# EXHIBIT K

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EXEMPT FROM FILING FEES PURSUANT TO CAL. GOV. CODE § 6103

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN BERNARDINO

CITY OF RIVERSIDE, a municipal corporation,

Petitioner/Plaintiff,

v.

CITY OF JURUPA VALLEY, a municipal corporation; CITY COUNCIL OF THE CITY OF JURUPA VALLEY, a governmental body; and DOES 1-20, inclusive

Respondents/Defendants.

RICK BONDAR, et al.,

Real Parties in Interest.

Case No. CIVDS1512381
(Related with Case No. CIVDS1513522)

**PETITIONER'S REPLY BRIEF**

(CEQA)

(ASSIGNED FOR ALL PURPOSES TO HON. DONALD ALVAREZ, DEPARTMENT S23)

(Petition Filed: April 17, 2015)
(Trial Date: March 15, 2016, 8:30 a.m.)

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## I. INTRODUCTION

> "We need to put something along that freeway if we are going to stymie that project in some way or another."
>
> - (George Ruiz, City of Jurupa Valley Planning Commissioner, referring to the Riverside Transmission Reliability Project during the Planning Commission's hearing on the Vernola Apartments project.) (AR3656.)
>
> "If not required, [the Project Developer] would like to ask that the City of Riverside not be on the distribution list."
>
> - (Email from Jurupa Valley Senior Planner regarding whether to send notice of the Vernola Apartments project to the City of Riverside prior to approval.) (AR5209 [underline in original].)

Although the City of Jurupa Valley and Real Parties (collectively, Respondents) would like the Court to believe that the City of Riverside (Riverside) has attempted to "abuse the CEQA process" (OPP at 2:7-8),[1] the administrative record tells a much different story.

Respondents would also like the Court to believe that Riverside is using the Riverside Transmission Reliability Project (RTRP) and CEQA to "hijack a residential development." (OPP at 1:2-3.) But Respondents' retelling of facts obscures the true timeline of events. Riverside fully completed environmental review and granted all of its discretionary approvals for the RTRP on February 5, 2013. (AR4492.) It was not until more than a year later, on July 25, 2014, that an *application* for the Vernola Apartments Project (Project) was submitted to Jurupa Valley. (AR4.) Project approval did not occur for another two years, on April 2, 2015, (AR3861, AR3865), *after* Jurupa Valley had lost its CEQA lawsuit challenging the RTRP. (See Southern California Edison Company's Request for Judicial Notice in Support of Opening Brief (RJN), Exhibit A.)

It is not Riverside that is attempting to abuse CEQA and hijack another's project. Rather, after failing to stop the RTRP, the Project is simply Jurupa Valley's latest effort to frustrate the RTRP. But motives aside, Jurupa Valley has failed to comply with CEQA. Presented with a fair argument that the Project may have a significant effect on the environment, Jurupa Valley was required to prepare an EIR. Thus, Jurupa Valley's Project approval must be overturned.[2]

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[1] Citations to the Joint Brief of Respondents and Real Parties in Opposition to Riverside's Petition for a Writ of Mandate are in the following form: OPP at [page].

[2] As with its Opening Brief, Riverside joins and incorporates by reference, to the fullest extent allowed by law, the

## II. ARGUMENT

### A. All arguments presented in Riverside's Opening Brief were administratively exhausted.

Respondents repeatedly claim that Riverside's arguments were not properly exhausted. (See e.g., OPP at 6:7 to 7:2; 9:13-20; 16:5-15; 19:24.) That claim ignores the law. It is sufficient if the alleged grounds for noncompliance are presented to the lead agency orally or in writing "by any person … prior to the close of the public hearing on the project." (Pub. Resources Code, § 21177(a).) Each of the arguments in Riverside's Opening Brief were presented to Jurupa Valley prior to the close of the public hearing on the Project, either by Riverside or by another entity.

For example, Riverside submitted a comment letter on March 19, 2015, exhausting its arguments that Jurupa Valley failed to provide adequate notice of its intent to adopt the Project's mitigated negative declaration (MND) (see AR4492 ["Jurupa Valley failed to fulfill the intent of CEQA's consultation provisions, which require that Jurupa Valley consult with any agency having jurisdiction by law over a resource affected by the proposed Project"])[3] and that Jurupa Valley failed to adequately analyze the Project's cumulative impacts (see AR4493 ["Jurupa Valley has not properly analyzed the Project's direct or cumulative impacts under CEQA"]).

Additionally, comments from the South Coast Air Quality Management District (SCAQMD) exhausted Riverside's arguments that the Project's mitigation measures are insufficient to reduce air quality impacts to less than significant (see AR5673-74 [noting that mitigation measures need to be "fully enforceable"]) and that the Project will cause a significant impact to air quality (see AR5673-76 [commenting that MND failed to properly analyze air quality health risks].) Likewise, Riverside's argument that the MND failed to properly consider the RTRP as part of the Project baseline was exhausted by a comment letter from SCE complaining that "there appears to be no mention of the Riverside Transmission Reliability

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Reply Brief filed by Southern California Edison Company (SCE) in the related case *Southern California Edison Company v. City of Jurupa Valley et al.*, Case No. CIVDS1513522, filed April 17, 2015.

[3] In any event, exhaustion is not required if, as is the case here, "the public agency failed to give the notice required by law." (Pub. Resources Code, § 21177(e).) And the MND stated that the "MND will be distributed to … the State Clearinghouse." (AR81.) So the public had no reason to believe that it would not be circulated, and therefore no reason to raise this issue during the administrative process.

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Project ('RTRP') in either the MND or any of the Proposals." (AR6195.) Although SCE's comment did not use the technical term "baseline," that is unnecessary. It is only necessary that the lead agency be "apprised of the relevant facts and issues." (*Center for Biological Diversity v. County of San Bernardino* (2010) 185 Cal.App.4th 866, 890; see also *Citizens Association for Sensible Development v. County of Inyo* (1985) 172 Cal.App.3d 151, 163.)

Respondents next assert that arguments exhausted in a comment letter from the California Department of Transportation (Caltrans) are time-barred because the letter was "belated." (OPP at 14:8-11; 19:17-25.) That argument is wrong for two reasons. First, as explained *infra* at FN 3, exhaustion is not required if, as is the case here, "the public agency failed to give the notice required by law." (Pub. Resources Code, § 21177(e); see also *Fall River Wild Trout Foundation v. County of Shasta* (1999) 70 Cal.App.4th 482, 492-93 [although public received adequate notice, exhaustion was unnecessary because lead agency failed to notify Department of Fish and Game].) Allowing Jurupa Valley to violate CEQA's noticing requirements and then claim that comments were untimely would create a perverse incentive for lead agencies.

Second, a petitioner may present objections even after a CEQA document is completed and certified, as long as the objections are presented before the end of the final public hearing on the project. (See Pub. Resources Code, § 21177(a); *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1199 [EIR overturned based on expert report submitted at final project hearing]; *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 85 [EIR failed based on comments submitted after final EIR was completed]; *Napa Citizens for Honest Government v. Napa County Board of Supervisors* (2001) 91 Cal.App.4th 342, 382 [comments made after certification of final EIR].) Caltrans's letter was received on March 23, 2015. (AR4508.) Project approvals were not final until at least April 2, 2015. (See AR3861, AR3865.)

Thus, the issues in Caltrans's letter were properly presented and served to exhaust Riverside's arguments that (1) the Project will cause a significant impact to hydrology (see AR4508 [raising issues with the MND's Hydrology and Grading" analysis), (2) the Project will cause a significant impact to traffic and transportation (see AR4508-11 [criticizing MND's

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transportation and traffic analysis), and (3) the Project's mitigation measures are insufficient to reduce traffic impacts to less than significant (see AR4508 [demanding "appropriate mitigation measures" for traffic impacts]). Because all of Riverside's arguments were adequately presented to Jurupa Valley prior to the close of the final public hearing on the Project, they were exhausted and are properly before the Court.

### B. Jurupa Valley failed to provide adequate notice of its intent to adopt the MND.

Public participation is widely recognized as an essential part of the CEQA process. (14 Cal. Code Regs. [C.C.R.], § 15074(b).) Respondents maintain that Jurupa Valley complied with CEQA's public participation requirements. (OPP at 9:4 to 12:18.) This is false.

#### 1. At least two state agency approvals are required, so notice needed to be provided to the State Clearinghouse.

Acknowledging that an MND must be provided to the State Clearinghouse "where one or more state agencies will be a responsible agency or a trustee agency" (OPP at 10:1-2), Respondents aver there is "*zero* evidence any responsible or trustee agencies have the slightest discretionary approval over the [Project]." (OPP at 11: 27-28 [italics in original].) This is incorrect. CEQA requires that an MND be submitted to the State Clearinghouse, "[w]here one or more state agencies will be a responsible agency or a trustee agency or will exercise jurisdiction by law over natural resources affected by the project." (14 C.C.R., § 15073(d) [emphasis added].) At least two state agencies (Caltrans and the Water Board) have jurisdiction by law over natural resources affected by the Project. Further, "doubt whether a project is ministerial or discretionary should be resolved in favor of the latter characterization." (*People v. Department of Housing & Community Dev.* (1975) 45 Cal.App.3d 185, 194.)

Caltrans, which submitted a comment letter indicating that a discretionary encroachment permit was needed (see AR4511), would disagree with Respondents' hyperbole. Respondents argue that Caltrans's letter should not be considered because it was "belated." As discussed above, this argument fails. Under Respondents' approach, a lead agency could avoid unwanted responsible agency comment letters by preemptively concluding there are no responsible

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agencies, prevent those agencies from discovering a project's existence by failing to provide notice to the State Clearinghouse, and then ignore late-arriving letters that assert authority.

Respondents next argue that an encroachment permit from Caltrans is not a discretionary permit. (OPP at 11:6-11.) This argument also fails. The only case Respondents cite for support, *Lexington Hills Association v. State of California* (1988) 200 Cal.App.3d 415, actually *discredits* their theory. There, the court held that although Caltrans did not have discretionary authority to block a *right of access* encroachment, Caltrans "does have statutory authority to grant or to withhold permits for [physical] 'encroachments' on a state highway." (*Id.* at 432.) Here, as Respondents assert, Project mitigation measures "require the applicant to 'assure the construction of geometric improvements specified in the Project conditions of approval' to the intersection of the subject I-15 ramps." (OPP at 20:4-5 [quoting AR241].) These physical encroachments are the very type described in *Lexington Hills Association* that require discretionary encroachment permits from Caltrans. Further, as explained in *Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo, supra,* 172 Cal.App.3d at 175, a case that also involved development adjacent to a state highway, "because Caltrans can condition the right to an encroachment permit upon 'the location and the manner' of the encroachment, its approval power is more discretionary than ministerial." Thus, Caltrans is a responsible agency, and Jurupa Valley was required to provide the MND to the State Clearinghouse.

Respondents also argue that a National Pollution Discharge Elimination System (NPDES) Municipal Stormwater Permit for construction activities is not a state agency permit. (OPP at 11:12-22.) The State Water Resources Control Board may disagree (see 40 Code of Federal Regulations, § 122.28 [requirements applicable to State NPDES programs]), and Respondents provide no evidence to the contrary. Because Jurupa Valley failed to comply with CEQA's noticing requirements, it is impossible to know what other responsible agency comments may have been received. (See *Rural Landowners Assn. v. City Council of Lodi* (1983) 143 Cal.App.3d 1013, 1021 [setting aside EIR for failure to timely provide it to Office of State Clearinghouse].)

**2. The MND's public notice was misleading and prejudicial.**

Arguing that no responsible agency permits are required, Respondents cite to MND pages

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that omit reference to responsible agency permits, implying that the absence is evidence that none are required. (OPP at 11:4.) Given Caltrans's comment letter and the MND's own acknowledgement that NPDES permits are required, this is not enough. Indeed, Respondents' argument is undermined by the admission that the MND includes a "mistaken reference" that the MND would be submitted to the State Clearinghouse." (OPP at 11:25-26.) Respondents cannot have it both ways. They cannot argue on one hand that the MND is irrefutably accurate (i.e., if it is silent on responsible agency permits, one must presume none are required), and then argue that Riverside "seeks to capitalize on an inadvertent mistake to delete some form language in the MND that referenced submitting the MND to the State Clearinghouse." (OPP at 11:25-26.) If one cannot believe affirmative assertions in the MND, how can one have confidence in the accuracy of its omissions? The MND states that it would be distributed to the State Clearinghouse. (AR81). It was not. "By giving such conflicting signals to decision makers and the public," the CEQA document was "fundamentally inadequate and misleading" and should be set aside. (*San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 655–656.)

Similarly, Respondents fail to address Riverside's point that Jurupa Valley deliberately subverted CEQA's widely-recognized mandate for informed public participation by ignoring the RTRP. (*Laurel Heights Improvement Association v. Regents of University of California* (1993) 6 Cal.4th 1112, 1123.) Realizing that Riverside would have great interest in the Project, Jurupa Valley's Senior Planner relayed the Project developer's request that the "City of Riverside not be on the distribution list" (AR5209 [underline in original) and provided no notice to Riverside. Riverside only discovered the Project's existence second-hand, mere days before the MND was to be approved. Although Riverside was able to quickly draft a comment letter in the limited hours remaining before approval, Jurupa Valley's intentional exclusion of Riverside and (now) contradictory statement that Riverside "actively participated in the CEQA process" (OPP at 12:11) show that Jurupa Valley undertook to *preclude* Riverside's participation in the CEQA process.

Jurupa Valley's failure to provide adequate notice of its intent to adopt the MND subverted CEQA's purposes of informed decisionmaking and public participation. That

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subversion is prejudicial. (*Fall River Wild Trout Foundation*, *supra*, 70 Cal.App.4th at 492-93.) Therefore, the MND must be set aside.

### C. The MND's baseline was deficient.

Respondents defend the MND's environmental setting by explaining that a project's baseline is "ordinarily" the conditions on the ground at the time environmental analysis is commenced." (OPP at 5:22; 5:8-10.) That ignores the California Supreme Court's declaration that there is no "uniform, inflexible rule for determination of the existing conditions baseline." (*Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 452.) Indeed, the Supreme Court has confirmed that using existing conditions as a baseline may be *inappropriate* where it detracts from the environmental document's "effectiveness as an informational document, either because an analysis based on existing conditions would be uninformative or because it would be misleading to decision makers and the public." (*Ibid.*) For that reason, the key factor in determining baseline sufficiency under CEQA is whether the baseline meets CEQA's central purpose—to provide the public with information about the effect which a proposed project is likely to have on the environment. (*Id.* at 453.) Jurupa Valley's omission of the RTRP is contrary to this central purpose.

Respondents claim the RTRP was properly ignored because Jurupa Valley considered it to be speculative (OPP at 5:26 to 6:1) and because the two projects are mutually exclusive (OPP at 8:21-23). Although incorrect on both counts,[4] both assertions are irrelevant because they are *post hoc* rationalizations.[5] The MND contains no such explanation. Had such an explanation been provided in the MND, perhaps there would be substantial evidence to support Jurupa Valley's decision to wholly exclude the RTRP from consideration; at a minimum, the public and decisionmakers would have been informed and they could have debated whether substantial evidence supported that decision. But that is not what occurred. Instead, Respondents are

[4] Respondents' claim that the RTRP was speculative is belied by their (unsuccessful) lawsuit challenging the RTRP approvals. (See RJN, Exh. A.) Further, as discussed *supra*, there is no evidence that the two projects are mutually exclusive.

[5] Although the Real Parties argued in a late letter to the City that the RTRP was too speculative to be considered (AR6381-82), the City made no such declaration in the MND or elsewhere.

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improperly attempting to justify their error with after-the-fact arguments. (See *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 81 [condemning *post hoc* rationalizations].)

By itself, admitting awareness of the RTRP (see OPP at 8:15) does not provide substantial evidence to support its exclusion from the Project's baseline. Contrary to Respondents' implication, silence on a subject is not substantial evidence.[6] (14 C.C.R., § 15384(a) [substantial evidence includes *facts*].) Intentionally omitting the RTRP from the MND's environmental setting and omitting any discussion of attendant compatibility impacts resulting from proposing housing on the same site as the RTRP, was affirmatively "misleading to decision makers and the public." (*Neighbors for Smart Rail, supra,* 57 Cal.4th at 452.)

Respondents also argue that there is "not a single case holding that using the 'normal' baseline has ever constituted an abuse of discretion." (OPP at 6:5-6.) That statement is false. First, case law does hold that use of existing conditions can be an abuse of discretion. The court in *Friends of the Eel River v. Sonoma County Water Agency*, (cited in the Opening Brief at 9:16-19) held that even an unapproved project *still under consideration* was required to be part of the environmental setting:

> We conclude the EIR's description of the Project's environmental setting is deficient because it *does not disclose either* the impact on Eel River salmonid species of diverting water from the Eel River *or the fact that FERC is considering proposals* to curtail these diversions in order to prevent harm to these species.

(108 Cal.App.4th 859, 873-874 [emphasis added].) If an EIR's environmental setting can be deficient for failing to consider proposals still under consideration, surely an MND is deficient for failing to consider an *approved* project that has completed full environmental review. Second, many cases hold that CEQA's purposes are subverted when a lead agency "omits material necessary to informed decisionmaking and informed public participation." (*County of Amador v.*

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[6] Respondents even go so far as to claim that Riverside has not met its burden because it failed to show that substantial evidence is lacking from the record or to distinguish the evidence that was provided in the MND. (OPP at 6:7-8.) That argument fails because there is no evidence to cite and, thus, no evidence to distinguish. Riverside properly carried its burden of proof by demonstrating that the MND does not contain even a single reference to the RTRP, despite comment letters requesting that the RTRP be considered. (See AR69-287 [MND omitting any mention of the RTRP]; AR4492-93 [Riverside's comment letter asking that the RTRP be considered]; AR6194-95 [SCE's comment letter requesting same].)

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*El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 946; see also *RiverWatch v. Olivenhain Municipal Water Dist.* (2009) 170 Cal.App.4th 1186, 1201 [a CEQA document that "does not 'adequately apprise all interested parties of the true scope of the project for intelligent weighing of the environmental consequences of the project,' informed decisionmaking cannot occur under CEQA and the [CEQA document] is inadequate as a matter of law."]; *Save Our Peninsula Committee v. Monterey County Board of Supervisors* (2001) 87 Cal.App.4th 99, 118 ["When the informational requirements of CEQA are not complied with, an agency has failed to proceed in 'a manner required by law' and has therefore abused its discretion."].)

There is not substantial evidence to support Jurupa Valley's determination to exclude the RTRP from the Project's environmental setting, and CEQA's purposes of informed decisionmaking and informed public participation have been subverted. Thus Jurupa Valley's adoption of the MND must be rescinded.

### D. Substantial evidence presents a fair argument that the Project will have a significant impact on the environment.

A lead agency's "decision not to require an EIR can be upheld only when there is no credible evidence to the contrary." (*Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1318.) Because Jurupa Valley was "presented with a fair argument that [the Project] may have a significant effect on the environment," it must prepare an EIR. (14 C.C.R., § 15064(f)(1).)

#### 1. Substantial evidence presents a fair argument that the Project will cause a significant impact to air quality.

SCAQMD's February 13, 2015 comment letter requested that the MND "analyze the health risks from project operations using an exposure duration that last for either 70 years or for the life of the Project." (AR5675.) But despite SCAQMD's expert knowledge in the field of air pollution, Respondents characterize SCAQMD's comments, in quotations, as "recommendations." (OPP at 16:27.) But the word *recommendations* does not appear in SCAQMD's letter. (AR5673-76.) Jurupa Valley seems to misunderstand SCAQMD's expert directive as to what "should" be done as mere suggestions. Lest there be any question as to the import of SCAQMD's directives, SCAQMD explained that without the requested analysis, the

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Health Risk Assessment and MND "have not demonstrated that the [Toxic Air Contaminant] impacts are less than significant compared with SCAQMD Maximum Incremental Cancer Risk and Chronic & Acute Hazard Index Thresholds." (AR5675.)

Further, Respondents' reliance on its "rebuttal" to SCAQMD letter is in vain. (OPP at 17:5-8.) Even if Respondents cited to expert testimony, CEQA is clear that "[i]f there is disagreement among expert opinion supported by facts over the significance of an effect on the environment, the Lead Agency shall treat the effect as significant and prepare an EIR." (14 C.C.R., § 15064(g).) Respondents also desperately claim that the "only inference" from the lack of subsequent SCAQMD comment letters "is that SCAQMD ultimately accepted the MND's analysis." (OPP at 17:10-11.) But relying on subsequent silence is unavailing, and far more inferences can be made than the one made by Respondents, particularly since there is no evidence that SCAQMD even received Jurupa Valley's response.

Finally, Respondents argue that Riverside is trying to flip the burden of proof and require Respondents to show a complete lack of any substantial evidence of a fair argument. (OPP at 16:24-26) This is not true. Riverside has simply demonstrated—consistent with the standard of review—that there is substantial evidence in the record supporting a fair argument that a significant impact may result. So Jurupa Valley's decision to dispense with an EIR must be set aside. (*Parker Shattuck Neighbors v. Berkeley City Council* (2013) 222 Cal.App.4th 768, 777-78.) Given SCAQMD's expertise in air quality and its comment letter containing substantial evidence of a fair argument that the Project may cause significant air quality impacts and corresponding health risks, an environmental impact report is required.

**2. Substantial evidence presents a fair argument that the Project will cause a significant impact to hydrology.**

Respondents dismiss Caltrans's comment letter opining as to significant hydrology and flooding issues for two reasons, both without merit. First, Respondents argue the comment letter was too late. (OPP at 16:5-15.) But as explained above, Caltrans's letter was submitted before the final hearing on the Project, and Caltrans was never provided proper notice. Thus, the comment letter may not be ignored. (See Pub. Resources Code, § 21177(a), (e).) Second, Respondents

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argue, once again, that Riverside is trying to "flip the burden." (OPP at 15:13-14.) But again, this is wrong, and Riverside carries its burden of proof by citing to record evidence (Caltrans's letter) showing a fair argument of a substantial hydrology and flooding impact. (AR4510.)

Furthermore, Respondents' arguments on this point include *not a single citation to the record.* (OPP at 15:5 to 16:15.) In *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1382, 1411, an initial study offered no evidence to back up its conclusion that the project would have no cumulative impacts, and the court was unable to find any such evidence in the record. Here, as in *Gentry*, this Court should conclude that the absence of evidence that impacts are insignificant supports a fair argument of significance. (*Ibid.*) Although Respondents explain *Gentry's* holding (OPP at 15:26), they provide no distinguishing facts that would lead to a different outcome.

**3. Substantial evidence presents a fair argument that the Project will cause a significant impact to traffic/transportation.**

Caltrans informed Jurupa Valley of deficiencies in the MND's level of transportation and traffic analysis. (AR4508-11.) The MND determined that the Project would cause "unacceptable levels of service" during peak hours at I-15 Southbound Ramps/Limonite Avenue and I-15 Northbound Ramps/Limonite Avenue. (AR235.) Although the MND concluded that proposed mitigation measures would reduce these impacts to less than significant (AR238), Jurupa Valley never addressed Caltrans's directives for preparation and submittal of a traffic study. (AR4510.) The MND also lacked any reference to encroachment permits that would be necessary to construct the improvements to the I-15 ramp intersections (AR241), as directed by Caltrans (AR4511). Jurupa Valley "should not be allowed to hide behind its own failure to gather relevant data." (*Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 311.)

**E. <u>Jurupa Valley failed to adopt adequate mitigation measures.</u>**

**1. Substantial evidence presents a fair argument that the Project's mitigation measures are insufficient to reduce air quality impacts to less than significant.**

SCAQMD's February 13, 2015 comment letter explained the inadequacy of Mitigation Measures AQ-4 and AQ-5 to reduce the cancer risks to residents of the Project. (AR5673-76.) SCAQMD urged Jurupa Valley to make these measures "fully enforceable beyond transferring

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responsibility to future tenants." (AR5673-74.) Yet, despite subsequent revisions, Measure AQ-5 still transfers mitigation responsibility to future tenants, requiring lease agreements to notify "renters of their responsibility to operate and maintain the air filtration system." (AR15.) Measure AQ-5 also places responsibility on the future "rental management company." (AR15.) Without any contractual relationship with future tenants or rental management companies, the Jurupa Valley Planning Department (tasked with monitoring compliance with these measures) will have no ability to enforce compliance. (Cf. *Rominger v. County of Colusa* (2014) 229 Cal.App.4th 690, 723-24 [mitigation measure requiring *project applicant* to implement mitigation measures].) Further, Measure AQ-4 makes clear that the air filters must be installed "[p]rior to final building inspections for each apartment building." (AR14.) But once the occupancy permit has been issued, there is no evidence that future compliance to maintain the air filters can or will be enforced. If Jurupa Valley intends to reissue occupancy permits on an annual basis to ensure compliance with the mitigation measure, the record provides no support. These concerns are more than mere "abstract questions regarding the specific persons who will maintain the system in the future." (OPP at 18:22-23.) The concerns go directly to the enforceability of the mitigation. And although Respondents claim that it is "beyond dispute that Jurupa Valley has the power to enforce the mitigation measures." (OPP at 18:17-18.) Riverside and, apparently, SCAQMD disagree.

Additionally, Measures AQ-4 and AQ-5 both include the vague requirement that the air filtration systems be *maintained*. (AR14-15.) But without a performance standard as to the necessary maintenance level, the measures are ineffective. Respondents argue that "no case, and certainly none cited by Riverside, has ever held that a requirement that an air filtration system be 'maintained' was insufficient because it was unspecified who would be maintaining it." (OPP at 17:25-27.) But the lack of a factually *identical* case does not provide cover for ineffective and unenforceable mitigation measures or distinguish the cases cited by Riverside that show similarly worded measures violate CEQA. (See e.g., *Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173, 1186-87 ["CEQA requires that feasible mitigation measures actually be implemented as a condition of development, and not merely be adopted and then neglected or

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disregarded].)[7]

**2. Substantial evidence presents a fair argument that the Project's mitigation measures are insufficient to reduce traffic impacts to less than significant.**

Reacting to Riverside's argument that Mitigation Measures TR-3 and TR-4 are unenforceable because their implementation requires a discretionary permit from Caltrans, Respondents argue that "Riverside cites no law to support its conclusion that the fact a Caltrans permit may be required means mitigation measures are ineffectual." (OPP at 19:26-27.) Again, while a *perfectly* identical case may not exist, Riverside's argument is fully supported and a practically identical case does exist. (See OPEN at 17:6-11, citing *Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1122 [reliance on a fee-based mitigation program only appropriate if fees are part of a reasonable plan of mitigation that an agency has committed to implement].)

Regardless whether Respondents consider an encroachment permit to be a "run-of-the-mill permit" (OPP at 20:1), as discussed above, it is a discretionary permit which Caltrans may approve or deny. (*Lexington Hills Association, supra,* 200 Cal.App.3d at 432; *Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo, supra,* 172 Cal.App.3d at 175.) So there is no assurance that the mitigation will occur (i.e, there can be no commitment that it will be implemented). Respondents declare that the mitigation requires the "the applicant 'to assure the construction of the geometric improvements specified in the Project conditions of approval' to the intersection of the subject I-15 ramps" (OPP at 20:3-5), thus providing a level of assurance. This is a misreading of the measures. The measures merely state that "the Project Proponent shall pay to the City of Jurupa Valley a fair share contribution to assure the construction of the geometric improvements." (AR32.) That is, contrary to Respondents' argument, there are *not* two separate requirements to pay *and then* assure completion. The second part of the measure simply explains the reason for the first part.

[7] Jurupa Valley also mixes Riverside's two separate arguments: (1) the measures are ineffective because of the vague requirement to "maintain" the air filter systems; and (2) the measures are unenforceable because they are imposed on future tenants and rental companies, with whom Jurupa Valley has no relationship, and there is no means of enforcement after occupancy permits are issued. Riverside is not seeking the name of the future maintenance person. Rather, it is demanding effective and enforceable mitigation.

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**F. Jurupa Valley failed to adequately analyze the Project's cumulative impacts.**

To justify its failure to consider the RTRP in the cumulative impacts analysis, Respondents rely primarily on one, novel assertion: that the RTRP and Project are mutually exclusive, thus they cannot have cumulative impacts. (SCE OPP at 6:1 to 13:25.) This argument is unsupported by fact and law.

First, despite Respondents' extensive repetition of the claim, there is no evidence in the record that the RTRP and Project are mutually exclusive. Respondents claim that SCE and Riverside "concede" that the projects are mutually exclusive, citing to text from the opening briefs. (SCE OPP at 7:13-18.) But the text from Riverside's Opening Brief that Respondents cite—that the Vernola Project will "thwart" the RTRP—is merely a quote from Jurupa Valley's *own Planning Commissioner*, expressing his motive for approving the Project. (AR3656, lns. 9-12 ["We need to put something along that freeway if we are going to stymie that project."].) SCE and Riverside requested that the RTRP be considered in the MND precisely because both projects partially share the same physical space and will have cumulative impacts, but nowhere in the MND is there evidence to demonstrate that the RTRP and the Vernola Project are mutually exclusive. Yet again, Respondents are providing an after-the-fact rationalization in an attempt to justify the RTRP's exclusion from the MND. Even assuming the two projects are mutually exclusive (they are not), that is all the more reason why the MND should have discussed the RTRP in its analysis. If the Project fully eliminates any possibility of the RTRP, then the public and decisionmakers deserve to know of that impact. (*Laurel Heights Improvement Association, supra,* 6 Cal.4th at 1123 [CEQA's "purpose is to inform the public and its responsible officials of the environmental consequences of their decisions before they are made"].)

Second, the MND's omission of the RTRP demonstrates arbitrary line drawing. CEQA is clear that even where a lead agency retains discretion to determine the scope of cumulative impact analysis, the lead agency's decision cannot be arbitrary. (See *Bakersfield Citizens for Local Control*, *supra*, 124 Cal.App.4th at 1216 [inconsistently selecting the geographic area for cumulative impacts analysis "does not constitute good faith disclosure and analysis that is required by CEQA"].) Here, the MND's cumulative impacts analysis arbitrarily included related

projects at all sorts of stages, including some planned but as-yet-unapproved projects. (See AR191 [discussing the potential for land use impacts related to an approved, but not yet constructed project]; AR147 [considering potential impacts "that a future land use might have," despite the use being "speculative"]; (AR235 [evaluating "projects that are approved and not yet constructed, along with developments that are currently in the process of entitlement"].) Yet, the MND excluded the RTRP, an *approved* project, without giving any reason. This inconsistent selection of cumulative projects is arbitrary and requires that the MND be set aside.

## III. CONCLUSION

Although Jurupa Valley's motives for the Project may have only been dubious, its methods were illegal. Jurupa Valley failed to comply with CEQA and subverted CEQA's purpose to inform the public and responsible officials of the environmental consequences of their decisions before they were made. Further, there is a fair argument that the Project may have a significant effect on the environment. Therefore, the MND must be set aside.

Dated: February 16, 2016

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## PROOF OF SERVICE

At the time of service I was over 18 years of age and not a party to this action. My business address is 3390 University Avenue, 5th Floor, P.O. Box 1028, Riverside, California 92502. On February 16, 2016, I served the following document(s):

**PETITIONER'S REPLY BRIEF**

☐ **By fax transmission.** Based on an agreement of the parties to accept service by fax transmission, I faxed the documents to the persons at the fax numbers listed below. No error was reported by the fax machine that I used. A copy of the record of the fax transmission, which I printed out, is attached.

☒ **By United States mail.** I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses listed below (specify one):

☐ Deposited the sealed envelope with the United States Postal Service, with the postage fully prepaid.

☒ Placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at Riverside, California.

☐ **By personal service.** At ____ a.m./p.m., I personally delivered the documents to the persons at the addresses listed below. (1) For a party represented by an attorney, delivery was made to the attorney or at the attorney's office by leaving the documents in an envelope or package clearly labeled to identify the attorney being served with a receptionist or an Individual in charge of the office. (2) For a party, delivery was made to the party or by leaving the documents at the party's residence with some person not less than 18 years of age between the hours of eight in the morning and six in the evening.

☐ **By messenger service.** I served the documents by placing them in an envelope or package addressed to the persons at the addresses listed below and providing them to a professional messenger service for service. A Declaration of Messenger is attached.

☐ **By overnight delivery.** I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses listed below. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

☒ **By e-mail or electronic transmission.** Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent to the persons at the e-mail addresses listed below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

*City of Riverside v. City of Jurupa Valley, et al.*

San Bernardino County Superior Court Case No. CIVDS1512381

*Related with*

*Southern California Edison Company v. City of Jurupa Valley, et al.*

San Bernardino County Superior Court Case No. CIVDS1513522

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on February 16, 2016, at Riverside, California.

Azucena Garibay

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