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SUPERIOR COURT FOR THE STATE OF CALIFORNIA

COUNTY OF MONTEREY

TURN DOWN THE LIGHTS,

Petitioner,

v.

CITY OF MONTEREY,

Respondent.

Case No.: M116731

OPPOSITION TO PETITIONER'S MOTION FOR ORDER AUGMENTING THE RECORD

Hearing Date: August 16, 2013
Time: 9:00 a.m.
Dept.: 14
Judge: Hon. Kay T. Kingsley

Filing Date of Action:
March 22, 2012

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I. INTRODUCTION

Respondent City of Monterey opposes Petitioner Turn Down the Lights' Motion for Order Augmenting the Record. The documents at issue (the "Augment Documents") are irrelevant to the City's discretionary approval of the Street and Tunnel Lighting Replacement Project that is the subject of Petitioner's challenge and irrelevant to the City's determination that the Project was exempt from the California Environmental Quality Act ("CEQA") (Pub. Resources Code, § 21000 et seq.). The Augment Documents were not before the City staff or City Council when they took the actions challenged in this case, and therefore, to add them to the record would directly contradict the California Supreme Court's holding in *Western States Petroleum Association v. Superior Court* (1995) 9 Cal.4th 559 (*Western States*). Indeed, Petitioner's attempt to add the Augment Documents to the record, only after it failed to exhaust its administrative remedies or to submit *any* evidence to the City at the administrative level, is precisely the kind of tactic that *Western States'* prohibition on extra-record evidence is aimed at preventing. Accordingly, this Court should deny Petitioner's Motion for Order Augmenting the Record in its entirety.

II. STATEMENT OF FACTS

The Monterey City Council approved the Street and Tunnel Lighting Replacement Project (the "Project") on November 1, 2011, during a regularly scheduled City Council meeting. (AR 2, 7, 24.)[1] The Project consisted of replacing the City's existing high-pressure-sodium street light and tunnel light fixtures with LED street light fixtures and induction tunnel light fixtures. (AR 40.) The Project was conceived as an economically feasible way to help make the City more energy-efficient and represents an important milestone for the City of Monterey, as it will help to bring the City into compliance with State goals and requirements regarding municipal greenhouse gas emissions. (AR 39.)

Prior to the November 1, 2011 City Council Meeting, the City provided regular notice to the public that the Project was being considered and that the City had determined that the Project was exempt from CEQA under the "categorical exemption" at California Code of Regulations, Title 14, Chapter 3, section 15302 (hereinafter, the "CEQA Guidelines"). (AR 38-41, 44-45.) The Project was listed as item number 7 on the public meeting agenda. (AR 44.) The agenda explained that the City Council accepts public comments regarding any item on the agenda and also designates a portion of meeting for the public to comment on any item that is not on the agenda. (AR 44-46.) The agenda and council agenda report were made available to the public according to the City's regular notice

[1] / Citations to the Administrative Record of Proceedings are noted by "AR" followed by the relevant page number(s).

requirements. (AR 38-41, 44-46.) The agenda report explained the Project in detail. (AR 38-40.) The agenda report explicitly stated that "[t]he City's Planning, Engineering, and Environmental Compliance Division determined that [the] project is exempt from CEQA regulations under Article 19, Section 15302." (AR 39.) During the meeting, City staff presented the staff report for the Project, including a Power Point presentation, and answered questions from the Council. (AR 7, 12-25, 26-36, 38-41.) Following the staff presentation and discussion about the Project, the Mayor opened public comments on the item. (AR 7, 23.) There were no requests to speak. (*Ibid.*) The discussion was returned to the dais and the City Council unanimously approved the Project. (AR 7, 24, 2.) The City began implementing the Project on January 17, 2012. (AR 229.) The City filed the optional Notice of Exemption for the Project with the State Office of Planning and Research on February 21, 2012. (AR 1.)

III. PROCEDURAL HISTORY

On March 22, 2012, Petitioner filed a "Petition for Writ of Mandate and to Enforce California Environmental Quality Act," challenging the City's determination that the Project was exempt from CEQA review under CEQA Guidelines section 15302. (Pet., pp. 13, 19-20.) Petitioner elected to prepare the administrative record of proceedings pursuant to its right to do so, codified at Public Resources Code section 21167.6, subdivision (b)(2), and subsequently submitted documents to the City for consideration for certification. The City refused to certify Petitioner's initially proposed record because, among other flaws, it contained website pages and documents regarding an unrelated City project (the "Friendly Plaza lighting project") that the City considered in September and October of 2009. The City also refused to agree to the inclusion of several documents that did not exist at the time the City made its exemption determination and approved the Project on November 1, 2011, or were never provided to the City by any member of the public prior to the Project approval. After extensive correspondence between the parties regarding whether the disputed documents should be included in the record, the City certified the complete record of proceedings and lodged the record with the Court on July 3, 2013. The 583-page administrative record includes all evidence that was in the City's possession and relevant to the City's approval of the Project and its determination that the Project is exempt from CEQA as of the date of the Project approval on November 1, 2011. Petitioner filed this Motion on July 22, 2013.

IV. ARGUMENT

A. Judicial review in CEQA cases is generally limited to the evidence in the administrative record.

It is well-established that judicial review in cases brought under CEQA is limited to review of the evidence that was before the agency when it made its challenged decisions. (*Western States, supra,* 9

Cal.4th 559.) In *Western States*, the California Supreme Court established the general rule that extra-record evidence is not admissible in traditional mandamus actions challenging an agency's quasi-legislative administrative decision.[2] (*Id.* at p. 579.) The Court confirmed that judicial review in such cases is strictly limited to the evidence in the administrative record. (*Id.*) The Court also confirmed that the administrative record includes only the evidence that was *before* the agency when it made its challenged decision. (*Id.* at p. 573, fn. 4.) All other evidence is considered "extra-record" evidence and, subject to very limited exceptions, is not admissible. (*Id.*)

The Court reasoned that evidence is limited to the contents of the administrative record that was before the agency because the court's review is limited to whether the public agency abused its discretion in light of the evidence in the record. (*Id.* at p. 565.) The overriding purpose of restricting review to the administrative record is to ensure that the courts do not "engage in independent fact finding rather than engaging in a review of the agency's discretionary decision."[3] (*Friends of the Old Trees v. Cal. Dept. of Forestry & Fire Protection* (1997) 52 Cal.App.4th 1383, 1391.)

Numerous courts have applied this rule in CEQA cases to exclude evidence outside the administrative record. (*See, e.g., Eureka Citizens for Responsible Government v. City of Eureka* (2007) 147 Cal.App.4th 357, 367 [denying appellants' motion to "augment" the administrative record with materials that were not presented to or considered by city council in reaching challenged decision]; *Sacramento Old City Assn. v. City Council* (1991) 229 Cal.App.3d 1011, 1032, fn. 13 [supplemental EIR not admissible because it was not before decision-makers prior to or at the time of their decision]; *Schaeffer Land Trust v. San Jose City Council* (1989) 215 Cal.App.3d 612, 624, fn. 9 [declaration regarding traffic analysis not admissible in CEQA action because "appellate review is limited to issues in the record at the administrative level"]; *City of Carmel-by-the-Sea v. Bd. of Supervisors* (1986) 183

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[2] / Although *Western States* involved a traditional mandate proceeding brought under Code of Civil Procedure section 1085 challenging a quasi-legislative agency decision, the rule also applies to administrative mandamus proceedings brought challenging quasi-judicial decisions brought under Code of Civil Procedure section 1094.5. (*Cadiz Land Company Inc., v. Rail Cycle LP* (2002) 83 Cal.App.4th 74, 120 [noting that, with regard to whether a court should admit and consider extra-record evidence, traditional mandamus versus administrative mandamus is "a distinction without a difference," as "the underlying principles in determining whether extra-record evidence is admissible are essentially the same"].)

[3] / A governmental agency's determination that a particular project is exempt from compliance with CEQA requirements is subject to judicial review under the abuse of discretion standard in Public Resources Code section 21168.5. Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence. (*See Robinson v. City and County of San Francisco* (2012) 208 Cal.App.4th 950, 955; *Save Our Carmel River v. Monterey Peninsula Water Management Dist.* (2006) 141 Cal.App.4th 677, 693.)

Cal.App.3d 229, 249, fn. 11 [subsequent EIR not admissible "since it was not part of the administrative record"]; *Browning-Ferris Indus. v. City Council* (1986) 181 Cal.App.3d 852, 861 [declarations, expert reports, and transcript of hearing by separate agency not admissible in action challenging EIR because not in administrative record]; *El Morro Community Assn. v. Cal. Dept. of Parks and Recreation* (2004) 122 Cal.App.4th 1341, 1358-1362 [affirming trial court's decision to deny motion to augment record with post-decisional documents because documents were not relevant to agency's compliance with CEQA].) The logic of these CEQA cases is consistent with the basic premise that only relevant evidence is admissible in court. (Evid. Code, § 350.)

As Petitioner notes, there are limited exceptions to the rule prohibiting extra-record evidence. (Motion to Augment, p. 8.) But Petitioner fails to explain why any of the exceptions might apply here. None do. Moreover, the Supreme Court in *Western States* made clear that, even when extra-record evidence is admissible under an exception to the general rule, "extra-record evidence can *never* be admitted merely to contradict the evidence the administrative agency relied on in making a quasi-legislative decision or to raise a question regarding the wisdom of that decision." (*Western States, supra,* 9 Cal.4th at p. 579, italics added.) Yet Petitioner offers the Augment Documents solely for that very reason. (Motion to Augment, pp. 12-15.) Therefore, the Court should deny Petitioner's Motion.

B. The general rule prohibiting extra-record evidence is applicable to this case.

Petitioner acknowledges the universally-applied rule that extra-record evidence is "generally not admissible in traditional mandamus lawsuits." (Motion to Augment, p. 8 [citing *Western States, supra,* 9 Cal.4th at 574].) Petitioner nonetheless, struggles to paint this case as something other than what it is – a typical CEQA case challenging an agency's discretionary determination that a project is categorically exempt from CEQA. Although Petitioner presents the rules applicable in *other* types of cases, it cannot escape the fact that the general rule prohibiting extra-record evidence applies to this case. "An unbroken line of cases holds that, in traditional mandamus actions challenging quasi-legislative administrative decisions, evidence outside the administrative record (extra-record evidence) is not admissible." (*Carrancho v. Cal. Air Resources Bd.* (2003) 111 Cal.App.4th 1255, 1269.)

Although Petitioner's specific arguments as to why this general rule applicable to traditional mandamus lawsuits should not apply are not easily discernible from its Motion to Augment the Record, its overall contention seems to be that the rule prohibiting extra-record evidence should not apply in this case because Petitioner claims the City's determination that the Project was exempt from CEQA was an "informal action," and it further claims the City did not hold a public hearing on the Project or provide an opportunity to present evidence at the administrative level. (Motion to Augment, pp. 4, 5, 7, 9-11.).

Petitioner is wrong on all points. There is nothing unique about this case that would remove judicial review outside of the general rule prohibiting extra-record evidence.

Petitioner's argument is based on the general statement in *Western States* that although extra-record evidence is generally inadmissible in traditional mandate cases challenging quasi-legislative administrative decision, "[the Court] will continue to allow admission of extra-record evidence in traditional mandamus actions challenging ministerial or informal agency actions." (9 Cal.4th at p. 576.) In excluding informal and ministerial administrative actions from the bar on extra-record evidence, the Supreme Court highlighted the fact that, unlike quasi-legislative administrative decisions, ministerial and informal actions are not entitled to judicial deference. (*Id.* at p. 575-76.) Moreover, the Court was persuaded by commenters who pointed out that "the administrative record developed during the quasi-legislative process is usually adequate to allow the courts to review the decision without recourse to such evidence." (*Id.*, at p. 575.)

In allowing extra-record evidence for ministerial or informal actions, the Court noted that there is a material difference between traditional mandamus cases "challenging ministerial or informal administrative actions" and those "challenging quasi-legislative administrative decisions." (*Ibid.*) Specifically, the Court explained that the rule prohibiting extra-record evidence should not apply in challenges to informal or ministerial actions because informal actions are not entitled to judicial deference and extra-record evidence is often necessary "because there is often little or no administrative record in such cases". (*Ibid.*)

C. The City's discretionary approval of the Project at a public meeting, based on a categorical exemption, was not a ministerial or informal agency action.

This case does not involve a ministerial or informal action by the City. Rather, Petitioner is challenging the City's quasi-legislative decision to approve the Project based on its determination that the Project was exempt from CEQA. (See Pet., pp. 13, 19-29.) In general, quasi-legislative actions are political in nature; they "involve the exercise of discretion governed by considerations of public welfare." (*Wilson v. Hidden Valley Municipal Water Dist.* (1968) 256 Cal.App.2d 271, 280.) They are also generally self-generated by public agencies. The City's actions regarding the Project fit this definition. Ministerial actions, on the other hand, involve "little or no personal judgment by the public official as to the wisdom or manner of carrying out the project." (CEQA Guidelines, § 15369.) "A ministerial decision involves only the use of fixed standards or objective measurements, and the public official cannot use personal, subjective judgment in deciding whether or how the project should be carried out." (*Ibid.*) Here, the City Council exercised its judgment on November 1, 2011, regarding

whether to approve the contract for the lighting project at issue. (CEQA Guidelines, § 15357 [definition of "discretionary project"].) The City determined that the Project was exempt from CEQA and approved the Project based on the evidence in the administrative record.[4] (AR 7, 12-25, 26-36, 38-41.) Thus, the general rule prohibiting extra-record evidence in traditional mandamus cases applies, and the Augment Documents are barred.

Moreover, Petitioner's claim that the City's actions are "informal agency actions" must fail because the City provided opportunity for public comment and an administrative record was developed at the administrative level. Although the Court in *Western States* did not define the characteristics of an "informal" agency action, courts have consistently held that an agency action is not informal when the agency allows the opportunity for public comment. In fact, cases since *Western States* have rejected claims by challengers that the approval at issue in the litigation was ministerial or an informal agency decision, finding that if there was an opportunity for public input, the decision was not informal, even where a hearing was not required. (*See, e.g.*, *Carrancho, supra,* 111 Cal.App.4th at pp. 1269-70 [although there was no hearing, the agency provided opportunity for input from the public]; *Save Our Carmel River, supra,* 141 Cal.App.4th at pp. 699-700 [declaration of city planner supporting the application of a categorical exemption was inadmissible extra-record evidence, although no hearing on the exemption was required]; *Friends of the Old Trees, supra,* 52 Cal.App.4th at p. 1392 [extra-record evidence inadmissible because, although a hearing was not required by law to be held on the approval of the project, there were numerous opportunities for public input].)

Here, the City's determination that the Project is exempt from CEQA cannot be considered a ministerial or informal action because the City provided an opportunity for the public to comment on the Project and to submit evidence into the record. The City Council unanimously approved the Project on November 1, 2011, at its regularly scheduled meeting. (AR 2, 7, 24.) The City Council approved a resolution awarding the contract for the Project. (AR 2, 7, 12-14, 24.) "Approval," for purposes of CEQA, "means the decision by a public agency which commits the agency to a definite course of action in regard to a project intended to be carried out by any person." (CEQA Guidelines, § 15352, subd. (a).) No particular form of approval is required under CEQA. (*See Stockton Citizens for Sensible Planning v. City of Stockton* (2010) 48 Cal.4th 481, 506.) Awarding the contract for the Project committed the City

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[4] / Indeed, the fact that the Council opened the matter to public comment at the public hearing demonstrates that the decision was not a ministerial one, because if it were ministerial, the existence of any public objections or requests for modification would be irrelevant to the determination of whether the project meets "fixed standards or objective measurements." (CEQA Guidelines, § 15369.)

to a definite course of action regarding the Project. Therefore, the City formally approved the Project at the City Council meeting on November 1, 2011.

Also, the November 1, 2011 City Council meeting was a "public hearing" for purposes of CEQA. The term "public hearing" is not a term of art under CEQA – it simply means a hearing that is open to the public. The November 1, 2011 City Council meeting fits within that definition. Not only was the meeting was open to the public, public participation was encouraged. (AR 12, 7, 44-46.)

Petitioner claims that the City did not provide notice or a public hearing on either the Project approval or the CEQA determination. (Motion to Augment, pp. 9-10.) Petitioner fails, however, to explain *why* the City Council meeting was not a "public hearing" and *how* the City Council meeting agenda and agenda report did not provide proper notice. Most importantly, Petitioner cites to no notice or hearing requirements in CEQA or any other statute with which the City failed to comply.

Petitioner erroneously claims that "the public did not have notice and an opportunity to be heard because the City did not hold a public hearing under the City's own rules." (Motion to Augment, p. 9.) Petitioner misapprehends the record. Petitioner cites only to the Monterey City Code to support its claim that the City was required individually notify every person in the City about the Project. (Motion to Augment, p. 9.) But that code section requires the Planning Commission or the Public Works Director to hold a public hearing on an application *for a use permit or variance*. (AR 327.) The Project does not involve or require an application for a use permit or variance. There is no rule that required the City to individually notify each person in Monterey that it was approving a contract to replace some of the City's existing lights with more energy-efficient fixtures.

Nor is there any requirement that the City provide any particular kind of notice when it determines that a project is exempt from CEQA. Under CEQA, an agency need not follow any particular procedure to determine that a project is exempt, and there are no CEQA provisions that require agencies to provide notice of such determinations. (*Tomlinson v. County of Alameda* (2012) 54 Cal.4th 281, 290.) In fact, an agency need not provide the public with any opportunity to review, or hold a public hearing on, its exemption determination. (See CEQA Guidelines, §§ 15060 (preliminary review), 15061 (review for exemption); *see also Magan v. County of Kings* (2002) 105 Cal.App.4th 468, 477 [even where an exemption is contested, an agency need not provide a hearing on the record].) Although not required to do so, the City approved the project at a public hearing and provided notice of its exemption determination. (AR 7, 24, 38-41, 44.) Petitioner (or any member of the public) could have presented any evidence to the City objecting to the new lights or the exemption determination before the City Council made its decision, but it failed to do so. This Motion to Augment the Record is merely Petitioner's

transparent attempt to get around its failure to exhaust its administrative remedies, which it could have easily done by providing the disputed documents to the City for inclusion in the record *before project approval.* (*Tomlinson, supra,* 54 Cal.4th at p. 291 [the exhaustion requirement applies to approvals for which exemption is claimed and for which there was an opportunity for public comment at a hearing]; *Western States, supra,* 9 Cal.4th 559 [the record includes only evidence that was before the agency when it approved the project].)

Petitioner's claim that the City was required to include its exemption determination in the Meeting Agenda is also unavailing. (Motion to Augment, p. 10.) As explained above, CEQA does not require that an agency give notice or hold a hearing before deciding a project is categorically exempt under CEQA. (*San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School Dist.* (2006) 139 Cal.App.4th 1356, 1385–86 (*San Lorenzo*).) Further, there is no requirement that an agency provide notice to the public that it has determined that a project is exempt from CEQA, ever. (CEQA Guidelines, § 15062, subd. (a); *Robinson, supra,* 208 Cal.App.4th at p. 961 ["[T]here is no requirement that an agency put its exemption decision in writing at *any* time, and the Guidelines expressly provide that notice of a categorical exemption determination not only need not, but *should* not be given until *after* the project is approved."].) Thus, by providing notice of its exemption determination in its council agenda report, the City did more than what is required by law. And this was certainly enough to put Petitioner and every other member of the public on notice that the City staff had determined the Project was exempt from CEQA and that the Council might agree with that determination and approve the Project at the November 1, 2011 meeting. (*Tomlinson, supra,* 54 Cal.4th at p. 290.) Again, the fact that the City also filed the optional Notice of Exemption is of no consequence. (*Ibid.*)

Petitioner's reliance on *San Joaquin Raptor Rescue Center v. County of Merced* (2013) 216 Cal.App.4th 1167 (*San Joaquin Raptor Rescue Center*) is inapposite. The court in that case concluded that a county violated the Brown Act (Gov. Code, § 54950 et seq.) because its planning commission took action on a mitigated negative declaration (MND) when that matter was not disclosed on the meeting agenda. (*Id.*) The court held that the MND was a distinct item of business, and not a mere component of project approval, since it involved a separate action or determination by the commission. (*Id.* at p. 1177.) The court noted that CEQA specifically requires that an MND must be formally adopted based on specific findings. (*Id.* at p. 1177, fn. 13.) There are no such adoption or approval requirements for exemption determinations. (*Robinson, supra,* 208 Cal.App.4th at p. 955 [If an activity is categorically exempt, "it is not subject to CEQA requirements and may be implemented without any

CEQA compliance whatsoever."]; *City of Pasadena v. State of California* (1993) 14 Cal.App.4th 810, 820 (*City of Pasadena*) ["It is plain that . . . if a project falls within a categorical exemption no formal environmental evaluation is made."].) Nothing in *San Joaquin Raptor Rescue Center* requires an agency to include an exemption determination on its meeting agenda when it approves a project based on an exemption. In fact, the court specifically noted that an exemption would *not* need to be included on an agenda because, "if a project was found to be exempt, there may not be a CEQA document at all." (216 Cal.App.4th at p 1178, fn. 17.)

Moreover, the certified record developed at the administrative level for the City's actions is adequate for judicial review. The record is 583 pages long and contains hundreds of documents. The scope of documents is inclusive (ranging back at least to October 2009, when the City first contemplated applying for the state energy efficiency grants that funded the Project [AR 300-323]) and complies with Public Resources Code, section 21167.6, subdivision (e), the section of CEQA specifying the contents of an administrative record. The record certified by the City includes all evidence relevant to the City's approval of the Project and its determination that the Project is exempt from CEQA, i.e., it includes all relevant evidence that was before the City at the time it considered and approved the Project. (*See Friends of the Old Trees, supra,* 52 Cal.App.4th at p. 1391 [court rejected claim that agency's administrative decision made as a result of a proceeding which did not require the taking of evidence was "informal," observing that the agency's decision "was not made in a bureaucratic vacuum leaving an inadequate paper trail, as the 600-plus page administrative record demonstrates"].)

Petitioner also relies on *City of Pasadena, supra,* 14 Cal.App.4th 810, to support its position, but Petitioner's discussion of that case is misleading. (Motion to Augment, pp. 5, 7.) Petitioner fails to mention, for example, that the Supreme Court in *Western States* explicitly overruled the statement in *City of Pasadena* providing that the court could generally receive evidence outside the administrative record in traditional mandamus cases. (*Western States, supra,* 9 Cal.4th at p. 570, fn. 2.) Moreover, Petitioner's reliance of that case to support its argument that the City's decision was "informal" is also not appropriate. (Motion to Augment, p. 7.) In *City of Pasadena* the State Department of Corrections determined that its lease of a building was exempt from the requirements CEQA under a categorical exemption. (14 Cal.App.4th at p. 817.) The agency provided no notice of the exemption. Rather, the use of a categorical exemption was not made public until the agency filed a Notice of Exemption. (*Ibid.*) Although the *City of Pasadena* court's reasoning for accepting extra-record evidence was disapproved in *Western States*, as stated above, the commentators in 2 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act (Cont.Ed.Bar 2d ed.) § 23.56, pp. 1196 ("Kostka and Zischke") still use this

case as an example of a situation where an agency action should be considered an "informal" agency action. (*See also* Motion to Augment, pp. 5, 7.) No subsequent court opinion, however, has cited this case for the proposition suggested by the commentators or Petitioner. But even if the Court accepts the commentator's opinion, *City of Pasadena* is easily distinguishable. Unlike the agency in that case, here the City of Monterey provided notice of its exemption determination and held a public hearing before it approved the Project and a complete administrative record was developed at the administrative level. (AR 39, 7, 12-25, 44-46.)

In sum, there is nothing unusual about this case that would expand judicial review beyond contents of the administrative record that was before the City when it made its challenged administrative decision. This case is simply a challenge to the City's discretionary decision to approve the Project. The City's decision was not a ministerial or informal action, and the certified administrative record is complete and adequate for the Court to review the City's decision. Therefore, the general rule prohibiting extra-record evidence applies, and the Court should deny Petitioner's Motion.

D. The Augment Documents submitted by Petitioner as Exhibit A are irrelevant and inadmissible.

Petitioner claims that the record should include the Friendly Plaza Lighting Project Documents and pages from the City's website related to the National Historic Landmark District Survey ("Exhibit A Documents") because those documents were in the City's files prior to the City Council's approval of the Project. (Motion to Augment, pp. 12-13.) That is not the standard. Not every document that was in the City's files at the time it approved the Project belongs in the administrative record for this Project approval. As explained above, the law is clear that judicial review in writ of mandate cases brought under CEQA is limited to review of the evidence that was before the agency when it made its challenged decision. (*Western States, supra,* 9 Cal.4th 559; Pub. Resources Code, § 21167.6, subd. (e); Code Civ. Proc., § 1085.)

The Friendly Lighting Plaza Project and the National Historic Landmark District Survey have nothing to do with the Project at issue in this case. For example, the Friendly Plaza Lighting Project refers to the City's consideration of lighting in and around Friendly Plaza. (AR 584-634.) Petitioner submits snippets from the City's files related to that project from 2002 and 2009. (*Ibid.*) The City's actions with regard to that separate project were not timely challenged and are not being challenged now. Indeed, the statute of limitations to challenge that project has long since passed. Similarly, the National Historic Landmark District Survey is also an entirely separate project that is not being challenged and is completely irrelevant to this case. There is no evidence that any of the documents

relating to those different projects were presented to the City, considered by the City, or otherwise before the City when it approved the specific lighting project that Petitioner challenges in this litigation. Therefore, they do not belong in the record. (*Western States, supra,* 9 Cal.4th 559.)

Porterville Citizens for Responsible Hillside Development v. City of Porterville (2007) 157 Cal.App.4th 885 (*Porterville*) is instructive. There, the respondent city adopted a mitigated negative declaration (MND) for a single-family home subdivision project on a hillside in eastern Porterville. In the trial court, the real party in interest requested that judicial notice be taken of, among other things, an EIR prepared for the city's General Plan several years prior to the project. (*Id.* at p. 889.) The request for judicial notice was not opposed, and the trial court granted the request. (*Ibid.*) On appeal, the real party argued the trial court erred in using the contents of the General Plan EIR in assessing whether the administrative record contained substantial evidence supporting a fair argument that the housing project might have adverse environmental effects. (*Id.* at pp. 894-895.) The Court of Appeal agreed, finding that the General Plan EIR constituted extra-record evidence that was not part of the administrative record before the city when it decided to adopt the MND and approve the project. (*Id.* at p. 895.) As the court explained, there was:

> no evidence … in the administrative record indicating the MND was tiered on the [general plan] EIR. Furthermore, the record lack[ed] any evidence indicating that the [general plan] EIR was utilized or consulted in the preparation of the initial study or the MND. Also, the [general plan] EIR was not referenced by any speaker during the public hearings and there is no evidence indicating that it was considered or consulted by any member of the city council prior to adoption of the MND. Thus, the [general plan] EIR constitute[d] extra-record evidence.

(*Id.* at p. 894.)

Here too, there is no evidence in the record indicating any of the Augment Documents in Petitioner's Exhibit A were utilized, consulted, or otherwise relied upon by the City in approving the challenged Project. Further, no one referenced those documents during the public hearing, and there is no evidence indicating that any member of the City Council considered any of those documents prior to the approval of the Project. Petitioner has failed to offer any evidence demonstrating a relationship between the documents in Exhibit A and the Project. Those documents therefore, are not part of the administrative record and constitute inadmissible extra-record evidence. (*Porterville*, *supra*, 157 Cal.App.4th at pp. 894-895; *Western States*, *supra*, 9 Cal.4th at p. 574.)

Petitioner's reliance on Public Resources Code, section 21167.6, subdivision (e) also does not support its expansive view of the record. (Motion to Augment, pp. 5, 12.) Section 21167.6, subdivision (e) lists the *types* of documents that must be included in the administrative record. But that section

clearly refers to documents in the record of the agency pertaining to the *particular project under review,* not every single project that had been or will be under consideration by the agency. Nor does it contemplate the inclusion of every document in an agency's files. Moreover, even if a document fits within one of the broad categories listed in subdivision (e), it is still subject to *Western States'* prohibition on extra-record evidence if those documents were not before the agency when it made its challenged decision. There is simply no authority that supports adding the Exhibit A documents to the record for this case.

The Exhibit A documents are simply irrelevant to the Project at issue. Petitioner could have made known its belief that the documents were relevant to the proposed decision to approve the lighting contract and offered the documents into the record *prior* to Project approval, but did not do so. Nothing in Public Resources Code section 21167.6, subdivision (e) mandates the admission of these documents in this case, and nothing in Code of Civil Procedure section 1085 and the *Western States* decision even permits their inclusion. Thus, the Court must deny Petitioner's Motion to Augment the Record with the Exhibit A documents.

E. The Augment Documents submitted by Petitioner as Exhibits B and C are irrelevant and inadmissible extra-record evidence.

Petitioner contends that the documents it offers as Exhibits B and C should be included in the record, despite the fact that the documents were submitted long after the City approved the Project – many even submitted well after the Project was *implemented.* (Motion to Augment, pp. 14-15.) Petitioner, however, cites to no authority supporting its position. Rather, Petitioner mischaracterizes the nature of its case in an attempt to create a moving target for when the administrative record was closed. For instance, Petitioner's characterization that its challenge in this case is limited to "the informal action of staff to sign and file the Notice of Exemption" is deceptive. (Motion to Augment, p. 2, 1.) If that were so, this case would be easily resolved, because the City could simply rescind its Notice of Exemption, leaving the new street light fixtures in place. The City was not required to sign and file the Notice of Exemption in the first place. (CEQA Guidelines, § 15062, subd. (a).) "[T]here is no requirement that the agency put its exemption decision in writing. According to the Guidelines, 'the agency *may* file a notice of exemption.' [*Ibid.*, italics added.] But it is not required to do so: 'A notice of exemption has no significance other than to trigger the running of the limitations period.' [Citation.]" (*San Lorenzo, supra,* 139 Cal.App.4th at p. 1385.) Rather, Petitioner can only be challenging the City's approval of the Project based on the exemption determination which occurred on November 1, 2011. (AR 2, 7, 24, 38-41.) The exemption determination was proposed by the City staff before the Project was approved, as it

must be. (*San Lorenzo, supra,* 139 Cal.App.4th at p. 1380 [explaining that agency must determine whether a Project is exempt from CEQA *before* it approves the project.].) Therefore, the Record ends on November 1, 2011 – the day that the Project was approved.[5] And any documents submitted to the City after that date are irrelevant. (*Friends of the Old Trees, supra,* 52 Cal.App.4th at p. 1391 [purpose of restricting review to the administrative record is to ensure that the courts do not "engage in independent fact finding rather than engaging in a review of the agency's discretionary decision."].)

Again, "the only evidence that is relevant to the question of whether there was substantial evidence to support a quasi-legislative administrative decision under Public Resources Code section 21168.5 is that which was before the agency when it made its challenged decision." (*Western States, supra,* 9 Cal.4th at p. 573, fn. 4.) Here, the City approved the Project on November 1, 2011 after determining that the Project was exempt from CEQA. (AR 2, 7, 24, 39.) Documents that did not yet exist could not have been before the City when it made its decision. Therefore, the documents submitted by Petitioner as Exhibits B and C are inadmissible.

Furthermore, an agency's compliance with CEQA for a particular project ends when it approves the project. As the court in *El Morro Community Association v. California Department of Parks & Recreation* (2004) 122 Cal.App.4th 1341, 1361, explained in rejecting a party's attempts to place post-decisional evidence in the record:

> [i]t is axiomatic that once an agency has given its requisite approval to a project, CEQA's role in that project is completed. Judicial review is limited to the CEQA determination for the project approved.

In this case, the Project was approved on November 1, 2011, and any evidence submitted after that date is irrelevant. It cannot be credibly disputed that the latest date that the City Council made a discretionary decision regarding the street light replacement project was November 1, 2011, the date of a publicly noticed Council meeting at which the contract for the Project was considered and discussed during the Council's consent calendar and adopted. The filing of the Notice of Exemption was merely an optional action by the City; the City was under no obligation to file it. (Guidelines, § 15062, subd. (a); *San Lorenzo Valley Community Advocates for Responsible Education, supra,* 139 Cal.App.4th at p. 1385.) The filing of a Notice of Exemption is of no consequence other than to trigger the statute of

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[5] / Although the Notice of Exemption post-dates the Project approval, as NOEs must (*Coalition for Clean Air v. City of Visalia* (2012) 209 Cal.App.4th 408 [NOEs cannot be filed before project approval]), NOEs are routinely included in administrative records even though they post-date the project approvals because they document the start of the statute of limitations. (*Stockton Citizens for Sensible Planning, supra,* 48 Cal.4th at p. 506; *see also*, Pub. Resources Code, § 21167.6, subd. (e)(5) [record includes all notices issued by the agency to comply with CEQA or any other law governing the processing and approval of the project at issue].)

limitations period. (*Ibid.*) Since documents that did not exist could not have been before the City staff when they were evaluating the Project or the City Council when it approved the Project, that evidence is inadmissible.

Petitioner's demand that the record should include complaints about the Project submitted to the City *after* the Project was implemented is particularly dubious. (Motion to Augment, pp. 14-15.) For instance, CEQA does not permit decision-makers to wait until after a Project is implemented to see if it will have any significant impacts and then decide what type of environmental document is appropriate, if any. Likewise, project challengers cannot wait until after a project is implemented, then complain about the project, and then rely on their own complaints as substantial evidence to challenge the validity of the project's approval. Yet that is exactly what Petitioner seeks to do here.

Simply put, the documents offered in Exhibit B and Exhibit C do not belong the City's record of proceedings for the Project being challenged by Petitioner because they did not exist at the time the City approved the Project. Thus, this Court should deny Petitioner's Motion to Augment the Record with those documents.

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V. CONCLUSION

Petitioner's attempt to introduce the Augment Documents contravenes the plain rule established by the state Supreme Court in *Western States* and its progeny. The Augment Documents were not before the City at the time it approved the Project. Many of the documents did not even exist. The Augment Documents therefore, are irrelevant and Petitioner's Motion to Augment the Record should be denied.

Dated: August 2, 2013

Respectfully,
REMY MOOSE MANLEY, LLP

By: Sabrina Teller
SABRINA V. TELLER
Attorney for Respondent
CITY OF MONTEREY

Turn Down the Lights v. City of Monterey
County of Monterey, Case No. M116731

PROOF OF SERVICE

I, Rosalia Lopez am employed in the City and County of Monterey. My business address is 512 Pierce Street, Monterey, CA 93940. My email address is caoncall@monterey.org. I am over the age of 18 years and not a party to the above-entitled action.

I am familiar with the City of Monterey's City Attorney's Office's practice whereby the mail is sealed, given the appropriate postage and placed in a designated mail collection area. Each day's mail is collected and deposited in a U.S. mailbox after the close of each day's business.

On August 5, 2013 at 12:41 PM., I served the following:

OPPOSITION TO PETITIONER'S MOTION FOR ORDER AUGMENTING THE RECORD

☐ On the parties in this action by causing a true copy thereof to be placed in a sealed envelope with postage thereon fully prepaid in the designated area for outgoing mail addressed as follows; or

☐ On the parties in this action by causing a true copy thereof to be delivered via Federal Express to the following person(s) or their representative at the address(es) listed below; or

☐ On the parties in this action by causing a true copy thereof to be delivered by facsimile machine number (916) 443-9017 to the following person(s) or their representative at the address(es) and facsimile number(s) listed below; or

☑ On the parties in this action by causing a true copy thereof to be electronically delivered via the internet to the following person(s) or representative at the address(es) listed below:

☑ On the parties in this action by causing a true copy thereof to be hand-delivered to the following person(s) or representative at the address(es) listed below; or

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I declare under penalty of perjury that the foregoing is true and correct and that this Proof of Service was executed this 5th day of August, 2013, at Monterey, California.

Rosalia Lopez