Michael W. Stamp/SBN 72785
Molly E. Erickson/SBN 253198
Stamp | Erickson
479 Pacific Street, Suite One
Monterey, California 93940
831.373.1214 Fax: 831.373.0242
erickson@stamplaw.us

Susan Brandt-Hawley/SBN 75907
Brandt-Hawley Law Group
P.O. Box 1659 Glen Ellen, CA 95442
Phone: 707.938.3900 Fax: 707.938.3200
susanbh@preservationlawyers.com

Rachel Mansfield-Howlett/SBN 248809
Provencher & Flatt, LLP
823 Sonoma Ave. Santa Rosa, CA 95404
Phone: 707.284.2380 Fax: 707.284.2387
rhowlettlaw@gmail.com

Attorneys for Petitioner

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF MONTEREY

TURN DOWN THE LIGHTS,

Petitioner,

v.

CITY OF MONTEREY,

Respondent.

_____/

Case No. M116731

Memorandum of Points and Authorities in Opposition to Motion to Strike

Hearing Date: May 11, 2016
Time: 2:00 p.m.
Dept.: 1, Salinas

Hon. Lydia M. Villarreal

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Introduction

The augmented record provides essential evidence that allows petitioner Turn Down the Lights to paint a complete picture of the case. Its relevance to the legal issues is manifest. This Court's initial ruling on the scope of the record was left intact by the Sixth District Court of Appeal, and the City offers no new facts or compelling argument.

The City of Monterey planning staff made an internal determination on an undisclosed date that a pending LED streetlight project would be exempt from CEQA.[1] In November 2011, a City Council meeting agenda listed a "public appearance" item described simply as "Award Street and Tunnel Lighting Replacement Project Contract." The agenda noted that the item was not formally noticed as there was to be no "public hearing." Unsurprisingly, no members of the concerned public appeared at the meeting to object. The City Council approved the lighting project contract but did not consider a CEQA determination. Three months later, in February 2012, City staff took informal action, without Council approval, to prepare a Notice of Exemption from CEQA. By that time the public had actual knowledge of the project and its significant citywide impacts.

The lighting project does not violate CEQA simply by virtue of being approved without notice or any public hearing. But by choosing to approve the project in an internal process of which the concerned public was unaware until the lights were installed, the City forfeited affirmative defenses vis-à-vis exhaustion of remedies and the scope of the record. Respectfully, the motion to strike should be denied.

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[1] Facts in the Introduction are cited to the record, *post*.

Statement of Facts

In November 2011, the Monterey City Council agendized the "Award Street and Tunnel Lighting Replacement Project Contract" as a "public appearance" item. (Administrative Record (AR):44.) While the City pronounces that it "provided regular notice" of the contract, it offers no evidence of any notice aside from sharing a copy of the agenda itself. (City Opposition (hereafter Opp.), p. 2, citing AR:38-41, 44-46.) Availability of the agenda is apparently "regular notice;" the agenda notes that "public appearance items . . . do not require formal noticing as public hearings." (*Ibid.*)

> The "Council Agenda Report" (aka staff report) prepared by City staff stated:
>
> RECOMMENDATIONS
>
> That the City Council adopt the attached resolution awarding a contract to Republic ITS for the Street and Tunnel Lighting Replacement Project for the base bid plus additive alternate bid amount of $934,655 ...
>
> [¶¶]
>
> ENVIRONMENTAL DETERMINATION
>
> The City's Planning, Engineering, and Environmental Compliance Division determined that this project is exempt from CEQA regulations under Article 19, Section 15302.

(AR:38-39.) The report explained that the City had been considering an energy savings project since 2009 to replace streetlights. (AR:40; 38-40.)

On November 1, 2011, as "public appearance" item 7 on the City Council agenda, and following a short staff presentation focusing on the energy savings from LED lights, the City Council awarded the contract. (AR:7, 12-37.) The approval resolution recited

that the City Finance Director had received and opened five bids for the lighting project the month prior, on October 5, 2011. (AR: 41.) No public notice had occurred. Although the agenda report recited that the project was exempt from CEQA, the Council did not consider or adopt any CEQA determination. A short exchange occurred between Councilmember Nancy Selfridge and General Service Superintendent George Helms:

> COUNCILMEMBER SELFRIDGE: In our historic district, will the lights look like that? Or will they be somehow in a correct format?
>
> MR. HELMS: They won't look -- they won't look like that. There is a separate grant for decorative lights, and they'll look exactly the way they look now.

(AR:20.)

Two months later, in January 2012 the City began to install new LED streetlights both within and outside of the Old Town Historic District, inconsistent with the representation made to Councilmember Selfridge. (AR:676, 701, 886, 888, 892.) Soon after, shocked City residents contacted the City with objections to the impacts of the overly-bright lights. Concerns focused on traffic and pedestrian safety, views, and impacts to the context of the City's nationally-important historic resources.

Objections grew stronger as more lights were installed. Residents confirmed that the new, much stronger lighting was harsh and glaring; was painful to look at and obtrusive; created unsafe driving situations; detracted from the quality of life in the City; shone through private windows on private property; and impacted the historic

qualities of the Old Town Historic District. (*E.g.*, AR:681 [complaints that lights are too bright]; 682 [lights are bright and cause glare, trespass into homes]; 683 [lights shine through windows]; 685 [excessive light, ruins night sky]; 693 [lights impact quality of life]; 695 [lights negatively impact the landmark district]; 696 [lights are too bright]; 700-701 [light is "painful"; City-added light "shields" don't work]; 706-708 [bright lights intrude into yard, are unsafe, are visible from block away,]; 711, 865 [lights impair sleep]; 874-875 [newspaper articles]; *see* 877-884, 901, 911-912, 921-1005.)

Resident Diane Belanger complained that the blinding LED light pierced her bedroom blackout shades and cast a "'prison yard light' on our lovely neighborhood." (AR:691.) Ms. Belanger claimed that navigating the City's hills while driving at night was now dangerous: "as a driver navigates hills, the lights are blinding." (*Ibid.*) Other City residents noted that the City's previous light fixtures had effective diffusing shades, which had softened their emitted light, while the new fixtures emitted a more intense light even with post-installation shields in place. (AR:677-678, 695, 862-865.)

One of the City residents who contacted the City regarding the impacts of the new LED lights was James Bryant, the owner-resident of the historic landmark Casa de la Torre Adobe (AR:409, 604-605, 862-863), a National Register property (AR:723, 732), and owner of *Carpe Diem Fine Books*, a local business located in a historic building on Pearl Street in downtown Monterey. (AR:409, 862-863). Mr. Bryant is the past president of the Alliance of Monterey Area Preservationists (AR:595) and is also a member of Turn Down the Lights.

Mr. Bryant has been an advocate of contextually appropriate lighting in historic Monterey since 2002, and the record documents his years of cordial correspondence with the City regarding streetlight issues. (*E.g.*, AR:584-587, 589, 591, 593-596, 614, 617.) After the LED lights were installed in early 2012, Mr. Bryant was among those who repeatedly contacted the City to explain problems with the lights and to suggest corrections. (*E.g.*, AR:700-701, 862-863, 863-867, 888, 903, 907, 908.)

Residents continued to bring the adverse impacts of LED lights to the attention of City staff in the months following. (*See* AR:716-717, 857-862.) The City kept a spreadsheet to keep track of complaints. (AR:716-717, 857-861 .) To address some of the residents' complaints about impacts to their residences, the City attempted after-the-fact mitigations on a small fraction of the installed lights (AR:36, 857-861) — less than 3% of the 1676 of the lights installed by the City — including adding light shields (*e.g.*, AR:, 716-717, 860-862, 862-863), dimming the lights (*e.g.*, AR:716-717), and trying to 'tilt' the lights. (*E.g.*, AR:911.)

On February 21, 2012, Mr. Bryant again contacted the City, specifically about "the three lights that directly negatively impact Casa de la Torre." (AR:862) That same day, almost three months after the City approved the LED streetlights, City staff filed a Notice of Exemption claiming a Class 2 categorical exemption for the project. (AR:1.)

Statement of the Case

This action was timely filed on March 22, 2012, within the 35-day statute of limitations following the posted Notice of Exemption. (Pub. Resources Code, § 21167, subd. (d).) A dispute arose about the petitioner's exhaustion of remedies. The City's demurrer to the petition on that issue was overruled by the Honorable Kay Kingsley.

A second threshold dispute arose about the proper scope of the record, now the subject of this motion. The City contends that the record should not include some documents that were in its possession before November 2011 or documents generated after the City Council approved the contract to install the LED streetlights on November 1, 2011. The City has certified and lodged a partial record.

Because *the City provided incomplete, inaccurate public notice of the project and no notice at all of its proposed CEQA exemption*, petitioner Turn Down the Lights contends that the record of proceedings not only includes the relevant documents in City files before 2011 but also documents provided to the City after the public learned of the project. In 2013, this Court granted the petitioner's motion to augment the record and the Sixth District denied the City's writ petition seeking to overturn the grant. The motion pleadings are here incorporated by reference.

An augmented record, solely containing documents within the City's files, is now lodged. Turn Down the Lights materially relied on the augmented record in its recent briefing on the merits of the underlying writ petition. (Opening Brief (hereafter OB), *passim.*)

Discussion

The administrative record in a CEQA action is intended to be broad and inclusive. (*E.g., Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal.App.4th 48, pp. 63-64; *Consolidated Irrigation District v. Superior Court* (2012) 205 Cal.App.4th 697, p. 717; *Eureka Citizens for Responsible Government v. City of Eureka* (2007) 147 Cal.App.4th 357, pp. 366-367; *County of Orange v. Superior Court* (2003) 113 Cal.App.4th 1, p. 8.)

The City nonetheless argues that when members of the public do not comment on a project before its approval, subsequent written communications cannot be part of the record. It contends that when an agency adopts a project with potentially significant environmental impacts — without noticing or holding a public hearing regarding any proposed CEQA exemption or the project's parameters — the uninformed public forfeits rights to comment on the project after that date.

The City's arguments are insupportable in both law and equity.

Whether or not augmentation of the record should occur largely relates to two facts: (1) the lack of public notice accurately describing the City Council's proposed action in November 2011 and (2) adoption of a Notice of Exemption in February 2012. The City's arguments largely spring from its assertions that it held a noticed public hearing regarding its contract approval on November 1, 2011 and that the Notice of Exemption was of no import. Neither of those assertions are supported by the record

A. There was Inadequate Public Notice and no Public Hearing

The scope of obligations of an environmental petitioner to exhaust remedies *by providing comments and evidence* — that will then become part of the administrative record — depend on notice and an opportunity to be heard. (Pub. Resources Code, § 21177.) Each contested issue must be presented to a public agency, as a codified matter of fairness, "during the public comment period provided by this division or prior to the close of the public hearing on the project before the issuance of the notice of determination." (Pub. Resources Code, § 21177 subd. (a), (b).)

However, an agency's reliance on a CEQA exemption requires neither public notice nor a comment period. (CEQA Guidelines [14 Cal. Code Regs, § 15000, et seq.], § 15061.) An agency may choose to rely on an exemption — without notice — and then choose whether to file a Notice of Exemption to trigger a 35-day statute of limitations. (*Id.*, subd. (d).) But unless the agency provides notice and an opportunity to be heard,

> ... it will not develop an evidentiary record suitable for judicial review. In such a case, admission of evidence from outside the record would usually be necessary. For example, in *City of Pasadena v. State of California* [(1993) 14 Cal.App.4th 810] the agency adopted a categorical exemption for a project and, consistent with CEQA, did not hold a hearing or solicit public comments before filing the notice of exemption. The decision was reviewed under CCP § 1085, and the trial court received and considered additional evidence. In the authors' view, this was appropriate because a complete evidentiary record, including comments, evidence, and objections submitted by interested parties, had not been developed the administrative level.

(2 Kostka & Zischke, *Practice Under the Cal. Environmental Quality Act* (Cont.Ed.Bar

2d ed. [2013]) §§ 23.55-23.56, pp. 1194-1196.) The CEB treatise's analysis of the law, including the *Pasadena* case, is cognizant of the Supreme Court's landmark ruling in *Western States Petroleum Association v. Superior Court of Los Angeles County* (1995) 9 Cal.4th 559; and emphasizes that the Supreme Court "did not decide when an administrative record on CEQA issues would be adequate for judicial review, thus precluding the admission of extrarecord evidence." (*Ibid.*)

Here, there was neither public notice nor any public comment period preceding the City's approval of the categorical exemption for the LED streetlight project. While the City's motion to strike repeatedly asserts that the City Council approved the project at a "public hearing" in November 2011, during petitioner's successful record augmentation proceedings in 2013 the City instead argued that because the City Council "put the matter up for public discussion, ... there was a staff presentation, a Power Point presented, there were questions asked ... [t]his *has all the hallmarks* of a public hearing ..." (Declaration of Sabrina V. Teller in Support of Motion to Strike, Ex. A, Reporter's Transcript, pp. 6-7.)

CEQA does not require, or define, "public hearings." Even if the agenda item for the LED streetlight project had been adequately described on the Council agenda, the City has pointed to none of its ordinances under which such an agenda provides sufficient public notice for a public hearing. The City's contention that "*the City provided an opportunity for the public to comment on the project and to submit evidence into the record*" thus mischaracterizes key facts. (Opp., p. 8, italics added.) Without meaningful public notice there is no effective opportunity for the public to

comment or submit evidence. (*Ante*, pp. 2-3.) Again, a City agenda simply listed the "Award Street and Tunnel Lighting Replacement Project Contract" as a minor "public appearance" item, confirming that "*public appearance items ... do not require formal noticing as public hearings.*" (AR: 44, italics added, OB, p. 7.)

Without public notice describing project parameters and an intention to exempt the project from CEQA, how would City residents know to show up? There was no public hearing, "hallmarks" aside. The record shows that when informed of the actual project — by experiencing adverse environmental effects, since the City did not provide notice — many concerned Monterey residents contacted the City. (*Ante*, pp. 3-5.)

Public Resources Code section 21177 subdivision (e) excuses issue exhaustion when there is no public hearing or public comment directed to a project's CEQA compliance: "This section does not apply to any alleged grounds for noncompliance with this division for which there was no public hearing or other opportunity for members of the public to raise those objections orally or in writing."

Azusa Land Reclamation Company v. Main San Gabriel Basin Watermaster (1997) 52 Cal.App.4th 1165 is on point; exhaustion of remedies was not required because the project approval hearing was not considered public under the agency's own rules. The public agency held a regularly scheduled public meeting, took comments from public agencies, experts, and others, then approved the project and found it exempt from CEQA. (*Id.*, p. 1188.) "[T]here was no public hearing ... there was simply a regularly scheduled public meeting of the Regional Board." (*Id.*, p. 1211.)

Tomlinson v. County of Alameda (2012) 54 Cal.4th 281 addressed a CEQA

addendum that, similar to an exemption, required no public comment period. But in *Tomlinson*, unlike in this case, the agency provided express public notice of its intention to rely on a specific exemption from CEQA, and a public hearing was held on that defined issue. (*Id.*, pp. 287-288.) The Supreme Court held that administrative remedies must be exhausted "as long as the public agency gives notice of the ground for its exemption determination, and that determination is preceded by public hearing" where objections may be raised. (*Id.*, p. 291.) The City provided no such public notice regarding the LED lights project. Under *Tomlinson*, without notice there is no requirement for a petitioner to exhaust remedies.

Consistently, *Santa Teresa Citizen Action Group v. City of San José* (2003) 114 Cal.App.4th 689, did not require exhaustion of remedies to challenge a CEQA document even though the project was considered at a hearing before the San José City Council, because there had been no public notice specifically regarding the City's proposed CEQA compliance. (*Id.*, pp. 701-702.)

Here, as noted above, the City did not provide accurate notice of the project description before its November 2011 meeting and did not hold a public hearing. Moreover, the exemption was not adopted until after the streetlights had already been approved and installed. And, unlike the facts in *Azusa*, the City did not adopt express findings supporting the CEQA exemption. As the *Tomlinson* Court emphasized:

> [T]he exhaustion requirement's application is conditioned upon the holding of public hearings to present any objections to or concerns about the proposed project, thus confirming that what matters is the opportunity for comment at such public hearings.

(*Id.*, pp. 290-291.)

> [W]e conclude that the exhaustion-of-administrative-remedies requirement set forth in ... section 21177 applies to a public agency's decision that a proposed project is categorically exempt from CEQA compliance as long as the public agency gives notice of the ground for its exemption determination, and that determination is preceded by public hearings at which members of the public had the opportunity to raise any concerns or objections to the proposed project.

(*Id.*, p. 291.)

The City of Monterey neither gave notice of the ground for its exemption nor preceded that decision with a noticed public hearing. Because there was no meaningful opportunity for public comment, the City's action was an informal action and admission of extra-record evidence is appropriate under *Western States Petroleum Association v. Superior Court of Los Angeles County, supra,* 9 Cal.4th 559, pp. 575-576. In *Western States*, the Supreme Court held that in a traditional mandamus action — involving a public agency's own project — the record may include evidence that existed before the agency made its challenged decision, evidence that could not have been presented to the agency in the exercise of due diligence, and evidence useful for background information or to ascertain if the agency adequately considered relevant factors. (*Id.*, pp. 578-579.)

The City suggests that concerned members of the public could have provided the documents in the augmented record to the City before project approval, but fails to describe how they could have known to do so. The augmented record includes a request

from James Bryant to the City asking to be notified of actions regarding lighting in Monterey's historic districts (AR:592.) Mr. Bryant and others had participated actively in the City's review of lighting in the historic district in 2009. (AR:587-591, 604-608.) The City did not notify Mr. Bryant about the proposed approval of city-wide LED streetlights. When the public became aware that the streetlights were being installed, Mr. Bryant and other members of the public began to comment. (AR:695, 716.)

Tellingly, in its opposition brief on the merits the City references a controlling case, *Defend Our Waterfront v. California State Lands Commission* (2015) 240 Cal.App.4th 570, regarding inadequate notice that excuses exhaustion of administrative remedies. (Opp., p. 28.) But the City fails to cite the case at all in its motion to strike.

In the City's words, *Defend Our Waterfront* "held that because the [agency's] meeting agenda had not mentioned the [CEQA] exemption determination, there had been inadequate notice of that determination prior to the public hearing, ... excusing petitioners from their duty to exhaust." (Opp., p. 28, citing *Defend Our Waterfront, supra,* 240 Cal.App.4th 570.) But, the City offers, this Court "can, and should, decline to follow [*Defend Our Waterfront*] ..." because it "misinterprets the law..." (Opp., p. 28.)

In fact, the case is both binding authority and correctly decided. In both *Defend Our Waterfront* and this case, while CEQA does not require an agency to provide public notice of its intention to approve a project based on an exemption, a lack of notice of project parameters or the proposed exemption defeats any claim that a petitioner did not exhaust administrative remedies. *The same logic applies to the scope of the record.* What administrative remedies were made available? *None.* How can the public produce

evidence to rebut a CEQA exemption unless notice is first provided that it is proposed?

The City's protestations that members of Turn Down the Lights failed to exhaust remedies or take advantage of public comment opportunities are unsupported.

B. The Augmented Record Evidence is Admissible

When there is no public notice or opportunity for public comment, agency decisions are considered informal actions that may require extra-record evidence for judicial review. Informal decisions proceed via traditional mandamus under Code of Civil Procedure section 1085. (*Western States, supra,* 9 Cal.4th 559, p. 575.) Augmentation of the record may be necessary in actions regarding informal agency decisions "because there is often little or no administrative record in such cases." (*Ibid.*) That is precisely the case here, as the City's proposed record provides a scant and incomplete picture of the impacts of the LED lighting project in Monterey.

Friends of the Old Trees v. Cal. Dept. of Forestry and Fire Protection (1997) 52 Cal.App.4th 1383 is distinguishable. In that case, public notice created "numerous opportunities for public and agency input..." (*Id.*, p. 1392 and fn. 6.) The public made comments in "numerous letters" and participated in the process. (*Id.*, p. 1398).

Contrary to the City's allegations, *City of Pasadena* was not overturned except to the extent it is inconsistent with the *Western States* case. The commentators in Kostka & Zischke's treatise, *Practice Under the California Environmental Quality Act, supra,* continue to cite *Pasadena* as an example of an informal agency decision. (*Ante*, p. 8.) The opinions of Kostka & Zischke are of particular interest because the Supreme Court

relied heavily on their analysis in establishing the limitations on evidence in *Western States*. (*Western States, supra*, 9 Cal.4th559, p. 575, citing the 1993 edition.)

The augmented documents contain relevant and material records that the City had in its possession prior to approving the contract for the streetlights, as in *County of Orange v. Superior Court, supra,* 113 Cal.App.4th 1, p. 8, and *Mejia v. City of Los Angeles* (2005) 130 Cal.App.4th 322, p. 335. The augmented documents are not really "extra record" because they are part of the record in the City's relevant files.

Conclusion

As the California Supreme Court has repeatedly directed, it is the Legislature's intent that CEQA "be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." (*Concerned Citizens of Costa Mesa v. 32nd District Agricultural Association* (1986) 42 42 Cal.3d 929, p. 939.) Nothing in Public Resources Code section 21167.6 or in Code of Civil Procedure section 1085 supports excluding the augmented documents from the record and hampering this Court's review of this public interest case.

In light of the lack of public notice or public hearing, the augmented record is appropriate and essential to provide an adequate record for this Court's review.

Petitioner Turn Down the Lights requests that the motion to strike be denied.

February 26, 2016

Respectfully submitted,

STAMP|ERICKSON

by _____

Molly E. Erickson

BRANDT-HAWLEY LAW GROUP
PROVENCHER & FLATT, LLP

by_____
Susan Brandt-Hawley
Rachel Mansfield-Howlett
Attorneys for Petitioner Turn Down the Lights

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF MONTEREY

I am employed in the County of Monterey, State of California. I am over the age of 18 and not a party to the within action. My business address is 479 Pacific Street, Suite One, Monterey, California 93940. My email address is mcfarren@stamplaw.us.

On February 26, 2016, I served the document(s) described as follows:

Memorandum of Points and Authorities in Opposition to Motion to Strike

(X) VIA ELECTRONIC MAIL pursuant to stipulation by all parties, via electronic mail at approximately _____ PM. No error message was received by me. Addressed as follows:

For Respondent City of Monterey:

Christine Davi
<davi@monterey.org>

Sabrina Teller
<steller@rmmenvirolaw.com>

Executed and emailed on February 26, 2016.

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

Rachael McFarren