Case No. D082360

No Fee Required Pursuant to
Government Code § 6103

COURT OF APPEAL FOR THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION ONE

CORONADO CITIZENS FOR TRANSPARENT GOVERNMENT;
Petitioner and Respondent;

v.

CITY OF CORONADO;
Defendant and Appellant.

Appeal from the May 1, 2023 Judgment After Trial Court Hearing of the
San Diego Superior Court, Hon. Katherine A. Bacal, Dept. 69
Case No. 37-2020-00044167-CU-TT-CTL

APPLICATION OF THE LEAGUE OF CALIFORNIA CITIES AND THE CALIFORNIA STATE ASSOCIATION OF COUNTIES FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANT AND APPELLANT CITY OF CORONADO; [PROPOSED] AMICUS CURIAE BRIEF

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APPLICATION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANT AND APPELLANT CITY OF CORONADO

Pursuant to Rule 8.200, subdivision (c), of the California Rules of Court, the Applicants, League of California Cities ("Cal Cities") and California State Association of Counties (CSAC), respectfully request leave to file an Amicus Curiae brief ("Brief") in this proceeding in support of Defendant and Appellant, City of Coronado ("City").

I. AUTHORSHIP AND FUNDING

This Brief was drafted by Sabrina V. Teller and Louisa I. Rogers of Remy Moose Manley, LLP on behalf of Cal Cities and CSAC. No party nor counsel for a party in the pending case authored the Brief in whole or in part, or made any monetary contribution intended to fund its preparation or submission.

II. STATEMENT OF INTEREST

Cal Cities is an association of 475 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. Cal Cities is advised by its Legal Advocacy Committee, comprised of 25 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

CSAC is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Committee

monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

III. ISSUES ON WHICH AMICI CURIAE SEEK TO ASSIST THE COURT OF APPEAL

This case raises important issues under the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.). In particular, it involves the burden that a CEQA petitioner must overcome to successfully challenge a lead agency's decision to adopt a mitigated negative declaration (MND) for a project that the agency determines will not result in any significant unavoidable impacts.

CEQA authorizes and directs agencies to prepare an MND, rather than a more comprehensive environmental impact report (EIR), for certain projects. Petitioners seeking to compel agencies to set aside an MND and instead prepare an EIR generally face a "low threshold" for requiring further environmental review; however, CEQA still requires such petitioners to prove that there is substantial evidence in the record demonstrating that the project at issue may result in significant environmental impacts that will not be adequately mitigated or avoided. "Low threshold" or not, CEQA imposes various requirements for the types of information that can constitute "substantial evidence," and these statutory requirements may not be disregarded when a petitioner challenges an MND.

Here, the trial court granted the CEQA petition to compel the City to set aside an MND and prepare an EIR instead. In doing so, the trial court failed to properly apply the applicable standard of review and disregarded the legal definition of "substantial evidence." The accompanying Brief explains the trial court's errors and explains why the trial court's decision threatens to undermine both the statutory scheme regarding the preparation of MNDs and the long-established rules regarding the kinds of information

that are appropriate to consider in an environmental analysis. If upheld, the trial court's decision threatens to significantly constrain lead agencies' statutory authority to adopt MNDs, impede local projects by heightening the required level of environmental review beyond what is required by CEQA, and waste judicial resources by rendering MNDs nearly indefensible in CEQA litigation.

Cal Cities and CSAC believe that this court may benefit from hearing the perspective of their members, as lead agencies under CEQA who frequently deal with these important issues, and have prepared the accompanying Brief to complement, but not duplicate, the arguments submitted by the parties to this case. Cal Cities and CSAC therefore respectfully request that this court order the accompanying Brief to be filed.

Respectfully submitted,

Dated: February 29, 2024

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TABLE OF CONTENTS

[PROPOSED] AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANT AND APPELLANT CITY OF CORONADO 9

I. INTRODUCTION 9

II. ARGUMENT 10

A. CCTG's lay opinion regarding technical information is not "substantial evidence" under CEQA. 10

B. CCTG fails to demonstrate that mitigation measures and regulatory protections may be insufficient to avoid or mitigate potential impacts. .. 15

C. There is no substantial evidence to suggest that the Project, which has been designed to avoid interference with views and to be visually unobtrusive to onlookers, may result in a significant aesthetic impact.... 21

III. CONCLUSION 29

TABLE OF AUTHORITIES

Page(s)

Cases

Banker's Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego
(2006) 139 Cal.App.4th 249 ..... 25, 28

Berkeley Hillside Preservation v. City of Berkeley
(2015) 60 Cal.4th 1086 ..... 17, 21, 25

Bowman v. City of Berkeley
(2004) 122 Cal.App.4th 572 ..... 22, 28

Center for Biological Diversity v. Department of Fish & Wildlife
(2015) 62 Cal.4th 204 29

Citizen Action To Serve All Students v. Thornley
(1990) 222 Cal.App.3d 748 13

Citizens' Com. to Save Our Village v. City of Claremont
(1995) 37 Cal.App.4th 1157 ..... 23, 24

Citizens for Responsible & Open Government v. City of Grand Terrace
(2008) 160 Cal.App.4th 1323 ..... passim

Clover Valley Foundation v. City of Rocklin
(2011) 197 Cal.App.4th 200 22

Covington v. Great Basin Unified Air Pollution Control Dist.
(2019) 43 Cal.App.5th 867 ..... 16, 19

Gentry v. City of Murrieta
(1995) 36 Cal.App.4th 1359 ..... 19, 20, 27

Georgetown Preservation Society v. County of El Dorado
(2018) 30 Cal.App.5th 358 ..... 21, 22, 28

Joshua Tree Downtown Business Alliance v. County of San Bernardino
(2016) 1 Cal.App.5th 677 ..... passim

Leonoff v. Monterey County Bd. of Supervisors
(1990) 222 Cal.App.3d 1337 16

Lucas Valley Homeowners Assn. v. County of Marin
(1991) 233 Cal.App.3d 130 ..... 17, 25

McCann v. City of San Diego
(2021) 70 Cal.App.5th 51 ..... 11, 27, 28

Newtown Preservation Society v. County of El Dorado
(2021) 65 Cal.App.5th 771 ..... 14, 23, 24

Oakland Heritage Alliance v. City of Oakland
(2011) 195 Cal.App.4th 884 16

Pocket Protectors v. City of Sacramento
(2004) 124 Cal.App.4th 903 ..... 23, 26

Porterville Citizens for Responsible Hillside Development v. City of Porterville
(2007) 157 Cal.App.4th 885 ..... 28, 1, 2

Protect Niles v. City of Fremont
(2018) 25 Cal.App.5th 1129 ..... passim

San Francisco Beautiful v. City and County of San Francisco
(2014) 226 Cal.App.4th 1012 ..... passim

Score Family Fun Center, Inc. v. County of San Diego
(1990) 225 Cal.App.3d 1217, fn. 2 24

Sundstrom v. County of Mendocino
(1988) 202 Cal.App.3d 296 ..... passim

Taxpayers for Accountable School Bond Spending v. San Diego Unified School Dist.
(2013) 215 Cal.App.4th 1013, fn. 14 ..... passim

Tiburon Open Space Committee v. County of Marin
(2022) 78 Cal.App.5th 700 ..... 17, 19, 29

Tracy First v. City of Tracy
(2009) 177 Cal.App.4th 912 16

Ukiah Citizens for Safety First v. City of Ukiah
(2016) 248 Cal.App.4th 256 11

World Business Academy v. California State Lands Commission
(2018) 24 Cal.App.5th 476 13

Statutes

Pub. Resources Code, § 21000 ..... 3, 9
Pub. Resources Code, § 21060.5 21
Pub. Resources Code, § 21068 21
Pub. Resources Code, § 21071 27
Pub. Resources Code, § 21080, subd. (c)(1) 15
Pub. Resources Code, § 21080, subd. (c)(2) 18, 20
Pub. Resources Code, § 21080, subd. (e) 11, 20
Pub. Resources Code, § 21080, subd. (e)(1) 22
Pub. Resources Code, §§ 21080, subd. (e)(2) 13
Pub. Resources Code, § 21082.2, subd. (c) 13

Rules

California Rules of Court, rule 8.204, subdivision (c) 31

[PROPOSED] AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANT AND APPELLANT CITY OF CORONADO

I. INTRODUCTION

Under the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.) and the CEQA Guidelines (Cal. Code Regs., tit. 14, div. 6, ch. 3), lead agencies are authorized and directed to prepare a mitigated negative declaration (MND), rather than an environmental impact report (EIR), for certain projects with potentially significant environmental impacts that will be adequately mitigated.

Here, the City of Coronado ("City") adopted an MND for the proposed Golf Course Water Recycling and Turf Care Facility Project ("Project"). The City concluded that the Project, which would comply with various protective environmental regulations and project design features and include a number of mitigation measures, would not result in any significant, unavoidable environmental impacts. Petitioner, Coronado Citizens for Transparent Government (CCTG), disagrees. Relevant here, CCTG brought this action to compel the City to set aside its MND and prepare an EIR for the Project, asserting that substantial evidence in the record demonstrates that the Project may result in significant geological, seismic, biological, and aesthetic impacts. The trial court agreed with CCTG that the record contains substantial evidence supporting a fair argument that the Project may result in these impacts.

Amici contend that the trial court's decision was flawed in three significant ways. First, the trial court improperly allowed CCTG to rely on non-expert interpretations of highly technical information in support of its fair argument that the Project may have significant geological, seismic, and biological impacts. Second, the trial court improperly excused CCTG's burden of demonstrating the potential inadequacy of mitigation measures and environmental regulations identified to mitigate or avoid the Project's

potentially significant impacts. Third, the trial court improperly concluded that the Project could have significant aesthetic impacts, despite the lack of any credible substantial evidence supporting a fair argument of such impacts. If affirmed by this court, the trial court's flawed decision threatens to significantly impair the ability of Amici's members to perform their duties as lead agencies under CEQA. Thus, as explained more fully below, Amici request that this court reverse the trial court's order granting CCTG's CEQA petition.

II. ARGUMENT

A. CCTG's lay opinion regarding technical information is not "substantial evidence" under CEQA.

Courts review an agency's decision to adopt an MND using the "fair argument" test (e.g., *Citizens for Responsible & Open Government v. City of Grand Terrace* (2008) 160 Cal.App.4th 1323, 1332 (*Citizens*)), which presents a "'low threshold' … for requiring the preparation of an EIR" (e.g., *Protect Niles v. City of Fremont* (2018) 25 Cal.App.5th 1129, 1139 (*Protect Niles*)). To successfully challenge the adoption of an MND, a petitioner must identify substantial evidence in the record demonstrating not only that there is "a fair argument of significant environmental impact," but also that "the proposed mitigation measures are inadequate" to avoid or mitigate any potential significant impacts. (*Citizens*, *supra*, at p. 1333.) So long as substantial evidence in the record supports a "fair argument that a project may have a significant nonmitigable effect on the environment," an MND is not appropriate, even where there is "other substantial evidence that the project will not have a significant effect." (*Protect Niles*, *supra*, at p. 1139.)

While the appropriate level of judicial scrutiny varies between fair argument review and substantial evidence review (which applies to an EIR's factual conclusions and some other aspects of an EIR), the legal

definition of "substantial evidence" is the same for both standards of review. (Compare, e.g., *Ukiah Citizens for Safety First v. City of Ukiah* (2016) 248 Cal.App.4th 256, 261 [defining "substantial evidence" supporting an EIR] with *McCann v. City of San Diego* (2021) 70 Cal.App.5th 51, 87 (*McCann*) [defining "substantial evidence" supporting a fair argument].) Specifically, for purposes of CEQA, "substantial evidence includes fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact"; it does not include "argument, speculation, unsubstantiated opinion or narrative, evidence that is clearly inaccurate or erroneous, or evidence of social or economic impacts that do not contribute to, or are not caused by, physical impacts on the environment." (Pub. Resources Code, § 21080, subd. (e); accord *id.*, § 21082.2, subd. (c).) Moreover, substantial evidence does not include "[c]omplaints, fears, and suspicions about a project," "[i]nterpretation of technical or scientific information … by members of the public," or "dire predictions by nonexperts" in the absence of "a specific factual foundation in the record." (*Joshua Tree Downtown Business Alliance v. County of San Bernardino* (2016) 1 Cal.App.5th 677, 690–691 (*Joshua Tree*).)

The parties to this litigation agree that the fair argument test applies to CCTG's challenge to the City's decision to adopt the MND for the Project. (Opening Brief, p. 19; Respondent's Brief, p. 37.) As noted above, to prevail under this test, CCTG must prove that the record contains *substantial evidence* demonstrating that (1) the Project may have significant environmental impacts and (2) any features or measures intended to avoid or mitigate such impacts may not be adequate. (*Citizens*, *supra*, 160 Cal.App.4th at p. 1333.)

CCTG, however, conflates CEQA's statutory requirements for what can constitute "substantial evidence" with the deferential substantial evidence standard of review applicable to challenges to an EIR and

effectively dismisses both as inapplicable "[i]n the MND context." (See Respondent's Brief, p. 39 [dismissing any case law that interprets statutory definition of "substantial evidence" in situations that "do not involve a decision to adopt an MND or application of the fair-argument standard"]; *id.* at pp. 49–50 [arguing, incorrectly that the City "confuse[d] what constitutes 'substantial evidence' and what constitutes a 'fair argument'" by challenging CCTG's "comments during the administrative process as being insufficient to constitute substantial evidence"].) CCTG's proposed interpretation of "substantial evidence" "[i]n the MND context," which was adopted by the trial court, is legally flawed and, if adopted by this court, threatens to diminish the already "low threshold" presented by the fair argument test into a virtually nonexistent one.

With respect to CCTG' assertion that the Project would have significant geological, seismic, and biological impacts,[1] CCTG's fundamental misunderstanding about what properly constitutes "substantial evidence" — in *any* CEQA context — is reflected in the mistaken claim that the various record materials cited in CCTG's brief meet the legal requirements for substantial evidence.

All of CCTG's purported evidence regarding the Project's potential geological, seismic, and biological impacts involve "technical or scientific information [that] requires an expert evaluation." (*Joshua Tree*, *supra*, 1 Cal.App.5th at p. 690.) Accordingly, "[t]estimony by members of the public on [these] issues does not qualify as substantial evidence." (*Id.* at pp. 690–691.) For example, CCTG cites various excerpts from a geotechnical

[1] CCTG's argument that "the record contains substantial evidence of a fair argument that the Project would have significant visual and aesthetic impacts" (see Respondent's Brief, pp. 61–67) is addressed separately in Part II.C, below.

report prepared for the Project by a registered geologist. (Respondent's Brief, pp. 41–43.) This report acknowledges:

> Geotechnical engineering and geologic sciences are characterized by uncertainty. Professional judgments and opinions presented in this report are based partly on our evaluation and analysis of the technical data gathered during our present study, partly on our understanding of the scope of the proposed project, and partly on our general experience in geotechnical engineering.

(AR 3:1070.) Similarly, CCTG cites the 2020 San Diego Earthquake Planning Scenario developed by the Earthquake Engineering Research Institute (EERI) — "a multidisciplinary team of geoscience, structural engineering, and social science professionals and researchers." (Respondent's Brief, pp. 43–44; 5 AA 45:1125.) CCTG concedes that none of its members "held themselves out as experts" on geotechnical issues; nevertheless, it argues, without supporting authority,[2] that its members were still "[capable] of reviewing and assessing the evidence in the record (*i.e.*, reports prepared by experts)." (Respondent's Brief, p. 53.) CCTG's position is contrary to established statutory and case law. Its members' nonexpert interpretations of technical reports are not substantial evidence.

Rather, much of CCTG's reliance on expert reports amounts to nothing more than speculative or "clearly inaccurate or erroneous" interpretations of technical information. (See Pub. Resources Code, §§ 21080, subd. (e)(2), 21082.2, subd. (c); *Joshua Tree*, *supra*, 1 Cal.App.5th

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[2] CCTG cites two cases in support of the proposition that "[n]on-expert members of the public are fully capable of (and not barred from) raising concerns related to seismic hazards." (Respondent's Brief, p. 53, citing *Citizen Action To Serve All Students v. Thornley* (1990) 222 Cal.App.3d 748, 757, and *World Business Academy v. California State Lands Commission* (2018) 24 Cal.App.5th 476, 507.) CCTG's citation to these cases is perplexing, as the court found in both cases that the petitioners' non-expert concerns about seismic impacts did not constitute substantial evidence of a fair argument.

at pp. 690–691.) For example, CCTG argues that the EERI report provides substantial evidence that the Project may have a significant environmental impact because, in CCTG's non-expert opinion, the report suggests that "[t]he already high risks of a Rose Canyon Fault earthquake on existing wastewater infrastructure will be expanded to this area and exacerbated by the Project." (Respondent's Brief, p. 44.) But the EERI report specifically identifies risks to *existing* infrastructure constructed "before recognition of the seismic hazards posed by the Rose Canyon Fault Zone" and "before modern seismic design provisions were in place." (5 AA 45:1126, 1130; see also 5 AA 45:1135 [the EERI report identifies "baseline vulnerabilities" but does not evaluate *new* development].) The EERI report does *not* in any way suggest that new infrastructure that complies with "modern seismic design" requirements could expand or exacerbate the risks associated with outdated vulnerable infrastructure. (See, e.g., AR 3:632 [MND describing regulatory standards developed "to safeguard the public health, safety, and general welfare through structural strength, means of egress, and general stability" that apply to the Project].) CCTG's suggestion that new Project infrastructure might fail and release raw sewage during a seismic event is not supported by substantial evidence; this suggestion goes far beyond the proper scope of the EERI report's findings and is nothing more than mere speculation. (See *Newtown Preservation Society v. County of El Dorado* (2021) 65 Cal.App.5th 771, 789–791 (*Newtown*) [without additional factual foundation to support speculation about future impacts, information about existing hazards did not constitute substantial evidence of potential environmental impacts].)

CCTG attempts to compensate for the lack of substantial evidence by insisting that the fair argument standard does not require "[definitive proof] that a particular environmental impact would in fact occur" and that the "'low threshold' does not require 'scientifically irrefutable' proof."

(Respondent's Brief, p. 54.) As noted above, CCTG is partially correct that the fair argument standard does not require a petitioner to prove that an environmental impact *will* occur. But this does not excuse CCTG's failure to provide *any* substantial evidence supporting its fair argument. Holding otherwise would undermine CEQA's statutory scheme and effectively eliminate the already "low threshold" presented by the fair argument test.

B. CCTG fails to demonstrate that mitigation measures and regulatory protections may be insufficient to avoid or mitigate potential impacts.

The type of environmental documentation that CEQA requires for a non-exempt project generally depends on the likelihood of the project to have significant non-mitigatable environmental impacts. First, if there is no substantial evidence that the project may have a significant impact, a negative declaration is appropriate. (Pub. Resources Code, § 21080, subd. (c)(1).) Second, if the project may have potentially significant impacts, but measures have been adopted to avoid or mitigate any potential impacts, an MND is appropriate so long as there is no substantial evidence that the project, *including such measures*, may still have a significant environmental impact. (*Id.*, subd. (c)(2).) Third, if there is substantial evidence that the project may have significant, non-mitigatable environmental impacts, an EIR is required. (*Id.*, subd. (d); *Protect Niles*, *supra*, 25 Cal.App.5th at p. 1139.)

This statutory scheme demonstrates that the Legislature, in authorizing lead agencies to prepare and adopt MNDs, did not intend for an EIR to be required in every instance where a project may have potentially significant, *but mitigatable*, environmental impacts. Accordingly, as noted above, CEQA petitioners challenging MNDs must specifically "demonstrate by substantial evidence that [a project's] mitigation measures are inadequate and that the project as … mitigated may have a significant

adverse effect on the environment." (*Citizens*, *supra*, 160 Cal.App.4th at p. 1333.) To require otherwise would disregard the statutory distinction between negative declarations and MNDs, rendering the latter obsolete.

In some cases, MNDs impose mitigation measures "requiring compliance with environmental regulations." (*Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 308 (*Sundstrom*).) So long as it is reasonable to expect compliance, such mitigation measures are "common and reasonable." (*Ibid.*) In other cases,[3] agencies "may rely on generally applicable regulations to conclude an environmental impact will not be significant and therefore does not require mitigation." (*San Francisco Beautiful v. City and County of San Francisco* (2014) 226 Cal.App.4th 1012, 1033 (*San Francisco Beautiful*).) This is unsurprising, as environmental regulations and standards are generally developed by agencies with extensive relevant expertise specifically to prevent or minimize undesirable environmental effects. (See, e.g., *Covington v. Great Basin Unified Air Pollution Control Dist.* (2019) 43 Cal.App.5th 867, 875 (*Covington*) [requirement to comply with protective regulatory standards supports a finding that a project's impacts will be avoided or mitigated]; *Oakland Heritage Alliance v. City of Oakland* (2011) 195 Cal.App.4th 884, 904, 906–907 [discussing building standards "intended to promote structural safety in the event of an earthquake"]; *id.* at p. 910 [impacts would be mitigated given "the rigorous investigation process required under the engineering standard of care, compliance with state laws and local ordinances, and regulatory agency technical reviews"]; *Tracy First v.*

[3] Whether regulatory compliance has been specifically adopted as a mitigation measure, or simply forms the basis for the determination that a project's impacts will not require mitigation, is immaterial. (*Leonoff v. Monterey County Bd. of Supervisors* (1990) 222 Cal.App.3d 1337, 1357 ["[p]resumably the project is subject to applicable laws whether or not [they are identified as project mitigation]"].)

City of Tracy (2009) 177 Cal.App.4th 912, 933–934 [discussing energy standards developed to "reduce the wasteful, inefficient, and unnecessary consumption of energy"]; *Tiburon Open Space Committee v. County of Marin* (2022) 78 Cal.App.5th 700, 774 (*Tiburon*) [discussing expertise of local water and fire authorities to "formulat[e] a bona fide and effective water supply plan" and "know [and require] what is necessary for the protection of the community," respectively].)

Accordingly, where an MND relies on mitigation measures and expected compliance with environmental regulations to avoid or mitigate a project's potentially significant environmental impacts, a project opponent may not force an EIR to be prepared by simply ignoring such measures and regulations and making a fair argument that, in their absence, the project may have significant environmental impacts. (See *Citizens*, *supra*, 160 Cal.App.4th at p. 1333; cf. *Hilltop Group, Inc. v. County of San Diego* (Feb. 16, 2024, D081124) __ Cal.App.5th __ (*Hilltop*) [2024 WL 653387, *15] [noting inadequacy of public commentary regarding a project's potential impacts that "fail[s] to address whether the purported … impacts will be substantially mitigated"]; *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1120 (*Berkeley Hillside*) [as a matter of law, opinions regarding the impacts of activities beyond the scope of those allowed under the proposed project are not substantial evidence]; *Lucas Valley Homeowners Assn. v. County of Marin* (1991) 233 Cal.App.3d 130, 162–164 (*Lucas*) ["the focus must be the use, as approved"].) Instead, CEQA imposes the burden on the project opponent to "demonstrate by substantial evidence that the proposed mitigation measures are inadequate and that the project as revised and/or mitigated may have a significant adverse effect on the environment." (*Citizens*, *supra*, 160 Cal.App.4th at p. 1333.)

In this case, the MND includes mitigation measures to avoid or mitigate any potentially significant environmental impacts. Additionally, in response to comments on the Draft MND, the City explained and revised the MND to note that the Project will be required to comply with a number of applicable laws and regulations intended to protect the environment. (E.g., AR 3:592–593, 632–633, 635–636, 654–655, 1189.) As explained above, this approach is authorized under CEQA and the applicable case law. (Pub. Resources Code, § 21080, subd. (c)(2); *Sundstrom*, *supra*, 202 Cal.App.3d at p. 308.) CCTG, however, all but ignores the Project's mitigation measures and the applicable regulatory requirements that the City determined would avoid or mitigate the Project's potentially significant environmental impacts. Moreover, CCTG's arguments suggest that the City has no authority to rely on features, regulations, or measures to avoid or mitigate any potentially significant impacts. CCTG's position (shared by the trial court) is flawed and undermines the authority and duties of lead agencies under CEQA.

For example, CCTG describes the various potential geologic hazards identified in the City's geotechnical report, but conspicuously omits the specific recommendations and regulatory requirements for avoiding or mitigating the potential impacts associated with each of these hazards. (Compare Respondent's Brief, pp. 41–43, with AR 3:1040 [liquefaction mitigation], 1043 [soil corrosivity mitigation], 1052 [differential settlement mitigation].) The City adopted all of the geotechnical report recommendations to address the specific issues now raised by CCTG. (AR 3:630–638, 3:1034–1062, 12:1665.) By ignoring these recommendations and requirements entirely, CCTG fails to meet its burden to "demonstrate by substantial evidence that [they] are inadequate and that the [P]roject as revised and/or mitigated may have a significant adverse effect on the environment." (*Citizens*, *supra*, 160 Cal.App.4th at p. 1333.)

Similarly, in response to the City's explanation that compliance with protective environmental regulations would avoid or mitigate potentially significant impacts, CCTG made no effort to demonstrate that the applicable regulations could be ineffective at avoiding or mitigating the Project's environmental impacts or that it would be unreasonable to expect compliance. (See, e.g., *Sundstrom*, *supra*, 202 Cal.App.3d at pp. 308–309 [relying on regulatory compliance is "beyond criticism" absent any evidence of inadequacy or anticipated non-compliance]; *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1394 (*Gentry*) [distinguishing between regulatory standards where compliance was likely (no fair argument) and those where substantial evidence suggested there was "no reason to expect compliance" and that a significant impact could occur as a result (fair argument)]; *Tiburon*, *supra*, 78 Cal.App.5th at pp. 773–774 [it "ignores logic and defies common sense" to simply presume non-compliance with regulatory requirements]; *id.* at p. 774 [in the absence of any evidence, it is improper to assume "bad faith, if not actual incompetence, by responsible public agencies"]; *Covington*, *supra*, 43 Cal.App.5th at pp. 874–877 [where project is required and reasonably anticipated to comply with applicable regulations, evidence of impact that would result from non-compliance is "immaterial"]; see also Evid. Code, § 664 [presumption that an agency regularly performs its official duties].)

Instead, CCTG merely concluded, without supporting authority, that compliance with these protective regulations "does not negate [the] fair argument" of significant Project impacts. (Respondent's Brief, pp. 49, 58–59; see also 9 AA 95:2139 [trial court ignoring regulatory requirements and stating that City failed to "show no substantial evidence exists that the Project may have a significant effect on the environment"].) But it is not the City's job to "negate" a fair argument of an avoidable or mitigable environmental impact (for which features or mitigation measures have

already been incorporated into the Project) by proving that the impact will indeed be avoided or mitigated. It is CCTG's job to demonstrate, with substantial evidence,[4] that the Project, *including features and measures to avoid or mitigate impacts*, may still have an environmental impact. (Pub. Resources Code, § 21080, subd. (c)(2); *Citizens*, *supra*, 160 Cal.App.4th at p. 1333; see also *Gentry*, *supra*, 36 Cal.App.4th at pp. 1410–1411 [evidence that "no on-site mitigation could be provided" for wildlife impact did not support a fair argument of a significant impact where adequate off-site mitigation had been identified]; *Sundstrom*, *supra*, 202 Cal.App.3d at pp. 308–309 [absent evidence to the contrary, negative declaration's reliance on air and water quality regulations to mitigate project impacts was "beyond criticism"].) CCTG has made no attempt to do so.

The application of the fair argument test proposed by CCTG and adopted by the trial court creates an impossible task for a lead agency seeking to defend its decision to adopt an MND. A lead agency may properly adopt an MND, *even where* "*[a]n initial study identifies potentially significant effects on the environment*," so long as the project includes measures to avoid or mitigate significant impacts and there is no substantial evidence that the project, *including such measures*, may have a significant environmental impact. (Pub. Resources Code, § 21080, subd. (c)(2).) In other words, *by definition*, a project for which an MND should be prepared involves "potentially significant effects on the environment." Under this statutory scheme, it cannot be enough for project opponents to simply point out potentially significant impacts, without also citing substantial evidence demonstrating that the project features and mitigation

[4] For the reasons discussed in Part II.A, above, to the extent that CCTG disagrees with the City's determination that the Project's impacts will be adequately avoided or mitigated, that disagreement, without more, does not constitute substantial evidence. (See Pub. Resources Code, §§ 21080, subd. (e), 21082.2, subd. (c); *Joshua Tree*, *supra*, 1 Cal.App.5th at pp. 690–691.)

measures identified to mitigate or avoid those impacts would be inadequate. Nor should project opponents be permitted to disregard protective environmental regulations without citing substantial evidence demonstrating either that they could be ineffective at avoiding or mitigating project impacts or that it would not be reasonable to expect compliance. Holding otherwise would effectively render MNDs legally indefensible, and CEQA's provisions authorizing their preparation meaningless. (Cf. *Berkeley Hillside*, *supra*, 60 Cal.4th at p. 1120 ["if a project opponent's opinion that *unapproved* activities may have a significant environmental effect constitutes fair argument, then it is doubtful that any project could survive challenge"].)

C. There is no substantial evidence to suggest that the Project, which has been designed to avoid interference with views and to be visually unobtrusive to onlookers, may result in a significant aesthetic impact.

Under CEQA, the "environment" includes "objects of … aesthetic significance." (Pub. Resources Code, § 21060.5.) Accordingly, a project's potential impact on its aesthetic surroundings is "a proper subject of CEQA environmental review." (*Protect Niles*, *supra*, 25 Cal.App.5th at p. 1141.) A potentially significant aesthetic impact is one that may result in an aesthetic change that is both *substantial* and *adverse*. (Pub. Resources Code, § 21068; see also CEQA Guidelines, App. G [sample aesthetic impact significance thresholds].)

While lay opinions are not substantial evidence of environmental impacts that require objective or highly technical assessments (e.g., geological, seismic, and biological impacts, discussed in Part II.A, above), lay opinions may sometimes provide substantial evidence regarding some kinds of potential aesthetic impacts. (*Georgetown Preservation Society v. County of El Dorado* (2018) 30 Cal.App.5th 358, 363 (*Georgetown*).)

Reliance on such opinion evidence concerning aesthetics, however, is subject to some very important limitations.

First, for lay opinions to constitute substantial evidence, they must be reasonable and based in fact; neither "vague notions of beauty or personal preference" nor "[u]nsubstantiated opinions, concerns, and suspicions about a project, though deeply felt" are substantial evidence. (See *Protect Niles*, *supra*, 25 Cal.App.5th at pp. 1139, 1147; Pub. Resources Code, § 21080, subd. (e)(1).) Specifically, opinion evidence must "rise to the level of fact-based evidence that the [project] will *substantially degrade* the existing visual character" of the project site. (*San Francisco Beautiful*, *supra*, 226 Cal.App.4th at p. 1030, emphasis added.) Evidence that the project will simply be *visible* to off-site observers does not, on its own, indicate a potentially significant environmental impact. (*Taxpayers for Accountable School Bond Spending v. San Diego Unified School Dist.* (2013) 215 Cal.App.4th 1013, 1041, fn. 14 (*Taxpayers*).)

Second, subjective aesthetic opinions from a small number of project neighbors do not constitute substantial evidence of a fair argument. (*Georgetown*, *supra*, 30 Cal.App.5th at p. 375, citing *Citizens*, *supra*, 160 Cal.App.4th at pp. 1337–1338 ["the environmental impact is not just obstruction of the views of a few adjacent homeowners"], *Clover Valley Foundation v. City of Rocklin* (2011) 197 Cal.App.4th 200, 243 ["individualized complaints regarding the aesthetic merit of a project" do not raise a "possibility of significant adverse environmental impact"], and *Taxpayers*, *supra*, 215 Cal.App.4th at p. 1042 [neighbors' complaints about a project's "bright lights and noise" were not "substantial evidence showing the lighting may have a significant effect on the environment"].) "To rule otherwise would mean that an EIR would be required [so long as] enough people could be marshaled to complain about how it will look." (Cf. *Bowman v. City of Berkeley* (2004) 122 Cal.App.4th 572, 592 (*Bowman*).)

Third, for lay opinions to constitute substantial evidence, they must be credible. Even under the fair argument standard, reviewing courts "must '"giv[e] [the lead agency] the benefit of [the] doubt on any legitimate, disputed issues of credibility."'" (*Newtown*, *supra*, 65 Cal.App.5th at p. 781, alterations in original.) Accordingly, "'[t]he lead agency has discretion to determine whether evidence offered by the citizens claiming a fair argument exists meets [CEQA's] definition of "substantial evidence"'" (*ibid.*), especially where the evidence involves "fundamentally local issue[s]" that the lead agency is "uniquely situated" to evaluate (see *Citizens' Com. to Save Our Village v. City of Claremont* (1995) 37 Cal.App.4th 1157, 1171 (*Claremont*)). A credibility determination depends, in part, on other "[e]vidence that rebuts, contradicts or diminishes the reliability or credibility" of evidence supporting a fair argument. (*Id.* at p. 1168.) In other words, the lead agency (and a reviewing court) may properly weigh other record evidence "in determining the preliminary issue of whether evidence is 'substantial' and thus deserving of consideration." (*Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 935 (*Pocket Protectors*) [explaining that this process "must not be confused with a weighing of some substantial evidence against other substantial evidence," which is not the function of an MND].)

Here, CCTG *concedes* that the Project renderings prepared for the MND "show very little change or obstruction of the Bay views." (Respondent's Brief, p. 63.) Relying on these renderings and other relevant evidence, the City reasonably concluded that the Project's aesthetic impacts would be less than significant. (See AR 3:583, 599–602, 695–707.) CCTG's disagreement with this conclusion is based on: (1) photographs of story poles at the Project site installed to delineate the proposed structures, allegedly "show[ing] that the Project would block the entire view of the Bay from certain vantage points," (2) public concerns that "parked trucks

and other vehicles" associated with the Project would be "visible from the Bayshore Bikeway," and (3) comments alleging that the Project would introduce structures and lighting at a site that currently has "no similar existing development." (Respondent's Brief, pp. 63–64.) As explained more fully below, none of CCTG's purported "substantial evidence to support a fair argument that the Project would have significant visual and aesthetic impacts" satisfies the requirements for substantial evidence. (See *id.* at pp. 61–68.)

CCTG asserts that the story pole photographs, unlike the City's renderings, reveal that the Project would impair views of the Bay. (Respondent's Brief, p. 63; see also AR 3:1276–1278.) These photographs do not constitute substantial evidence, however, because the City reasonably determined that they were not credible evidence of a fair argument of potential aesthetic impacts. (See *Newtown*, *supra*, 65 Cal.App.5th at p. 781.) Specifically, the City explained that the images did not accurately represent how the site "would be viewed by a naked eye human observer," due to CCTG's use of a telephoto lens. (AR 3:1199.) Moreover, the City explained that the photographs "convey[ed] a viewpoint immediately adjacent to the proposed structures" that "would not be publicly accessible" after construction of the Project. (*Ibid.*) As a result, the photographs were highly misleading and portrayed an unrealistic view of the Project. CCTG does not appear to dispute the factual basis of these credibility findings. (See Respondent's Brief, pp. 51, 66–67.) As the City is "uniquely situated" to assess the appropriateness of the vantage point from which the photographs were taken, given its familiarity with the local Project site and its surroundings, this court should defer to the City's finding. (*Claremont*, *supra*, 37 Cal.App.4th at p. 1171; cf. *Score Family Fun Center, Inc. v. County of San Diego* (1990) 225 Cal.App.3d 1217, 1219, fn. 2 [deference is appropriate where original fact-finder has

"superior position" to assess credibility, including through personal on-site observation].)

The credibility of CCTG's story pole photographs is further undermined by the visual renderings prepared for the Project. (Compare AR 3:1276–1278 with AR 3:699–707.) Although aesthetic values are often highly subjective, where an objective visual rendering has been prepared, the project's actual anticipated appearance is not reasonably up for much debate. (See *Banker's Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego* (2006) 139 Cal.App.4th 249, 280 (*Banker's Hill*) [no fair argument of a significant aesthetic impact where photographs in the record revealed that a project's visual setting would "not be impacted in any way that can be fairly described as 'significant' or 'substantial'"]; cf. *Hilltop*, *supra*, __ Cal.App.5th __ [2024 WL 653387, *19] [pointing out the discrepancy between reports prepared for the project and public opinions "not to reweigh the evidence," but to emphasize that the comments failed to "undermine the factual premises upon which the technical studies based their conclusions"]; *Berkeley Hillside*, *supra*, 60 Cal.4th at p. 1119 [fair argument "must be based on the proposed project as actually approved"]; *Lucas*, *supra*, 233 Cal.App.3d at p. 164 ["the focus must be the use, as approved," not what is "feared or anticipated"].) The visual renderings (and other information provided in the MND), illustrate that the Project has been designed to blend in with its surroundings and that landscaping would screen the new Project structures from view. Unlike these renderings, CCTG's photographs represent the Project in a manner that is misleading and deviates substantially from the Project's proposed design and anticipated appearance.[5] Because objective visual evidence in the record

[5] To the extent that CCTG is reviving an argument that the MND's description of the Project is inaccurate, this argument was rejected by the

demonstrates the unreliability of CCTG's photographs, the City reasonably determined that the photographs are not substantial evidence. (See *Pocket Protectors*, *supra*, 124 Cal.App.4th at p. 935.)

With respect to CCTG's reliance on comments that various parts of the Project would be visible to off-site observers, CCTG does not identify any factual support for the conclusion that such visibility would rise to the level of an aesthetic effect that is both substantial and adverse. (Respondent's Brief, pp. 18–19 [noting potential visibility of landscaped berm from residential street], 63–64 [visibility of parked vehicles from bikeway], 64 [new buildings and lights would be visible]; see also 9 AA 95:2140–2141 [trial court concluding that the landscaped berm, by itself could cause an aesthetic impact, and that the new lighting could also cause an impact because it is "proposed in an area that does not currently have lighting"].) In the absence of fact-based evidence that the Project may cause a *substantial* and *adverse* aesthetic change to the environment, these comments are not substantial evidence. (*San Francisco Beautiful*, *supra*, 226 Cal.App.4th at p. 1030; *Protect Niles*, *supra*, 25 Cal.App.5th at p. 1147 [distinguishing comments "solely based on ague notions of beauty or personal preference" from those factually "grounded in inconsistencies with the prevailing building heights and architectural styles" of the surrounding area]; see also *Taxpayers*, *supra*, 215 Cal.App.4th at p. 1041, fn. 14 ["[t]o the extent [a petitioner] asserts there may be a significant effect on the environment if [part of a project] can merely be seen from the neighborhood, … we are not persuaded the threshold for significance is or should be set so low"]; *Hilltop*, *supra*, __ Cal.App.5th __ [2024 WL 653387, *16–*17] [comments about neighbors' ability to "personally

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trial court, and CCTG did not appeal that portion of the trial court's ruling. (See 9 AA 95:2138.)

observe the project site" did not constitute substantial evidence of an aesthetic impact].)

The record does not provide any factual basis for determining that the Project's changes to its aesthetic surroundings will be significant or adverse. As described above, the Project's design will not substantially and adversely impair scenic views, and CCTG's photographs do not credibly demonstrate otherwise. Additionally, the Project is not in a "rural or undeveloped" area; rather, it is located within the City, in an "urbanized area" (see Pub. Resources Code, § 21071), on an existing golf course. (AR 3:599–602.) In this context, the mere visibility of parked vehicles, a low-profile, dimly-lit structure, and a grassy berm could not reasonably be classified as features that would substantially and adversely change the aesthetic setting. (See *San Francisco Beautiful*, *supra*, 226 Cal.App.4th at p. 1027 ["incremental visual effect" was minimal where project structures were "visible to passersby and observers from nearby buildings" but similar to existing structures already present in the "urbanized environment" and visual impacts were "confined to the immediate area"]; *McCann*, *supra*, 70 Cal.App.5th at pp. 89–91 [CEQA does not require an EIR for small structures in developed neighborhoods].) Nor is there any fact-based evidence that the Project's new "low-watt security lighting similar to other lighting in the golf course" (Respondent's Brief, p. 64) may substantially and adversely impact either people or wildlife. (*Taxpayers*, *supra*, 215 Cal.App.4th at pp. 1041–1042 [public comments that new lighting would harm "the feel and quality of the neighborhood," was not substantial evidence that the lights could "reasonably be considered to have a substantial direct visual impact on the surrounding neighborhood that would constitute a significant effect on the environment"]; *Gentry*, *supra*, 36 Cal.App.4th at pp. 1410 [biologist's opinion about wildlife impacts,

without factual support, was not substantial evidence supporting a fair argument of a significant impact].)

In the absence of specific, credible facts, the small number of vague complaints by neighbors regarding the Project's aesthetics do not constitute substantial evidence of a potential aesthetic impact. The trial court's decision is contrary to the long-established rule that a small number of subjective opinions about a project's appearance or its impact on private views does not constitute substantial evidence of a potential aesthetic impact. (E.g., *Bowman*, *supra*, 122 Cal.App.4th at p. 586–587 ["obstruction of a few private views in a project's immediate vicinity is not generally regarded as a significant environmental impact"]; *id.* at p. 592 [the Legislature did not intend to require an EIR wherever "enough people could be marshaled to complain about how [a project] will look"]; *McCann*, *supra*, 70 Cal.App.5th at pp. 87–90 ["individualized claims of aesthetic impact do *not* constitute substantial evidence"]; *Georgetown*, *supra*, 30 Cal.App.5th at p. 375 ["a few stray comments" are not substantial evidence]; *Protect Niles*, *supra*, 25 Cal.App.5th at p. 1142 [CEQA is not concerned with the views of a few particular persons]; *id.* at p. 1147 [distinguishing comments "based on vague notions of beauty or personal preference" from those grounded in specific facts]; *Porterville Citizens for Responsible Hillside Development v. City of Porterville* (2007) 157 Cal.App.4th 885, 902–904 [small number of private concerns that were "vague and unsupported by a specific factual basis or any photographic evidence" were not substantial evidence]; *Banker's Hill*, *supra*, 139 Cal.App.4th at p. 279 [concerns about a few private views are not substantial evidence of potential impact]; *Taxpayers*, *supra*, 215 Cal.App.4th at p. 1042 [small number of concerns about an "impact on the feel and quality of the neighborhood" were not substantial evidence].)

The trial court's decision, if affirmed by this court, would chip away at the standards for what constitutes "substantial evidence" under CEQA and greatly diminish the already low threshold that project opponents must overcome to successfully compel a lead agency to prepare an EIR. Specifically, the trial court's decision would open the door for strategic project opponents to stall a small urban project by simply rallying a few allies to repeat vague complaints about its appearance — even if *objective visual renderings* plainly belie those complaints. But "rules regulating the protection of the environment must not be subverted into an instrument for the oppression and delay of social, economic, or recreational development and advancement"; and "CEQA is not meant to cause paralysis." (*Tiburon*, *supra*, 78 Cal.App.5th at pp. 781–782 [quoting *Center for Biological Diversity v. Department of Fish & Wildlife* (2015) 62 Cal.4th 204, 253–254 (dis. opn. of Chin, J.).) Holding that vague and self-serving aesthetic opinions by project neighbors, without more, can constitute substantial evidence of a potentially significant environmental impact is contrary to existing law and will significantly complicate the CEQA process for lead agencies.

III. CONCLUSION

If affirmed by this court, the trial court's flawed decision threatens to significantly impair the ability of Amici's members to perform their duties as lead agencies under CEQA. In particular, affirming the trial court's decision would: (1) confuse the legal definition of substantial evidence, (2) effectively eliminate a lead agency's discretion to rely on an MND, and (3) empower project opponents to delay small projects with very little effort. These outcomes would undermine CEQA's statutory framework, contradict the Legislature's intent, and place a strain on agency and judicial resources. Accordingly, for the reasons set forth above, Amici respectfully request that

this court reject CCTG's unsupported challenge to the City's MND and reverse the trial court's order granting the CEQA petition.

Respectfully submitted,

Dated: February 29, 2024

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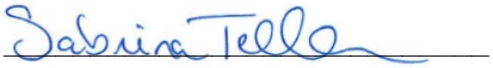
CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.204, subdivision (c), I certify that the total word count of this LEAGUE OF CALIFORNIA CITIES AND THE CALIFORNIA STATE ASSOCIATION OF COUNTIES AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANT AND APPELLANT CITY OF CORONADO, excluding covers, table of contents, table of authorities, signature blocks, and certificate of compliance, is 6,231.

Respectfully submitted,

Dated: February 29, 2024

REMY MOOSE MANLEY, LLP

By: 

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PROOF OF SERVICE

I, Kaitlyn Hubbard, am employed in the County of Sacramento. My business address is 555 Capitol Mall, Suite 800, Sacramento, CA 95814, and email address is khubbard@rmmenvirolaw.com. I am over the age of 18 years and not a party to the above-entitled action.

I am familiar with Remy Moose Manley, LLP's practice for collection and processing mail whereby mail is sealed, given the appropriate postage and placed in a designated mail collection area. Each day mail is collected and deposited in a USPS mailbox after the close of each business day.

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I declare under penalty of perjury that the foregoing is true and correct. Executed February 29, 2024, at Sacramento, California.

K Hubbard

Kaitlyn Hubbard

Coronado Citizens for Transparent Government v. City of Coronado, et al.
Fourth Appellate District, Division One, Case No. D082360

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