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FILED  
SUPERIOR COURT OF CALIFORNIA  
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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
10 FOR THE COUNTY OF RIVERSIDE

11	HIGHLAND SPRINGS CONFERENCE AND TRAINING CENTER	)	CASE NO.: RIC 460950
12		)	
13	Petitioner,	)	PETITIONERS' COMBINED OPENING BRIEF
14	v.	)	Date: November 30, 2007
15	CITY OF BANNING,	)	Time: 1:30 p.m.
16	Respondent.	)	Judge: Hon. Thomas Cahraman
17		)	Dept.: 62 (Riverside Hall of Justice)
18	CENTER FOR BIOLOGICAL DIVERSITY,	)	Action Filed: November 21, 2006
19	Petitioner,	)	CASE NO.: RIC 460967
20	v.	)	Action Filed: November 21, 2006
21	CITY OF BANNING, <i>et al.</i> ,	)	
22	Respondents.	)	
23	CHERRY VALLEY PASS ACRES AND NEIGHBORS, <i>et al.</i> ,	)	CASE NO.: RIC 461035
24	Petitioners,	)	Action Filed: November 22, 2006
25	v.	)	
26	CITY OF BANNING,	)	
27	Respondent.	)	

IMAGED

1 BANNING BENCH COMMUNITY OF )  
INTEREST ASSOCIATION, INC., )  
2 Petitioner and Plaintiff, )  
3 v. )  
4 CITY OF BANNING, *et al.*, )  
5 Respondents. )  
6 SCC/BLACK BENCH, LLC, *et al.*, )  
7 Real Parties in Interest. )

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Action Filed: November 22, 2006

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## I. INTRODUCTION

Last fall, respondents City of Banning and its City Council (collectively, the "City") narrowly approved a tract home development proposed by real party in interest SCC/Black Bench, LLC ("SunCal"). The City's preparation and certification of the Environmental Impact Report ("EIR") for SunCal's 1,500-home project on the undeveloped and nearly inaccessible Black Bench (the "Project") violated so many requirements of the California Environmental Quality Act ("CEQA") that *four* petitioners filed actions challenging the Project and EIR.

Incredibly, with the exception of some traffic and air quality impacts, the EIR claims either that there are *no* significant adverse impacts from the Project, or that all impacts will be mitigated to a less-than-significant level. The EIR makes this claim even though SunCal's leap-frog development is planned for a remote, mountainous, and biologically rich piece of property adjacent to National Forest lands to the north and east, the wildlands of Highland Springs Training and Conference Center to the south and southwest, and Riverside County Regional Park and Open Space as well as privately held mountainous open space property to the west. The only homes in the area are to the east, and those are part of the sparsely populated unincorporated community of Banning Bench. To obtain access to the Project, SunCal will have to construct a new four lane highway across adjoining open lands it does not own. A required secondary road for emergency access only would be up the narrow, winding, and substandard Bluff Street through rural Banning Bench.

The City's claim that the Project will have no impacts except on intersections in adjacent jurisdictions and air quality is ludicrous, and the EIR's analysis is deficient because it does not serve as a good faith document of disclosure but instead attempts to "sweep environmental problems under the rug." (*Santa Clarita Organization for Planning the Environment v. County of Los Angeles* (2003) 106 Cal App.4th 715, 723 ) First, the EIR measures impacts using an improper baseline—the growth allowed by the City's General Plan—rather than the existing environment. For example, it contends that traffic impacts will not be significant because the 15,000-plus daily automobile trips the Project would inject into a now bucolic area are consistent with the City's General Plan.

Second, the EIR minimizes or altogether omits serious adverse impacts. For example, it claims there is an adequate water supply, though the groundwater basins for the area are overdrawn, and it

1 ignores serious questions raised by the public about water supply. The EIR also fails entirely to analyze  
2 and mitigate the Project's greenhouse gas emissions, which contribute to global warming, even though  
3 CEQA requires evaluation of this serious environmental impact. It also asserts that there are no land  
4 use impacts, even though the Project would be totally out of character for the area and ignores or  
5 inadequately considers serious aesthetic, biological, noise, public service, water quality and wildfire  
6 impacts.

7 Third, even when the EIR does concede a negative impact to air quality, its analysis of those  
8 impacts is inadequate, and it fails to adopt feasible mitigation measures as CEQA requires. Similarly,  
9 purported mitigation measures for a variety of impacts, that were analyzed and adopted were often  
10 deferred or unenforceable.

11 The public was largely shut out of the CEQA process, and the EIR does not provide a good faith  
12 response to public comments. Indeed, relying upon the need to complete the Project that was described  
13 in a 1994 Pre-Annexation and Development Agreement (the "Development Agreement") between the  
14 City and SunCal's predecessor, the EIR rejects feasible and environmentally superior alternatives and  
15 fails to analyze a reasonable range of alternatives, even though such analysis was specifically requested  
16 and is legally required.

17 Shockingly, the City approved the Project without access, even though it admitted that  
18 construction of a new four-lane highway must be part of the Project. But SunCal cannot build this  
19 primary access highway along any of the alignments analyzed in the EIR. Therefore, unless this Court  
20 grants the requested writ, SunCal will likely construct a highway to the Project that does not follow *any*  
21 of the alignments analyzed in the EIR, violating CEQA's requirement for an accurate and stable project  
22 description and ban on segmenting projects into parts for environmental analysis.

23 Finally, in adopting a statement of overriding considerations and approving the Project without  
24 assurance that the construction of one of the primary access highways analyzed in the EIR would  
25 actually occur, the City violated CEQA and failed to comply with the procedures required by law. The  
26 Project approval and the EIR should be set aside and the City and SunCal barred from acting to  
27 implement the Project unless and until the City prepares and circulates for public comment a legally  
28 adequate EIR.

1 **II. STATEMENT OF FACTS**

2 **A. The Project Site and Environmental Setting**

3 The site of the proposed Project consists of 1,488 acres of wildlands located at the southern base  
4 of the San Bernardino Mountains, in Riverside County below the San Bernardino County border  
5 (T28:2001)<sup>1</sup>, and within the San Gorgonio Pass area several miles north of Interstate 10. (T28:1951.)  
6 Although the City incorporated part of the site in 1994 specifically for the purpose of allowing the site's  
7 development to proceed as contemplated by the 1994 Development Agreement between the City and a  
8 previous owner of the property (T28:1952), the Project would be a leapfrog development from the  
9 urbanized area of the City. (T28:2002.)

10 The Project site is undeveloped except for "one residential structure with adjacent outbuildings  
11 in the northwest portion of the site, and unimproved access roads." (T28:2000.) The only utilities  
12 currently found on the Project site are a low voltage electric transmission line, an on-site well, and a  
13 septic tank. (T28:2006.) Approximately 990 acres of the site lie within the boundaries of the City, and  
14 498 acres are within the unincorporated area of the County of Riverside. (T28:2000.) As discussed  
15 below, the original plan also included approximately 156.5 acres of off-site Project features, including  
16 land for construction of a major access road to the site, and utilities (*id.*), but the Project was ultimately  
17 approved without any assured primary access. (T28:2045.)

18 A portion of the Project site is currently used for grazing a small herd of cattle. (T28:1952.)  
19 The eastern portion of the site is relatively flat, though substantial grading will still be required  
20 (T28:2027, 2030), while the western portion is steep hillsides and canyons (T28:2030), and it is crossed  
21 by a major creek, Smith Creek, as well as the Smith Creek tributary and several other smaller tributaries  
22 to these watercourses. (T28:2004, 2161.) Chaparral and grassland vegetation covers most of the site  
23 (849.4 and 573.4 acres, respectively), with smaller bands of oak woodland, oak savannah, and alluvial  
24 fan scrub vegetation. (T28:2150.) Mountain lions and bears roam the land, and a number of rare  
25 species inhabit or cross the property. The site provides habitat for a variety of important wildlife  
26 species, including golden eagles (T28:2166), and is located within the area covered by the Western

27 <sup>1</sup> Citations to the administrative record in this case are preceded by "T" and are in the format T[tab  
28 number]:[page number].

1 Riverside County Multiple Species Habitat Conservation Plan ("MSHCP"). The MSHCP is a plan to  
2 facilitate the preservation of biological diversity on a regional scale. (T28:2004.)

3 The Project site is also located within a seismically active area with an active fault, the San  
4 Gorgonio Pass fault, approximately one mile away. (T28:2109.) Smith Creek is a designated 100-year  
5 flood area within the western portion of the site. Additionally there is some potential for flooding of  
6 streets where the natural water courses located on the site are interrupted by the development, which  
7 requires implementation of flood control measures within the Project. (T161:7760, T28:2128.)

8 Land uses surrounding the Project site include undeveloped open space in the National Forest  
9 and San Bernardino County to the north, undeveloped open space to the west and south, and  
10 undeveloped land and a low density, rural residential area known as Banning Bench to the east, and  
11 represented by Petitioner Banning Bench Community of Interest Association. (T28:2016 [for  
12 convenience, attached as Exhibit A.]) Petitioner Highland Springs Conference and Training Center  
13 ("Highland Springs") owns the land to southwest of the Project site. (T28:2030.) Highland Springs is  
14 a retreat with only a sprinkling of low rise buildings, primarily used by youth and civic and religious  
15 groups. (T211:11169.) Small portions of the Highland Springs property are used as an organic herb  
16 farm. (T28:2492.) The rest of the land is maintained in its natural state. There are miles of hiking and  
17 equestrian trails on the retreat's 900 plus acres, and these wildlands provide a home for many species of  
18 wildlife including mountain lions, black bears, deer, as well as smaller animals, and many kinds of  
19 raptors and other birds.

20 **B. The Black Bench Project**

21 The Project includes construction of up to 1,500 residential units, a 13.1 acre school site, 81.2  
22 acres of community open space, and necessary infrastructure. As part of the Project, 869 acres of  
23 mountainous land owned by SunCal would not be developed. (T28:2009.) The Project consists of  
24 several components, including a Specific Plan that would allow construction of the homes and  
25 supporting infrastructure ("Specific Plan"); an amendment to the Circulation Element of the City's  
26 General Plan, to accommodate the Project ("General Plan Amendment"); and a Tentative Tract Map to  
27 allow 1,452 residential units. (T28:2009-11; T295:12860, the EIR analyzes the effects of up to 1,500  
28 homes; therefore, that is the number used in this brief.) Off-site features of the Project include access



1 roads, including construction of a yet to be identified primary access road, and utilities. The Project  
2 contemplates construction of one large detention basin and numerous other smaller basins in the Smith  
3 Creek tributary to control the increase in water runoff the Project would produce. (T28:2024-5.)

4 Water supplies in the area are a subject of great concern. The EIR concedes that the hundreds of  
5 millions of gallons of water that the Project will consume each year will come from "groundwater  
6 resources." (T28:2138, 2466.) There is no question that the groundwater basins from which the water  
7 will come are already in overdraft. According to the San Geronio Pass Water Agency ("SGPWA"),  
8 the "safe yield" from the Beaumont Basin is only 6,000 acre feet per year, the overdraft in the  
9 Beaumont Basin was approximately 12,700 acre feet in 2002 and 13,300 acre feet in 2003, and the  
10 groundwater levels drop by approximately one foot per year. (T3:235; T28:2469.) The Banning Basin  
11 is also in overdraft, with groundwater levels declining steadily over time. In calculating water available  
12 to the Project, the EIR relies in part on 5,910 acre feet a year that it will take from the over-drafted  
13 Beaumont Basin. (T28:2307.) In addressing future water demand, the EIR assumes that future demand  
14 will be met by purchasing sufficient State Water Project Water to fill the basin's purported 200,000 to  
15 400,000 acre foot storage capacity. The EIR also asserts that there will be adequate water available for  
16 the Project because the SGPWA will complete the East Branch Extension of the California Aqueduct  
17 by 2010; however, a letter from the SGPWA to the City states that the earliest date by which the  
18 extension would be completed is 2011. (T28:2309; T255:11841-111842.) The Project also includes  
19 two multi-million gallon reservoirs for the storage of water. (T28:2025-7.)

20 The Project site is in the South Coast Air Basin, which is currently designated as a non-  
21 attainment area for ozone and particulate pollution standards. (T28:2005; T28:2236; T30:3409.) The  
22 15,164 daily automobile trips generated each day from this isolated development (T28:2191) require  
23 longer trips, and thus generate more air pollution, than if the homes were built in an urbanized area,  
24 closer to jobs, retail uses, schools, entertainment, government offices, and other development, as well as  
25 freeway access. (T207:11138-11139.) Of course, in addition to the vehicle trips, the energy used in the  
26 construction and operation of the Project will also result in air pollution. The EIR admits the Project  
27 will have significant air quality impacts even if the air mitigation measures proposed in the EIR are  
28 implemented, including significant emissions of ozone (O<sub>3</sub>), particulate matter (PM<sub>10</sub>), oxides of

1 nitrogen (NO<sub>x</sub>), and carbon monoxide (CO). (T28:2252-53.) The EIR claims these impacts are  
2 unavoidable, requiring the City to adopt a statement of overriding considerations. (T28:2434.)

3 The EIR also fails to consider the Project's emission of greenhouse gases. Carbon dioxide is the  
4 principal "greenhouse gas" whose presence and accumulation in the atmosphere contributes to global  
5 warming, which is leading to profound changes in California's and the world's climate. (T207:11440-  
6 55, 11160.1.) In addition to the 15,164 average daily trips the Project will generate (T28:2191), it will  
7 also consume a significant amount of energy for construction as well as for the cooling, heating, and  
8 lighting of the Project over its lifetime. The EIR estimated the residential units would consume 9.34  
9 million Kilowatt hours (kWh) of electricity annually. (T28:2321.) The EIR also calculated that the  
10 residential component of the project is estimated to consume 1.1 million therms of natural gas annually.  
11 (T28:2323.) This consumption of energy results in the direct emission of greenhouse gases.

12 While the EIR acknowledges that the Project would potentially have significant land use,  
13 geotechnical, hydrology/water quality, biological, noise, hazards and hazardous materials, public  
14 services and utilities, fire protection and police services, recreation, and cultural resource impacts, it  
15 claims all these impacts would be mitigated to a less than significant level. (T28:2434.)

16 According to the EIR, the Project would result in *direct* impacts to approximately 766.8 acres of  
17 annual grassland, chaparral, oak savanna, oak woodland, and alluvial fan scrub habitat. (T28:2004,  
18 2148-51, 2368.) The 492 acres on which the development is proposed is less steep than the remaining  
19 lands, but the Project would still require massive grading—some "4.83 million cubic yards of  
20 earthwork (cut and fill), and an additional 5.0 million cubic yards of remedial grading (removal and  
21 recompaction of unsuitable soils) would be required to ensure slope stability." (T28:2027, 2030.)  
22 Instead of designing the Project to adapt to the contours of the land, the Project attempts to completely  
23 reshape the environment to suit its needs by cut and fill, to build large homes on small, terraced lots.  
24 (T211:11170.) And the EIR claims the biological impacts of the Project will be covered by the Western  
25 Riverside County MSCHP. (T28:2162-63, 2477.)

### 26 C. Project Site Access

27 The Project site lies in a high fire hazard area, particularly the western portion, with abundant  
28 natural fuels and steep slopes on the land, adjacent to the National Forest. (T18:497; T28:2003, 2005.)

1 The only current access to the land is Bluff Street, a small, narrow, winding country road through the  
2 Banning Bench community. (T28:1956) The Fire Department requires at least two access roads for  
3 remote developments like the Project. (T26:1310.) However, the Banning Bench community strongly  
4 opposed SunCal utilizing Bluff Street for primary *or* secondary Project access:

5         The idea of using Bluff Street as the secondary access is totally unacceptable. The  
6 existing roads on the Banning Bench were constructed to standards which cannot stand  
7 high usage or heavy loads. At the most, there is only an inch and a half (1&1/2 inch) of  
8 asphalt, laid on native soil. These roads would deteriorate in a very short time to pot  
9 holes and rubble. Heavy truck loading would only accelerate this condition. The roads  
are narrow and hazardous at high speeds. With an additional three thousand cars (3,000  
cars) having the use of these streets it becomes a hazard to life and property and to the  
life-style of the existing residents.

10 (T18:513 [the homes on Banning Bench just off of Bluff Street can be seen, in part, at the far right];  
11 T28:2168, 2405.) In partial response to their protests, the City agreed to limit the Project's use of Bluff  
12 Street to temporary construction traffic and, upon build-out, to emergency vehicles, with a gate that  
13 would be released in case evacuation of residents was needed. (T26:1232-3; T227:11458.) Yet even  
14 with this restricted use, significant improvements and repairs to Bluff Street would be required.  
15 (T28:1956; T227:11457.)

16         For primary access, SunCal proposed building a major four-lane, 90 foot wide highway from  
17 Highland Home Road through the previously approved "Deutsch project" northeasterly to the Project.  
18 (T28:1955-6.) The EIR also identified two "access alternatives projects," one from Highland Springs  
19 Road and one from Sunset Avenue. (T28:1954-5.) All three of these access routes bisected the  
20 Highland Springs property.

21         Thousands of people visit Highland Springs every year and use the retreat's network of trails,  
22 including the following: Alesian Farms, Big Ditch, Bobcat, Canyon Crest, Hidden Meadow, Highland  
23 Peak, Mountain Meadow, Scat, Smith Creek, and ZigZag. (T28:1876.) They treasure the clean air,  
24 quiet, wild animals, and the spectacular nighttime sky. (T211:11168-11170.) Each year, approximately  
25 2,500 fourth to sixth grade school children also come to the retreat for a week at a time as part of their  
26 science education and to experience the surrounding wilderness, exploring the miles of hiking and  
27 equestrian trails on the retreat's 900 plus acres. (T211:11169.)

1 Because of concerns about the primary access highway's impacts on the environment and the  
2 wilderness experience now enjoyed by retreat visitors, Highland Springs refused to grant SunCal  
3 permission to build the highway across its property. (T211:11168; T282:12537.) However, Highland  
4 Springs fears that the City or the County may in the future exercise the power of eminent domain to  
5 obtain the right-of-way for the highway so the Project can go forward. (T28:2224.)

6 **D. Approval of the Black Bench Project**

7 In July, 1994, the Banning City Council ("Council") approved, by the adoption of Ordinance  
8 No. 1153, the Development Agreement between the City and the previous owners of the Black Bench  
9 Project site, at which time the Project site was annexed to the City. (T37:4105.) In December of 2003,  
10 the Project site was sold to SunCal and the Development Agreement was assigned to them.  
11 (T44:4281.) The Development Agreement provides for the preparation and processing of a specific  
12 plan for the Project site that would include the development of 1,500 residential lots with development  
13 standards and requirements, the same project at issue in this action. (T37:4107.)

14 In Section 1.b. of the Development Agreement, the City purported to obligate the City to, in the  
15 future, redesignate the Project site as a Specific Plan Overlay Development Zone ("SPOD Zone") and  
16 require the owner of the Project site to prepare and process a specific plan permitting the subdivision of  
17 the site into 1,500 residential lots. (T37:4107.) At the time it approved the Development Agreement,  
18 the City prepared a "negative declaration" for it that postponed all assessments of the Project's potential  
19 impacts to a later date. (T249:11679.) The City's justification for the postponement of environmental  
20 review was apparently based upon Section 2.c. of the Development Agreement, which states: "There is  
21 hereby reserved in the City its absolute discretion to take any action in conformance with, allowed by or  
22 required by CEQA, and the Landowners hereby waive any right to commence any legal actions against  
23 City because of any such action taken by it." (T37:4109.)

24 The City released a Draft EIR for the Project on March 30, 2006 and circulated it for comments  
25 for 45 days, until May 15, 2006. (T28: 2448.) Despite the size of the Project and its isolated and  
26 ecologically sensitive location, the EIR asserts that, after mitigation, all impacts are less than significant  
27 except for air quality and traffic intersection impacts. No alternative locations for the Project were  
28 analyzed and only one alternative that would lessen the impacts of the Project was considered, although

1 it was improperly rejected. (T28:1954-5.) Alternative access routes to the Project site were considered  
2 as alternatives to the Project

3       Comments submitted on the EIR included statements about the improper downplaying of the  
4 severe impacts the Project would have on the current unobstructed views of mountains and open space,  
5 the many sensitive plant and animal species that inhabit or use the site, the nearby historic resources,  
6 increased noise in this rural area, water quality, and a failure by the EIR to identify an adequate water  
7 supply, as well as many other flaws in the EIR. (T211:11168-82.) On August 15, 2006, over  
8 widespread public opposition, the City Planning Commission recommended to the City Council that  
9 they approve the Project and certify the EIR. (T194:10688.) The Final EIR was not before the Planning  
10 Commission when the Commission voted on August 15, 2006 to recommend certification of the EIR,  
11 and it was not released to the public until September 12, 2006. (T211:11172.)

12       Thereafter, the Council noticed a public hearing for September 19, 2006, to consider the  
13 approval of the Project and the certification of the EIR. (T28:11162.) Despite the fact that public  
14 testimony regarding the Project was overwhelmingly in opposition to the Project and its many negative  
15 environmental impacts and raised numerous objections regarding legal and factual deficiencies and  
16 errors, on October 11, 2006, the Council, by a vote of three to two, certified the Final EIR, adopting a  
17 Statement of Overriding Considerations, Findings, and a Mitigation Monitoring Program, adopted a  
18 resolution approving General Plan Amendment #06-2502, and executed the Memorandum of  
19 Understanding with SunCal. (T274:11935-6; T281:12417.)

20       Because the Council agreed to some changes in the Project in order to reduce grading, the  
21 Specific Plan and Tract Map were continued to the October 24, 2006 Council meeting, where those  
22 final approvals were granted. (T281:12418-9.) On October 24, 2006, the Council conducted the "first  
23 reading" for Ordinance No. 1353, approving Specific Plan No. 04-209, and approved Resolution No.  
24 2006-130, approving Lot Split #04-4509 and Tentative Tract Map 34001. Thereafter, the Council  
25 conducted the "second reading" of Ordinance No. 1353, and, on October 27, 2006, filed a "notice of  
26 determination" for the Project. (T299:13045.) As discussed in greater detail below (see IV and V.H.  
27 *infra*), the Council approved the Project knowing that SunCal could not secure a primary access road to  
28 the Project, even though the EIR analyzed three road alignments, and at least one primary access road is

1 a key Project component. (T281:12172-4.)

2 **III. STANDARD OF REVIEW**

3 Enacted in 1970, CEQA embodies the entwined themes of substantive environmental protection,  
4 information disclosure, and governmental accountability. (Pub. Res. Code § 21100 *et seq.*) CEQA  
5 requires full disclosure of a project's significant environmental effects so that decision-makers and the  
6 public are informed of these consequences before the project is approved, and to ensure that  
7 government officials are held accountable for these consequences. (*Laurel Heights Improvement Ass'n*  
8 *of San Francisco v. Regents of the University of California* (1988) 47 Cal.3d 376, 392 ("*Laurel*  
9 *Heights I*").) "The heart of CEQA" is the requirement that public agencies proposing to carry out or  
10 approve a project that may have a significant effect on the environment must prepare a detailed  
11 environmental report, or EIR. (Pub. Res. Code §§ 21061, 21100(a); 14 Cal. Code Regs. (hereinafter  
12 "Guidelines") § 15003(a).<sup>2</sup>) Environmental protection is the guiding concept in interpreting CEQA.  
13 "The foremost principle under CEQA is that the Legislature intended the act 'to be interpreted in such  
14 manner as to afford the fullest possible protection to the environment within the reasonable scope of the  
15 statutory language.'" (*Laurel Heights I*, 47 Cal.3d at 390, quoting *Friends of Mammoth v. Board of*  
16 *Supervisors* (1972) 8 Cal.3d 247, 259.)

17 Petitioners in this case seek review of the City's quasi-judicial and quasi-legislative approvals in  
18 connection with the Project. According to CEQA, quasi-judicial determinations are reviewed based on  
19 principles of administrative mandamus, while quasi-legislative approvals are reviewed according to  
20 principles of traditional mandamus. (Pub. Res. Code §§ 21168, 21168.5.) The distinction between  
21 these provisions is "rarely significant." (*County of Amador v. El Dorado County Water Agency* (1999)  
22 76 Cal.App.4th 931, 945.) In reviewing a public agency's CEQA determinations under either  
23 provision, a court must determine whether the agency prejudicially abused its discretion. (*Ibid.*) "An  
24 abuse of discretion occurs where the agency has not proceeded in a manner required by law, or its  
25 decision that the EIR is adequate is not supported by substantial evidence." (*Santa Clarita*  
26 *Organization, supra*, 106 Cal App 4th at 721.)

27 <sup>2</sup> The "Guidelines" are found at 14 Cal. Code Regs. § 15000, *et seq.*, and are CEQA's  
28 implementing regulations.

1 Thus, there are two distinct grounds for finding that the agency abused its discretion under  
2 CEQA, with significantly different standards for determining error. (*See Vineyard Area Citizens for*  
3 *Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435.)

4 Challenges to purely factual aspects of an EIR, such as the scope of analysis and the  
5 methodology for studying an impact are governed by the substantial evidence standard of review.  
6 (*Federation of Hillside and Canyon Ass'ns. v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1259.)

7 While a court reviewing an agency's decisions under CEQA does not pass on the correctness of an  
8 EIR's environmental conclusions, it must determine whether these conclusions are supported by  
9 substantial evidence, which includes "facts, reasonable assumptions predicated upon facts, and expert  
10 opinion supported by facts" and excludes "[a]rgument, speculation, unsubstantiated opinion or  
11 narrative, [and] evidence which is clearly inaccurate or erroneous..." (Pub. Res. Code §21082.2(c).)  
12 Thus, while agency studies are generally afforded deference, a "clearly inadequate or unsupported study  
13 is entitled to no judicial deference." (*Berkeley Keep Jets Over the Bay Comm. v. Board of Port Comms.*  
14 (2001) 91 Cal.App.4th 1344, 1355 ("*Berkeley Jets*").)

15 Challenges to an agency's failure to proceed in the manner required by CEQA, such as the  
16 failure to address a subject required to be covered in an EIR or to disclose information about a project's  
17 environmental effects, are subject to a less deferential standard than challenges to an agency's  
18 substantive factual conclusions. (*Vineyard Area Citizens, supra*, 40 Cal.4th at 435.) In reviewing these  
19 claims, the court must "determine de novo whether the agency has employed the correct procedures,  
20 'scrupulously enforc[ing] all legislatively mandated CEQA requirements.'" (*Ibid.*, quoting *Citizens of*  
21 *Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564 ("*Goleta II*").) In reviewing whether  
22 the agency proceeded in the manner required by CEQA, the court must determine whether the EIR is  
23 sufficient as an informational document. (*Dry Creek Citizens Coalition v. County of Tulare* (1999) 70  
24 Cal.App.4th 20, 26.) "A prejudicial abuse of discretion occurs if the failure to include relevant  
25 information precludes informed decision-making and informed public participation, thereby thwarting  
26 the statutory goals of the EIR process." (*Ibid.*) When an agency fails to proceed as required by CEQA,  
27 harmless error analysis is inapplicable. "The failure to comply with the law subverts the purposes of  
28 CEQA if it omits material necessary to informed decision-making and informed public participation."

1 (*Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099,  
2 1106.)

3 Thus, the degree of deference afforded the City's decisions depends on the nature of the CEQA  
4 claim in question. "In evaluating an EIR for CEQA compliance...a reviewing court must adjust its  
5 scrutiny to the nature of the alleged defect, depending on whether the claim is predominantly one of  
6 improper procedure or a dispute over the facts." (*Vineyard Area Citizens, supra*, 40 Cal.4th at 435; *see*  
7 *also Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1207-  
8 1208 [rejecting argument that substantial evidence standard applied to agency's failure to proceed as  
9 required by CEQA].) Examples of challenges which are properly analyzed under the "failure to  
10 proceed in the manner required by law" standard include the failure to require an applicant to provide  
11 certain information mandated by CEQA and to include that information in its environmental analysis  
12 (*Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1236); failure to comply with information  
13 disclosure/omission of relevant data which precludes informed decisionmaking (*Bakersfield Citizens,*  
14 *supra*, 124 Cal.App.4th at 1197-98); failure to comply with certain substantive requirements of CEQA,  
15 such as analysis of cumulative impacts (*ibid.*); inadequate responses to comments (*Berkeley Jets, supra,*  
16 91 Cal.App.4th at 1371); and inadequate project description (*San Joaquin Raptor/Wildlife Rescue*  
17 *Center v. County of Stanislaus* (1994) 27 Cal. App.4th 713, 723-29).

18 **IV. THE LACK OF A CONSISTENT PLAN FOR ACCESS AND UTILITIES**  
19 **TO THE PROJECT SITE VIOLATES CEQA**

20 A project encompasses "the whole of an action." (Guidelines § 15378.) For this reason, the  
21 EIR properly describes the two required access roads as part of the Project. (T28:1952.) Indeed, one of  
22 the three primary actions for which the Draft EIR was prepared was to amend the Circulation Element  
23 of the General Plan to identify the route for construction of a new major road to provide access to the  
24 Project. (T28:1951.) To do otherwise would chop the Project into at least two parts, a practice  
25 condemned by the California Supreme Court and by many Courts of Appeal.

26 In *Laurel Heights I, supra* 47 Cal.3d 376, the California Supreme Court mandated that an EIR  
27 include an analysis of the environmental effects of reasonably foreseeable future action. The  
28 construction of at least one access road to this development is not just foreseeable—it is essential. And



1 both common sense and the Riverside County Fire Department require at least *two* access roads for this  
2 large residential development (T26:1310), which is removed from other developments and nestled  
3 between the foot of the National Forest and other wildlands (T28:2003), in a high fire hazard area  
4 (T18:496-7). Yet the only *certain* access the City approved as part of the Project is limited to use by  
5 emergency personnel and equipment access and, if necessary, evacuation of residents. No *certain*  
6 primary access to the Project site was approved as part of the Project. Although the EIR evaluated three  
7 potential access road alignments, in light of Highland Springs' unwillingness to allow a four lane road  
8 to bisect its property, it is quite possible that a different road alignment might be selected, the  
9 environmental impacts of which are not known. In fact, the Specific Plan for the Project acknowledges  
10 that SunCal may not be able to secure any of the primary access road studied in the EIR, and allows an  
11 unknown future and yet to be evaluated road access area alternative: the "Third Access Alternative."  
12 (T19:590.) Further, all utilities, including electrical, natural gas, sewer, and water, are proposed to be  
13 constructed beneath the primary access road. (T28:2314-5, 2320-1, 2323; T20:812.) For all of these  
14 utilities, the EIR analyzed their impacts based upon the three studied locations of the primary access  
15 road. (T28:2038-41, 2380, 2384; T29:2728-30 & 2731 [for convenience, attached as Exhibit B].)

16 Given that "[t]he proposed off-site utility connections would be located *within existing and*  
17 *future roadways...*" (T28:2299), and the EIR failed to identify where the "Third Access Alternative"  
18 would be, the EIR failed to provide any meaningful or relevant analysis of the impacts that might result  
19 from installing those utilities within that alternative. Thus, it effectively changed the EIR's Project  
20 description as to public services and parsed any relevant discussion of public service impacts out of the  
21 EIR (e.g., how is anyone to know what impact the ultimate alignment will have on emergency response  
22 times or what the impacts of locating utilities within that alignment will be?). This is "piecemealing at  
23 its worst. This also means that, in violation of CEQA, any identification of feasible mitigation  
24 measures for those impacts is *deferred* to a future date.

25 The description of the Project in the EIR includes construction of a primary access road from  
26 Highland Home Road northeasterly (T28:1951), through the Highland Springs property and over Smith  
27 Creek (T26:1234) and the Big Ditch trail to the Project site. (T27:1552A.) Two alternative Project  
28 descriptions would provide primary access by construction of a four lane road from Highland Springs

1 Avenue or a primary access road from Sunset Avenue. (T28:1954-55.) All three of these access roads  
2 would go through Highland Springs. (See map T28:2499.) An aerial photograph located at T27:1552A  
3 [for convenience, attached as Exhibit C] shows the boundaries of Highland Springs in relationship to  
4 the Project as well as the trails found there. As Highland Springs stated in a comment on the Draft EIR,

5 As can be seen in Exhibit 4 1-3, proposed Street A [the primary access] runs directly  
6 parallel to Canyon Crest Trail and Smith Creek Trail, and also crosses Bradshaw Trail.  
7 This location is easily visible from the Resort's secondary meeting room "Hitching Post"  
8 as well as the cabins used by Science Camp children.

9 (T26:1268-9.) Highland Springs also complained,

10 To say that the trail would not be significantly impacted by the proposed project because  
11 there will be an "undercrossing" for the Big Ditch Trail is absurd. Placing a 90 foot  
12 wide, 4 Lane highway next to what is now a wilderness trail certainly will have an  
13 impact.

14 (T26:1268.) Indeed, the EIR acknowledged that the road would be through "steep, vacant hillside  
15 terrain." (T123:7446.) Such a road would severely impact the experience of countless people using the  
16 Highland Springs property. A four lane road through Highland Springs would deprive the retreat's  
17 thousands of annual visitors of the wilderness experience they seek.

18 The required secondary access proposed is up the narrow, winding road of Bluff Street, though  
19 rural Banning Bench community where very few homes exist in a rural setting. (T28:2016 [for  
20 convenience, attached as Exhibit D.) Early on, that community strenuously objected to access through  
21 their community and the impact on the life-style of the existing residents. (T18:513.) The EIR itself  
22 acknowledged that "Because Bluff Street "has very tight turns and narrow pavement," ... travel demand  
23 modeling for each traffic impact analysis scenario has indicated that approximately five percent of  
24 Project traffic will use the difficult, circuitous route. (T28:2453.)

25 As a result of the opposition from the Banning Bench community, the City agreed that *after* the  
26 primary access road was constructed, access through Bluff Street would be limited to emergency  
27 vehicles and an emergency evacuation route, with a gate that would be released in case evacuation of  
28 residents was needed. (T28:2457-8.) Though one would question whether it is prudent to have only  
one regular access in and out of a development surrounded by wildlands and rural development, as  
things now stand, SnnCal cannot secure even the primary access it needs the Project.

The Planning Commission approved the Project *without* primary access secured, and would

1 have allowed the grading of the Project site, with the heavy equipment gaining access from Bluff Road.  
2 This would mean that massive grading could take place, and the residents of Banning Bench could be  
3 severely impacted by the heavy construction equipment and nearby grading activities *before* it was  
4 known whether primary access to the site was secured. There was great public opposition to the course  
5 taken by the Planning Commission. As stated by the Banning Bench community:

6       The Banning City Planning Commission has conditioned the property to begin grading  
7 Phase One without securing access. After completion of the grading the developer will  
8 have 30 days to prove they have primary access from Sunset, Highland Home, *or a*  
9 *third undisclosed location*. . . This access can be anywhere and nothing is confirmed in  
the proposal. This leaves the entire bench area very vulnerable. The project should not  
be approved and the developer should not be allowed to move any dirt until they have  
access! We have a right to know what the access will be before the project is approved.

10 (T8:352.)

11       While the City Council did not allow any grading to commence unless SunCal secured access, it  
12 did approve the Project without a definite primary access. It stated that the City's first choice for access  
13 is from Sunset Avenue (T227:11428), with its second being Highland Home Road (T227:11429). It  
14 acknowledged that the EIR had studied access from Highland Springs Avenue, Highland Home Road,  
15 and Sunset Avenue, and that if another route is secured, it will not have been analyzed. (T297:12939.)  
16 Indeed, the adopted Specific Plan and Mitigation Monitoring Program both acknowledge:

17       If either the Highland Home Road Alignment or the Sunset Avenue Alignment is not  
18 secured by the Applicant and City or any other governmental agency to whom such a  
19 request is made decline to exercise rights of eminent domain, then Applicant shall secure  
20 access to the Black Bench Project through another road access area alternative (Third  
21 Access Alternative). The Third Access Alternative shall require City review and the City  
22 shall have the ability to require that the Applicant submit to the City a request for (1) an  
amendment to the circulation element of the General Plan, (2) an amendment to the Black  
Bench Specific Plan, and (3) an amendment to TIM 34001 to the extent that the Third  
Access Alternative is inconsistent with such plans and maps. The Third Access  
Alternative shall also require further environmental review as required under the  
California Environmental Quality Act (CEQA)

23 (T19:590; T227:11624-26.) Further, the City and SunCal entered into a Memorandum of Understanding  
24 on October 11, 2006, whereby SunCal reserved the right to request the City or the County to exercise  
25 the power of eminent domain, but waived their right to enforce the provisions of Government Code  
26 section 66462.5 prohibiting denial of a final subdivision map because off-site improvements have not  
27 been completed. (T34:4091.) This approval of the Project without a known primary access violates  
28 CEQA because the access road is *part of the Project*.

1 The courts have repeatedly stated that: "An accurate, stable and finite project description is the  
2 *sine qua non* of an informative and legally sufficient EIR." (*County of Inyo v. City of Los Angeles*  
3 (1977) 71 Cal.App.3d 185, 192-93; *San Joaquin Raptor/Wildlife Reserve Center v. County of Stanislaus*  
4 (1994) 27 Cal.App.4th 713, 730.) "The defined project *and not some different project* must be the  
5 EIR's bona fide subject." (*M.M. Homeowners v. San Buenaventura City* (1985) 165 Cal.App.3d 357,  
6 365, emphasis added.) While an EIR is not designed to freeze a project in the mold of the original  
7 proposal, "[o]n the other hand, a curtailed or distorted description of the project may 'stultify the  
8 objectives of the reporting process.'" (*Dry Creek Citizens, supra*, 70 Cal.App.4th at 28.) Most  
9 recently, a court stated:

10 [a] curtailed, enigmatic or unstable project description draws a red herring across the path  
11 of public input" (*Id.* at p. 197-198 . . .) "[O]nly through an accurate view of the project  
12 may the public and interested parties and public agencies balance the proposed project's  
13 benefits against its environmental cost, consider appropriate mitigation measures, assess  
the advantages of terminating the proposal and properly weigh other alternatives." (*City*  
*of Santee v. County of San Diego* (1989) 214 Cal.App.3d 1438, 1454)

14 (*San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 654.)

15 While the Project description was never changed to eliminate the access road, which access road  
16 will be built is completely uncertain. Thus, this case is perhaps more analogous to that in *Vineyard*  
17 *Area Citizens, supra*, 40 Cal.4th 412. There, the California Supreme Court set aside an EIR and the  
18 project approval that rested upon it, ruling that although long term water supplies did not have to be  
19 demonstrated with certainty, the EIR had not identified sufficiently a water supply likely to prove  
20 available, and speculative water sources were an insufficient basis for decision-making under CEQA.  
21 (*Id.* at 432.) Further, the Court stated:

22 Where, despite a full discussion, it is impossible to confidently determine that anticipated  
23 future water sources will be available, CEQA requires some discussion of possible  
24 replacement sources or alternatives to use of the anticipated water, and of the  
environmental consequences of those contingencies.

25 (*Ibid.*) The Court specifically rejected the concept that it was sufficient to approve a project contingent  
26 upon securing an adequate water supply in the future, stating:

27 While it might be argued that not building a portion of the project is the ultimate  
28 mitigation, it must be borne in mind that the EIR must address the project and assumes

1 the project will be built.

2 (*Id.* at 444.) Since it is impermissible to approve a project without either a reasonably secure water  
3 supply or a discussion of possible alternative supplies, and their environmental impacts, it is even more  
4 unreasonable to approve a project without identification of an adequate primary access road, and simply  
5 assume the developer will be able to secure it in the future.

6 While the Project description includes access from Highland Home Road, and the EIR discusses  
7 two alternative primary access roads, the approvals and the Memorandum of Understanding between  
8 the City and SunCal specifically anticipate that SunCal will probably not secure any of them.  
9 Nonetheless, the City approved the Project, simply acknowledging that additional environmental review  
10 will be required for a highly likely "Third Access Alternative." (T19:590.) By SunCal not securing the  
11 routes discussed in the EIR and being allowed the option of pursuing an unstudied alternative route to  
12 its Project, this constitutes an impermissible segmentation or "piecemealing" of the Project.

13 In any case, the Project approval should be set aside because there is not a stable, defined  
14 project with adequate access to the proposed 1,500 home development.

15 **V. THE EIR'S ANALYSIS OF IMPACTS IS INADEQUATE**

16 **A. The EIR's Determination of Significant Environmental Impacts**  
17 **Is Predicated Upon an Improper Environmental Baseline**

18 As a threshold matter, the EIR's analysis of potentially significant environmental impacts is  
19 flawed because the City relied on an improper baseline. Failure to use a proper baseline resulted in the  
20 oversimplification and unjustified dismissal of significant impacts.

21 It is well established that the purpose of an EIR is to provide public agency decision-makers and  
22 members of the public with an informational document that explains potentially significant  
23 environmental impacts and feasible mitigation measures. (Pub. Res. Code § 21002.1; Guidelines §  
24 15121; *Carmel Valley View, Ltd. v. Board of Supervisors* (1976) 58 Cal.App.3d 817, 821-822.) In  
25 order to be useful, however, the EIR must accurately identify what significant impacts exist. "[T]he  
26 significance of a project's impacts can be ascertained only if the agency first establishes the physical  
27 conditions against which those impacts are to be measured." (Michael H. Remy et al., *Guide to CEQA*  
28 *California Environmental Quality Act*, 198 (11<sup>th</sup> ed., Solano Press 2007).) The idea is to compare

1 "what will happen if the project is built with what will happen if the site is left alone." (*Woodward Park*  
2 *Homeowners Assn, Inc. v. City of Fresno* (2007) 58 Cal.Rptr.3d<sup>3</sup> 102, 119 ("Woodward Park").)

3 The rule for what constitutes an environmental baseline is set forth in Guidelines section  
4 15125(a), which provides that:

5 An EIR must include a description of the physical environmental conditions in the  
6 vicinity of the project, as they exist at the time the notice of preparation is published, or if  
7 no notice of preparation is published, at the time environmental analysis is commenced,  
8 from both a local and regional perspective. This environmental setting will normally  
constitute the baseline physical conditions by which a Lead Agency determines whether  
an impact is significant.

9 Applying this rule to projects involving the development of raw land, it follows that significant  
10 impacts are determined by comparing the status of the land with the project against the status of the  
11 land as it is. Indeed, the Fifth District Court of Appeal in *Woodward Park* held that an environmental  
12 impact report prepared for the development of a commercial/retail shopping center on vacant land was  
13 "inadequate as an informational document because it failed to analyze consistently and coherently the  
14 impacts of the project relative to leaving the land in its existing physical condition," which was  
15 undeveloped. (*Woodward Park*, 58 Cal.Rptr.3d at 122.) "CEQA nowhere calls for evaluation of  
16 [environmental] impacts of a proposed project on an existing general plan; it concerns itself with the  
17 impacts of the project on the environment, defined as the existing physical conditions in the affected  
18 area." (*Environmental Planning and Information Council v. County of El Dorado* (1982) 131  
19 Cal.App.3d 350, 354.)

20 The *Woodward Park* court was concerned that the "EIR had a dominant theme of comparing the  
21 proposed project with build-out under existing zoning, combined with a scattered, partial discussion of  
22 some of the project's impacts relative to vacant land." (*Woodward Park*, 58 Cal.Rptr.3d at 120.  
23 According to the *Woodward Park* court, this approach led to the "EIR never present[ing] a clear or a  
24 complete description of the project's impacts compared with the effects of leaving the land in its  
25 existing state." (*Id.* at 121.)

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26  
27 <sup>3</sup> This citation is to the California Reporter (instead of the California Appellate Reports) because  
28 pinpoint citation references are not yet available on Westlaw for the California Appellate Reports.

1 The Black Bench EIR does exactly what the *Woodward Park* court determined to be  
2 objectionable. Whereas in a few places the EIR properly evaluates environmental impacts of the  
3 Project by comparing the project's environmental effects with the vacant land, such analysis is  
4 intermittent and inconsistent. There are many places in the EIR where the City fails to use the existing  
5 physical condition of the Project site as the environmental baseline and thus understates or distorts the  
6 Project's impacts. Three examples are noteworthy.

7 First, in Section 4.4, "Hydrology/Water Quality," significance threshold 6 asks whether "the  
8 project [would] substantially deplete ground water supplies or interfere substantially with ground water  
9 recharge such that there would be a net deficit in aquifer volume or a lowering of the local ground water  
10 table level." (T28:2129.) The City's response to this question is evasive and focuses on ground water  
11 quality not ground water quantity. (T28:2138.) There is absolutely no discussion of the ground water  
12 level of the site without development and there is a complete lack of quantifiable and measurable data  
13 showing what the ground water level would be after the Project is built. (*Ibid.*) In its May 15, 2006  
14 letter to the City of Banning, Cherry Valley Pass Acres and Neighbors ("Cherry Valley") points out  
15 that:

16 The EIR's analysis of impacts on hydrogeology and water quality is woefully inadequate,  
17 and its conclusion that impacts to local groundwater would be 'less than significant' is  
18 not supported by the EIR. The EIR concedes that the hundreds of millions of gallons of  
19 water that the Project will consume each year will come from 'groundwater resources.'  
20 There is no question that the groundwater basins from which the water will come are  
21 already in overdraft. [Statistical sentences omitted] The EIR should discuss the current  
22 status of each of the groundwater basins from which the City draws water (in addition to  
23 the Beaumont and Banning Basins, the Upper Canyon Storage Unit, and the Cabazon  
24 Storage Unit), and in particular whether these storage units are in overdraft and whether  
25 groundwater levels have been declining.

26 (T26:1241-42.) In responding to this comment, the City inexplicably reports the results of borings that  
27 were conducted in 2004 to show the depth of groundwater in the Project area. (T26:1255-56.) The  
28 remainder of the City's response focuses on water quality and the City's rights pursuant to a Stipulated  
Judgment. (T26:1256-58.)

This approach runs afoul not only of the *Woodward Park* decision but also commits errors  
similar to those the Monterey County Board of Supervisors committed in *Save Our Peninsula  
Committee v. Monterey County Board of Supervisors* (2001) 87 Cal.App.4th 99 ("Save Our

1 Peninsula"). In *Save Our Peninsula*, the court determined that the EIR failed to provide sufficient  
2 baseline information regarding ground water availability and usage because the EIR included raw data  
3 and figures without any analysis. (*Id.* at 124.) Like the EIR in *Save Our Peninsula*, the Black Bench  
4 EIR fails to analyze raw data describing ground water availability with and without the Project. This  
5 analysis is deficient.

6 The second example of the EIR's reliance on an improper baseline is found in Section 4.8  
7 "Noise." Significance threshold 4 in this section asks whether "the proposed project [would] result in a  
8 substantial permanent increase in ambient noise levels in the project vicinity above levels existing  
9 without the project?" (T28:2266.) Interestingly, this significance threshold incorporates into it the  
10 proper environmental baseline. That is, a comparison of existing ambient noise levels of the vacant site  
11 as against the anticipated ambient noise levels of the site once developed.

12 Unfortunately, the EIR does not analyze whether the Project would result in substantial  
13 permanent increases in ambient noise above levels existing without the project. (T28:2254-77.) The  
14 EIR identifies new on-site features that would contribute noise: traffic, school, neighborhood parks, and  
15 the water pump stations and sewage lift stations. (T28:2263-65.) However, the EIR dismisses all of  
16 these noise impacts as insignificant because the noise "would be occasionally audible." (T28:2270-71.)  
17 Whether the "noise would be occasionally audible" is not the standard. The standard is to compare  
18 noise that would be present with the Project against noise that would be present without the Project.  
19 Common sense indicates that the ambient noise levels would significantly increase and that mitigation  
20 would be necessary.

21 The final example of improper baseline is in Section 4.10 "Population and Housing." Threshold  
22 1 in this Section asks whether "the project [would] induce substantial population growth in an area,  
23 either directly...or indirectly...?" (T28:2293.) The City concluded that the Project would not induce  
24 substantial growth in the area because,

25 Development of the proposed project site has been anticipated based on the Black Bench  
26 Specific Plan Development Agreement, as well as the current land use designations and  
27 zoning for the project site. The respective population and housing forecasts for the  
28 proposed project are consistent with regional and local population and housing  
projections, and would not induce unanticipated growth.



1 (*Ibid.*) In other words, the City determined that the Project would not result in substantial population  
2 growth because the *legal* setting (instead of the *environmental* setting) hypothetically permitted the  
3 number of residential dwelling units contemplated by the Specific Plan. This type of rationale is similar  
4 to the rationale rejected by the *Woodward Park* court. The EIR should have analyzed population  
5 growth, not as a function of the number of units permitted in the Development Agreement, but instead  
6 as a function of the number of units that were on the site at the time the Notice of Preparation was  
7 circulated.

8 As proposed, the Specific Plan contemplated the addition of 1,500 new residential lots to the  
9 City. (T28:2007.) The housing/population impact analysis was based upon an assumption of 2.6  
10 persons per household, which would lead to 3,900 new City residents. (T28:2293.) Common sense  
11 dictates that the addition of 3,900 new residents to the City constitutes substantial population growth  
12 deserving of proper mitigation.

13 In summary, reliance upon an improper baseline creates problems for the entire EIR because  
14 impacts that would otherwise be identified as significant had a proper baseline been used go  
15 unmitigated and are disregarded. To be adequate, the EIR should have used the existing vacant land as  
16 the environmental baseline for the analysis of all potential impacts.

17 **B. The EIR Does Not Adequately Analyze the Project's Water Supply Impacts**

18 The EIR's abbreviated discussion of water resource and supply issues is woefully defective. A  
19 considerable and growing body of CEQA case law requires that water supply impacts be fully and  
20 adequately discussed before a project is approved. (*See, e.g., Vineyard Area Citizens, supra*, 40 Cal.4th  
21 at 416 [EIR failed to clearly and coherently explain how the long term water demand of project would  
22 be met, the environmental impacts of exploiting the planned sources of water, and how those impacts  
23 are to be mitigated]; *California Oak Foundation v. City of Santa Clarita* (2005) 133 Cal.App.4th 1219,  
24 1239-41 [EIR improperly relied on paper entitlement to purchase State Water Project water without  
25 assessing the uncertainty surrounding that entitlement]; *Santa Clarita Organization, supra*, 106  
26 Cal.App.4th at 722-725 [holding that reliance on paper entitlements to State Water Project water in an  
27 EIR for a housing project does not satisfy CEQA]; *Santiago County Water Dist. v. County of Orange*  
28 (1981), 118 Cal.App.3d 818, 831 ("*Santiago*") [holding that analysis of adverse water supply impacts is

1 required for project EIR.) The EIR falls far short of the standards laid down by the courts in these  
2 cases.

3 **1. Existing Water Supply Situation**

4 The City's Public Works Department is the planned water purveyor for the Project, although the  
5 City does not currently supply any potable water to the Project site. (T28:2306.) Thus, SunCal's  
6 development of the Project will result in the long-term demand for additional water supplies of  
7 approximately 1,149 acre-feet per year<sup>4</sup>— or over 1 million gallons of new water each and every day.  
8 (T28:2311; T171:10134.) The City currently relies exclusively on groundwater to meet its water  
9 demand. (T171:10151.) This ever growing demand for groundwater has now increased to the level  
10 where production limitations are being realized in certain portions of the City during dry years. (*Ibid.*)  
11 Nonetheless, the EIR optimistically claims that the City has sufficient groundwater resources to supply  
12 the Project – and all other planned and existing demands – for another three (3) years, at which point  
13 “[State Water Project] water and recycled water will be available.” (T28:2311.) However, even after  
14 2010, the City plans to rely extensively on depleted groundwater sources. (T28:2310. [Table 4.11-7])  
15 Indeed, the City plans to meet some part of its water demands for the Project by a scheme it refers to as  
16 “groundwater mining,” which it defines as “the deliberate extraction of groundwater in excess of  
17 recharge in a basin.” (T2:52; T28:2308.)

18 The City draws its water from a series of groundwater storage units that are within the San  
19 Gorgonio Pass and Banning Canyon Groundwater Basins. Within the San Gorgonio Pass Groundwater  
20 Basin the City draws from the Banning Bench, Banning, Beaumont and Cabazon storage units, and  
21 from the Banning Canyon Groundwater Basin it draws from the Upper, Middle and Lower Banning  
22 Canyon storage units. (T2:47.) These groundwater basins are a shared water source from which the  
23 City, the Beaumont-Cherry Valley Water District, and many others, draw water. (T3:241.) Even  
24 without the City's “groundwater mining” scheme, the Beaumont Basin is experiencing a severe  
25 overdraft, estimated by the San Gorgonio Pass Water Agency (“SGPWA”) to be 12,700 acre feet in  
26 2002 and 13,300 acre feet in 2003. (T3:235.) The Banning and Cabazon Basins “are at similar risk of  
27

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28 <sup>4</sup> An acre foot of water contains 325,851 gallons.

1 overdraft." (*Ibid.*) By 2030, the SGPWA projects a deficit of 25,142 acre-feet per year between  
2 anticipated demand and available water supplies. (T10:371.)

3 The SGPWA was created in 1961 for the express purpose of importing State Water Project  
4 water to replenish groundwater basins depleted by prior withdrawals. (T3:222; Water Code App. §  
5 101-15.5, ["It is the intent of the Legislature that, in allocating water received from the State Water  
6 Project pursuant to this act, the highest priority shall be given to eliminating groundwater overdraft  
7 conditions within any agency or district receiving the water."]) To fulfill this mandate, the SGPWA has  
8 constructed facilities that can deliver a maximum of 8,650 acre-feet per year of water to "spreading  
9 grounds for percolation into the Beaumont storage unit." (T28:2308.) A second phase, which may  
10 construct additional facilities to allow delivery of up to 17,300 acre-feet per year, is only in the planning  
11 stage. (T28:2309.) If the SGPWA is ever able to obtain its full allocation of 17,300 acre feet per year,  
12 the additional imported water also will be used "to recharge the Beaumont storage unit via the Noble  
13 Creek spreading grounds in Cherry Valley." (T2:54.)

14 **2. The EIR's Discussion and Consideration of**  
15 **Water Supply Impacts Are Legally Deficient**

16 Both the EIR and the Water Supply Assessment on which its water analysis is supposedly based  
17 are so lacking in supporting facts and analysis as to prevent meaningful public disclosure or informed  
18 public decision making.

19 **a. The EIR's Water Supply Analysis Is Inadequate and Misleading**

20 A public agency that intends to approve a substantial residential development project subject to  
21 CEQA, such as the Project, must first prepare a "water supply assessment" to determine whether there  
22 is sufficient supply to accommodate the project (Water Code §§ 10910-10915), and must also obtain a  
23 written verification from the local water purveyor that there is sufficient water supply available to serve  
24 the development. (Gov. Code § 66473.7.)

25 As part of the Draft EIR, the developer's consultant prepared a Water Supply Assessment.  
26 (T171:10127-56.) The Water Supply Assessment in turn relied heavily on the City of Banning's  
27 December 2005 Urban Water Management Plan ("UWMP") (T2:21-212) which, in turn, relied heavily  
28 on a November 2003 "Determination of Maximum Perennial Yield for the City of Banning" that was

1 prepared by yet another consultant. (T41:4128-70.)

2 The Water Supply Assessment contains numerous flaws and inconsistencies, which – because of  
3 the EIR's unquestioning reliance upon it – undermine the EIR's water analysis. These flaws and  
4 inconsistencies are particularly egregious in regards to the City's reliance on State Water Project water.  
5 First, its statement that "the City is entitled to 38 percent or 6574 acre-ft/yr of the SGPWA's  
6 entitlement" is utterly without any evidentiary support in the Record. (T171:10142.) Second, the  
7 SGPWA currently has the capacity to bring only 8,650 acre-feet of State Water Project water to the  
8 Pass annually, and there is no evidence of how much of this capacity is actually being delivered.  
9 (T171:10142.) Third, even if the SGPWA were to upgrade its facilities, it has entitlements to purchase  
10 a *total* of 17,300 acre-feet per year of State Water Project water, which will all go to helping recharge  
11 the increasingly overdrafted Beaumont Basin, and even that purchase is uncertain given the current  
12 State Water Project limitations. (T10:368; T171:10142.) Moreover, the EIR understates the fact that  
13 the Beaumont Basin is a major water supply for the entire region, not just the City of Banning, and thus  
14 the SGPWA's entitlement to State Water Project water will be used to recharge the groundwater  
15 extractions of several local communities. There is simply no factual basis for the misguided conclusion  
16 that the City is "entitled to" or will actually receive as much as 38 percent of the SGPWA's allocation  
17 of State Water Project water. (T171:10144.)

18 The Water Supply Assessment also inexplicably assumes that the City is entitled to 100% of the  
19 safe yield of the Banning Bench, Banning, Cabazon, and Upper, Middle and Lower Banning Canyon  
20 groundwater storage units, despite the fact that there are other entities currently drawing water from  
21 these storage units. (T171:10144 [Table 4]; T3.242-244; T41: 4149.) No information is provided in the  
22 Water Supply Assessment as to how much water these other users currently use or plan to use from  
23 these same storage units the City plans to rely on. Once again, the City has not provided any analysis  
24 for its assumption that it is entitled to this water.

25 The Water Supply Assessment projects that water demand will steadily and dramatically  
26 increase from 11,313 acre-feet per year in 2005 to 22,051 acre-feet per year by 2030. (T171:10145.)  
27 Given this skyrocketing need for water, the pertinent question for the assessment is whether there is  
28 sufficient available supply, both physically and legally, to meet projected demand. The summary table

1 of projected water supplies in the Water Supply Assessment suggests that water supply will increase  
2 steadily from 2005 through 2030 mainly due to a significant increase in State Water Project water.  
3 (T171:10144.) This summary table is not supported by any actual analysis or data. For instance,  
4 following the reduction in available Beaumont Basin groundwater after 2005, the summary projects a  
5 ten-fold increase (from 400 to 4,000 acre-feet per year) in water from this same source starting in 2025,  
6 but there is no narrative discussion or analytic documentation to support that projection. Moreover, in a  
7 separate line item, the table projects an increase in "State Water Project" water, apparently  
8 contemplated as something different from the Beaumont Basin recharge water that the SGPWA hopes  
9 to purchase, from zero in 2005 to 4,000 acre-feet per year in 2010, to 8,771 acre-feet per year in 2015,  
10 and finally to 9,266 acre-feet per year in 2020 and thereafter. (T171:10144.) Again, there is no  
11 explanation or supporting analysis for these numbers either in the document or elsewhere in the Record.

12 The Water Supply Assessment states that "the City has developed plans for purchasing [State  
13 Water Project] water in addition to its allocated share of the amount of [State Water Project] water  
14 currently contracted by the SGPWA." (T171:10145.) As noted above, there is nothing in the Record to  
15 support this 38 percent "allocation" from the SGPWA. And the cited section of the UWMP (3.2.2) is  
16 silent on the subject of the City's "plans" to somehow buy more State Water Project water. (T2:57-60.)

17 Similarly, there is no analysis or data to support the study's conclusion that recycled water,  
18 which did not contribute any amount to water supply in 2005, will provide nearly 3,000 acre-feet per  
19 year of new water by 2030. (T171:10144.) Indeed, the Water Supply Analysis concedes that the City's  
20 recycled water plan is in the development phase, undergoing updated "feasibility studies."  
21 (T171:10143.) It is not clear whether this system will ever be constructed and, if so, when. What is  
22 clear is that recycled water will not be used by the Project, so recycled water will not alleviate any of its  
23 increased water demands. (T28: 2041.)

24 The Water Supply Analysis also relies on the UWMP for its conclusions on the adequacy of  
25 water supply during dry years. (T171:10145.) Yet the UWMP makes clear that if its projected delivery  
26 of State Water Project water drops from the hoped for 9,266 acre feet a year to 1,853 feet per year  
27 (because, for example, drought years reduce deliveries of State Water Project water) the only way the  
28 City will meet demand is by increasing its draw down of the overdrafted Beaumont Basin at a rate of

1 7,000 acre feet per year in 2020, 9,000 acre feet per year in 2025, and a whopping 11,000 acre feet a  
2 year in 2030 – nearly twice the Basin’s safe yield. (T2:65.) The record is silent on the environmental  
3 impacts of such a massive extraction of water from an historically depleted resource upon which tens of  
4 thousands of people outside the City of Banning rely for their water.

5 Despite the utter lack of supporting foundation, these future water supply projections constitute  
6 the pivotal underlying rationale for the conclusions drawn in the Water Supply Assessment that the City  
7 has sufficient water to meet future demand. For example, the Water Supply Assessment concludes that  
8 in 2015, when the Project will be fully built out, water supply of 21,017 acre-feet per year will exceed  
9 water demand of 15,002 acre-feet per year<sup>5</sup> by 6,015 acre-feet per year. (T171:10145 [Table 5].)  
10 However, if the mysterious 8,771 acre-feet per year of unexplained new “State Water Project” water is  
11 removed from the calculation, the City would actually face a shortfall of 2,756 acre-feet per year.

12 The City was well aware of these deficiencies when it approved the EIR. Cherry Valley  
13 submitted technical comments on the Water Supply Assessment and its supporting documents, prepared  
14 by two expert hydrogeologists. (T216:11230-11252.) The City never responded to these comments.

15 **b. The Water Impacts Analysis Contains Significant Fatal Flaws**

16 Where the description of the environmental setting for a project is inaccurate, incomplete or  
17 misleading, the EIR does not comply with CEQA. (*San Joaquin Raptor, supra*, 27 Cal.App.4th at 729.)  
18 Here, both the Black Bench EIR, and the Water Supply Assessment on which it is supposedly based,  
19 are so lacking in supporting facts and analysis as to prevent meaningful public disclosure or informed  
20 public decision-making.

21 **(1) The EIR Does Not Coherently Explain Future Water Sources for the**  
22 **Project.**

23 The EIR, and the Water Supply Assessment upon which it is based, do not clearly or coherently  
24 explain how the long term water needs of this Project will be met. As noted above, the Water Supply  
25 Assessment and the EIR repeatedly assert that the City is entitled to 38% of the SGPWA’s allocation of  
26

27 <sup>5</sup> The precise source of the 15,002 acre-feet per year demand number is unclear. The UWMP,  
28 which the Water Supply Assessment uses as a source for this table, projects demand in 2015 of 15,518  
acre-feet per year. (T28:2000 [Table 3-1].)

1 State Water Project water. (T28:2308; T171:10142.) Nothing in the record supports this assertion.  
2 When this issue was raised in public comments, the City conceded that “[t]he SGPWA has not yet  
3 adopted a formal allocation system for the delivery of State Project water,” but because other  
4 (unspecified) agencies do use an allocation system, “it is reasonable for the [Water Supply Assessment]  
5 to assume that the delivery of State Project water by SGPWA to its member agencies will be based on  
6 such a system.” (T28:24807.)

7 In fact, the 17,300 acre-feet per year of State Water Project water that may flow to the SGPWA  
8 under the most optimistic scenario (e.g., assuming no State Water Project cutbacks, which typically  
9 have been about 50 percent in recent years) is intended to recharge the badly depleted Beaumont  
10 groundwater aquifer, which serves as a primary water source for several surrounding communities and  
11 water suppliers, including (but not limited) to the City. (See T10:368; *Friends of the Santa Clara River*  
12 *v. Castaic Lake Water Agency* (2002) 95 Cal App.4th 1373, 1376 [“[t]he reliability of delivery is  
13 approximately 50 percent of entitlements.”].) The City also concedes that its future appropriative right  
14 to water from the Beaumont Basin will drop to only 400 acre-feet in 2015 (when the Project will be on  
15 line and using water) (T171:10144.)

16 Yet the Water Supply Assessment inexplicably increases its estimate of the City’s draw from  
17 the Beaumont Basin by 1,000% (to 4,000 acre-feet per year) beginning in 2025, increasing to 6,000  
18 acre feet per year by 2030. (T171:10144.) Once again, neither the EIR nor the Water Supply  
19 Assessment provides a coherent explanation as to how or why this water will materialize. When these  
20 questions were raised in comments on the Draft EIR, the City either dismissed them or failed to  
21 respond. Thus, the CEQA documents and responses provided to the concerned public in connection  
22 with the Project incorrectly and misleadingly suggest that the City is entitled to nearly two billion  
23 gallons of water each year to which it has no such right or expectation.<sup>6</sup>

24 The EIR includes a table setting forth what is purportedly the “Maximum Extraction from  
25 Storage Units.” (T28:2307 [Table 4.11-5].) However, the calculations included apparently actually

26 <sup>6</sup> This is not hyperbole. There are 325,851 gallons in an acre foot of water. 6000 acre feet – the  
27 amount of water that the City claims it will draw from the overdrafted Beaumont Basin and receive from  
28 the SGPWA Agency – amounts to more than 1.9 billion gallons of water per year.

1 represent the "well design capacity" of the City's wells in the best of years and, in fact, are contrary to  
2 the "Maximum Perennial Yield" calculated by the City's own consultant in 2003. (T41:4174.) The  
3 EIR thus gives the misleading impression that the storage units from which the City will draw water to  
4 meet Project needs have far more water available than they do. This hardly satisfies CEQA's  
5 requirement that data in an EIR "must be presented in a manner calculated to adequately inform the  
6 public and decision makers who may not be previously familiar with the details of the project."  
7 (*Vineyard Area Citizens, supra*, 40 Cal.4th at 442.)

8 Finally, and as noted above, the Water Supply Assessment upon which the EIR relies claims  
9 that much of the future water demand of the City will be met through purchasing additional State Water  
10 Project water, although there is no discussion or analysis of the efficacy of this plan, whether the water  
11 is available and whether the physical infrastructure exists to deliver it. (T171:10145-47; T2:57.)

12 **(2) The EIR Fails to Analyze the Impacts of Providing Water to the Project.**

13 In addition to its inadequate analysis of current and future water supplies, the EIR fails entirely  
14 to achieve its statutory purpose of analyzing and disclosing Project impacts on water resources.  
15 Instead, the EIR merely states that the Water Supply Assessment "identified three sources of water  
16 supply to meet projected water demands with the City's service area: groundwater, recycled water, and  
17 State Water Project water." (T28:2312.) As explained above, however, all of the new water that the  
18 SGPWA hopes to purchase from the State Water Project is already needed to help remedy the ever-  
19 worsening overdraft condition of the Beaumont aquifer. Thus, the purchase and transfer of some of this  
20 water to the proposed Project site, where no water has previously been provided, plainly impacts the  
21 condition of the Beaumont aquifer and the ability of the SGPWA to remedy the worsening overdraft.  
22 In addition to its impacts on the existing aquifer, the Project also will require the construction of a new  
23 water distribution system, including water lines, on and off-site pump stations, pressure reduction  
24 stations, and two water reservoirs. (T28:2314.)<sup>7</sup> The CEQA documents fail to analyze the  
25 environmental impacts of any of these necessary features of the proposed water purchase arrangement;

26 <sup>7</sup> The City also apparently plans to drill new wells in the Cabazon Storage Basin – where it currently has  
27 no wells. (*Compare* T171:10137 [no wells in Cabazon Unit] with T171:10144 [Table 4, 2,050 acre feet  
28 per year from Cabazon Unit beginning in 2010].)



1 accordingly, the EIR is legally deficient. (*Vineyard Area Citizens, supra*, 40 Cal 4th at 428 [“[A]n EIR  
2 must address the impacts of reasonably foreseeable future activities related to the proposed project.”])

3 The EIR should have evaluated the environmental impacts of transferring designated aquifer  
4 recharge water to the Project or, alternatively, of developing other new sources if such State Water  
5 Project water is not available. Its failure to do so constitutes reversible error (*Vineyard Area Citizens,*  
6 *supra*, 40 Cal. 4<sup>th</sup> at 441 [EIR must explain the likely sources of water and analyze their impacts.];  
7 *Santiago, supra*, 118 Cal.App.3d at 831 [what is needed is some analysis of adverse impacts].)

8 The EIR also fails to analyze the impact of exacerbating or creating overdraft in the Beaumont  
9 and other storage units from which it plans to pump water. There is no question that many of the Basins  
10 that the City intends to rely on for groundwater are already in overdraft. For example, the SGPWA  
11 found the “safe yield” from the Beaumont Basin to be only 6,000 acre feet per year, while the overdraft  
12 was approximately 12,700 acre feet in 2002 and 13,300 acre feet in 2003. (T3:235.) This overdraft has  
13 resulted in the groundwater levels dropping by approximately one foot per year. (T3:235.) This does  
14 not take into account the 2004 “stipulated judgment” adjudicating the Beaumont groundwater basin,  
15 which provides for increasing the overdraft to at least 16,000 acre feet per year for the next ten years.  
16 (T2:45; 139-164; 167.)<sup>8</sup> Moreover, it is clear from the record that the other groundwater units are also  
17 depleted. “The increased production combined with below average rainfall over the past four years has  
18 already lead to declines in the ground water levels in the Banning and Canyon subunits.” (T41:4156.)

19 The EIR also fails to analyze the impacts on the Banning Bench, Banning, Cabazon, and Upper,  
20 Middle and Lower Banning Canyon groundwater storage units, despite the fact that there are other  
21 entities currently drawing water from these storage units.

22 One of the City’s more egregious sleights of hand is its abbreviated discussion of “groundwater  
23 mining” in the Water Supply Assessment. (T171:10139 [“[T]he City intends to rely on groundwater  
24 mining as part of an overall management strategy.”].) The term “groundwater mining” is not defined in  
25 the Water Supply Assessment; however, the term is defined in the UWMP as follows: “Groundwater

26  
27 <sup>8</sup> Conspicuously absent from the Geoscience 2003 report, which serves as the foundation of the  
28 City’s Water Supply analysis, is a determination of the “maximum perennial yield” for the Beaumont  
storage unit.

1 mining is the deliberate extraction of groundwater in excess of recharge in a basin." (T2:52.) Yet  
2 nowhere in the EIR or the Record is there any analysis of how the City intends to implement this  
3 strategy of deliberately worsening the overdraft, or the environmental impacts of doing so. Petitioners'  
4 water expert raised this concern prior to the City's certification of the deficient EIR, and the City never  
5 responded to it. (T216: 11235-36) Once again, the EIR fails to comply with CEQA's requirement of  
6 meaningful disclosure and analysis.

7 Finally, although the Project contemplates construction of two multi-million gallon reservoirs  
8 for the storage of water, the EIR does not specify how they will be constructed, and who will be  
9 responsible for constructing or maintain these reservoirs. (T28:2025-27.) The EIR also does not  
10 analyze the environmental impacts of these storage facilities and their siting, nor does it evaluate  
11 alternative siting locations.

12 **c. The City's Water Analysis also Far Short of the**  
13 **Requirements of Water Code Section 10910(f)**

14 Water Code section 10910(f) requires specific information when groundwater basins are cited as  
15 a water supply source for a project. The statute requires that the EIR not only describe each basin from  
16 which it will draw water, but that it identify the rights of the public water supply to use that basin, the  
17 overdraft status of the basin, any past or planned overdraft mitigation efforts, and a sufficiency analysis  
18 of the basin to supply the Project for twenty years. Here, the Water Supply Assessment failed to do so,  
19 rendering the EIR fatally deficient. (T171:10135; T27:1798-1800.)

20 The EIR's water analysis is inadequate because neither the EIR nor the Water Supply  
21 Assessment adequately assess each of the ground water storage units that are identified as the primary  
22 water sources for the Project. While the EIR claims that "detailed information on each groundwater  
23 basin that currently supplies water to the City," is included in the City's UWMP, that statement is  
24 simply inaccurate. (T2:47-9.) In fact, as noted above, technical comments on the Water Supply  
25 Assessment specifically identified the information that should have been but was not included in the  
26 Water Supply Assessment. (T216:11230-38 [identifying failure to describe the geometry of storage  
27 basins, characteristics and nature of the aquifer zones, and the degree of hydraulic connection and cause  
28

1 and effect between the various storage units, sources of water to recharge and current groundwater  
2 levels].) The City did not respond to these comments.

3 This information is vital for a reasoned analysis of the impacts of the Project and the availability  
4 of water. In its 2003 Report, Geoscience points out that understanding the hydraulic connection  
5 between storage units is crucial to determining the actual supply available from groundwater sources.  
6 (T41:4152.) Most notably, it concludes that, because groundwater movement from storage unit to  
7 storage unit has changed over the years, "maximum perennial yield estimates for storage units alone  
8 may not be completely reliable." (T41:4152.)

### 9 3. The EIR's Conclusions and the City's Findings Regarding

#### 10 Water Resource Impacts Are Not Supported by Evidence in the Record

11 Because the EIR does not actually analyze direct and cumulative water resource impacts from  
12 the Project, its conclusions are not supported by evidence in the Record. The EIR concludes that  
13 "[t]otal groundwater supplies are sufficient to meet the City's projected water demands until 2010, at  
14 which time State Water Project water and recycled water will be available," that "the City is anticipated  
15 to have a surplus of water to meet its customers' water demand over the next twenty-five years," and  
16 that "[n]o significant impacts relative to water supply would result." (T28:2310-11.) At best, these  
17 assertions are mere speculation. At worst, they reflect a fundamental misunderstanding of the  
18 groundwater and water supply situation in the region. Nevertheless, these faulty assertions form the  
19 basis for the City's subsequent CEQA finding that "the proposed project would not result in significant  
20 water impacts with implementation of the [Project Design Features] and [Standard Conditions]  
21 identified below." (T227:11470).

22 Especially perplexing is the EIR's conclusion that there will be no significant "water impacts"  
23 with respect to the Beaumont Basin, given the condition of that source and the limited ability of the  
24 water purveyor to import new water. The Project will require 1,149 acre-feet per year – or roughly  
25 400,000,000 gallons – of water per year, *on top of* existing and other future demand on the same  
26 groundwater resource. (T28:2311; T171:10134.) Because constraints on the importation of new State  
27 Water Project water to the Beaumont Basin are legal and physical, not financial, the mere agreement by  
28 the City or SunCal to pay for newly imported water does not negate the environmental impacts of the

1 Project. That conclusion would be accurate only if the SGPWA had an unlimited right and ability to  
2 purchase imported water for placement in the Beaumont aquifer in order to replace the proposed  
3 consumptive use by the Project. Short of that unattainable scenario, any consumptive use at the Project  
4 site necessarily displaces other demands and directly impacts the highly constrained ability of the  
5 SGPWA to generate new water through additional purchases or infrastructure improvements. (*See*  
6 *Planning and Conservation League*, 83 Cal.App.4th at 908, fn.5 and 914, fn 7 [describing the limited  
7 availability of State Water Project water, the illusory nature of “paper water” promised by the State  
8 Water Project, and the “unfulfilled dreams” of those who proposed it].)

9 Likewise, and for the same reason, the EIR’s conclusion that the Project will not have  
10 significant cumulative impacts on water resources is unsupported by the evidence. The one-paragraph  
11 discussion of cumulative water resource impacts is hardly a model of clarity or meaningful disclosure  
12 (*see* T28:2329), and the City seems to be relying on the “paper water” discussed in the Water Supply  
13 Assessment and in the UWMP. This “paper water” apparently includes the purchase of over 9,000  
14 acre feet per year of new State Water Project water and increased pumping over time from the  
15 Beaumont aquifer, as well as a variety of reclaimed water sources that have not yet been developed.  
16 (T2:46 [UWMP Table 2-1, showing sources of future water supply including “SWP Table A  
17 Entitlement,” “SWP Additional Table A,” as well as use of recycled water, new pumping from Cabazon  
18 Unit and increased pumping from Beaumont Storage Unit.]) The Water Supply Assessment simply  
19 copied this Table from the UWMP. (T171:10144.) However, the EIR, the UWMP and the Water  
20 Supply Assessment never explain *why* the City anticipates being able to obtain such significant amounts  
21 of State Water Project water, especially given the extremely limited availability of State Water Project  
22 water into the foreseeable future and the many other demands placed on it in the Beaumont Basin area.  
23 Nor do these documents address the obvious uncertainty surrounding their extremely optimistic  
24 forecasts. In fact, none of the CEQA documents even describes what “rights” – as opposed to mere  
25 hopes – the City of Banning actually holds to any future State Water Project water.

26 Courts have consistently held that such unquestioning reliance on dubious State Water Project  
27 contract rights – even assuming they exist here – is both misplaced and insufficient to satisfy the  
28 dictates of CEQA. (*California Oak Foundation, supra*, 133 Cal.App.4th at 1239-41; *Santa Clarita*

1 *Organization, supra*, 106 Cal App.4th at 722-725.) As the court concluded in *California Oak*  
2 *Foundation*, “[t]ransparency is impossible without a clear and complete explanation of the  
3 circumstances surrounding the reliability of the water supply” and reliance on the conclusions of a  
4 Water Supply Assessment or Urban Water Management Plan is “not a proper substitute for a discussion  
5 which allows ‘those who did not participate in [the EIR] preparation to understand and meaningfully  
6 consider the issue at hand.’” (*Id.* at 1241.) Without a more thorough analysis of water supply  
7 projections, the conclusion in the EIR and the City’s subsequent CEQA findings that the potential  
8 cumulative water resource impacts from the Project will be reduced to a level of insignificance by the  
9 purchase or development of new water sources are simply not supported by the evidence in the Record.

10 **C. The EIR Understates the Project’s Wildfire Risks**

11 The Project proposes to place 1,500 homes and more than 5,000 people in and adjacent to high  
12 fire hazard areas without adequately analyzing the significant risk of tragedy as a result of wildland fire.  
13 (T28:2284.) The EIR fails to provide sufficient information on how the Project will provide for  
14 emergency assistance and evacuation or how it will mitigate the increased danger of wildfire. It also  
15 fails to adequately respond to numerous comments on these issues. Yet, the City concluded that the  
16 significant risk of exposing people and homes to wildland fire is considered less than significant.  
17 (T28:2285.) There is no support for this conclusion, and accordingly, it violates CEQA.

18 The EIR greatly understates the real danger of building a high density residential development  
19 in a high fire hazard zone. The Project site is predominantly surrounded by wildlands, highly prone to  
20 wildfires due to steep slopes, strong seasonal winds, vegetation with high oil content, and dry  
21 conditions. (T28:2005, 2297; T32:3980-84; T280:12144-45.) The winds pose a significant danger  
22 because they spread fire by blowing embers. (T32:3984; T298:13004, 13009.) The Banning Area has a  
23 long history of wildfires, many of which have burned thousands of acres. (T32:3981.) The  
24 undeveloped areas surrounding the Project site have the “greatest potential for future fires to burn  
25 uncontrollably,” because of a history of fire suppression. (T32:3981.)

26 There is no doubt that the Project will increase the risk of wildfire both on and off site.  
27 (T28:2535.) The increased human population “would increase the opportunity for accidental or  
28 deliberately set fires, because public access to natural areas would be increased.” (T28:2284, 2535.)

1 Fire emanating from surrounding undeveloped areas could spread very quickly and uncontrollably  
2 when combined with high winds and steep slopes. (T280:12144-45.) The Project site itself, as well as  
3 its offsite roads, will also increase the risk of wildfire. (T28:2284, 2535.) The Project will introduce  
4 numerous sources of ignition, including engine sparks, traffic accidents, overheated brakes, exhaust  
5 particles, cigarettes, arson, barbecues, and other sources associated with an urban/wildland interface.  
6 (T28:2284, 2535; T32:3981.) An urban/wildland interface is the area where the urban environment  
7 interfaces with wildlands. (T32:3981.)

8 On-site, the Project will place 1,500 homes and more than 5,000 people in and adjacent to high  
9 fire hazard areas without proper mitigation or analysis. Clustering will likely increase this risk because  
10 "residences that are close to each other can hinder emergency access to the back of residences."  
11 (T32:3986.) The back of the residences are the areas where the wildfire risk is the highest because that  
12 is the area directly adjacent to the surrounding wildlands.

13 The EIR wrongly states that proposed offsite roads would not expose people or structures to  
14 hazards from wildfires. (T28:2285.) The Fire Marshall explicitly told the City that the planned offsite  
15 roads would increase the hazards from wildfires and that it may not even be possible to mitigate this  
16 danger. (T28:2535.) In its response, the City admits to the increased danger, but fails to correct its  
17 false statements in the EIR or provide any analysis of the increased the hazard of wildfire by use of  
18 offsite roads. (T28:2535.)

19 The City's General Plan finds that wildfires in urban/wildland interface "can be particularly  
20 dangerous and complex and pose a severe threat to public and firefighter safety." (T32:3981.) The EIR  
21 states that the highest risk of wildfire is in the "National Forest, in nearby rural areas, and along urban  
22 edges." (T28:2005, 2280.) Building at an urban/wildland interface has pushed many fire protection  
23 systems beyond capacity, as will be the case with the Black Bench Project. (T280:12143.) A local  
24 resident reminded the City Council of the tragic loss of a local firefighter and stated that, "the Council  
25 [should] remember that decisions made by the Council affect someone's family, loved one or son."  
26 (T305:13065) South Lake Tahoe is only the most recent and dramatic example, but at least there, there  
27 has been no loss of life.

28

1 "Fire protection services are provided to the City of Banning through a contractual agreement  
2 with Riverside County Fire Department (RCFD), which in turn contracts with the California  
3 Department of Forestry and Fire Protection (CDF)." (T28:2296.) The Project requires a new fire  
4 station to handle both the increased demand for fire protection as well as the requirement of a maximum  
5 five minute response time for medical aid response and ten minute response time for structure fires.  
6 (T28:2298, T292:12807.) The current response time from the two fire stations serving the Project area,  
7 Station No. 89 and Station No. 20, is 15 minutes. (T28:2296.) Because these existing stations cannot  
8 adequately provide required services to the Project site, the "Banning Fire Protection Master Plan calls  
9 for a fire station to be located within the proposed project." (T18:496 [Riverside County Fire  
10 Department Letter Nov. 11, 2004].) The Project will also require additional staff and equipment to  
11 service the Project area. (T18:496.)

12 Inexcusably, construction of a fire station is not included as part of the Project. (T28:2298.)  
13 Moreover, the EIR is entirely lacking any analysis of the significant impacts the construction and  
14 operation this fire station may cause. The EIR simply dismisses the need to comply with the Fire  
15 Master Plan and the County of Riverside requirements because "MM 11-1 requires that adequate fire  
16 protection facilities be provided prior to occupancy." (T28:2298.) Further, it states it does not have to  
17 comply with CEQA now because RCFD has not picked a location for this new fire station. (T28:2298.)

18 The City's decision to increase the demand for fire protection services necessitated environ-  
19 mental review in the EIR. This "piecemealing" of the Project violates the letter and spirit of CEQA and  
20 sections 15004, 15051, and 15378 of the Guidelines. The new Fire Station is required because of the  
21 Project; therefore, the City had a duty to conduct CEQA review of its construction and operation in this  
22 EIR. (*County of Amador v. City of Plymouth* (2007) 149 Cal.App.4th 1089, 1108.) In *County of*  
23 *Amador*, the City of Plymouth entered into a municipal services agreement with a local tribe planning  
24 to build a casino. (*Id.* at 1093-94.) Just as the City of Plymouth's approval of the agreement and  
25 endorsement of that project increased the need for fire protection services and obligated it to provide  
26 these services, the City of Banning's approval of the Specific Plan increases the need for fire protection  
27 services and obligates the City to provide these services. (*Id.* at 1108; T28:2298.) Accordingly, the  
28 City's certification of the EIR was an "activity directly undertaken by the City which has the potential

1 for resulting in direct physical change in the environment.” (*County of Amador, supra*, at 1108, citing  
2 Pub. Res. Code § 21065(a); Guidelines § 15378(a).)

3 Without analysis of alternative locations for this fire station, the EIR does not provide sufficient  
4 information or analysis of the risk of wildfire or if this fire station will be able to provide the necessary  
5 services. Quite shockingly, the Mayor Pro Tem stated at a public hearing that, due to the location of the  
6 Project, the City’s Fire Protection Master Plans response time standards “may not be attainable” and  
7 mitigation may be necessary. (T292:12807; T298:12994.) This issue was not addressed in the EIR and  
8 no alternative mitigation was analyzed. The Project cannot proceed until the EIR provides an honest  
9 and complete discussion of the City’s ability to provide life saving fire protection services to the  
10 Project.

11 Road access is a major issue as development encroaches into rural areas. (T28:2453;  
12 T280:12149.) Heavy traffic and long travel distances in the canyon and hillside areas of the City can  
13 hinder response times. (T32:3984.) The EIR provides insufficient information or analysis in regards to  
14 the ability of fire crews to access the site and the ability of residents to safely evacuate. This issue was  
15 raised in comments by Cherry Valley and others but never adequately responded to. (T28:2468.)

16 The Fire Department requires two access roads for access by emergency vehicles and for  
17 emergency evacuation. (T28:2535.) Also, the provisions of Program 3 B of the City’s General Plan  
18 “require that adequate emergency vehicle access and evacuation routes be available with *approval* of  
19 any new development.” (T32:3993, emphasis added.) The EIR failed to provide evidence that these  
20 requirements were met.

21 The EIR relies heavily on the use of a “primary access road” for emergency use, but no primary  
22 access road was actually identified. The only known access road for the site is Bluff Street, a  
23 substandard, narrow, winding, two-lane street without center striping, that is dangerous at high speeds.  
24 (T18:513; T28:2209, 2453, 2531; T280:12067.) Due to the substandard conditions and complaints by  
25 local residents, the City limited use of Bluff Street to emergencies only. (T28:2226.) This plan  
26 contradicts all logic, because it intends to use a substandard road as an emergency exit.

27 The City proposed to build a “crash gate” on Bluff Street to allow for evacuation and access for  
28 emergency vehicles, but has not had the Fire Department review this plan to see if it will be effective.



1 (T28:2458.) More significantly, the EIR only identified Bluff Street as an emergency exit and failed to  
2 analyze whether this street can actually handle emergency vehicles or mass evacuation, much less both  
3 uses at the same time. (T28:2453.) All evidence in the Record makes it clear that it cannot. (T18:513;  
4 T28:2209, 2453, 2531; T280:12067.) Nor did the EIR analyze what would happen if a wildfire made  
5 the primary access road unusable and all evacuation traffic was forced onto Bluff Street. The  
6 Circulation Element of the County of Riverside's General Plan calls for a street network with quick and  
7 efficient routes for emergency vehicles. Bluff Street does not meet this standard. (T28:2457.)

8 The only onsite mitigation planned for the Project is Project Design Feature 9-1 (PDF 9-1),  
9 consisting of a "conceptual fuel modification plan." (T28:2287.) This conceptual plan is really only a  
10 diagram that fails to analyze the "amount and arrangement of vegetation, topography, degree of  
11 exposure, local weather conditions, construction design, and placement of structures." (T28:2033.)  
12 The City of Beaumont Fire Department Battalion Chief stated "there may be specific areas where  
13 [SunCal will] have problems meeting their protection zone or their defensible space requirements  
14 [because the Project] abuts up to federal land and may abut up to arroyos or conservancy land where  
15 they are not going to be able to develop." (T292:12808; T298:12995-96.) The EIR provides no  
16 alternatives to its "conceptual fuel modification zone" and does not analyze the effectiveness of the  
17 zone if it cannot be 150 feet, as was represented in the document. (T280:12067.)

18 **D. There Was No Analysis of the Project's Greenhouse Gas Emissions**

19 The EIR is inadequate because it provides no disclosure or analysis whatsoever of one of the  
20 Project's most important impacts - greenhouse gas emissions. The Project, located far from the City's  
21 urban core, will result in foreseeable and quantifiable emissions of carbon dioxide and other greenhouse  
22 gases from sources including, but not limited to, the Project's quantified electricity use (T28:2321),  
23 natural gas demand (T28:2323), and average daily vehicle trips (T28:2191). Yet, contrary to CEQA's  
24 purpose and comprehensive scope, the EIR does not even mention this critically important factor.  
25 Having failed to even acknowledge the issue, the EIR then fails to analyze alternatives and mitigation  
26 measure to reduce the Project's substantial greenhouse gas emissions. The failure of an EIR to include  
27 relevant information precludes informed decision-making and public participation, thereby thwarting  
28 the procedural and substantive goals of CEQA. Such a failure constitutes a prejudicial abuse of

1 discretion. (*Save Our Peninsula, supra*, 87 Cal.App.4<sup>th</sup> at 118; *see also Berkeley Jets, supra*, 91  
2 Cal.App.4<sup>th</sup> at 1370 [lead agency “must use its best efforts to find out and disclose all that it reasonably  
3 can” in CEQA process].)

4 Concentrations of greenhouse gases are increasing in the earth’s atmosphere, primarily from  
5 society’s burning of fossil fuels for energy and destruction of forests. These gases, including carbon  
6 dioxide (CO<sub>2</sub>), methane (CH<sub>4</sub>), and nitrous oxide (N<sub>2</sub>O), absorb solar radiation that would otherwise be  
7 radiated back into space. This phenomenon is called global warming and is leading to profound  
8 changes in the earth’s and California’s environment, which have been extensively studied and  
9 documented. (T207:11440-55 [Center for Biological Diversity letter], 11160.324-443 [Cal. Climate  
10 Action Team 2006 Report to Governor], 11160.1499-1590 [Cal. Climate Action Center 2006 Report on  
11 public health impacts of climate change in Cal.], 11160.2027-91 [PEW Center 2004 report on observed  
12 impacts of climate change in the U.S.]; T293:12823-24 [California Global Warming Solutions Act of  
13 2006]; *see also Massachusetts v. EPA*, 127 S. Ct. 1438, 1455 (2007) [“The harms associated with  
14 climate change are serious and well recognized.”].) The world’s leading scientists agree that society’s  
15 production of greenhouse gases is responsible for the unprecedented rate of warming observed over the  
16 past century. (T207:11160.1884-1911 [2001 IPCC summary for policymakers].) In addition to sea  
17 level rise, worsening air pollution, and impacts to water supply, the catastrophic loss of biodiversity is  
18 one of the most devastating risks posed by global warming. (T207:11160.2027-91.)

19 In enacting Assembly Bill 32, the California Global Warming Solutions Act of 2006  
20 (T293:12822-34), the California legislature and governor confirmed that greenhouse gas pollution and  
21 global warming are significant environmental impacts that pose a great risk to California’s environment  
22 and public health:

23 Global warming poses a serious threat to the economic well-being, public health, natural  
24 resources, and the environment of California. The potential adverse impacts of global  
25 warming include the exacerbation of air quality problems, a reduction in the quality and  
26 supply of water to the state from the Sierra snowpack, a rise in sea levels resulting in the  
displacement of thousands of coastal businesses and residences, damage to marine  
ecosystems and the natural environment, and an increase in the incidences of infectious  
diseases, asthma, and other human health-related problems.

27 (Health and Safety Code § 38501(a); T293:12823.) The Act requires California to return to 1990 levels  
28 of greenhouse gas emissions by the year 2020. (Health & Safety Code § 38550; T293:12827; *see also*

1 Executive Order S-3-05 (June 1, 2005) [requiring reduction of California's emissions to 80 percent  
2 below 1990 levels by 2050], T207:11160.1041-42.) The Global Warming Solutions Act and Executive  
3 Order S-3-5 are instructive in this case in that they affirm the State's position that greenhouse gas  
4 emissions and global warming are significantly impacting California's environment and public health  
5 and must be greatly reduced.

6 The Global Warming Solutions Act is complementary to, and in no way lessens or displaces  
7 CEQA's independent mandate to analyze all of a project's potentially significant impacts, including  
8 greenhouse gas emissions. As the statute itself states; "[n]othing in this division shall relieve any  
9 person, entity, or public agency of compliance with other applicable federal, state, or local laws or  
10 regulations, including state air and water quality requirements, and other requirements for protecting  
11 public health or the environment." (Health & Safety Code § 38592(b); T293:12833.) In fact, as the  
12 state Attorney General has repeatedly confirmed, its reduction mandates dovetail neatly with CEQA's  
13 comprehensive requirements to analyze, disclose, and mitigate *all* potentially significant environmental  
14 impacts and in no way relieve local agencies from their CEQA duty to analyze and mitigate  
15 greenhouse gas emissions. (T293:12835-40 [comment letter on San Bernardino General Plan Update];  
16 *People of the State of California ex rel. Attorney General Edmund G. Brown v. County of San*  
17 *Bernardino*, Case No. SS 700329 (San Bernardino County Superior Court) (filed April 12, 2007)  
18 [challenge to San Bernardino General Plan Update and EIR for failure to analyze and mitigate global  
19 warming impacts].)

20 Nor can the Project's greenhouse gas emissions somehow be deemed consistent with applicable  
21 air quality plans pursuant to CEQA Guideline Section 15064(h)(3) as SunCal also suggests.  
22 (T221:11350.) While the Project's emissions of criteria air pollutants identified by the federal and state  
23 Clean Air Acts and regulated by the South Coast Air Quality Management District ("SCAQMD") were  
24 analyzed (T28:2233-35), the Air Quality Management Plan ("AQMP") does not address greenhouse  
25 gases. As a result, the contention that the AQMP can be relied upon for the required CEQA analysis is  
26 unavailing. Further, no agency has established safe emissions thresholds for greenhouse gases under  
27 the voluntary provision of CEQA that permits agencies to do so. (Guidelines § 15064.7(a).) Similarly,  
28 however, this clearly does not absolve agencies of complying with CEQA's mandatory provisions.

1 The City was required to disclose and analyze the Project's greenhouse gas emissions, just like  
2 any other potentially significant impact. There are numerous existing methodologies available for  
3 quantifying a project's direct and indirect emissions of greenhouse gases. (T218:11154; T293:12839-  
4 40.) In fact, the City already had in its possession much of the data required to conduct such an  
5 analysis. The EIR estimated that the Project would generate 15,164 average daily trips (T28:2191), and  
6 Appendix G to the EIR calculated average trip lengths. (T159:7684.) The EIR also estimated the  
7 residential units would consume 9.34 million Kilowatt hours (kWh) of electricity annually, calculated  
8 by assuming each residence uses an estimated 5,626 Kilowatt-hours/unit/year. (T28:2321.) The EIR  
9 also calculated that "[b]ased on a natural gas consumption rate of 750 therms per year per residential  
10 unit, the residential component of the project is estimated to consume 1.1 million therms annually."  
11 (T28:2323.) There are numerous tools available for converting gasoline, electricity, natural gas, and  
12 other fuel units into CO<sub>2</sub> and other greenhouse gas emissions amounts. (T203.11153-54 [providing  
13 links to U.S. Environmental Protection Agency and other greenhouse gas emissions calculator and  
14 conversion tools, which calculate the greenhouse gas emissions of human activities, convert carbon  
15 emissions to equivalent units, and identify and compare emissions reduction options].)

16 Despite the EIR's specific data on vehicle trips, electricity and natural gas consumption, and the  
17 readily available methods for inventorying a Project's greenhouse gas emission, the City failed to assess  
18 the Project's greenhouse gas emissions. This analysis could have been completed in conjunction with  
19 the required assessment of the Project's energy consumption and conservation efforts, which was also  
20 not squarely addressed in the EIR. As Guidelines Appendix F entitled "Energy Conservation" clarifies  
21 "[i]n order to assure that energy implications are considered in project decisions, the California  
22 Environmental Quality Act requires that EIRs include a discussion of the potential energy impacts of  
23 proposed projects, with particular emphasis on avoiding or reducing inefficient, wasteful and  
24 unnecessary consumption of energy." (See also Pub. Res. Code § 21000(b)(3) [EIR must include  
25 section discussing "[m]itigation measures proposed to minimize significant effects on the environment,  
26 including, but not limited to, measures to reduce the wasteful, inefficient, and unnecessary consumption  
27 of energy."] )

28 Lacking any discussion of greenhouse gas emissions, the EIR also violates CEQA because it

1 failed to make any determination about whether the Project's emissions may have a "significant" effect  
2 on the environment, thereby triggering the requirement to analyze alternatives and mitigation measures  
3 to reduce the impact. (Pub. Res. Code § 21082.2(d).) This violation is even more troubling because the  
4 Project is so large and will lead to substantial new greenhouse gas emissions. It is also particularly  
5 problematic because new sources of greenhouse gas emissions fit squarely within the category of  
6 impacts that trigger a *mandatory* finding of significance. Under CEQA, certain circumstances trigger a  
7 mandatory finding of significance, including that the "possible effects of a project are individually  
8 limited but cumulatively considerable." (Pub. Res. Code § 21083(b); Guidelines § 15065.)  
9 "Cumulatively considerable" is defined to mean that "the incremental effects of an individual project  
10 are considerable when viewed in connection with the effects of past projects, the effects of other current  
11 projects, and the effects of probable future projects." (*Ibid.*)

12 CEQA's provisions make it abundantly clear that the statute is designed to ensure that  
13 environmental problems resulting from the combined effects of many small impacts are not overlooked  
14 because any one project's contribution can be characterized by a project proponent or lead agency as  
15 small or insignificant. Importantly, the requirement to analyze cumulative impacts cannot be avoided  
16 by contending a project would only make a *de minimis* contribution to the problem as a whole. As the  
17 court noted in *Communities for a Better Environment v. California Resources Agency* (2002) 103  
18 Cal.App.4th 98, 117, this interpretation of the cumulative impacts requirement would "contravene the  
19 very concept of cumulative impacts" and "turn the cumulative impact analysis on its head by  
20 diminishing the need to do a cumulative impact analysis as the cumulative impact problem worsens."  
21 (*See id.* at 120 ["In the end, the greater the existing environmental problems are, the lower the threshold  
22 should be for treating a project's contribution to cumulative impacts as significant."]); *Kings County*  
23 *Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 721 [the EIR "improperly focused upon  
24 the individual project's relative effects and omitted facts relevant to an analysis of the collective effect  
25 this and other sources will have"]; *Massachusetts v. EPA*, 127 S.Ct. at 1457 [U.S. Environmental  
26 Protection Agency arguments for not regulating carbon dioxide from vehicles under the Clean Air Act  
27 "rests on the erroneous assumption that a small incremental step, because it is incremental, can never be  
28 attacked in a federal judicial forum. Yet accepting that premise would doom most challenges to

1 regulatory action. Agencies, like legislatures, do not generally resolve massive problems in one fell  
2 regulatory swoop.”])

3 Global warming is a paradigmatic example of a cumulative effects problem; where emissions  
4 from numerous, small sources combine to create one of the most pressing environmental and societal  
5 problems of our day. Like its numerous sources, the solution lies not in any one single action, but  
6 rather with all agencies ensuring that the projects they approve address their contributions to climate  
7 change by adopting avoidance or mitigation measures. Here, the City failed entirely to consider the  
8 issue, which presents a clear violation of CEQA.

9 **E. The EIR’s Analysis of Air Quality Impacts Is Inadequate**

10 The EIR fails in its role as an informational document because its discussion of air quality  
11 impacts omits information that is essential to an informed evaluation of the Project’s impacts. CEQA  
12 provides that in discussing the environmental effects of a project, an EIR must include “a sufficient  
13 degree of analysis to provide decisionmakers with information which enables them to make a decision  
14 which intelligently takes account of environmental consequences.” (Guidelines § 15151.) Here, the  
15 EIR’s omission of information about the Project’s air quality impacts and their environmental and  
16 public health effects made informed review and decisionmaking impossible.

17 Californians experience the worst air quality in the nation, with annual health and economic  
18 impacts estimated at 8,800 deaths and \$71 billion per year. (T207:11160.1507 [Cayan 2006].) The  
19 Project lies within the South Coast Air Basin, which is currently designated as a non-attainment area for  
20 ozone (O<sub>3</sub>), particulate matter (PM<sub>10</sub>), oxides of nitrogen (NO<sub>x</sub>), and carbon monoxide (CO).  
21 (T28:2236.) The Project will further degrade the region’s air quality by generating considerable  
22 emissions from the construction phase through the future operation of the complex. The EIR  
23 acknowledges that Project-related construction activities would result in a significant short-term  
24 construction-related air quality impact for CO, VOC, NO<sub>x</sub>, and PM<sub>10</sub>. (T28:2242.) The EIR notes that  
25 implementation of SC 7-1 through SC 7-5, and MM 7-1 would reduce these impacts, but not to a level  
26 considered less than significant. (T28:2252.) The EIR also admits that the Project will result in  
27 significant long-term air quality impacts for CO, VOC, NO<sub>x</sub>, and PM<sub>10</sub> even after mitigation.  
28 (T28:2252-53.) However, the EIR contains an incomplete analysis of the Project’s air quality impacts.

1 never addresses the Project's air quality impacts on public health and the environment, and fails to  
2 adequately analyze its cumulative air quality impacts. Given the poor condition of air quality in the Air  
3 Basin and significant pollution contributions of the Project, this section of the EIR is particularly  
4 critical, and its flaws particularly disturbing.

5 **1. Inadequate Analysis of CO, VOC, NO<sub>x</sub>, and PM<sub>10</sub>**

6 The EIR contained an inadequate analysis of the Project's emission of carbon monoxide (CO),  
7 ozone-forming volatile organic compounds (VOCs), oxides of nitrogen (NO<sub>x</sub>), and particulates (PM<sub>10</sub>)  
8 because it fails to present accurate information about the significance of these impacts. To determine  
9 the significance of air quality impacts, the EIR relies on criteria provided in the Initial Study checklist  
10 form in Appendix G of the CEQA Guidelines. (T28:2238-45.) Following this checklist, the EIR  
11 acknowledges it must discuss the consistency between the Project and applicable plans, including the  
12 South Coast Air Quality Management Plan ("AQMP"), the City of Banning General Plan, and SCAG's  
13 Regional Comprehensive Plan and Guide. (T28:2245.)

14 The EIR correctly notes that there are two key indicators of AQMP consistency: (1) whether  
15 the Project will result in an increase in the frequency or severity of existing air quality violations or  
16 cause or contribute to new violations, or delay timely attainment of air quality standards or the interim  
17 emission reductions specified in the AQMP; and (2) whether the Project will exceed the assumptions in  
18 the AQMP based on the year of Project buildout and phase. (T28:2238, 2247.) However, the EIR  
19 reaches the unsupportable conclusion that the Project is consistent with the AQMP. (T28:2239, 2247.)

20 Evaluation of the Project's consistency with the first consistency indicator requires  
21 consideration whether the Project will exceed the short-term or long-term thresholds established by  
22 SCAQMD. The Project fails this first key indicator because it will admittedly result in significant  
23 short-term and long-term air quality impacts for CO, VOC, NO<sub>x</sub>, and PM<sub>10</sub> even after mitigation and in  
24 excess of SCAQMD thresholds. (T28: 2239-44, 2252-53.) Table 4.7-4 demonstrates the degree to  
25 which this Project exceeds the SCAQMD significance thresholds for short-term impacts. (T28:2242.)  
26 The Project will emit 255 lbs VOCs /day or 3.4 times the threshold. The Project will emit 1233.99 lbs  
27 NO<sub>x</sub> /day or 12.34 times the threshold. The Project will emit 1425.93 lbs CO /day or 2.59 times the  
28 threshold. The Project will emit 1017.48 lbs PM<sub>10</sub>/day or 6.78 times the threshold. (*Ibid.*)

1 The EIR states that implementation of SC 7-1 through SC 7-5, and MM 7-1 would reduce these  
2 impacts, but not to a level considered less than significant. (T28:2242.) Nonetheless, the EIR also  
3 concludes that: “[w]hile emissions would be generated in excess of SCAQMD’s threshold criteria, it is  
4 unlikely that short-term construction activities would increase the frequency or severity of existing air  
5 quality violations due to required compliance with SCAQMD Rules and Regulations. Similarly, the  
6 emissions from the Project are projected to be a fraction of a percentage of the basin wide emissions.”  
7 (T28:2247.) It is incomprehensible how the EIR arrives at this conclusion regarding frequency or  
8 severity of the air quality violations when the thresholds of significance are exceeded even *with*  
9 mitigation. Nor is it reasonable to determine that because the Project only represents a “fraction of a  
10 percentage of basin wide emissions” (T28:2247) that the significant impacts are somehow rendered less  
11 troubling. This argument would stand CEQA’s requirement to analyze and mitigate the cumulative  
12 environmental impacts of proposed projects completely “on its head by diminishing the need to do a  
13 cumulative impact analysis as the cumulative impact problem worsens.” (*Communities for a Better*  
14 *Environment, supra*, 103 Cal.App.4th at 117; *see also discussion infra* at IV.L.)

15 The Project will also admittedly result in significant long-term air quality impacts. (T28:2243.)  
16 In the summer, the Project will emit: 220.91 lbs VOCs /day or 4.02 times the VOC threshold; 147.91  
17 lbs NO<sub>x</sub> /day or 2.69 times the NO<sub>x</sub> threshold; 1558.41 lbs CO /day or 2.83 times the CO threshold;  
18 and 153.9 lbs PM<sub>10</sub>/day or 1.03 times the PM<sub>10</sub> threshold. (*Ibid.*) In the winter, there will be similarly  
19 extreme violations. (*Ibid.*) Despite these figures, the EIR concludes that “the analysis for long-term  
20 local air quality impacts showed that local pollutant concentrations are not projected to exceed any of  
21 the air quality standards.” (T28:2247.) Given the results of the emissions modeling, which indicated  
22 year-round violations of all but the SCAQMD SO<sub>x</sub> standard, as well as the basin’s non-attainment  
23 status for O<sub>3</sub>, PM<sub>10</sub>, NO<sub>2</sub>, and CO, this statement is at odds with the data and not supported by the  
24 evidence in the record.

25 Assessing Project compliance with the AQMP assumptions (consistency indicator 2) requires  
26 evaluation of whether the anticipated population density and land use are consistent with the growth  
27 assumptions used in the AQMP for the air basin. The EIR determined that the Project is consistent with  
28 the AQMP if it is consistent with the growth forecasts of the AQMP and if “all available emissions



1 reduction strategies are implemented as effectively as possible on a project-specific basis." (T28:2239.)  
2 The EIR concludes that "[t]he Black Bench Specific Plan relates to the air quality planning process  
3 through the growth forecasts that were used as inputs into the regional transportation model." (*Id.*)

4 Contrary to this contention, the Regional Transportation Planning (RTP) model did not evaluate  
5 land uses, population growth or roadways on the Project site or within several miles of the Project site.  
6 The closest roadway evaluated in the RTP is Interstate 10 approximately 3.5 miles south of the Project  
7 site and the population projections used in the AQMP are for analysis year 2010. The RTP does not  
8 anticipate 1,500 homes coming online from the Project area in 2010. (T214:11193.) In addition, the  
9 fact that the Project must "comply with applicable SCAQMD requirements and control measures for  
10 new developments... such as Rule 403, for the control of fugitive dust" does not equate to the Project  
11 having implemented "all available emissions reductions strategies...as effectively as possible,"  
12 particularly where the Project will violate all but one of the SCAQMD's significance thresholds even  
13 with its suggested mitigation measures. (*Ibid.*)

14 The EIR also concludes that the Project will be consistent with the City's General Plan and  
15 SCAG's Regional Comprehensive Plan and Guide. (T28:2246.) The EIR notes that the Banning  
16 General Plan contains the goal to "preserve and enhance local and regional air quality for the protection  
17 of the health and welfare of the community." (T28:2246.) Policy 4 states "Development proposals  
18 brought before the City shall be reviewed for their potential to adversely impact local and regional air  
19 quality and shall be required to mitigate any significant impacts." (*Ibid.*) Yet, the EIR does not  
20 provide any mitigation measures that substantially reduce the air quality impacts of this Project. (*See*  
21 *infra* at VLB.) Policy 6 of the General Plan states that the City "shall support the development of  
22 facilities and projects that facilitate and enhance the use of alternative modes of transportation,  
23 including pedestrian oriented retail and activity centers, dedicated bicycle paths and lanes, and  
24 community-wide multi-use trails." (T28:2246.) The EIR does nothing, however, to reduce the 15,164  
25 new vehicle trips the Project will admittedly generate. The same noncommittal approach was taken in  
26 the consistency analysis for the SCAG Regional Comprehensive Plan and Guide. (*Ibid.*)

27 The EIR's analysis of the Project's air quality impacts is also deficient because emissions were  
28 underestimated in the modeling contained in the EIR. For example, Project-generated emissions were

1 estimated using the CARB Urban Emissions Model (URBEMIS), version 8.7, but the emission source  
2 "architectural coatings" applied to the homes as part of the maintenance activities during long-term  
3 operation of the Project was turned off by the modeler for (T159:7682, 7686.) This results in an  
4 underestimate of VOC emissions.

5 The EIR also fails to analyze the Project with reference to the SCAQMD's Localized  
6 Significance Thresholds (as opposed to Regional Thresholds of Significance that were used) (T214:  
7 11191). SCAQMD recommends that lead agencies perform project-specific modeling for larger  
8 projects in determining localized air quality impacts. The EIR for this Project provides no justification  
9 for failing to even mention localized air quality impacts or Localized Thresholds of Significance.

## 10 **2. Failure to Analyze Microparticulate Pollution (PM<sub>2.5</sub>), HAPs and TACs**

11 The EIR contained no analysis of the Project's direct, indirect, or cumulative impacts related to  
12 the emission of microparticulate pollution (PM<sub>2.5</sub>). Determining Project-generated emissions of PM<sub>2.5</sub>  
13 and the impacts associated with those emissions is important because this pollutant poses a substantial  
14 health risk. In epidemiological studies it has been determined that PM<sub>2.5</sub> poses the greatest risk  
15 associated with particulate matter because these extremely small particles are able to lodge deep within  
16 the lungs where they have the potential to cause the greatest harm. PM<sub>2.5</sub> is referred to briefly in the  
17 discussion of state and federal ambient air quality standards, but never makes another appearance in the  
18 air quality section. (T28:2232, 2234.) The SCAQMD document entitled "Methodologies to Calculate  
19 Particulate Matter (PM) 2.5 and PM<sub>2.5</sub> CEQA Significance Thresholds" (August 2006) provides a  
20 roadmap for the City to determine the Project's short- and long-term emissions of PM<sub>2.5</sub> and determine  
21 the significance of those emissions. (T214:11202-14.) The EIR fails to use this or any other method to  
22 assess the Project's PM<sub>2.5</sub> emissions.

23 The EIR also fails to discuss toxic air contaminants or hazardous air pollutants. In addition to  
24 several criteria pollutants, motor vehicles emit several hazardous air pollutants, referred to as toxic air  
25 contaminants under California law, which the U.S. Environmental Protection Agency ("EPA")  
26 classifies as known or probable human carcinogens (T207:11160.1987-2011 [report on TACs] ) EPA  
27 estimates that mobile sources of air toxics, such as cars, trucks, and buses, account for as much as half  
28 of all cancers attributed to outdoor sources of air toxics. The gasoline additive benzene, for instance, is

1 a motor vehicle emission and a known human carcinogen. (T207:11160.1648-54 [EPA 2000].)  
2 Benzene causes leukemia and blood disorders in adults. Short-term exposure to benzene can cause  
3 dizziness, headaches, vomiting, unconsciousness, and, at high levels, even death. (*Ibid.*) The EIR's  
4 failure to disclose the Project's emissions of toxic air contaminants or hazardous air pollutants renders it  
5 inadequate as an informational document.

6       **3. Failure to Analyze Environmental and Public Health Implications of**  
7                   **Admittedly Significant Air Quality Impacts**

8       Among the most critical flaws of the air quality section and EIR as a whole is the lack of any  
9 discussion whatsoever of the environmental and public health implications of the Project's admittedly  
10 significant air quality impacts. As a state of California report recently summarized:

11           It is well known that exposure to various air pollutants, including ozone, PM, nitrogen  
12 dioxide, sulfur dioxide, and carbon monoxide, can induce a variety of adverse health  
13 effects (CARB, 2000). These health effects include, but are not limited to premature  
14 death, hospitalizations and emergency room visits for heart- and lung-related causes, as  
well as reductions in lung function, asthma exacerbation, and possible changes in lung  
development.

15 (T207:11160.1555; *see also id.* at 11160.1555-58.) The CEQA Guidelines provide that, in discussing  
16 the environmental effects of a project, an EIR must include "a sufficient degree of analysis to provide  
17 decision-makers with information which enables them to make a decision which intelligently takes  
18 account of environmental consequences." (Guidelines § 15151.)

19       Here, the EIR's omission of information about the environmental and public health effects of  
20 the Project's significant air pollutant emissions thwarted informed review and decision-making as  
21 required by CEQA. (Guidelines §§ 15126, 15126.2 [EIR must discuss, *inter alia*, "health and safety  
22 problems caused by the physical changes" that a proposed project will generate.] In *Bakersfield*  
23 *Citizens, supra*, 124 CalApp.4th 1184, the Court held that the "failure to correlate the acknowledged  
24 adverse air quality impacts to resulting adverse effects on human respiratory health was erroneous." In  
25 doing so, it expressly rejected the approach taken in the Project EIR at hand:

26           Buried in the description of some of the various substances that make up the soup known  
27 as 'air pollution' are brief references to respiratory illnesses. However, there is no  
28 acknowledgement or analysis of the well-known connection between reduction in air  
quality and increases in specific respiratory conditions and illnesses. After reading the

1 EIR's, the public would have no idea of the health consequences that result when more  
2 pollutants are added to a nonattainment basin. On remand, the health impacts resulting  
3 from the adverse air quality impacts must be identified and analyzed in the new EIR's.

4 (*Id.* at 1220.) As in *Bakersfield Citizens*, the EIR in this case gave only the most cursory description of  
5 the air pollutants and their effects in general (T28:2234-35) and did not attempt to assess the impacts of  
6 the Project's air pollutant emissions on public health and the environment specifically. This does not  
7 constitute compliance with CEQA.

#### 8 **4. Inadequate Analysis of Impacts to "Sensitive Receptors"**

9 The EIR fails to mention the potential for sensitive receptors at the parks, school site and  
10 numerous trails near the site to be exposed to levels of CO, VOC, NO<sub>x</sub>, and PM<sub>10</sub> in excess of standards  
11 and to other air pollutants not analyzed in this document such as benzene and PM<sub>2.5</sub>. The "CEQA Air  
12 Quality Handbook" published by SCAQMD defines residential units, schools and parks as sensitive  
13 receptors. (T28:2244 ) As discussed in detail above, the Project will result in a significant short-term  
14 construction-related air quality impact for CO, VOC, NO<sub>x</sub>, and PM<sub>10</sub>, significant long-term air quality  
15 impacts for CO, VOC, NO<sub>x</sub>, and PM<sub>10</sub>, and possibly exposure to other pollutants not analyzed in the  
16 EIR. The EIR notes that the residential uses are not located adjacent to a congested roadway or other  
17 area with a high background CO concentration, but does not disclose whether the parks, school site and  
18 numerous trails near the Project will be exposed to dangerous levels of pollutants. (T28:2244-45.)

19 The numerous trails adjacent to the Project site, including the Big Ditch Trail, serve over 2500  
20 young children a year. (T211:11169; T192:10561.) Further, it is well-known that "individuals at  
21 greatest risk of experiencing adverse health effects from ozone exposure are those who spend prolonged  
22 periods of time outdoors while participating in activities that increase the breathing rate. This group is  
23 comprised primarily of children, outdoor workers, and recreational and professional athletes." (T207:  
24 11160.1557.) In addition, "Because children breathe more air relative to their body weight, their  
25 exposure to air contaminants is higher relative to adults." (T207: 11160.1990.) As a result, the City  
26 should not have so blithely dismissed the potential for the Project to have a significant air quality  
27 impact on sensitive receptors.  
28

1       **F.     The EIR Improperly Avoids Analysis and Downplays the**  
2               **Significance of the Project's Impacts to Biological Resources**

3             Although on- and off-site Project impacts will eliminate over 750 acres of natural vegetation,  
4 including approximately 596.6 acres of annual grassland, 145.5 acres of chaparral, 8.6 acres of oak  
5 savanna, 7.9 acres of oak woodland, and 4.7 acres of alluvial fan scrub habitat, the EIR concludes that  
6 this effect is less than significant. (T28:2167-69.) These plant communities function as habitat for a  
7 diverse assortment of sensitive animals and plants, including the golden eagle, Bell's sage sparrow,  
8 California horned lark, San Diego black-tailed jackrabbit, and Parry's spineflower. (T28:2166.)  
9 Contrary to the requirements of CEQA, the EIR fails to provide a full disclosure and analysis of the  
10 environmental consequences of destroying this habitat.

11            The EIR is uniformly dismissive of the Project's impacts on sensitive vegetation communities  
12 and species. The EIR acknowledges that the Project will eliminate sensitive vegetation communities,  
13 including oak woodland, oak savanna, and alluvial fan scrub that "provide suitable habitat for a variety  
14 of plant and wildlife species" but concludes that the impact is less than significant because "these  
15 wildlife habitats are outside the conservation areas of the MSHCP and do not serve as habitat for any  
16 state- or federally-listed threatened or endangered species." (T28:2169.) The EIR also suggests that the  
17 Project will have a less than significant impact on oak woodland, oak savanna, and alluvial fan scrub  
18 because "substantial amounts of each community are preserved in open space on site." (*Ibid.*) The EIR  
19 fails to explain how the elimination of significant portions of each of these habitats on the Project site,  
20 resulting in a net loss of each habitat type, is a less than significant impact merely because some habitat  
21 is preserved. The EIR further concludes that although habitats for Bell's sage sparrow and San Diego  
22 black-tailed jackrabbit (chaparral and alluvial fan sage scrub) would experience "limited" impacts,  
23 these impacts "would be less than significant and are covered by the MSHCP." (T28:2166.)

24            The "MSHCP" is the Western Riverside Multiple Species Habitat Conservation Plan.  
25 (T28:2144.) According to the EIR, the MSHCP "represents a comprehensive subregional approach for  
26 enhancing and maintaining biological diversity and ecosystem processes while, at the same time,  
27 allowing for future economic growth." (*Ibid.*) The MSHCP covers 146 endangered, threatened, and  
28 sensitive species in the 1.2 million acre Western Riverside County planning area. (*Id.* at T28:2144-45.)

1 It is intended to establish a conservation framework for these species and their habitat by identifying  
2 lands to be conserved, while providing "take" authority for 118 of the 146 species. (*Ibid.*) "Take," as  
3 defined in the federal Endangered Species Act, means "to harass, harm, pursue, hunt, shoot, wound,  
4 kill, trap, capture, or collect, or to attempt to engage in such conduct." (16 U.S.C. § 1532(19).) The  
5 MSHCP was itself subject to CEQA and the federal equivalent, the National Environmental Policy Act,  
6 and a joint EIR/Environmental Impact Statement was prepared (the "MSHCP EIR/EIS"). (T28:2145;  
7 T220:11340.)

8         When the Project EIR states that certain impacts are "covered" by the MSHCP, it implies that  
9 the City is absolved of any further obligation under CEQA to conduct a site-specific analysis of the  
10 impact. Indeed, a memorandum prepared by the developer's consultant suggests that the Project EIR is  
11 intended as a second-tier analysis based on the first-tier analysis in the MSHCP EIR/EIS.  
12 (T220:11341-43.) This type of "tiered" environmental analysis is permitted under some circumstances.  
13 (*See* Pub. Res. Code §§ 21068.5, 21094; Guidelines §§ 15152, 15385.) "'Tiering' refers to using the  
14 analysis of general matters contained in a broader EIR (such as one prepared for a general plan or  
15 policy statement) with later EIRs...on narrower projects; incorporating by reference the general  
16 discussions from the broader EIR; and concentrating the later EIR...on the issues specific to the later  
17 project." (Guidelines § 15152(a).) Where tiering is used, the later EIR should be limited to effects that  
18 "(1) [w]ere not examined as significant effects on the environment in the prior EIR; or (2) [a]re  
19 susceptible to substantial reduction or avoidance by the choice of specific revisions in the project, by  
20 the imposition of conditions, or other means." (Guidelines § 15152(d).)

21         CEQA requires that the later EIR "shall refer to the prior EIR and state where a copy of the prior  
22 EIR may be examined. The later EIR...should state that the lead agency is using the tiering concept  
23 and that it is being tiered with the earlier EIR." (Guidelines § 15152(g); *Gilroy Citizens for*  
24 *Responsible Planning v. City of Gilroy* (2006) 140 Cal.App.4th 911, 929.) Here, the Project EIR does  
25 not expressly state that the City is using the tiering concept or otherwise relying on the MSHCP  
26 EIR/EIS, nor does it expressly state where a copy of the MSHCP EIR/EIS may be examined. The  
27 City's failure to invoke tiering in the EIR represents a failure to abide by the mandatory procedures  
28 required by CEQA, and precludes the City from incorporating the analyses of the MSHCP EIR/EIS.

1 According to CEQA, tiering must be explicit – there must be sufficient information to enable the  
2 decisionmakers and the public to determine that particular impacts have been adequately analyzed and  
3 mitigated or avoided in the first tier environmental review. (Guidelines § 15152(g).)

4 Even if the City can rely on the analysis in the MSHCP EIR/EIS, however, it must still provide  
5 a site-specific analysis of those impacts that are not evaluated in the previous EIR or that “are  
6 susceptible to substantial reduction or avoidance” in the current Project. (Guidelines § 15152(d).) The  
7 EIR fails to include this analysis. In particular, it does not evaluate whether impacts to oak woodland,  
8 oak savanna, and alluvial fan scrub habitat, Bell’s sage sparrow, and San Diego black-tailed jackrabbit  
9 are susceptible to substantial reduction or avoidance through Project revisions, conditions, or other  
10 means. Instead, it summarily concludes that these impacts are less than significant because impacts to  
11 these vegetation communities and species are covered by the MSHCP and because the affected habitats  
12 are outside the conservation areas of the MSHCP. (T28:2166, 2169 ) No evidence in the record,  
13 however, supports this conclusion; the EIR contains no analysis whether these impacts are susceptible  
14 to substantial reduction or avoidance. In addition, substantial evidence indicates that these impacts  
15 could be further reduced or avoided. (See T207:11133-35 [recommended mitigation and avoidance  
16 measures].)

17 The EIR further concludes that although the Project will directly impact approximately 370  
18 individual Parry’s spineflower plants in three locations through grading, “impacts to this species are  
19 adverse but less than significant” because the plants are “of limited sensitivity” and impacts are covered  
20 under provisions of the MSHCP. (T28:2166.) The EIR describes the Parry’s spineflower as a plant of  
21 limited sensitivity because it is a California Native Plant Society (“CNPS”) List 3 species. (*Ibid.*)  
22 CNPS has conducted a statewide inventory of special status plant species. The resulting lists are used  
23 by public agencies in their CEQA analyses. (T28:2154.) Plant species on Lists 1A, 1B, and 2 meet the  
24 criteria for endangered, threatened, or rare status. List 3 species are those for which CNPS requires  
25 additional information to properly evaluate their status. (*Ibid.*) Inclusion of the Parry’s spineflower on  
26 CNPS List 3 is not a sufficient basis for concluding that the species is of limited sensitivity. At best,  
27 inclusion of the species on List 3 indicates that more information needs to be gathered to determine  
28 whether the Project will have a significant impact. (T207:11130-31.) In addition, as discussed above,

1 the EIR does not properly incorporate the analysis and findings of the MSHCP EIR/EIS, and coverage  
2 under the MSHCP is not a sufficient basis for concluding that the Project's site-specific impacts are less  
3 than significant.

4 The elimination of nearly 600 acres of annual grasslands without compensatory mitigation is not  
5 evaluated in the EIR beyond the conclusions that this habitat, which supports California horned lark, is  
6 "widely available in the region," impacts "would not reduce these communities below self-perpetuating  
7 levels throughout the region," and the impact area is adequately covered by the MSHCP. (T28:2167,  
8 2169.) As Petitioner Center for Biological Diversity noted in comments to the City, however, only  
9 about 36 percent of California's original grasslands remained in 2000, with the surviving acreage  
10 fragmented by urbanization. (T207:11129.) The MSHCP anticipates a further loss of 72 percent of the  
11 remaining grasslands. (MSHCP EIS/EIR at 4.1-13; see *Petitioners' Request for Judicial Notice*,  
12 Exhibit 1 at 8.) The remaining grasslands provide important habitat for sensitive species  
13 (T207:11129.) The EIR's conclusory statements regarding the insignificance of the Project's grassland  
14 impacts are not supported by any substantial evidence in the record.

15 In addition, the City may not rely on the MSHCP to avoid the disclosure and analysis of the  
16 Project's grassland impacts. As discussed above, the EIR does not properly incorporate the analysis  
17 and findings of the MSHCP EIR/EIS. In addition, grasslands are not "covered" by the MSHCP in the  
18 same manner as other sensitive species and habitats. Instead, the MSHCP EIS/EIR concluded that  
19 significant impacts to grassland resources could still occur despite adoption of the MSHCP's  
20 conservation program. (*Petitioners' Request for Judicial Notice*, Exhibit 1 at 10.) Thus, it is not  
21 possible for the City to conclude that the Project's grassland impacts have been mitigated or avoided as  
22 a result of the MSHCP. Instead, analysis and mitigation of the grassland impacts must be included in  
23 the Project EIR. If further mitigation or avoidance is not feasible, the City must adopt a statement of  
24 overriding considerations describing how the Project's benefits justify its environmental costs. (Pub.  
25 Res. Code § 21081(b); see *Communities for a Better Environment*, *supra*, 103 Cal.App.4th at 124  
26 [tiering does not relieve lead agency from obligation to adopt statement of overriding considerations  
27 where higher-level EIR found impact was significant and unavoidable].) Contrary to CEQA's  
28 mandatory procedures, however, the City failed to analyze, mitigate, or adopt a statement of overriding



1 considerations for the Project's grassland impacts.

2       The EIR's conclusion that the Project will not have a significant impact on sensitive vegetation  
3 communities, wildlife, and plants is not backed by substantial evidence in the record. Instead, the EIR  
4 dismisses the significance of these impacts based on conclusory statements and allusions to coverage in  
5 the Western Riverside MSHCP without properly tiering from the MSHCP's analysis, explaining why  
6 the previous analysis obviates the need for a site-specific analysis, or demonstrating that the impacts are  
7 not susceptible to substantial reduction or avoidance. Accordingly, the City has not satisfied its  
8 obligation under CEQA to "disclose and carefully consider the environmental consequences of its  
9 actions, mitigate adverse environmental effects if feasible, explain the reasons for its actions, and afford  
10 the public and other affected agencies an opportunity to participate meaningfully in the environmental  
11 review process." (*Federation of Hillside & Canyon Assns. v. City of Los Angeles* (2004) 126  
12 Cal.App.4th 1180, 1198.)

13 **G. The EIR Inadequately Analyzes Land Use and Aesthetic Impacts**

14       The EIR fails to acknowledge and adequately analyze the impacts that will result from  
15 implementation of the Project, which consists of construction of a dense residential subdivision and a  
16 four-lane highway in wildlands. Specifically, the Project is not consistent with the City's  
17 Comprehensive General Plan ("General Plan") or adjacent residential developments. It also fails to  
18 adequately consider land use and aesthetic impacts to the adjacent San Bernardino National Forest  
19 ("National Forest") and Highland Springs.

20       The findings in the EIR of consistency of the Project with applicable land use plans and policies  
21 are not supported by substantial evidence. (T28:2076.) All cities and counties must adopt a general  
22 plan for the physical development of their land. (Gov. Code § 65300 *et seq.*; T32:3670.) The City's  
23 General Plan guides the development of the City and seeks to preserve its "valued assets, resources and  
24 quality of life."<sup>9</sup> (T32:3670.) The Initial Study Checklist for CEQA, used to determine whether a  
25 project may have significant environmental impacts, includes the question whether a project may  
26

27 <sup>9</sup> Policy 5 of the Land Use Element of the General Plan states that, "all land use proposals shall be  
28 consistent with the [General Plan]." (T28:2071.)

1 conflict with any applicable land use plan, policy, or regulation adopted for the purpose of avoiding or  
2 mitigating an environmental effect. (Guidelines appen. G, § IX, subd. (b), T28:2066.)

3 Quite sensibly, Goal 3, Policy 4 of the Housing Element of the General Plan calls for a  
4 prohibition on, "housing development in areas subject to significant...fire hazards." (T28:2294;  
5 T32:3840.) In its consistency analysis the City wrongly states that, "[t]he proposed project is not  
6 located in an area subject to significant...fire hazards with implementation of mitigation." (T28:2294.)  
7 The only analysis given in this consistency analysis is a general reference Section 4.9. Section 4.9 does  
8 not support the conclusion of consistency.

9 To begin with, Section 4.9 states that, "[t]he Project would develop residential structures within  
10 and adjacent to high fire hazard areas." (T28:2284.) Mitigation or not, the City cannot change the fact  
11 that the "open space to the West and western portion of the development area is in the High Wildfire  
12 Zone" based on the Wildfire Susceptibility Map in the Riverside County Pass Area Plan. (T28:2284.)  
13 Moreover, Fire Marshall Ted Yarbrough, Mayor Pro Tem Hanna, and Battalion Chief Andrew Bennett  
14 of the City of Beaumont Fire Department have all stated that the fire hazard mitigation discussed in  
15 Section 4.9 of the EIR is either incomplete or will be ineffective. (T28:2535; T292:12807;  
16 T298:12994; T292:12808; T298:12995-96.) Therefore the findings in the EIR of consistency of the  
17 Project with applicable land use plans and policies are not supported by substantial evidence.

18 The Project will impact adjacent County residential uses because of the high density that is  
19 allowed by the Specific Plan. The City designated a Specific Plan Overly Development Zone (SPOD)  
20 for the Project area which allowed Sun Cal to create its own new zoning regulations for the Project site,  
21 in the form of the Specific Plan. (T19:537, T28:2063). The preparation of the Specific Plan allows  
22 residential development to be "clustered" on lots smaller than the underlying land use designation and  
23 zoning would allow. (T28:2067.) The Black Bench Specific Plan calls for clustering homes which will  
24 increase the allowed density from a maximum of 0 to 2 dwelling units per acre to an average of 3  
25 dwelling units per acre (1,500 units on 494 acres).<sup>10</sup> (T28:2007; T28:2009.)

26  
27 <sup>10</sup> The density will range from 1.6 to 4.8 dwelling units per acre.  
28

1 Just because clustering is an option for the Project site does not mean it will not have a  
2 significant impact on land use. The Project site itself is currently undeveloped and predominantly open  
3 space, blending almost seamlessly with the surrounding area. (T28:2003.) Current uses consist of one  
4 residential dwelling, cattle grazing, recreational hiking and biking, and wildlife habitat. (T28:2055;  
5 T28:2151-59.) The Project site is bordered on the north, south, and west by wildlands and by low-  
6 density residential development on the east. (T28:2056-58.) No clustering exists in the surrounding  
7 area, and even Project supporters acknowledged that, "the project seeks to be an island up on an isolated  
8 area of the bench surrounded by its own mountains" (T261:11886.)

9 This Project will allow an average density that is three times more than what exists in the  
10 adjacent area to the East and thirty times the allowed density of the area to the west and south. The area  
11 to the east allows one acre minimum lot sizes. The western portion of the project site and the area south  
12 of the project site are designated as Rural Mountainous with a 10 acre minimum lot size. (T28:2065.)  
13 The City makes the conclusory statement that buffers, landscaping, and transition zones will reduce  
14 potential significant land use impacts to these adjacent areas. Incredibly, it found the Project achieved  
15 the General Plan's "Residential Goal 1: Preserve and enhance the City's neighborhoods," despite there  
16 being no "neighborhoods" anywhere near the Project site. (T226:11406 & 11412.) There is no factual  
17 or scientific support for any of this, much less any analysis. (Pub. Res. Code §21082.2(c) (argument,  
18 speculation, or unsubstantiated opinion is not substantial evidence).)

19 It is undeniable that allowing very high density residential development in this area will have a  
20 significant impact. The staff of the Planning Department for the County of Riverside Transportation  
21 and Land Management agency found that the City's conclusion of no significant impacts related to land  
22 use and planning was unsupported by the Draft EIR. (T28:2530.) They found "impacts to adjacent  
23 County residential uses will occur and must be considered significant due to the magnitude, duration  
24 and unique location of the project site." (T28:2530.) The City failed to respond to this specific  
25 comment, despite CEQA's requirement that there must be good faith, reasoned analysis in response to  
26 recommendations and objections raised in comments. (Guidelines § 15088(b); *Berkeley Jets, supra*, 91  
27 Cal.App.4th at 1367 n.13 ["court may properly be skeptical" whether EIR's environmental conclusions  
28 have a substantial basis in fact where lead agency ignored views of agency with pertinent expertise].)

1 The findings in the EIR of no land use impact to surrounding residential uses are not supported by  
2 substantial evidence.

3 The EIR does not properly acknowledge or analyze the Project's off-site land use and aesthetic  
4 impacts to the surrounding National Forest or Highland Springs. "[A]ny substantial, negative effect of  
5 a project on view and other features of beauty could constitute a "significant" environmental impact  
6 under CEQA." (*Quail Botanical Gardens Foundation, Inc. v. City of Encinitas* (1994) 29 Cal.App.4th  
7 1597, 1604.) The National Forest is immediately to the east and adjacent to the Project site. Portions  
8 of National Forest share a majority of the northerly Project boundary. (T28:2003, 2057.) Highland  
9 Springs is located immediately to the southwest of the Project site and surrounding the proposed  
10 primary access road study area. (T28:2058.) Both the National Forest and Highland Springs are  
11 currently used for recreation and conservation. (T28:2057-58; T28:2492.) Here, the views of the  
12 Project from hiking trails and other natural areas adjacent to the Project will have significant impacts  
13 similar to the aesthetic impacts views of an aluminum water reservoir cover from a public hiking trail  
14 were found to have in *Ocean View Estates Homeowners Assoc., Inc. v. Montecito Water District* (2004)  
15 116 Cal.App.4th 396, 402.

16 This issue of off-site land use impacts was raised by the Planning Director for the County of  
17 Riverside Transportation and Land Management Agency. (T28:2530.) Again, the staff of the Planning  
18 Department for the County of Riverside Transportation and Land Management agency found that the  
19 City's conclusion of no significant land use and planning impact to the National Forest and Highland  
20 Springs was unsupported by the EIR. (T28:2530.)

21 The EIR does not contain any analysis of the land use and aesthetic impacts on the National  
22 Forest or its users. The EIR does not even identify who the users of the National Forest are or how they  
23 use the Forest. Without this analysis the EIR fails as an informational document. Cherry Valley alerted  
24 the City to this omission of analysis in its comments on the Draft EIR. (T28:2466.) Its comments were  
25 not adequately responded to. The City missed the point in regards to the aesthetic impacts on the  
26 National Forest. (T28:2480.) The response to Cherry Valley's comment does not address impacts on  
27 the National Forest and its users.

28

1 In its response to the lack of analysis of the land use impact, the City acknowledges that the  
2 National Forest has relevant land use policies, but says that it is not required to comply with them.  
3 (T28:2479.) Saying the City does not have to comply with the Forest Service policies does not lead to a  
4 conclusion of no impact on the National Forest, especially considering the increased risk of wildfire the  
5 Project will create. The EIR provides no legitimate reason for why it did not do a consistency analysis  
6 for the National Forest policies as it did for the City's General Plan, the County of Riverside General  
7 Plan, and SCAG. (T28:2070-75.)

8 Moreover, SunCal has made it clear that the Project will impact the adjacent National Forest.  
9 One of the planning goals and objectives listed in the Specific Plan is to provide a diverse trail system  
10 that will promote pedestrian, bicycling, mountain biking, and equestrian activities and connect the  
11 development to the National Forest and other adjacent properties. (T19:540.) SunCal promotes the  
12 ability to use trails and surrounding open spaces as a "key feature of the projects design." (T165:8554.)  
13 This planned recreational use will not only increase public use of the National Forest, it will increase  
14 the risk of wildland fire. (T28:2284, 2535). Because the City failed to even consider the intended  
15 impact on land use in the National Forest, it has failed to proceed in the manner required by law.

16 The conclusion in the EIR that there will not be a significant land use and aesthetics impact on  
17 Highland Springs is without support. First, it should be noted that Highland Springs derives a large part  
18 of its business and revenue from recreational use of its hiking trails, yet the EIR fails to adequately  
19 address the impact on this land use. (T28:2623.) There are many trails, extending north and east from  
20 Highland Springs. (T28:2069.) The trails are on land owned by Highland Springs as well as land  
21 owned by others, including the Black Bench site. (T28:2069.) Recreational users of the resort come  
22 for a wilderness experience and to escape a dense urban environment. (T28:2531.)

23 The development, as well as the road construction, would interfere with Highland Springs' use  
24 of its property by destroying pristine views from Highland Springs and running a highway across and  
25 adjacent to its trails. (T28:2493-95.) Local residents with personal knowledge of this area informed the  
26 City that the highway will be visible from buildings and outdoor gathering areas at the Resort. (T28:  
27 2084, 2493.) Instead of enjoying great views of open space, recreational users in the area would see a  
28

1 large, intensive housing development as well as the proposed four-lane highway, and all the traffic that  
2 comes with it.

3 The construction of a highway through Highland Springs and surrounding wildlands will  
4 significantly alter the character of the area. (T28: 2495, 2531.) The thousands of children who use  
5 these trails will be put into close proximity with fast-moving vehicles and their associated increased fire  
6 risk, noise, and air pollution. (T28:2069, 2492-96.) The EIR does analyze the addition of this major  
7 highway in its aesthetics analysis, most notably in view number two, but dismisses it based on the  
8 contention that the highway blends into the existing landscape. (T28:2087, 2089.) One glaring feature  
9 is missing from this picture – traffic. The City assumes in the aesthetics analysis that there will be zero  
10 traffic traveling to and from Black Bench. This assumption is not tenable considering the City actually  
11 anticipates 15,164 vehicle trips per day.

12 The EIR provides an array of unsupported reasons why users of Highland Springs and  
13 recreational users of the trail system will not be impacted. The four-lane highway will be  
14 approximately 0.1 to 0.2 miles from the Mountain Meadow and Smith Creek Trails which are part of  
15 the primary loop used by the Resort. (T28:2069.) The City dismisses this based on a false conclusion  
16 that the highway would not be visible from the trails. (T28:2493-94.) The highway will be built on top  
17 of a portion of the Big Ditch Trail, yet the City finds there is no impact because the trail will be routed  
18 under the proposed roadway. (T28:2075) This conclusion is not supported in the EIR. (T28:2494.)  
19 Other trails were not even considered despite comments on the Draft EIR from the Resort that they  
20 needed to be. (T28:2492-93.) The City does find an impact to the Cahuilla Canyon trail but dismisses  
21 it because part of it is not on the Resort property and users could use other trails. (T28:2069.) No  
22 mitigation for this impact is planned.

23 The EIR misses the big picture because it fails to address the potential for the Project to drive  
24 away the thousands of people who visit this area because it lacks dense urban development. (T28:2493.)  
25 It is the very nature of these wildlands that draws people to Highland Springs. The issue here is not  
26 whether the City thinks tourism or trail use is an important to Banning. The issue is whether there will  
27 be a significant impact on users of Highland Springs. The findings in the EIR of no impact to the  
28 Highland Springs are not supported by substantial evidence.

1 Light pollution from the development and proposed highway would diminish the view of the  
2 stars at night, and mar the sense of wilderness during the day. (T28:2495.) The City admits that the  
3 proposed project would introduce new sources of light and glare into the currently undeveloped area,  
4 yet all of its vantage point analysis focuses on daytime views. (T28:2095.) The City does not even  
5 acknowledge the light pollution impact from the thousands of vehicles trips that will occur at night or  
6 the street lights that will be required on the highway. Highland Springs notified the City of this  
7 deficiency but no response was given to this specific comment as required by CEQA. (T28:2494;  
8 Guidelines § 15088(b) ["objections raised in the comments must be addressed in detail giving reasons  
9 why specific comments and suggestions were not accepted."].)

10 Instead of performing any actual analysis of the light pollution impact from the Project site, the  
11 EIR generally refers to regulations and guidelines that it says will minimize the light impact if followed.  
12 (T28:2095.) The EIR fails to independently analyze these guidelines to determine if they will actually  
13 be effective or are suitable for the Project site. Moreover, the EIR fails to include these regulations and  
14 guidelines in the EIR which prevents independent review of the City's conclusions. (*Laurel Heights I*,  
15 *supra*, 47 Cal.3d at 128 ["If an EIR fails to include relevant information and precludes informed  
16 decision making and public participation, the goals of CEQA are thwarted and a prejudicial abuse of  
17 discretion has occurred."].)

#### 18 **H. The City's Treatment of Traffic and Circulation Impacts Violates CEQA**

19 Public comments on the Project's traffic and circulation impacts focused on the EIR's failure to  
20 comply with CEQA in addressing those impacts. First and foremost was the EIR's basic lack of  
21 honesty and objectivity in addressing traffic and access issues. For example, the EIR identified as the  
22 Project's "Primary" access road the new four-lane highway SunCal proposed to construct across  
23 Highland Springs' property and over an Alquist-Priolo Fault Zone to connect the Project to Highland  
24 Home Road. (T26:1234, 1444; T227:11487.) The EIR initially claimed the new four-lane highway  
25 was "designed to avoid direct impacts" on Highland Springs and the surrounding community, and  
26 therefore, "[t]he impact to the Cahuilla Canyon Trail within the ownership of Highland Springs would  
27 not be considered a significant impact...." (T28:2068-69.) But even SunCal later acknowledged a  
28 consensus regarding the Highland Home access road's impacts on Highland Springs:

1 And we felt one of the ways to reduce the impact, as much as possible, was to find an  
2 alternative access. The other thing of concern is that this road crosses a number of trails -  
3 - a couple of trails on the resort property, and the resort made it very clear that's their  
4 bread and butter. We didn't want to interfere with their business activities any more than  
absolutely necessary, and that's why we looked a various alternatives here to see how we  
could minimize impact to that trail system.

5 (T281: 12218:15-18; 12219:18-12221:4.) Despite SunCal's candor, the City somehow "found" that  
6 "mitigation measures included in the [EIR] would reduce the project generated traffic impacts to a less  
7 than significant level." (T226:11405.) Supposedly, *all* of the Project's traffic impacts both within and  
8 without the City were entirely mitigable; however, the City cannot implement mitigation outside its  
9 jurisdiction, and there is no evidence to show that they have attempted to assure that mitigation  
10 measures will be implemented in other jurisdictions. (T28:2459; T227:11504, 11520-21;  
11 T281:12253:7-12254:9; T287:12753.)

12 The EIR also identified two "alternative" road alignments. One proposed the construction of a  
13 four-lane highway from Highland Springs Avenue, and the other proposed an eastern alignment for the  
14 highway "to reduce the impact, as much as possible," on Highland Springs. (*Id.*; T28:1954-55.) The  
15 EIR disclosed that the former alternative "would have significant, unavoidable land use and aesthetic  
16 impacts" and "not meet the established primary and secondary project objectives." (T28:2380-83.)  
17 The latter alternative, dubbed the "preferred" Sunset Avenue alternative, also crossed two earthquake  
18 faults with a low to moderate potential for actual surface fault rupture along the alignment for which  
19 further study was recommended. (T123:7454, 7459; T226:11410.) Moreover, it required the relocation  
20 of a U.S. Forest Service facility and helipad; however, the EIR failed to address the impacts associated  
21 with these relocations or identify mitigation measures for them. (T227:11481-82 )

22 Many comments focused on the EIR's dismissive treatment of traffic and access impacts. For  
23 example, the Project admittedly results in the "[e]xtension of infrastructure (water, sewer and  
24 roadways) into an area where these do not exist." (T6:324.) Even one project supporter, who was  
25 otherwise unsympathetic to Banning Bench and Highland Springs, termed this "obscene" and  
26 "offensive" to himself and many other residents: "In essence, this sleepy road will become a freeway to  
27 the freeway. . . . Highland Home road will see over 20,000 cars per day travel on . . . a road that  
28 probably currently sees less than 50 cars a day north of Wilson Street." (T177:10174.) Yet the EIR



1 fails to address this growth-inducing aspect of the Project, arguing the Project "was included within the  
2 projected infrastructure planning documents" for the City's General Plan. (T28:2435; see V.A, *supra*,  
3 and V.K, *infra*.) But inclusion in the General Plan does not negate the fact that there will be significant  
4 impacts from any possible new road.

5 The City took a similar tack with the County's objection to the Project making *any* use of Bluff  
6 Street. The County noted that "[i]t does not appear feasible to make significant improvements to Bluff  
7 Street to accommodate additional traffic, due to the existing road layout and topography," and therefore  
8 the City should consider Sunset Avenue as "[a] potential secondary access route" instead of Bluff.  
9 (T28:2453.) Moreover, even "construction traffic should be kept off Bluff Street." (T28:2454.) But  
10 instead of honestly addressing the County's concerns, the City simply ignored them.

11 As noted above, Highland Springs refused to consent to any alignment that crossed its property,  
12 and for its part, the City declined to commit to using its power of eminent domain to acquire the  
13 property SunCal needed for its primary access road. (See IV, *supra*.) Moreover, the County declines to  
14 grant "access over the portions of either proposed access road that are in the county" (T265:11910;  
15 T282:12534), and Bluff Street could not begin to handle the Project's projected 15,164 daily trips,  
16 1,379 peak hour morning trips and 1,570 peak hour evening trips. (T279: 12013; T281:12216:21-22.)  
17 As a consequence, public comments demanded that the EIR identify and analyze an *actually possible*  
18 primary access road before the City approved the Project. (T265:11907, 11909; T266:11912;  
19 T282:12534, 12585.)

20 The public's request was not unreasonable. After all, the EIR acknowledged that "the terrain  
21 surrounding the project limits the number of feasible access points to the project." (T28:2457.) City  
22 staff even conceded that the public's demand was grounded in the mandates of CEQA, stating in a staff  
23 report that, without a primary access road, SunCal's Project was "a project that violated the EIR as well  
24 as CEQA." (T259:11872.) In fact, even after the City certified the EIR, City staff confessed to "a very  
25 grave concern with processing this project knowing that access was not required," noting that

26 In this particular case the applicant has not acquired the access and staff is asking the  
27 applicant to acquire an access that could conceivably and probably will be on someone  
28 else's current land; someone else's property. . . . If the applicant is not able to acquire  
access from the Highland Home Road or Sunset then what would happen to the  
environmental analysis that they created especially if now they are saying that they are

1 going to waive the condition as an example and go up Bluff. That certainly not  
2 something that staff would want to have happen.

3 (T292:12804.)

4 Another example of non compliance with CEQA is shown in the City's adoption of a Mitigation  
5 Monitoring Plan for the Project where all mitigation measures "[a]pply to Sunset Avenue and Highland  
6 Home Road access roads unless otherwise noted," and SunCal's inability to obtain Project access via  
7 any of the alignments studied in the EIR is "mitigated" by requiring future CEQA analysis.  
8 (T227:11568-626.) This deferral of impact study and formulation of mitigation violates CEQA. (See  
9 VLE, *infra*.)

10 Finally, in approving the Project's Specific Plan without identifying an *actually feasible* access  
11 highway to it, the City violated provisions of the Planning and Zoning Law pertaining to specific plans  
12 which require that, "[n]o specific plan may be adopted or amended unless the proposed plan or  
13 amendment is consistent with the general plan." (Govt Code §65454.) The City found the Project to be  
14 "consistent with the goals and policies of the Circulation Element of the General Plan" because (among  
15 other things) it "proposes a hierarchy of streets, including the primary access from Sunset Avenue (now  
16 the preferred alternative) or Highland Home Road as a four lane roadway." (T259:11870.) This is  
17 trying to have it both ways. If those two "primary access" roads are not possible for SunCal to develop,  
18 then the City simply cannot rely on them to find the Specific Plan, minus those roadways, to be  
19 consistent with the General Plan.

#### 20 I. The EIR Improperly Downplays Noise Impacts

21 Due to the lack of human activity in these area, the Project site and surrounding areas are  
22 currently well below the threshold of significance for impacts from noise. (T106:6736.) The Project  
23 would bring many new sources of noise to this quiet area. Due to the extensive grading that would be  
24 required to flatten out this sloping property at the foot of the San Bernardino Mountains, rock crushing  
25 and blasting are anticipated as part of the construction of the Project. (T28:2263; T106:6771.) Pile  
26 driving is not expected, but is also not prohibited. (T28:2263.) There would also be grading activities  
27 using heavy duty trucks, scrapers, graders, and bulldozers; and constructing homes and support  
28 facilities, with concrete mixers, portable generators, sawing, hammering and clattering of pipes and  
boards. (T28:2263.) After the construction noise, there would be the long term noise impacts of the

1 thousands of new daily trips that would be generated by the Project, including road noise, honking, car  
2 alarms, slamming doors; fire engines and station; the water pump stations; the sewage lift station  
3 equipment; household noises such as barking dogs and leaf blowers; and noise from the school and  
4 neighborhood park. The EIR fails to adequately analyze and mitigate the significant noise impacts  
5 these many new sources would have on the tranquility presently experienced at the Project site and  
6 nearby wildlands, and on the rural community of the Banning Bench.

7 **1. Construction Noise**

8 The most glaring flaw of the EIR's analysis of noise impacts is its attempt to evade true  
9 environmental review of the serious noise impacts from construction on the surrounding residents and  
10 land owners and those recreating on the adjacent Highland Springs property and the National Forest. It  
11 does so by claiming that any construction noise that does not violate the exceptionally lax City Noise  
12 Ordinance is not significant.

13 In lieu of real analysis, the EIR repeatedly claims that the City's Noise Ordinance fully  
14 "excludes control of construction activities during the hours of 7:00 a.m. to 6:00 p.m." (T28:2263,  
15 2265, 2266.) The EIR uses this statement as its basis for a finding of no significant noise and  
16 groundbourne vibrations impacts on hikers, equestrians, and others using nearby trails, and residents on  
17 Bluff Street from construction. (T28:2263-72.)

18 This approach violates CEQA. A threshold of significance is defined by the CEQA Guidelines  
19 as:

20 an identifiable quantitative, qualitative or performance level of a particular environmental  
21 effect, non-compliance with which means the effect will normally be determined to be  
determined to be less than significant.

22 (Guidelines § 15064.7(a).) The lack of a standard for construction noise cannot be considered a  
23 threshold for deciding the significance of an impact. The EIR's unrelenting reliance on an improper  
24 threshold cannot negate the fact that noise levels at the Project site and surrounding area will be  
25 significantly increased by extensive construction activity. (*Mejia v. City of Los Angeles* (2005) 130  
26 Cal.App.4th 322, 342.)

27 Moreover, the EIR is incorrect in its statement that construction noise is completely excluded  
28 from City controls. Municipal Code section 11D-09 states in the "construction exception" that the

1 noise levels cannot be above 55 dBA for more than 15 minutes per hour. (T106:6783-84.) The EIR  
2 fails to analyze whether the construction activities will comply with this restriction, but it is difficult to  
3 believe that they could. (See T32:3963 [the City's General Plan states "Normal conversation is roughly  
4 60 dB at three feet, whereas loud engine noise is about 100 dB."].)

5 The use of the City's Noise Ordinance as the sole measure of noise impacts from construction is  
6 also improper because a portion of the Project is located on County lands. (T28:2002.) Additionally,  
7 the National Forest lands that are adjacent to the Project site will be impacted by the construction noise  
8 from the Project. (*Ibid.*) These lands are not within the City and therefore the City's Noise Ordinance  
9 is inapplicable.

10 Further, the brief analysis of construction noise impacts the EIR does provide is inadequate.  
11 Highland Springs submitted a critique of the noise impacts analysis by noise expert Michael Hendrix.  
12 (T214:11195-98, 11201, 11216-23; T280:12076-77.) In evaluating construction noise impacts, he  
13 found the EIR completely failed to analyze the impacts from groundbourne vibrations caused by the  
14 combined construction activities that will take place onsite (T214:11196; T280:12077.) Hendrix  
15 found the "EIR merely states that the blasting will occur in "small bursts" and compares the explosions  
16 to "the dull thump of an ocean wave breaking on the sand." While this is a nice sounding analogy, it  
17 does not provide a meaningful analysis of impacts." (T214:11196.) The EIR must adequately evaluate  
18 the "ground vibrations from blasting and rock crushing activities in combination with other construction  
19 equipment operating onsite in order to adequately address this potential impact." (*Ibid.*)

20 The EIR also fails to adequately analyze noise impacts from rock crushing devices. Hendrix  
21 found that the EIR underestimates noise impacts from rock crushing by using an inaccurate attenuation  
22 rate, and failing to consider that rock crushing equipment is elevated, and therefore noise carries  
23 further. (T214:11197-98.) Hendrix provided analysis of what the noise levels at the nearest residential  
24 property would actually be when the inaccuracies of the EIR were corrected: approximately 81.3  
25 decibels ("dB") for the majority of the day when rock crushing devices are in use. (214:11198.) This is  
26 well above the acceptable residential noise standards of 65 dB and even above the City's "clearly  
27 unacceptable" level of 75 dB. (T28:2261.)

28

1           **2. Traffic Noise**

2           Traffic noise would be a significant long term impact of the Project, but it was not adequately  
3 analyzed or mitigated. The Project proposes to construct a 90 foot wide four lane highway through  
4 over and near hiking trails at Highland Springs. Any of the three alternatively proposed access roads  
5 would adversely impact the peacefulness of Highland Springs and the restorative value of the hiking  
6 trails, but the EIR contains no analysis of this impact. (T27:1552A.) The President of Highland  
7 Springs submitted comments on the Draft EIR stating that the proposed Highland Springs Avenue  
8 access road would pass directly over the Big Ditch trail and travel within 0.1 miles of other trails  
9 (T28:2496), but the EIR fails to consider the noise impacts to those using the trails. Noise impacts to  
10 hikers from a new highway would be significant, especially in light of the fact that many of the hiking  
11 trails are through wildlands where hikers are the only human intrusion. (T28:2492-94.) Highland  
12 Springs advised the City Council that the visual and noise impacts of the Road "would destroy the  
13 wilderness experience for hikers." (T211:11170.) The CEQA Guidelines recognize that "an activity  
14 which may not be significant in an urban area may be significant in a rural area." (Guidelines § 15064,  
15 subdivision (b).) And the Resort is not just rural—most of the area is wildlands.

16           The only response to these repeated comments that the EIR failed to consider the significant  
17 traffic noise impacts is a claim that "[b]ecause the noise is considered short-term for users of the Big  
18 Ditch Trail, this is considered a less than significant impact. In addition, the City of Banning does not  
19 have noise standards for private or public trails and recreational areas." (T28:2502-03.) These claims  
20 are without merit for several reasons. First, no evidence is given to support the claim that noise impacts  
21 to those on the Big Ditch or other trails should be considered short term noise impacts. There is no time  
22 limit on how long hikers may be on a trail— some hike slowly to fully enjoy the surrounding wilderness,  
23 stop and relax next to a trail, or climb one of the peaks overlooking the trails. Additionally, the entire  
24 wilderness experience for hikers will be drastically changed no matter how long the impact is for,  
25 making the increase in noise a significant impact that will forever reduce the enjoyment of nature  
26 experienced by noise on Highland Springs hiking trails.

27           Additionally, while there is no regulation that specifically applies the noise standards to hiking  
28 trails, there is nothing that says that the noise standards do not apply to trails, and the General Plan

1 Noise Element Policy 1 states that the City shall protect noise sensitive land uses, including open space.  
2 (T28:1762.) The hiking trails and recreation areas on the Highland Springs property clearly fall within  
3 the category of open space. As such, it should be considered a sensitive land use that require protection  
4 from excess noise by the City's General Plan. The same standards required for residential uses could  
5 also have been used for evaluation impacts, as the Court of Appeal has found that residential noise  
6 standards are appropriate for predicting the impact of noise levels on parklands. (*National Parks and*  
7 *Conservation Ass'n v. County of Riverside* (1999) 71 Cal.App.4th 1341, 1358.)

8 Further, once again, the analysis the EIR does provide for noise impacts from traffic, after  
9 excluding trail uses from consideration, is inaccurate. The threshold set by the EIR is from the Noise  
10 Element for the City's General Plan. A noise impact from traffic would be considered significant if  
11 there is an increase in noise levels by 3 dBA which would result in a noise level of 65 dBA or higher  
12 for residential uses. (T28:2262.) The EIR claims this threshold would not be reached by the Project  
13 but the Hendrix report submitted by Highland Springs explained that future buildout noise levels would  
14 actually be 69.7 dBA at 100 feet from the roadway and there would be an "increase of 22.5 dBA CNEL  
15 at Highland Springs Resort and wilderness trails [which] is substantially higher than the 3 dBA increase  
16 threshold the City has set in determining a significant increase in noise levels." (T214:11197.)

17 **J. The EIR Failed to Analyze Significant Hydrological Effects**

18 The Project site is a broad alluvial plateau of the foothills of the San Bernardino Mountains,  
19 with elevations from 3,222 to 5,000 feet. (T28:2122.) While the lower elevations in this area receive  
20 minimal rainfall, the higher elevations receive up to 40 inches per year. (*Ibid.*) The larger amounts of  
21 rain at the higher elevations naturally drain down the slopes of the San Bernardino Mountains to the  
22 lower areas as runoff. The Project site contains two natural drainage courses carrying runoff across the  
23 site from the northern higher elevations: the Smith Creek along the eastern boundary and the Smith  
24 Creek tributary running through the center of the site. (T28:2122-23.) The Smith Creek and the Smith  
25 Creek tributary then feed into the San Gorgonio River to the southeast of the Project site. (T28:2122.)

26 The Project would result in the alteration of these natural drainage patterns and an increase in  
27 stormwater flows above existing conditions. (T28:2129.) These alterations are primarily due to the  
28 Project converting large portions of the mainly permeable surface of the site into impermeable surface

1 area. (*Ibid.*) The Project includes the creation of an on-site storm drain system to convey stormwater  
2 flows from the majority of the Project site into the Smith Creek tributary, and the flows from the eastern  
3 side into the Smith Creek. (T28:2129.) The Project also includes the construction of a detention basin  
4 along the Smith Creek tributary and ten "bio-basins" along the tributary in an attempt to slow the flow  
5 of runoff. (T217:2130, 2133.) The hydrological changes caused by the Project could have significant  
6 adverse impacts that were not analyzed by the EIR.

7 Hydrological expert Barry Hecht prepared comments on behalf of Highland Springs regarding  
8 the Project's hydrological impacts. (T217:11261-65.) He is a registered geologist and a certified  
9 hydrogeologist with more than 35 years experience in specialized investigations of complex  
10 hydrogeologic, recharge, geomorphic, bed-sedimentation, water-quality, and sediment-quality questions  
11 in aquifers, streams, lakes, and tidal environments. (T217:11257-60.) Based upon his expertise, Hecht  
12 found that the EIR failed to analyze, and thus failed to mitigate, channel stability and water quality, as  
13 well as water supply (which is discussed in that section). (T217:11261.)

14 First, channel stability was simply not addressed. (T217:11261.) While acknowledging that the  
15 Project will require the installation of a new drainage system, the EIR fails to analyze the channel  
16 stability of that system. (*Ibid.*) Hecht pointed out that channel instability can have many severe  
17 impacts "including potential slope instabilities, bridge scour or failures, debris collection and removal,  
18 potential severing of critical utilities, and general degradation of the environment in this new  
19 community." (*Ibid.*) The fact that the Project site has loose alluvial deposits and the channels are  
20 braided, making them prone to 'attack' banks, increases the likelihood these serious impacts may occur.  
21 (*Ibid.*) Additionally, channel instability could "degrade the most important on-site habitats-those along  
22 the channel system, and create niches in which invasive plants and animals (such as rats and skunks)  
23 may flourish." (*Ibid.*) Installing bioretention swales (the proposed "bio-basins") in a potentially  
24 unstable channel was also found to be unwise because of the frequent need for repairs this could  
25 require. (T217:11262.) These significant impacts on Project residents as well as those living  
26 downstream from the site were not analyzed in the EIR, in violation of CEQA.

27 Hecht recommended as mitigation for the impacts of channel instability that a geomorphic  
28 assessment of the channel system be prepared by an expert in the field as part of the CEQA process.

1 (T217:11262.) This would help ensure proper placement and protection of "stormwater outfalls, debris  
2 basins, bridges and utility stream crossings, as well as repair of existing instabilities to limit their future  
3 aggravation or continuing growth." (T217:11262.) The Project's failure to analyze these significant  
4 impacts precluded these impacts from being appropriately mitigated, as is required by CEQA.

5 Water quality impacts also were not properly analyzed. (T217:11262.) The impacts from  
6 "hydromodification", which results in increased erosion and sedimentation, impacting the water quality  
7 for miles downstream, were not analyzed or mitigated. (*Ibid.*) Hecht explained that  
8 "hydromodification" is the one-time change in a channel size due to the greater flows storms other than  
9 those causing a 100-year flood. (*Ibid.*) The change in channel capacity from these smaller, more  
10 typical storms can cause a significant amount of erosion in the channel, which results in the "one-time  
11 discharge of bank and bed material into the stream" (*Ibid.*) This discharge of sediment can impact  
12 habitat downstream, cause channel incision, and lessen the channels ability to convey runoff. (*Ibid.*)  
13 Hecht found that other large residential projects in Southern California experienced significant  
14 hydromodification and this Project may have even more significant impacts because it affects such a  
15 large percentage of the watershed it is located within. (*Ibid.*) These impacts can extend many miles,  
16 Hecht finds, possibly affecting the enter river system to Palm Springs or further. (T217:11262-63.)

17 Despite these serious impacts and the foreseeability of hydromodification, it is not discussed in  
18 the EIR. (T217:11263) Hecht recommended that the EIR be revised to include an evaluation of  
19 hydromodification so that mitigation monitoring program for this significant impact could be evaluated.  
20 (*Ibid.*) As it stands, the slope stability and water quality analysis are inadequate and thus the EIR does  
21 not contain mitigation measures to reduce these impacts below a level of significance.

22 **K. The EIR Incorrectly Asserts that the Project Will Not Have Growth-Inducing Impacts**

23 The failure to confront the growth-inducing impacts of the Project violates CEQA. Under  
24 section 15126.2(d) of the CEQA Guidelines, the EIR must discuss "the ways in which the proposed  
25 project could foster economic or population growth, or the construction of additional housing, either  
26 directly or indirectly, in the surrounding environment." It also must discuss the Project's potential to  
27 "encourage and facilitate other activities that could significantly affect the environment, either  
28 individually or cumulatively." (*Ibid.*) CEQA Guidelines Section 15064, subdivision (d) mandates that



1 both primary (direct) and "reasonably foreseeable" secondary (indirect) consequences be considered in  
2 determining the significance of a project's environmental effect: "For example, the construction of a  
3 new sewage treatment plant may facilitate population growth in the service area due to the increase in  
4 sewage treatment capacity..." (Guidelines § 15064 (d)(2).) In this case, construction of a major road  
5 and the extension of water, sewer lines and other utilities may induce such growth. (T28:2387;  
6 T28:2435.) Despite these facts, the EIR discusses growth inducing impacts in less than one full page  
7 (T28:2434-5), most of which is discussion of what "growth-inducing" means. The EIR concludes that  
8 the Project

9 [w]ould not increase the number of dwelling units on the project site beyond that  
10 assumed under existing land use designations and the existing Development Agreement  
11 between the City of Banning and the property owner. Therefore, the project would not  
12 directly induce or cause unexpected growth in the area... Although the project proposes  
13 to construct new infrastructure facilities, these facilities would be site specific and would  
14 not induce additional growth in the area not already included in the City's projections. In  
15 addition, areas within the San Bernardino National Forest or conservation areas identified  
16 in the Western Riverside MSHCP surround the project site...thereby limiting the  
17 developable land in the vicinity of the project site.

18 (T28:2435 ) The EIR also notes that the Project was designated for development in the General Plan,  
19 and concludes that any growth induced by the Project is "already included in the City's projections."  
20 (*Ibid.*)

21 This contention has a certain Alice in Wonderland quality to it. As an initial matter, the concern  
22 about growth-inducing impacts does not deal with the growth at the Project site itself, but in the  
23 surrounding areas. A simple examination of an aerial photograph shows that there is substantial  
24 developable open space adjacent to any of the proposed access roads. (T27:1552A.) At the right hand  
25 side of Exhibit 4.1-3 [Exhibit C], numerous undeveloped parcels can be viewed, including those  
26 belonging to Brinton, Bessesen, Four Seasons Ranch, Duff, and Hastings. With a road through that  
27 area, those parcels could be developed. If Highland Home Road is extended, then the parcel owned by  
28 Isa (which looks like a cut-out from the bottom of Project site) would be ripe for development. Further,  
the City's conclusion that it has already addressed these impacts in the General Plan is not supported by  
any evidence, and is not based on any analysis in the EIR.

The EIR relies upon the fact that National Forest land abuts the Project site, and some of the  
land is in an MSHCP conservation area. (T28:2435) But only one small parcel is Forest Service land.

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land is in an MSHCP conservation area. (T28:2435) But only one small parcel is Forest Service land,

1 shown as USA 531, west of one of the Duff parcels, on Exhibit 4.1-3. (T27:1552A) And it is not  
2 uncommon to have isolated public lands traded for other lands. Even though some of the surrounding  
3 land is part of the area designated for conservation under the MSCHP, that designation does not mean  
4 that the land is undevelopable. Surrounding growth may place pressure on an area to be developed,  
5 which can led to changes in land use designations. "Zoning is subject to change and amendment of a  
6 general plan is not a rare occurrence." (*Stanislaus Audubon Society, Inc. v. County of Stanislaus*  
7 (1995) 33 Cal.App.4th 144, 156-57, [agency must prepare EIR to consider growth-inducing effects of  
8 golf course and country club even though surrounding area zoned for agricultural use because it would  
9 attract development of housing nearby], *City of Antioch v. City Council* (1986) 187 Cal.App.3d 1325,  
10 1337 [construction of a road and sewer would provide a catalyst for further development in the  
11 immediate area, thus requiring an EIR].) Like these cases, the EIRs analysis of growth inducing  
12 impacts is woefully inadequate and the Project approval should be set aside.

13 **L. The EIR's Analysis of Cumulative Impacts Is Inadequate**

14 The EIR's discussion of cumulative impacts is equally defective as its analysis of the Project's  
15 other impacts. Cumulative impacts are defined by the CEQA Guidelines as "two or more individual  
16 effects which, when considered together, are considerable or which compound or increase other  
17 environmental impacts." (Guidelines § 15355.) CEQA requires a mandatory finding of significance  
18 and preparation of an EIR where impacts of a Project are "[c]umulatively considerable" meaning that  
19 "the incremental effects of an individual project are significant when viewed in connection with the  
20 effects of past projects, the effects of other current projects, and the effects of probable future projects."  
21 (Pub. Res. Code § 21083(b); Guidelines § 15064(h)(1).) "Cumulative impacts can result from  
22 individually minor but collectively significant projects taking place over a period of time." (Guidelines  
23 § 15355(b).) The EIR must discuss the regional setting for the project, placing special emphasis on  
24 environmental resources that are rare or unique to the region. (*Whitman v. Board of Supervisors of*  
25 *Ventura County* (1979) 88 Cal.App.3d 397, 407; Guidelines § 15125(a).)

26 As the courts have explained, the analysis of cumulative impacts is of vital importance in CEQA  
27 review:

28 Consideration of the effects of a project or projects as if no others existed would

1 encourage the piecemeal approval of several projects that, taken together, could  
2 overwhelm the natural environment and disastrously overburden the manmade  
infrastructure and vital community services. This would effectively defeat CEQA's  
mandate to review the actual effect of the projects upon the environment.

3 (*San Joaquin Raptor, supra*, 27 Cal.App.4th at 740 [quoting *Las Virgenes Homeowners Federation,*  
4 *Inc. v. County of Los Angeles* (1986) 177 Cal.App.3d 300, 306]; see also *Kings County, supra*, 221  
5 Cal.App.3d at 720 ["One of the most important environmental lessons evident from past experience is  
6 that environmental damage often occurs incrementally from a variety of sources . . . [which] appear  
7 insignificant, assuming threatening dimensions only when considered in light of the other sources with  
8 which they interact"]; *San Franciscans for Reasonable Growth v. City and County of San Francisco*  
9 (1984) 151 Cal.App.3d 61, 77.)

10 To satisfy the requirements of CEQA, a cumulative impacts analysis must include: (1) a list of  
11 past, present and foreseeable future projects producing related impacts, including projects outside the  
12 agency's control, or a summary of a planning document that evaluates regional or area wide conditions;  
13 (2) a summary of the expected environmental effects to be produced by those projects; and (3) a  
14 reasonable analysis of the cumulative impacts of the relevant projects, together with an examination of  
15 reasonable options for mitigating or avoiding any significant cumulative effects. (Guidelines  
16 § 15130(b); *Citizens to Preserve the Ojai v. County of Ventura* (1985) 176 Cal.App.3d 421, 428-29.)  
17 All projects with related impacts, not just similar projects, must be considered. (*Laupheimer v. State*  
18 (1988) 200 Cal.App.3d 440, 465.)

19 Except for air quality impacts (T28:1953), the EIR denies that there are any significant  
20 cumulative impacts from the Project. However, given the impacts of this Project and the developments  
21 slated to occur in the Project vicinity, this conclusion is entirely disingenuous; CEQA does not allow  
22 agencies to "sweep environmental problems under the rug." (*Santa Clarita Organization, supra*, 106  
23 Cal.App.4th at 723.)

24 While it is true that the area immediately surrounding the Project site is mostly open land, with  
25 only a small rural community on the Banning Bench, there are many developments planned for  
26 Banning and the nearby area. As discussed above, the EIR must disclose the cumulative impacts  
27 relating to past, present, and probable future projects in the vicinity. Contrary to this mandate, the EIR  
28 never identifies the projects encompassed by its cumulative impact analysis. The EIR must list and

1 analyze all projects that may lead to cumulative impacts, including those "outside the control of the  
2 agency." (Guidelines § 15130(b)(1).) It also must define the geographic scope of the area affected by  
3 each type of cumulative impact, and to explain its use of any particular limitation on that scope.  
4 (Guidelines § 15130(b)(3).) The EIR does not include any of this information or analysis. The only  
5 geographic scope provided, a five mile limit for traffic impacts, is arbitrary and should be rejected.  
6 (T28:2477.)

7 In the City there are over 10,000 units that either have been approved or are "in the pipeline."  
8 (T224:11387.) A *Press-Enterprise* article provides a map of new projects, which it attributes to the  
9 City, and at least one of these projects--the 2,214 home Sunset Crossroads project-- does not appear to  
10 be on the General Plan map provided as Exhibit III-2 of the January 31 adopted plan. (T224:11382,  
11 11387.) The EIR must also consider projects outside the City. Petitioner Cherry Valley's letter  
12 commenting on the Draft EIR provided a list of reasonably foreseeable projects in the area showing  
13 47,477 proposed dwelling units. (T28:2464-66.) The letter specifically asked that the EIR analyze the  
14 cumulative impacts of these projects. The EIR was completely unresponsive, again just stating that the  
15 cumulative impact analysis was based upon the General Plan. (T28:2477-8.)

16 In addition to the information presented by Cherry Valley, Highland Springs pointed out that the  
17 City of Beaumont, located just a few miles away from Banning, is projected to grow sevenfold, adding  
18 over 75,000 residents by 2025, according to SCAG's 2004 RTP Forecasts. (T224:11382.) This future  
19 growth needs to be considered in the cumulative impacts analysis for Black Bench. A list of "major  
20 projects" in Beaumont either under development or in the planning stages as of August 1, 2006, totaled  
21 25,261 dwelling units. (*Ibid.*) Development in Calimesa and the Morongo Casino Resort and Spa in  
22 Cabazon will also impact the area.

23 With all of the development expected in the area, it is difficult to imagine what sleight of hand  
24 the EIR could use to deny that there would be significant cumulative impacts. Yet it came up with  
25 several. Primarily, the EIR relies upon the impact analysis in the General Plan and the General Plan  
26 EIR. For example with respect to land use, the EIR contends:

27 The Comprehensive General Plan EIR did not identify any significant cumulative impacts  
28 or land use incompatibilities with implementation of the Comprehensive General Plan or  
associated Zoning map amendment. Because the Black Bench Specific Plan is identified

1 as a planned land use in the Comprehensive General Plan, it is assumed as part of General  
2 Plan buildout. Therefore, the project's contribution to cumulative land use and planning  
3 impacts is less than significant.<sup>11</sup>

4 (T28:2076.)

5 The EIR's reliance on the General Plan and General Plan EIR is misplaced. The CEQA  
6 Guideline on which the City relies (T28:2248) only applies when the adopted Plan or EIR "described or  
7 evaluated regional or area wide conditions contributing to the cumulative impact." (Guidelines  
8 § 15130(b)(1)(B).) Here, neither document supports the EIR's conclusion that there are no significant  
9 cumulative impacts, other than air quality, because neither discusses conditions contributing to  
10 cumulative impacts. Neither discusses the environmental impacts of any of the specific projects  
11 planned in Banning, its sphere of influence, or its planning area in the next twenty years. In fact, the  
12 General Plan only mentions the Black Bench project once (T32:3740), related to extension of a road.  
13 And there is not analysis of the environmental impacts, even of the growth planned in the City.

14 The General Plan includes a land use designation map of the City (Exhibit III-2) that shows that  
15 several project sites (including Black Bench) are designated for specific plan development. (T32:4084.)  
16 The General Plan contemplates 31,503 units at buildout in the planning area. Within the City, the  
17 General Plan lists 10,404 units as "existing" and 26,595 units as total projected (Table III-2), but gives  
18 no information as to location or timeframe. (T32:3685.) The Plan says the total population for the City  
19 will be 67,697, and for the entire General Plan area, 80,226. (*Ibid.*) The Plan states that the City's  
20 2003 population was 25,600; and that SCAG projects Banning's population as 34,658 in 2010 and  
21 42,027 in 2020. There is no statement of the current population, but surely an increase of over 42,000  
22 people between 2003 and buildout will create significant impacts. And there is no information in the  
23 General Plan EIR to support a conclusion that it will not. Thus, the General Plan and its EIR cannot be  
24 relied upon to support the Black Bench EIR's cumulative impact analysis.

25 With respect to cumulative water resource impacts, the EIR limits the discussion geographically  
26 to the City's service area. (T28:2330.) As Petitioners pointed out in their comments on the EIR,  
27 however, over 40,000 new dwelling units actually have been proposed within the service area that

28 <sup>11</sup> It should be noted that the Black Bench EIR does not, as required by CEQA, state where the General  
Plan EIR was available. (Guidelines § 15152(g).)

1 draws groundwater from the Beaumont aquifer. (T28:2464-65.) For purposes of assessing cumulative  
2 impacts to this shared water source, therefore, the EIR should have considered all of these proposed  
3 developments because each of them potentially places accumulating new demands on the overdrafted  
4 Beaumont aquifer and on the State Water Project water that the Pass Water Agency hopes to purchase  
5 for recharge.

6 In response to Petitioners' comment, the City conceded that it relied on the UWMP, which was  
7 limited to "planned development within its service area," thereby ignoring cumulative impacts to the  
8 Beaumont Basin from projects in neighboring cities, such as Beaumont. (T28:2478.) The UWMP (like  
9 the EIR) is limited in its scope to an analysis of the City's needs. Neither the UWMP nor the EIR  
10 address the cumulative impacts to a shared resource from tens of thousands of new residential units  
11 throughout the region served by the depleted Beaumont groundwater source. Because the EIR's  
12 analysis of cumulative water resource impacts is overly narrow, it does not satisfy the requirements of  
13 CEQA. (See, e.g., *Kings County, supra*, 221 Cal.App.3d at 729-30 [EIR inadequate where it did not  
14 analyze cumulative water resources impacts of all foreseeable projects on overdrafted aquifer].)

15 While the EIR concludes the Project will result in cumulatively significant air quality impacts, it  
16 contains an utterly inadequate analysis of the issue, thereby thwarting informed decision-making. The  
17 EIR's cumulative air quality impacts reads, in its entirety:

18 The proposed project's impacts associated with the exceedance of CO, NO<sub>x</sub>, and PM<sub>10</sub>  
19 thresholds would be considered cumulatively significant because the Basin is in non-  
20 attainment for these pollutants (Impact 4.7-3). Mitigation would reduce these emissions,  
but not to a level below the SCAQMD's thresholds. Therefore, cumulative air quality  
impacts would remain significant and unavoidable.

21 (T28:2253.) The EIR's cumulative impacts analysis notably omits the fact that the Project will result in  
22 an exceedance of the ozone thresholds as well, leading to a cumulatively significant ozone impact.  
23 (T28:2231-53.) Furthermore, nowhere does the EIR actually assess the cumulative air quality impacts  
24 of the Project and past, present, and reasonably foreseeable projects in the vicinity as required by  
25 CEQA. (Guidelines § 15130(b).) "The EIR must contain facts and analysis, not just the bare  
26 conclusions of a public agency." (*Santiago, supra*, 118 Cal.App.3d 818, 831; see also *Galante*  
27 *Vineyards v. Monterey Peninsula Water Management District* (1997) 60 Cal.App.4th 1109, 1123  
28 (citing Guidelines §§ 15151, 15126) [court found an EIR's acknowledgment that fugitive dust impacts

1 would be "significant and unavoidable, even with mitigation measures," "inadequate" and lacking the  
2 requisite "detailed analysis of how adverse the impact will be."].)

3 The EIR also fails to contain a cumulative impacts analysis of traffic impacts. The analysis in  
4 the EIR states that it takes account of developments being processed or already approved, and also  
5 includes ambient growth rate scenario of 2 percent per year. (T28:2193) However, the analysis does  
6 not actually analyze the impacts of all the projects reasonably foreseeable under the new General Plan,  
7 nor of projects in nearby communities as discussed above. Elsewhere, in the Response to Comments,  
8 the City claimed to have addressed 23 other developments in its analysis of cumulative traffic impacts  
9 to projects within five miles of the Project (T28:2477-8), but it never identifies these projects nor  
10 provides any reasoning for excluding projects more than five miles from the Project, despite their use of  
11 common roadways, including Interstate 10.

12 The EIR's analysis of the cumulative impacts of this Project and others on noise is grossly  
13 inadequate because it *only* considers traffic noise impacts (T28:2273), and ignores construction and  
14 other operational noise, such as car alarms, fire engines, and other noise that will impact the rural  
15 Banning Bench community and the wildlands of Highland Springs. Highland Springs will especially  
16 experience cumulative noise impacts to its trails, since they are sandwiched between the approved  
17 Deutsch project and SunCal's Project.

18 For other impacts, the City claims only that various impacts are site specific, and not subject to a  
19 cumulative impact assessment, even though such impacts are routinely and properly analyzed in EIRs.  
20 For example, as to cultural resources, including archeological sites, the EIR states: "[p]otential  
21 cumulative impacts related to cultural resources are site specific and cannot be comprehensively  
22 assessed on a cumulative basis." (T28:1847.) This is an error. The incremental loss of Native  
23 American sites is an important cumulative impact that should be addressed, especially where, as here,  
24 there is a tremendous amount of raw land now being developed that likely supported Native Americans.  
25 There is nothing in CEQA that exempts cultural resources from the requirement for a cumulative  
26 impacts analysis. The EIR improperly treats geology and soils in the same, dismissive manner.  
27 (T28:2120-21.)

28



1 In the discussion of impacts on public services and facilities, there is no specific discussion of  
2 cumulative impacts, but only a general disclosure that the Project will "incrementally contribute to  
3 cumulative impacts" before mitigation and that it is not expected to contribute significantly to those  
4 impacts after mitigation. There is no disclosure of which impacts might be cumulatively considerable  
5 before mitigation. (T28:2329.)

6 With respect to visual impacts, the EIR draws unsupported conclusions that cumulative impacts  
7 are insignificant, even when the statements are contrary to the facts and common sense. The EIR  
8 concludes that cumulative aesthetic impacts are insignificant because the Project is compatible with  
9 existing setting and surrounding land uses. (T28: 2098-9.) This belies the fact that the Project can  
10 hardly be described as compatible with the sparsely populated Banning Bench, Riverside County  
11 Regional Park and Open Space, or the National Forest and Highland Springs, where it will be visible  
12 from trails and peaks. On the contrary, this Project will have a significant visual impact, especially if  
13 considered in conjunction with the Deutsch project, which will also be visible from Highland Springs.

14 With regard to fire hazards, the EIR concludes:

15 Development of future projects would cumulatively increase development intensity and  
16 population in the region, thereby exposing a greater number of people to potential  
17 hazards in the area (e.g.,...fire). The proposed project, as well as other potential future  
18 projects, would be required to comply with applicable local, state, and federal  
requirements concerning hazardous materials. Therefore, the proposed project would not  
contribute to any significant cumulative hazardous materials impacts.

19 (T28:2287.) But the cumulative impacts of fire hazards from building at the urban/wildlands interface  
20 cannot be mitigated simply by compliance with regulations, even assuming such compliance occurs.  
21 Building in a high fire hazard area necessarily incurs some adverse impacts. The EIR contains the same  
22 cursory argument for hydrology and water quality impacts (T28:2140-41.)

23 Finally, as discussed above (V.D, *supra*), the EIR entirely omitted analysis and mitigation of the  
24 Project's greenhouse gas emissions. In sum, both as to the general approach, and as to specific  
25 applications, the cumulative impact analysis violates CEQA.



1 unlawfully failed to consider *any* meaningful mitigation measures for such impacts. The only  
2 "mitigation effort" mentioned in either the direct or cumulative water consists of the SGPWA use of  
3 State Water Project water to recharge the overdrafted Beaumont Basin, and the City's planned  
4 "recycled water program." (T28:2308.) Ironically, the City actually counts water that would otherwise  
5 be used for aquifer "recharge" as available for it to supply new development. And of course neither of  
6 these "mitigation efforts" constitute mitigation measures within the meaning of CEQA. (*See also*  
7 *discussion supra* at IV.B.)

8 **B. The EIR Fails to Consider Any Mitigation for the Project's Greenhouse Gas Emissions**

9 Lacking any discussion whatsoever of greenhouse gas emissions, it is not surprising that the EIR  
10 also fails to consider any mitigation measures to avoid or reduce these emissions as CEQA requires. *See*  
11 *Guidelines* § 15126.4(a)(1) [an EIR must include "feasible measures which could minimize significant  
12 adverse impacts, including where relevant, inefficient and unnecessary consumption of energy]; *see*  
13 *also* *Pub. Res. Code* § 21000(b)(3) [an EIR must include a separate section discussing "[m]itigation  
14 measures proposed to minimize significant effects on the environment, including, but not limited to,  
15 measures to reduce the wasteful, inefficient, and unnecessary consumption of energy."].) This is a  
16 procedural violation with extraordinarily important real-world results.

17 Having failed to properly analyze the issue, the EIR then failed to examine many feasible  
18 alternatives and mitigation measures that would have greatly slashed the Project's greenhouse gas  
19 emissions. The measures suggested by Petitioners include but are not limited to passive solar  
20 placement and design of the housing units, use of energy-efficient appliances and lighting fixtures, the  
21 use of photovoltaics (solar panels) to generate the electricity needed by each household, and the use of  
22 solar water heating to save large quantities of natural gas. (T207:11139-40, 11154-55.) In this instance  
23 the City's CEQA violations resulted in a Project with much greater impacts than necessary, in clear  
24 violation of CEQA. The Court should not hesitate to overturn the City's approval of the EIR for its  
25 complete failure to analyze and mitigate the Project's greenhouse gas emissions.

26 **C. The EIR's Mitigation of Air Quality Impacts Is Inadequate**

27 With respect to air quality, the EIR's "Mitigation Program" (T28:2248-53) failed to consider all  
28 feasible mitigation measures to reduce its significant impacts to air quality despite its admitted long-

1 term and short-term exceedance of the South Coast AQMD's significance thresholds for CO, VOC,  
2 NO<sub>x</sub>, and PM<sub>10</sub>. An agency violates CEQA if it approves a project as proposed when there are feasible  
3 mitigation measures available that would lessen any significant effects the project might have on the  
4 environment. (Pub. Res. Code § 21002, Guidelines § 15021.) Acceptable mitigation measures can  
5 approach impacts from many angles, including: avoiding impacts by not taking part of the action;  
6 minimizing impacts by limiting the magnitude of the action; rectifying impacts by restoring the affected  
7 environment; and compensating for impacts by providing substitute resources. (Guidelines §§  
8 15126.4(a)(1)(A), 15370.) While the CEQA Guidelines clarify that the City "must meet its own  
9 responsibilities under CEQA and shall not rely on comments from other public agencies or private  
10 citizens as a substitute for work CEQA requires the lead agency to accomplish" (Guidelines § 15020),  
11 the City is required to respond to specific suggestions for mitigating a significant impact unless the  
12 suggested mitigation is "facially infeasible." (*Los Angeles Unified Sch. Dist. v. City of Los Angeles*  
13 (1997) 58 Cal.App.4th 1019, 1029.) A measure is not infeasible if it is more expensive. "What is  
14 required is evidence that the additional costs or lost profitability are sufficiently severe as to render it  
15 impractical to proceed with the project." (*Citizens of Goleta Valley v. Board of Supervisors* (1988) 197  
16 Cal.App.3d 1167, 1181 ("*Goleta I*"); see also *Kings County, supra*, 221 Cal.App.3d at 736.)

17 The EIR fails to require all feasible conservation and energy efficiency measures, fails to  
18 consider adoption of the South Coast Air Quality Management District's recommended mitigation  
19 measures, and fails to require offsets for air pollution in excess of significance thresholds. Instead, the  
20 EIR's "Mitigation Program" contains a whole host of feeble measures it labels mitigation. The EIR  
21 claims that these measures will reduce the impacts of the Project to the greatest extent feasible, but that  
22 the air quality impacts will remain significant and unavoidable. (T28:2246-52.) However, the  
23 measures the EIR includes are not mandatory or enforceable, and thus do not qualify as mitigation.  
24 (Guidelines § 15126.4(a)(2) [mitigation measures must be "fully enforceable through permit conditions,  
25 agreements, or other legally binding instruments".]) Contrary to CEQA, the purported mitigation  
26 measures of the EIR are either not mitigation, are not legally binding, and/or improperly defer analysis  
27 of their efficacy to some later date.

28 For example, many of the Standard Conditions ("SCs") listed (7-1, 7-2, 7-3) require compliance

1 with existing regulations, which does not constitute mitigation. In addition, SCs 7-5, 7-6, and 7-7 all  
2 contain qualifying language. SC 7-5 requires implementation of various construction equipment  
3 measures "to the extent feasible." (T28:2250.) SC 7-6 provides that "[t]o minimize indirect-source  
4 emissions, developers *may*" implement energy conservation measures beyond state and local  
5 requirements; install low-polluting, high efficiency appliances; install solar pool and water heaters,  
6 where feasible; landscape with appropriate drought-tolerant species to reduce water consumption and  
7 provide passive solar benefits; and install energy-efficient street lighting. (T28:2250, emphasis added.)

8 Similarly, Standard Condition 7-7 provides that "[t]o minimize building energy consumption,  
9 developers *shall be encouraged* to improve the thermal integrity of buildings; utilize window glazing,  
10 wall insulation, and efficient ventilation methods; introduce efficient heating and appliances, such as  
11 water heaters, cooking equipment, refrigerators, furnaces, and boiler units; incorporate appropriate  
12 passive solar design and solar heaters; and use devices that minimize the combustion of fossil fuels.  
13 (T28:2251, emphasis added.) By leaving these measures to the whim of the developer without any  
14 evidence in the record that their mandatory adoption is infeasible, the EIR fails to incorporate them as  
15 actual mitigation for the Project's impacts.

16 For construction emissions, mitigation measure (MM) 7-1 states "[i]n addition to the existing  
17 regulations and standard conditions identified above, the following mitigation measures are also  
18 *recommended*," followed by a list of four emissions reduction measures (T28:2251, emphasis added.)  
19 Likewise, MM 7-2 is qualified with the words "where feasible" before listing additional mitigation  
20 measures (install solar or low-emission water heaters, use central water-heating systems, use built-in,  
21 energy-efficient appliances, and ensure that sidewalks and pedestrian paths are installed throughout the  
22 project area) when there is no evidence in the record that these measures are infeasible and thus should  
23 be permitted to be discretionary.

24 Petitioners noted numerous additional mitigation measures for air quality impacts that could  
25 have been adopted by the City but were not. For example, the EIR neglects to adopt SCAQMD  
26 mitigation measures to reduce NO<sub>x</sub> emissions. These mitigation measures include installing lean NO<sub>x</sub>  
27 catalysts, diesel oxidation catalysts, and/or cooled gas recirculation on construction equipment.  
28 SCAQMD also suggests running construction equipment on aqueous diesel fuel to reduce NO<sub>x</sub>

1 emissions. (T214:11191-95.) Other suggested measures included requiring consistency with U.S.  
2 Green Building Council's LEED (Leadership in Energy and Environmental Design) or comparable  
3 standards for energy- and resource-efficient building during pre-design, design, construction, operations  
4 and management, requiring installation of the maximum possible solar energy array on the building  
5 roofs and/or on the Project site to generate solar energy for the Project, requiring passive heating,  
6 natural cooling, solar hot water systems, and reduced pavement, ensuring public transportation will be  
7 available for the Project, and purchasing offsets for remaining emissions. Cumulative air quality  
8 impacts can be mitigated by acquiring emission credits or providing emission offsets, such as through  
9 retrofitting local school buses to burn natural gas or other lower emissions fuel, or providing new  
10 school buses equipped with low emission engines. (T214:11191-95.) The EIR does not consider any of  
11 these mitigation measures, nor contend that they are infeasible. The Project also incorporated other  
12 deferred and unenforceable mitigation measures in violation of CEQA, including, but not limited to SC  
13 7-4 (defers submission of a PM<sub>10</sub> Management Plan for construction operations) (T28:2250) and SC 7-5  
14 (requires minimization of construction emissions to the "greatest extent feasible," which is not defined).  
15 (*Ibid.*)

16 **D. The EIR Improperly Defers Mitigation for the Project's Historic Resource Impacts**

17 Highland Springs, adjacent to the Project, has played a unique role in the history of the San  
18 Gorgonio Pass area. It was home to a ranch established by Dr. Isaac Smith, the first Caucasian to settle  
19 permanently in the San Gorgonio Pass area. The ranch became a stagecoach stop in 1862. Many  
20 historic figures, including Wyatt Earp, stayed at Highland Springs, which has provided lodging for  
21 travelers since 1884. In 1927, the property was purchased by the Hirsch family, who renamed it  
22 Highland Springs Resort. Since then, Highland Springs has served countless families, churches and  
23 businesses. Highland Springs contains the historically significant Bradshaw Trail and is also a  
24 significant archaeological site for local Native American tribes. (T28:2492.) The construction of any  
25 of the three proposed primary access roads through the property would significantly impact both of  
26 these resources, but the EIR fails to provide inadequate mitigation for those significant impacts.

27 Since its inception, CEQA's substantive protections have encompassed historic resources. The  
28 Supreme Court reiterated in *Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal.4th 165 that

1 while CEQA is "directed primarily to ecological concerns and preservation of the environment," it is  
2 "the policy of the state to 'preserve...examples of the major periods of California history.'" (*Id.* at 183-  
3 84; Pub. Res. Code § 21001(c).) Indeed, the Legislature has committed to "take all action necessary to  
4 provide the people of this state with...historic environmental qualities." (Pub. Res. Code § 21001(b).)  
5 Thus, "A project that may cause a substantial adverse change in the significance of an historical  
6 resource is a project that may have a significant effect on the environment." (Pub. Res. Code §  
7 21084.1.)

8 The Bradshaw Trail is historically significant due to its use as "the primary thoroughfare for  
9 stagecoaches traveling between coastal southern California and the gold fields near present-day  
10 Ehrenberg, Arizona" (T32:3896.) The trail later became part of the U.S. Mail route between Los  
11 Angeles and Santa Fe, New Mexico. (*Ibid.*) The Highland Springs and Gilman Ranch stagecoach stops  
12 in the vicinity of the Project site have been determined to be historically significant. (T169:10004-05.)  
13 Highland Springs is listed as a California Point of Historical Interest and Riverside County Historical  
14 Landmark. Gilman Ranch is listed on the National Register of Historic Places. (*Ibid.*) The County of  
15 Riverside already has restored the Gilman Ranch stagecoach stop and reconstructed a museum on that  
16 site. "The County provides educational and interpretive programs for the time period that the Gilman  
17 Ranch operated." (T28:1827.) The County is now anxious to reconstruct the Bradshaw Trail and  
18 reconnect the Gilman's Ranch and Highland Springs stops for additional educational purposes.  
19 (T28:2623.)

20 While the Bradshaw Trail has not yet been listed on a historic site register, the EIR agrees that  
21 the Bradshaw Trail is probably historically significant stating that preliminary research indicates the  
22 trail is likely eligible for both the National Register and the California Register. (T28:1839.)

23 Many submitted comments on the Draft EIR relating to the historic significance of the  
24 Bradshaw Trail. The Riverside County Planning Department underscored the impact the Project would  
25 have on the historically significant trail:

26 Highland Springs... supports a number of historical features... such as the Bradshaw Trail,  
27 that date back to the 1800s... Stating that these regional trails and/or historical features  
28 may cross or be located on adjacent properties which are under separate ownership does  
not reduce the significance of this resource or relieve the Draft EIR from mitigating or,  
preferably, avoiding impacts to said resources resulting from the Project.

1 (T182:10345.) Area residents and community groups also commented that the Project would  
2 negatively impact the Riverside County historical location of Highland Springs. (T28:2514; T28:2462-  
3 63.) The President of the Highland Springs Resort succinctly stated that "the EIR fails to evaluate the  
4 extent to which the Project would have a substantial adverse change in the significance of this historic  
5 resource." (T28:2495.)

6 The EIR acknowledges that the City does not know where the Bradshaw Trail is exactly, even  
7 though information about the trail is available in a number of books, but instead states that if it were  
8 found during the construction of the access road, which they expect it would be, then it would be a  
9 significant historic impact. (T28:1841.) In light of the significance of the Bradshaw Trail, the  
10 mitigation measures proposed by the EIR to mitigate impacts to the Trail from construction of the  
11 proposed access road, none of which require avoiding destruction of the trail, are inadequate to mitigate  
12 the impacts to the Trail below the level of significance. (T28:1845.) The proposed mitigation measures  
13 would essentially allow the demolition of an historic resource, meaning a significant and unmitigated  
14 impact would remain that was not disclosed in the EIR.

15 The preparers of the EIR should instead have attempted to ascertain the location of the  
16 Bradshaw Trail so that possible alternative roads that avoid the Trail could be analyzed and public  
17 input could be received as part of the environmental review process on how to best to protect this  
18 historic resource. Merely allowing "the archaeologist [to] determine appropriate actions" is not  
19 adequate. (T28:1845.) Additionally, by plowing a four lane highway through this historically  
20 significant site, the Project would prevent the County of Riverside from accomplishing their goal of  
21 reconnecting the Bradshaw Trail from Highland Springs to Gilman Ranch. (T28:2623.) The Project  
22 should have considered mitigation measures, such as alternative locations of the access road that would  
23 not prohibit the Bradshaw Trail from being reconnected.

24 The cultural resources report prepared for the EIR also acknowledges that the Highland Springs  
25 property is a designated archaeological site. (T169:9988.) The EIR did not follow the recommendation  
26 of its own expert regarding the protection of archaeological resources on the Highland Springs property  
27 and prepare a "new and updated field survey of all off-site improvement areas associated with the  
28 project...so that resources potentially within the impact area can be identified, evaluated and, if



1 determined significant, have impacts (adverse effects) mitigated through a treatment plan that may  
2 include preservation or data recovery.” (T169:10010-11.) Therefore, the potential impacts have not  
3 been adequately mitigated. In addition, the EIR improperly defers mitigation by requiring the  
4 recommended survey *after* project approval. (T28:2353-54.)

5 **E. The EIR Improperly Defers Mitigation for the Project’s Access and Traffic**

6 By failing to identify a possible Primary access highway for the Project, the City improperly  
7 deferred the study of the potential impacts of that access and the formulation of mitigation measures for  
8 it as well as the utilities buried under it. (*Sundstrom, supra*, 202 Cal.App.3d at 307-09.) Cherry  
9 Valley’s comment letter noted:

10 [t]he EIR’s traffic analysis makes it clear that the Project will have significant - and  
11 unmitigated impacts - on the community of Cherry Valley and the City of Beaumont. In  
12 particular, the level of service at intersections within Cherry Valley (Brookside and  
13 Beaumont Avenues and Cherry Valley Boulevard and Beaumont Avenue) will be below  
14 the acceptable levels of service as a consequence of the direct and cumulative impacts of  
this project. The EIR improperly fails to evaluate mitigation measures within the City of  
Banning that could mitigate these significant off site impacts at all locations outside of  
the City.

15 (T26:1242.) Moreover and as explained above (*see* Section IV, *infra*), the City certified the EIR  
16 knowing that SunCal could not obtain access along any of the three alignments discussed in the EIR,  
17 refused to commit to assisting SunCal in obtaining access, and then deferred CEQA analysis of an  
18 unspecified “Third Access Alternative” to the future. (T19:590; T28:2014.)

19 When future traffic congestion will result from the cumulative impact of several projects,  
20 cumulative traffic mitigation measures for a single project (that is one of the several  
21 projects) may be deemed sufficient if those measures are based on *a reasonable plan of  
actual mitigation* that the relevant agency commits itself to implementing. [Citations  
omitted]

22 (*Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173, 1187.) Here, without  
23 knowing *how* SunCal might ultimately obtain primary access to the Project, the City could not possibly  
24 *formulate* “a reasonable plan of actual mitigation” for that access highway, much less *commit* itself to  
25 implementing that plan. As recently stated by the court in *San Joaquin Raptor Rescue Center v. County  
26 of Merced, supra*, 149 Cal.App.4th at 670-71:

27 We recognize there are circumstances in which some aspects of mitigation may  
28 appropriately be deferred. “Deferral of the specifics of mitigation is permissible where

1 the local entity commits itself to mitigation and lists the alternatives to be considered,  
2 analyzed and possibly incorporated in the mitigation plan. . . On the other hand, an agency  
3 goes too far when it simply requires a project applicant to obtain a biological report and  
4 then comply with any recommendations that may be made in the report. . . If mitigation is  
feasible but impractical at the time of a general plan or zoning amendment, it is sufficient  
to articulate specific performance criteria and make further approvals contingent on  
finding a way to meet them.”

## 5 VII. INADEQUATE ANALYSIS OF ALTERNATIVES

6 The City had a duty under CEQA to evaluate a reasonable range of alternatives to this  
7 environmentally damaging leap-frog development. “One of [an EIR’s] major functions . . . is to ensure  
8 that *all reasonable alternatives* to proposed projects are thoroughly assessed by the responsible  
9 official.” (*Laurel Heights I, supra*, 47 Cal.3d at 400 [quoting *Wildlife Alive v. Chickering* (1976) 18  
10 Cal.3d 190, 197]; emphasis in original.) Further,

11 Under CEQA, the public agency bears the burden of *affirmatively demonstrating*  
12 that . . . the agency’s approval of the proposed project *followed meaningful consideration*  
of alternatives and mitigation measures.

13 (*Mountain Lion Foundation v. Fish and Game Commission* (1997) 16 Cal.4th 105, 134, emphasis  
14 added; accord *Village Laguna of Laguna Beach v. Board of Supervisors* (1982) 134 Cal.App.3d 1022,  
15 1035.) As the Supreme Court has said, while an EIR is “the heart of CEQA”, the “core of an EIR is the  
16 mitigation and alternatives sections.” (*Goleta II, supra*, 52 Cal.3d at 564.)

17 Determining the reasonableness of the range of alternatives in an EIR requires an evaluation of  
18 the circumstances of a project in light of the purpose of CEQA. (*Goleta II, supra*, 52 Cal.3d at 566.)

19 A legally adequate EIR must produce information sufficient to permit a reasonable choice  
20 of alternatives so far as environmental aspects are concerned. . . . It must contain  
21 sufficient detail to help ensure the integrity of the process of decisionmaking by  
precluding stubborn problems or serious criticism from being swept under the rug.

22 (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692 at 733, internal citations  
23 and quotation marks omitted.) While “An EIR need not consider every conceivable alternative to a  
24 project, ‘it must consider ‘a reasonable range of *potentially feasible alternatives*...’” (Guidelines §  
25 15126.6(a), emphasis added.) “The range of feasible alternatives [for an EIR] shall be selected and  
26 discussed in a manner to foster meaningful public participation and informed decision making.”  
27 (Guidelines § 15126.6(f).)

1 [T]he discussion of alternatives shall focus on alternatives to the project *or its location*  
2 which are capable of avoiding or substantially lessening any significant effects of the  
project, even if these alternatives would impede to some degree the attainment of the  
project objectives, or would be more costly.

3 (Guidelines § 15126.6(b), emphasis added.) Numerous other cases have set aside EIRs on the ground  
4 that they do not analyze a reasonable range of alternatives. (See *San Joaquin Raptor Wildlife Center v.*  
5 *Stanislaus* (1994) 27 Cal.App.4th at 608, 735-39; *Kings County Farm Bureau, supra*, 221 Cal.App.3d  
6 at 733; and *San Bernardino Valley Audubon Soc'y, Inc. v. County of San Bernardino* (1984) 155  
7 Cal.App.3d 738, 750-51.)

8 Here the range was blatantly unreasonable. Other than the various "access road" alternatives, the  
9 EIR only considered (1) the mandatory "no project" alternative; (2) one alternative still providing for  
10 1,500 residential units but on 355 acres rather than 492 acres; (3) a 1,193 residences with the same  
11 development footprint and off-site impacts as the Project; and (4) a 330 single-family home  
12 development with exclusive access from Bluff Street. (T28:1954.) Thus, there was only one  
13 alternative, other than the "no project" alternative that would significantly reduce impacts—the 330  
14 home development, which was rejected for improper reasons, as discussed below.

15 **A. The City Had a Duty to Adopt any Feasible**  
16 **Alternative that Would Reduce Adverse Impacts**

17 The EIR states that one of the issues to be resolved is "whether or how to mitigate significant  
18 impacts." (T28:1955.) This is an egregious misinterpretation of CEQA. CEQA prohibits approval of  
19 projects with adverse environmental impacts if there are feasible alternatives and mitigation measures.  
20 Alternatives that would lessen environmental impacts *must* be adopted if feasible. (Pub. Res. Code §§  
21 21002, 21181; Guidelines § 15021(a)(2).) The "policy of the state" reflected in CEQA is that projects  
22 with significant environmental impacts *may not* be approved "if there are feasible alternatives or  
23 feasible mitigation measures available which would substantially lessen the significant environmental  
24 effects..." (Pub. Res. Code § 21002; Guidelines § 15021(a)(2).)

25 As the California Supreme Court recently so powerfully stated:

26 CEQA does not authorize an agency to proceed with a project that will have significant,  
27 unmitigated effects on the environment, based simply on a weighing of those effects  
against the project's benefits, unless the measures necessary to mitigate those effects are  
28 *truly infeasible*. Such a rule, even were it not wholly inconsistent with the relevant statute  
(*id.*, § 21081, subd. (b)), would tend to displace the fundamental obligation of "[e]ach

1 public agency [to] mitigate or avoid the significant effects on the environment of projects  
that it carries out or approves whenever it is feasible to do so" (*id.*, § 21002.1, subd. (b)).

2 (*City of Marina v. Board of Trustees of the California State University* (2006) 39 Cal.4th 341, 368.)

3 The CEQA Guidelines require an agency to "disclose to the public the reasons why a  
4 governmental agency approved the project in the manner the agency chose if significant environmental  
5 effects are involved." (Guidelines § 15002(a)(4).) In order to implement this policy, the Guidelines  
6 specify that:

7 A public agency may approve a project even though the project would cause a significant  
8 effect on the environment *if* the agency makes a fully informed and *publicly disclosed*  
*decision* that:

9 (a) There is no feasible way to lessen or avoid the significant effect.

10 (Guidelines § 15043, emphasis added.) More specifically, the Guidelines provide:

11 If the lead agency concludes that no feasible alternative locations exist, it must disclose  
12 the reasons for this conclusion, and should include the reasons in the EIR.

13 (Guidelines § 15126.6(f)(2)(B).)

14 **B. The EIR Did Not Analyze a Reasonable Alternative—an Off-Site Development**

15 Petitioner Highland Springs specifically requested analysis of an off-site alternative.  
16 (T224:11379-11386.) In its May 15, 2006 letter commenting on the Draft EIR, Petitioner Cherry  
17 Valley requested analysis of an urban infill project, which would also be off-site. (T26:1248.) When  
18 the public offers reasonable alternatives to the Project, the City must provide a meaningful analysis of  
19 them. (*See* Pub. Res. Code § 21091(d)(2)(B); Guidelines § 15088(c); *Berkeley Jets, supra*, 91  
20 Cal.App.4th at 1367, 1371.) Instead, the EIR argues:

21 The identification of an off-site alternative is contingent upon the availability of a site  
22 capable of *supporting the project*. . . Based on the project characteristics, an alternative  
23 site would require nearly 1,500 contiguous acres of vacant land able to *support the*  
24 *proposed residential development*, circulation system, associated infrastructure, and  
25 dedication of 869 acres of open space. . . Based on the criteria established by the project  
characteristics, there is no other undeveloped, available area which could *accommodate*  
*the proposed project as designed* that is not already planned or entitled for another master  
planned community.

26 ((T28:2359, emphasis added.) This conclusion is based upon fallacious reasoning that only a location  
27 that can accommodate the planned Project should be considered. To the contrary, alternatively sized  
28 projects should have been considered for alternative locations. The existence of the 1994 Development

1 Agreement does not excuse that requirement.

2        Though a development agreement arguably could have committed the City to a 1,500 unit  
3 project at the SunCal site, as Banning Bench informed the City Council, this Development Agreement  
4 emphatically did not. It provides:

5        2.c. There is hereby reserved in the City its absolute discretion to take any action in  
6 conformance with, allowed by or required by CEQA, and the Landowners hereby waive  
any right to commence any legal action against City because of any action taken by it.

7        2.d. There is hereby reserved in the Landowners the right to refrain from proceeding  
8 with development of the Property, upon a determination by the Landowners, in the sole  
exercise of their discretion, that any environmental mitigation or conditions makes the  
9 project infeasible, or for any other reason.

10 (T37:4109; T211:11176.) It is likely these clauses were the reason why the Development Agreement  
11 was not challenged, even though it was done on the basis of a Mitigated Negative Declaration.

12 (T211:11176.) Thus, the existence of the Development Agreement does not restrict the reasonable  
13 range of alternatives to ones that could accommodate 1,500 units, or limit the alternatives to those at the  
14 SunCal property, especially in light of the fact that CEQA specifically contemplates consideration of  
15 off-site alternatives.

16        The CEQA Guidelines recognize that the requirement to consider an off-site alternative applies  
17 in all but extraordinary circumstances. Section 15126.6 (f)(2)(B), emphasis added, states:

18        (B) None feasible. If the lead agency concludes that no feasible alternative locations  
19 exist, it must disclose the reasons for this conclusion, and should include the reasons in  
20 the EIR. For example, *in some cases there may be no feasible alternative locations for a  
geothermal plant or mining project which must be in close proximity to natural  
resources at a given location.*

21 Further, numerous EIRs have been set aside for the failure to analyze off-site alternatives. In *Goleta I*,  
22 *supra*, 197 Cal.App.3d at 1180, the EIR was set aside when Santa Barbara County analyzed *four on-site*  
23 *alternatives but no off-site alternatives*. Similarly, the EIR for a new cemetery that impacted rare plants  
24 and archaeological resources in *San Bernardino Valley Audubon Society v. County of San Bernardino*,  
25 (1984) 155 Cal.App.3d 738, was set aside because it failed to analyze any alternative locations. (*Id.* at  
26 751.)

27        Essentially, the failure to consider off-site alternatives is fatal unless the site has been selected as  
28 a result of a extensive planning process (*Goleta II, supra*, 52 Cal.3d 553; Guidelines § 15126.6

1 (f)(2)(C)), or there is something unique about the site that makes it, and not other sites, appropriate for  
2 the project, such as occurs with a geothermal project or a mining project. (*San Joaquin Raptor Rescue*  
3 *Center, supra*, 149 Cal.App.4<sup>th</sup> at 672; Guidelines § 15126.6 (f)(2)(B).)

4 The City's failure to consider an off-site alternative is one reason why, in its Petition for Writ of  
5 Mandate, Banning Bench also alleged violations of the Planning and Zoning Law (Govt. Code § 65000  
6 *et seq.*). Approving the Project without *any* consideration given to an off-site location was contrary  
7 legislative policy:

8 The Legislature also recognizes that premature and unnecessary development of  
9 agricultural lands for urban uses continues to have adverse effects on the availability of  
10 those lands for food and fiber production and on the economy of the state. Furthermore,  
11 it is the policy of the state that development should be guided away from prime  
12 agricultural lands; therefore, in implementing this section, *local jurisdictions should*  
13 *encourage, to the maximum extent practicable, in filling existing urban areas.*

14 (Govt. Code § 65589.5(c), emphasis added.)

### 15 C. The EIR Should Have Considered A Large Lot Development

16 Another reason Banning Bench alleged violations of the Planning and Zoning Law concerned its  
17 request that the City consider the alternative of very large parcel homes as the County of Santa Barbara  
18 had done in the mid-1970s when it approved a residential development for Hollister Ranch in minimum  
19 100 acre parcels, a decision since lauded for its environmental sensitivity. (T249:11673.) The City  
20 ignored this request.

21 Section 65453(a) of the Planning and Zoning Law provides that, "[a] specific plan shall be  
22 prepared, adopted, and amended in the same manner as a general plan . . . ." In turn, section 65351  
23 mandates that a city "provide opportunities for the involvement of citizens . . . and other community  
24 groups, through public hearings" during the preparation or amendment of a general plan, and section  
25 65353 requires that the planning commission conduct "at least one public hearing before approving a  
26 recommendation on the adoption or amendment of a general plan." The clear intent of the Legislature  
27 in enacting these sections is for a city to conduct at least one public hearing on a specific plan before  
28 adopting it, and that the public hearing not be a "sham" hearing on a decision that is already a *fait*  
*accompli*. Rather a city must proffer the public the opportunity to meaningfully shape, modify, reject  
and/or condition some or all of the provisions of a specific plan. That the public holds this right is well-

1 established in California land use law. (*Horn v. County of Ventura* (1979) 24 Cal.3d 605, 612.)

2       However, the Record reveals that the City and its staff processed the Project approvals under the  
3 assumption that the Development Agreement *mandated* a 1,500 home development. (T281:12168;  
4 T281:12221.) They ignored efforts by Banning Bench representatives and others to apprise the City  
5 that, as noted above, Section 2 of the Development Agreement did not constrain the City to only  
6 approve a 1,500 home development; instead, it empowered the City to approve a significantly smaller  
7 and more environmentally sensitive project than the one SunCal wanted. (T211:11176-7.) By simply  
8 ignoring Section 2 of the Development Agreement, the City made the same mistake Huntington Park  
9 made in *Redevelopment Agency v. Norm's Slauson* (1985) 173 Cal.App.3d 1121: it caused public input  
10 at the mandatory public hearings to be a sham and a waste of time, since it conducted those hearings  
11 under the erroneous assumption that the City had contracted away its discretion to approve anything but  
12 1,500 residential lots. (*Id.* at 1127.)

13       Granted, the Hollister Ranch model of minimum 100 acre parcels may seem inordinately large.  
14 But there is no evidence in the record to show that a very large lot alternative is infeasible. An  
15 alternative cannot be rejected unless there is substantial evidence in the record supporting the  
16 conclusion of infeasibility. (*Preservation Action Council v. City of San Jose* (2006) 141 Cal.App.4th  
17 1336 [a city's finding that a smaller Lowes was infeasible set aside because not supported by anything  
18 in the record other than the preference of Lowes]; *Uphold Our Heritage v. Town of Woodside* (2007)  
19 147 Cal.App.4th 587 [a town's finding that it was infeasible to preserve historic home set aside as  
20 lacking substantial evidence to support finding].) Under CEQA, evidence of economic infeasibility  
21 must be specific and concrete. In *Goleta I, supra*, 197 Cal.App.3d at 1180-1183, a case involving a  
22 coastal hotel, the court refused to accept assertions that a particular alternative was economically  
23 infeasible simply because it would be more expensive or less profitable to the applicant. "In the  
24 absence of *comparative data and analysis*, no meaningful conclusions regarding the feasibility of the  
25 alternative could have been reached." (*Id.*, emphasis added.) The court added that:

26       The fact that an alternative may be more expensive or less profitable is not sufficient to  
27 show that the alternative is financially infeasible. What is required is evidence that the  
28 additional costs or lost profitability are *sufficiently severe* as to render it *impractical* to  
proceed with the project.

1 (*Id.*, emphasis added.)

2 **D. Project Objectives Are Improperly Used to Reject Alternatives**

3 The EIR claims that a second "primary" Project objective is implementation of the 1994  
4 Development Agreement. (T28:1953; T28:2356.) While this is unacceptable for the reasons set forth  
5 above, alternatives need not meet all project alternatives to be considered feasible. (*Mira Mar Mobile*  
6 *Community v. City of Oceanside* (2004) 119 Cal.App.4th 477; Guidelines § 15126.6(b).) But each  
7 housing alternative (as opposed to access alternative) is rejected for not meeting the objective of  
8 implementing the Development Agreement, except for the 1,500 unit development on 355 acres.  
9 (T28:1922, 2373, 2380.) While it is true that the "no project" alternative would not meet any of the  
10 Project objectives, a reduced density alternative is reasonable and cannot be rejected simply because it  
11 does not meet the stated objective of achieving 1,500 units. As previously stated, the Development  
12 Agreement preserved the City's discretion to require a much smaller project, or indeed, to reject it if  
13 there are adverse impacts and there is a feasible alternative, whether it be in Banning or not.  
14 Compliance with the Development Agreement's goal of providing 1,500 units should thus not be a  
15 Project objective.

16 Furthermore, the objectives for a project cannot be so narrowly defined so that they essentially  
17 preordain the selection of the agency's proposed alternative. Case law under CEQA's federal  
18 equivalent, the National Environmental Policy Act ("NEPA," 42 U.S.C. § 4331 *et seq.*) can be helpful  
19 in interpreting CEQA. Early CEQA cases relied heavily on NEPA case law. (*No Oil, Inc. v. City of Los*  
20 *Angeles* (1974) 13 Cal.3d 68, 80; *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247,  
21 261.) "NEPA cases continue to play an important role in adjudication of CEQA cases, especially when  
22 a concept developed in NEPA decisions has not yet been applied to CEQA cases." (*Del Mar Terrace*  
23 *Conservancy, Inc. v. City Council* (1992) 10 Cal.App.4th 712, 732.)

24 The position of the Seventh Circuit in *Simmons v. U.S. Army Corps of Eng'rs* (7th Cir. 1997)  
25 120 F.3d 664, 669 is therefore relevant to this case:

26 the 'purpose' of a project is a slippery concept, susceptible of no hard-and-fast  
27 definitions. One obvious way for an agency to slip past the strictures of NEPA is to  
28 contrive a purpose so slender as to define competing 'reasonable alternatives' out of  
consideration (and even out of existence). The federal courts cannot condone an  
agency's frustration of Congressional will.



1 The District of Columbia Circuit Court of Appeal similarly said:

2 An agency may not define the objectives of its action in terms so unreasonably narrow  
3 that only one alternative from among the environmentally benign ones in the agency's  
power would accomplish the goals of the agency's action.

4 (*Citizens Against Burlington v. Busy* (D.C. Cir. 1991) 938 F.2d 190, 196.) Thus, the rejection of a less  
5 intense development based upon an artificial project objective was improper.

6 **E. The 330 Home Development Was Improperly Rejected**

7 The 330 home development alternative, with access from Bluff Street, is identified in the EIR as  
8 the environmentally superior alternative. (T28:1922.) As noted previously, the City rejected it in part  
9 because it does not comply with the objective of the Development Agreement, but this is not a  
10 legitimate project objective because the Development Agreement preserved the City's discretion to  
11 reject or require modification of the Project. In addition, the EIR concluded that the reduced density  
12 alternative did not "contribute to regional housing needs to the same extent as the proposed project due  
13 to the reduction in the number of units (Objective 4)." (T28:2373.) As Highland Springs explained in  
14 its letter to the City on September 19, 2006, this too is not a proper ground for rejecting the alternative,  
15 for several reasons.

16 First, objective 4 is "Contribute to regional housing needs as projected by the Southern California  
17 Association of Governments [SCAG]." (T28:1953.) But the EIR itself admits that "the [Project] would  
18 not be under construction within the timeframe covered by the RHNA [Regional Housing Needs  
19 Assessment]." (T28:1785.) Further, the Regional Housing Needs Assessment focuses on the provision  
20 of affordable housing, which would not be provided by this Project. Also, the Regional Housing Needs  
21 Assessment of 2000 projected a need for a total of 1,780 new homes in Banning (see  
22 <http://api.ucla.edu/Rhna/RegionalHousingNeedsAssessment/FinalNumbers/Frame.htm>), and other  
23 projects that have been approved recently by the City more than meet these needs. (T211:11178;  
24 T224:11382, 87.) The Deutsch project alone will likely provide over 5,000 new homes in the City.  
25 (T19:553.) Moreover, SCAG does not compel construction of projects in particular locations, and has  
26 many other policies that disfavor construction in environmentally sensitive areas.  
27 ([http://www.scag.ca.gov/rcp/pdf/Table\\_of\\_Habitat\\_and\\_Open\\_Space\\_Policies.pdf](http://www.scag.ca.gov/rcp/pdf/Table_of_Habitat_and_Open_Space_Policies.pdf).) For example,  
28 SCAG states:

1 California's flora and fauna are unique in the world... Southern California, in turn,  
2 contains 50 percent of California's habitat types, has 50 percent of the 108 California  
3 threatened and endangered species, and 320 species of plants and animals that are  
4 candidates for listing. The combination of uniqueness and threat makes California one  
5 of the 18 ecological "hot spots" of the world (E.O. Wilson, Diversity of Life, 1992, p  
6 262), the only one that is in the United States.

7 \* \* \*

8 While the basic concern is about species, planning and management attention for species  
9 protection is shifting across the country to the ecosystem (i.e., habitat) level. This  
10 approach is perceived to be more effective; it better handles the known and still poorly-  
11 understood dynamics of all species in relationship with each other and their physical  
12 environments; it reduces or eliminates the need for piecemeal planning and streamlines  
13 project permitting processes; and, it is more conducive to bringing all land use  
14 considerations and jurisdictions into the planning and management pictures.

15 (T211:11178-11179.) For that reason, SCAG has a policy to "Encourage patterns of urban  
16 development and land use, which reduce costs on infrastructure construction and make better use of  
17 existing facilities." Similarly, SCAG has a policy to "Preserve rural, agricultural, recreational, and  
18 environmentally sensitive areas." (T211:11179.) In any case, an environmentally superior alternative  
19 must be adopted, unless it is infeasible "even if [it] would impede to some degree the attainment of the  
20 Project objectives, or would be more costly." (Guidelines § 15126.6 (b).) Because the record does not  
21 provide substantial evidence that the 330 unit project is infeasible, it was not properly rejected.

22 The EIR fails because it does not analyze a reasonable range of alternatives, even when analysis  
23 of specific alternatives is requested, and rejects the alternatives it does consider on the grounds that they  
24 do not provide for the units contemplated by the Development Agreement.

#### 25 **VIII. THE CITY'S STATEMENT OF OVERRIDING**

#### 26 **CONSIDERATIONS IS LEGALLY DEFECTIVE**

27 Where the lead agency makes a finding that mitigation measures or alternatives are infeasible or  
28 otherwise allows a project with unmitigated significant impacts to proceed, it also must prepare a  
separate written Statement of Overriding Considerations setting forth the specific reasons in support of  
its action. (Pub. Res. Code § 21081(b); Guidelines § 15093.) Like other CEQA findings, the Statement  
of Overriding Considerations must be supported by substantial evidence in the record. (*Sierra Club v.*  
*Contra Costa County* (1992) 10 Cal.App.4th 1212, 1223.)

1 In this case, the City rejected all of the lower density alternatives for the Project, including  
2 several that would substantially reduce the Project's significant adverse impacts, based on a Statement  
3 of Overriding Considerations that listed seven purported "benefits" of the Project. (T227:11560-  
4 11561.) However, the supposed "benefits" listed in the Statement do not, in fact, justify the rejection of  
5 lower density alternatives or justify the environmental damage caused by the Project. Rather, the  
6 statement merely lists some of the mitigation measures needed for the Project *as proposed*, and claims  
7 that these are "benefits." This approach manifestly fails to comply with CEQA's mandatory procedures  
8 for a Statement of Overriding Considerations. For instance, the City makes the tautological claim that  
9 one of the benefits of the project is that it will provide "infrastructure improvements including on-site  
10 roadways, bridges, stormwater and drainage facilities, and off-site roadway improvements."  
11 (T227:11561.) Of course the only reason there is a need for these "infrastructure improvements" is  
12 because of the Project itself.

13 The City first attempts to justify the unmitigated environmental damage caused by the Project  
14 based on the assertion that the Project will provide "Housing Opportunities for City Residents and  
15 Southern California Region." (T227:11560.) The City notes that the Project will provide  
16 approximately 1,500 homes with varying lot sizes. Completely absent is any evidence of a demand for  
17 this housing, nor is there any hint from the available data that the City, or region, will face a shortage of  
18 appropriate new housing over the next few decades. In fact, the EIR states that in the year 2000 the  
19 City had 9,724 households, and that by 2025 the City is projected to need housing for an additional  
20 7,647 households. (T28:2289.) However, as of December 2005 (nearly a year before the City approved  
21 the Project), there were already a total of 13,284 additional dwelling units (excluding the Project) that  
22 were already in, or through, the approval process. (T2:40, 42.) Thus, the City failed to support its  
23 decision to go forward with the Project as proposed by the developers in the face of unavoidable  
24 significant environmental impacts with any - let alone substantial - evidence in the record. This error  
25 alone constitutes prejudicial abuse of discretion. (*See Goleta I, supra*, 197 Cal.App.3d at 1180 [scaled  
26 down project alternative could not be rejected as infeasible without specific information in record  
27 showing that scaled down project was economically or otherwise infeasible].)

28

1 Second, the City asserts that the Project will supply "recreational facilities," namely the 81.2  
2 acres of public-owned parks and recreation areas. (T227:11560.) Once again, this is little more than a  
3 characteristic of the Project, and there is no evidence, let alone substantial evidence, that these benefits  
4 would not be available through some other development of the property at issue.

5 The third and fourth purported project benefits that the City asserts are that the Project "provides  
6 for the preservation of 869 acres of open space" and will preserve "Criteria Cell # 227 in the Western  
7 Riverside Multiple Species Habitat Conservation Plan." (T227:11560.) Again, these are simply Project  
8 characteristics, and there is no evidence in the record that such "benefits" would not be available  
9 through some other development of the property. Indeed, the Project actually reduces the amount of  
10 habitat and open space.

11 The fifth purported benefit of the Project that justifies the unmitigated significant environmental  
12 impacts that it will cause is the construction of a "secondary highway." (T227:11561.) Of course, there  
13 is no evidence that this secondary highway would be necessary in the absence of the Project – which  
14 places 1,500 homes in an isolated and wild-fire prone area – nor is there any evidence that such a  
15 project feature could be incorporated into any other development of the subject property.

16 The sixth purported project benefit is "regional trail connectivity." (T227:11561.) Once again,  
17 this is simply a feature of the Project, and there is no evidence that this design feature could not be a  
18 part of any other development of the site.

19 The seventh purported project benefit is that the Project will provide unspecified "revenue" to  
20 the City. (T227:11531.) However, the record includes no economic analysis setting forth the net  
21 financial benefit to the City of the Project, the need for such revenue, and that other development  
22 scenarios would not generate comparable net revenue to the City.

23 In short, the purported "benefits" are little more than project characteristics, and the City makes  
24 absolutely no attempt to include within the record any supporting evidence or analysis that would  
25 justify the conclusion that such routine development conditions and extractions can or should override  
26 the unmitigated significant adverse resource effects of the Project. In the absence of such evidence, the  
27 City's unsupported, circular logic should not prevail. Otherwise, the requirement to "override" a  
28 project's significant adverse impacts would be rendered meaningless, and the limited exception set

1 forth in CEQA would swallow the general rule that "no public agency shall approve or carry out a  
2 project...which identifies one or more significant effects on the environment." (Pub. Res. Code  
3 § 21081.)

#### 4 IX. CONCLUSION

5 In approving the Black Bench Project, the City violated CEQA in numerous ways. The City  
6 approved the Project without a primary access road; thus the location of the road, should it ultimately  
7 be built, and the Project's utilities, which are proposed to be built under the road, are unknown.  
8 Moreover, none of the routes that were studied in the EIR may actually be used. Therefore, in  
9 approving the Project without a primary access road, the City segmented the Project and violated  
10 CEQA's requirement for an accurate and stable project description.

11 The EIR's analysis of many of the impacts of the Project is grossly inadequate. The analysis is  
12 predicated upon an improper baseline, comparing impacts with the development allowed by the General  
13 Plan, rather than comparing it with the existing environment, as is required by CEQA. The analysis of  
14 the impacts for the Project contained in the EIR is exceedingly inadequate, failing to consider many  
15 impacts, such as the Project's greenhouse gas emissions, and improperly glossing over others, including  
16 water supply, air quality, wildfire hazards, biological, traffic, land use and aesthetics, historical, water  
17 quality, and noise impacts. Like so many other impacts, the cumulative and growth-inducing impacts  
18 of the Project are denied, even though the Record shows they will be real and significant.

19 For those impacts the EIR does identify, it fails to provide adequate mitigation. The range of  
20 alternatives to the Project are not reasonable, as the EIR refuses to consider an off-site alternative, or a  
21 significantly less dense Project, claiming that such alternatives would be inconsistent with the project  
22 envisioned in the Development Agreement. Similarly, the two reduced-size alternatives that were  
23 considered are rejected as infeasible without substantial evidence to support that conclusion. Finally,  
24 the statement of overriding considerations that was prepared because the EIR recognizes the Project  
25 will have a significant unmitigated air quality impact, fails to meet the requirements of CEQA. There  
26 are feasible mitigation measures and alternatives that would reduce the impacts of the Project, and the  
27 statement of overriding considerations failed to identify any real benefits of the project that would  
28 justify the rejection of environmentally preferable alternatives.


1 RESPECTFULLY SUBMITTED: July 3, 2007

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3 CHATTEN-BROWN & CARSTENS

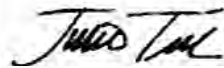
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