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FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN BERNARDINO
SAN BERNARDINO DISTRICT

JUL 23 2021

8 Attorney for Petitioner, SIERRA CLUB

9 BY Justin Manassee
JUSTIN MANASSEE, DEPUTY

10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **COUNTY OF SAN BERNARDINO**

12 SIERRA CLUB,) Case No.: **CIV SB 2 12 16 05**
13)
14) Petitioner,) Assigned to:
15) vs.) Dept.:
16) Action Filed:

17 CITY OF FONTANA,)
18)
19) Respondent,) **VERIFIED PETITION FOR**
20) **PEREMPTORY WRIT OF MANDATE**

21)
22) DUKE REALTY; DUKE REALTY, LLC;)
23) DUKE REALTY CORPORATION; DUKE) (Code Civ. Proc. §§ 1094.5 and 1085; Cal.
24) REALTY S&O LLC; and DOES 1 through) Pub. Res. C. § 21000 *et seq.*)
25) 100, inclusive,)

26)
27) Real Parties in Interest.) **CASE DESIGNATION: CEQA**
28)

INTRODUCTION

1. This action challenges the approval by Respondent City of Fontana ("City") on or about June 22, 2021 of a land use project known as the Slover and Oleander Industrial Building Project ("the Project"). The Project will develop a 8.6-acre vacant site with a large industrial building totaling 205,949 square feet. The Project will be operated as

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1 a “logistics warehouse.” The Project is fundamentally incompatible with the
2 surrounding neighborhood as it will subject neighbors and school children to its
3 relentless industrial operations: the Project site is surrounded by existing single-
4 family residences, the closest being within 128 feet, and it is directly adjacent to
5 Jurupa Hills High School. The approval of the Project goes against the
6 recommendation of the California Air Resources Board (“CARB”) that warehouse
7 land uses should not be located within 1,000 feet of sensitive receptors such as
8 children.

9 2. Sierra Club brings this action seeking to vacate the Project approvals because the City
10 failed to conduct appropriate analysis of the Project pursuant to the California
11 Environmental Quality Act (“CEQA”), and the City failed to adopt appropriate
12 mitigation to offset the long-term, adverse harms resulting from the Project.

13 3. The California Environmental Quality Act (“CEQA”) (Public Resources Code §
14 21000 et seq.) requires an Environmental Impact Report (“EIR”) for any project that
15 *may* have a significant adverse effect on the environment. Despite reasoned
16 comments in the record regarding the Project’s significant environmental effects, the
17 City declined to prepare an EIR for the Project, instead relying upon a lesser level of
18 CEQA review, a Mitigated Negative Declaration (“MND”). This was in error where
19 the record contains substantial evidence of a “fair argument” of significant
20 environmental harm. Additionally, the City erred in approving the Project because the
21 record lacks sufficient information, such as facts and analysis, to support the
22 conclusions of the MND.

23 4. As a result of these CEQA violations, Sierra Club respectfully requests issuance of a
24 peremptory writ of mandate setting aside the approvals of the Project. (Code Civil
25 Procedure, §§ 1085 and 1094.5.)

26 5. By this verified Petition, Petitioner, Sierra Club, alleges the following:

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PARTIES

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2 6. Petitioner, SIERRA CLUB (“Petitioner”), is a national nonprofit, environmental
3 organization that is dedicated to exploring, enjoying, and protecting the wild places of
4 the earth; to practicing and promoting the responsible use of the earth’s ecosystems
5 and resources; to educating and encouraging humanity to protect and restore the
6 quality of the natural and human environment; and to using all lawful means to carry
7 out these objectives. Members of Sierra Club’s San Gorgonio Chapter live, work, and
8 recreate in an around the areas that will be affected by the construction and operation
9 of the Project.

10 7. Respondent, CITY OF FONTANA (“City”), is a political subdivision of the State of
11 California. The City is a local governmental agency charged with the authority of
12 regulating and administering local land use and development within its territory in
13 compliance with the provisions of its general plan and zoning ordinances as well as
14 applicable provisions of State law, including CEQA. The City is the lead agency for
15 the Project and is therefore charged with the duty of ensuring compliance with
16 applicable laws.

17 8. Petitioner is informed and believes, and thereon alleges, that Real Party in Interest,
18 DUKE REALTY is the applicant for the Project, the sponsor of the Project, has an
19 ownership interest in the property, and/or claims an interest in the Project approvals at
20 the subject of this lawsuit. DUKE REALTY is identified on the Project’s Notice of
21 Determination as the “Project Proponent.” Petitioner is unaware of the precise
22 business nature of “DUKE REALTY”.

23 9. Petitioner is informed and believes, and thereon alleges, that Real Party in Interest,
24 DUKE REALTY, LLC is the applicant for the Project, the sponsor of the Project, has
25 an ownership interest in the property, and/or claims an interest in the Project
26 approvals at the subject of this lawsuit. “DUKE REALTY, LLC” is identified as the
27 “Applicant” on the Project’s Initial Study/Mitigated Negative Declaration. Petitioner
28 is unaware of the precise business nature of “DUKE REALTY, LLC”.

1 10. Petitioner is informed and believes, and thereon alleges, that Real Party in Interest,
2 DUKE REALTY CORPORATION, is the applicant for the Project, the sponsor of the
3 Project, has an ownership interest in the property, and/or claims an interest in the
4 Project approvals at the subject of this lawsuit. DUKE REALTY CORPORATION is
5 a corporation registered with the State of California.

6 11. Petitioner is informed and believes, and thereon alleges, that Real Party in Interest,
7 DUKE REALTY S&O LLC, is the applicant for the Project, the sponsor of the
8 Project, has an ownership interest in the property, and/or claims an interest in the
9 Project approvals at the subject of this lawsuit. DUKE REALTY S&O LLC is a
10 limited liability corporation registered with the State of California.

11 12. DOES 1 through 100 are individuals or entities that may have an ownership interest in
12 the property, were project applicants, or claim an interest in approvals at the subject
13 of this lawsuit. Petitioner is unaware of the true names or capacities of the Real
14 Parties in Interest identified herein under the fictitious names DOES 1 through 100
15 inclusive.

16 **STATEMENT OF FACTS**

17 **The Project**

18 13. The Project is a proposal for the construction and operation of a 205,949 square foot
19 industrial building at the southwest corner of the Slover and Oleander Avenue
20 intersection in the City of Fontana. The Project is designed to operate as a
21 "warehouse logistics" facility for the receipt, handling, processing, storage, and
22 movement of goods. Heavy-duty diesel trucks, traveling from points unknown, will
23 transport goods to the Project facility, while other diesel trucks will transport those
24 goods to destinations unknown.

25 14. Land uses surrounding the logistics warehouse include existing single-family homes
26 immediately north of the Project site on the northside of Slover Avenue; existing
27 single-family homes east of the Project site on the eastside of Oleander Avenue;
28 vacant and undeveloped land to the west that is zoned for commercial uses; and

1 Jurupa Hills High School to the immediate south of the Project site. The high school
2 shares a physical boundary with the Project site.

3 15. The Project site is zoned M-1 under the City's Municipal Code. Per Municipal Code
4 Section 3-522, the M-1 zone allows Light Industrial Uses to include "high
5 cube/warehousing" except "logistics businesses" that "generate high volumes of
6 truck traffic".

7 16. Vehicular access to the Project site will be provided by one driveway on Slover
8 Avenue and two driveways on Oleander Avenue. The Project's southern driveway
9 connects the Project's loading docks, on the west side of the building, with Oleander
10 Avenue, on the east side of the site, and it is designed to serve both passenger vehicles
11 and heavy trucks. As such, the site's circulation plan may include trucks traveling
12 along the southern drive-lane to/from the Project's loading docks, along the boundary
13 with the existing high school. Current site plans do not show any fencing or barrier
14 between the Project's southern elevation and the adjacent high school facility. Current
15 landscape plans show the planting of single row of trees, 24-inch box size, spaced
16 approximately 20-30 feet apart, along the Project's southern elevation, between the
17 Project's southern drive lane and the high school property.

18 17. Construction of the Project building, associated infrastructure and other
19 improvements is expected to occur over a period of eight months.

20 18. Once operational, the Project building may be used for cold storage, *i.e.*,
21 refrigerated/freezer warehouse space, and it will be operational 24 hours per day,
22 seven days per week.

23 19. The Project building will have 22 loading docks on the west side of the building. In
24 addition to loading and unloading activity at the loading docks, exterior operations
25 include truck movements within the site and the operation of forklifts and other on-
26 site equipment (*e.g.*, yard goats/yard hostlers).

27 20. The Project is assumed to generate 272 passenger vehicle trips and 114 truck trips per
28 day on average. The Project is expected to demand approximately 2,360,116 kilowatt

hours of electricity per year, 2,896,108 units of natural gas per year, and 182,172 gallons of fuel mostly due to off-site diesel truck trips.

21. The Project includes the following approvals authorizing the development proposal which is the subject of this lawsuit:

- a. Adoption of an Initial Study, Mitigated Negative Declaration (“MND”) and Mitigation, Monitoring, and Reporting Program (“MMRP”); and
- b. Resolution PC No. 2021-17 approving Tentative Parcel Map No. 20367 (TPM No. 20-018) to consolidate seven (7) parcels into one parcel for the development of the logistics and distribution facility, and approving Design Review No. 20-027 to construct an approximately 205,949 square foot logistics and distribution facility on approximately 8.610-acres of land including approximately 20,000 square feet of two-story office space.

The Project’s Administrative Process

22. On March 31, 2021, the City of Fontana prepared and/or circulated a Notice of Intent to Adopt a Negative Declaration (“NOI”), with a period for public comment from March 31, 2021 to April 20, 2021.

23. On April 20, 2021, the final date for public comments on the MND, the City of Moreno Valley Planning Commission held a public hearing on the proposed Project and voted to adopt the MND and approve the Project. At this hearing, numerous residents testified in opposition to the proposed Project. Residents testified the Project will increase truck traffic on local roadways, and it will negatively impact students at the high school because of noise and traffic issues.

24. On or about April 29, 2021, a resident appeal was timely filed (“Appeal No. 21-002”) requesting to overturn the Planning Commission’s actions including the adoption of the MND and MMRP.

25. On June 22, 2021, the City Council conducted a public hearing concerning Appeal No. 21-002. The Council voted 3-1 in favor of adopting the MND and approving the Project.

1 26. On June 24, 2021, the City posted and filed the Project's Notice of Determination
2 ("NOD") pursuant to CEQA. This action is timely filed.

3 27. The maintenance of this action is for the purpose of enforcing important public
4 policies of the State of California with respect to the protection of the environment
5 under CEQA and conformance with state law. The maintenance and prosecution of
6 this action will confer a substantial benefit upon the public by protecting the public
7 from environmental and other harms alleged in this Petition. Petitioner is acting as a
8 private attorney general to enforce these public policies and prevent such harm.

9 28. The City's approval of the Project will cause Petitioner irreparable injury for which
10 Petitioner has no adequate remedy at law. Petitioner and its members will be
11 irreparably harmed by the City's actions in approving the Project. Petitioner was
12 harmed by, among other things, the failure of the City to require the preparation of a
13 EIR to adequately evaluate the potential impacts of the Project, and by the City's
14 approval of the Project without providing adequate and effective mitigation measures
15 contrary to the requirements of State law.

16 **EXHAUSTION OF ADMINISTRATIVE REMEDIES AND CEQA LITIGATION**
17 **REQUIREMENTS**

18 29. During the Project's administrative review process, Petitioner commented that the
19 CEQA review was inadequate in that the MND failed to properly disclose and
20 evaluate impacts and/or support its conclusions with evidence; that the record
21 supported a fair argument of significant impacts to/from the following: air quality,
22 land use/planning, noise, among others; and that the City did not adopt adequate
23 mitigation for these potential effects or adopt all feasible mitigation.

24 30. As a result of these comments in the record, Petitioner exhausted administrative
25 remedies pursuant to the requirements of Cal. Public Resources Code, § 21177.

26 31. Petitioner has performed all conditions precedent to filing the action by complying
27 with the requirements of Public Resources Code § 21167.5, in notifying Respondent
28 of the filing of this action (attached hereto as Exhibit "A"), and by complying with the

1 requirements of Public Resources Code § 21167.6, in notifying Respondent of
2 Petitioner’s election to prepare the record of proceedings in connection with this
3 action (attached hereto as Exhibit “B”).

4 **JURISDICTION AND VENUE**

5 32. This Court has jurisdiction to issue writs of mandate under Code of Civil Procedure
6 §§ 1085 and 1094.5.

7 33. Venue is proper in this Court pursuant to Code of Civil Procedure §§ 393 and 394 as
8 the Project is located in, and the relevant events occurred in, San Bernardino County,
9 and because the City is located in San Bernardino County.

10 **CAUSE OF ACTION**

11 **(WRIT OF MANDATE- VIOLATIONS OF THE CALIFORNIA ENVIRONMENTAL
12 QUALITY ACT, AS TO ALL PARTIES)**

13 **a. The City wrongly adopted a Mitigated Negative Declaration for the Project
14 when there was substantial evidence of a fair argument of significant
15 environmental impacts as a result of the Project.**

16 34. Petitioner hereby realleges and incorporates paragraphs 1 through 33 above as though
17 set forth in full herein.

18 35. As the lead agency, Respondent City is charged with the duty to fully and accurately
19 consider the environmental consequences of the Project through the preparation of an
20 Environmental Impact Report (“EIR”). (Public Resources Code, § 21080 (d).)

21 36. The EIR requirement is the “heart of CEQA.” (Cal. Code of Regs., Tit. 14 “State
22 CEQA Guidelines,” § 15003(a).)

23 37. An EIR is required for any proposed project that *may* have a significant effect on the
24 environment. (Public Resources Code, § 21100 (a).)

25 38. If a lead agency is presented with a “fair argument” based on substantial evidence in
26 the record that a proposed project may have a significant effect on the environment,
27 the lead agency shall prepare an EIR even though it may be presented with other
28 substantial evidence that the proposed project will not have a significant effect. (State
CEQA Guidelines, § 15064(f)(1).)

1 39. A lead agency may prepare a mitigated negative declaration for a project *only* when:
2 (1) revisions in the project would avoid or mitigate the potentially significant project
3 effects to a point where clearly no significant effects would occur; *and* (2) there is no
4 substantial evidence in light of the whole record that the project as revised may have a
5 significant effect on the environment. (State CEQA Guidelines, § 15070 (b).)

6 40. The City was presented with substantial evidence of a fair argument that the Project
7 may significantly affect the environment within the meanings of CEQA for impacts
8 to/from, but not limited to, air quality, energy, environmental justice, greenhouse gas
9 emissions, land use/ planning, and noise. Petitioner and others submitted comments to
10 the City based on substantial evidence that the Project may result in significant
11 environmental impacts that were not adequately evaluated and/or mitigated.

12 41. By way of example, Petitioner commented the record supports a “fair argument” of
13 significant environmental impacts, and an EIR is required by law, because the Project
14 is a new source of greenhouse gas emissions (“GHGs”), and it is not shown that the
15 Project’s GHG impacts are mitigated to a level below significance thresholds. The
16 MND relies on vague and ill-defined measures that do not demonstrate that the
17 Project’s GHG’s impacts are mitigated with any level of certainty. Without certain
18 and effective mitigation, the Project will produce GHGs above the adopted thresholds
19 of significance. An EIR is required under these circumstances.

20 42. By way of further example, the record supports a “fair argument” of significant land
21 use impacts as the Project is not consistent with the City of Fontana General Plan and
22 General Plan EIR’s mitigation program, including, but not limited to, the General
23 Plan’s Infrastructure and Green Systems Chapter, Goal 7, Policy 1 regarding the
24 City’s goal to “promote renewable energy” towards the goal of “becoming a zero net
25 energy city.” The Project does not include any renewable energy systems – e.g., solar
26 PV panels – when such measures are patently feasible.

27 43. By adopting the MND for the Project where there is substantial evidence supporting a
28 fair argument that the Project may result in significant environmental effects, the City

1 committed a prejudicial abuse of discretion and the Project approvals must be set
2 aside. (Code Civ. Proc., §§ 1085, 1094.5; Public Resources Code, § 21168.)

3 **b. The Initial Study Fails as an Informational Document.**

4 44. Under CEQA, a prejudicial abuse of discretion may occur when relevant information
5 is not presented to the public agency. “When the informational requirements of
6 CEQA are not complied with, an agency has failed to proceed in ‘a manner required
7 by law’ and has therefore abused its discretion.” (*Lighthouse Field Beach Rescue v.*
8 *City of Santa Cruz* (2005) 131 Cal.App.4th 1170, 1200.) “The failure to comply with
9 the law subverts the purposes of CEQA if it omits material necessary to informed
10 decisionmaking and informed public participation.” (*Lighthouse, supra*, 131
11 Cal.App.4th at 1201.)

12 45. CEQA requires that the lead agency investigate impacts. “CEQA places the burden
13 of environmental investigation on government rather than the public.” (*Gentry v. City*
14 *of Murrieta* (1995) 36 Cal.App.4th 1359, 1379.) “Where an agency ... fails to gather
15 information and undertake an adequate environmental analysis in its initial study, a
16 negative declaration is inappropriate. (*City of Redlands v. County of San Bernardino*
17 (2002) 96 Cal.App.4th 398, 406-408.)

18 46. Petitioner commented that the Initial Study fails to adequately evaluate and disclose
19 impacts and/or substantiate its conclusions, despite comments in the record that
20 information was lacking or that conclusions were not supported by facts or analysis.
21 The Initial Study fails to substantiate its conclusion of “less than significant” or “less
22 than significant with mitigation” with respect to impacts including to/from:
23 cumulative air quality emissions, energy, environmental justice, and land use impacts.

24 47. By way of example: the Initial Study fails to disclose or analyze the Project’s
25 cumulative air quality impacts in terms of the numerous other logistics warehouses
26 recently constructed or approved for construction in the City. As many of these
27 warehouse projects are currently operating, or will operate, in the immediate vicinity
28 of the proposed Project, and as many of those projects were found by their respective

1 EIRs to generate cumulatively significant air quality impacts, the absence of these
2 projects from the Initial Study's analysis was in error, and the record fails to contain
3 sufficient information by which the City could reasonably conclude that the Project's
4 individual contribution to air quality emissions is less-than-significant.

5 48. As a result of these and other failures of the City to properly disclose and evaluate
6 potential adverse impacts, the public and decision-makers were deprived of sufficient
7 information to understand the adverse impacts of the proposed Project.

8 **WHEREFORE**, Petitioner prays for the following relief on all causes of action:

9 49. For the Court's peremptory writ of mandate requiring Respondent to set aside its
10 decision approving the MND and the land use approvals for the Project. (Public
11 Resources Code, §§ 21168, 21168.9; Code Civ. Proc., §§ 1094.5, 1085)

12 50. For costs of this suit, including attorney's fees pursuant to Code of Civil Procedure, §
13 1021.5 and other provisions of law.

14 51. For such other and further relief, including a stay or preliminary and permanent
15 injunctive relief, in the event that the Real Parties in Interest, or their agents or
16 instrumentalities, intend to commence construction on the site during the litigation.
17 (Code of Civil Procedure § 526.)

18 52. For such other relief as may be just and proper.

19
20 DATED: July 23, 2021

Respectfully submitted,

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22 By: Abigail Smith

23 Abigail A. Smith
24 *Attorney for Petitioner*
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VERIFICATION

I, the undersigned, certify and declare that I have read the foregoing Petition for Writ of Mandate and know its contents. The statement following the box checked is applicable.

I am (X) a member, () an officer of Sierra Club, a party to this action, and I am authorized to make this verification for and on its behalf, and I make this verification for that reason. The matters stated in the document described above are true of my own knowledge and belief except as to those matters stated on information and belief, and as to those matters I believe them to be true.

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

Dated: July 23, 2021

By: Mary Ann Ruiz
Mary Ann Ruiz, Chapter Chair

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EXHIBIT "A"

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EXHIBIT "A"

**Law Office of Abigail Smith
A Professional Corporation**

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VIA E-MAIL AND U.S. MAIL

July 22, 2021

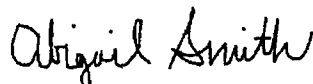
City of Fontana
c/o Tonia Lewis, City Clerk
8353 Sierra Avenue
Fontana, CA 92335
tlewis@fontana.org

Re: *Notice of Intent to File CEQA Petition in the Matter of the Approval of the Mitigated Negative Declaration for the Slover & Oleander Industrial Building/Duke Realty Project*

To the City of Fontana:

PLEASE TAKE NOTICE, under Public Resources Code section 21167.5, that this letter serves as written notice of the intent of Petitioner SIERRA CLUB to file a Petition for Writ of Mandate under the provisions of the California Environmental Quality Act ("CEQA") against Respondent CITY OF FONTANA challenging the City Council's approval of the Slover and Oleander Industrial Building project, including adoption of the Mitigated Negative Declaration ("MND"), made on or about June 22, 2021.

Sincerely,



Abigail Smith, Esq.
Counsel for Sierra Club

EXHIBIT "B"

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EXHIBIT "B"

1 LAW OFFICE OF ABIGAIL SMITH, A PROFESSIONAL CORPORATION
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Attorneys for Petitioner, SIERRA CLUB

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SAN BERNARDINO

10 SIERRA CLUB,) Case No.:
11)
12 Petitioner,) Assigned for all Purposes to:
13 vs.) Dept.:
14) Action Filed:
15 CITY OF FONTANA,)
16 Respondent,)
17) **PETITIONER SIERRA CLUB'S**
18) **NOTICE OF ELECTION TO PREPARE**
19) **THE ADMINISTRATIVE RECORD**
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DUKE REALTY; DUKE REALTY, LLC;)
DUKE REALTY CORPORATION; DUKE)
REALTY S&O LLC; and DOES 1 through) (Cal. Pub. Res. C. § 21167.6)
100, inclusive,)
Real Parties in Interest.)

TO ALL PARTIES AND THEIR ATTORNEY'S OF RECORD:
PLEASE TAKE NOTICE that, pursuant to California Public Resources Code § 21167.6, Petitioner SIERRA CLUB hereby notifies Respondent CITY OF FONTANA of Petitioner's election to prepare the administrative record of proceedings relating to this action.

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DATED: July 23, 2021

Respectfully submitted,

By: Abigail Smith
Abigail A. Smith
Attorney for Petitioner