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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

SAVE OUR CHINATOWN
COMMITTEE,

Plaintiff and Appellant,

v.

CITY OF RIVERSIDE,

Defendant and Respondent;

RIVERSIDE COUNTY OFFICE OF
EDUCATION,

Defendant and Appellant;

JACOBS DEVELOPMENT COMPANY,
INC.,

Real Party in Interest and Appellant.

E049816

(Super.Ct.No. RIC512553)

OPINION

SAVE OUR CHINATOWN
COMMITTEE,

Plaintiff and Respondent,

v.

RIVERSIDE COUNTY OFFICE OF
EDUCATION,

Defendant and Appellant.

E050962

APPEAL from the Superior Court of Riverside County. Sharon J. Waters, Judge.

Affirmed in part and reversed in part with directions.

Johnson & Sedlack, Raymond W. Johnson, Abigail A. Broedling, and Kimberly A. Foy for Plaintiff and Appellant.

Atkinson, Andelson, Loya, Ruud & Romo, John W. Dietrich, and Jennifer D. Cantrell for Defendant and Appellant.

Best Best & Krieger, Michelle Ouellette, Melissa R. Cushman, and Alisha M. Winterswyk for Real Party in Interest and Appellant.

Gregory P. Priamos, City Attorney, and Kristi J. Smith, Deputy City Attorney, for Defendant and Respondent.

The corner of Brockton and Tequesquite Avenues was once the site of Riverside's historic Chinatown. Now, it is a vacant lot. Jacobs Development Company, Inc. (Jacobs) entered into an agreement to buy the property from the Riverside County Office of Education (the County). Jacobs proposes to combine the County's parcel with a smaller, adjacent parcel and to build a medical office building and an associated parking lot there.

Pursuant to the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.), the City of Riverside (the City) prepared an environmental impact statement (EIR) for the project. The EIR concluded that, as a mitigation measure, an archaeologist should prepare a plan for the excavation, analysis, and curation of any archaeological resources. It further concluded, however, that even with mitigation, the project would have significant adverse environmental effects on archaeological resources. The City adopted a statement of overriding considerations (Pub. Resources Code, § 21081, subd. (b)), finding that the benefits of the project outweighed its adverse environmental effects, and approved the project.

The Save Our Chinatown Committee (the Committee) then filed this proceeding against the County, the City, and Jacobs, alleging (among other things) that (1) the County's sale of the property to Jacobs violated various provisions of the Education Code dealing with the sale of surplus property, and (2) the City's approval of the project violated various aspects of CEQA.

The trial court ruled that the County had violated the surplus property provisions. Accordingly, it set aside the purchase and sale agreement. However, it found no CEQA violation. It also awarded the Committee attorney fees.

In this appeal:

1. The County contends:

a. The trial court erred by finding that the County had violated the surplus property provisions of the Education Code and by setting aside the purchase and sale agreement as a remedy for the violation.

b. The trial court’s judgment and writ of mandate are “void for vagueness.”

(Capitalization omitted.)

2. The Committee contends:

a. The EIR’s rejection of the project alternatives was not adequately explained and was not supported by substantial evidence.

b. The EIR failed to analyze a reasonable range of alternatives.

c. The EIR failed to consider and respond to alternatives suggested by the public.

d. The EIR improperly deferred mitigation.

e. The City erred by adopting a statement of overriding considerations because there was insufficient evidence of the nature and effect of the deferred mitigation.

3. Jacobs and the County both contend that the trial court’s award of attorney fees was erroneous, and the County also contends that the award of costs was erroneous.

We will hold that the surplus property provisions of the Education Code do not apply to the County, because it is not a school district. We will further hold that some (though not all) of the Committee’s contentions regarding the EIR are well taken. In particular, the EIR rejected several alternatives involving the reconfiguration of the project, on the theory that any development whatsoever would require “overexcavation” of the entire site and thus would entail the removal of any remaining archaeological resources. This conclusion, however, was not supported — indeed, it was contradicted — by the geotechnical report on which the EIR purported to rely. As the Committee

correctly contends, “The City . . . reached the unsupported conclusion that[, as a result of soils onsite,] no alternatives would substantially reduce impacts to cultural resources . . . , an opinion completely unsupported by substantial evidence in the record yet repeated *ad nauseam*.” These holdings require us to reverse the awards of costs and attorney fees; thus, the parties’ contentions regarding costs and attorney fees are moot.

I

FACTUAL BACKGROUND

A. *Historic Chinatown.*

In 1885, Chinese leaders acquired 6.3 acres of land (the Chinatown tract), which became Riverside’s historic Chinatown. The Chinatown tract was bordered on the north by Evergreen Cemetery, on the east by Pine Street, on the south by Tequesquite Avenue, and on the east by Brockton Avenue. The principal buildings of Chinatown were on the east side; the west side was mainly used for farming, gardening, and camping.

It is estimated that, during the height of Chinatown, in the 1890s, some 400 to 500 people lived there. By the 1920’s, however, only about 40 residents remained, and by about 1940, there was only one — Wong Ho Leun (also known as George Wong). Wong purchased the entire Chinatown tract. He covered much of the east side with fill dirt. In 1967, he leased the southeastern corner, at Brockton and Tequesquite, to an oil company, which used it as a Chevron gas station until 1973. Wong died in 1974. In 1978, the last remaining Chinatown building was demolished.

In 1980, the County purchased the entire Chinatown tract. In 1981, it built a maintenance and operations facility on the west end. In 1984, it authorized the

installation of a parking lot over the central portion. The east end (the property), measuring about 3.2 acres, remained a vacant lot.

The installation of the parking lot awakened public concern about preserving Chinatown. As a result, in 1984-1985, archaeologists excavated portions of the Chinatown tract. They focused on the central parking lot portion, which, unlike the east side, had largely escaped being covered with fill dirt. However, one test trench was dug under the fill dirt; it revealed a “wall stub.” In the opinion of the archaeologists, there were probably additional archaeological resources on the east side, which the fill dirt had effectively sealed and protected.

In 1990, the property was added to the National Register of Historic Places. It had already been designated as a city landmark, a county landmark, and a state point of historical interest. The City and the County agreed, in principle, that the City would buy the property and use it to create a “Chinatown Historical Park.” Negotiations, however, broke down, and this plan came to naught.

B. The Purchase and Sale Agreement.

In May 1999, the County declared the property surplus and adopted a resolution of intent to sell it. The resolution set July 20, 1999, as the deadline for submitting written bids and provided that the County would consider all written bids at its public meeting on July 21, 1999. No bids were submitted by that date, or for years thereafter. Suddenly, however, between March and May 2005, the County received four bids. The highest bid was submitted by Jacobs.

In July 2007, the County and Jacobs entered into an agreement for the purchase and sale of the property (the purchase and sale agreement). The purchase and sale agreement gave Jacobs up to three years before close of escrow to obtain all entitlements necessary to develop the property with a medical office building.

Meanwhile, in September 2006, Jacobs had already applied to the City for approval of the construction of a medical office building. The proposed site (the site) consisted of the property, plus a smaller adjacent parcel to the north (the northern parcel).¹ (See appendix A, *post*, p. 58.) The building would be in the southeast corner, at the corner of Brockton and Tequesquite. It would occupy approximately 12 percent of the site. Most of the rest of the site would be a parking lot.

Under the Downtown Specific Plan (the specific plan), most or all of the site was designated as part of the Health Care District. Because the specific plan required new buildings in the Health Care District to be in a “similar genre” to certain existing

¹ The northern parcel had been the site of various vehicle-related businesses, including a gas station, an automotive repair shop, and an auto body paint shop. These businesses had used various hazardous chemicals.

The City asserts that the site (i.e., because it includes the northern parcel) is “a Superfund site.” That is false. (See <<http://yosemite.epa.gov/r9/sfund/r9sfdocw.nsf/WSOState!OpenView&Expand=2.21#2.21>>, as of Mar. 14, 2012.) However, because one of the businesses on the site had been “a small quantity generator of hazardous material,” the northern parcel was listed in the federal Resource Conservation and Recovery Act (RCRA) database. Also, due to a release of gasoline into groundwater in 1986, the northern parcel was on the state “Cortese” list.

No soil on the property itself was contaminated, although there was speculation that gasoline from the 1986 release on the northern parcel could have migrated into the groundwater under the property.

buildings, the proposed building design had a faintly Spanish flavor, with arches and a tile roof.

C. *The Draft and Final EIR's.*

Jacobs's application triggered the preparation of an EIR. The draft and final EIR's were prepared by Jones & Stokes. In 2007, Jones & Stokes conducted an exploratory archaeological excavation of the east end of the property. They found that the soil had been disturbed by the construction and subsequent removal of the gas station and its associated underground storage tank. However, they did find some artifacts from Chinatown — brick wall footings, part of a brick pavement, Go game pieces, and a glass bottle. They concluded, “[I]t appears that intact deposits extend to the east and possibly the north into areas that were not explored during our excavation.”

In April 2008, the draft EIR was completed and made available for public comment.

According to the draft EIR, the project objectives were:

1. “[T]o develop a medical office facility . . .”;
2. “[T]o provide jobs . . .”;
3. “[T]o develop an underutilized vacant parcel in downtown Riverside in accordance with the applicable land use plans, development standards, and the Downtown Specific Plan (DSP)”;
4. “[T]o develop the site with a use that is compatible with surrounding medical and health care uses”; and

5. “[T]o minimize impacts, to the greatest extent possible, to the remnants of Riverside’s Chinatown that remain buried beneath the site.”

The draft EIR concluded that the project had potentially significant environmental impacts with regard to aesthetics, air quality, hazardous materials, noise, traffic, and cultural resources. It also concluded, however, that after mitigation, the project’s only significant impacts would be on cultural resources: “The project will result in an adverse change to a historical and archaeological resource, the Riverside Chinatown.”

The draft EIR found that “[i]ntact significant archaeological deposits remain on the site”² It also found that “[t]he proposed project will have a significant impact on the buried, intact archaeological deposits . . . that are located within the project’s construction footprint. The impacts will result from subsurface excavation for the medical building itself, trenching for utilities, excavation for vaults, and compaction of soils over much of the project site.”

As a mitigation measure, the draft EIR required Jacobs to prepare and implement a “treatment plan.” The treatment plan had to be drafted by an archaeologist and approved by the City. The draft EIR featured guidelines for the treatment plan, including the following:

² Jacobs and the City assert that, after the final EIR was approved and excavation began, it was soon discovered that there was actually very little of archaeological value remaining on the property, presumably due to the construction and subsequent demolition of the gas station. The evidence of this, however, was not presented to the City — and could not have been — before the final EIR was approved.

1. Under the direction of a qualified archaeologist, the “Area of Potential Direct Impact” would be excavated. This was defined as “the areas that will be affected by project construction,” and further defined as “the areas that will be excavated below grade for construction of the medical facility, utility lines, utility vaults, parking facility, and other excavations associated with construction.”

2. “[A]ny discoveries [would be] marked, recorded, and given a designation”

3. “[A]nalysis of the recovered materials w[ould] be conducted”

4. A “cultural resources report[,]” which would include an “artifact catalog” and “artifact analysis,” would be prepared. The EIR laid out detailed requirements for the contents of the cultural resources report.

5. The archaeologist would “prepare the collection for curation in accordance with the guidelines established by the Riverside Metropolitan Museum.”

6. The archaeologist would coordinate the transfer of “the collection and its associated documentation” to the Riverside Metropolitan Museum.

7. Construction would be subject to archaeological monitoring; an archaeological monitoring plan, to be included in the treatment plan, would specify “what procedures will be followed when intact archaeological features are located during construction.”

Also as a mitigation measure, the draft EIR required Jacobs “to integrate [the following] historical interpretive measures into the site plan”:

1. A “Chinese pocket garden with lantern post or birdhouse” and “Chinese heritage landscap[ing]”;

2. A “[h]istoric walk, which may include bronze plaques set in the sidewalk”;

3. A “Chinatown artifact display area inside the building lobby, which will feature rotating exhibits containing archaeological artifacts from excavations that take place on the site”;
4. A “Chinese rock garden sitting area”; and
5. A page on the Riverside Metropolitan Museum’s website regarding “the results of the Chinatown archaeological excavations”

In September 2008, the final EIR was completed. The final EIR modified the project in several respects. In response to comments that Spanish styling was inappropriate, the design was revised so as feature “clean lines and simple detailing with . . . elements that evoke a traditional Chinese construction style.” As additional mitigation measures, Jacobs was required to include:

1. A “display area” on every floor of the building, which would include “items such as a computer kiosk for digital information about the site’s history, artifact displays, photographs, and plaques”
2. An “interpretive garden.” The footprint of the building was shifted 10 feet north, to make more room for the interpretive garden.³

On October 7, 2008, the City certified the final EIR, adopted a statement of overriding considerations, and approved the project.

³ The interpretive garden was to include “a history walk” as well as “the rock garden.” Thus, it is not entirely clear whether this was a new mitigation measure, or a revised and more detailed specification of the rock garden and historic walk that the draft EIR already required.

In February 2009, the City approved and adopted the treatment plan. The treatment plan provided for the excavation of the entire property. It allowed for the discard of the following items, unless “they have heritage or educational value”:

1. “[A]rtifacts less than 45 years old”
2. “Glass and ceramic sherds smaller than 1 inch in diameter that have no unusual or distinctive qualities[] and that lack markings or decoration”
3. “Construction materials including: wood; window glass; amorphous, melted or fragmentary metal; brick; plaster; concrete paving stone; mortar; sewer pipe; and other construction materials.”

II

PROCEDURAL BACKGROUND

The Committee filed a combined petition for writ of mandate and complaint for declaratory relief, naming the City, the County, and Jacobs as defendants and/or real parties in interest. As an affirmative defense, all defendants alleged failure to exhaust administrative remedies.

The trial court granted a preliminary injunction.

After briefing and argument, the trial court issued a written statement of decision. It found that the County had “failed to comply with statutory requirements regarding its sale of surplus property to Jacobs.” It therefore directed the County “to set aside the Purchase and Sale Agreement” However, it rejected the Committee’s CEQA claims

against the City based largely on failure to exhaust administrative remedies.⁴ The trial court entered judgment accordingly and issued a writ of mandate. The County appealed; the Committee cross-appealed.

The Committee then filed a motion for attorney fees on a “private attorney general” theory. (See Code Civ. Proc., § 1021.5.) After hearing argument, the trial court awarded the Committee \$43,200 in attorney fees against the County and Jacobs, jointly and severally. The County and Jacobs appealed.

III

THE PROVISIONS OF THE EDUCATION CODE REGARDING THE SALE OF SURPLUS PROPERTY

The County contends that the trial court erred by ruling that it violated statutory requirements for the sale of surplus property.

A. *Statutory Background.*

Part 10.5, chapter 4 of the Education Code, comprising sections 17385 through 17561, is entitled “Property: Sale, Lease, Exchange.” We will refer to these sections as the surplus property provisions.

The surplus property provisions — in broad general outline, and subject to various exceptions — require the following.

⁴ In addition to alleging CEQA claims against the City, the Committee had also alleged that the County had violated CEQA when it entered into the purchase and sale agreement. The trial court rejected this claim, based on the statute of limitations. The Committee does not challenge this ruling.

Before a “school district” may sell real property, it must appoint an advisory committee. (Ed. Code, § 17388.) The advisory committee must, among other things, determine what real property of the district is surplus and hold hearings regarding acceptable uses of the surplus real property. (Ed. Code, § 17390.)

The “school district” must offer the property first for park and recreational purposes. (Ed. Code, § 17464, subd. (a).) Second, it must offer it to various public entities and nonprofit charities. (*Id.*, subd. (b).) “Third, the property may be disposed of in any other manner authorized by law.” (*Id.*, subd. (c).)

The “governing board” must adopt a resolution declaring its intent to sell the property. (Ed. Code, § 17466.) “The resolution shall fix a time not less than three weeks thereafter for a public meeting of the governing board to be held at its regular place of meeting, at which sealed proposals to purchase or lease will be received and considered.” (*Ibid.*)

“At the time and place fixed in the resolution for the meeting of the governing body, all sealed proposals which have been received shall, in public session, be opened, examined, and declared by the board. . . . [T]he proposal which is the highest . . . shall be finally accepted, unless . . . the board rejects all bids.” (Ed. Code, § 17472.) “The final acceptance by the governing body may be made either at the same session or at any adjourned session of the same meeting held within the 10 days next following.” (Ed. Code, § 17475.)

The surplus property provisions lay out what should happen if no proposals are received in response to a resolution of intent to *lease*. (Ed. Code, § 17477.) However,

they do not specifically provide for the eventuality that no proposals are received in response to a resolution of intent to *sell*. The trial court essentially ruled that the County's compliance with the surplus property provisions in 1999 was *functus officio* once no bids were received by the date specified in the resolution and that a new round of compliance was required before the County could sell the property in 2007.

B. *Analysis.*

The County contends that the trial court erred in invalidating the purchase and sale agreement based on the violation of the surplus property provisions. It offers a variety of arguments in support of this contention. One is that the surplus property provisions do not apply to the County, because it is a county office of education, not a school district. Because we conclude that this argument is meritorious, we do not discuss the County's other arguments.

As the County admits, it failed to raise this argument in the trial court. However, we have discretion to consider an issue for the first time on appeal when it involves a question of law based on undisputed facts. (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 24.) This is such an issue, and we exercise our discretion to consider it.

The Constitution and the Education Code contemplate that each county will have a county board of education (Cal. Const., art. IX, § 7; Ed. Code, § 1000) and a county superintendent of schools. (Cal. Const., art. IX, § 3; Ed. Code, § 1200 et seq.) The board of education (as governing body) and the superintendent of schools (as chief executive officer) jointly administer the county office of education. A county office of education provides various services for school districts in the county. (See Ed. Code, §§ 1600-

1606, 1700-1946, 2400-2403; see also <<http://www.cde.ca.gov/re/sd/co/coes.asp>>, as of Mar. 14, 2012.)

Under certain circumstances, a county office of education may operate schools — for example, when the county as a whole constitutes a single unified school district. When acting in this capacity, the county office of education is treated as if it were a school district. (Ed. Code, §§ 1000, 1791, 1792, 1906.) Otherwise, however, a county office of education and a school district are distinct entities.

Some of the applicable provisions of the surplus property provisions, by their terms, refer to school districts. (Ed. Code, §§ 17388, 17464.) Indeed, the very first provision, Education Code section 17385, states: “*The governing board of any school district shall receive in the name of the district conveyances for all property received and purchased by it, and shall make in the name of the district conveyances of all property belonging to the district and sold by it.*” (Italics added.) Other related provisions of the surplus property provisions similarly apply specifically to school districts. (E.g., Ed. Code, §§ 17463 [use of proceeds from sale of surplus real property], 17470 [school district must give notice to former owners of intent to sell real property], 17482 [school district may sell historic building to nonprofit organization].)

Admittedly, Education Code sections 17466 and 17477 refer only to a “governing board”; they do not specify the governing board of *what*. The Committee claims that Education Code section 78 defines “governing board” as including a county board of education. Not so. Education Code section 78 states: “‘Governing board’ means board of school trustees, community college board of trustees, and city, *and city and county*

board of education.” (Italics added.) There is only one “city and county board of education,” because there is only one “city and county” in California — San Francisco. Thus, this definition is limited to city-level or school-district-level boards; it is not intended to encompass county-level boards.

In any event, this definition does not apply when “the context otherwise requires” (Ed. Code, § 10.) When these sections are taken in context — among related statutes referring to a school district — they can only be understood as referring to the governing board of a school district.

We also note that most of the provisions dealing with the acceptance of bids refer to a “governing *body*,” not a “governing *board*.” That includes Education Code section 17472 and 17475, which the Committee is claiming were violated here, as well as Education Code section 17476 and 17578. This indicates that the Legislature did not intend the definition of “governing board” in Education Code section 78 to apply to these provisions.

The Legislature may, when it chooses, make a statute applicable to county offices of education as well as school districts. Generally, however, it has done so explicitly. (E.g., Ed. Code, §§ 224.5, subd. (a), 14600, subd. (b), 17920.) Sometimes it uses the umbrella term “local agency” or “local education agency” to include both county offices of education and school districts. (e.g., Ed. Code, §§ 421, 7051, 8208, subd. (ak), 8802, subd. (e).) Also, it sometimes defines “school district,” for purposes of a specific section or sections, as including a county office of education. (E.g., Ed. Code, § 17070.15, subd. (m), 17161, subd (e).) Significantly, Education Code section 1279 specifically limits a

county office of education’s ability to sell *personal* property. The Legislature, however, has not used any similar wording to make the surplus property provisions, regarding the sale of *real* property, applicable to a county office of education.

We did briefly consider whether Education Code section 8771 applies. It requires a county office of education, when selling or otherwise disposing of real or personal property, to follow “the same procedures as are established by law for the sale . . . or other disposition of real or personal property by a school district” That section, however, was enacted as part of an article entitled, “Outdoor Science, Conservation and Forestry.” Another section of that same article authorizes a county office of education to purchase real property “necessary to conduct classes in outdoor science education and conservation education.” (Ed. Code, § 8768.) And significantly, Education Code section 8772 — the section immediately following Education Code section 8771 — provides, “All proceeds from the sale, lease, exchange, or other disposition of real or personal property received by the county superintendent of schools *pursuant to the provisions of this article* shall be used for the purpose of acquiring other real or personal property for use in connection with programs and classes in outdoor science education and conservation education or to pay the cost of conducting such programs and classes.” (Italics added.) It would be absurd to suppose that the Legislature intended to require that the proceeds of *any* sale of real property be used for these limited purposes. Thus, even though Education Code section 8771 does not explicitly so provide, it must be understood as limited to the sale of property purchased for the purpose of outdoor science and conservation education.

Finally, at oral argument, the Committee argued for the first time that the sale of the property was subject to an entirely different set of surplus property statutes — Government Code sections 54220 through 54232. ““We need not consider an argument not mentioned in the briefs and raised for the first time at oral argument. [Citation.]’ [Citation.]” (*McCarty v. Department of Transportation* (2008) 164 Cal.App.4th 955, 986, fn. 11 [Fourth Dist., Div. Two].) “For obvious reasons of fairness, it is not appropriate to rely upon points not mentioned in the parties’ briefs. [Citations.]” (*Transcontinental Ins. Co. v. Insurance Co. of State of Pennsylvania* (2007) 148 Cal.App.4th 1296, 1309.)

Here, since 2008, the Committee has been challenging the sale of the property based on a particular set of statutes. While the County did not argue below that it was not subject to those statutes, it did raise that argument squarely in its opening brief on appeal. The Committee had a full and fair opportunity to raise its present argument in its respondent’s brief, but it did not. If we allowed the Committee to raise the argument belatedly, at oral argument, we would have to allow the County to file supplemental briefing. All of this would unduly delay the resolution of the status of the property. We therefore conclude that the Committee has forfeited any reliance on any other statutes. At the risk of being obvious, we point out that, as a result, we can express no opinion on whether the sale of the property might be invalid under such other statutes.

We therefore conclude that the surplus property provisions did not apply to the County’s sale of the property. Thus, the trial court’s ruling setting aside the purchase and sale agreement must be reversed. We hasten to add that this should not be viewed as any

kind of aspersion on the trial court. Once again, the County did not raise this issue below; thus, the trial court had no occasion to consider it. Nevertheless, it would be inequitable to let the purchase and sale agreement remain set aside based on inapplicable statutes.

In light of this outcome, we need not address the County's contention that the judgment and the writ of mandate are vague.

IV

CEQA ISSUES

A. *General Legal Principles.*

““The EIR is the heart of CEQA,” and the integrity of the process is dependent on the adequacy of the EIR. [Citations.]’ [Citation.] [¶] The EIR is presumed legally adequate, however [citations], and the agency’s certification of the EIR is presumed correct [citation]. Persons challenging the EIR therefore bear the burden of proving it is legally inadequate and that the agency abused its discretion in certifying it. [Citations.]” (*Cherry Valley Pass Acres & Neighbors v. City of Beaumont* (2010) 190 Cal.App.4th 316, 327-328 [Fourth Dist., Div. Two].)

““In determining the adequacy of an EIR, [we] look to whether the report provides decision makers with sufficient analysis to intelligently consider the environmental consequences of a project. [Citation.] . . . “[T]he sufficiency of an EIR is to be reviewed in the light of what is reasonably feasible The courts have [therefore] looked not for perfection but for adequacy, completeness, and a good faith effort at full disclosure.” [Citation.]’ [Citation.] The overriding issue on review is thus ‘whether the [lead agency]

reasonably and in good faith discussed [a project] in detail sufficient [to enable] the public [to] discern from the [EIR] the “analytic route the . . . agency traveled from evidence to action.” [Citation.]’ [Citation.]” (*California Oak Foundation v. Regents of University of California* (2010) 188 Cal.App.4th 227, 262

“We do not review the correctness of the EIR’s environmental conclusions, but only its sufficiency as an informative document. [Citation.] ‘We may not set aside an agency’s approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable. “Our limited function is consistent with the principle that ‘The purpose of CEQA is not to generate paper, but to compel government at all levels to make decisions with environmental consequences in mind. CEQA does not, indeed cannot, guarantee that these decisions will always be those which favor environmental considerations.’” [Citation.] We may not, in sum, substitute our judgment for that of the people and their local representatives. We can and must, however, scrupulously enforce all legislatively mandated CEQA requirements.’ [Citation.]” (*Save Round Valley Alliance v. County of Inyo* (2007) 157 Cal.App.4th 1437, 1446-1447 [Fourth Dist., Div. Two], fn. omitted.)

Under CEQA, the “relocation” of an archaeological resource “such that [its] significance . . . [is] materially impaired” is deemed to be a significant environmental impact. (Guidelines, § 15064.5, subd. (b)(1); see also *id.*, subd. (c).)⁵ “Preservation in

⁵ All references to the “Guidelines” are to the “Guidelines for Implementation of the California Environmental Quality Act” promulgated by the California Resources Agency. (Cal. Code Regs., tit. 14, § 15000 et seq.)

place,” rather than “data recovery through excavation,” “is the preferred manner of mitigating impacts to archaeological sites.” (Guidelines, § 15126.4, subd. (b)(3)(A), (b)(3)(C).)

B. *The EIR’s Analysis of Project Alternatives.*

1. *Additional factual and procedural background.*

The draft EIR concluded that the project would have a significant impact on archaeological resources, due to “subsurface excavation for the medical building itself, trenching for utilities, excavation for vaults, and compaction of soils over much of the project site.”

The draft EIR considered four project alternatives:

1. The “No Project Alternative.”
2. “Development on Pilings”: Using pilings to support the building, so that it would “float” over any archaeological resources.
3. “Reconfiguration of the Site Plan”: Moving the building to the southwest corner, which had been excavated in 2007, and moving the parking lot to the southeast corner, which was where any archaeological resources were likely to be.
4. “Reduced Site”: Eliminating the northern parcel and building a smaller building on the resulting smaller site.

The draft EIR concluded that all of these alternatives (other than the no project alternative) would have essentially the same impacts on archaeological resources as the project itself.

It explained that alternative 2 (development on pilings) would require excavation of “areas for the piling footings, areas directly beneath the proposed building footprint, and areas across the site that would be graded and overexcavated⁶ to native land depths.”

It conceded that, in alternative 3 (reconfiguration of the site plan), “impacts to subterranean archaeological resources may be slightly reduced.” However, it explained that “the majority of the site would still need to be graded and overexcavated . . . to minimize soil hazards beyond the building footprint and under parking areas.”

It added that alternative 3 “would place the building at the back of the site, with the surface parking lot dominating the southwest corner of Tequesquite and Brockton Avenues. This . . . is not compatible with the City’s goals and policies for pedestrian-oriented design and walkability by keeping buildings oriented toward the streets in the Downtown Health Care District.”

Finally, with regard to alternative 4 (reduced site), it explained: “While the site may be reduced by one acre, the majority of the former Chinatown artifacts remain on [the property].”

During the public comment period, many commenters suggested turning the site into a historical park. Others suggested that it should be developed as a Chinese cultural center or history center. Some commenters suggested shifting the building’s footprint

⁶ “Overexcavation” means excavating unsuitable soil (e.g., contaminated soil or loose fill) below grade, so it can be replaced with suitable fill and recompacted.

from the east of the site to the west or building a parking structure. Still other commenters suggested simply building the medical office building somewhere else:

“[T]he project may be good. The site is wrong.”

One commenter challenged the rejection of alternative 3 (reconfiguration of the site plan), stating: “Jones & Stokes wrote in a report that even if the building’s moved away onto a different part of the site, the entire site still has to be excavated . . . because of the soil instability. That argument has never been well presented in any of our past meetings. We are, therefore, far from convinced”

One commenter asked whether the archaeological resources could be preserved by covering the site with asphalt. In response, the final EIR stated, “As stated in previous responses, it will not be possible to develop the site without overexcavating the majority of the site to accommodate adequate soil conditions for development.”

The EIR’s conclusions regarding “overexcavation” were based on a 2006 geotechnical investigation report (the geotechnical report or the report).⁷ The report stated:

⁷ Jacobs and the City both state that the purpose of the report was to determine whether the project could be redesigned so as to reduce its impact on archaeological resources.

Nothing in the record indicates that this was the purpose of the report. The report itself does not so much as mention either Chinatown or archaeological resources. Rather, it appears that the report was prepared as a matter of standard operating procedure in preparation for construction.

“[I]t is our opinion that the upper undocumented fill and loose soils will not, in their present condition, provide uniform or adequate support for the proposed structures. . . .

“In order to mitigate the settlement potential at the site, it is our recommendation that the proposed structures be supported on one of the following foundation systems: 1) pile foundations, 2) conventional shallow foundations on compacted fill with complete removal of loose soils (to 25 feet or more), or 3) posttensioned slab or grade beam footings supported by compacted fill with partial removal of loose soils. Other measures of liquefaction mitigation would also be utilized.

“Because of the site conditions, it will be necessary to remove, at a minimum, the upper 36 inches of existing native soil in all areas to be graded, regardless of foundation type selected[,] . . . to locate and facilitate removal of undocumented fill, debris, or loose and disturbed soils.”

“To assist in undocumented fill and/or loose soil identification and removal, it is our opinion that all areas to be graded should be subexcavated to a minimum depth of 36 inches bgs.”

“In addition, it is our recommendation that all existing undocumented fills and loose soils under any proposed paved or flatwork area be removed and replaced with properly compacted and controlled fills. If this is not done and any undocumented fills are left, premature structural distress of the paved and flatwork areas can be expected. However, the additional cost . . . should be compared to the higher maintenance costs and other problems caused by distressed paved and flatwork areas. It is our opinion that

decreased settlement will result from increasing the amount of undocumented fill and loose soils removed, with complete removal of all undocumented fill and loose soil being the upper limit on reasonable efforts to minimize settlement. *An economic analysis of the relationship between current construction costs and ongoing maintenance costs should be undertaken to determine the most cost-effective amount of undocumented fill and loose soil to be removed.*” (Italics added.)

The trial court rejected all of the Committee’s challenges to the alternatives analysis based on failure to exhaust administrative remedies. It stated: “It is not sufficient that members of the public proposed other alternatives [The Committee] has failed to point to any comment that actually raised a question about the number of alternatives or challenged the range of alternatives selected for analysis in the EIR. Otherwise, [the] City made findings regarding the four alternatives. [Citation.] [The Committee] does not appear to raise a specific objection with respect to these findings.”

2. *General legal principles.*

“An EIR shall describe a range of reasonable alternatives to the project, or to the location of the project, which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives. An EIR need not consider every conceivable alternative to a project. Rather it must consider a reasonable range of potentially feasible alternatives that will foster informed decisionmaking and public participation. . . . There is no ironclad rule governing the nature or scope of the

alternatives to be discussed other than the rule of reason.” (Guidelines, § 15126.6, subd. (a).)

“The range of potential alternatives to the proposed project shall include those that could feasibly accomplish most of the basic objectives of the project and could avoid or substantially lessen one or more of the significant effects. . . . Among the factors that may be used to eliminate alternatives from detailed consideration in an EIR are: (i) failure to meet most of the basic project objectives, (ii) infeasibility, or (iii) inability to avoid significant environmental impacts.” (Guidelines, § 15126.6, subd. (c).)

CEQA requires the lead agency to respond to “each significant environmental issue that is raised by commenters” (Pub. Resources Code, § 21091, subd. (d)(2)(A), (d)(2)(B).) “[T]he major environmental issues raised when the lead agency’s position is at variance with recommendations and objections raised in the comments must be addressed in detail[,] giving reasons why specific comments and suggestions were not accepted.” (Guidelines, § 15088, subd. (c).) “Responses to comments need not be exhaustive; they need only demonstrate a ‘good faith, reasoned analysis.’ [Citations.]” (*Eureka Citizens for Responsible Government v. City of Eureka* (2007) 147 Cal.App.4th 357, 378.)

“The lead agency should ordinarily respond to comments suggesting a new alternative that can substantially reduce significant project impacts by either explaining why further consideration of the alternative was rejected or providing an evaluation of the alternative. [Citations.]” (1 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act (Cont. Ed. Bar 2d ed. 2011) Project Alternatives § 15.41, p. 770.6.)

3. *Failure to support the rejection of alternatives.*

The Committee contends that the final EIR's rejection of the alternatives that it did analyze was not adequately explained and was not supported by substantial evidence.

a. *Exhaustion.*

“Exhaustion of administrative remedies is a jurisdictional prerequisite to challenging any project approval. ‘An action or proceeding shall not be brought . . . unless the alleged grounds for noncompliance with [CEQA] were presented to the public agency orally or in writing by any person during the public comment period . . . or prior to the close of the public hearing on the project before the issuance of the notice of determination.’ [Citations.]” (*Santa Clarita Organization for Planning the Environment v. City of Santa Clarita* (2011) 197 Cal.App.4th 1042, 1050.)

“Some courts have interpreted the statutory [exhaustion] requirement . . . to mean that the ‘exact issue’ raised in the litigation must have been presented to the agency [Citations.] [¶] Other courts have found the specific-objection requirement satisfied if the issue was raised in some form. [Citations.] [¶] The [exhaustion] determination . . . turns on whether the agency was apprised of the basis for the challenge in a way that g[a]ve[] it an opportunity to respond by either correcting any errors it has made or showing why it ha[d] not erred. [Citations.]” (2 Kostka & Zischke, *supra*, CEQA Litigation, § 23.98, pp. 1238-1239.)

““While “less specificity is required to preserve an issue for appeal in an administrative proceeding than in a judicial proceeding’ because[] . . . parties in such proceedings generally are not represented by counsel . . .” [citation]’ [citation],

‘generalized environmental comments at public hearings,’ ‘relatively . . . bland and general references to environmental matters’ [citation], or ‘isolated and unelaborated comment[s]’ [citation] will not suffice. The same is true for “[g]eneral objections to project approval” [Citations.]’ [Citation.]” (*Citizens for Responsible Equitable Environmental Development v. City of San Diego* (2011) 196 Cal.App.4th 515, 521, original quotation marks corrected.)

““The petitioner bears the burden of demonstrating that the issues raised in the judicial proceeding were first raised at the administrative level. [Citation.]” [Citation.] . . .’ [Citation.]” (*Citizens for Responsible Equitable Environmental Development v. City of San Diego, supra*, 196 Cal.App.4th at p. 521.) Accordingly, we have not combed the record to ferret out every potentially relevant public comment; rather, we have limited our review to the public comments cited by the Committee in its briefs. ““An appellate court employs a de novo standard of review when determining whether the exhaustion of administrative remedies doctrine applies.’ [Citation.]” (*Ibid.*)

The Committee relies, in part, on comments made before or after the public comment period. To satisfy the statutory exhaustion requirement, however, a comment must be submitted “during the public comment period . . . 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).) Statements made before the completion of a draft EIR (*Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 536) or after the public hearing on the project (*Central Delta Water Agency v. State Water Resources Control Bd.* (2004) 124 Cal.App.4th 245, 273-274) simply do not count.

Here, however, during the public comment period, one commenter stated: “Jones & Stokes wrote in a report that even if the building’s moved away onto a different part of the site, the entire site still has to be excavated . . . because of the soil instability. *That argument has never been well presented in any of our past meetings. We are, therefore, far from convinced . . .*” (Italics added.) As we will discuss in more detail below, the EIR rejected each of the alternatives because, supposedly, like the project itself, they would require overexcavation due to soil instability, and thus they would have the same impact on archaeological resources. The Committee argues that the EIR failed to explain why the alternatives would require overexcavation and that the conclusion that they would is not supported by substantial evidence. This is exactly the same point that the commenter was making. Thus, there was exhaustion with regard to this issue.

The trial court also stated that the Committee “does not appear to raise a specific objection with respect to the[] findings” concerning the alternatives. That is incorrect. In its trial briefs, the Committee specifically raised the same challenges to the findings that it does on appeal. Hence, these arguments have been preserved.

b. *Analysis.*

The EIR rejected alternative 3 (reconfiguration of the site plan) on the ground that it would have nearly the same impacts on archaeological resources as the project would, because “the majority of the site would still need to be graded and overexcavated” However, it is impossible to tell, from the final EIR or from the administrative record, whether any part of the site (other than the building footprint) would have to be overexcavated, or if so, what part.

This conclusion is supposedly based on the geotechnical report. However, the report is self-contradictory. It states that at least 36 inches of soil would have to be removed under any “graded” areas. But does this mean only areas under the building, or does it also include areas under the parking lot? It might seem reasonable to assume that the entire site would have to be graded. However, the report states that the whole reason for removing fill is that it would not support “the proposed *structures.*” (Italics added.) Moreover, the report goes on to state *explicitly* that “paved” areas did *not* have to be overexcavated, if it would be cheaper to fix them if and when they subsided.

In addition, whatever “graded” areas might mean, it is not clear how much excavation is required under them. At one point, the report states that at least “36 inches of existing native soil” should be removed. As the City points out, “native soil” would seem to mean soil that had accumulated naturally at the site, as opposed to imported fill. At another point, however, the report states that graded areas “should be subexcavated to a minimum depth of 36 inches bgs.” “Bgs,” or “below ground surface,” would ordinarily be measured from the surface, including fill. Thus, it is not at all clear that the recommended overexcavation would be deep enough to impact archaeological resources.

Significantly, the EIR never found that *the entire site* would have to be overexcavated. With regard to the project itself, it found (rather vaguely) that the project would require “subsurface excavation for the medical building itself, trenching for utilities, excavation for vaults, and compaction of soils over *much* of the project site.” (Italics added.) It also required the treatment plan to provide for the removal of artifacts in the “Area of Potential Direct Impact,” which it defined (again vaguely) as “those areas

that will be excavated below grade for construction of the medical facility, utility lines, utility vaults, parking facility, and *other excavations associated with construction.*”

(Italics added.)

Similarly, with regard to the alternatives, the EIR merely found that alternative 3 would require overexcavation of “the majority of the site” Most glaringly, it stated that, under alternative 3, “impacts to subterranean archaeological resources may be slightly reduced.” This effectively conceded that alternative 3 would not require as much overexcavation as the project itself would.

There is no support — in the EIR itself, in the geotechnical report, or elsewhere in the administrative record — for the conclusion that this reduction would be only “slight” rather than significant. Based on this record, it is simply impossible to quantify it. However, the whole point of alternative 3 was to move the building to the southwest side of the site, which had already been excavated, and to pave over the southeast side, which had not. To the extent that the paved area did not have to be overexcavated, it would appear that the reduction in the archaeological impact would be substantial.

In this appeal, the City and Jacobs flatly assert that *any* construction on the site would necessarily require overexcavation of the *entire* site. There is absolutely no evidence of this. As already noted, the geotechnical report does not support this conclusion; to the contrary, it indicates that paved areas may be left unexcavated, if that would save money in the long run.

Admittedly, at one public hearing, Dana McGowan, a representative of Jones & Stokes stated, “[D]uring the course of our work, we’ve determined that it’s not possible

to maintain the portion of the site that is not going to be built upon because the soils are too unstable to build even a parking lot on. So that the whole site will have to be over excavated” Ms. McGowan, however, did not claim to be a geotechnical expert⁸ or to have any basis for her opinion other than the geotechnical report.⁹ Using the unsupported opinion of a nonexpert EIR preparer as substantial evidence to support the EIR would be sheer bootstrapping. (Cf. *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1417 [“in the absence of a specific factual foundation in the record, . . . predictions by nonexperts regarding the consequences of a project do not constitute substantial evidence”].)

Finally, even if there were *some* evidence that overexcavation of the entire site was required, the final EIR itself essentially *rejected* such evidence, by finding that (1) “much” or the “majority” of the site required overexcavation, and (2) alternative 3 would require less overexcavation than would the project itself.

The EIR’s very failure to disclose that it was not necessary to overexcavate paved areas was fatal to its analysis of alternatives. If there could be sound economic reasons not to overexcavate the paved areas, there could also be sound environmental reasons. The public was entitled to know that in paved areas archaeological resources could be left in situ, in exchange for higher maintenance costs. Instead, when one commenter

⁸ According to a declaration filed in connection with the preliminary injunction, she was an archaeologist.

⁹ In its briefs, the City concedes that this conclusion was based on the geotechnical report.

specifically asked whether archaeological resources could be preserved by covering the site with asphalt, the final EIR said they could not. In light of the geotechnical report, this was not only unsupported, but affirmatively false.

Finally, the EIR gave an additional reason for rejecting alternative 3 — that it was not compatible with the specific plan, which provides that buildings in the Health Care District “should have a strong architectural orientation toward the street” But not so. The only difference was that in the project, as proposed, the building would be close to both Brockton and Tequesquite (although the entrance would face *away* from both streets, toward the parking lot), whereas in alternative 3, the building would only be close to Tequesquite. A “strong architectural orientation toward the street” does not appear to prohibit buildings in midblock nor parking lots at corners.

The flaws in the EIR’s analysis of alternative 3 also infect its analysis of alternative 4 (reduced site). Alternative 4 involved a smaller building. The EIR rejected it on the premise that it would still require overexcavation of most or all of the site. However, if it was only necessary to overexcavate under the building, and not in paved areas, then reducing the size of the building had at least the potential to reduce the impact on archaeological resources. The analysis in the EIR is inadequate to show why it would not.

We find no fault, however, with the EIR’s analysis of alternative 2 (development on pilings). The geotechnical report stated that, even if the building had a pile foundation, the same amount of overexcavation would be required. Admittedly, the geological report was unclear about exactly how much overexcavation that meant and

where it was needed. Even so, it seems reasonable to conclude that alternative 2 would have the same impacts on archaeological resources as the project would.

In sum, we conclude that the EIR's analyses of alternatives 3 and 4 were inadequate and unsupported by the record. This would be a sufficient reason, standing alone, to reverse the judgment. Nevertheless, whenever we "find[] . . . that a public agency has taken an action without compliance with [CEQA]," we should "specifically address each of the alleged grounds for noncompliance." (Pub. Resources Code, § 21005, subd. (c)). Hence, we will also address the Committee's other contentions.

4. *Failure to analyze a reasonable range of alternatives.*

a. *Exhaustion.*

As discussed in more detail below, during the public comment period, a number of commenters suggested various specific alternatives to the project. Thus, at a minimum, there was exhaustion as to the claim that these alternatives should have been considered.

The trial court ruled, however, that this was insufficient to exhaust the claim that the EIR failed to analyze a reasonable *range* of alternatives. We disagree, because these two claims are inextricably intertwined. A claim that an EIR failed to analyze a reasonable range of alternatives will likely be doomed unless the claimant can show that some feasible alternative existed. (See *Planning and Conservation League v. Castaic Lake Water Agency* (2009) 180 Cal.App.4th 210, 248 [appellants "identify no specific alternatives improperly omitted from the EIR"]; *Save San Francisco Bay Assn. v. San Francisco Bay Conservation etc. Com.* (1992) 10 Cal.App.4th 908, 922-923 ["[a]ppellants have not pointed to a single [alternative] location brought to the City's

attention that was disregarded”].)¹⁰ Similarly, a claim that an EIR was deficient because it failed to analyze a particular alternative is doomed unless the claimant can show that, as a result, the EIR failed to analyze a reasonable range of alternatives. (See *Cherry Valley Pass Acres & Neighbors v. City of Beaumont*, *supra*, 190 Cal.App.4th at pp. 354-355.)

Accordingly, a public comment that a particular alternative should have been considered is, in effect, a claim that the EIR failed to analyze a reasonable range of alternatives. As this court has stated, “less specificity is required to preserve an issue for appeal in an administrative proceeding than in a judicial proceeding. This is because “[i]n administrative proceedings, [parties] generally are not represented by counsel. To hold such parties to knowledge of the technical rules of evidence and to the penalty of waiver for failure to make a timely and specific objection would be unfair to them.” [Citation.] . . .’ [Citation.]” (*Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151, 163 [Fourth Dist., Div. Two].) Certainly the City was on notice that it should respond to the suggested alternatives, either by analyzing them or by explaining why its selection of alternatives was adequate without them. Hence, we conclude that there was exhaustion as to both of these contentions.

¹⁰ If and to the extent that the Committee is actually contending that the EIR failed to analyze a reasonable range of alternatives *in the abstract*, without regard to whether any feasible alternatives are available, we do agree that this particular contention was never raised in the administrative proceedings and hence is barred by exhaustion. (*Tracy First v. City of Tracy* (2009) 177 Cal.App.4th 912, 927.)

The City argues that no commenter ever raised the Committee’s additional argument that the final EIR failed to give adequate reasons for not considering the public’s suggested alternatives. A final EIR, however, is not normally recirculated for further comments. (See 1 Kostka & Zischke, *supra*, Overview of CEQA Process, § 1.8 at pp. 8-9.) The exhaustion requirement “does not apply to any alleged grounds . . . for which there was no . . . opportunity for members of the public to raise those objections orally or in writing prior to the approval of the project” (Pub. Resources Code, § 21177, subd. (e).) Thus, a challenge to material that appears for the first time in a final EIR need not have been raised in the administrative proceedings.

The City cites *Towards Responsibility in Planning v. City Council* (1988) 200 Cal.App.3d 671 (*TRIP*). There, however, in response to comments, the lead agency prepared a supplement to the draft EIR. (*Id.* at p. 682.) The court suggested (though it did not hold) that the plaintiff had forfeited its challenge to material in the supplement by failing to raise it during the period for additional public comment regarding the supplement. (*Ibid.*) Accordingly, *TRIP* is actually consistent with our conclusion.

b. *Analysis.*

i. *Installing a park.*

Many commenters suggested using the site as a historical park or garden, along the lines of the plan that had been proposed in 1990. The final EIR responded: “The suggested resurrection of the plan would require collaboration and cooperation between [the County and the City] and purchase of the site, or part of the site. . . . The current proposal is from a private developer, which would require the developer to subsidize the

Chinatown Historical Park It should be noted that any development on the site, including a museum or public park, could not preserve the archaeological resources within the site due to the soil conditions and underlying fill associated with the former Chinatown.”

This response adequately explained why this alternative was infeasible. In particular, Jacobs had no incentive to develop the property as a park, and there was no “deep pocket” standing by to purchase the site and turn it into a park. We also note that this alternative would fail to satisfy two of the five project objectives (to develop a medical office facility and to provide jobs).

The Committee notes — correctly — that there was no evidence that using the site as a park would require any overexcavation or have any impact on archaeological resources. Certainly the geotechnical report did not support any such conclusion.¹¹ Nevertheless, the final EIR also stated other valid reasons for not considering this alternative.¹²

¹¹ The City asserts, “[T]he only way to avoid impacts to cultural resources would be to have the Project site remain vacant in perpetuity, which would be inconsistent with applicable zoning” Similarly, Jacobs asserts, “[T]here was no feasible way to mitigate the Project’s impacts to cultural resources to a level of less than significant, other than to leave the site permanently vacant.” These assertions are untrue. The site could be used as a park or green space without disturbing any archaeological resources. Moreover, “[p]arks and open spaces” are permitted uses in the Health Care District.

¹² Our discussion here deals with using the entire site as a park. To the extent that the commenters were suggesting using part of the site as a medical office building and part as a park, this alternative was substantially identical to the alternative of freeing up space for a park by building a parking structure, discussed in part IV.B.4.b.iv, *post*.

ii. *Building a cultural or history center.*

A number of commenters suggested that the site should be developed as a Chinese cultural center or history center. In response, the final EIR pointed out that, as mitigation measures, “[i]nterpretive elements,” including an interpretive garden, as well as a more Chinese building design were required. It concluded that the existing mitigation measures were “adequate under CEQA.” It also stated, “[T]he draft EIR adequately discloses that impacts to significant archaeological resources would be significant under CEQA, and that no amount of mitigation would reduce impacts to less than significant levels.”

One set of commenters in particular suggested that the medical office building should be combined with a cultural center, to be located either on its own separate acre of the site, or in 5,000 square feet of the lobby and first floor of the medical building. Jacobs would be required to “subsidize[]” the operations of the cultural center.¹³

The final EIR repeated the response above and added: “[O]nly feasible mitigation measures need to be considered, and mitigation needs to be proportional to the impact. The developer is not proposing to donate portions of the property, construct a museum-

¹³ The commenters went into great detail regarding the amenities of the proposed cultural center. It was to “[i]nclude state of the art computer technology, a small auditorium/lecture room, office space, [a] conference room, and . . . exhibit space, including [American Association of Museums] quality gallery cases” The exhibits were to include not only historical and archaeological material relating to Chinatown, but also “temporary shows of art . . . and traveling materials from Jiangmen, . . . our Sister City.”

cultural center, nor dedicate any easements within the building at this time. The suggested mitigation appears disproportional to the impact.”

The alternative of building a cultural center *instead of* a medical office building was actually worse than the alternative of installing a park. (See part IV.B.4.i, *ante*.) Once again, Jacobs had no incentive to build a cultural center. Moreover, unlike a park, a cultural center *would* require the excavation of archaeological resources.

With respect to the alternative of building a cultural center *in addition to* a medical office building, the final EIR properly concluded that the project already provided adequate mitigation and that this alternative would require mitigation “disproportional to the impact.” The project required Jacobs to excavate all meaningful archaeological materials, have them analyzed, display a sample in the medical building, and turn them all over to the Riverside Metropolitan Museum. It is hard to see how adding an on-site cultural center would further mitigate the project’s effects *on archaeological resources*. Rather, this appears to be precisely the sort of extortionate demand that gives CEQA a bad name.

The Committee claims the statement that Jacobs was not proposing to pay for a cultural center was “conclusory” and did not explain why a cultural center was infeasible. However, this fact was plainly fatal to feasibility. We may presume that Jacobs could have been required to fund a cultural center as a condition of project approval.¹⁴ The

¹⁴ Public Resources Code section 21083.2 limits the amount that a project applicant can be required to pay to mitigate the impacts of a commercial project on archaeological resources (other than by leaving them in situ) to one-half of one percent of
[footnote continued on next page]

final EIR, however, obviously meant that in that case, Jacobs would not proceed with the project. In other words, this alternative would effectively be the same as the no project alternative.

iii. *Moving the building.*

Several commenters suggested shifting the building's footprint to the west. In response to one such comment, the final EIR stated, "[N]o development could occur onsite that would preserve the remaining underground archaeological resources due to soil conditions and fill that requires [*sic*] overexcavating the majority of the site to accommodate development. Overexcavation of the unconsolidated fill soils would require excavating beyond the building limits, which would not be able to preserve any portion of the resources within the site."

Moving the building's footprint to the west was, in substance, the same as alternative 3 (reconfiguration of the site plan). Moreover, the final EIR responded to these comments; essentially, it restated the assertion in the draft EIR that *any* development would require overexcavation of "the majority" of the site.

Thus, the City did not fail to analyze this alternative. Its analysis, however, was defective for the same reason that its analysis of alternative 3 was defective. As we held in part IV.B.3.b, *ante*, there was no substantial evidence that it would be necessary to overexcavate "the majority" of the site. Also, the EIR failed to disclose how much of the

[footnote continued from previous page]

the total cost of the project. (Pub. Resources Code, § 21083.2, subs. (c), (e)(1).) The parties have not addressed how this limitation would apply in this case. It seems likely, however, that this statute alone made it infeasible to require a cultural center.

site would have to be overexcavated; thus, its analysis failed to support its conclusion that this alternative would not significantly reduce the project's adverse impacts.

iv. *Moving the building and adding a parking structure.*

Several commenters suggested not only moving the building, but also building a parking structure instead of a parking lot. The obvious point was that at least some part of the site could be left as green space, so that any archaeological resources underlying that part could be left undisturbed.

The final EIR wholly failed to respond to these comments. On its face, it appears that this alternative would have met all of the project objectives. It is not at all apparent that it was infeasible or that it would have the same adverse impacts as the project itself. To the contrary, it seems logical that it would reduce the adverse impact on archaeological resources.

On this record, this alternative was a necessary member of the reasonable range of alternatives. The final EIR should at least have explained why it was reasonable not to consider it. It may be that this alternative was infeasible for reasons that do not appear in the record. We may speculate, for example, that a parking structure would be too expensive or would conflict with applicable zoning requirements. If the City had analyzed this alternative, it might have concluded that the reduced impact on archaeological resources would be minimal and would be outweighed by the substantial adverse aesthetic impact that would result. The problem is that the City never analyzed this alternative, so we have no way of knowing what its analysis would have shown.

Hence, the failure to respond to the comments suggesting this alternative was an additional violation of CEQA.

v. *Moving the building to a different site.*

In response to one commenter who asked why the project could not be built elsewhere, the final EIR stated, “Comment noted. This comment does not address the adequacy of the EIR. No further response or analysis is warranted.”

“There is a paucity of case law addressing when off-site alternatives must be discussed.” (*Mira Mar Mobile Community v. City of Oceanside* (2004) 119 Cal.App.4th 477, 491.) “The Guidelines . . . do not require analysis of off-site alternatives in every case. Nor does any statutory provision in CEQA ‘expressly require a discussion of alternative project locations.’ [Citation.]” (*California Native Plant Society v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 993.) “It is necessary to examine the particular situation presented to determine whether the availability of other feasible sites must be considered in the EIR.” (*Citizens of Goleta Valley v. Board of Supervisors* (1988) 197 Cal.App.3d 1167, 1179.)

The leading treatise on CEQA states, “In the authors’ view, identification of suitable locations for particular types of uses is a planning concern that should be addressed when local and regional land use plans are adopted. Once the policy decision has been made on the appropriate uses for a site, and that policy is incorporated in applicable land use plans, a specific development proposal should not trigger ad hoc reconsideration of plan policies.” (1 Kostka & Zischke, *supra*, Project Alternatives § 15.25, at p. 758.)

This approach finds support in *Mira Mar Mobile Community v. City of Oceanside*, *supra*, 119 Cal.App.4th 477. There, a city’s redevelopment plan designated the proposed site of a project — a 96-unit condominium development — as suitable for high-density residential development. (*Id.* at p. 485.) The appellate court rejected the claim that the EIR was defective because it did not discuss any off-site alternatives: “[T]he long-term planning process necessarily compels the consideration of alternative ‘land-use goals, policies and implementation measures.’ [Citation.] Because of this ‘an EIR is not ordinarily an occasion for the reconsideration or overhaul of fundamental land use policy.’ [Citation.] Here, the local coastal program [citation] included a section on alternative land uses and the Plan EIR addressed alternatives to redevelopment, including alternative redevelopment boundaries and an inventory describing the various districts. Thus, the public had ample opportunity to review and comment on the particular use of the land for a high-density residential development and the fact such a development was proposed should not prompt reconsideration of existing planning policies in the Final SEIR. [Citation.] Because the proposed project is consistent with the City’s existing plans, policies and zoning, we conclude a review of alternative sites was not necessary.” (*Id.* at pp. 491-492.)

Here, similarly, the City had already determined in the specific plan, which had been subject to CEQA review, that use of the site for “[m]edical and dental offices and laboratories” was appropriate and permitted. The public comments to the effect that “[t]he project may be good [but t]he site is wrong” effectively sought reconsideration of this determination. Thus, various on-site alternatives, when combined with the required

“No Project” alternative, could constitute a reasonable range of alternatives. It was not necessary to go further and to analyze any alternative sites.

In hindsight, it might have been better for the final EIR to respond to comments like this by explaining in more detail exactly *why* it was unnecessary to consider alternative sites. Nevertheless, while its actual response could have been more informative, it was technically correct.

C. *Deferred Mitigation.*

The Committee contends that the EIR improperly deferred mitigation by allowing the treatment plan to be drafted after the EIR itself had already been approved.

1. *Exhaustion.*

a. *Additional factual and procedural background.*

The trial court rejected this contention based on failure to exhaust administrative remedies.

During the public comment period, one commenter stated: “I am concerned the Devil’s in the details, not only with the formation of an Interpretive Plan [i.e., the treatment plan] but its execution and its ongoing maintenance and active development. [¶] I am glad to hear of the involvement of the Metropolitan Museum. I would ask that . . . that be vigorously and energetically included in the mitigation measures, and spelled out to the satisfaction of all parties.”

Another stated: “[W]hat we’re asking for is time to be able to do this up front in the document. So that in the conditions of approval that go forward to the City Council, we have specificity in the criteria for the Treatment Plan

“That’s our concern, because in previous experiences in oversees [*sic*; *sc.* “overseas”? “overseeing”?] Chinese sites, those specificities have not been in place up front, and then it’s up to the monitoring agency. And we need to specify the monitoring agency on implementing these mitigation plans. Otherwise, it’s out in the ether someplace, and it’s up to someone to do. And while we trust everybody — as President Reagan said, ‘Trust but verify’ — we want the specificity up front in the COA’s that go to the City Council.”

Yet another commenter stated, “[T]he proposed mitigation measures . . . are not adequate. For example, hiding the artifacts inside a medical building is not a respectful way to honor the history. In addition, there are several important matters that are unresolved. These include:

“Who will own the artifacts after excavation?

“Who will oversee and enforce the permanence of the display?

“Who has rights to alter the display?

“Is a parking lot with Chinese-style lanterns fitting to tell the story of early Chinese immigrants and their contribution to the citrus industry of Riverside?”

Many others made substantively identical comments. In response to one of these, the final EIR stated:

“[T]he EIR attempts to outline the types of activities that will be undertaken, and the types of considerations to be addressed by the treatment plan. It is by no means detailed enough to specifically identify everything that will be undertaken and what will ultimately be accomplished. Additional pre-field research is required in conjunction with

the treatment plan. . . . The mitigation measure presented in the EIR adequately outlines the types of activities that will be undertaken, and the types of considerations to be addressed by the treatment plan, and provides sufficient detail regarding the work that will be undertaken and what will ultimately be accomplished. In addition to the pre-field research that will be required, extensive post-field analysis will be conducted to answer these outstanding questions.”

b. *Analysis.*

In sum, a number of commenters asserted that the mitigation measure requiring a treatment plan was vague. Jacobs argues that a comment that proposed mitigation is *vague* is not the same thing as a comment that mitigation has been improperly *deferred*. Legally, however, as we will discuss in more detail below, these issues are interconnected. Deferred mitigation is permissible only when (1) mitigation, in general, is known to be feasible; (2) for practical reasons, it is not feasible to prescribe specific mitigation measures in the EIR itself; and (3) the EIR articulates *specific* performance criteria for future mitigation measures. (See, e.g., *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 94.)

Here, one commenter stated that the criteria for the treatment plan should be made more specific before, rather than after, City approval — it should be done “up front in the document.” He also argued that the EIR left too much up to the discretion of the “monitoring agency.” Another stated that he was concerned about the “details, not only with the formation of an Interpretive Plan but its execution and its ongoing maintenance

and active development.” This was adequate to alert the City to a claim that the EIR improperly deferred mitigation.

It is also significant that the City evidently was, in fact, aware that vagueness and deferred mitigation were related. In response to one commenter who asserted that the mitigation measure was vague, the final EIR asserted that it was not feasible to prescribe more specific mitigation measures but that the EIR did “provide[] sufficient detail regarding the work that will be undertaken and what will ultimately be accomplished.” As mentioned, these are criteria for whether mitigation has been improperly deferred. Thus, basically, the final EIR responded to a vagueness claim by asserting that mitigation had not been improperly deferred. In light of the basic fairness rationale that underlies the requirement of exhaustion of administrative remedies, we are convinced that the public comments were sufficient to alert the City that deferred mitigation was an issue.

Jacobs notes that one of the comments, by its terms, related to the “conditions of approval”; it argues that the Committee “has not challenged the conditions of approval, and a Treatment Plan would never be found in the conditions of approval in any case” The *mitigation measure* requiring a treatment plan, however, *would* be found in the conditions of approval, and it was this mitigation measure that the commenter was criticizing. In any event, this is precisely the type of hypertechnical, legalistic approach that does *not* apply to exhaustion of administrative remedies.

We therefore conclude that the trial court erred in ruling that this claim was barred by failure to exhaust.

2. *The propriety of deferred mitigation.*

“Formulation of mitigation measures should not be deferred until some future time.” (Guidelines, § 15126.4, subd. (a)(1)(B).) However, “““for [the] kinds of impacts for which mitigation is known to be feasible, but where practical considerations prohibit devising such measures early in the planning process . . . , the agency can commit itself to eventually devising measures that will satisfy specific performance criteria articulated at the time of project approval. Where future action to carry a project forward is contingent on devising means to satisfy such criteria, the agency should be able to rely on its commitment as evidence that significant impacts will in fact be mitigated. [Citations.]”” [Citation.]” (*Oakland Heritage Alliance v. City of Oakland* (2011) 195 Cal.App.4th 884, 906.)

““[W]hen a public agency has evaluated the potentially significant impacts of a project and has identified measures that will mitigate those impacts, the agency does not have to commit to any particular mitigation measure in the EIR, as long as it commits to mitigating the significant impacts of the project. Moreover, . . . the details of exactly how mitigation will be achieved under the identified measures can be deferred pending completion of a future study.’ [Citation.]” (*Oakland Heritage Alliance v. City of Oakland, supra*, 195 Cal.App.4th at p. 906.)

“Deferral of the specifics of mitigation is permissible where the local entity commits itself to mitigation and lists the alternatives to be considered, analyzed and possibly incorporated in the mitigation plan. [Citation.] On the other hand, an agency goes too far when it simply requires a project applicant to obtain a . . . report and then

comply with any recommendations that may be made in the report. [Citation.]” (*Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1275.)

The Committee asserts that the EIR did not contain any specific performance standards for the treatment plan.¹⁵ We disagree. The EIR specified how the treatment plan had to be prepared and what steps it had to require. For example, it spelled out in considerable detail the area to be excavated and the matters that the final cultural resources report was to address. It was particularly specific about the extent to which the public was to have access to the process. It simply left matters of archaeological discretion, such as the precise manner of excavation and method of analysis, to be specified in the treatment plan.¹⁶

The Committee also argues that the EIR was not specific enough — at least in hindsight — because the eventual treatment plan “did not provide the level of mitigation

¹⁵ Jacobs responds, “The EIR detailed pages of exacting performance standards for the Treatment Plan” This is literally true, but misleading. The EIR’s specifications for the treatment plan start with less than a full paragraph at the bottom of one page; they cover the next full page, then end with two paragraphs on a third page. Standing alone, they would cover less than two pages.

At the end of the EIR, the same specifications are reprinted as part of a table, in a narrow column, in landscape orientation. In that restrictive format, they cover five pages.

¹⁶ The Committee also contends that the City abused its discretion by adopting a statement of overriding considerations before a treatment plan had actually been prepared. This merely restates its contention that the EIR improperly deferred mitigation. Because we conclude that the EIR included suitably specific performance standards for the treatment plan, we also conclude that there was substantial evidence to support the findings in the statement of overriding considerations that (1) the project would have significant and unavoidable effects on cultural resources, and (2) these effects were acceptable in light of the project’s benefits.

expected.” Specifically, the treatment plan, according to the Committee, (1) did not require excavation of the entire site, and (2) did not require the collection of every artifact.

On the first point, the Committee is confusing the *property* with the *site*. The treatment plan required the excavation of the property — i.e., the entire site, minus only the northern parcel, which had never been part of Chinatown.

On the second point, the EIR did not require the collection of every artifact.¹⁷ The treatment plan did not, either; however, it did spell out which artifacts were to be collected and which were to be discarded. The Committee’s real objection is not that the EIR failed to include performance standards, but that it failed to include the performance standards that the Committee would prefer. Nevertheless, from the performance standards in the EIR, it was reasonably clear that the details of the collection process, necessarily including any discard policy, would be left up to the archaeologist who drafted the treatment plan, subject to the City’s approval. Public commenters were free to argue that a discard policy should have been spelled out in the EIR itself. Thus, in this respect, the EIR fulfilled its disclosure function.

¹⁷ To fill this gap, the Committee cites oral assertions by Jacobs, by Jones & Stokes, and by City staff members to the effect that “[a]ll the material would be . . . preserved and curated Actually, a Jones & Stokes representative specifically warned: “There is some latitude . . . [as] to how much — how much material would be collected, how much material would be analyzed”

More to the point, however, the EIR did not improperly defer mitigation simply because it failed to conform to oral representations made at the public hearings.

The Committee argues, however, that there was no apparent reason why the drafting of the treatment plan had to be deferred. This was not a case “““where practical considerations prohibit[ed] devising [mitigation] measures early in the planning process””” (*Oakland Heritage Alliance v. City of Oakland, supra*, 195 Cal.App.4th at p. 906.) Thus, the treatment plan should have been included in the EIR itself.

We agree. When deferred mitigation is permitted at all, it is permitted based on a rule of necessity. (See *Sacramento Old City Assn. v. City Council* (1991) 229 Cal.App.3d 1011, 1028-1029.) However, if the EIR is to serve its “basic purposes,” including “[i]nform[ing] governmental decision makers and the public about the potential, significant environmental effects of proposed activities” and “[p]revent[ing] significant, avoidable damage to the environment by requiring changes in projects through the use of . . . mitigation measures” (Guidelines, § 15002, subds. (a)(1), (a)(3)), it must disclose available mitigation measures to the fullest extent that current knowledge will allow. Hence, “[w]hen an agency defers formulation of a mitigation measure, it should explain why deferral is appropriate. Deferral can be found improper if no reason for doing so is given.” (1 Kostka & Zischke, *supra*, Mitigation Measures § 14.12, p. 699; accord, *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 671.)

Jacobs asserts that, *whenever* a project will have a significant environmental impact, even with mitigation, deferred mitigation is “appropriate.” Basically, Jacobs seeks to distinguish two types of situations. In the first situation, a lead agency defers mitigation, yet relies on the deferred mitigation in concluding that an adverse

environmental effect can be reduced to insignificance. As Jacobs would agree, this is an abuse of discretion. In the second situation, a lead agency defers mitigation but concludes that, even with mitigation, the project will still have a significant adverse environmental effect. According to Jacobs, this is just fine.

But that is not the law. For example, in *San Joaquin Raptor Rescue Center v. County of Merced*, *supra*, 149 Cal.App.4th 645, the court held that mitigation had been improperly deferred (*id.* at pp. 670-671), even though the project must have had significant adverse environmental effects, as the lead agency had adopted a statement of overriding considerations. (*Id.* at p. 652.)

Jacobs cites *Fairview Neighbors v. County of Ventura* (1999) 70 Cal.App.4th 238. There, to mitigate air quality impacts, the EIR required the project proponent to participate in a proposed vehicle emissions mitigation program, but only if the lead agency ultimately adopted the program. Similarly, to mitigate noise impacts, it required the proponent to participate in a proposed assessment district and a proposed noise monitoring program, but only if these were adopted by other agencies. Finally, to mitigate biological impacts, it required the proponent to hire a biologist to prepare a habitat conservation plan. The lead agency found that each of these impacts was significant and “unmitigable”; it adopted a statement of overriding considerations. (*Id.* at p. 244.)

The petitioner argued that the EIR improperly deferred mitigation. (*Fairview Neighbors v. County of Ventura*, *supra*, 70 Cal.App.4th at p. 243.) At least with respect to biological impacts, the appellate court agreed: “The EIR states that a [habitat

conservation plan] would be prepared in the future . . . using standards and procedures not yet determined by a biologist not yet approved. . . . [S]uch a ‘mitigation’ measure is improper.” (*Id.* at p. 244, italics added.)

Nevertheless, it reasoned that the EIR did not “rel[y] on future proposed mitigation studies to provide presumed mitigation measures.” (*Fairview Neighbors v. County of Ventura, supra*, 70 Cal.App.4th at p. 245.) “Here the EIR explains what the environmental impacts would be, and it concludes that the impacts would be significant and unmitigable regardless of the proposed mitigation measures or future studies. Under such circumstances, the Board may adopt a statement of overriding considerations and approve the project. The EIR is only required to provide the information needed to inform the public and the decisionmakers of the significant problems which would be created by the project and to discuss currently feasible mitigation measures. [Citation.]” (*Ibid.*)

The court relied on the lead agency’s finding that, even with a habitat conservation plan, the project would still have “significant and unmitigable” biological impacts. (*Fairview Neighbors v. County of Ventura, supra*, 70 Cal.App.4th at p. 244.) It continued: “A proposed ‘mitigation’ measure which could not be effectual whenever and however attempted is illusory. The [lead agency] assessed the EIR, explaining the impact of the project on biological resources and the inability to mitigate those impacts. The [lead agency] properly adopted a statement of overriding considerations regarding these impacts.” (*Ibid.*) In other words, there was no need for the EIR to include a habitat

conservation plan, because the lead agency had already determined that such a plan could not reduce the biological impacts of the project to a level of insignificance.¹⁸

A mitigation measure, however, is not “illusory” or ineffectual merely because it will not *completely* eliminate an environmental impact. Reducing an adverse impact may be worthwhile, even if the impact remains significant. And, more to the point, under CEQA, the lead agency and the public still have the right to disclosure of, and an opportunity to comment on, any proposed mitigation. In *Fairview* itself, if the habitat conservation plan had been included in the draft EIR, the public might have raised objections. Moreover, even though the lead agency presumably would still have approved the project, it might have required changes in the habitat conservation plan.

“[F]ailure to comply with the information disclosure requirements [of CEQA] constitutes a prejudicial abuse of discretion when the omission of relevant information has precluded informed decisionmaking and informed public participation, regardless whether a different outcome would have resulted if the public agency had complied with the disclosure requirements. [Citations.]’ [Citation.]” (*Lighthouse Field Beach Rescue v. City of Santa Cruz* (2005) 131 Cal.App.4th 1170, 1182.)

This case is unlike *Fairview* because we cannot say that the deferred mitigation was illusory. To the contrary, the treatment plan was the linchpin of the EIR. Even

¹⁸ We question how the lead agency could conclude that the biological effects of the project were “unmitigable” without having seen a proposed habitat conservation plan. It would seem that this finding was based on insufficient evidence (although there may have been supporting evidence that the court did not mention in its opinion).

though it would not reduce the archaeological effects of the project to insignificance, it was the only way they could be mitigated at all. Thus, the treatment plan itself should have been included in the EIR, absent a showing that this was impractical.

Nevertheless, under the peculiar circumstances of this case, the omission was clearly harmless. Less than two months after the final EIR was approved, the draft treatment plan was released.¹⁹ It was the subject of public comment and three public hearings. Finally, the City approved the treatment plan. Thus, it seems clear that, even if the treatment plan had been included in the EIR, the City ultimately would have approved both the EIR and the treatment plan. Although there was a technical failure to comply with CEQA, we can be confident that it did not interfere with informed decisionmaking and informed public participation.

V

DISPOSITION

The judgment is reversed. The matter is remanded to the superior court with directions to enter a new judgment consistent with this opinion. Thus, among other things, the new judgment shall direct the issuance of a writ of mandate compelling the City (1) to set aside its certification of the final EIR, its findings of fact and statement of overriding considerations, and its approval of the project, and (2) not to certify any new final EIR for the project unless and until the City has taken all action necessary to bring

¹⁹ In hindsight, this further supports our conclusion that there is no reason why the treatment plan could not have been included in the EIR.

its analysis of alternatives into compliance with CEQA. The trial court shall retain jurisdiction by way of a return to the writ until it determines that the City has complied with CEQA.

The award of costs and the order awarding attorney fees are also reversed. (See *Schaefer Dixon Associates v. Santa Ana Watershed Project Authority* (1996) 48 Cal.App.4th 524, 530, fn. 1 [Fourth Dist., Div. Two] [“[t]he award of fees below . . . stands or falls with the judgment as a whole”].) In the interest of justice, the parties shall each bear their own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
J.

We concur:

McKINSTER
Acting P.J.

CODRINGTON
J.

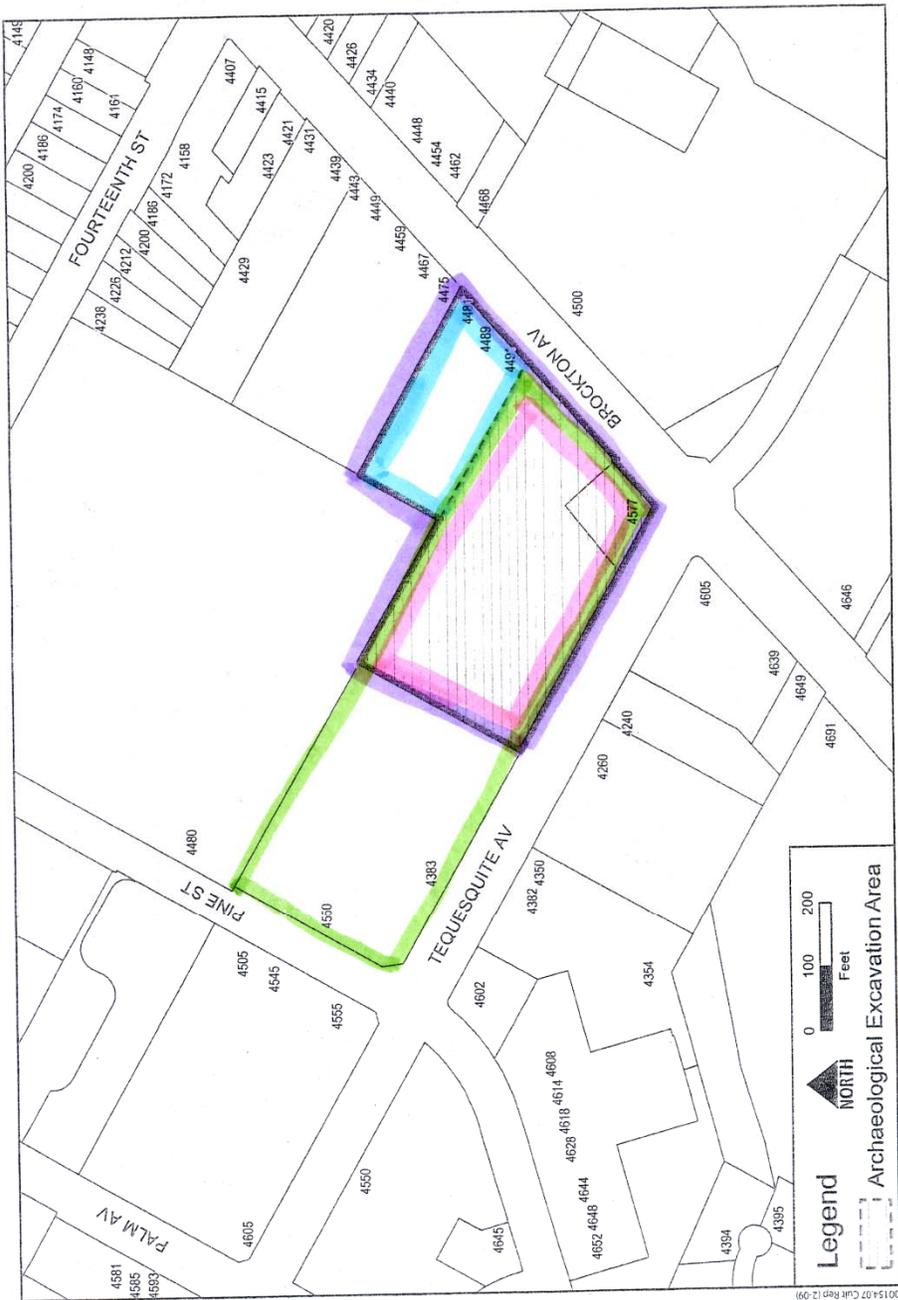


Figure 1b
Limits of Archaeological Excavation

ICF Jones & Stokes
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Appendix A