environmental Health Center in New York submitted written comments to the City expressing his concerns that the major chemical components of crumb rubber, styrene and butadiene, are a neurotoxin and proven human carcinogen, respectively, and that the types of exposure risks have not been adequately studied. AR7935-8.

Petitioners also presented the City with numerous peer-reviewed scientific journal articles concluding that SBR presents significant human health risks. AR7942-78, 7980, 7982, 8066, 8106, 9605. The City relied primarily on a non-expert, non-peer-reviewed internal study conducted by the City's Synthetic Playfields Task Force in 2008 – long before the expert evidence presented by Petitioners. AR777; 20579. The City even ignored the fact that the City of Piedmont published a contemporaneous EIR concluding that the "potential hazardous effects from the use of the proposed [SBR] synthetic turf field … would be … a significant and unavoidable impact" AR8060.

The City refused even to consider widely-used non-toxic alternatives to SBR such as padding made from cork and coconut husks ("corkonut") (used in Piedmont and San Carlos), rubber "carpet-pad" cushion (used in New York), AR7938, silicon-based infill, elastomer-coated sand (used in Los Angeles), or other non-toxic materials. AR8062-4, 26039.

Matthew Hagemann, C.Hg., former director of US EPA's West Coast Superfund program, concludes that the Project will have significant cancer and non-cancer health risks. Mr. Hagemann stated:

> The new synthetic turf would consist of four basic components: fiber, infill, backing, and underlayment. The infill typically consists of crumb rubber, finely ground rubber from recycled or scrap tires.
> Toxins from tire crumb can enter the body through inhalation of particulates, fibers, and volatile organic compounds (VOCs). VOCs can cause organ damage, irritation of eyes, throat, and airways, and nervous system impairments. Synthetic turf can be heated to high temperatures when exposed to sunlight which, in turn, can lead to further release of VOCs.

AR7919-20.

a. Petitioners Provided Expert Testimony and Other Substantial Evidence that SBR Creates Substantial Cancer Risks.

Petitioners submitted tremendous amounts of expert evidence demonstrating that SBR Turf exposes children to significant cancer risks. Dr. Phillip Landrigan, MD, epidemiologist

and Director of the Mount Sinai School of Medicine Children's Environmental Health Center in New York, submitted a letter to the City Planning Department on May 8, 2012, stating:

> The major chemical components of crumb rubber are styrene and butadiene, the principal ingredients of the synthetic rubber used for tires in the United States. Styrene is neurotoxic. Butadiene is a proven human carcinogen. It has been shown to cause leukemia and lymphoma. The crumb rubber pellets that go into synthetic turf fields also contain lead, cadmium and other metals. Some of these metals are included in tires during manufacture, and others picked up by tires as they roll down the nation's streets and highways. There is a potential for all of these toxins to be inhaled, absorbed through the skin and even swallowed by children who play on synthetic turf fields. AR7936.

Former EPA Senior Science advisor, Matthew Hagemann, C.Hg., stated:

> The DEIR includes references to synthetic turf studies that have shown risks to human health from inhalation of VOCs to exceed a commonly accepted threshold of one additional cancer incidence in a population of a million people ("one in a million or 10-6"). Although this is disclosed in the DEIR, the DEIR fails to identify this as a significant impact and fails to mitigate the risk.
>
> One study cited in the DEIR, a 2009 study prepared by the California Office of Environmental Health Hazard Assessment (OEHHA), concludes that soccer players with inhalation exposure to vapors from a theoretical scenario of playing for 51 years on synthetic turf would have increased "lifetime cancer risks that ***exceeded the insignificant risk level of 10-6" from breathing benzene, formaldehyde, naphthalene, nitromethane and styrene,*** chemicals associated with VOC vapors from synthetic turf. The OEHHA finding of significant health risks was corroborated by a 2011 Italian study which showed the risk to be ***in excess of 10-6 from particle-bound polycyclic aromatic hydrocarbons.*** Another 2011 study found that benzothiazole, a chemical that causes respiratory irritation and dermal sensitization, volatilizes from crumb rubber resulting in inhalation exposure. The latter two studies are not mentioned in the DEIR. The individual risks from ***benzene, formaldehyde, naphthalene, nitromethane and styrene each exceed the one in a million threshold***. When summed, the cancer risk from chemicals identified in the OEHHA study equals 1.9 in 100,000 which exceeds a 10-5 level (or one in a hundred thousand) risk level (**19 in a million**). AR7920-1; 9545 (emphasis added).

Mr. Hagemann also pointed out that the City's "Precautionary Principle requires the selection of the alternative that presents the least potential threat to human health and the City's natural systems… Simply put, the Precautionary Principle means "Safety First.'" AR1643; AR7924. "Where there are reasonable grounds for concern, the precaution approval to decision-making is meant to help reduce harm by triggering a process to select the least potential threat." AR1640. Since SBR turf poses significant human health risks, non-toxic alternatives should be considered as a feasible alternative that poses less human health risk in accordance with the Precautionary Principle. A conflict with a duly

adopted policy intended to protect the environment is itself evidence of a significant impact that must be disclosed in the EIR. 14 CCR § 15125(d); *Pocket Protectors v. Sacramento* (2005) 124 Cal.App.4th 903; *Endangered Habitats League, Inc. v. Orange* (2005) 131 Cal.App.4th 777, 783-4.

Petitioners cited a study by the California EPA Office of Environmental Health Hazard Assessment (OEHHA) in 2009, that concludes that SBR crumb rubber fields, create a cancer risk of ***18.8 per million***. The OEHHA Study concludes: "***Estimated inhalation exposures of soccer players to five of these (benzene, formaldehyde, naphthalene, nitromethane and styrene) gave theoretical increased lifetime cancer risks that exceeded the insignificant risk level of 10-6***." The study cites the following cancer risks: ***Benzene 2.8/million; Formaldehyde 1.6/million; Naphthalene 3.8/million; Nitromethane 8.7/million; Styrene 1.9/million.*** AR9452; 9636-39 (emphasis added).

Petitioners provided hundreds of pages of peer-reviewed scientific journal articles and studies establishing that SBR Turf creates significant cancer risks. See, AR1599-1682; 7854-8144; 9424-9785; 11094-11136; 11162-11408; 11436-11440; 11457; 11463-11476; 15584-15641. For example, Petitioners provided the City with a published 2011 study concluding that SBR exposes children to dioxin at levels exceeding 1x10-6 cancer risk. AR9605. Petitioners also provided a 2012 study from the highly respected journal, *Chemosphere*. The study revealed that the used tires on sport fields and playground surfaces contain a large number of hazardous substances including polycyclic aromatic hydrocarbons (PAHs), phthalates, antioxidants, benzothiazole and derivatives, among other chemicals. Many of these hazardous substances were at high or extremely high levels. In addition, vapor studies revealed that many of the organic compounds are volatile even at room temperature. The study concludes that because of the "presence of a high number of harmful compounds, frequently at high or extremely high levels, in these recycled rubber materials…they should be carefully controlled, and their final use should be restricted or even prohibited in some cases."AR11468-76.

Miriam Pinchuk, a medical editor for the British Medical Journal and the World Health Organization, submitted comments documenting numerous peer-reviewed studies finding that SBR Turf poses significant human health risks. AR1659. Ms. Pinchuk pointed out that the City relied almost entirely on out-dated studies from 2008 or earlier that have been disproven by later research. AR1661. Ms. Pinchuk cites eight peer-reviewed journal articles published after from 2009 through 2011 that identify significant health risks from toxic chemicals SBR Turf, including dioxins, PAHs, benzothiozole, heavy metals, and other toxins. AR1661-1665.

Extensive public comments were also submitted on the issue of Carbon Black. AR1599; 15584-15641. Carbon Black constitutes over 20% of the content of SBR. AR1603. The EIR states, "The SBR

material also contains carbon black, an industrial chemical used in the manufacturing of automobile tires and other plastic materials…It, [Carbon Black], is composed of nanoparticles that are much smaller than PM10 and PM2.S (nanoparticles vary in size from 1 to 100 nanometers, with a billion nanometers forming a meter)." AR774. Carbon Black is listed by the California Office of Environmental Health Hazard Assessment (OEHHA) as a substance known to the State to cause cancer in humans. AR1604. The Beach Chalet DEIR reports, "Fine particulates small enough to be inhaled into the deepest parts of the human lung can cause adverse health effects, and studies have shown that elevated particulate levels contribute to the death of approximately 200 to 500 people per year in the Bay Area. High levels of particulates have also been known to exacerbate chronic respiratory ailments, such as bronchitis and asthma, and have been associated with increased emergency room visits and hospital admissions." AR775. "Laboratory research indicates that there can be health risks associated with the inhalation of these particles, (nanoparticles)." AR775. One commenter cited a published study concluding that "Carbon nanotubes are frequently likened to asbestos. In a recent study that introduced carbon nanotubes into the abdominal cavity of mice, results demonstrated that carbon nanotubes showed the same effects as asbestos fibers, raising concerns that exposure to carbon nanotubes may lead to pleural abnormalities such as mesothelioma. (Poland C, et al.(2008))" AR1605, 28016-28017. In fact, the Los Angeles Unified School District sued SBR Turf manufacturers under California's Proposition 65 for exposing children to cancer-causing carbon black. (Declaration of Richard T. Drury (Drury Decl., Exh. A.)

Despite this mountain of substantial evidence, the City's EIR steadfastly refused to admit that SBR Turf poses significant health risks. Unlike the City of Piedmont, which ultimately admitted in its EIR that the "potential hazardous effects from the use of the proposed [SBR] synthetic turf field … would be … a significant and unavoidable impact," AR8060, the City refused to reach the same conclusion. Obviously, if SBR poses a significant and unavoidable impact to the children of Piedmont, the children of San Francisco will be exposed to the same risks and are entitled to the same protections.

b. The City Lacks Substantial Evidence to Rebut Petitioners' Expert Evidence.

In response to this mountain of scientific evidence documenting the fact that SBR exposes children to cancer risks far above the CEQA significance threshold, the City continued to refuse to disclose the risk to the public or consider alternatives. The final EIR spends almost 100 pages summarizing the public comments on cancer risk from SBR. AR1599-1684. But the Final EIR dismisses these extensive comments with a single brief conclusion that the comments do not change the

City's decision. AR1668, 1682. The Final EIR dismisses the significant expert comments and scientific journal articles as "unsubstantiated narratives or opinions." AR1669.

However, the Final EIR ultimately concludes, "The only cancer risk that exceeded the de minimus level of one in a million was the increased cancer risk of 2.9 in a million related to hand-to-surface-to-mouth activity." AR1671. Of course, this is almost ***three times*** above the CEQA significance threshold of 1.0 per million. Thus, by the City's own admission, the EIR should have disclosed that SBR Turf poses a significant cancer risk. The final EIR also admits cancer risks of up to 8 per million have been found in outdoor fields. AR1670.

The final EIR relies almost entirely on older studies that pre-date much of Petitioners' evidence. The City relies on a 2008 study[1] conducted by an in-house task force composed largely of non-experts. AR1660, 1669. Of course, a 2008 study cannot rebut research conducted in 2009 through 2012. Furthermore, the 2008 SF Turf Task Force Report is far from an endorsement of SBR Turf. The Task Force Report includes no calculation of cancer risk, and no calculation of Acute Hazard Index. The Report expressly only analyzes risks related to lead and zinc, AR2949, and does not analyze other toxic chemicals at all. AR2949. Thus, the Report cannot form the basis of a response to the expert comments on styrene, butadiene, benzene, dioxin, nitromethane, carbon black, etc. The Report recommends consideration of turf materials that "do not include zinc," AR2933, which would exclude SBR due to its high zinc content. The Report recommends additional study of risks of particulate matter. AR2934. "The group could not find data on the concentrations of chemicals released in outdoor settings. To accurately assess the potential for human health toxicity, accurate measurements of particulate matter, specifically PM10, PM2.5 and ultra fine particles are required. Currently, the literature does not address this, though it does for indoor particulates from artificial turf… The study group identified the current gaps in research and made recommendations for how the methodologies of several studies could be improved to yield more conclusive outcomes. In addition, ***determining if the recycled tire infill is a pollution source and health risk in the outdoors requires further research***." AR2951 (emphasis added). The Report states, "Chemical release by rubber crumb used in synthetic fields is likely to be

[1] To the extent that the City may attempt to rely on conclusions of federal agencies, those conclusions are irrelevant to CEQA. The State of California has a long history of adopting more stringent environmental standards than federal law, particularly in the area of public information. For example, California's Toxic Warning law, Proposition 65, requires public notification of cancer risks at levels far below that required by federal law. See, *People ex rel. Lungren v. Cotter & Co.* (1997) 53 Cal. App. 4th 1373, 1388. Similarly, CEQA requires public disclosure of health risks, but does not ban products outright. CEQA, like Proposition 65 requires the agency to inform the public and decision-makers of health risks so that they can make informed decisions on how and whether to avoid those risks.

greater since the surface area/weight of rubber crumb is greater than that for rubber shreds." AR2951. Finally, the Report concludes that "New York and New Jersey are leading the way" on alternative turf products and San Francisco should follow their lead. AR2934. Of course, New York has banned SBR Turf. AR7938, 26039. Petitioners agree that San Francisco should follow New York's lead. Thus, to the extent that the City relies primarily on the 2008 Task Force Report, it does not provide substantial evidence to rebut Petitioners' expert evidence.

In response to detailed research on Carbon Black, the City's Final EIR states merely that, "because wind would disperse the nanoparticles, if generated, it is expected that exposure to nanaoparticles as a result of play on synthetic turf fields that use SBR infill would be minimal." AR1672. However, in making this bald assertion, the City cites no study, no expert evidence and no substantial evidence at all.

The City's response to comments falls far short of the CEQA's requirement for a substantive response to substantive comments. An agency's responses to comments must specifically explain the reasons for rejecting suggestions received in comments and for proceeding with a project despite its environmental impacts. Such explanations must be supported with specific references to empirical information, scientific authority, and/or explanatory information. *Cleary v. County of Stanislaus* (1981) 118 Cal.App.3d 348, 357. The responses, moreover, must manifest a good faith, reasoned analysis; conclusory statements unsupported by factual information will not suffice. *People v. County of Kern* (1974) 39 Cal.App.3d 830, 841. Here the City responded without any scientific substantial evidence with only the most conclusory of responses. The City's response falls far short of the rigorous analysis and substantial evidence CEQA requires before an impact is dismissed as insignificant. *Kings County Farm Bureau*, 221 Cal.App.3d 692, 732.

In fact, the final City Staff Report admits that the OEHHA study found that "the increased risk of cancer from off-gassing was ***above*** the de minimus level for five of the eight chemicals tested." AR3663 (emphasis added). Since the de minimus level is one per million, AR9636, which is the same as the CEQA significance threshold, AR774, this should have lead the City to disclose that SBR poses significant cancer risks – particularly since the OEHHA study found a single chemical (nitromethane) to pose a cancer risk of 8.7 per million. AR 9636. Despite this, the Staff Report makes the bizarre conclusion that the cancer risk is insignificant. AR3663.

The final Staff Report also erroneously states that Mr. Hagemann erred by "adding-up" the cancer risk posed by the numerous toxic chemicals in SBR. Instead the Staff Report stated that each

chemical should be analyzed separately. AR3663. City staffer Sarah Jones stated in her presentation to the Board of Supervisors:

> "The sort of cumulative methodology of adding up the cancer risks that was presented in the appeal letter is not something that our Department of Public Health considers the appropriate methodology for assessing cancer risk… It's essentially evaluating the various carcinogens and toxins that would be found. It's not a cumulative or additive situation. ***This is, I have to say, not my area of expertise.*** Unfortunately, we don't have a representative from the Department of Public Health here today. We were hoping to have somebody." AR4954-5 (emphasis added).[1]

First, this position is simply scientifically incorrect, which is not surprising since the position is articulated by a self-professed non-expert who is questioning the former director of EPA's Superfund program. Even the EIR stated, "***To address potential additive effects, the estimated cancer risks for each chemical and exposure route are summed to estimate the total excess cancer risk for the exposed individual***." AR774-5. Thus, the non-expert Ms. Jones is contradicted by the City's own EIR. Furthermore, California EPA's Guidance on the Evaluation of Human Cancer Risks, which is cited by by Petitioner's experts and the EIR, states, "Risks posed by exposure to multiple chemicals with similar health affects are considered to be additive or 'cumulative.' For example, the total excess lifetime risk of cancer posed by the presence of several carcinogenic chemicals in all exposure media is the sum of the risk posed by each individual chemical." (Petitioners' Motion to Augment, Exh. A, Cal. EPA, Use of California Human Health Screening Levels (CHHSLs) in Evaluation of Contaminated Properties.)

Second, even if Ms. Jones were correct, it would be irrelevant since the studies show that at least five individual chemicals each exceed the cancer risk level of one per million. In particular, nitromethane poses a cancer risk of 8.7 per million – more than 8 times above the CEQA significance threshold. AR 9636. Thus, even if cancer risk were not additive (which it is), the City would still have to disclose that SBR creates a significant cancer risk. Also, the final Staff Report admits that dioxin risks exceed one per million. AR3664. The Staff Report attempts to dismiss Petitioner's evidence, stating that many of the studies relied upon by Petitioners were conducted indoors, but the Staff Report goes on to admit that studies have found butadiene cancer risks on ***outdoor*** fields as high at 8 per million – which is approximately the same level as in the indoor studies. AR3665.

[1] Despite City Staff's assertion that the Department of Public Health (DPH)) had no concerns on SBR, AR4955, the record reveals to the contrary. DPH recognized the SBR Turf includes toxic chemicals and that children should avoid "hand-to-mouth" exposure. DPH also recommended that toxic run-off should be kept out of the water table. AR2939. Similarly, the San Francisco Department of the Environment concluded that SBR exposure creates a cancer risk of 2.9 per million, which "is slightly higher than the di minimis risk level of 1 case per one million" AR3152. "SFE recognizes the potential for aquatic toxicity from synthetic turf leachate." AR3152.

While the courts review an EIR using an "abuse of discretion" standard, "the reviewing court is not to 'uncritically rely on every study or analysis presented by a project proponent in support of its position. A 'clearly inadequate or unsupported study is entitled to no judicial deference.'" *Berkeley Jets*, 91 Cal. App. 4th 1344, 1355, quoting, *Laurel Heights Impr. Assn. v. Regents of Univ. of Calif.* (1988) 47 Cal. 3d 376, 391 409, fn. 12. In determining whether any particular piece of evidence is "substantial," a reviewing court must look at "the entire record," rather than "isolated bits of evidence" selected by one of the parties. *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874. "[C]ontrary evidence is considered in assessing the weight of the evidence supporting the asserted environmental impact." *Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1994) 33 Cal.App.4th 144, 151. "[T]he court must consider all relevant evidence, including evidence detracting from the decision, a task which involves some weighing to fairly estimate the worth of the evidence." *Lucas Valley Homeowners Association v. County of Marin* (1991) 233 Cal.App.3d 130, 142.

Given the overwhelming evidence presented by Petitioners, and the lack of sound evidence presented by the City, it is clear in light of the whole record that substantial evidence does not support the City's conclusion that SBR Turf does not present a significant cancer risk. In this case, there is no substantial evidence to support the City's conclusions. Even the studies that the City purports to rely upon conclude that SBR creates cancer risks far above the CEQA significance threshold. ***There is no evidence in the record concluding that the cancer risk of SBR is below 1.0 per million.*** The EIR was therefore legally inadequate due to its failure to disclose this risk to the public and to the City's decision-makers. If the public and the Board of Supervisors were informed that SBR poses significant toxic risks to children, it is highly likely that the Board would have considered and selected non-toxic alternatives such as those in use in Los Angeles, New York and dozens of other cities.

B. The City Abused its Discretion and Failed to Proceed in a Manner Required by Law by Refusing to Consider Widely-Used Non-Toxic Alternatives to SBR.

CEQA requires an agency to consider feasible alternatives to reduce a Project's significant impacts. *Uphold Our Heritage v. Town of Woodside* (2007) 147 Cal.App.4th 587, 597. The City abused its discretion by failing to proceed in a manner required by law by refusing to consider non-toxic alternatives to SBR Turf. Petitioners suggested that the City should consider several widely used non-toxic alternatives to toxic SBR Turf. AR7885. The City abused its discretion and failed to proceed in a manner required by law by refusing even to consider these alternatives, and the EIR contains no analysis whatsoever of the non-toxic turf alternatives. AR780-1. This renders the EIR legally inadequate as an informational document.

Petitioners provided substantial evidence that non-toxic alternatives to SBR Turf are feasible, widely available, and in widespread use. Dr. Philip Landrigan commented that the City of New York has banned SBR Turf and is successfully using rubber "carpet-pad" style turf. AR7938. Petitioners provided the City with a study analyzing several widely-used non-toxic alternatives to SBR, including Thermoplastic Elastomers (TPEs), Ethylene Propylene Diene Monomer rubber (EPDM), organic cork and coconut ("corkonut"), and acrylic coated sand. AR8062-4. The study notes that TPEs are "specified by the City of New York School Construction Authority," and is "free of heavy metals and toxins." AR8063, 26039. The study states, EDPM "is durable, non-toxic and environmentally friendly." AR8063. Brigham Young University in Provo, Utah has successfully installed an EDPM field. *Id*. The study notes that organic materials, such as Corkonut, are being used as turf material. Corkonut is a completely natural combination of used corks and corcknut husks. The City of Piedmont in the East Bay has installed Corkonut at athletic fields. AR8064. Finally, the study notes that there are several producers of Acrylic Coated Sand infill, which is free of toxins. The Los Angeles Unified School District has installed Acrylic Coated Sand and "they are pleased with its performance." AR8064. Even key Planning Department Staff in charge of the Beach Chalet Project admitted in internal emails that non-toxic alternatives to SBR are available. AR051312-51320.

Despite substantial evidence that non-toxic turf alternatives are feasible and in widespread use, the EIR refused even to consider any non-toxic alternatives. CEQA requires that the agency evaluate "potentially" feasible alternatives. Guidelines §15126.6 (a); *Save Round Valley Alliance v. County of Inyo* (207) 157 Cal. App. 4th 1437, 1457-1458. CEQA provides that "the discussion of alternatives shall focus on alternatives to the project … which are capable of avoiding or substantially lessening any significant effects of the project, even if these alternatives would impede to some degree the attainment of the project objectives, or would be more costly." Guidelines § 15126.6 (b) (emphasis added); *Preservation Action Council v. City of San Jose* (2006) 141 Cal.App.4th 1336, 1354. "CEQA contains a 'substantive mandate' requiring public agencies to refrain from approving projects with significant environmental effects if 'there are feasible alternatives or mitigation measures' that can substantially lessen or avoid those effects." *County of San Diego v. Grossmont-Cuyamaca Comm'y. College Dist*. (2006) 141Cal.App.4th 86, 98-100. The lead agency under CEQA has an affirmative duty to adopt all feasible alternatives. Pub.Res. Code § 21002. In the recent case of *Habitat & Watershed Caretakers v. City of Santa Cruz* (2013) 213 Cal. App. 4th 1277, 1304-1305 the court held:

> CEQA does not permit a lead agency to omit any discussion, analysis, or even mention of any alternatives that feasibly might reduce the environmental impact of a project on the unanalyzed

> theory that such an alternative might not prove to be environmentally superior to the project. The purpose of an EIR is to provide the facts and analysis that would support such a conclusion so that the decision maker can evaluate whether it is correct. By failing to mention, discuss, or analyze any feasible alternatives, the draft EIR and the final EIR failed to satisfy the informational purpose of CEQA, which included providing LAFCO with relevant information.

The EIR is patently inadequate due to its refusal even to consider non-toxic alternatives to SBR Turf. Even if the City may have ultimately rejected the alternatives due to cost or other factors, CEQA requires that the EIR must include an analysis of alternatives and state clear reasons for rejecting environmentally superior alternatives. In short, if the City is to select highly toxic SBR Turf despite the existence of non-toxic alternatives begin used in New York, Los Angeles, Utah, and even Piedmont, then it must openly discuss and disclose this fact with the public. "There is a sort of grand design in CEQA: Projects which significantly affect the environment can go forward, but only after the elected decision makers have their noses rubbed in those environmental effects, and vote to go forward anyway." *Woodward Park v. Fresno* (2007) 150 Cal. App. 4th 683, 720. In this way, CEQA holds decision-makers politically accountable since it subjects them to "public awareness and possible reaction to the individual members' environmental and economic values." *Kleist v. City of Glendale* (1976) 56 Cal. App. 3d 770, 779. By refusing to discuss non-toxic alternative turf materials entirely, the EIR fails to meet CEQA public information and disclosure requirements.

C. EIR is Legally Inadequate Because it Fails to Analyze the Feasible Hybrid Alternative.

The City abused its discretion by failing to proceed in a manner required by law because it refused even to consider the "Hybrid Alternative," which would achieve all Project objectives while reducing environmental impacts. Petitioners repeatedly urged the City to consider a "Hybrid Alternative," involving: (1) restoring Beach Chalet with natural grass, improved drainage, and gopher-proofing (gopher mesh), and (2) installing night lights and non-toxic artificial turf at the West Sunset Playground only eight blocks away. AR7855, 9426. Petitioners provided evidence that the Hybrid Alternative would actually provide more play hours than Beach Chalet since West Sunset is larger than Beach Chalet. AR11099, 11120-11131. West Sunset, encompassing 17.6 acres, AR814, can accommodate 6 soccer fields (pitches), while Beach Chalet, with only 9.4 acres, AR555, can fit only four. AR7855. The City abused its discretion by refusing even to consider this alternative despite the fact that it would achieve all Project goals, reduce Project impacts, and would be feasible.

The EIR creates a false choice: either improve Beach Chalet, OR improve West Sunset. This choice is patently absurd since the City already plans to upgrade West Sunset with real grass next year

[http://sfrecpark.org/BondOutreach.aspx]. AR9427. The Hybrid Alternative simply "swaps" the two parks – instead of real grass at West Sunset, install artificial turf and lights; and instead of plastic turf at Beach Chalet, install real grass. This will result in 6 artificial soccer pitches at West Sunset instead of 4 at Beach Chalet, and will upgrade Beach Chalet with new, real grass fields. The Hybrid Alternative achieves ALL of the Project Objectives, while avoiding the admittedly significant impacts on the natural and historic resources of the Western end of Golden Gate Park. The EIR is patently inadequate due to its refusal to analyze the Hybrid Alternative, and the City is required to select the Hybrid Alternative since it is environmentally superior and achieves all Project objectives.

1. CEQA Requires Discussion of Alternatives that would Feasibly Attain Most Project Objectives but would Substantially Avoid Impacts.

Where a project is found to have significant adverse impacts, ***CEQA requires the adoption of a feasible alternative that meets most of the project objectives but results in fewer significant impacts.*** *Citizens of Goleta Valley v. Bd. of Supervisors* (1988) 197 Cal.App.3d 1167, 1180-81. A "feasible" alternative is one that is capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social and technological factors. (PRC § 21061.1; Guidelines § 15364). In the recent case of *Habitat & Watershed Caretakers v. City of Santa Cruz* (2013) 213 Cal. App. 4th 1277, 1304-1305 the court held:

> A potentially feasible alternative that might avoid a significant impact must be discussed and analyzed in an EIR so as to provide information to the decision makers about the alternative's potential for reducing environmental impacts. Without analysis, the theory posited by the City and the Regents is purely speculative and is not supported by any facts discussed in the draft EIR or the final EIR. Since, as Habitat points out, the draft EIR and the final EIR neither discussed nor analyzed a limited-water alternative, the decision makers were not provided with any information about the effect that such an alternative might have on water supply impacts or other impacts.
>
> CEQA does not permit a lead agency to omit any discussion, analysis, or even mention of any alternatives that feasibly might reduce the environmental impact of a project on the unanalyzed theory that such an alternative might not prove to be environmentally superior to the project.

An EIR shall describe a range of reasonable alternatives to the project, or to the location of the project, which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives. CEQA Guidelines § 15125.6. The analysis of project alternatives must contain a quantitative assessment of the impacts of the alternatives. *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 733-73.

The lead agency is required to select the environmentally preferable alternative unless it is infeasible. As explained by the Supreme Court, an environmentally superior alternative may not be rejected simply because it is more expensive or less profitable:

> The fact that an alternative may be more expensive or less profitable is not sufficient to show that the alternative is financially infeasible. What is required is evidence that the additional costs or lost profitability are sufficiently severe as to render it impractical to proceed with the project.

Citizens of Goleta Valley v. Bd. of Supervisors (1988) 197 Cal.App.3d 1167, 1180-81; *see also, Burger v. County of Mendocino* (1975) 45 Cal.App.3d 322; *County of El Dorado v. Dept. of Transp*. (2005) 133 Cal.App.4th 1376 (agency must consider small alternative to casino project); *Preservation Action Counsel v. San Jose* (2006) 141 Cal. App. 4th 1336.

The City could accomplish all of the project objectives if it would only consider—as has been urged by members of the public since the genesis of this project—a "Hybrid Alternative" that would (1) improve the grass turf and existing facilities at the Beach Chalet and (2) renovate the West Sunset Playfields to meet higher playing time demands (e.g., installing non-toxic artificial turf, lights, etc.) This would result in the creation of *six* non-toxic artificial turf fields at West Sunset (3 full size and 3 U10), rather than 4 at Beach Chalet, plus improved grass fields at Beach Chalet. The Final Staff Report states that the Hybrid Alternative is "encompassed" in the other alternatives. AR3646. However, this is plainly untrue since none of the other alternatives achieve all of the Project objectives by both increasing play time and improving both West Sunset and Beach Chalet.

The record contains no substantial evidence from the City indicating that the Hybrid Alternative is technologically infeasible, cost prohibitive, or that it would provide any less play hours than the proposed Project. By contrast, Petitioners provided substantial evidence from registered Landscape Architect Katherine Howard, ASLA, that the cost of the Hybrid Alternative would be essentially the same as the proposed Project, and that it would provide at least as many or more play hours. AR11120-11131; 11436-11440; 11403-07. Ms. Howard provided a detailed analysis demonstrating that the Hybrid Alternative would provide 22,913 play hours per year, while the City's Project would provide only 21,975 play hours. AR11124. Thus, the Hybrid Alternative provides almost 1000 more play hours than the City's proposed Project. The EIR and administrative record provides no substantial evidence to rebut these calculations. To the extent that the City rejected consideration of the Hybrid Alternative due to cost, the SFOE has prepared a cost analysis showing that the cost of the Hybrid Alternative is almost identical to the cost of the Beach Chalet alternative. AR 11403-07. The City has produced no

substantial evidence to show that the Hybrid Alternative is economically infeasible or to support the proposed statement of overriding considerations to reject the Hybrid Alternative.

Since the Hybrid Alternative is "potentially feasible," and would reduce impacts of the Project, the EIR was legally deficient since it refused to analyze the alternative.

2. The Project Objectives are too Narrowly Defined.

The objectives for the Beach Chalet Project have been tailored to result in the rejection of any off-site Alternative. The Project really has two major goals: (1) renovate the Beach Chalet facilities to provide for more play time and a better user experience and (2) contribute to meeting an increased city-wide demand for play time. AR809. There is no reason that these two objectives must be linked to the Beach Chalet site itself.

The EIR and findings reject the Off-site Alternative primarily because it would not meet the Project objective to improve the condition of the Beach Chalet fields. AR3646, AR22. The EIR rejects the Off-site Alternative primarily because it would allow the Beach Chalet field to "continue to degrade." AR544. Of course, this ignores the option of improving both fields. An agency may not reject an off-site alternative *because* it is off-site – which is essentially what the City has done. It is well-established that off-site alternatives must be considered under CEQA. As the Supreme Court has explained, an EIR is required to explain in detail why various alternatives were deemed infeasible, and should explore the potential to locate the project somewhere other than proposed. (*Laurel Heights I*, 47 Cal.3d at 404-406; *Goleta Valley*, 197 Cal.App.3d 1180-81) The City's position, rejecting the West Sunset alternative *because* it is not located at Beach Chalet, makes a mockery of CEQA's requirement for a true off-site alternative analysis. If an offsite alternative could be rejected simply because it is in a different location, then the offsite alternative analysis would be meaningless.

Furthermore, the Hybrid Alternative would achieve the on-site objectives of restoring the Beach Chalet Fields, (with natural grass, gopher controls and good drainage), while also providing non-toxic artificial turf fields for additional play hours at West Sunset.

To narrowly define the primary "objective" of the proposed project itself constitutes a violation of CEQA since such a restrictive formulation would improperly foreclose consideration of alternatives. *See City of Santee v. County of San Diego* (1989) 214 Cal.App.3d 1438) (holding that when project objectives are defined too narrowly an EIR's analysis may also be inadequate). As a leading treatise on CEQA compliance cautions, "The case law makes clear that…overly narrow objectives may unduly circumscribe the agency's consideration of project alternatives." (Remy, Thomas, Moose & Manley,

Guide to CEQA (Solano Books, 2007), at 589) For example in *Preservation Action Council v. City of San Jose*, 141 Cal.App.4th 1336, 1354, the developer of a Lowe's store insisted that the store had to be built on a single story because all Lowe's are single story. The Court held that the alternatives analysis was inadequate due to a failure to consider a two-story Lowe's design that would have reduced impacts on an adjacent historic building. See also, *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 736 (alternatives may not be artificially limited). Inconsistency with only some of the Project Objectives is not necessarily an appropriate basis to eliminate impact-reducing project alternatives from analysis in an EIR. 14 Cal. Code Regs § 15126.6(c), (f).

3. Barring Consideration of the Hybrid Alternative, the Off-Site Alternative Should Be the Preferred Alternative for the Project.

The FEIR admits that the off-site alternative "would attain most of the project's basic objectives," and would "avoid or substantially lessen one of more of the significant environmental impacts of the proposed project," and would be "feasible." The Planning Commission therefore abused its discretion by failing to adopt the off-site alternative. The Responses to Comments states:

> **[t]he EIR includes analysis of an off-site alternative (West Sunset Playground) that would: (1) attain most of the project's basic objectives; (2) *avoid or substantially lessen* one or more of the significant environmental impacts of the proposed project; and (3) be feasible.** AR1759.

As discussed above, under CEQA, the lead agency may not approve a proposed project if feasible alternatives exist. Pub. Res. Code § 21002. "Our Supreme Court has described the alternatives and mitigation sections as the 'core' of an EIR ... In furtherance of this policy, section 21081, subdivision (a) contains a 'substantive mandate' requiring public agencies to refrain from approving projects with significant environmental effects if 'there are feasible alternatives … that can substantially lessen or avoid those effects'." *Uphold Our Heritage v. Woodside* (2007) 147 Cal.App.4th 587, 597; C*itizens of Goleta Valley v. Bd. of Supervisors* (1988) 197 Cal.App.3d 1167, 1180-81.

Since the Final EIR admits that the West Sunset Off-site alternative (1) attain most of the project's basic objectives; (2) avoids or substantially lessen one or more of the significant environmental impacts of the proposed project; and (3) is feasible, CEQA prohibits the City from approving the environmentally inferior proposed Project.

D. The City Illegally Deferred Development of Mitigation Measures.

The City abused its discretion by failing to proceed in a manner required by law because it deferred the development of mitigation measured until after Project approval to address toxic

stormwater run-off and disposal of toxic SBR Turf at the end of its lifespan. CEQA prohibits deferred mitigation. *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 92.

1. Toxic Stormwater Run-off.

The EIR acknowledges that the SBR Turf is so toxic that stormwater run-off from the field threatens to contaminate soil and groundwater, and that mitigation will therefore be required to protect groundwater beneath the field. In other words, although children will be directly exposed to the toxic SBR, the City admits that it must take action to protect the dirt. The EIR states:

> [T]he composition of tire crumb is dependent on the tires used in the manufacturing process and can be variable. Therefore, the quality of stormwater runoff and leachate from the proposed synthetic playfields is unknown and could contain pollutants that could degrade groundwater quality… ***Therefore, cumulative impacts related to degradation of water quality are potentially significant***.

AR772 (emphasis added). According to a letter from the Dec. 9, 2011 memo from San Francisco Public Utilities Commission to the San Francisco Department of Parks and Recreation, ***zinc levels in stormwater run-off from SBR fields are fifty times higher than drinking water standards***, which is a potentially significant impact. AR7878; 11269-70; 26032. The memo states further, "The SFPUC will coordinate with the San Francisco Recreation & Parks Department (SFRPD) on potentially feasible options to manage the stormwater runoff from the artificial turf underdrain system onsite; if and when it is determined that artificial turf runoff can be infiltrated and managed onsite.." AR11269-70.

CEQA prohibits such deferred mitigation. CEQA requires the agency to specifically identify the mitigation measures to be used so that the public can scrutinize their adequacy. *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 307. "[R]eliance on tentative plans for future mitigation after completion of the CEQA process significantly undermines CEQA's goals of full disclosure and informed decision making; and[,] consequently, these mitigation plans have been overturned on judicial review as constituting improper deferral of environmental assessment." *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 92; *Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1275; *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 670.

The EIR is inadequate due to its failure to set forth specific mitigation measures to reduce toxic stormwater run-off.

2. The EIR Improperly Defers Mitigation for Disposal of Toxic SBR Turf at the End of its 8 year lifespan.

The City acknowledges that the disposal of artificial turf is required every 8-12 years, creating 400 tons of debris, and having potentially significant adverse impacts on landfill space. AR781, 541. Further, the City admits that there are no companies that currently recycle SBR turf. AR803. To address this significant impact on landfill space, the City has unlawfully deferred development of mitigation measures by allowing the turf manufacturer to propose a turf recycling plan as late at 7 years after project approval. AR802. This unlawfully defers development of mitigation, since there is no reasonable assurance that an adequate mitigation measure will be developed.

For the purposes of CEQA compliance, the City's decision to defer development of the mitigation measure for turf disposal unlawfully removes the development of mitigation from all public review and scrutiny. The end-of-life plan will be left in the hands of a private company, subject only to staff-level review, and outside the scope of CEQA, public review, and review by elected decision-makers. As explained by the *Sundstrom* court:

> An EIR "[is] subject to review by the public and interested agencies. This requirement of "public and agency review" has been called "the strongest assurance of the adequacy of the EIR." The final EIR must respond with specificity to the "significant environmental points raised in the review and consultation process." . . . Here, the hydrological studies envisioned by the use permit would be exempt from this process of public and governmental scrutiny.

Sundstrom, 202 Cal.App.3d at 308. The same is true with the non-existent mitigation measures for artificial turf recycling.

The EIR's reliance on the possibility of a turf manufacturer implementing a recycling program constitutes inappropriately speculative and deferred mitigation under the EIR. Guidelines § 15126.4(a)(1)(B). The City has abused its discretion and failed to proceed in a manner required by law by failing to specify how the SBR Turf will be recycled or disposed of.

E. The City's Decision Must be Set Aside Because the City Refuses to Produce the "Whole Record."

The City has refused to produce documents that are required to be included in the Administrative Record. CEQA requires the Court to review the "whole record" in determining whether the City has complied with the law. The City's refusal to produce documents that are required to be included in the administrative record requires the Court to reverse the agency's decision. In this case, the City steadfastly refuses to produce any letters, electronic mails or other correspondence sent to or from members of the Board of Supervisors – the ultimate decision-making body for this action. In addition, the City refuses to produce correspondence sent to the Clerk of the Board or members of the

Board of Supervisors prior to the date of the appeal of the EIR approval from the Planning Commission to the Board of Supervisors. In addition, key City staff members, including the director of the Recreation and Parks Department, Mr. Philip Ginsberg, the official City spokesperson for the Beach Chalet Project, Ms. Sarah Ballard, and key Planning Department staff, Dan Mauer and Sarah Jones, have admitted that they destroyed numerous emails related to the Project. (AR30079-30102; Transcript of Ethics Commission Hearing, Request for Judicial Notice in Support of Petition for Writ of Mandate ("RJN"), Exh. A, pp. 6, 26, 28-30, 50-51, 59-60). This intentional omission renders the Administrative Record legally inadequate and requires the Court to set aside the City's decision.

CEQA requires the Court to determine "whether there is 'substantial evidence in light of the ***whole record'***… indicating the project may have a 'significant effect on the environment.'" *Western States Petroleum Assn. v. Superior Court* ("*WSPA*") (1995) 9 Cal. 4th 559, 571, citing, Pub. Res. Code, § 21080(c) & (d), 21082.2(a) & (d) (emphasis added). To perform this function, the record before the Court must contain all documents that were "before the agency at the time it made its decision." *WSPA*, 9 Cal. 4th at 574. In determining whether any particular piece of evidence is "substantial," a reviewing court must look at "the entire record," rather than "isolated bits of evidence" selected by one of the parties. *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874. "[C]ontrary evidence is considered in assessing the weight of the evidence supporting the asserted environmental impact." *Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1994) 33 Cal.App.45h 144, 151; *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1996) 42 Cal.App.4th 608, 617. As a result, "[T]he court must consider all relevant evidence, including evidence detracting from the decision, a task which involves some weighing to fairly estimate the worth of the evidence." *Lucas Valley Homeowners Association v. County of Marin* (1991) 233 Cal.App.3d 130, 142; see also, *Richard v. Board of Pension Comrs.* (1985) 164 Cal.App.3d 405, 412 ("in all cases, the determination whether there was substantial evidence to support a finding or judgment must be based on the whole record. The reviewing court may not consider only supporting evidence in isolation, disregarding all contradictory evidence").

In CEQA cases such as this one, PRC section 21167.6(e) governs the specific documents that ***must*** be included in the Administrative Record. Among other specific categories of documents, Section 21167.6(e) provides that "[t]he record of proceedings shall include, but is not limited to, all of the following items: . . .

> (3) All staff reports and related documents prepared by the respondent public agency and ***written testimony or documents submitted by any person*** relevant to any findings or

> statement of overriding considerations adopted by the respondent agency pursuant to this division...[and] (6) ***All written comments received in response to, or in connection with, environmental documents prepared for the project***, including responses to the notice of preparation…[and] (7) ***All*** written evidence or ***correspondence submitted to, or transferred from, the respondent public agency*** with respect to compliance with this division or with respect to the project….[and] (10) Any other written materials relevant to the respondent public agency's compliance with this division or to its decision on the merits of the project, including…all internal agency communications, including ***staff*** notes and memoranda related to the project or to compliance with this division. . . .

PRC § 21167.6(e) (emphasis added). "The quoted statutory language…is mandatory—all items described in any of the enumerated categories shall be included in the administrative record." *County of Orange*, 113 Cal.App.4th at 8; *Eureka Citizens for Responsible Gov't v. City of Eureka* ("*Eureka*") (2007) 147 Cal. App. 4th 357, 366–67.

Under this provision, "Decision-making body" expressly includes "***any person or group of people*** within a public agency permitted by law to approve or disapprove the project at issue." 14 CCR §15356. Furthermore, the Court of Appeal has specifically held that emails and correspondence are properly part of the administrative record in a CEQA action. *Citizens for Open Gov't v. City of Lodi ("Lodi")* (2012) 205 Cal.App.4th 296, 307, 311. Section 21167.6(e) has consistently been interpreted broadly to include, inter alia: documents from prior project proceedings, including application materials, staff reports, *correspondence*, environmental studies, and other documents from proceedings previously resulting in a court judgment on the project (*Mejia v. City of Los Angeles* (2005) 130 Cal App 4th 322; *County of Orange*, 113 Cal. App. 4th at 7)); ***correspondence "presented to" City Council members*** (*Eureka*, 147 Cal. App. 4th at 366); and emails that include internal agency communications and with city consultants (*Lodi*, 205 Cal. App. 4th at 304).

By excluding these very documents, the City certified an incomplete record, in violation of CEQA.[1] All of these documents are properly within the scope of the record under PRC § 21167.6(e). Furthermore, the omission of documents from the administrative record that are relevant to an agency's decision to approve a project is a grave error, and constitutes both agency misconduct and a basis for reversal of the project approvals. *Lodi*, 205 Cal.App.4th at 309-310; *Protect Our Water v. County of Merced* (2003) 110 Cal.App.4th 362, 365-73.; see *Berkeley Jets over the Bay Com. v. Board*

[1] The City is not entitled to any deference for its decision to certify an incomplete Administrative Record. Certification of the administrative record is a ministerial task. *See County of Orange*, 113 Cal.App.4th at 11 (compilation of administrative record is ministerial task). Ordinarily, when an agency performs a ministerial task, deferential judicial review is not appropriate. *See W. States Petroleum Ass'n v. Super. Ct* (1995) 9 Cal.4th 559, 576 (ministerial actions by an agency do not merit deference).

of Port Comrs. (2001) 91 Cal.App.4th 11344, 1366 ("The omission of the CARB official's opinion...is a serious one, and is such as to prevent a decisionmaker and the public from gaining a true understanding of ...important environmental consequences.").

1. The Board of Supervisors Correspondence Is Properly Part of the Administrative Record.

The City has refused to include in the administrative record letters or emails sent to members of the Board of Supervisors. The Board of Supervisors (BOS) Correspondence falls squarely Section 21167.6(e), including, in particular, "written evidence or correspondence submitted to, or transferred from, the respondent public agency" (PRC § 21167.6(e)(7)), and "internal agency communications, including staff notes and memoranda" related to the project or to compliance with CEQA. *Id*. at subs. (e)(10). Individual Board members comprise the City's "decision-making body" as defined by CEQA, each being individually a "***person…***within a public agency permitted by law to approve or disapprove the project at issue." 14 CCR § 15356 (emphasis added); *see El Morro Community Ass'n v. Cal. Dep't.. of Parks & Rec*. (2004) 122 Cal. App. 4th 1341, 1349 (agency that acts through individual director or designee is "decision-making body" within the meaning of CEQA). They are also part of the "public agency" whose correspondence is required to be include in the record under Section 21167.6(e)(6) and (7). See PRC § 21063; 14 Cal. Code Regs ("CCR") § 15379. In *Lodi*, the Court specifically interpreted Section 21167.6(e) to include emails. Petitioners in that case sought to augment a CEQA administrative record with 27 emails the city had failed to include in the record, including *internal agency communications* and emails with city consultants. 205 Cal. App. 4th at 304. The court held that the emails were properly part of the record, and ordered them included.

The City has relied on *Eureka* and *El Morro* to argue that the BOS Correspondence does not belong in the record because it was not submitted "during time periods when the Project approval was[] before the Board." Both cases conclude the opposite. In *Eureka*, petitioners submitted 47 documents to augment the record that included "correspondence to or from various City officials." 147 Cal. App. 4th at 366. Only some of the documents related to the Project, and most were never "presented to" the City council. *Id*. at 367. Here, by contrast, the BOS Correspondence are "from files" of the Board, and that the documents relate to the Project. They are thus part of the record.

Simlarly, in *El Morro*, the court refused to augment an administrative record to include extra-record, post-decisional documents that were not before the agency at the time of its decision. 122 Cal. App. 4th at 1359. By contrast, Petitioners seek a narrow range of documents that were "before the agency" and which were submitted to the City during the relevant period from the City's posting of its

CEQA Notice of Preparation ("NOP") of an EIR for the Project, on February 2, 2011, and its September 13, 2012 posting of the Notice of Determination ("NOD") that approved the Project.

Finally, the City contends that any correspondence with the Board, including with the Clerk of the Board, does not fall under Section 21167.6(e) if it was submitted prior to the date on which Petitioners filed their appeal to the Board, June 12, 2012. This argument has no basis in CEQA. The plain language of Section 21167.6(e) places no such time restraint on the record. Furthermore, under *County of Orange*, the timing of the documents is irrelevant, so long as they existed at some point *prior to* the ultimate project approval, and are relevant. 113 Cal. App. 4th at 7-8 (EIR Addendum from prior project part of record even though predated Board's consideration of challenged project EIR).

The City may not unilaterally exclude documents from the record based on policies that do not exist in the statute. PRC §21083.1. Rather, the City must comply with the plain language, and include, *at a minimum*, all documents enumerated in Section 21167.6(e). Indeed, if Section 21167.6(e) has been held to include "not only the final version of the project approved by the public agency, but also prior versions of the project constituting substantially the same overall activity," as in *Mejia*, 130 Cal. App. 4th at 334, and *County of Orange*, 113 Cal. App. 4th at 7, then certainly the record must also include any correspondence and documents submitted to that same Board of Supervisors relating to the same Project, and the same EIR, that was ultimately considered and approved by the Board, so long as they were submitted during the Project's administrative process.

2. Emails from Planning Department and Rec & Park Staff are Properly Part of the Administrative Record.

Planning Department staff, Dan Mauer and Sarah Jones, admit in emails to deleting emails concerning the Beach Chalet Project. AR30079-30102. Ms. Jones states that "informational communications" from the "project sponsor" (City Fields Foundation) are "not retained as a matter or course." AR300079. Rec & Park General Manager, Phillip Ginsberg , testified to the Ethics Commision, stating"***I did delete the email,"***in response to a question concerning an email related to the Project.

The City's spokesperson for the Beach Chalet project, Ms. Ballard, then testified that she routinely destroyed ***all emails*** after she sent them, regardless of importance. RJN, Exh. A, pp. 50-51. The Planning Department, Ginsberg and Ballard emails are necessary parts of the administrative record. CEQA expressly provides that the record includes "all internal agency communications, including ***staff*** notes and memoranda," PRC §21167.6(e)(10) (emphasis added)), and including emails. *Lodi*, 205 Cal.App.4th at 307.

It cannot be disputed that Rec and Park, as the proponent sponsor of the Project, was an agency within the meaning of this statute, and emails about that concerned the Project were "related to the project." A CEQA administrative record must contain all materials related to CEQA compliance, not just those documents reviewed by the approving governmental body. *County of Orange v. Super. Ct.* (2003) 113 Cal.App.4th 1, 7-8. In *County of Orange*, the court stated that PRC § 21167.6(e) sets forth an inclusive view of the record and "contemplates that ***the administrative record will include pretty much everything that ever came near a proposed development or to the agency's compliance with CEQA in responding to that development***," including "any other written materials relevant to the respondent public agency's compliance with this division or to its decision on the merits of the project." *Id*. (Emphasis added). Emails are properly part of the administrative record in a CEQA action. *Lodi,* 205 Cal.App.4th 296, 307. Where there is an illegal exclusion of such documents and it is prejudicial, an agency's project approvals must be set aside. *Lodi*, 205 Cal.App.4th 296, 309-310; *Protect Our Water v. County of Merced* (2003) 110 Cal.App.4th 362, 365-73.[1]

Thus, in this CEQA action, the City was required to retain all documents set forth under PRC §21167.6(e) for inclusion in the Administrative Record. If the Planning and Rec and Park Departments failed to do so because they followed an improper email retention policy, or implemented a proper policy in an improper manner, it then destroyed records that constituted a mandatory part of the CEQA administrative record and the record produced by the City is incomplete.[2]

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[1] See also, Evid. Code § 413. Party's failure to explain or deny evidence. In determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party's failure to explain or to deny by his testimony such evidence or facts in the case against him, or his willful suppression of evidence relating thereto, if such be the case.

[2] Petitioners are entitled to an evidentiary presumption that any documents destroyed by the City would have supported Petitioners' action. A party, or anyone who anticipates being a party, to a lawsuit has a duty to preserve evidence. (*Cedars-Sinai Med. Ctr. v. Super. Ct.* (1998) 18 Cal.4th 1, 11-12; see *Fujitsu v. Federal Express Corp.* (2d Cir. 2001) 247 F3d 423, 436 ("The obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation."); *Zubulake v. UBS Warburg LLC* (SDNY 2003) 220 FRD 212, 216) A party or anticipated party must retain all relevant documents in existence at the time the duty to preserve attaches, and any relevant documents created thereafter. (*Zubulake*, 220 FRD at 218). Failure to take reasonable measures to preserve evidence pending the completion of the litigation can result in evidentiary, monetary, issue, contempt, or even terminating sanctions being imposed against a public agency. (See Evid. Code § 413; Cal. Code Civ. Proc. § 2031.060(i); *Cedars-Sinai Med. Ctr*., 18 C4th at 11-12; *Williamson v. Super. Ct.* (1978) 21 Cal. 3d 829, 836 ("if [defendant] fails to produce evidence that would naturally have been produced he must take the risk that the trier of fact will infer, and properly so, that the evidence, had it been produced, would have been adverse."); *People v. Zamora* (1980) 28 Cal. 3d 88, 95). This is particularly true since Petitioners sent the City a letter on July 18, 2012, advising the City and its staff "not to destroy, conceal or alter any information or documents

F. The City Has Violated Government Code §34090 By Destroying Documents in Less than Two Years, and by Maintaining a Policy Allowing Such Document Destruction.

The City is required to retain records for a minimum of two (2) years under the Gov. Code. Gov. Code § 34090(c)-34090.8). Gov. Code § 34090 provides as follows:

> Unless otherwise provided by law, with the approval of the legislative body by resolution and the written consent of the city attorney the head of a city department may destroy any city record, document, instrument, book or paper, under his charge, without making a copy thereof, after the same is no longer required. This section does not authorize the destruction of:
> (c) Records required to be kept by statute
> (d) Records less than two years old

Under the Government Code, the City was required to retain its emails for 2 years, and the emails destroyed prior to then are "records illegally destroyed" even if the City permitted such destruction under its retention policies. *People v. Zamora* (1980) 28 Cal.3d 88, 95. Gov. Code § 34090 also requires the City to retain all "records required to be kept by statute."[1] Here CEQA §21167.6(e), required Rec and Park to maintain records on that project and produce them in the administrative record to decide Petitioners' claims.

Mr. Ginsberg and Ms. Ballard have admitted in testimony to destroying governmental documents that were less than two years old. This is a violation of Section 34090.

Rec and Park maintains a policy entitled Record Retention and Destruction Policy ("Record Retention Policy"). RJN, Exh. B. The Record Retention Policy applies to "all records and documents, regardless of physical form or characteristics, which have been made or received by the Recreation and Park Department in connection with the transaction of public business." The Record Retention Policy designates four categories of documents: Category 1: Permanent Retention, Category 2: Current Records, Category 3: Storage Records, Category 4: No Retention Required. *Id*. at pp. 1-2. As part of its Record Retention Policy, the City also maintains a policy entitled "Record Retention and Destruction Schedule," which sets specific limitations on premature destruction of records. RJN, Exh. C.

The Record Retention Policy expressly allows the destruction of certain governmental documents. It provides as follows:

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referring or relating to the Beach Chalet Project." AR 11420-23. The letter put the City on notice that litigation was anticipated and that any document destruction could result in discovery sanctions, including terminating sanctions.

[1] Gov. Code § 6252(e) defines "Public records" to include "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." Gov. Code § 6252(g) defines "Writing" to specifically include email.

> Category 4: No Retention Required. Documents and other materials that are not "records" as defined by Administrative Code section 8.1 need not be retained unless otherwise specified by local law. Documents and other materials (including originals and duplicates) that are not otherwise required to be retained, are not necessary to the functioning or continuity of the Department and which have no legal significance may be destroyed when no longer needed. Examples include materials and documents generated for the convenience of the person generating them, draft documents (other than draft of agreements subject to disclosure pursuant to Administrative Code Section 67.24(a)) which have been superseded by subsequent versions, or rendered moot by departmental action, and duplicate copies of records that are no longer needed. Specific examples include calendars, telephone message slips, miscellaneous correspondence not requiring follow-up or departmental action, notepads, e-mails that do not contain information required to be retained under this policy, and chronological files. With limited exceptions, no specific retention requirements are assigned to documents within this category. Instead, ***it is up to the originator or recipient to determine when the documents business utility has ended***. RJN, Exh. B, p. 2 (emphasis added).

Category 4 is the exception that swallows the rule. It allows city staff to decide unilaterally whether to destroy governmental documents and to determine unfettered from any review whether a particular document is "not necessary to the functioning or continuity of the Department" or has "legal significance." The testimony of Mr. Ginsberg and Ms. Ballard displays how this exception operates to allow massive document destruction. Ms. Ballard testified that she immediately deletes all of her outgoing email, no matter how important. Mr. Ginsberg regularly deletes the email from his inbox. It is simply not credible to believe that all of a staff members' email is not legally significant.

Category 4 is plainly in violation of Government Code §34090, which requires government to retain all documents for a minimum of two years. The City has violated its mandatory duty to maintain records under both the Government Code. Petitioners request a writ of mandate requiring the City to comply with Government Code §34090 and setting aside the City's illegal document destruction policy.

G. The City Has Violated The Public Records Act.

By refusing to produce correspondence and emails to and from members of the Board of Supervisors related to the Beach Chalet Project, the City has violated the California Public Records Act (PRA or "Act"). The PRA, Gov. Code §§ 6250-6277, is the statutory scheme that provides for the disclosure of public records held by public agencies. In enacting the PRA, the Legislature declared that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." Gov. Code § 6250. The Act's objective is to increase freedom of information, and is designed to give the public access to information in possession of public agencies. *Los Angeles Police Dept. v. Super. Ct.* (1977) 65 Cal. App. 3d 661, 668. "As the result of an initiative

measure adopted by the voters in 2004, this principle now is enshrined in the state Constitution: 'The people have the right of access to information concerning the conduct of the people's business, and, therefore,…the writings of public officials and agencies shall be open to public scrutiny.'" *Comm'n on Peace Officer Stds. v. Super. Ct* (2007) 42 Cal. 4th 278, 288, citing Cal. Const., art. I, § 3, subd. (b)(1).

Under the Act, public records are open to inspection "at all times during the office hours of the state or local agency and every person has a right to inspect any public record, except as expressly provided." Gov. Code § 6253(a). "Public records" include "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." Gov. Code § 6252(e). Under the Act, "writing" means "any handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by ***electronic mail*** or facsimile, and every other means of recording upon any tangible thing any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored. Gov. Code § 6252(g) (emphasis added).

An agency must justify withholding any record by demonstrating the record is expressly exempt under the Act, or that on the facts of a particular case the public interest in nondisclosure clearly outweighs the public interest served by disclosure. Gov. Code § 6255. Further, any reasonably segregable portion of a record must be available for inspection by any person requesting the record after redaction of portions that are exempted by law. Gov. Code § 6253(a). "This definition is intended to cover every conceivable kind of record that is involved in the governmental process and will pertain to any new form of record-keeping instrument as it is developed. Only purely personal information unrelated to 'the conduct of the public's business' could be considered exempt from this definition." *Commission on Peace Officer Standards & Training v. Superior Court* (2007) 42 Cal. 4th 278, 288 fn3. The City must respond to Public Records Act requests within ten days. Gov. Code § 6253(c). No extension to respond to a PRA request may be for more than fourteen (14) days. Gov. Code § 6253(c).

On October 24, 2012. Petitioners sent a Public Records Act request to the City's records custodian (Decl. Drury, Exh. B) requesting, inter alia:

> (3) All staff reports and related documents prepared by the City and written testimony or documents submitted by any person relevant to any findings or statement of overriding considerations adopted by the agency pursuant to CEQA.
> (6) All written comments received in response to, or in connection with, environmental documents prepared for the Project, including responses to the notice of preparation.
> (7) All written evidence or correspondence submitted to, or transferred from, the City with respect to compliance with CEQA or with respect to the Project.

(10) Any other written materials relevant to the City's compliance with CEQA or to its decision on the merits of the Project, including the initial study, any drafts of any environmental document, or portions thereof, that have been released for public review, and copies of studies or other documents relied upon in any environmental document prepared for the Project and either made available to the public during the public review period or included in the public agency's files on the Project, and all internal agency communications, including staff notes and memoranda related to the Project or to compliance with CEQA.

Letters and emails sent to and from members of the Board of Supervisors concerning the Beach Chalet Project clearly fall within scope of Petitioners PRA request. The City has refused to produce these documents. These documents are not exempt from disclosure under any exclusions or exceptions to the Public Records Act. Therefore the City has violated the PRA.

The City may argue that certain of the requested documents are subject to the deliberative process privilege or attorney client privilege. However, the City would still have a duty to produce the documents that are not subject to these privileges and cannot claim a blanket exclusion for all documents. Further, if the City claims an exclusion, it bears the burden to demonstrate that an exemption applies for each documents withheld. It has not even attempted to make this showing. *Lodi*, 205 Cal.App.4th at 305-6 ("Not every disclosure which hampers the deliberative process implicates the deliberative process privilege. Only if the public interest in nondisclosure clearly outweighs the public interest in disclosure does the deliberative process privilege spring into existence. The burden is on the [one claiming the privilege] to establish the conditions for creation of the privilege.").

The City is in violation of the PRA, and should be ordered to produce the requested BOS documents to Petitioners.

V. CONCLUSION

For the foregoing reasons, Petitioners respectfully ask this Court to issue the requested Writ of Mandate.

July 8, 2013

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AND THE ENVIRONMENT, ANN CLARK, and
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THE SIERRA CLUB

PROOF OF SERVICE

I, Toyer Grear, declare as follows:

I am a resident of the State of California, and employed in Oakland, California. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 410 12th Street, Suite 250, Oakland, CA 94607.

On July 8, 2013, I served a copy of the foregoing document(s) entitled:

PETITIONERS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF MANDATE

on the following interested parties in the above referenced case by: 1) transmitting by electronic mail to the email addresses below; and 2) placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Oakland, California addressed as set forth below:

Jim Emery, Victoria Wong, Marlena Byrne Deputy City Attorneys City and County of San Francisco City Hall, Room 234 1 Dr. Carlton B. Goodlett Place San Francisco, CA 94102 Email: Jim.Emery@sfgov.org; Victoria.Wong@sfgov.org; Marlena.Byrne@sfgov.org Counsel for Respondents and Real Parties in Interest	G. Scott Emblidge MOSCONE EMBLIDGE SATER & OTIS LLP 220 Montgomery St., Suite 2100 San Francisco, CA 94014 Tel: (415)362-3599; Fax: (415)362-2006 Email: emblidge@mosconelaw.com Counsel for Intervenor

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed July 8, 2013 at Oakland, California.

Toyer Grear