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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

CITIZENS FOR THE PRESERVATION  
OF RURAL LIVING,

Plaintiff and Respondent,

v.

COUNTY OF SAN BERNARDINO,

Defendant;

LAZER BROADCASTING, INC.,

Real Party in Interest and Appellant.

G050884

(Super. Ct. No. CIVDS1213273)

O P I N I O N

Appeal from a judgment of the Superior Court of San Bernardino County,  
Donald R. Alvarez, Judge. Affirmed.

Gresham Savage Nolan & Tilden, John C. Nolan and Jonathan E. Shardlow  
for Real Party in Interest and Appellant.

Chatten-Brown & Carstens, Jan Chatten-Brown and Josh Chatten-Brown  
for Plaintiff and Respondent.

No appearance for Defendant.

In assessing whether a project may have a significant environmental impact under CEQA (California Environmental Quality Act, Pub. Resources Code, § 21000 et seq., all further statutory references are to the Public Resources Code, unless otherwise indicated), context is everything. In this case, the context is the hilly terrain of undeveloped wilderness property adjacent to a state park, near a national forest, in an area designated in the County of San Bernardino's (County) land use plans for open space where the public enjoys scenic views and vistas. The proposed project is a 43-foot tall monopole radio antenna, and a 100-square foot equipment building and an adjacent parking space, both surrounded by a six-foot tall security fence and a 10-foot perimeter of cleared vegetation and 30 feet of thinned vegetation. The equipment building (placed on the ridge) and the antenna tower (placed 227 feet below the ridge) would be connected by a cleared six-foot-wide pathway running down the slope. The proposed project would be visible from up to 65 percent of the adjacent state park and from other properties in the vicinity.

Lazer Broadcasting, Inc. (Lazer), obtained approvals from the County, to construct the project that included a conditional use permit (CUP), and a major variance from the County's fire safety overlay plan allowing a reduction in the fuel clearance area around the project. The County adopted a mitigated negative declaration (MND) concluding that with mitigation measures—that included camouflage painting the antenna, tower, and equipment building, re-planting areas disturbed by construction, and dedicating the remainder of Lazer's property to open space—the project would have no significant environmental impacts.

The trial court granted the petition for writ of mandate filed by Citizens for the Preservation of Rural Living (CPRL), concluding substantial evidence supported a fair argument the broadcast tower project may have a significant impact on the environment—particularly with regard to its visual, growth-inducing, fire, and land use impacts—necessitating preparation of an environmental impact report (EIR). Lazer

appeals contending any significant environmental impacts were mitigated by the conditions of approval and no substantial evidence supports the trial court's judgment. We reject its contentions and affirm the judgment.

## FACTS AND PROCEDURE

### *Project Site and Vicinity*

The project site is on 38.12 acres of undeveloped land in the steep foothills of the San Bernardino Mountains, adjacent to Wildwood Canyon State Park (Wildwood Park), in unincorporated County territory, just west of the City of Yucaipa. The property is in the Oak Glen Planning Area, zoned rural living with 20-acre minimum lot sizes. There is another broadcast tower about three-fourths of a mile away. The property is within the County's Fire Safety Overlay District One (FS-1), which is characterized by moderate to steep terrain and moderate to heavy combustible material, near the boundaries of San Bernardino National Forest, within the Pisgah Peak Open Space Area. The project site is at an elevation of about 4,450 feet, and the topography consists of two east-west trending ridgelines descending from a north-south ridge along the property's eastern border. The project site is accessed from Pisgah Peak Road, a 12-foot wide unpaved dirt road. There are some private residences in the vicinity.

Wildwood Park is a wilderness area consisting of 900 acres with trails for hikers, mountain-bike riders, and equestrian users. It was formed to preserve the wilderness aspects of the area and serves approximately 350,000 visitors per year. The primary view shed for hikers and equestrian users within Wildwood Park is northeast towards Pisgah Peak—the project site area—and the majority of the park's recreational trails trend in that direction.

### *2007 Project Application*

Lazer purchased the property in June 2006. In mid-2007, it submitted a land use application to construct a broadcast antenna for its radio station located in Hemet, which included an application for a CUP. A radio transmission tower is a land

use that requires a CUP. Lazer's original proposal was for a 140-foot tall three-legged self-supporting lattice tower below the ridgeline, with a 25-foot tall, 42-inch diameter antenna; a 250-square foot equipment building at the top of the ridge, with an external generator and a 500-gallon fuel tank, grading near the equipment building for two parking spaces; and six-foot high chain link fencing topped with barbed wire surrounding the tower and the equipment building. Before being submitted to the County's Planning Commission for approval, the tower was reduced to 80 feet in height, and Lazer removed one parking space from its proposal. Additionally, Lazer sought a major variance from the FS-1 requirement of a 100-foot fuel clearance around structures, to a perimeter of 10 feet of fuel clearance and 30 feet of fuel thinning.

The 80-foot tower proposal was submitted to the Planning Commission in Fall 2008. The County's planning staff recommended approval and adoption of a mitigated negative declaration. There was extensive public opposition to the project, and to proceeding without preparation of an EIR, focused on many impacts of the project, including the impact of the tower on the otherwise pristine vistas and views. The Planning Commission approved the 80-foot tower proposal.

CPRL appealed to the County Board of Supervisors (the Board), which granted the appeal and denied project approval in March 2009. The Board's findings included that the project site was inadequate in terms of open space because it was completely visible from portions of Wildwood Park; the project was contradictory and detrimental to a primary goal of Wildwood Park to provide a pristine wilderness experience to park visitors; the project did not comply with the access requirements of the FS-1 overlay; the project would have a negative visual impact on abutting properties because it could be seen from several locations in Wildwood Park; the project was inconsistent with the General Plan's open space element of preserving and improving the open space corridor attached to Wildwood Park and supporting expansion of Wildwood Park; the project was inconsistent with the Oak Glen Community Plan goal of preserving

scenic vistas and open space corridors; no feasible mitigation measures had been identified to allow the project without disruption of the scenic views and open space corridors; and granting a variance from fuel modification area might be detrimental to other properties.

*2010 Application: Current Project*

In May 2010, Lazer submitted a new application for its proposed transmission tower. The new application was originally for a 43-foot tall lattice tower built 227 feet below the ridgeline. The equipment building on the top of the ridgeline was reduced to 100 square feet, with no external generator or fuel tank, and only one parking space. Lazer proposed to deed restrict the remainder of its property for open space. Lazer again sought a CUP for the tower and equipment building and a major variance from the fuel modification area. It proposed adoption of a mitigated negative declaration asserting the 43-foot tower would not cause any unmitigated visual impacts because it was 227 feet below the ridgeline, there was a “bowl effect” from the surrounding topography, and the lattice tower would simply blend in with the vegetated background. The 2010 application was accompanied by a visual study prepared by Lazer’s consultants, David Moss & Associates (the 2010 Moss Visual Study).

The 2010 Moss Visual Study included photo simulations depicting the visibility of the tower and equipment building from vantages ranging from 10,032 feet away up to 900 feet away. Although the Project would be visible from many of the vantages, it would be only minimally visible from sensitive vantages, and any visual impacts were fully mitigated.

Sometime around July 2010, to mark the project site and demonstrate the impact of the proposal, Lazer graded access to the project site and installed a 43-foot tall telephone pole (the mock-up pole). Lazer installed the mock-up pole without County approval utilizing a tracked vehicle causing degradation to the project site. The ground scraping and vegetation removal that occurred when the mock-up pole was placed created

a visible linear path from the top of the ridge to the location of the mock-up pole. In September 2010, Lazer applied for and obtained a temporary use permit after the fact to allow the mock-up pole to remain in place for six months.

A hearing before the Planning Commission was initially set for March 17, 2011. County planning staff recommended denial of the application. The staff report noted the substantial correspondence it had received about the application including approximately 3,000 letters in opposition raising issues concerning aesthetics, fire safety, biological resources, growth inducement in the way of the potential proliferation of similar towers, cultural resources, and requesting preparation of an EIR. As for aesthetics, staff noted that although Lazer had reduced the height of the tower by almost 50 percent, it had moved the tower higher up the slope on the project site so the top of the tower was at the same elevation as the original proposal. Therefore, the impact of the tower on views was the same as the prior project, which the Board had already decided caused a significant negative impact. No new mitigation measures were being proposed. Staff also reported Lazer was seeking the variance from the FS-1 fuel reduction requirement of a 100-foot perimeter to 30 feet to reduce the visual impact of the project, but the Board had already found reducing the fuel modification area may be materially detrimental. At Lazer's request the Planning Commission meeting was continued so Lazer could modify the proposal to change the tower from a lattice structure to a single wooden pole (the monopole).

On May 5, 2011, the Planning Commission held a hearing on the modified project, which included approval of a CUP for a 43-foot free standing monopole, a 100-square foot equipment building, and a major variance from the fuel modification area from 100 feet to 30 feet (hereafter the Project). Planning staff recommended the Project be denied. Its April 25, 2011, memorandum to the Planning Commission noted as of that date the County had received over 4,500 letters opposing the Project; over 6,000 signatures on petitions opposing the Project, and 5,500 letters supporting the Project. At

the hearing, planning staff and the Planning Commission discussed that there were utility poles at the entrance to Wildwood Park. They also discussed that the variance from the fuel modification requirements was requested to reduce the visual impact of the Project and the County Fire Department did not object to the variance.

Members of the public spoke in favor and against the Project. Opposition included that the Project would be visible from 65 percent of Wildwood Park, and photo simulations submitted by Lazer purporting to show the Project was barely visible were taken from unrealistic distances. From the perspective of the public that used the park (i.e., hikers, bikers, and equestrian users of park trails), the tower was completely visible. At that time, CPRL's attorney submitted a photograph depiction the Project prepared by an architect, Michael DeBell, demonstrating what he believed was the visual impact from nearby trails (the DeBell Photo).

The Mayor of Yucaipa spoke at the hearing in opposition to the Project. He described the pristine nature of the area and its unmarred ridgelines and hills. He commented the tower would be in full view of the valley below it and the scenic vista would be destroyed. He also commented that if this tower was approved, other towers would follow turning the ridgeline into a tower farm.

Numerous other citizens made similar observations. A representative of "Supporters of Wildwood Canyon State Park" explained the project site was immediately adjacent to Wildwood Park, and right between two land conservancy preserves, in the most scenic area. The Project would be visible from two-thirds of Wildwood Park. Another member of the public commented on the damage that had already been done to the project site from Lazer's installation of a mock-up pole, and the number of years it would take to revegetate the disturbed area. A nearby resident commented the mock-up pole was fully visible from her home and from park trails.

At the conclusion of the May 5, 2011, hearing, the Planning Commission voted 3-2 that it intended to approve the Project and directed planning staff to complete

the required environmental analysis and prepare findings. The matter was taken off calendar.

Planning staff contracted with Lilburn Corporation to prepare a visual impact assessment for the Project, following which planning staff prepared a CEQA Initial Study and a proposed mitigated negative declaration for the Project. The Initial Study described the project setting—steep foothills with slopes of greater than 30 percent dominated by chaparral and currently vacant except for the mock-up pole Lazer installed. The monopole would be placed on a western facing slope about 227 feet below the ridgeline. The antenna would be attached to the pole starting at about 21 feet, extending out about 4.5 feet, and going to the top of the pole for a total antenna length of 21 feet. A six-foot high wrought iron fence would be installed around the equipment building. Electrical and telecommunications lines would be brought approximately 6,700 feet from the transmission tower northeast of the project site. The lines would then be brought underground 680 feet from the equipment building to the tower.

The Initial Study analyzed environmental factors potentially affected by the Project—we discuss only those that are at issue in this case. The aesthetic impact of the Project was analyzed for four factors and the Initial Study concluded as to two—its effects on scenic vistas and its potential for degradation of existing visual character quality of the site or its surroundings—the impact would be less than significant once mitigation measures were incorporated.

The Initial Study explained the tower would be placed below the ridgeline on a west facing slope, so it would not be significantly visible from properties to the east or south. The Project would be visible from properties to the west and southwest and from the eastern portions of Wildwood Park.

The visual impact assessment conducted by Lilburn (The 2011 Lilburn Visual Study), evaluated the Project from five locations within Wildwood Park, using the methodology employed by the Federal Bureau of Land Management (BLM).

The monopole would be visible along portions of the park's trails. Lilburn analyzed the project site as a BLM Class I Visual Resource—similar to national wilderness areas, the wild section of national wild and scenic rivers, which are areas designated for preservation of a natural landscape. That BLM class provides for preserving the existing character of the landscape. The class provides for natural ecological changes and does not preclude “management activity,” but any change to the character of the landscape should be “very low and must not attract attention.” From those five vantage points, the Project would not be intrusive or dominate. The tower and equipment building would be visible intermittently by hikers when they rested (because while hiking they would be watching their footing and not looking around at the scenery), and visible more often for equestrian users. The Project could be seen but would not attract attention or distract from the scenic aspects of the area. With mitigation, the Project would have a weak contrast against the current natural surroundings. The contrast could be mitigated by measures including camouflage painting of the monopole, antenna, and equipment shed to blend in with surrounding vegetation. Additionally, the contrast would be mitigated by requiring Lazer to re-vegetate the area scraped of vegetation when Lazer installed the mock-up pole (i.e., the line going down the slope from the top of the ridge to where the mock-up pole was placed), and any additional areas disturbed during installation of the tower. And finally, Lazer would submit a landscaping plan for the reduced fuel modification area.

The Initial Study concluded the Project would have a less than significant impact on land use and planning because it did not conflict with any applicable land use plans. The Oak Glen Community Plan encouraged expansion of Wildwood Park. The Project would encompass only 425 square feet of the 38.12-acre parcel, and the remainder of the parcel would be deed restricted with an open space easement. And the Initial Study concluded the Project would have a less than significant impact on fire protection services.

The Initial Study was circulated and public comments were received. The State of California Department of Parks and Recreation wrote that it was concerned the visual impact assessment was not comprehensive—it considered the monopole itself but did not consider the visual impact of the antenna or the equipment building.

The City of Yucaipa wrote a letter signed by its mayor and council members requesting an EIR be prepared. They wrote the Project was completely inconsistent with the mission of Wildwood Park, which was chosen as a park because of its nearly pristine natural areas. They criticized the 2011 Lilburn Visual Study because the closest view from which it assessed the Project's visual impact was 3,000 feet away from the tower. Lilburn did not assess the visual impact from Pisgah Peak Road (600 feet from the tower) or from the closest hiking trails that came within 900 feet of the tower. The council members wrote they had personally evaluated the mock-up pole and believed it demonstrated the Project would have a significant aesthetic impact on park visitors and it substantially degraded the major scenic vistas. Moreover, they were gravely concerned that if the Project was approved, there would be requests for similar broadcast towers in the area—either on the remainder of Lazer's property or others in the vicinity. They objected that the Initial Study failed to consider the cumulative impact of additional broadcast facilities. Although Lazer had offered to dedicate the remainder of its property as open space, such a dedication was not a required mitigation measure. And once electricity was brought in for the Project, it would become easier for other properties in the area to make similar applications. The council members observed the surrounding community overwhelmingly opposed the Project—over 17,500 signatures had been obtained on petitions opposing—as did various open space conservancies supporting Wildwood Park.

CPRL similarly commented on the Initial Study, and asserted an EIR should be prepared. It too criticized the 2011 Lilburn Visual Study, noting a BLM Class I Visual Resource was the most highly protected category. CPRL attached

the DeBell Photo to its letter explaining DeBell was a licensed architect who based his rendering on a photograph of the project site taken from a nearby hiking trail. The DeBell Photo simulated the Project based on Lazer's description of a 43-foot tall pole, with a 25-foot tall, 42-inch diameter, six-bay antenna, and a 10-foot by 10-foot equipment building; both surrounded by a six-foot tall fence, with a 10-foot wide perimeter of completely cleared vegetation, and 20 feet of thinned vegetation; and a six-foot wide cleared path leading from the equipment building down to the pole. CPRL stated the DeBell Photo represented what a park visitor would see from the hiking trail. CPRL argued the County's General Plan and the Oak Glen Community Plan, both of which set a goal and policy of preserving the scenic vistas, set the standards for reviewing the Project's impact. CPRL repeated comments made at earlier hearings that the Project would be visible from 65 percent of Wildwood Park. Although the tower was shortened, it was moved up higher on the slope so it had the same visibility as the previous 80-foot tower project, which the Board rejected because of its negative visual impact on the park.

After comments on the Initial Study were received and further visual assessments were made, some additional minor changes were made to the Project. The revisions included a change in the location of the equipment shed and parking space and recessing the building into the existing slope so the back and sides were placed four to seven feet into the earth. There were changes to the fencing with the fence around the monopole now being described as a five-foot high wrought iron fence or a five-foot high, topped with a three-strand wire fence.

Lilburn issued another visual assessment (2012 Lilburn Visual Study), this time following a United States Forest Service methodology, again concluding the Project would not have a significant impact on scenic resources. The 2012 Lilburn Visual Study assigned many of the existing viewpoints as having moderate or low scenic integrity due to existing barren areas on the slope resulting from Lazer's prior field/geological work (i.e., the scraping it did to install the mock-up pole).

The Planning Commission held another public hearing on the Project on September 20, 2012. Planning staff spoke in favor of approval reiterating information in the various reports. Staff explained that although the Project would be visible from Wildwood Park and properties southwest of the project site, it would not have a significant effect on scenic resources because of the mitigation measures including camouflage painting the tower and equipment building, revegetation of disturbed areas, and imposition of open space deed restrictions on remaining portions of the property.

Numerous members of the public spoke in opposition. CPRL's attorney spoke, again expressing that the Project on what was currently a pristine view would be visible from 65 percent of Wildwood Park. The Lilburn studies were not conducted from the perspective of the users of the park. The photo analyses in the Lilburn studies were from a mile or two away from the Project, a distance from which he agreed the Project was not visible. But there were many formally designated hiking trails immediately adjacent to the project site. The tower and equipment shed could easily be seen from the area trails and, thus, the Project was "very visible for actual users of the park." CPRL's attorney commented the pathway Lazer had already cleared from the top of the ridge to the location where it installed its mock-up pole, was very visible and ugly. He explained the negative visual impact of the current pathway gave insight into the negative impact of the Project, which would have two fully cleared areas (10-foot fully cleared and 30-foot thinned radius around the equipment building and the tower) plus a six-foot wide cleared pathway down the ridge from one to the other. CPRL's attorney also commented approval of the tower would set precedence for approving similar towers in the vicinity. He also commented the Project did not meet the FS-1 overlay fire department access requirements because the access road to project site was greater than 14 percent grade.

The Mayor of Yucaipa spoke consistently with earlier written comments. He commented on the overwhelming community opposition to the Project, the pristine views of the area, and that the tower would "desecrate" Wildwood Park's panoramic

views. A city council person from the City of Calimesa commented the Project would be an eyesore on the ridgeline and ruin the scenic vistas enjoyed by the public.

A representative from the Yucaipa Valley Conservancy objected the Project was inconsistent with the General Plan and Oak Glenn Community Plan purposes of preserving open space. A representative from the Wildlands Conservancy made comments about the increased risk of lightning strike fires. He complained the photo representations submitted in support of the Project did not accurately depict the visual impact of the Project because they did not show the access pathway or the parking space. He commented on the public's use of the area and the enjoyment of pristine open space and vistas that would be damaged.

Several other citizens, including area residents, who frequented Wildwood Park and its environs also spoke in opposition. Their comments included concerns about increased fire threat, concerns about destruction of pristine views they currently enjoyed and valued highly, and concerns about the potential for proliferation of similar towers turning the ridgelines into tower farms. One resident discussed the ugly scar already created by the installation of the mock-up pole and her own experience with working as a volunteer on revegetation projects similar to what Lazer would be required to do on the project site (“[E]ven with the fancy equipment we used 13 years ago you can still see that road that we took back out. It is barely now beginning to mold back into the environment”). Another resident explained she had been hiking in the area for many years and “no matter the size of the pole . . . the current proposed construction site is in the most prominent and visible location[] overlooking [Wildwood Park].” The trenching and other construction activity would redefine the area.

A resident who lived about one-half a mile from the project site, and who was a frequent recreational user of the trails in the vicinity, commented the mock-up pole was clearly visible not only from her home, but from the road and from the area trails (“I can see it clearly from my home. I can see it when I am driving, I can see it when I am

riding my horse, I can see it when I hike with my children . . . .”) She presented pictures she had taken from trails she used in the area—“I can see it, it’s here. There it is. Monopole. There’s nothing that they can do to mitigate that.”

A county fire department representative, Deputy Fire Marshall Mike Horton, responded to questions about whether the tower itself could increase the risk of fires caused by lightning strikes to the pole. He agreed the tower would be “an attractive place for a lightning strike,” but said precautions could be taken to protect it to a degree.

In response to the public comments, Lazer’s representative explained the equipment building would be on a ridgeline; the tower on “the downslope face of an interior slope[] coming off of one of those ridgelines.” He observed, “There’s no sense in debating the visual aspect of this project . . . because [the opponents’] experts say that it’s visually impacted.” But he argued the Planning Commission should accept the conclusions drawn by their own staff. He explained the variance from the fuel modification area had been requested by staff to reduce the amount of vegetation removed from the site to reduce the visual impact.

At the conclusion of the public hearing, the Planning Commission approved the Project and adopted the mitigated negative declaration. CPRL appealed to the Board.

The Board held a public hearing on CPRL’s appeal on November 27, 2012. Public comments were largely the same as those made at the Planning Commission hearing. CPRL’s attorney made several additional points. He commented that the final Project would be even more impactful than the current mock-up tower because there would be the addition of the equipment building and the actual antenna on the pole. He criticized staff’s and Lazer’s reliance on the fact there were already utility poles at the entrance to Wildwood Park that impacted aesthetics because there was a plan to eventually underground the utilities and remove the poles and the utility poles were not in the path of the pristine view of the hills.

The county fire department representative, Horton, clarified his prior comments on fire protection issues. He explained access was not a concern for the fire department because the tower and the equipment building were unmanned facilities that the fire department would not attempt to defend. The equipment building would have a fire suppression system that minimized risk and permitted a smaller fuel modification area. As for the risk of lightning strikes to the tower causing a fire, he stated a grounding cable would provide sufficient protection. Lightning strikes could occur anywhere there was a topographical high point—“it could occur without that tower being there.” The Board denied CPRL’s appeal.

#### *Writ Petition & Ruling*

CPRL filed its petition for writ of mandate against the County pursuant to sections 21168 and 21168.5 and Code of Civil Procedure sections 1085 and 1094.5, seeking to set aside its adoption of the mitigated negative declaration, and approvals for the Project. Following a bench trial, the trial court issued an extensive written ruling in favor of CPRL agreeing it had established a fair argument the Project may have a significant impact on the environment requiring preparation of an EIR.

With regard to the aesthetic impacts of the Project, the trial court found citizen testimony and the various reports supported a conclusion the project site and monopole would be visible along portions of the trails within Wildwood Park and would attract attention, which “contradicts the State Park’s goal of providing a pristine wildlife experience to users and the objective of a BLM Class 1 area to preserve the existing character of the landscape.” The trial court also concluded the County (and Lazer) used an incorrect baseline by assessing the visual impact in relation to the landscape as it had been disturbed by Lazer’s activities in installing the mock-up pole (“Lazer does not provide any discussion as to why it is entitled to rely on the landscape alterations it created as a baseline in order to support its findings. It appears the proper baseline to have considered would have been the landscaping before the ‘mock-up’ monopole was

installed.”) And the trial court agreed the County’s and Lazer’s studies were flawed because they did not consider multi-use trails identified by the City of Yucaipa that are adjacent and close to the project site.

With regard to land use impacts, the trial court concluded substantial evidence supported a fair argument the Project might have growth inducing impacts, including encouraging proliferation of similar broadcast towers in the area and making development of other parcels easier. The trial court agreed there was a fair argument the Project conflicted with applicable County land use policies aimed at preservation of open space and scenic vistas. And the trial court found there was substantial evidence supporting a fair argument the Project might violate the County’s development code, which prohibited grading on slopes greater than 40 percent in grade.

With regard to fire safety impacts, the trial court agreed there was evidence supporting an argument of increased fire risks due to lightning strikes and there was no indication that risk was adequately analyzed or precautions evaluated. The trial court rejected CPRL’s argument regarding fire vehicle access to the project site.

The trial court entered a judgment in favor of CPRL, issuing a writ of mandate ordering the County to set aside its adoption of the mitigated negative declaration, and its approval of the CUP and major variance for the Project. It ordered the County to prepare a legally adequate EIR prior to any further approvals of the Project, enjoined Lazer from engaging in any further development activity on the project site, and ordered Lazer to remove the mock-up pole. Lazer filed a notice of appeal from the judgment; the County did not.

## DISCUSSION

Lazer contends the evidence is insufficient to support a finding of any potentially significant unmitigated environmental impacts from the Project and the County was not required to prepare an EIR. Therefore, it argues, the trial court erred by granting the petition for writ of mandate. We reject its contentions.

## 1. CEQA Requirements/ Standard of Review

CEQA requires that a public agency determine whether a project may have significant environmental impacts before it approves the project. (§ 21151, subd. (a); *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 79 (*No Oil*)). ““With narrow exceptions, CEQA requires an EIR whenever a public agency proposes to approve or to carry out a project that may have a significant effect on the environment.” [Citation.] “[A]n EIR is “an informational document” . . . .” [Citation.] Its purpose ““is to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project.”” [Citation.]” (*Banning Ranch Conservancy v. City of Newport Beach* (2012) 211 Cal.App.4th 1209, 1220; § 21151, subd. (a); see Cal. Code Regs., tit. 14, § 15000 et seq. (the Guidelines), §§ 15080-15096, 15120-15132, 15160-15170, 15358, 15362, 15382.) The preparation of an EIR is described as the ““heart”” of CEQA because it is the principal method for bringing information about the environmental impacts of a particular project to the attention of the agency and the public. (*No Oil, supra*, 13 Cal.3d at p. 84.)

When an agency determines a project “would not have a significant effect on the environment,” it must prepare a negative declaration, briefly describing the reasons for its determination. (§ 21080, subd. (c); Guidelines, § 15371.) A negative declaration is appropriate only if “[t]here is no substantial evidence in light of the whole record before the [public] agency” that a significant environmental impact may occur as a result of the proposed project. (§ 21080, subd. (c)(1); see also Guidelines, § 15070, subd. (a).) A “significant effect” is a substantial, or potentially substantial, adverse [physical] change in the environment. (*County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 945.) If there is substantial evidence a project will have a significant environmental effect, but that effect may be reduced to a level of

insignificance by implementing mitigation measures, the agency may adopt a mitigated negative declaration allowing the project to go forward subject to those measures. (§§ 21064.5, 21080, subd. (c)(2); *Citizens for Responsible & Open Government v. City of Grand Terrace* (2008) 160 Cal.App.4th 1323, 1331 (*Citizens for Responsible & Open Government*).)

In reviewing an agency's decision to adopt a negative declaration or a mitigated negative declaration, a court (whether at the trial or the appellate level) must determine whether there is substantial evidence in the record to support a "fair argument" a proposed project *may* have a significant effect on the environment. (*Citizens for Responsible & Open Government, supra*, 160 Cal.App.4th at p. 1331; *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1399-1400.) The fair argument standard creates a "low threshold" for requiring an EIR, reflecting a legislative preference for resolving doubts in favor of environmental review. (*Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1316-1317 (*Sierra Club*); see *No Oil, supra*, 13 Cal.3d at p. 85.)

The question of whether the evidence establishes a fair argument that a project may result in significant environmental impacts is one of law. (*Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 928 (*Pocket Protectors*); Guidelines, § 15064, subd. (f)(1).) A reviewing court does not give any deference to the agency's determinations, except insofar as the agency has made express credibility findings (*Sierra Club, supra*, 6 Cal.App.4th at pp. 1317-1318), but determines the matter de novo. (*County Sanitation Dist. No. 2 v. County of Kern* (2005) 127 Cal.App.4th 1544, 1579.)

Evidence supporting a fair argument may consist of facts, reasonable assumptions based on fact, or expert opinions supported by fact but not "argument, speculation, unsubstantiated opinion or narrative, evidence that is clearly inaccurate or erroneous, or evidence of social or economic impacts that do not contribute to, or are not caused by, physical impacts on the environment." (§ 21080, subd. (e)(2); Guidelines, § 15384, subs. (a), (b).) If substantial evidence exists to support a fair argument a

significant effect may result from the project, the agency is required to prepare an EIR, irrespective of whether there is other substantial evidence in the record to the contrary. (§ 21080, subd. (d); Guidelines, §§ 15063, subd. (b)(1), 15074, subd. (b); *Citizens for Responsible & Open Government, supra*, 160 Cal.App.4th at p. 1331.)

The requirement that an EIR be prepared does not preclude an agency from ultimately approving a project that will have significant, unmitigatable environmental impacts. (See § 21081, subd. (b); Guidelines, § 15093, subd. (a); *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564.) CEQA does not require a public agency favor environmental protection over other considerations but does require it to disclose and carefully consider the environmental consequences of its actions, mitigate or avoid adverse environmental effects if feasible, explain the reasons for its actions, and afford the public and other affected agencies an opportunity to participate meaningfully in the environmental review process. Rather, its purpose is to ensure that public officials are aware of the environmental consequences of decisions they are considering making and to inform the public of the basis for the decisions that are ultimately made, thereby promoting accountability and informed self-government. (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 392.)

## 2. CPRL's Request for Judicial Notice

Before addressing the merits of Lazer's appeal, we consider CPRL's request for judicial notice of several documents, attached as exhibits to its request, which we deferred for decision with the merits of the appeal. (Evid. Code, §§ 452, 459.)

Exhibit C is the trial court's October 1, 2013, ruling. Lazer does not oppose this part of CPRL's request. Because the ruling is part of the superior court record, we treat the request as one to augment the record (Cal. Rules of Court, rule 8.155(a)(1), and grant the request.

Exhibits A, B, F, and G are portions of the County's Development Code (sections 82.13.030, 82.19.010, & 83.08.040), and the Open Space Area Map from the County's General Plan, all of which were referenced in the trial court. Lazer opposes the request arguing the County's own land use planning documents were not part of the administrative record that was before the Planning Commission and Board when the Project was approved—a contention we reject. It also argues the County's Development Code and its land use planning documents were not before the trial court—another contention we reject not only because they were cited in the parties' briefing and pleadings (including Lazer's answer), but were referred to by the trial court in its written ruling. The County's Development Code and land use documents are the proper subjects of judicial notice (Evid. Code, § 452), and we grant CPRL's request as to those documents.

Exhibit H is a printout from a National Weather Service website pertaining to lightning safety. Lazer opposes this request. We deny the request because the document was not part of the administrative record. (See *Architectural Heritage Assn. v. County of Monterey* (2004) 122 Cal.App.4th 1095, 1112 (*Architectural Heritage Assn.*) [appellate court would not consider extra-administrative record evidence]; see also *Porterville Citizens for Responsible Hillside Development v. City of Porterville* (2007) 157 Cal.App.4th 885, 897 (*Porterville Citizens*) ["extra-record evidence is not admissible when considering a challenge to the substantiality of evidence supporting a quasi-legislative determination under CEQA"].)

Exhibits D and E are printouts from the Bobcat Company website describing the capacity and function of certain tractors/construction equipment. Lazer opposes the request for the same reason as the National Weather Service website

printout—it was not part of the administrative record. We deny the request.

(*Architectural Heritage Assn.*, *supra*, 122 Cal.App.4th at p. 1112.)<sup>1</sup>

3. *Substantial Evidence Supports a Fair Argument of Significant Environmental Impacts*

Lazer contends there is no substantial evidence to support a fair argument the Project will have any significant visual impact on the environment. We disagree.

A project's negative effect on the aesthetic, natural, scenic, and historical environmental qualities in its vicinity may constitute a significant environmental impact under CEQA. (*Pocket Protectors*, *supra*, 124 Cal.App.4th at pp. 936-937; *Mira Mar Mobile Community v. City of Oceanside* (2004) 119 Cal.App.4th 477, 492; § 21001, subd. (b).) Substantial evidence supports a fair argument the Project may have a significant negative effect on the aesthetic, natural, and scenic environmental qualities of the Wildwood Park and its environs.

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<sup>1</sup> Although we deny the request as to these documents, we briefly comment on why the Bobcat Company website printouts have been proffered. As explained in the above facts, the Initial Study and the Lilburn studies referred to grading to the project site caused by Lazer's installation of the mock-up pole, i.e., the cleared swath of land from the ridge down to where the mock-up pole was installed. And the County's conclusion the Project would have no significant visual impact was at least in part reached by contrasting the Project to the project site as degraded from installation of the mock-up pole. Lazer did not dispute before the County that it caused the degradation of the project site, but it argued in the trial court it had not because photographs taken in 2008 showed a cleared brush line in the area. The trial court rejected the argument, specifically noting the poor quality of photographs upon which Lazer relied. For the first time in its opening brief Lazer refers to the equipment it used to install the mock-up pole—its after the fact application for a temporary use permit stated a 41-hp mini-excavator and a 56-hp skid steer were used. Without citing anything in the record to support the assertion, Lazer states neither of these machines are used for grading; they are only used for digging and drilling. The website documents CPRL offers are to refute that point by showing the machines are marketed by the manufacturer for scraping and clearing brush. Just as we deny CPRL's request for judicial notice of these documents, we similarly disregard Lazer's unsupported factual assertions the equipment used when installing the mock-up pole would not have caused the project site degradation referred to in the reports.

In assessing the potential significance of an impact, setting is critical. The Guidelines state, “An ironclad definition of significant effect is not always possible because the significance of an activity may vary with the setting. For example, an activity which may not be significant in an urban area may be significant in a rural area.” (Guidelines, § 15064, subd. (b); see *Olmsted Citizens for a Better Community v. U.S.* (8th Cir. 1986) 793 F.2d 201, 206 [distinguishing aesthetic impacts in “a pristine wilderness area” from those in “an urban city block”].) It is undisputed the project site is undeveloped pristine ridgeline wilderness adjacent to a state wilderness park. The Lilburn studies conceded the project site must be treated as a BLM Class I Visual Resource, like National Wilderness Areas and wild sections of National Wild and Scenic Rivers, and as such an area designated for preservation of a natural landscape. Any change to the character of the landscape must be “very low and must not attract attention.” The Project includes installation of a 43-foot monopole holding a 21-foot tall, four-and one-half foot wide antenna and a 10-foot by 10-foot building 227 feet up the slope on the ridge. Both structures would be surrounded by a six-foot tall fence, a 10-foot perimeter of fully cleared brush, and a 30-foot perimeter of thinned brush. The two structures would be connected by a six-foot wide cleared pathway running down the slope. There was evidence the Project would be visible from 65 percent of Wildwood Park and to the recreational users of the park. In 2009, the Board rejected Lazer’s original project application concluding the then 80-foot tower and antenna, which would be “completely visible from portions of [Wildwood Park],” was “contradictory and detrimental to a primary goal of the State Park, which is to provide a pristine wilderness experience to park visitors.” The current project, on the same project site, although half the height of the original, was moved further up slope, so effectively the antenna of approximately the same size as the original project was in the same place. The tower was modified from a three-face lattice style to a monopole. But even if that arguably made the tower less intrusive on the view, it does not address the visual effect of the attached

antenna. We note that California Department of Parks and Recreation criticized the visual assessment for failing to consider the visual impact of the antenna itself. And although the equipment building was reduced in size that does not obviate that the Project in totality may nonetheless impact scenic resources.

As the trial court pointed out, there were extensive public comments about the special environmental nature of the project site and its surrounding area including the pristine vistas enjoyed by park users and area residents alike, and the potential negative impact of the Project on the public's use and enjoyment of a wilderness area. We have detailed that evidence above and only summarize the gist of it here. The City of Yucaipa wrote (and its mayor spoke at various public hearings) about the pristine nature of the area, the unmarred ridgelines and hills, and that the antenna tower would be in full view of the valley below it and scenic vistas destroyed. Yucaipa city council members wrote they had personally evaluated the mock-up tower (which we note was just a 43-foot tall pole, with no antenna) and believed even the mock-up tower substantially degraded the major scenic vistas, particularly from nearby recreational trails. A council person from the nearby City of Calimesa objected to the Project as an eyesore on the ridgeline and that would ruin the scenic vistas currently enjoyed by the public. Representatives from various land conservancies and members of the public who used the trails in the park commented about the pristine views the public currently enjoyed and valued highly. A representative of one organization explained the project site was in the most scenic view area of the park; nearby residents, who also used the park's trails, commented the project site was "the most prominent and visible location[] overlooking [Wildwood Park]." They commented on the visual degradation of the views already resulting just from the installation of the mock-up pole, which was fully visible from their properties and from the trails within Wildwood Park. CPRL's attorney commented the Project was visible from 65 percent of Wildwood Park. There were formally designated trails immediately adjacent to the project site, from which the tower and equipment shed and the cleared

pathway connecting the two could easily be seen, and thus from the perspective of actual park users the Project was very visible.

Lazer dismisses the public's and the residents' comments concerning the Project as mere NIMBY-ism (i.e., "'not in my backyard' statements"), which do not constitute substantial evidence of a fair argument. Lazer goes so far as to assert none of the "comments even address[ed] impacts to scenic views." We disagree. The public comments, when combined with other evidence in the administrative record, support a fair argument of a significant impact to scenic resources.

The question of whether a project may have a significant effect on aesthetics is extraordinarily subjective in nature. (*Ocean View Estates Homeowners Assn., Inc. v. Montecito Water Dist.* (2004) 116 Cal.App.4th 396, 402 (*Ocean View Estates*)). "Relevant personal observations of area residents on nontechnical subjects may qualify as substantial evidence for a fair argument. [Citations.]" (*Pocket Protectors, supra*, 124 Cal.App.4th at p. 928; *Ocean View Estates, supra*, 116 Cal.App.4th at p. 402; see *Oro Fino Gold Mining Corp. v. County of El Dorado* (1990) 225 Cal.App.3d 872, 882-883 [comments by members of public must be supported by adequate factual foundation which may be established by relevant personal observations].) "On the other hand, mere argument, speculation, and unsubstantiated opinion . . . is not substantial evidence for a fair argument. [Citations.] 'The existence of public controversy over the environmental effects of a project shall not require preparation of an environmental impact report if there is no substantial evidence in light of the whole record before the lead agency that the project may have a significant effect on the environment.'" [Citations.] Neither is the mere possibility of adverse impact on a few people, as opposed to the environment in general. [Citation.]" (*Pocket Protectors, supra*, 124 Cal.App.4th at pp. 928-929.)

In *Ocean View Estates, supra*, 116 Cal.App.4th 396, a water district proposing to place a cover on a reservoir adopted a mitigated negative declaration for the

project concluding there would be no significant aesthetic impact. There was photographic evidence the cover would be visible from public trails; comments from neighboring property owners and the president of the homeowners association about the aesthetic impacts of the project; and the county had urged the water district to take appropriate mitigation measures to minimize the aesthetic impacts. The appellate court concluded the visual impact of the cover was by its nature subjective and was not a matter within the “special purview of experts.” (*Id.* at p. 402.) “The evidence here goes beyond a few people expressing concern about the aesthetics of the project. There is substantial evidence to support a fair argument that the project may have a significant adverse aesthetic impact.” (*Id.* at p. 403.)

In *Pocket Protectors*, *supra*, 124 Cal.App.4th at page 937, area residents objected to the potential aesthetic impacts of a housing development. Their comments, based on their personal observations, pointed out the ““tunneling”” or ““canyoning”” effect of the houses, insufficient landscaping, possible intrusions into the adjacent greenbelt, “and the overall degradation of the existing visual character of the site from the excessive massing of housing with insufficient front, rear, and side yard setbacks.” The court held the area residents observations sufficed to raise a fair argument about the potential of a significant aesthetic impact from the proposed project. (*Ibid.*)

As in *Ocean View Estates* and *Pocket Protectors*, the comments here were not simply from a few neighbors but from many conservancy groups and elected officials of affected cities (Yucaipa and Calimesa), who spoke about the potential negative effect of the Project on the public’s enjoyment of the scenic beauty of Wildwood Park. When Lazer submitted its 2010 application—originally for a 43-foot tall lattice tower, County planning staff recommended denying noting the visual impact was the same as the impact

the Board had previously found unacceptable. The Lilburn studies and County staff reports acknowledged the Project would be visible from Wildwood Park's trails.<sup>2</sup>

Lazer's reliance on *Porterville Citizens, supra*, 157 Cal.App.4th 885, to support its argument the public comments were insufficient to raise a fair argument is misplaced. In that case, only two speakers raised concerns about the aesthetics of a housing development saying the area was desirable and they wanted less dense development that would preserve its beauty. There was no evidence the development would have any impact on public views, vistas, or scenic highways and there was nothing in the record suggesting the development was near any public gardens, parks, or trails. (*Id.* at p. 902.) The court observed, "[T]he record contains nothing but 'expressions of concern by one or two people' about a possible impact on the overall aesthetics of the local area resulting from approval of a housing subdivision that has a slightly higher density than the subdivision in which they live. These vague complaints do not rise to the level of substantial evidence supporting a fair argument that the housing project may have a significant adverse aesthetic impact." (*Id.* at p. 903.)

Similarly, Lazer's reliance on *Bowman v. City of Berkeley* (2004) 122 Cal.App.4th 572 (*Bowman*), is misplaced. In that case, neighbors' complaints that an urban in-fill project—a four story mixed use building bordered by apartment buildings

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<sup>2</sup> Lazer also complains the DeBell Photo was not substantial evidence of any significant aesthetic impact. It argues the photograph was based on the description of the Project in the 2010 application and did not accurately depict the Project as modified to camouflage paint the tower and equipment building and to recess the equipment building into the ground. Moreover, Lazer argues whereas the visual studies commissioned by the County were "prepared by a licensed visual resource management consultant," the DeBell Photo was prepared by an architect and architecture "is not a profession associated with illustrations of visual impacts." Although we question Lazer's latter assertion, we need not consider it further. The trial court agreed with Lazer's former assertions and found the DeBell Photo was not substantial evidence of a significant visual impact. Because other evidence supports a fair argument of a significant visual impact, we need not consider this argument further.

and single family homes—were insufficient to establish a fair argument the project may have a significant environmental impact because it could disrupt their views. The court observed that obstruction of private views was not generally regarded as a significant environmental impact. (*Id.* at p. 586; see *Banker’s Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego* (2006) 139 Cal.App.4th 249, 279 [effect of project on private views of a few adjacent homeowners does not constitute a significant effect on environment for purposes of CEQA].) The court specifically observed it was not a case involving recreation areas or interference with unobstructed attractive scenic views (*Bowman, supra*, 122 Cal.App.4th at p. 591), and the neighbors’ complaints boiled down to disliking the project aesthetics because it was one story too high. The court stated, “Where scenic views or environmentally sensitive areas are concerned, aesthetic considerations are not discounted as environmental impacts merely because they involve subjective judgments. [Citations.] But we do not believe that our Legislature in enacting CEQA . . . intended to require an EIR where the sole environmental impact is the aesthetic merit of a building in a highly developed area. [Citation.] . . . [T]he aesthetic difference between a four-story and a three-story building on a commercial lot on a major thoroughfare in a developed urban area is not a significant environmental impact, even under the fair argument standard.” (*Id.* at p. 592.) As *Bowman* recognized, in CEQA, context is everything. (*Id.* at p. 589 [“The significance of an environmental impact is in any event measured in light of the context where it occurs”].) The context of the Project—a radio antenna tower in an undeveloped wilderness area adjacent to a state wilderness viewable from the parks trails—plainly distinguishes this case from both *Bowman* and *Porterville Citizens*.

Lazer also complains the trial court’s conclusion there is evidence supporting a fair argument the Project may have significant environmental impacts regarding scenic resources and views is contradicted by the various visual assessments prepared by Lilburn utilizing visual impact methodologies employed by the Federal

Highway Administration, the BLM, and the United States Forest Service. Under each methodology, Lilburn concluded the Project would have no significant impact on scenic resources. But even if there is substantial evidence that no significant impact will occur, a mitigated negative declaration cannot be upheld where the administrative record contains substantial evidence to the contrary. (*Ocean View Estates, supra*, 116 Cal.App.4th at p. 399.) Where, as here, no EIR “has been prepared, neither the lead agency nor a court may ‘weigh’ conflicting substantial evidence to determine whether an EIR must be prepared in the first instance.” (*Pocket Protectors, supra*, 124 Cal.App.4th at p. 935.)

In sum, we conclude, as did the trial court, that there is substantial evidence supporting a fair argument the Project may have a significant adverse aesthetic impact. Accordingly, the trial court correctly granted the writ of mandate compelling the County to prepare an EIR before approving the Project. In view of this conclusion, we need not address Lazer’s arguments on appeal concerning the trial court’s findings regarding the Project’s land use impacts or fire safety impacts ruling. (See *Mejia v. City of Los Angeles* (2005) 130 Cal.App.4th 322, 342.)

#### DISPOSITION

Respondent’s request for judicial notice filed August 8, 2014, is granted as to Exhibits A, B, F, and G, denied as to Exhibits D, E, and H, and the record on appeal is augmented with Exhibit C. The judgment is affirmed. Respondent is awarded its costs on appeal.

O’LEARY, P. J.

WE CONCUR:

ARONSON, J.

IKOLA, J.