



The First District Court of Appeal largely upheld the City of Oakland's EIR and CEQA findings for the Oakland A's proposed new baseball stadium and surrounding mixed-use development, with the exception of one mitigation measure that was improperly deferred. *East Oakland Stadium Alliance v. City of Oakland*, 89 Cal.App.5th 1226 (2023).

The proposed project at the Port of Oakland's Howard Terminal would include, in addition to the stadium, development of the surrounding area with residential, retail, commercial, and hotel uses; a performance venue; parking for 8,900 vehicles; and publicly accessible open space.

### **Railroad Safety Impacts**

The project site is bounded on the north by active railroad tracks that run down the middle of a major street. The EIR found that the passenger and freight trains using these tracks would pose a safety hazard to ballpark visitors. Mitigation measures for this impact included installing fences on both sides of the tracks along the entire project frontage to prevent pedestrians and vehicles from crossing the tracks between intersections, eliminating one intersection, building a bicycle and pedestrian overcrossing, and building a vehicle overcrossing. The city found that although these measures would improve safety conditions, but the project's impact would remain significant and unavoidable. The petitioners asserted three reasons why there was inadequate mitigation for safety impacts of railroad traffic on ballpark visitors:

- *Multi-Use Path*: Part of the fencing mitigation included a multi-use path on property owned by Union Pacific Railroad. During the CEQA process, Union Pacific informed the city that it would not allow any part of its property to be used for the project. The Final EIR acknowledged that Union Pacific's position would preclude the multi-use path. The court rejected the petitioners' argument that the EIR was flawed because the multi-use path was not feasible given Union Pacific's refusal to allow it. The court explained that "[t]he path does not itself contribute to the fence's mitigation of safety hazards. Rather, the path appears to be simply an amenity. . . . With or without a multi-use path, the fence will have the desired effect of precluding access to the tracks between intersections, and there is no evidence to suggest that loss of the path will reduce the effectiveness of the fencing."
- *Pedestrian and Bicycle Overcrossing*: The EIR identified a tentative location for the overcrossing, while recognizing that the actual location could not be determined yet because it would be subject to the jurisdiction of the California Public Utilities Commission. This tentative location scored highest among four potential locations that were evaluated in a technical study. At this location, the overcrossing was estimated to be used by 60 percent of gameday visitors. The EIR concluded that the overcrossing would improve safety and therefore reduce the severity of hazards posed by the railroad tracks, but also recognized that some visitors would continue to use at-grade crossings. The court rejected the petitioners' argument that the pedestrian and bicycle overcrossing would be ineffective. The court held that the EIR's analysis of this topic was supported by substantial evidence: "The EIR unquestionably contains substantial evidence to support a finding that the overpass will significantly mitigate the hazards by diverting thousands of visitors from at-grade intersections."
- *Temporary Closure of Intersections*: The petitioners argued that the EIR should have considered the temporary closure of intersections at the railroad tracks during ballpark events as a mitigation measure. The court held that this argument was not raised with sufficient specificity during the CEQA process and therefore had not been properly exhausted. One comment letter had stated that "the most effective and safest way to preclude the possible use of at-grade crossings is by closing them, whether temporarily or permanently." The court held, however, that this suggestion to temporarily close intersections, considered in the context of the broader comment letter, did not fairly apprise the city of the issue because it gave no indication that it was intended to refer to a suggested mitigation measure. The court explained that this single reference to temporarily closing intersections was an isolated and unelaborated comment, appearing toward the end of a long letter that included lengthy discussions other potential mitigation measures (including lengthy discussion advocating permanent closure of intersections).

## **Air Quality**

The court rejected the petitioners' challenges to the EIR's air quality analysis and mitigation for greenhouse gas (GHG) emissions.

- *Displaced Truck Parking Assumptions*: Development of the project would displace an overnight truck parking site at Howard Terminal. For the air quality analysis, the EIR assumed that any displaced truck parking could be accommodated elsewhere within the Port property at two 15-acre sites. This assumption

was based on a study that forecasted overnight truck parking needs at the Port through 2050 and found that 30 acres would be adequate. Although some public comments raised concerns about truck parking shortages and argued that the two 15-acre sites would be inadequate, the court held that the parking demand forecasts in the parking study, combined with statements in the EIR about the availability of two 15-acre sites, provided substantial evidence to support the assumption that displaced truck parking could be accommodated on 30 acres elsewhere within the Port property.

- *Regional Air Emissions from Displaced Truck Parking:* For the analysis of regional air emissions, the EIR did not consider any additional emissions associated with the relocation of truck parking to locations outside the Port. The EIR characterized these emissions as speculative, explaining that it was not possible to obtain reliable information on where existing truck parking tenants and drivers might relocate to. The court found that this conclusion was reasonable and supported by substantial evidence, particularly given the city's conclusion that adequate alternative parking would be available within the Port.
- *Emergency Generator Emissions:* The EIR assumed that emergency generators would run for 50 hours per year, and a mitigation measure limited annual testing and maintenance of generators to 20 hours. The petitioners argued that the EIR should have assumed each generator would run for 150 hours annually, which was the worst-case assumption in a policy document used by the Bay Area Air Quality Management District for determining the applicability of certain regulations. The court upheld the EIR's analysis, explaining that the estimate of 50 hours represented a reasonable allowance for running generators during sporadic power shutoffs in addition to the maximum 20 hours for testing and maintenance. The court explained that CEQA only required analysis of reasonably foreseeable consequences, not worst-case scenarios, and there was no evidence that regular, predictable, or sustained use of emergency generators was reasonably foreseeable.
- *Greenhouse Gas Mitigation:* A mitigation measure required, prior to the city's approval of any construction-related permit, development of a plan to reduce or offset the project's GHG emissions so as to result in no net emissions beyond those generated by the A's existing activities. The mitigation measure included a five-page list of on-site and off-site measures to meet this "no-net-increase" threshold, and identified other sources for other possible measures. The court upheld the GHG mitigation measure, rejecting the petitioners' argument that the city had improperly deferred mitigation. The court concluded that the mitigation measure met the requirements of CEQA Guidelines section 15126.4: (1) it committed the city to the mitigation measure by requiring the mitigation plan prior to any project construction; (2) it adopted a specific performance standard of no net additional GHG emissions, which was a specific level of emissions quantified in the EIR; and (3) it identified the types of potential actions that could feasibly achieve the performance standard and would be considered, in that it included a detailed list of specific measures, some of which were mandatory and all of which were required if necessary to achieve the "no-net-increase" threshold, as well as references for other sources for potential measures.

## **Hazardous Materials**

The court upheld the EIR's discussion of existing environmental contamination at the project site and mitigation for impacts related to hazardous materials.

- *Removal of Existing Concrete Cap:* The court held that the EIR did not need to separately discuss the effects of removing an existing concrete cap at the project site that prevented the escape of soil contamination. The court explained that penetration of the cap was implicit in the EIR's analysis of hazardous materials: "[T]he EIR's entire discussion of hazardous substances is, in effect, a discussion of the risks associated with cap penetration. Without penetration of the cap, which is necessary for any construction to occur, those substances would remain sealed in the soil and would not present a public health risk."
- *Hydrocarbon Oxidation Products:* The court held that the EIR was not deficient in failing to separately discuss hydrocarbon oxidation products (HOPs) as an existing contaminant at the project site. The EIR

included HOPs in its measurements of total petroleum hydrocarbons (TPH). The court explained that "the EIR did not fail to disclose the presence of HOPs, any more than it failed [to] disclose the presence of gasoline or any other individual chemical component of TPH that was not reported separately from the overall measurement." Furthermore, there was little evidence in the record "to suggest that HOPs present an environmental risk sufficiently distinct from that of hydrocarbons as to require their separate reporting and discussion." Rather, the court noted that the Department of Toxic Substances Control (DTSC), which had jurisdiction over remediation activities at the project site, had reviewed and approved the site investigation report and health risk assessment (both of which were relied upon in the EIR) and had not recommended or required separate reporting of HOPs—concluding that DTSC's judgment in this regard provided substantial evidence to support the EIR's analysis.

- *EIR Recirculation to Discuss Remedial Measures:* The EIR recognized that a remedial action plan (RAP) would be prepared in connection with remediation activities at the project site, as required by the state Hazardous Substance Account Act. The EIR identified potential remedial measures that might be included in the RAP. A mitigation measure required the RAP to be completed and approved by DTSC prior to project construction. A draft RAP was completed after the final EIR was published. The court held that the city was not required to recirculate the draft EIR to discuss the draft RAP's remediation measures. The court explained that the draft RAP did not disclose a new or more severe significant impact, nor did the draft RAP add new information to the EIR "other than to confirm which of the available remedial measures discussed in the draft EIR have been deemed most appropriate for implementation."
- *Deferred Mitigation:* The court ruled that the city did not improperly defer mitigation of impacts related to environmental contamination and hazardous substances. The court explained that (1) it was infeasible to include mitigation details in the EIR because they were within DTSC's regulatory jurisdiction; (2) the target cleanup levels in the health risk assessment were a specific performance standard because the mitigation measure required the project sponsor to verify that those levels have been achieved prior to the city's issuance of any construction permits; and (3) although the mitigation measures themselves did not describe potential remediation actions and approaches, the EIR cited and summarized a consultant report that did so.

## **Cumulative Impacts**

The court ruled that the EIR's cumulative impact analysis appropriately excluded the potential expansion of the turning basin for large vessels in Oakland's Inner Harbor. The court explained that substantial evidence supported the city's conclusion that the turning basin project was not a "probable future project" because the Port of Oakland and the Army Corps of Engineers were still studying the project's feasibility and the details of the project were not sufficiently certain to allow for meaningful analysis.

## **Wind Mitigation**

The court ruled that the city improperly deferred mitigation for wind impacts. A mitigation measure required a wind tunnel analysis for buildings exceeding 100 feet in height prior to issuance of a building permit, and required the project sponsor to identify feasible mitigation strategies to eliminate or reduce significant wind hazards "to the maximum extent feasible without unduly restricting development potential." The court held that the mitigation measure lacked a specific performance standard. The court explained that the measure did not provide "reliable means for deciding the degree of wind impact reduction required with respect to a particular building." Further, the court held, the mitigation measure did not adequately identify the types of actions that could potentially be adopted: The measure included a few vague references to design changes and features such as landscaping, but did not indicate whether more significant changes to building size or location could be considered. The court also rejected the city's and developer's argument that a specific performance standard was not required when the lead agency adopts a statement of overriding considerations and it is uncertain whether full mitigation can be achieved.

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