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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF RIVERSIDE

HIGHLAND SPRINGS CONFERENCE AND TRAINING CENTER,

Petitioner,

v.

CITY OF BANNING,

Respondent.

Case No.: RIC 460950

RESPONDENTS' AND REAL PARTY IN INTEREST'S JOINT OPPOSITION TO PETITIONERS' COMBINED OPENING BRIEF

Date: November 30, 2007
Time: 1:30 pm
Dept.: 62 (Riverside Hall of Justice)
Honorable Thomas Cahraman

Action Filed: November 21, 2006

CENTER FOR BIOLOGICAL DIVERSITY, Petitioner, v. CITY OF BANNING, et al. Respondents.	**Case No.: RIC 460967** Action Filed: November 21, 2006
CHERRY VALLEY PASS ACRES AND NEIGHBORS, et al., Petitioners, v. CITY OF BANNING, Respondent.	**Case No.: RIC 461035** Action Filed: November 22, 2006
BANNING BENCH COMMUNITY OF INTEREST ASSOCIATION, INC., Petitioner and Plaintiff, v. CITY OF BANNING, et al. Respondents.	**Case No.: RIC 461069** Action Filed: November 22, 2006
SCC/BLACK BENCH, LLC, et al. Real Parties in Interest	

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES
(continued)

INDEX OF EXHIBITS

Exhibit

I. OPENING STATEMENT OF THE CASE

After fifteen years of long term planning and analysis, including numerous public hearings, the City of Banning ("City") approved the 1,453 unit residential project ("Project") proposed by real party SCC/Black Bench, LLC ("SunCal") on a flat mesa (the "bench" or "Black Bench") within the existing boundaries of the City, adjacent to other planned and developing residential communities. The Project Site consists of 1488 acres owned by SunCal located in part within the boundaries of the City and in part within unincorporated land in the County of Riverside ("County"). Of that total acreage, only 492 acres within the City boundaries are proposed to be developed with housing, an elementary school and local parks. The remaining portion of the Project Site (which is both within the City and the unincorporated County), is to remain as open space, and will include recreational opportunities for residents of the City and neighboring areas. The mesa has historically been used for cattle grazing.

Petitioners, each with their own agenda aimed at stopping the Project altogether, make numerous unfounded allegations, such as scant or missing environmental analyses. However, as the record demonstrates, the Project has been carefully planned to respect the density of the surrounding areas while minimizing impacts on the environment and allowing orderly growth of the City. The Project's Environmental Impact Report ("EIR") prepared by the City examined dozens of different impact areas in great detail based on numerous technical reports, and in the end, the City and SunCal were able to reduce almost all of the Project's potential impacts to insignificant levels through the imposition of state of the art project design features and mitigation measures.[1]

Seeking to stop any planned development near their property and to advance a broader political agenda, Petitioners make a host of scattershot arguments based on distortions of the record. For example:

- Petitioners claim that the public hearing held by the City Council was a "sham," with the result being "predetermined." That claim is roundly contradicted by the Project's two-year

[1] The only impacts that could not be mitigated to insignificant levels concern air quality (given existing conditions in this Air Basin) and traffic in jurisdictions beyond the City (simply because the Project's EIR conservatively assumed that those other jurisdictions may not proceed to implement the feasible mitigation measures identified in the EIR).

entitlement process, and the seven public hearings, including the six-hour final hearing held by the City Council. If anything, it was Petitioners who attempted to derail the lengthy proceedings by submitting a raft of last minute comment letters a week before the scheduled City Council hearing on the Project, including comments from one of the Petitioners who had never appeared before in the two-year entitlement process.

► Petitioners wish the Court to believe that the Project will eviscerate ridgelines and mountain tops. Yet, they utterly fail to tell the Court that the Project will be sited on the flat mesa or bench area in between the surrounding hills. They also fail to note that the Project will be developed on only one-third of the acreage owned by SunCal, thereby preserving 869 acres of surrounding land of higher ecological value as open space.

► Petitioners label the Project as "leapfrog" development, but, in reality, the Project is part and parcel of the City's long-term planning, which has provided for several other major planned communities immediately south of the Project. In fact, Petitioner Highland Springs Resort, while decrying the loss of wilderness with respect to the Project, fails to disclose that its property is the subject of a specific plan dating back to 1973 permitting residential and resort development and that substantial parts of this plan have been built out. Part of that build-out is the Resort itself, to which Petitioners claim "thousands of visitors" arrive by car each year.

► Petitioners try to paint a picture of the Project taking all endangered species in its path. The truth is this – the Project causes no harm to any such species, and the appropriate wildlife resource agencies have determined that the Project more than satisfies the requirements of the habitat conservation plan previously adopted for this region.

► Another one of Petitioners' scare tactics is their claim of a heightened risk of wildfires at the Project site and assertion that fire officials for this area share Petitioners' belief. Petitioners, however, ignore the plethora of mitigation measures and project design features – including siting the majority of development on the portion of the site designated as a "Low Wildfire Zone" that will fully mitigate all such risks, and fail to inform the Court that fire officials testified at the final Council hearing in support of the Project.

CEQA's goals are twofold: (1) providing information to decision-makers and the public

concerning the environmental effects of the proposed project and (2) identifying ways that environmental effects can be avoided or significantly reduced by requiring alternatives or mitigation measures where feasible. As demonstrated in this joint brief, the City and SunCal have fully met these requirements of CEQA and have designed an environmentally sensitive project fully consistent with City and regional land use, water, transportation and habitat preservation policies. Accordingly, this Court should deny all of Petitioners' claims and permit this long-planned and well conceived Project to proceed.

II. THE PARTIES

Petitioner Highland Springs Conference and Training Center owns the Highland Springs Resort, which is located to the southeast of the Project site. (An area map showing the Project site relative to the Petitioners' properties and communities is provided at Ex. A hereto and is attached as Ex. 11 to the City's and SunCal's Request to Take Judicial Notice ("RJN"), submitted herewith.) The developed portion of the Resort's property lies more than half a mile away from the portion of the Project to be developed, and the Resort is substantially lower in elevation than the intervening hills and ridgelines surrounding the Project.

Petitioner Banning Bench Community of Interest Association, Inc. ("Banning Bench Community"), is a group of homeowners residing in unincorporated County territory that lies to the east of the Project beyond another ridgeline.

The Cherry Valley Pass Acres and Neighbors and Cherry Valley Environmental Planning Group ("Cherry Valley Petitioners") are comprised mainly of homeowners in Cherry Valley, which lies roughly two miles west of the Project in unincorporated Riverside County.[2]

Finally, Petitioner Center for Biological Diversity appeared during the administrative process for the first time one week prior to the scheduled City Council hearing on the Project and its Final EIR, apparently to raise the issue of global warming, an issue that CBD has pressed in different CEQA challenges filed throughout the State.

Respondent City acted as the lead agency on the EIR for the Project, as well as the land use

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[2] The Cherry Valley Petitioners have recently filed CEQA lawsuits against several other development projects in this region, seeking the invalidation of EIRs and project entitlements.

entitlements granted for the Project, which include an amendment to the City's General Plan concerning the specific location of the primary access road, a specific plan that details all elements of the Project, and a tentative tract map. Real Party SunCal has owned the Project Site for a number of years, and seeks to develop the Project pursuant to those entitlements.

III. THE PROJECT'S CAREFUL ENVIRONMENTAL DESIGN RESPECTED THE UNIQUE CHARACTERISTICS OF THE SITE, WHILE ALSO ACHIEVING THE KEY OBJECTIVES OF THE LOCAL AND REGIONAL PLANS THAT PRECEDED THE CITY'S APPROVAL OF THE PROJECT

It is well recognized that California has the most rigorous and comprehensive planning and environmental laws in the country. In this case, those laws achieved their core objective – a project that preserves all significant environmental resources while providing much needed benefits to the local community. That goal was secured through a lengthy environmental review and entitlement process, which resulted in the collaborative formulation of a comprehensive set of mitigation measures and conditions ensuring that significant environmental impacts will be avoided. Thus, the Project will be fully compatible with surrounding uses in this area, both existing uses as well as new development previously approved by the City as part of its long term planning efforts that have been ongoing for well over 15 years. Land use compatibility and protection of valuable environmental resources is enhanced by the Project's full compliance with the regional plans recently adopted by other public agencies charged with ensuring sufficient water supply, preservation of biological resources, and adequate transportation infrastructure. Such an integrated approach to the planning for the Project and this region belies Petitioners' unfounded assertions of "leapfrog" development and incomplete environmental review.

A. The Plan And Design For The Project

Keenly aware of its obligation to responsibly plan for the explosive growth anticipated for the Riverside County area, the City began planning for development in this area of the City as early as 1992. As part of that effort, the City and the then-owner of the Project site entered into an "Annexation Agreement," which allowed the City to seek approval from the Riverside County Local

Agency Formation Commission ("LAFCO") for annexation of the Project area. T28:2063.[3] LAFCO subsequently approved annexation of the easterly portion of the Project, consisting of approximately 1,000 acres, into the City. Id. The remainder of the Project lies within the County's jurisdiction. Id. In conjunction with this annexation, the City zoned the portion of the Project within its jurisdiction as "VLDR," which allows a maximum of two dwelling units per acre. T28:2064. That density is generally consistent with the zoning for that portion of the Project located in the County, which allows up to one dwelling units per acre. See id. As described in greater detail below, the Project is consistent with these densities.

With the easterly portion of the Project now annexed into the City, the City entered into a Development Agreement with the Property owner in 1994. T37:4105-4119. The Development Agreement provides that the site would be re-designated as a "Specific Plan Overlay Development Zone," which requires the preparation of a specific plan for any development on the site. T37:4107. The Development Agreement further requires at least 500 acres of open space, a diverse mix of recreational uses, and all necessary public facilities and infrastructure. T37:4107, 4109.

The Development Agreement's standards were satisfied and exceeded by the Project's specific plan that SunCal formulated for the Project. That accomplishment was achieved through, among other ways, the deliberate siting of the development. As can be seen in aerial photographs (refer to Ex. B hereto), the easterly portion of the Project lies on a "mesa" or a natural "bench." T19:557. This area consists of a "wide and flat-bottomed" canyon surrounded by mountain ridges. Thus, this area of the Project lies on the "relatively flat" bottom of a bowl. Id.; T28: 2094.

To avoid the environmental consequences associated with developing on or into the mountain tops and ridges, SunCal designed the Project so the residential uses are limited to the bench area. T28:2094. As shown in the Conceptual Land Use Plan (Ex. C hereto), the Project's 17 residential "Planning Areas" are clustered on the eastern portion of the site dominated by this natural bench. T18:543. By doing so, the residential uses will be sited on only 492 acres of the 1,500 acre Project site. Id. In turn, this design allows for the permanent dedication of 869 acres of open spaces.

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[3] The citations in this brief to the administrative record will be by reference to the number of the tab of the record, followed by the page number(s).

T28:2020. That substantial amount of open space far exceeds the 500 acres required under the 1994 Development Agreement. T37:4107.

By siting the residential development in this manner, two other potential impacts are avoided. First, the Project completely avoids -- and thereby preserves -- the only biological "Criteria Cell" on the Project site designated under the region's previously approved habitat conservation plan. T28:2004. Second, the Project's design avoids placing any residential uses in a "Moderate to High Wildfire Zone." T28:2005. Instead, as confirmed by the County's "Wildfire Susceptibility Map," that the eastern portion of the Project Site, where the residential uses will be located, lies in a "Low Wildfire Zone." Id.

Designing the Project to avoid environmental impacts also lies at the heart of the "clustering" concept embodied in the Project. Under this concept, residential neighborhoods with higher densities and smaller lots are located near the center of the community, while lower density neighborhoods with larger lots are situated along the community's edges. T28:2014. Overall, the density of the Project's developed portion (492 acres) is approximately three units per acre, while the density based on the entire Project Site (1,500 acres) is one unit per acre. In addition to providing a range of housing opportunities for City residents, this clustering and transitioning of residences preserves vast amounts of open space and creates buffers for adjacent off-site uses. Id. Clustering on the most suitable topographic areas also allows SunCal to preserve the natural hillsides and major water courses, and increases walkability to schools and parks within the development.

Avoiding impacts to its surrounding environment was not the only objective of the Project. The Project was also designed to facilitate the residents' recreational use and appreciation of the environment. For example, 21.5 acres of parks will be developed, including a 6.8 acre park, a 59.7 acre "nature" park located in Project's center, and seven pocket parks. T28:2020-22. A diverse trail system will be established, providing connections to the nearby County park (Bogart Park) and the San Bernardino National Forest. T28:2018-20. Finally, all major wildlife corridors will be preserved. T28:2070-71.

These design features are detailed in a comprehensive Specific Plan. In that 215-page document, all aspects necessary to develop the Project in the environmentally sensitive manner that

SunCal promised are addressed. See generally T19:524-739. The Plan details all authorized uses (residential, school, recreation), open space, vehicular and non-vehicular circulation, drainage, water and sewer service, grading, construction phasing, public facilities and design guidelines. T19:527-530.

One final aspect of the Project's planning process must be noted, and that concerns access to the Project. As further detailed in Section X(A), the City's General Plan has, for the past 20 years, called for the construction of an access road from Highland Springs Avenue, north to the Project site. T32:3729. However, because that road alignment would be far closer to the Resort's existing complex, SunCal met with Resort representatives early in the entitlement process to develop alternative routes that would not significantly impact the Resort. Incorporating specific input from the Resort's representatives, SunCal examined four alternative road alignments farther east of the Resort area, and examined a total of 11 alternative road alignments in the EIR, as shown in Ex. D hereto. T28:2497-99.

B. Years Of Responsible Planning By The City

The Project's comprehensive planning and design did not occur in isolation. Instead, the Project is part and parcel of the City's integrated planning for this area. The City accomplished such planning through its General Plan as well as the formulation of "specific plans" for a variety of complementary developments aimed at accommodating the growth first projected in the City's General Plan of 1986.[4] The City experienced the significant population growth predicted in its plans between 1990 and 2000 when the City's residential population increased by 14.2% and the number of households climbed by 22.6%. T28:2289.

Indeed, forward planning for the development of urban residential uses in the vicinity of Banning is not unique to the Project or the City. Even before the City undertook any specific plans for this area, the County approved a specific plan for the Highland Springs Resort – one of the

[4] As recognized by State law in Government Code sections 65450 et seq., and as expressed in the City's General Plan, specific plans "are important tools in the coordinated development of larger parcels for projects which propose a variety of land uses. They [specific plans] shall include design standards and guidelines, infrastructure plans and implementation measures to insure that coordinated, orderly development of a project." T32:3679.

Petitioners in this lawsuit. In 1973, the County approved the "Highland Springs Specific Plan," which authorized the Resort's development of 1,630 residential units, a nine-hole private golf course and club, and a visitor-serving conference and banquet facility. T28:2058. The development site covered by this specific plan lies immediately south of the Project, as shown in Ex. E hereto. T279:12001. In fact, the Resort has only developed slightly more than half of the density authorized by this specific plan, and the approved specific plan authorizes residential development on the land the Resort now claims must remain as "open space" and not be touched by the Project's access road.

With the County having initiated the specific plan process for the region, the City continued that effort to keep up with the County's increasing housing demands. Accordingly, the City and neighboring cities approved the following nearby master planned communities (depicted in part in Ex. B hereto):

- In 1985, the City approved the Deutsch Banning Planned Community Specific Plan, which will be a mixed-use community on a 1,552 acre site located southeast of the Resort. T28:2058, 2062. The Deutsch Specific Plan authorizes a variety of residential uses, 25 acres of commercial uses, 75 acres of parks, 3 elementary schools, and a 193-acre golf course. Residential densities range from 2.5 dwelling units per acre ("du/ac") to 20 du/ac, with a maximum buildout of 5,400 dwelling units. Id.
- In 2004, the City of Beaumont approved development of a 1,162 acre site covered by the Sundance Specific Plan. T28:2063. That Plan authorizes 4,716 residential units. Id.
- In 2005, the City approved the Banning Bench Specific Plan, which will be a master plan community sited on 1,537 acres to the southeast of the Project site. T28:2058. This plan authorizes the development of 944 residential units, a golf course, parks and open space, ten acres of commercial use, and six acres of community-serving uses (e.g., police and fire station). T28:2063.

The City's planning efforts continued with its adoption of an updated General Plan in 2006. T28:2063. In connection with this process, the City prepared a full EIR, which analyzed all of the potential environmental impacts associated with the update. Pursuant to that update, total population

at City buildout is projected to be 80,226, while the City's population in 2004-2005 is 27,192. T32:3685, T28:2289. To accommodate that growth, the General Plan update expressly encourages master planned communities, as well as specific plans that provide the development details for such communities. Based on the City's experience, that master plan "process has resulted in a strong sense in the City of a high quality, livable community." T32:3686. The update further recognizes that such new quality housing opportunities can be created while preserving open space by employing different planning techniques, such as "density transfers" for developments sited on topographically suitable areas in order to preserve adjacent hillside areas. T32:3687. As discussed above, such planning techniques are evident in the Black Bench Project, as reflected in the updated General Plan. T32:4084.

C. Regional Plans Complement The City's Careful Planning Efforts

Growth such as that experienced in the County and the City does not occur properly without significant planning. Not only has the City been so engaged, but it has worked closely with regional governments to plan for water, habitat preservation, and transportation infrastructure to successfully accommodate such growth.

Briefly, with respect to water,[5] local water agencies and other major water users came together and developed a water management plan for the major groundwater basin in this area, the Beaumont Basin. That plan received court approval in 2004, and is overseen by a court-appointed Watermaster. These same water agencies then worked with the California Department of Water Resources to develop plans to bring State Project Water to this region. The first phase of that infrastructure project has been built, and the second (and final) phase is well into the planning, funding and permitting stages. Finally, the City developed its own "Urban Water Management Plan" in late 2005, which addressed additional water sources for the City's population.

With respect to transportation, local and regional agencies have developed a number of transportation improvement programs. For example, the County established the Western Riverside County Transportation Uniform Mitigation Fee Program ("TUMF"), which collects fees from

[5] Greater details concerning these regional plans involving water supply, traffic and biological resources are provided in Sections VI, VII and X of this brief.

participating cities (including Banning), which, in turn, collect those fees from developers prior to the issuance of building permits. Further, the Southern California Association of Governments ("SCAG") prepares the comprehensive, long range transportation plan for the six-county region, including Riverside County. T28:2188. This plan, referred to as Regional Transportation Plan ("RTP"), identifies additional area-wide traffic improvement projects. T28:2189. In addition, the County voters recently re-authorized "Measure A," which is a half-cent sales tax program that provides funding for a variety of transportation projects. T28:2190. Finally, the City itself collects Traffic Control Facilities fees. T28:2187. All of these funding programs will facilitate the development of traffic improvement projects in the vicinity of the Project.

Finally, as for biological resources, the Multiple Species Habitat Conservation Plan ("MSHCP") represents a "comprehensive subregional approach for enhancing and maintaining biological diversity and ecosystem processes, while, at the same time, allowing for future economic growth." T28:2144. Authorized by multiple federal statutes, the MSHCP "provides a framework for integrated, rather than piecemeal, open space and habitat conservation within Western Riverside County, thereby creating a sustainable reserve system to protect endangered and threatened species and the habitat on which they rely." Id. The habitat plan, designed to protect 146 species and conserve over 500,000 acres, was approved by the County Board of Supervisors in June 2003 and by the U.S. Fish & Wildlife Service in June 2004. T28:2145. Areas covered by the habitat plan include "Criteria Areas" and "cells" for which biological issues and target acreages have been specified. Id. Development projects that are sited on or near a criteria cell must apply to various regulatory agencies for a determination of consistency with the MSHCP. RJN Ex. 7 at Vol. 1-6.1.1.

IV. THE MULTI-YEAR PERMITTING AND ENVIRONMENTAL REVIEW PROCESS FOR THE PROJECT INVOLVED NUMEROUS EXPERT STUDIES, EXTENSIVE OPPORTUNITIES FOR PUBLIC INPUT (INCLUDING SEVEN PUBLIC HEARINGS) – AND A LAST MINUTE CHANGE IN TACTICS BY PETITIONERS

Building on the elaborate plans for the Project and this region, a comprehensive permitting and environmental review process was also established. One of the hallmarks of that process was a high level of public participation. In the ensuing two years after SunCal submitted its entitlement application in September 2004, four City Planning Commission hearings, including a public tour of

the Project site, and three City Council hearings, including a hearing on the Project's Water Supply Assessment, were held to discuss the Project. In addition to those publicly noticed hearings, SunCal held numerous meetings with community groups. Indeed, that outreach effort was so extensive that both City Councilmembers and members of the public, including the homeowner closest to the Project Site, publicly praised SunCal for that undertaking. T281:12231-32; 12254-56; 12361 and 12390.

The Project's environmental review process conducted under CEQA was equally extensive. Despite Petitioners' vain attempt to characterize the Project's EIR as replete with incomplete and scant environmental analysis, the EIR analyzed a wide range of environmental issues. See generally T28:1939-42. Twelve different technical reports, attached as Appendices B through M in the EIR, support that analysis. T28:1943.

The public and other agencies commented on and shaped those environmental studies at every step along the way. In November 3, 2004, the City sent out a Notice of Preparation ("NOP") for the Project's EIR to a long list of government agencies and members of the public. T18:493. By submitting written comments on that NOP, as well as testifying at the public "scoping" meeting held on November 16, 2004, the public and agencies were able to provide input on the scope of the environmental issues that should be analyzed in the EIR. See CEQA Guidelines §§ 15082, 15083.[6]

With that information in hand, the City prepared and published the Draft EIR for the Project on March 30, 2006. T28:2448. Deploying multiple methods of providing notice (including the Internet), the City informed the public and government agencies of the opportunity to submit written comments by May 15, 2006 (the statutory comment period established by CEQA). T173:10161.

Critical agencies such as the Air Quality Management District, the Regional Water Board, and California Department of Fish and Game received notice of the Draft EIR and submitted no written objections to the Project or its EIR. Other agencies, such as SCAG and the County Flood Control District, commented on the Draft EIR indicating their concurrence in the EIR's analysis. T28:2451, 2526-27. A few agencies (Riverside County and the Fire Department) submitted written

[6] The State CEQA Guidelines are provided at 14 Cal. Code Regs. §§ 15000, et seq., and are CEQA's implementing regulations.

comments that raised specific issues (T28:2529-32, 2535), but, exactly as contemplated by CEQA's comment and response process, these agencies raised no further concerns after receiving the City's written responses. In fact, officials of the Riverside County Fire Department appeared at the City Council hearing on the Final EIR and the Project, and expressed approval of the Project and its fire protection measures. T281:12348-51.

With the review and comment process completed, the City commenced another round of public hearings. In connection with those hearings, the following additional environmental documentation was prepared and submitted to the City decision-makers -- (i) written responses to every comment received on the Draft EIR during the comment period, which comments and responses were included in the Final EIR; (ii) a detailed "Mitigation Monitoring Report" which identified 131 measures aimed at mitigating the Project's environmental impacts; (iii) a comprehensive set of 223 "conditions of approval" covering all aspects of the Project; and (iv) a 145-page set of CEQA Findings that provided the City's "analytic route" concerning the Project's potential environmental impacts and associated mitigation measures. Topanga Association For Scenic Community v. County of Los Angeles, 11 Cal. 3d 506, 515 (1974); T226:11419-11563.

Hoping to derail the Project at all costs, Petitioners misused this process by resorting to such tactics as reneging on promises they had made and submitting a host of untimely comments on the eve of the City Council hearing. For example, at the Planning Commission hearing, one of the Petitioners – Banning Bench Community – testified that they would withdraw their objection to the Project if SunCal agreed to certain security measures concerning the gated entrance to the Project from Bluff Street. T192:10568-575. SunCal agreed to those measures and the City incorporated them into the Project's conditions of approval. T28:2226. Yet, given their joinder in the lawsuit before this Court, this Petitioner failed to keep its promise. Similarly, the Resort testified at the same hearing that they would never consent to use of their property for any of the primary access routes studied in the EIR, even though they had previously worked with SunCal to identify alternative routes rather than follow the route contained in the City General Plan.

After the Planning Commission voted 5-0 to recommend approval of the Project, the City Council began its final hearings on the Project. T226:11401. At this late stage in the two-year

review process for the Project, a new Petitioner (Center for Biological Diversity) emerged for the very first time to raise concerns over greenhouse gas emissions in an attempt to use CEQA to achieve what they failed to achieve in recent State-wide legislation (see infra, pp. 39-40). At the same time, the Resort retained an attorney who, disregarding two years of discussion between the Resort, SunCal and the City as well as CEQA's requirement that comments be submitted within the prescribed comment period, submitted a wealth of paperwork less than one week before the scheduled Council hearing.[7] Those papers raised entirely new issues that had never been raised before in the CEQA process for the Project (e.g., climate change, hydromodification, etc.).

Despite this eleventh-hour attempt to hi-jack the process, written responses were prepared to all of these last minute comments, and this entire set of new comments and responses were submitted to the City Council for review prior to the final hearings. T28:2448-49. City staff also summarized those written responses at the Council's public hearing. With all of this information before it, the Council held multiple hearings on the Project, starting with a six-hour hearing on October 11, 2006. T281:12164. After that hearing and two subsequent hearings, the Council approved the Project. In doing so, the Council did exactly what CEQA calls for – it carefully weighed the Project's benefits against the Project's remaining significant environmental impacts. T277:11975 In exercising its legislative discretion, the Council determined that the following Project benefits outweighed the Project's air quality impacts:

- **Enhanced Housing Opportunities** – The Project will provide 1,453 single-family homes for residents of the City (and the rest of the Southern California region), which will assist the City in meeting its Regional Housing Needs set by SCAG.
- **Recreational Facilities** – The Project will provide approximately 81.2 acres of parks, substantially exceeding the requirements of the City's Parks and Recreation Master Plan.
- **Preservation of Open Space** – The Project will preserve 869 acres of open space, far

[7] The final Council hearing on the Project and the Final EIR was scheduled for September 19, 2006. After Petitioners' new set of voluminous comments were submitted on September 8, 2006, the Council hearing was continued to October 11, 2006. T277:11973.

exceeding the 500-acre dedication required in the 1994 Development Agreement.

- **Preservation of Criteria Cell #227 in the Multiple Species Habitat Conservation Plan** – The Project will preserve Criteria Cell #227 in the MSHCP. Additionally, preservation of other open spaces will link Cell #227 to the remainder of Sub-unit 2 within the MSHCP, thereby preserving wildlife movement through the region.
- **Construction of Secondary Highway** – The Project provides for construction of the secondary highway consistent with the City's General Plan. This secondary highway will provide emergency access to the City's northern bluff portion, which currently has limited access.
- **Regional Trail Connectivity** – The Project's trail system has been designed to connect to the existing trail system to extend and enhance the overall trail system in the vicinity.
- **Revenue for the City** – The Project provides for over $50 million in infrastructure improvements, and with development of the Project, the City's general fund would increase through property taxes and fees, allowing the City to continue providing high quality services. T226:11559-61.

Not satisfied with this comprehensive and participatory review and entitlement process,[8] Petitioners now continue their shotgun attacks raising every conceivable issue in the vain hope of finding a thread the Court will grasp. However, the City process in complying with CEQA in this instance is sound, the public and Council were fully informed, and the record is replete with information disclosed by the City and SunCal regarding the Project's environmental effects of the Project and the measures imposed to mitigate those effects. Petitioners' disagreement with the outcome of the City's decision to approve development, in an area already slated for development, is

[8] During their last minute salvo against the Project, Petitioners raised certain procedural objections, such as the City's alleged failure to properly notice the availability of the Draft EIR as well as the planning commission's failure to have a copy of the Final EIR before it when it voted to recommend certification of the EIR. Once those allegations were demonstrated to be patently untrue (T221:11347 and T28:2544), Petitioners raised no further procedural claims in their opening brief. Accordingly, these claims have been waived. Younger v. California, 137 Cal. App. 3d 806, 813 (1982).

simply not a sufficient reason for this Court to overturn the City's well reasoned process. Accordingly, the Court should uphold the judgment of the City and deny the Petitions in their entirety.

V. CEQA'S UNDERLYING PURPOSE IS COMPLEMENTED BY THE DEFERENTIAL STANDARD OF REVIEW AND HEAVY BURDEN OF PROOF GOVERNING CEQA LAWSUITS

One of the fundamental purposes of an EIR is "to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment." Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova, 40 Cal. 4th 412, 428 (2007) ("Vineyard"); Pub. Resources Code, § 21061. Thus, the court's role is to determine the sufficiency of an EIR as an informational document, and not to determine the correctness of the EIR's environmental conclusions. Id. at 435.

A court's task "is not to weigh conflicting evidence and determine who has the better argument." Vineyard, 40 Cal. 4th at 435; emphasis added. Strict adherence to that rule is critical since courts in CEQA cases "may not, in sum, substitute our judgment for that of the people and their local representatives." Citizens of Goleta Valley v. Board of Supervisors, 52 Cal. 3d 553, 563 (1990) ("Goleta").

Thus, to successfully prevail on a challenge to an EIR, a CEQA petitioner must show an "abuse of discretion," in that the lead agency (1) failed to proceed in the manner required by law or (2) its decision is not supported by substantial evidence. Vineyard, 40 Cal. 4th at 426. Applying that test requires an examination of petitioner's claim to determine if it is "one of improper procedure or a dispute over the facts." Vineyard, 40 Cal. 4th 412, 435. In this case, Petitioners have raised no claims in their Opening Brief related to procedural issues such as notice or public hearings. See supra, p. 14, fn. 8. Rather, Petitioners' attacks arise from their disagreements with the City's informal conclusions of policy decisions.

In resolving questions of fact, courts accord deference to agencies. Napa Citizens for Honest Gov't v. Napa County Bd. of Supervisors, 91 Cal.App.4th 342, 357 (2001). The mere presence of conflicting evidence in the administrative record does not invalidate determinations in an EIR. Rather, the agency's factual determinations must be upheld if supported by substantial evidence.

Chaparral Greens v. City of Chula Vista, 50 Cal. App. 4th 1134, 1143 (1996). "Substantial evidence" is defined as "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." CEQA Guidelines § 15384(a) (emphasis added); Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal., 47 Cal. 3d 376, 393 (1988).

In applying the substantial evidence standard, the reviewing court must resolve reasonable doubt in favor of the lead agency. Id. at 392. That rule extends to any disagreement among competing experts. CEQA Guidelines § 15151. CEQA holds that differing expert opinion are not grounds for invalidating an EIR. Rather, all that is required is for the EIR to be responsive to opposing expert viewpoints. Cadiz Land Company v. Rail Cycle, 83 Cal. App. 4th 74, 104 (2000).

In reviewing the record, the Court must also keep in mind the level of detail required of EIRs.

> [A]n EIR should be prepared with a sufficient degree of analysis to provide decisionmakers with information which enables them to make a decision which intelligently takes account of environmental consequences. An evaluation of the environmental effects of a proposed project need not be exhaustive, but the sufficiency of an EIR is to be reviewed in light of what is reasonably feasible.... The courts have not looked for perfections but for adequacy, completeness, and a good faith effort at full disclosure.

CEQA Guidelines, § 15151.

In evaluating the sufficiency of the EIR's environmental analysis, courts must be mindful of the three-step process established by CEQA for environmental impacts – (1) identify the existing environmental conditions at and surrounding the project, (2) quantify or otherwise determine the impact that the project may cause over and above that existing baseline, and (3) assess the significance of the calculated impact. Save Our Peninsula v. Monterey County Board of Supervisors, 87 Cal. App. 4th 99, 124-125 (2001). The existing environmental conditions (i.e., the "baseline") are "the physical environmental conditions in the vicinity of the project, as they exist at the time the notice of preparation is published." CEQA Guidelines, § 15125(a). Although the first and second steps in the process are fixed by CEQA, the final step – the significance assessment – is based on the lead agency's discretion of any selection of thresholds:

> A lead agency has the discretion to determine whether to classify an impact described in an EIR as 'significant,' depending on the nature of the area affected. In exercising its discretion, a lead agency must necessarily make a policy decision in distinguishing between substantial and insubstantial adverse environmental impacts based, in part, on the setting. Where the agency determines that a project impact is insignificant, an EIR need only contain a brief statement addressing the reasons for that conclusion.

Mira Mar Mobile Community v. City of Oceanside, 119 Cal. App. 4th 477, 493 (2004).

The burden of establishing non-compliance with these requirements lies with the petitioner. Under CEQA, an EIR is presumed adequate and the "plaintiff in a CEQA action has the burden of proving otherwise." Barthelemy v. Chino Basin Municipal Water District, 38 Cal. App. 4th 1609, 1617 (1995). Petitioners do not meet this burden by merely asserting that an EIR "failed to disclose" an impact. National Parks and Conservation Assn. v. County of Riverside, 71 Cal. App. 4th 1341, 1353 (1999). Rather, Petitioners must actually address the evidence in the record:

> When [a petitioner] urges the insufficiency of the evidence to support the findings it is his duty to set forth a fair and adequate statement of the evidence which is claimed to be insufficient. He cannot shift his burden to respondent, nor is a reviewing court required to undertake an independent examination of the record when [petitioner] has shirked his responsibility in this respect...[The] failure to do so will be deemed tantamount to a concession that the evidence supports the findings.

Markley v. City Council of the City of Los Angeles, 131 Cal. App. 3d 656, 673 (1982).

Adherence to this deferential standard of review and substantial burden of proof will allow the Court to fulfill CEQA's primary purposes concerning meaningful public disclosure and feasible mitigation of significant environmental impacts, while, on the other hand, not allowing project opponents to use CEQA as a means of delaying development projects. Courts have cautioned that "rules regulating the protection of the environment must not be subverted into an instrument for oppression and delay of social, economic, or recreational development and advancement." Goleta, 52 Cal. 3d at 563 (1990). Instead, "the purpose of CEQA is not to generate paper, but to compel government at all levels to make decisions with environmental consequences in mind. CEQA does not, indeed cannot, guarantee that these decisions will always be those which favor environmental considerations." Id. at 563.

As will be seen in the remaining sections of this Brief, the City carefully made its decision concerning the Project with its "environmental consequences" in mind. Further, numerous

government agencies have been following that same mandate for years as they adopted regional plans for water supply, air quality, biological resources and transportation infrastructure. Indeed, as shown in Sections VI-X below, those plans reflect the substantial amount of environmental and resource planning conducted by public agencies in this region, as well as the important policy decisions made by those agencies when adopting the plans. Although the Petitioners failed to challenge those plans at the time they were prepared, they now disagree with the policies set forth in the plans as applied to the Project. But, as discussed above, disagreement over policy is not a ground for overturning an EIR under CEQA. Rather, Petitioners have the burden of proving the City abused its discretion in certifying the EIR, and they have failed to meet this burden.

VI. THE CITY'S DETERMINATION THAT THERE IS SUFFICIENT WATER TO SUPPORT THE PROJECT WAS PREMISED ON ITS COMPLIANCE WITH NUMEROUS SAFEGUARDS ESTABLISHED BY THE LEGISLATURE

Over the past five years, the Legislature has become keenly aware that new development should move forward only after a sufficient water supply has been demonstrated. Accordingly, the Legislature has adopted safeguards that require local agencies to address water supply on both a regional and a project-specific level. Here, the City, as the water purveyor for the Project, meticulously complied with each and every one of these safeguards. Not only did the City prepare both regional and project-specific assessments of its available water supply, it has taken numerous actions to diversify its sources of water by developing *three* sources – groundwater, surface water and recycled water. The fact that Petitioners simply disagree with the City's and its experts' conclusions cannot form a basis for invalidating the EIR.

A. The City Complied With The Safeguards Provided By The Urban Water Management Planning Act

The Urban Water Management Planning Act (Water Code § 10610 et. seq.) (the "UWMP Act"), requires all urban water purveyors of a certain size to prepare Urban Water Management Plans ("UWMPs") that evaluate the purveyor's water supplies and demands for a 20-year period. Water Code § 10620. Among other requirements, the UWMP Act requires purveyors to identify existing water supplies and demands; project future supplies and demands for the next 20 years; assess such supplies and demands during dry years; and describe all water supply projects and

programs that may be undertaken by the purveyor. Id. at 10631 (g). Once prepared, UWMPs provide valuable information that can be used in the land use planning process and enable cities, such as the City of Banning, to gauge the availability of water supplies to support development projects within their boundaries.

In this case, the City prepared and adopted an UWMP in December 2005. Among other things, the UWMP projected the City's future water demands, including the Project's demand. In addition, the UWMP included a description of all the water supply projects and programs, and provided evidence as to the funding and permitting of those projects. T2:63. The UWMP also included evidence concerning water conservation measures (T2:81), water supply reliability (T2:63) and water shortage contingency measures (T2:73), and used a 20-year planning horizon (T2:57).

Although not required, the City took a further step to ensure it had an available supply of groundwater to support its needs. The City commissioned an expert to analyze the sufficiency of the groundwater basins underlying the City and surrounding vicinities. T223:11373. That expert collected and evaluated data that delineated the groundwater aquifers in this region, prepared detailed geohydrologic maps, analyzed previous investigations, and examined various groundwater production reports. All of this work was done to determine the "maximum perennial yield" of the City's groundwater supply. T41:4136-37. The expert's report was completed on November 12, 2003. T41:4128. Then, the City conservatively used in its UWMP the expert's lowest estimate and average of all possible maximum perennial yield estimates T41:4174 and T223:11373.

The City made the draft UWMP available for public review and also held a properly noticed public hearing. None of the Petitioners appeared at the hearing in opposition to the UWMP, and no litigation was filed challenging the final UWMP.

B. The City Complied With The Safeguards Provided By SB 610.

After the UWMP Act was passed, the Legislature enacted an additional safeguard to strengthen the mandates contained in the UWMP Act and to ensure sufficient water exists to support future development projects. In 2002, Senate Bill 610 (SB 610) was enacted. Cal. Water Code §§ 10910, et seq. SB 610 requires cities and counties to request specific information on water supplies from the water purveyor which would serve the proposed "project" (as defined in Water Code

Section 10912),[9] and to include this information in environmental review documents prepared pursuant to CEQA. Cal. Wat. Code §§ 10910(a). If the water demand for the project was accounted for in the UWMP, SB 610 expressly allows the city or county to incorporate the information from the UWMP into the Water Supply Assessment ("WSA") for the project. Cal. Wat. Code §§ 10910(c)(2).

The purpose of SB 610 is to determine whether there is sufficient water available to support both existing and future development projects. The test for sufficient water supply is "whether the total *projected* water supplies, determined to be available by the city or county for the project during normal, single dry, and multiple dry years during a 20-year projection, will meet the project water demand associated with the proposed project, in addition to existing and planned future uses." Id. at § 10910(c)(4); emphasis added. This test is consistent with a similar test under CEQA, as most recently clarified by the California Supreme Court in Vineyard, 40 Cal. 4th 412 (2007).

In Vineyard, the petitioners claimed that the EIR was deficient due to its failure to identify "the actual source of most of the water needed to fill the project's long-term demand." Vineyard, 40 Cal. 4th at 427. The Court disagreed, because no court has held that a "land use plan is inadequate unless it demonstrates that the project is definitely assured water through signed, enforceable agreements with a provider." Id. at 432. "[R]equiring certainty when a long-term, large-scale development project is initially approved would likely be unworkable, as it would require water planning to far outpace land use planning." Id. See also, Western Placer for Citizens for an Agricultural and Rural Environment v. County of Placer, 144 Cal. App. 4th 890, 909 (2006) ("if an EIR were required to identify a guaranteed source of water, then no EIR would ever be sufficient."). Thus, the ultimate question under CEQA is "not whether an EIR establishes a likely source of water, but whether it adequately addresses the reasonably foreseeable impacts of supplying water to the project." Vineyard at 434.

The courts' logic is consistent with the California Department of Water Resources' ("DWR") Guidelines for the preparation of WSAs, which confirm that WSAs may rely on a future source of

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[9] SB 610 defines a "project" to include residential development projects of more than 500 dwelling units.

water to supply a project. DWR's guidance provides that water purveyors may rely on future water supplies if they provide evidence of the likelihood and reliability of such a supply, such as capital programs, permits, regulatory approvals or entitlement contracts. RJN Ex. 1, p. 15.

Here, just as the City prepared and adopted a legally valid UWMP, the City also prepared a valid WSA for the Black Bench project. T171:10130-10156. That WSA satisfied all of the requirements of SB 610, the Vineyard decision and DWR. Specifically, the WSA included an identification of existing water supply entitlements, water rights and contracts relevant to the City's water supplies. T171:10134. Because the City draws upon local groundwater to fulfill its customers' water demands, the WSA also included the additional information required by SB 610 for groundwater supplies. T171:10140-10141. Water Code § 10910(f). Further, because the UWMP expressly considered the Project, the WSA properly drew upon the UWMP's information and analysis. T171:10130.

The City Council formally adopted the Final WSA at its publicly noticed meeting of June 13, 2006. T184:10355. As was the case with the UWMP, no challenges were made to the WSA and none of the Petitioners appeared at the hearing to oppose the WSA. Accordingly, both the City's UWMP and the WSA for the Project were properly incorporated into the Project's EIR and attached as technical appendices. T28:2305.

C. The City Properly Considered Its Multiple And Diversified Sources Of Water Supply In Approving The Project

Despite the mandates already imposed on the City by the UWMP Act and SB 610, and despite the fact Petitioners chose not to previously file an action challenging the sufficiency of either the City's UWMP or the WSA, Petitioners now claim that the EIR inadequately analyzes the Project's available water supply. Petitioners base their challenge on numerous misstatements and misinterpretations about the City's diversified water supply. In order to correct these misinterpretations, it is necessary to first provide the Court with some background information on the City's multiple sources of water supply, which include groundwater, surface water and recycled water.

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1. Groundwater

There are two main groundwater basins that underlie the City. The first is the San Gorgonio Pass Groundwater Basin, and the second is the Banning Canyon Groundwater Basin. T2:47. Each of these groundwater basins and their corresponding "storage units"[10] are described in detail both in the UWMP and in the WSA. T2:47, 49, T171:10135-37.

a. The Adjudicated Beaumont Basin

The City pumps a significant amount of groundwater from the Beaumont Basin, which is located in the San Gorgonio Pass Groundwater Basin and is a court "adjudicated" groundwater basin.[11] That adjudication lawsuit resulted in the entry of a Judgment by the Riverside Superior Court in 2004 (the "Judgment").

The goal of the Judgment is to manage overall groundwater pumping in the Beaumont Basin. T2:123. This goal is accomplished by quantifying the actual amount of groundwater each user can extract annually. Thus, the Judgment provides certainty and assurance that the production of groundwater from the Beaumont Basin will not lead to undue reductions in overall supply.

The Judgment promotes this certainty by establishing a two-step process. First, the Judgment establishes the "safe yield" of the Basin. The Judgment defines the safe yield as the "maximum quantity of water which can be produced annually from a [g]roundwater [b]asin under a given set of conditions without causing a gradual lowering of the water level leading eventually to depletion of the supply in storage." T2:143. A determination of safe yield is typically based on a number of factors, including recharge from native rainfall and runoff, as well as return flows from water that is imported from outside the groundwater basin. See generally, City of Los Angeles v. City of San Fernando, 14 Cal. 3d 199 (1975) ("San Fernando"). After analyzing these factors, the court set the safe yield for the Beaumont Basin at 8,650 acre-feet per year ("AFY"). T2:145.

The second step of the process was to implement a "physical solution" that serves as the

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[10] The San Gorgonio Pass Groundwater Basin is divided into the Banning Bench, Banning, Beaumont and Cabazon storage units, and the Banning Canyon Groundwater Basin is divided into the Upper, Middle and Lower Banning Canyon storage units T171:10135.

[11] Because the Judgment refers to the Beaumont Storage Unit as the "Beaumont Basin," this term is used throughout the remainder of this brief for ease of reference.

framework of the entire Judgment. In implementing this solution, the Court was cognizant of the constitutional mandate that prohibits the waste of water and requires "reasonableness of use, method of use, and method of diversion for all uses of water". Cal. Const. Art. X, § 2, T2:151. This mandate requires courts in adjudication lawsuits to take the steps necessary to protect and preserve the groundwater supply. See, e.g., Pasadena v. Alhambra, 33 Cal. 2d 908, 924 (1949) ("The trial court had authority to limit the taking of groundwater for the purpose of protecting the supply and preventing a permanent undue lowering of the water table."); Burr v. Maclay Rancho Water Co., 154 Cal. 428, 438 (1908) (courts must protect against the groundwater basin from being "gradually depleted and eventually exhausted"). Based on those cases and constitutional mandate, the Judgment adopted a physical solution that established "a legal and practical means for making the maximum reasonable beneficial use of the water of the Basin, to facilitate conjunctive utilization of surface, ground and [s]upplemental [w]aters, and to satisfy the requirements of water users having rights in, or who are dependent upon, the Beaumont Basin." T2:151.

The approved physical solution is based on two fundamental premises. First, any significant overproduction of groundwater by a water producer on a short-term basis must be mitigated through a program that will replenish the Basin. Thus, parties who pump more than the amount of their adjudicated right shall be charged for the cost of water needed to replenish the Basin if that user pumps five times its share of the safe yield in any five consecutive years. T2:152-153. That user must provide funds to enable the "Watermaster" to replace the overproduction, which is the entity appointed by the court to administer the physical solution. T2:144.

Second, the Court established a "temporary surplus" of water that exceeds the long-term safe yield of the Basin. Temporary surplus is a strategy by which groundwater that is surplus to the long-term safe yield can be withdrawn to create additional storage space in the basin. Contrary to Petitioners' doomsday portrayal of this temporary surplus, the concept of a temporary surplus is a management strategy well recognized under California water law. As early as 1975, the courts have recognized the value in establishing a temporary surplus, in addition to setting a safe yield, for groundwater management purposes. See San Fernando, supra, 14 Cal. 3d 199. These two groundwater management strategies accomplish different but complementary purposes. Safe yield is

a long-term strategy aimed at ensuring groundwater levels are not lowered to the point where "undesirable results" occur, such as a depleted supply. San Fernando, 14 Cal. 3d at 278. By contrast, temporary surplus, just as its name suggests, is a *temporary* management strategy. That strategy creates storage space in the groundwater basin that can be used to store either native water sources, such as excess rainfall, or non-native water that is imported from outside the basin. Id. at 280; "the amount of water which if withdrawn would create the storage space necessary to avoid the waste and not adversely affect the basin's safe yield is a temporary surplus available for appropriation to beneficial use."

As noted in the Judgment, a temporary surplus was needed in this case in order to "create enough additional storage capacity" (T28:2583) to accommodate, among other things, a new source of water – water imported from the State Water Project ("SWP"). As discussed more thoroughly below, SWP water is an additional source of supply relied upon by the City to ensure water supply reliability. For example, during dry-year periods, rather than extract groundwater from the Basin, the City can use SWP water. In turn, during periods where groundwater is plentiful, the City can use the newly created storage space in the basin to store SWP water. This leads to the availability of multiple sources of water rather than an over reliance on any one source. Without the temporary surplus in place, however, this management scheme would be impossible.

Mindful of its mandate to preserve the long-term health of the Basin, the adjudication court set a quantitative limit on this "temporary surplus" – 160,000 acre-feet, and a temporal limit – 10 years. T2:167. The City received an adjudicated right to 5,910 AFY of the temporary surplus for each of the first ten years after the effective date of the Judgment. Id.

All of these management strategies adopted in the Judgment are expressly incorporated into the EIR and the WSA.

b. In Addition To The Beaumont Basin, Additional Water Supply Is Available From Other, Non-Adjudicated Groundwater Basins

The EIR also analyzed pumping from several non-adjudicated groundwater basins. Non-adjudicated basins are not subject to court oversight and pumping from these basins is subject only to common law. Under that body of common law, groundwater may be extracted from the basins as

long as there is surplus water and the water is used for reasonable and beneficial purposes. City of Los Angeles v. City of San Fernando, 14 Cal. 3d 199, 273 (1975). The extraction of such groundwater is not subject to any State regulatory regime. T28:2486.

Because pumping from these non-adjudicated basins is not subject to court judgment or any permitting authority, the EIR relied on a conservative estimate of the available groundwater from these basins. As noted previously, the City retained an expert to analyze the amount of water available from the non-adjudicated basins. In its report (the "Geoscience Report"), this expert studied the sources of inflows of water into these basins as well as the outflow of water from the basins. T41:4139. Armed with that information, the expert employed several methods to determine the maximum perennial yield. The expert chose to use the "lowest estimate and average of all maximum perennial yield estimates" to derive a range of maximum perennial yield for each groundwater basin. T41:4138. Rather than use the high end of each of these ranges, the EIR selected the midpoint. T28:2481.

This expert's findings were confirmed by yet another expert in 2006. That expert, Geomatrix, compared the results of a recently published report by the federal agency known as "USGS" with the findings in the Geoscience Report. Geomatrix concluded that the USGS Report shows values for precipitation and natural groundwater recharge that would result in higher maximum perennial yield values than the more conservative values presented in the Geoscience Report. T191:10430. According to Geomatrix, the method chosen by Geoscience to calculate the maximum perennial yield "tended to make the range of values recommended by [Geoscience] conservatively low." T191:10433. Petitioners have offered no evidence, expert or otherwise, to rebut these expert conclusions on the safe yield of the unadjudicated basins.

2. In Addition To Groundwater, Surface Water Is Also Available

As noted previously, the EIR relies on a diversified water supply consisting of not only groundwater, but also surface water that is imported from the SWP. DWR manages the SWP. Planning and Conservation League v. Department of Water Resources, 83 Cal. App. 4th 892 (2000). Twenty-nine local or regional water agencies contract for SWP (commonly known as "State Contractors"). Id. Among those agencies is the San Gorgonio Pass Water Agency ("San Gorgonio"

or "SGPWA"), the State Contractor for this region. San Gorgonio has a contract with DWR for 17,300 AFY of SWP. T171:10142. As noted in the EIR, however, San Gorgonio's (or any other contracting agency's) entitlement of SWP is not guaranteed every year. Climate, the availability of diversion, storage and conveyance facilities, and environmental concerns can affect the amount of SWP deliveries in any given year. T171:10142.

To provide agencies with a better assurance as to how much SWP they can expect to receive over the twenty-year planning horizon, DWR publishes The State Water Project Delivery Reliability Report (the "Reliability Report"). That Report estimates the average delivery of SWP to be 71 percent and projects a gradual increase to 75 percent by the year 2021. T171:10142. These estimates were incorporated into the UWMP (T2:54), the WSA (T171:10142) and the EIR (T28:2308).

In order to bring its contractual SWP supply to this region, San Gorgonio has been working with DWR and the San Bernardino Valley Municipal Water District to construct the "East Branch Extension" of the SWP. T171:10142. Phase I of this pipeline and delivery project has been completed and will bring the first 8,650 AFY of SWP water to this region. T171:10142. The EIR for phase II is currently being prepared by DWR and will be funded by DWR initially, with reimbursement by San Gorgonio upon completion of the phase. T171:10142. Upon completion, estimated at 2010 or 2011, phase II will bring another 8,650 AFY of water. T171:10142. Phase III of this project is currently in conceptual planning and will involve the construction of a new pipeline to Cabazon. T171:10142.

San Gorgonio has not yet adopted a formal allocation system for the delivery of SWP water to its member agencies. T223:11376. However, SWP Contractors routinely use an allocation method based on assessed property valuation to estimate their expected allocation of SWP water. Id. To determine the City's allocation of SWP from San Gorgonio, the EIR used this method of "assessed valuation." T28:2308. Thus, if a contractor has 40 percent of San Gorgonio's total assessed valuation, then the contractor would be entitled to up to 40 percent of San Gorgonio's

entitlement. T28:2308.[12]

Using the assessed valuation method, the EIR rightfully assumes the City will receive 38 percent of San Gorgonio's SWP supply, namely, 6,574 AFY of SWP water. T28:2308. This number was reduced in the EIR and WSA to account for the current percentages set forth in DWR's Reliability Report. T28:2308.[13]

San Gorgonio can transmit this water to the City in a number of ways. One way is to artificially recharge (as opposed to natural recharge which occurs from rainfall) this water into the Beaumont Basin, thereby increasing the overall amount of water available. T28:2486. Another way is for San Gorgonio to directly deliver surface water to the City so it can decrease its production of groundwater (commonly called an "in lieu" program). T28:2487. Either method results in an increase in the City's overall supply.

3. Recycled Water Provides An Additional Source Of Water

Both the City's UWMP and the WSA confirm that recycled water will be available to support the City's demands beginning in 2010. T2:64 and T28:2310. The production of that water will come from the City's existing Wastewater Treatment Plant, and the City is currently developing a program to substitute recycled water for existing potable water that is used for irrigation. T28:2309. That program incorporates a design already completed for a pipeline running to the City's irrigation customers. T28:2309. Phase I of the program would make 4,033 AFY available for irrigation purposes and Phase II would make an additional 3,361 AFY available, for a total of 7,394 AFY. T28:2309. An Irrigation Feasibility Study has recently been updated by the City to determine the costs associated with implementing Phases I and II, and water rates have been increased, and will continue to increase, to finance the City's proposed regional recycled water system. T28:2309.

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[12] Petitioners' unfounded assertion against the EIR's use of the valuation method runs contrary to case law holding that EIRs must be upheld when its technical analysis are supported by such reasonable assumptions. Cadiz Land Company v. Rail Cycle, supra, 83 Cal. App. 4th at 104.

[13] In addition to accommodating San Gorgonio's existing entitlement of SWP water, the capacity of East Branch Extension project will allow for additional SWP water that may be brought into this region if such excess SWP water becomes available. However, the WSA conservatively assumed that such excess or additional SWP water would not be available. T171:10145.

D. Given The Applicable Statutory Safeguards, Court Judgment, And Multiple Sources Of Water Available To The City, Petitioners' Argument That The EIR Failed To Adequately Analyze Water Supply Must Be Rejected

Petitioners make several arguments that the EIR failed to properly analyze the sufficiency of water supply to support the Project. However, the evidence and the law clearly refute all of those arguments.

With respect to groundwater, Petitioners first argue that the EIR failed to analyze the environmental impacts associated with relying on the temporary surplus established in the 2004 Judgment. That bald assertion runs contrary to the constitutional mandate that governed the court in the adjudication, namely, to preserve the Basin and ensure that the groundwater can be used for beneficial use. Cal. Const. Art. X, § 2; City of Los Angeles v. City of San Fernando, supra, 14 Cal. 3d at 273. Petitioners' argument also runs contrary to the very essence of the court's determination of the safe yield for the entire Basin, namely, the level of extractions that can be allowed without causing "adverse" effects to the groundwater supply. Id.

Similarly, the adjudication court imposed two other safeguards on the temporary surplus established in the Judgment. First, the temporary surplus is only accessible to users for a fixed period of time (ten years). Thus, rather than allow pumpers to exceed their allotment indefinitely, the adjudication court clearly took into account the long-term health of the basin by allowing a temporary surplus only for a limited period of time. Second, the Court appointed a Watermaster, who is charged with overseeing the entire Judgment and ensuring the continuous protection of the Beaumont Basin. T28:2593. In fact, the Watermaster is obligated to develop and implement a groundwater management plan for the entire Basin. T28:2593. In short, to claim as Petitioners do, that the adjudication court established the temporary surplus without regard for environmental considerations or protections runs contrary to both the law and the facts.

Petitioners' other claimed deficiencies in the EIR's groundwater supply analysis are equally unavailing. For example, Petitioners cite to a report published by the San Gorgonio, which noted an "overdraft" in the Beaumont Basin in 2002 and 2003. But, that "overdraft" represents *annual* overdraft for those two years, which is simply the difference between the annual production of groundwater and annual recharge. Annual overdraft, however, is different than safe yield. City of

Los Angeles v. City of San Fernando, supra, 14 Cal. 3d at 278. Moreover, those two years of annual overdraft preceded the entry of the 2004 Judgment, which prospectively established a safe yield limit and a physical solution for the entire Basin. As readily acknowledged by SGPWA in this report, the Judgment "provides for management of groundwater resources in the Beaumont Basin" (T3:227), which will ensure its reliability as a source of water for the City.

As it does with selected portions of the SGPWA report, Petitioners also take out of context a statement in the EIR and WSA concerning "groundwater mining," which is the temporary overproduction of groundwater. The EIR fully responded to Petitioners' concerns, noting that groundwater mining was referenced in the UWMP solely as a strategy for resolving short-term drought. T223:11376. As the EIR notes, the "replenishment of groundwater from mining can be cured a number of ways, for instance, by replenishment during wet years or by replenishment water purchased by the Beaumont Basin Watermaster." T223:11376.

Petitioners also contend that the EIR failed to analyze the impacts of groundwater production by non-City users in the non-adjudicated basins. Op. Br. at 29. However, while Petitioners cite to a single table in an engineering study commissioned by SGPWA that provides a comprehensive list of those pumpers (T3:241), Petitioners fail to cite to the subsequent tables in the same report that illustrate the historically low pumping by these pumpers. T3:242-243. In those basins, the non-City users make up only .03% (Banning Canyon Basin), .04% (Banning Bench Basin), 17% (Banning Basin), and 24% (the Cabazon Basin as of 2010 when the City's wells will be completed).[14] This level of production by non-City users in the non-adjudicated basins is more than accounted for by the EIR's reliance on the mid-point of a range for maximum perennial yield calculated by one expert, which was deemed conservative by another expert.[15]

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[14] From the years 1992 to 2003, (i) the non-City users in the Banning Bench basin extracted 830 acre-feet of water compared to the 19,777 acre-feet extracted overall; (ii) for the Banning Canyon basin, the non-City users extracted 1519 acre-feet compared to the 53,791 acre-feet extracted overall; and (iii) for the Banning basin, the non-City users extracted 911 acre-feet compared to the 6,333 overall. T3:242. From the years 1992 to 2003, the non-City users in the Cabazon basin extracted an average of 632 acre-feet. In the year 2010, the EIR projects the City will extract 2,050 acre-feet per year. T28:2310.

[15] Petitioners' argument that the EIR confused the maximum extraction capacity of the City's groundwater wells with the maximum safe yield of the groundwater basin can be quickly dismissed

With respect to surface water, Petitioners' arguments are also unsupported. First, Petitioners repeatedly try to convince the Court that SWP water must be used by SGPWA to recharge overdrafted groundwater basins, such as the Beaumont Basin, and is not available as a source of water for new development. But, SGPWA's enabling statute does not restrict the methods by which SGPWA can use SWP water to recharge the Basin. Cal. Stats 1961, ch. 1435. As confirmed by the experts, SGPWA can recharge the Basin by directly replenishing it with SWP water (e.g., through spreading grounds), or through "in lieu" where the water purveyor foregoes groundwater pumping in exchange for direct delivery of imported water such as SWP water T223:11374. Since the EIR and WSA embraced those recharge concepts in calculating the amount of supply available to the City, Petitioners' claimed deficiency on this issue must be rejected. T223:11374-75.

Next, Petitioners repeatedly assert that SWP water is unreliable and the WSA improperly relied on such "future" water. Yet, the EIR's reliance on future SWP water is expressly permitted under CEQA as well as SB 610 as discussed supra (at pp. 19-21). Both SB 610 and DWR's Guidelines expressly authorize cities and water purveyors to rely on "projected" water supplies, subject to evidence confirming the likelihood that such future supply will be realized. Here, the EIR and WSA provided a wealth of evidence confirming the receipt of SWP water beginning as early as 2006, and tempered the projection of the available amount SWP water by employing DWR's Reliability Report and its recommendation that only 71 percent of SWP entitlement will be available. Further, for purposes of the WSA, a worst-case scenario was analyzed, namely, the City being unable to purchase additional SWP water beyond its current entitlement. Under this scenario, the City would still have a surplus of water for the period from 2005 to 2030 in normal water years even without additional SWP water that may be purchased by the City. T171:10147. The EIR and WSA went further and also analyzed the availability of SWP water during single and multiple dry years, and concluded that sufficient water will be available during those years. T171:10145.

Interestingly, Petitioners try to rely on the Vineyard, supra, 40 Cal. 4th at 412, case to support their proposition that the EIR improperly relied on a future water supply. Yet, Petitioners

since the EIR clearly distinguished between the two concepts. Compare T28:2307 to T28:2310.

misread the holding in Vineyard. Vineyard involved the future water supply for a 22,000 residential unit development project. Id. at 422. The EIR for that project relied upon a local water agency's "Zone 40" project, which included groundwater that would eventually be available for the area. Id. at 423. The Vineyard EIR, however, failed to include an adequate discussion of the applicable groundwater management programs for the basin, choosing instead to defer all analysis until the Zone 40 master plan update was complete. In overturning the EIR, the court held that although CEQA "does not require a city or county each time a new land use development comes up for approval, to reinvent the water planning wheel," the "FEIR water supply discussion fails to disclose the 'analytic route the...agency traveled from evidence to action' and is thus not sufficient to allow informed decision making." Id. at 445. The court contrasted this situation with the scenario where an UWMP's information and analysis is incorporated in the WSA. Id. at 434.

Here, the EIR in the instant case did precisely what the Vineyard court suggested would constitute compliance with CEQA. The EIR's water supply analysis was based on the City's UWMP, the 2003 Geoscience report, and the WSA. All of these supporting documents more than substantiate the City's conclusion that there was sufficient water to meet the Project's supply needs, and provide full disclosure as to the City's reasoning on how it arrived at that conclusion.

Finally, as to the City's third source of water, recycled water, Petitioners make only one argument, which is their conclusory assertion that "there is no analysis or data" to support the WSA's determination that recycled water will become available to augment the City's water supply. Yet, the WSA reviews the City's adopted fee structure for raising the necessary funds for its recycled water program, identified all the necessary studies for the program, and estimated when the construction of the system will be completed. T171:10143. Because a future water supply can be legally relied upon in an EIR and a WSA in light of such substantiating evidence, Petitioners' argument must be rejected. Vineyard, supra, 40 Cal. 4th at 432. [16]

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[16] The flaws in Petitioners' three remaining arguments concerning the adequacy of the EIR's water supply analysis are readily evident. Petitioners claim that the EIR failed to address *cumulative* water impacts by not accounting for other water users. Yet, the EIR's cumulative water analysis clearly studied the issue since it relied on the WSA prepared pursuant to SB 610, which it took into account existing and future uses in addition to the proposed project. Cal. Water Code § 10910 (c)(4). Next, Petitioners claim that the EIR failed to examine any potential environmental effects

The availability of these three reliable water sources brings this case in line with a case not discussed by Petitioners, Western Placer Citizens for an Agricultural and Rural Environment v. County of Placer, 144 Cal. App. 4th 890 (2006). In that case, the EIR's water supply analysis relied on a contract with the local water district for 2,437 AF of surplus water, as well as groundwater and riparian and appropriative rights to streamflow. The plaintiffs argued that the EIR was invalid because it did not identify a guaranteed source of water. In rejecting that argument, the court highlighted the fact that there were "multiple sources of water available to the property" and held that the EIR was sufficient because it had identified "existing, available, and sufficient sources of water for the project." Id.

As was the case in Western Placer, the EIR in the instant case properly relied on a diversified water supply. Not only can the City rely on San Gorgonio's contractual entitlement to SWP water, but, the City also owns adjudicated groundwater rights and will develop recycled water shortly.

For all of the above reasons, the Petitioners' contention that the EIR fails to adequately analyze water supply for the Project is simply untenable. The EIR relies on years' worth of studies to support its conclusion of an adequate water supply. The City's groundwater supply draws upon a court Judgment, which establishes adjudicated rights to the Beaumont Basin's supply and involves a comprehensive management scheme to ensure that supply remains sufficient. For the unadjudicated basins, the EIR conservatively relies on the mid-point of a maximum perennial yield, which has been determined to be conservative by a second expert. Further, the EIR relies on a contractual entitlement to SWP water and infrastructure to deliver that water that has either already been completed or is close to being completed. The City then supplements these firm sources of water with an additional supply of recycled water. Thus, the water supply analysis contained in the EIR is fully consistent with both CEQA and SB 610. Accordingly, the Petitioners' claims concerning water supply must be rejected.

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attributable to the infrastructure (on-site and off-site) for the Project's water system. The EIR repeatedly analyzed those effects in each impact area covered in Sections 4.11.19 through 4.11.22. T28:2314-17. Finally, Petitioners claim that the technical details requested in their expert's last-minute comment letter were never provided. As with all of Petitioners' letters, however, detailed responses were provided, including the information sought on this issue. T28:2476-77.

VII. THE EIR PROPERLY DETERMINED THAT IMPACTS TO BIOLOGICAL RESOURCES WOULD BE LESS THAN SIGNIFICANT BASED ON FULL COMPLIANCE WITH THE MSHCP, NUMEROUS SITE SPECIFIC BIOLOGICAL SURVEYS, AND THE PROJECT'S ENVIRONMENTALLY SENSITIVE DESIGN

The Project's design embraces the important goal of preserving biological resources. The goal is achieved by dedicating vast amounts of open space (including a Criteria Cell under the MSHCP), preserving of on-site natural drainage courses, and clustering development in areas with fewer environmental constraints. T28:2031. Although Petitioners would like this Court to believe the Project brazenly destroys every species and habitat in its path, this assertion could not be farther from the truth. Rather, the development of the subject site (currently used as a cattle grazing ranch) avoids all federal and state listed endangered species and complies with the MSHCP in all respects. Further, to ensure the Project remains true to the conservation goals set forth in the MSHCP, and to ensure that the Project remains as environmentally sensitive as possible, a site-specific biological survey, as well as numerous general biological surveys were prepared. T167:9149-56. In response, Petitioners, while vainly trying to manufacture legal attacks on the EIR's biological impact analysis, are simply asking this Court to disregard those technical studies and toss aside the MSHCP. The Court must decline that unwarranted invitation because the MSHCP took years of planning, protects 145 species and conserves over 500,000 acres within 1.26 million acres in this region. T28:2144-45. Further, the very committee overseeing this comprehensive plan blessed the Project and deemed it consistent with the plan.

A. The Multiple Species Habitat Conservation Plan

The MSHCP's purpose is to provide a framework for integrated, rather than piecemeal, open space and habitat conservation within the Western Riverside County. T28:2144. After certifying a joint EIR and Environmental Impact Statement (pursuant to the National Environment Policy Act), the MSHCP was approved by the County's Board of Supervisors in June 2003 and by the U.S. Fish and Wildlife Service in June 2004. T28:2145. Areas covered by the MSHCP are divided into 16 units called Area Plans. T28:2145. Those Area Plans are then divided into Criteria Areas for which biological issues and target acreages are specified. T28:2145. The Criteria Areas are further divided into numbered cells, which have additional conservation goals. T28:2145. The Project is located within the Badlands/San Bernardino National Forest Subunit of the Pass Area Plan, and "Criteria

Area Cell 227" is located within the Project boundaries. T28:2145.

When a development project is located in a Criteria Area of the MSHCP, it must comply with the Habitat Acquisition and Negotiation Strategy process ("HANS"). The HANS process ensures that development projects are consistent with the policies and conservation goals of the MSHCP, thereby ensuring biological diversity and preservation. T117:7352. In the instant case, SunCal prepared a detailed HANS application and submitted it to the City's HANS committee. The HANS committee consists of the Western Riverside County Regional Conservation Authority, acting in conjunction with the California Dept. of Fish and Game. T180:10332.

After reviewing the HANS application, the HANS committee determined that the Project design is fully consistent with the MSHCP. T180:10333. That determination was based on the fact the "project proposes to dedicate 100% of Cell 227 (154.9 acres), as well as 150.3 acres of existing undeveloped open space adjacent to Cell 227 providing a direct connection to Cell 243 located in the west." T180:10334. According to the committee, the preservation of Cell 227 will further contribute to the protection of the MSHCP's "Existing Core I", a critical area in the San Bernardino Mountains. T180:10334. Existing Core I provides "potential nest sites, foraging habitat, a connection to the portion of the San Bernardino Mountains in San Bernardino County and harbors key populations of certain species." T180:10334. This entire consistency determination was incorporated into the Final EIR for the Project. T180:10333.

The HANS committee determination is also consistent with one of the MSHCP's primary policy goals. Specifically, the MSHCP allows for the "incidental take of individual species or their habitats outside the MSHCP Conservation Area, in exchange for the assembly and management of a coordinated MSHCP Conservation Area." RJN Ex. 7, Vol. 4–1.0 (emphasis added). Thus, the conservation and protection of both Cell 227 the Existing Core I mitigates any incidental impacts that may occur outside the core MSHCP Conservation Area.

B. The EIR Properly Relied On The MSHCP

The City incorporated the MSHCP's conservation goals, policies and mitigation measures into the Project's EIR. In doing so, the EIR properly relied on two provisions of CEQA. CEQA Guideline 15130 authorizes a project-specific EIR to use information in a "planning document" that

describes a regional condition associated with a cumulative environmental impact. CEQA Guidelines 15130(b)(1)(B). Relying on such regional planning documents, a project's contribution to a cumulative environmental condition can be determined to be less-than-significant if the project complies with the mitigation measures identified in the regional plan. CEQA Guidelines 15130(a)(3). Second, CEQA requires an analysis of a proposed project's consistency with regional plans. CEQA Guidelines 15130(d). "[S]uch regional plans include, but are not limited to . . . habitat conservation plans. . ." CEQA Guidelines, § 15125(d).

In the portion of their opening brief addressing biological resources, Petitioners go to great lengths to convince the Court that the EIR "tiered" off the EIR previously prepared for the MSHCP and that the Project's EIR failed to comply with CEQA's requirements for tiering.[17] Yet, the EIR makes absolutely no reference to tiering off the EIR for the MSHCP, and for good reason since the Project EIR did not do so. Under CEQA, tiering allows a project-level EIR to avoid environmental analysis of the project's impacts by cross-referencing to analyses contained in a prior EIR adopted for a planning document. CEQA Guidelines 15152. In the instant case, however, numerous biological surveys were conducted for the Project and its surroundings (see supra, p. 33), so no environmental review of biological resources was avoided through tiering off any EIR, whether for the MSHCP or otherwise. Instead, the Project's EIR addressed the Project's consistency with the MSHCP and relied on the mitigation measures in the MSHCP to conclude that the Project will not cause a significant cumulative impact to biological resources. "Tiering" is simply a red herring.[18]

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[17] Petitioners' claim that a "memorandum prepared by the developer's consultant suggests that the Project EIR is intended as a second-tier analysis" (Op. Br. at 50) should be disregarded. That memorandum was prepared by a technical consultant and was not intended to convey legal conclusions. The EIR itself contains no mention of tiering off the EIR for the MSHCP, and the Project EIR remains the final authority on the issue.

[18] Because the Project EIR did not tier off the EIR for the MSHCP, there is no need to address Petitioners' claim that the Project EIR failed to inform the public where a copy of the EIR for the MSHCP could be obtained. Op. Br., p. 50, CEQA Guidelines § 15152. It should be noted, however, that Petitioners obviously had little trouble locating a copy of the EIR for the MSHCP since they attach a copy to their Request for Judicial Notice.

C. The EIR Fully Analyzed The Significance Of The Project's Impacts To Biological Resources

In addition to relying on the MSHCP, the City also commissioned a detailed site-specific biological survey, as well as several general biological surveys to determine the existence of any environmentally sensitive species on the Project site. T167:9149-56. These surveys were conducted on multiple occasions over a two-year period, and also included an analysis of the California Natural Diversity Database occurrence data, which is the U.S. Fish and Wildlife Service's data concerning critical habitat, vegetation mapping and focused studies for special status plant species. T167:9144. The EIR incorporated all those surveys.

The results of these surveys indicated that no state or federally listed plant or wildlife species is located on the Project site. T167:9144. But to ensure compliance with CEQA, the surveys also analyzed whether the Project would have any impacts on sensitive or special status plant, vegetation or wildlife species. CEQA defines a "significant biological impact" as one that would have a substantial adverse effect on any species identified as a candidate, sensitive or special species in local or regional plans. See CEQA Guidelines, App. G.

1. Plants And Vegetation

Based on the above surveys and data, the EIR concluded that 19 special status plant species could potentially occur on the Project site. Of these 19 species, however, it concluded that 12 would not be expected on the site because of a lack of habitat to support the species or because the Project site is outside the species' elevation range. T28:2156. Five other special status plant species were not detected during focused sensitive plant surveys. T28:2156. Of the remaining two species, one was also confirmed to be absent from the Project site.

The remaining species, the Parry's spineflower, is not listed as a federal or state endangered or threatened species, nor is it listed as a state species of special concern. It is, however, included in an inventory compiled by the California Native Plan Society ("CNPS"). T28:2154. CNPS' inventory consists of four lists: 1) List 1A plants are considered extinct; 2) List 1B plants are rare, threatened or endangered in the State of California; 3) List 2 are considered rare, threatened or endangered but are more common in other states; and 4) List 3 species are those species for which CNPS cannot assign any specific threat level because more information such as "habitat

vulnerability, specificity, distribution, and condition of occurrences" is needed. T28:2154; RJN Ex. 10. The Parry's spineflower is a List 3 plant.

Because the Parry's spineflower is not listed on CNPS' Lists 1A, 1B, or 2, it is not a rare, threatened or endangered species, a fact expressly recognized by Petitioners. Op. Br., p. 51. In light of that status, and CNPS' decision to not assign a specific threat level to this plant, and because this plant is also covered in the MSHCP, the EIR rightfully concluded that impacts to this species would be less than significant. T28:2166. Petitioners' conclusory demand for "more information to be gathered" on this plant is irrelevant because no additional analysis would alter the listing of any species or rebut the substantial evidence supporting the EIR's conclusions on this matter. Association of Irritated Residents v. County of Madera, 107 Cal. App. 4th 1383, 1396 (2003) (CEQA does not require a lead agency to conduct every recommended test and perform all recommended research to evaluate the impacts of a proposed project.)

The EIR also analyzed Project impacts on numerous vegetation communities. The biological surveys indicated that five vegetation communities occur on the Project site: alluvial fan scrub, oak woodland, oak savanna, chaparral, and annual grassland. T28:2149. Of these communities, only alluvial fan scrub, oak savanna and oak woodland are considered special status species. T28:2154.

According to the EIR, alluvial fan scrub is limited to "7.1 acres in the upper reaches of the southern drainage, is relatively poorly developed, and in many area has partially given way to annual grassland." T28:2149. Further, no threatened or endangered habitats that may occur in alluvial fan scrub have been recorded on the Project site. T28:2149. As a result, the EIR properly determined there would be less than significant impacts to alluvial fan scrub.

As for oak woodland and oak savanna, the EIR determined that the Project would result in the loss of approximately 4.2 acres of oak woodland and 8.6 acres of oak savanna. T28:2169. Yet, as discussed previously, the MSHCP allows for the incidental take of species or their habitats outside the MSHCP Conservation Area in exchange for the assembly and management of a coordinated MSHCP Conservation Area." RJN Ex. 7, Vol. 4–1.0. The Project clearly contributes to this assembly and management by its conservation and protection of the Existing Core I. In addition, the Project provides additional protection to oak woodland and savanna by setting aside "substantial

amounts of each community…in open space on site." T28:2169. Thus, the EIR properly concludes that the impacts to oak woodland and savanna would be less than significant.

Although Chapparal is not considered a sensitive or a special status species, this vegetation may "provide suitable habitat for a variety of plant and wildlife," and, accordingly, the EIR analyzed the impacts to this community. T28:2169. Although the Project will impact 106 acres of chaparral, the EIR concluded this impact to be less than significant because substantial amounts of chaparral will be preserved in open space. T28:2169. The EIR also analyzed the impacts to special status species that may depend on chapparal for their habitat (namely, the Bell sage sparrow and the black-tailed jackrabbit.) T28:2166. Given the preservation of so much open space, the EIR determined that any impacts to those species would be limited, and those limited impacts could be further reduced due to the Project's compliance with the MSHCP. T28:2166.

The EIR similarly concluded that impacts to grasslands would be minimal. Here, it is important to correct a number of misstatements made by Petitioners. Petitioners request judicial notice of a portion of the MSHCP EIR to support its proposition that annual grasslands are a sensitive species covered by the MSHCP and that the MSHCP's EIR determined that impacts to such grasslands will be significant in the future. Thus, Petitioners argue that the EIR's conclusion that the Project's impact to grasslands will be less than significant is erroneous. Yet, what Petitioners fail to tell the Court is that <u>non-native</u> annual grasslands are <u>not</u> a sensitive or special status species, and that non-native grasslands overwhelmingly dominate the Project site. T167:9158; T28:2169. (Indeed, limiting the Project's physical development to the flat mesa or bench area will reduce even the impacts to non-native grassland given the years of cattle grazing on this grassland area.) That determination for the Project was based on both site-specific and general biological surveys. T167:9149-56. By contrast, the MSHCP relied on aerial photographs that prohibited it from differentiating between the two types of grasslands. RJN Ex. 7, Vol. IIC. Petitioners' factually flawed argument must be disregarded.

2. Wildlife

The EIR also conducted a thorough analysis of the Project's impacts to wildlife. Five special status wildlife species were determined to potentially occur on the site since their habitat is located

on the Project site. Four of these species (the Cooper's hawk, the Bell's sage sparrow, the black-tailed jackrabbit and the California horned lark) and their habitat are covered by the preservation measures in the MSHCP. Additional habitat preservation will be achieved through the Project's design, including retention of 869 acres of open space. Accordingly, the EIR correctly determined that the impacts to these species will be less than significant. T28:2166. As for the fifth species, the golden eagle, despite Petitioners' particularly egregious misstatement that the "site provides habitat for a variety of important wildlife species, including golden eagles" (Op Br. at 3), the EIR's studies confirmed that adequate breeding areas for the golden eagle are not present on the Project site. T28:2166. Further, the EIR determined that foraging for this species is more than protected under the MSHCP. T28:2166. Accordingly, impacts were determined to be less than significant. T28:2166.

In sum, the EIR properly relies on the goals and policies of the MSHCP, and the MSHCP's mitigation measures. The Project has been determined by the HANS committee to be consistent with the MSHCP. Further, numerous site-specific and general biological surveys were conducted for the Project site, all of which confirmed that there would be less than significant impact to any state or federal endangered, special status or sensitive species. As a result, the EIR properly evaluated and mitigated the Project's biological impacts in full compliance with CEQA.

VIII. PETITIONERS' ASSERTION THAT THE CITY SHOULD HAVE ANALYZED GLOBAL WARMING IN THIS EIR IS CONTRARY TO THE STATUTE THAT THEY CITE, CEQA CASE LAW, AND FUNDAMENTAL PRINCIPLES OF FAIRNESS

There is no dispute that global warming is an important issue. Indeed, the issue is at the forefront of the State legislature's agenda, as well as various State regulatory agencies. But the issue is not whether global warming warrants action from our government. Rather, the issue is whether global warming should be addressed by California at this time on a state wide level or on a project-specific basis. This, however, is a policy determination, not a CEQA issue. Indeed, there are no CEQA Guidelines that even begin to address the issue. And, the only State legislation that directly addresses global warming to date became effective after the date the Project's EIR was certified and does not even involve CEQA.

Because the State government has just begun to formulate and to address global warming on a State-wide level, SunCal developed the Project consistent with the local and regional plans governing development in this area of the City. Adhering to those plans promoted the development of a Project imbued with substantial environmental and social benefits and few (if any) significant environmental impacts. While providing much needed housing, the Project preserves surrounding hillsides and mountain ridges, creates connectivity between major wildlife and biological corridors, dedicates 869 acres of land for open space, and preserves oak trees on over 35 acres of the Project site. Such environmental considerations will carry over to the operation of the Project, which will comply with over 140 mitigation measures and conditions. T28:1958-92. Notably for the issue of climate change, the Project will fully comply with the State's "Title 24" energy conservation measures, and likely exceed those measures through use of low emission water heaters, energy efficient appliances and increased insulation beyond Title 24 requirements. T28:2252.

Willing to sacrifice such a Project to further its political agenda, however, Petitioner Center for Biological Diversity entered the entitlement process at the eleventh hour to claim that the Project's EIR had to analyze climate change. No Petitioner had raised that issue previously. *Instead, the first mention of global warming was on September 8, 2006, four months after the close of the public comment period and only one week before a scheduled City Council hearing on the Project and its EIR.*

Despite the untimeliness of Petitioners' last minute submittal, thorough written responses were prepared and presented to the decision-makers prior to the Council hearing. As discussed in those responses, Petitioners rely heavily on recently enacted State legislation commonly referred to as "AB 32." But what Petitioners fail to address is how AB 32 implicates CEQA, given that it utterly fails to mention CEQA, or how AB 32 applies to this case, given that it became effective after the date the EIR was certified. Also absent in this legislation are any regulatory standards or significance thresholds by which to evaluate a project's emission of greenhouse gases. In fact, there are no such standards or thresholds under any law or regulation, a fact Petitioners concede. Under similar circumstances, courts have not required speculative analyses in EIRs. This Court should reach the same decision and reject Petitioners' dilatory claim to the contrary.

A. The Petitioners' Assertion That Global Warming Must Be Analyzed In This Local EIR is Not Supported By AB 32, Which Establishes A State-Wide, Not Local, Regulatory Scheme

AB 32 represents the State's plan to reduce the emission of greenhouse gases ("GHG"), which may effect climate change, by establishing a State regulatory scheme. This State-wide approach to this global issue is to be carried out by a State agency, CARB. CARB is mandated to work with the three other California agencies which have jurisdiction over GHGs, the State Energy Resources Conservation and Development Commission, the California Climate Action Registry, and the Secretary for Environmental Protection. Refer to Legislative Counsel's Digest of AB 32; AB 32, § 38501(f).

AB 32 is a forward-looking statute. It requires CARB to set a variety of standards, *all in the future*. For example, CARB will (1) adopt regulations for reporting GHGs on January 1, 2008, (2) determine on January 1, 2008 the level of GHG emissions that existed as of 1990, (3) formulate a "scoping" plan for achieving reductions in GHG emissions on January 1, 2009, and (4) adopt regulations for GHG emission reduction measures on January 1, 2011. AB 32 §§ 38550-62. Those measures are ultimately aimed at establishing "a statewide greenhouse gas emissions limit equivalent to the statewide greenhouse gas emissions levels in 1990 to be achieved by 2020." AB 32 § 385561.

To date, the only action taken by CARB under AB 32 concerns the formulation of "early action items" designed to reduce GHG emissions. Although initially projected to number more than thirty, the complexities of the issue forced CARB to focus its efforts on three of its foremost concerns: 1) a low-carbon fuel standard requiring oil refineries to reduce the carbon dioxide (CO2) levels contained in vehicle fuel; 2) a restriction on hydro-chlorofluorocarbons produced by recharging leaky car air conditioning systems; and 3) the installation of emission control systems at landfills. RJN Ex. 9. (Notably, none of these early action items involve GHG emissions from new residential developments.)

Despite this careful and deliberate State-wide approach to tackling a global issue by adopting regulatory measures by specified dates in the future, Petitioners attempt to use AB 32 to support its claim that the EIR for this local Project certified last year should have analyzed the issue of climate change. In making that assertion, Petitioners fail to inform the Court of a critical fact – there is not a

single reference to CEQA in AB 32. And for good reason, since the focus of AB 32 is on State-wide measures, rather than local management. That approach avoids the conflicting and piecemeal approach that could arise if cities and counties had to address GHG emissions on a project-by-project basis. Instead, the Legislature deferred this enormously complicated task to State agencies with federal involvement.[19]

During the entitlement process for the Project, Petitioners cited to a clause in AB 32 to support their contention that AB 32 was intended to work "in conjunction" with CEQA. That clause provides that "[n]othing in this division shall relieve any person, entity, or public agency of compliance with other applicable federal, state, or local laws or regulations, including state air and water quality requirements, and other requirements for protecting public health or the environment." Op. Br., p. 39. Yet, Petitioners fail to explain how this clause means that the Legislature intended that global warming be analyzed under CEQA. Not only is there no mention of CEQA in the text of AB 32 itself, there is no mention of CEQA anywhere in AB 32's legislative history encompassing over 900 pages. RJN Exh. 8. Indeed, during the State process in early 2006, one of the Petitioners in this case – CBD – submitted a comment letter claiming that the California Resources Agency ("CRA") should issue "guidance" as to whether global warming should be addressed under CEQA, since CRA publishes the State CEQA Guidelines. CRA declined to do so.

Black letter law holds that courts must presume that if the Legislature had intended for AB 32 to apply to CEQA documents, it would have simply expressed that intent in the statute itself. Gikas v. Zolin, 6 Cal. 4th 841, 852 (1993). Consequently, AB 32 cannot support Petitioners' claim that global warming had to be analyzed in this EIR.

B. Without Significance Thresholds Or Any Regulatory Standards Concerning GHG Emissions, The Project's Impact On Climate Change Is Speculative And Cannot Be Assessed

There is a valid reason why CARB and the Legislature are taking a broad strokes approach to

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[19] In a case cited by Petitioners, the federal government was ordered to address GHG emissions from automobiles under the federal Clean Air Act. Massachusetts v. EPA, 127 S. Ct. 1438 (2007). Emissions of air pollutants from automobiles are regulated by the federal and California governments, not local municipalities. Id. Yet, for the Project at issue in this action, automobiles represent the largest source of operational air pollutants. T28:2242.

addressing GHG emissions rather than focusing on project specific developments. There are simply no thresholds yet developed that would allow for an analysis at a micro level.

As mentioned infra in Section IX(A), SCAQMD regulates air quality in the Basin. In doing so, SCAQMD establishes significance thresholds for various air pollutants, which allow local agencies to determine the significance of a particular project's air quality impacts. However, SCAQMD has yet to establish significance thresholds for GHG emissions, a fact acknowledged in Petitioners' opening brief. See Op. Br. at 39.

The CEQA implications attributable to this lack of significance thresholds is readily seen in the context of case law and CEQA mitigation measures. For example, a petitioner seeking to stop a project may argue that the nature of global warming dictates that the emission of *any amount* of GHG be considered a significant impact under CEQA. Under that logic, all projects would require a full-blown global warming analysis in full EIRs even if the project would emit only a single molecule of a GHG. The courts, however, have expressly rejected that position. See, e.g., Communities for a Better Environment v. California Resources Agency, 103 Cal. App. 4th 98, 120 (2002) (in addressing a project's emission of air pollutants, the court held that "this does not mean, however, that any additional effect in a nonattainment area necessarily creates a significant cumulative impact; the 'one additional molecule rule' is not the law").

Further, Petitioners' approach would presumably require mitigation measures for the emission of a single molecule of a GHG. That outcome, however, would run contrary to the rule that "mitigation measures must be roughly proportional to the impacts of the project." Napa Citizens for Honest Government et. al., v. Napa County Board of Supervisors, 91 Cal. App. 4th 342, 360 (2001); see also, CEQA Guidelines, § 15126.4 (a)(4)(B).

Petitioners ask the Court to disregard the legal deficiencies in their position by manufacturing a legal argument based on the holding in Berkeley Keep Jets Over the Bay Committee v. Board of Port Commissions, 91 Cal. App. 4th 1344 (2001). The facts of that case, however, show a lead agency misrepresenting the technical facts.

In Berkeley, the EIR claimed that it could not assess the increased emissions of toxic air pollutants from airplane engines on the ground that "there is no approved, standardized protocol for

determining the risks associated with mobile-source TAC's, such as aircraft." Id. at 1364. The EIR based its conclusion on 1991 protocol developed by CARB, which did not provide specific methodology to analyze the air pollutants at issue. However, after the draft EIR had been circulated for public comment, a more recent protocol (dated 1994) was published by CARB to assess the risks associated with mobile-source TACs. The Port Commissioners ("Port") rejected the use of the 1994 protocol by claiming that an air pollution specialist with CARB "expressed concern regarding the accuracy of some of the particular compounds contained in [the profile]." Id. at 1365. That assertion by Port officials, however, was knowingly incorrect. In fact, a representative from CARB submitted a declaration correcting the misleading impression provided by the Port: "I told [the Port] that, in my opinion [the 1994 protocol] is the best profile available. . . I did say that the older [protocol] should not be used." Id. In addition to that expert's declaration, the chief of CARB's emission inventory branch had submitted a letter stating that the 1994 protocol to be "a more accurate and comprehensive profile... than what is contained in the 1991 protocol." Id.

The court invalidated the EIR, in large part, because the EIR "was not a reasoned and good faith effort to inform decision-makers and the public about the increase in TAC emissions." Id. at 1367. As noted by the court, "[v]oluminous documentary evidence was submitted to the Port supporting the assertion that an approved and standardized protocol did exist." Id. But instead of disclosing this evidence, the Port provided information that "was either incomplete or misleading." Id. at 1371.

By contrast, in the instant case, absolutely no protocol or methodology for determining the significance of the Project's greenhouse gas emissions exists, which Petitioners concede. In addition, unlike the facts in Berkeley, Petitioners first raised the issue of global warming on September 8, 2006, four months after the close of the formal comment period. Finally, unlike the facts of Berkeley, thorough and honest written responses to those comments were provided to the City decision-makers. For all of these reasons, the holding in Berkeley is of no avail to Petitioners.

In the absence of any guidance or standards as to the significance of any project's emissions of GHGs, it would simply be speculative to engage in the exercise of assessing a local project's impact on climate change. Because CEQA does not require speculative analyses in EIRs,

Petitioners' request for a global warming analysis in the EIR must be rejected. Apartment Association of Greater Los Angeles v. City of Los Angeles, 90 Cal. App. 4th 1162, 1176 (2001) (Court rejects Petitioners' assertion that an expert opinion concluding something "potentially...may occur" constitutes substantial evidence.).

C. CEQA Mandates Deferral To Regional Plans That Address A Regional Environmental Condition

The formulation of regulatory standards concerning GHG emissions will be forthcoming under AB 32. Compliance with the State and regional plans adopting those standards will be required under CEQA. CEQA has long held that when a cumulative environmental condition is analyzed in a regional plan, and a proposed project's contribution to that condition is addressed in the plan, no additional environmental analysis is required in a project-level EIR. See Sierra Club v. West Side Irrigation District, et. al., 128 Cal. App. 4th 690, 701 (2005); CEQA Guidelines, § 15130(c). Indeed, CEQA Guidelines 15130(c) recognizes the reality that "the only feasible mitigation for a cumulative condition may involve the adoption of ordinances or regulations rather than the imposition of conditions on a project-by-project basis."

With respect to GHG emissions, SCAQMD previously adopted certain policies and controls in its AQMP. RJN Ex. 2 at 3-7. The City properly determined that the Project is consistent with the AQMP (see infra, pp. 49-53). When additional control measures and policies for GHG emissions are adopted pursuant to AB 32, the City, along with other cities, will faithfully follow those policies. To require cities to formulate GHG significance thresholds on a local project basis in the interim would only lead to a patchwork of ad hoc measures, which would surely conflict with the careful and comprehensive approach to climate change embraced by the Legislature in AB 32. CEQA's deferral to regional plans to address regional environmental issues should be respected by this Court.

D. Recent Court Decisions Have Rejected Untimely Attempts To Use The Issue Of Global Warming To Force Additional CEQA Review

For the first time after two years of administrative review for the Project, Petitioners raised the issue of global warming in letters submitted one week before a scheduled Council hearing. By that time, the proposed Final EIR had been prepared, which included written responses to all timely

comments submitted on the Draft EIR. That proposed EIR had been acted on by the City's Planning Commission prior to Petitioners' submittal of comments concerning climate change.

Misusing CEQA and concerns of climate change in order to delay development projects are tactics that the courts have recently rejected. For instance, in Natural Resources Defense Council v. The Reclamation Board of the Resources Agency, Case No. 06CS-01228 (Sacramento County Sup. Ct., April 27, 2007), a CEQA lawsuit was filed in an attempt to block the state's issuance of encroachment permits needed to build 11,000 homes on top of levees in Lathrop, California. Id. at 1. The petitioners argued that the effects of climate change upon the "Delta," including rising water levels that could threaten levees, constituted "new information" under CEQA Section 21166 and required supplemental EIR review. Id. at 5.[20] The Court disagreed. Since the petitioners failed to present any information concerning the *specific effects* that climate change may have on the Delta where the project would be built, and instead cited only to generalized information regarding the potential effects of climate change, the Court denied petitioners' clam for additional CEQA review. Id. at 9.

Similarly, in American Canyon Community United for Responsible Growth v. City of American Canyon, Case No. 26-27462 (Napa County Superior Court, May 27, 2007), opponents of a proposed Wal-Mart filed a lawsuit alleging Napa County failed to analyze GHG emissions in an addendum to an EIR. The petitioners argued the adoption of AB 32 constituted "new information" triggering the need for further CEQA review. The Court denied that claim since it "fail[ed] to see how a mere legislative mandate for the creation of regulations could have triggered review" and did "not agree that [AB 32] is the type of new information contemplated by [Public Resources Code] section 21166." Id. at 8.

The Court should reach the same holding in the instant case. Otherwise, the Supreme Court's admonition would be ignored, namely, that "rules regulating the protection of the

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[20] CEQA Section 21166 sets forth the criteria used for determining whether a "subsequent" or "supplemental" EIR is required after the original Final EIR is certified. Those criteria, which are also set forth in CEQA Guidelines §§ 15162-15164, are very similar to the criteria applicable to determining when a proposed EIR has to be recirculated for public review due to "significant new" information that came to light prior to certification of the Final EIR. (See CEQA Section 21092 and Guideline 15088.5.)

environment must not be subverted into an instrument for oppression and delay of social, economic, or recreational development and advancement." Citizens of Goleta Valley v. Board of Supervisors, 52 Cal. 3d 553, 563 (1990).

IX. THE EIR COMPLIES WITH CEQA BY THOROUGHLY ANALYZING AND DISCLOSING THE PROJECT'S AIR QUALITY IMPACTS AND ADOPTING ALL FEASIBLE MITIGATION MEASURES TO REDUCE THOSE IMPACTS

Just as Petitioners attempt to use global warming as a means to stop development, Petitioners rely on the complexities inherent in air quality as a further attempt to halt the Project. For instance, Petitioner Highland Springs Resort makes grandiose claims about the Project's "15,164 daily trips, 1,379 peak hour morning trips and 1,570 peak hour evening trips." Op Br. at 61. However, the Resort is already generating "thousands of visitors" and, as the Resort conveniently fails to mention, its approved specific plan authorizes the *doubling* of its residential units to 1,630 (which would generate thousands of new vehicle trips). T28:2058. The air quality issues associated with that traffic is nowhere mentioned in Petitioners' brief.

Because of the inherent complexities involved with managing air quality on a regional, statewide and national basis, and because of the risk that project opponents will use air quality as a means to serve their own self interests, it is vital that the Project's impacts on air quality not be viewed in a vacuum, as Petitioners advocate. Rather, the proper focus of analysis is the Project's consistency with the Plans developed by the various agencies charged with managing air quality throughout the region.

A. Air Quality Management Requires Comprehensive Oversight By Federal, State And Local Agencies Through Adoption of Various Plans

As discussed in the EIR, at the federal level, the Federal Clean Air Act ("CAA") establishes national ambient air quality standards (NAAQS), which include pollutants such as carbon monoxide (CO), nitrogen dioxide (NO_2), sulfur dioxide (SO_2), and respirable particulate matter (PM_{10}). T28:2232. Pursuant to the federal CAA, states must submit and implement State Implementation Plans (SIPs) for local areas that do not meet the NAAQS. T28:2232. Those SIPs include pollution control measures that demonstrate how the NAAQS will be met. T28:2232.

Also discussed in the EIR is the California Air Resources Board ("CARB"), which ensures

state-wide compliance with the federal CAA. As part of California's SIP, CARB approved the Air Quality Management Plan ("AQMP") in 2003, which was further adopted by the California Environmental Protection Agency in 2004. T28:2234. CARB is also responsible for implementing the California CAA. T28:2233. The California CAA mandates that emissions be reduced to the maximum degree possible from vehicular and mobile sources in order to attain California's ambient air quality standards (CAAQS). T28:2233 Those CAAQS include all pollutants for which the federal government has established NAAQS, as well as additional standards that are not covered by the NAAQS. T28:2233. The AQMP provides control measures that reduce emissions to attain these federal and state standards. RJN Ex. 3 at p. 1-10.

At the local level, the South Coast Air Quality Management District ("SCAQMD") is the agency responsible for bringing air quality in areas under its jurisdiction into compliance with both NAAQS and CAAQS. T28:2233. In addition to monitoring those pollutants, SCAQMD also monitors the emissions of volatile organic compounds (VOCs) and reactive organic gases (ROGs) (which provides the additional benefit of monitoring "ozone," which is created as a by-product when ROGs and VOCs react in the presence of sunlight. RJN Ex. 2 at 3-2.

SCAQMD and the AQMP provide regulatory oversight of the South Coast Air Basin ("Basin"), which is where the Project is sited. In carrying out its regulatory functions, SCAQMD coordinates with cities within its jurisdiction and SCAG. RJN Ex. 3 at p. 1-13. This coordination ensures that all agencies are working in concert to reduce emissions from pollutants specified under the national and state standards. In particular, SCAQMD's interaction with cities involves a determination of whether those cities' General Plans for future development are consistent with the AQMP. Although not required, cities have the ability to adopt air quality elements into their General Plans. RJN Ex. 3 at p. 1-13. In this case, the City's General Plan includes an Air Quality Element, which addresses both NAAQS and CAAQS. T28:2237.

B. The EIR Properly Concluded That The Project Is Consistent With The Applicable Air Quality Plans

In determining that the Project is consistent with the AQMP, the EIR properly relied on the SCAQMD's CEQA Air Quality Handbook ("Handbook"). T28:2238. According to SCAQMD,

"[w]ith the help of the Handbook, local land use planners will be able to analyze and document how proposed and existing projects affect air quality and should be able to fulfill the requirements of the CEQA review process." Id. Accordingly, SCAQMD's comment letter in response to the NOP for the Project recommends that the City rely on the Handbook for its air quality analysis. T18:495.

The Handbook notes that the "AQMP control strategy is based on projections from local General Plans." RJN Ex. 2 at 12-2. As such, "projects consistent with local General Plans are considered consistent with the air quality related regional plans." Id. Thus, the EIR first analyzes the Project's consistency with the City's General Plan.

1. The Project Is Fully Consistent With The Air Quality Element Of The City's General Plan

The City's General Plan Air Quality Element seeks to "preserve and enhance local and regional air quality for the protection of the health and welfare of the community." T28:2246. To promote this goal, the General Plan includes two general policies: (1) to review all development proposals for their potential to adversely impact local and regional air quality and to feasibly mitigate any significant air quality impacts, and (2) to support the development of projects that facilitate and enhance the use of alternative modes of transportation. T28:2246.

With respect to the first policy, the City imposed a significant number of mitigation measures to reduce the Project's impacts on air quality to the greatest extent feasible. T28:2246. Those measures fully incorporate the mitigation recommended by both SCAQMD and CARB. T28:2251. The City also impacts mitigation measures to ensure consistency with the General Plan's second policy. Those measures include a non-vehicular circulation system that includes facilities for bicyclists, pedestrians, and/or equestrians. T28:2246.

After imposing all of these mitigation measures, the City properly determined that the Project is consistent with its General Plan, including its Air Quality Element. This determination should be upheld since "[C]ourts accord great deference to a local governmental agency's determination of consistency with its own general plan, recognizing that the 'body which adopted the general plan policies in its legislative capacity has unique competence to interpret those policies.'" Eureka Citizens for Responsible Government v. City of Eureka, 147 Cal. App. 4th 357 (2007).

Pursuant to the Handbook, the Project's consistency with the General Plan necessarily implies the Project is consistent with the AQMP ("projects consistent with local General Plans are considered consistent with the air quality related regional plans"). RJN Ex. 2 at 12-2. But the EIR took the additional step of analyzing the Project's consistency with the AQMP based on another two-part test recommended by SCAQMD – (1) whether the project will increase the frequency or severity of existing air quality violations or cause new violations, and (2) whether the project will exceed the assumptions in the AQMP pertaining to population, transportation assumptions and regional housing needs. RJN Ex. 2 at 12-3.

2. The Project Will Not Result In An Increase In The Frequency Or Severity Of The Basin's Existing Air Quality Violations Or Cause New Violations

To assess the Project's impacts on existing or future air quality violations, the EIR started its analysis by looking at the Project's long-term (i.e., operational) and short-term (i.e., construction) emissions. T28:2238.

a. The Project's Long-Term Impacts Will Not Increase Basin-Wide Violations

To determine the Project's long-term impacts, the EIR relied on CARB's model called "URBEMIS 2002." T28:2242. Using that model, the Project's operational emissions of ROG, NO_X, CO, SO_X and PM_{10}, were quantified based on new vehicle trips, dust from cars traveling on the roads, the Project's expected natural gas emissions, landscaping equipment, and emissions from consumer projects. T28:2243-44. The EIR then compared those emissions to SCAQMD's significance thresholds developed for determining project-specific air quality impacts because a basin-wide violation (the test for AQMP consistency) would not occur if a project-specific exceedance would not occur. However, since the Project will exceed SCAQMD's project-specific thresholds on a long-term operational basis for CO, VOC, NO_X and PM_{10}, additional analysis is necessary to determine Plan consistency. T28:2242.

Petitioners, however, eschew that additional analysis and jump to the conclusion that the Project must be inconsistent with the AQMP since the Project would exceed those thresholds. Op. Br., pp. 43-44. Petitioners fail to read, however, the applicable portion of the Handbook on how to determine consistency with the AQMP. As provided in that guidance document:

> The purpose of the consistency finding is to determine if a project is inconsistent with the assumptions and objectives of the regional air quality plans, and thus if it would interfere with the region's ability to comply with federal and state air quality standards. If the project is inconsistent, local governments should consider project modifications or inclusion of mitigation to eliminate the inconsistency. It is important to note that even if a project is found consistent it could still have a significant impact on air quality under CEQA. For example, if the analysis demonstrates a project is consistent with the regional air quality plans and local Air Quality Element, that does not mean that the project could not also have a significant effect on air quality by exceeding the significance thresholds.

RJN Ex. 2 at 12-1.

Thus, after quantifying the Project's long-term emissions, the EIR engaged in additional analysis as to whether those emissions would result in an overall increase in *basin-wide* air quality violations. The EIR concluded that the "emissions from the project are projected to be a fraction of a percentage of the basin-wide emissions." T28:2247. This fact, combined with the determination that the Project is consistent with the City's General Plan, resulted in the proper determination that the Project's long-term emissions will not increase basin-wide air quality violations.

b. The Project's Short-Term Impacts Will Not Increase Basin-Wide Violations

Just as it did with long-term emissions, the EIR assessed the emissions associated with the Project's short-term, construction related impacts. According to the EIR, the Project will result in a short-term increase in emissions of CO, VOCs, NO_X, SO_X, and PM_{10}. T28:2240. To quantify those emissions, the EIR assumed the Project would be built in phases, each phase commencing only upon completion of the previous phase. T28:2240. However, the EIR went further and analyzed a "worst case" scenario.

This extremely conservative scenario looked at a snapshot of a peak construction day in August 2007 when multiple phases of construction may be underway. T28:2240. According to SCAQMD, operators at most construction sites do not typically operate their equipment continuously for more than seven hours per day. RJN Ex. 5. But, in an effort to be as conservative as possible, the EIR assumed that during this peak construction day, (1) multiple phases of development would be occurring at the same time; (2) 62 pieces of equipment would be operational for eight continuous hours; (3) all construction workers for all construction activity would be

commuting by automobile to and from the Project site; (4) 25.3 acres of the Project would be actively graded during the peak day; (5) 26 pieces of heavy equipment would be used; and (6) ten dwelling units would be at some stage of painting. T28:2240-41.

Using this conservative scenario, the EIR determined that the Project's short-term construction emissions would exceed SCAQMD's thresholds of significance for CO, VOC, NO_X, and PM_{10}. T28:2242. As a result, extensive construction-related mitigation measures were imposed on the Project, including compliance with SCAQMD's Rules 402 and 403 (governing off-site nuisances and fugitive dust control) and all conditions imposed under the City's procedures for the issuance of grading permits. T28:2249-2250.

Although the Project will exceed SCAQMD's thresholds of significance using this "worst-case" scenario, the EIR properly concluded that the Project's short-term air quality impacts would not contribute to basin-wide air quality violations because the Project will be required to comply with all of SCAQMD's Rules applicable to construction and the Project's short-term emissions are expected to be a fraction of the basin-wide emissions. T28:2247.

3. The Project Will Not Exceed The Applicable Assumptions In The AQMP

The second part of SCAQMD's additional test to determine AQMP consistency relates to the Project's consistency with the AQMP's assumptions concerning population, transportation, housing and employment growth assumptions. T28:2247. Because the AQMP assumptions are based, in large part, on the regional growth and transportation forecasts prepared by SCAG, the EIR started by comparing the Project's expected vehicle miles traveled with the assumptions contained in SCAG's Regional Transportation Plan ("RTP"). T28:2245-47. In addition to comparing the Project with the RTP, SCAQMD also recommends looking at two other planning documents: (1) the City's general plan and (2) SCAG's other regional plans (such as SCAG's Regional Comprehensive Plan and Guide), in order to determine the Project's consistency with the AQMP's assumptions on population, housing and employment.

The EIR analyzed the Project's consistency with all of those documents. As discussed previously, the EIR contains a thorough analysis of the Project's consistency with the City's General Plan, including a description of how the Project complies with each of the City's stated policy goals.

T28:2246. In addition, the EIR contains a detailed analysis of the Project's consistency with SCAG's Regional Comprehensive Plan and Guide, including SCAG's "Core Action 5.07" (consistency with SCAG's air quality command and control regulations or alternatives), and "Core Action 5.11" (the environmental review process must "consider air quality, land use, transportation and economic relationships to ensure consistency and minimize conflicts"). T28:2246.

The EIR's thorough analysis of the Project's consistency with all of these planning documents stands in stark contrast to Petitioner's thin assertion that the EIR failed to engage in the proper AQMP consistency analysis. For example, Petitioners argue the Project is inconsistent with AQMP's assumptions pertaining to population density and land use because the RTP does "not evaluate land uses, population growth or roadways on the Project site" and the EIR supposedly examined only the RTP. Op. Br., p. 45. While Petitioners correctly note that AQMP consistency cannot be determined by looking solely at the RTP given the limits on the scope of the RTP, they fail to tell the Court that this EIR fully analyzed the Project's consistency with the other two planning documents that provide the assumption not covered in the RTP. Accordingly, Petitioners' argument on AQMP consistency must be rejected.

C. Petitioners' Argument Would Require The EIR To Analyze Factors That Are Either Not Required Or Employ Methodologies Yet To Be Adopted

As noted above, consistency with the AQMP does not end the air quality impact analysis required by SCAQMD for project-level EIRs. SCAQMD requires a second level of analysis, namely, whether the proposed project will cause individual air quality impacts due to its construction and operation.

Here, the EIR provided that additional analysis (see supra, pp.50-52). Because the Project will cause the emission of certain air pollutants in exceedance of SCAQMD's thresholds (supra, p. 50-51), the EIR concluded that the Project will cause significant air quality impacts (both for short-term construction impacts and long-term operational impacts). The Project reaches the same conclusion for cumulative impacts. T28:2248.[21] After adopting all feasible mitigation measures, the

[21] Petitioners' claim that the EIR failed to consider cumulative impacts related to ozone is misleading. Ozone is a by-product of ROGs (such as nitrous oxides) and VOCs, and the EIR clearly

EIR concluded that these significant air quality impacts would still be significant. Consequently, following CEQA to the letter, the City adopted a Statement of Overriding Considerations that described how the Project's benefits outweigh those unavoidable air quality impacts.

In response, Petitioners fashion arguments concerning toxic pollutants, $PM_{2.5}$ and Local Significance Thresholds. (Notably, each of these tenuous arguments were raised by Petitioners for the first time *four months after the close of public comment.*) But, as discussed below, the EIR followed SCAQMD's requirements governing toxics, the methodology governing $PM_{2.5}$ had yet to be adopted at the time the EIR was prepared, and the EIR properly compared the Project's air quality impacts against regional, rather than local, significance thresholds. Therefore, each of Petitioners' untimely arguments is refuted by both the EIR and SCAQMD's rules and regulations.

1. The EIR Properly Analyzed Toxic Pollutants

Petitioners disingenuously employ a scare tactic by claiming the EIR failed to analyze "known human carcinogen[s]" such as benzene and other toxic pollutants. Op. Br., p. 47. Yet, what Petitioners fail to point out is that the EIR analyzed toxic air contaminants in full compliance with SCAQMD guidance.

Toxic air contaminants are "non-criteria" pollutants and, accordingly, they do not have federal or state air quality standards. RJN Ex. 2 at 3-3. As a result, the EIR relied on the Handbook and its local regulations governing toxic contaminants. T28:2238. According to the Handbook, the "Hot Spots Information and Assessment Act" (Cal. Health & Safety Code §§ 44300 et seq.), requires operators of specified facilities to submit comprehensive emissions inventories and reports to SCAQMD. RJN Ex. 2 at 3-7. SCAQMD then reviews those reports and places the facilities into high-intermediate and low-priority categories based on the "potency, toxicity and proximity of sensitive receptors to the facility. Id. Only those facilities designated "high priority" are required to prepare a toxic contaminant health risk assessment (such as dry cleaners, gas stations, gasoline refineries, power plants, landfills and airports). (RJN Ex. 3, Table 2-3, p. 2-10. Notably, a 1,500 home residential project is not designated as a high priority faciltiy.

states that the Project will have both short and long-term impacts on both nitrous oxides and VOCs.

Even though the City was not required to prepare such a health risk assessment for the Project, the EIR analyzed air quality emissions generated from Project-related traffic and performed a "CO hot spot" impact analysis to assess localized impacts on sensitive receptors. T28:2243. This analysis assessed the toxic pollutant that could be attributable to this residential Project – carbon monoxide (CO) from automobiles – and analyzed whether that pollutant would impact sensitive receptors who may be exposed at adjacent roadways and intersections. T28:2243. Drawing on the Handbook's definition of a "sensitive receptor" (T28:2244), the CO hot spot analysis examined impacts to "residences, elementary school site(s) and parks." T28:2244. Because there are no sensitive receptors located within a quarter mile of any primary Project facility emitting a toxic pollutant (a quarter mile is the threshold used by both SCAQMD and CARB), the EIR properly concluded that sensitive receptors will not be impacted. T28:2244, RJN Ex. 2 at 10-5.

Likely knowing that this applicable methodology supports the EIR's conclusions, Petitioners try to rely on Bakersfield Citizens for Local Control v. City of Bakersfield, 124 Cal. App. 4th 1184 (2004), to argue the EIR failed to include sufficient information on air quality impacts to resulting adverse effects on human respiratory health. Id. at 1220. In Bakersfield, the EIR failed to acknowledge "the health consequences that necessarily result from the identified adverse air quality impacts." Id. By contrast here, the EIR provided a description of each monitored air pollutant in the Basin, as well as the corresponding adverse health impacts related to each of those pollutants. T28:2234. The EIR went further and included an assessment of each pollutant, its corresponding health effects, and performed an additional "hot spots" analysis for CO to determine any adverse impacts on sensitive receptors. Petitioners' cries of "no analysis" simply fall flat.

2. The Methodology Governing $PM_{2.5}$ Had Not Been Adopted At The Time The EIR Was Prepared

Petitioners also assert that the EIR ignored $PM_{2.5}$ in its air quality analysis. As discussed in the EIR, $PM_{2.5}$ is an air pollutant consisting of tiny solid or liquid particles of soot, dust, smoke, fumes and aerosols. T28:2234. Although State and Federal standards exist for analyzing PM_{10} (a similar pollutant), no regulatory standards or CEQA thresholds existed for $PM_{2.5}$ at the time the EIR was prepared.

In response, Petitioners' steadfastly argue that the EIR should have used SCAQMD's draft methodology to calculate $PM_{2.5}$ emissions. But the methodology cited to by Petitioners was still in public workshops, and comments were still being solicited by SCAQMD at the time the Final EIR for the Project was prepared. RJN Ex. 5. Indeed, it would have been futile for the EIR to rely on this methodology as it was amended even further in both September and October of 2006. Id. It was not until October 6, 2006 – five days before the EIR was certified -- that SCAQMD's Governing Board adopted the $PM_{2.5}$ methodology. Id.

Inappropriate reliance on this draft methodology was also a concern of SCAQMD. In fact, SCAQMD explicitly stated that it would not make comments on any project's draft EIR "relative to the $PM_{2.5}$ proposal on CEQA documents [until] January 2007." RJN Ex. 5 at 3. Indeed, SCAQMD's resolution adopting the $PM_{2.5}$ methodology provides that the $PM_{2.5}$ methodology should not be included in its Handbook until December 2006. Thus, SCAQMD asked other public agencies to implement the $PM_{2.5}$ methodology only by "early 2007." RJN Ex. 6 (emphasis added). Consequently, in its comment letter in response to the Project's NOP, SCAQMD made no suggestion that the $PM_{2.5}$ methodology should be utilized in this case. T18:494-95.

Even though there was no methodology in place for analyzing $PM_{2.5}$, the City still addressed this issue in the EIR in order to comply with CEQA's mandate to fully disclose all environmental impacts. The EIR disclosed the existing data for $PM_{2.5}$ in this region, and then informed the reader that there are no standards or thresholds yet adopted by which to assess this data. Thus, the EIR fulfilled its purpose as a legally adequate disclosure document. T28:2237.[22]

3. The EIR Properly Relied On Regional, Rather Than Local, Significance Thresholds

Just as the Court should reject Petitioners' argument that the EIR should have relied on a draft methodology for $PM_{2.5}$, it should also reject Petitioners' argument that the EIR improperly failed to consider SCAQMD's Local Significance Thresholds ("LSTs"). As conceded by

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[22] Petitioners' reliance on Berkeley Keep Jets Over the Bay Committee v. Board of Port Commissions, 91 Cal. App. 4th 1344 (2001), concerning $PM_{2.5}$ is misplaced for several reasons, as explained supra at pp. 43-44.

Petitioners' own air quality expert, LSTs are voluntary. T214:11191. As provided by SCAQMD, "[T]he use of LSTs is voluntary for local agencies that want the tools to analyze potential localized impacts. For CEQA purposes, lead agencies are already required to evaluate emissions from projects." RJN Ex. 4. Accordingly, SCAQMD's NOP comment letter contains no suggestion that the EIR should have used LSTs. T18:494-95

Rather than using the voluntary LSTs, the City, as the lead agency under CEQA, exercised its discretion and chose to analyze the Project's emissions in two other ways, namely, by comparing those emissions to SCAQMD's Regional Significance Thresholds and by performing the CO hot spot" impact analysis since CO is the primary pollutant that affects localized receptors. Supra, p. 54. T28:2243. The EIR properly concluded that there would be no localized impacts based on the EIR's CO hot spot analysis.

In sum, the EIR properly and thoroughly analyzed air quality impacts on a region-wide basis. This approach is fully consistent with the comprehensive management strategy used by SCAQMD in the AQMD to regulate air quality throughout the Basin. Such Plan consistency combined with the EIR's comprehensive air quality analysis clearly withstands Petitioners' erroneous challenges.

D. The EIR Contains Adequate Mitigation Measures To Reduce The Project's Air Impacts To The Fullest Extent Feasible

Because of the Project's impacts on air quality, the EIR incorporated numerous mitigation measures recommended by the City, SCAQMD and CARB. T28:2248-52. Blind to the list of those measures, Petitioners claim that the EIR failed to incorporate SCAQMD's recommended mitigation concerning the use of lean-NO_X catalysts for off-road diesel trucks, the use of low sulfur fuel, and the use of cooled gas recirculation. Op. Br., pp. 80-81.

Each of those mitigation measures, however, were either incorporated into the Project or addressed in the EIR. For instance, MM 7-1 requires the use of lean-NO_X catalysts for off-road diesel trucks (T28:2251) and SC 7-6 requires the use of low sulfur fuel for construction equipment (T28:2250.) As for cooled gas recirculation, SCAQMD confirmed that the use of cooled gas recirculation is not feasible for most types of construction-related equipment, and, therefore, this item was not included as a mitigation measure. T225:11393. Finally, MM 7-1 requires the use of

"Zero-VOC" paints (i.e., paints with no volatile organic components), which is a mitigation measure specifically recommended by SCAQMD in its CEQA Handbook. T28.2251.[23]

In addition to these measures, the Project is required to comply with all state and local agency regulations governing air quality. For instance, all construction-related mitigation must be approved by the City's Public Works Department (T28:2250) and all contractors must comply with SCAQMD rules and regulations (T28:2248). In addition, the Project incorporates all mitigation measures contained in the City's General Plan. T28:2249. Last, the Project must implement all practices identified by CARB to minimize the Project's air quality impacts. T28:2251. However, Petitioners still propose numerous additional mitigation measures, including such measures as energy efficient buildings, solar energy installation and purchasing offsets or credits for remaining emissions. Op. Br., p. 81. Many of those measures, however, have been required as mitigation. For instance, SC 7-6 requires the implementation of "thermal integrity [into] buildings," "efficient heating and appliances" and the incorporation of "appropriate passive solar design." T28:2251. As for Petitioners' remaining suggestion concerning the purchase of basin-wide emission offsets, Petitioners fail to show how those measures would lessen or avoid the impact. CEQA does not require "analysis of every *imaginable* alternative or mitigation measure; its concern is with *feasible* means of reducing environmental effects." Concerned Citizens of South Central Los Angeles v. Los Angeles Unified School District, 24 Cal. App. 4th 826, 840 (1994) (emphasis added).

Petitioners finally argue that the EIR is invalid because it contains measures that "are not mandatory or enforceable." Op. Br., p. 79. However, CEQA imposes a duty only to "avoid or minimize environmental damage where feasible." CEQA Guidelines § 15021; emphasis added. Contrary to Petitioners' assertion, the word "shall" is included in every mitigation measure listed in the EIR that incorporates CEQA's concept of feasibility. With respect to the standard condition ("SC") measures cited by Petitioners, those measures are taken directly out of the City's General Plan and, as such, the language remains unchanged from that language provided in the General Plan.

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[23] Petitioners' argument that despite the EIR's air quality analysis, the modeling was flawed because the "emission source architectural coatings applied to the homes as part of the maintenance activities" was "turned off by the modeler" (Op. Br. at 46) is simply irrelevant since the use of Zero-VOC paints fully mitigates the impacts related to VOC emissions.

T28:1957. Further, that mitigation is made mandatory for the Project by the City's conditions of approval for the Project. T198.11045. Thus, by fully incorporating the wealth of mitigation recommended by each state and local agency charged with managing basin-wide air quality, the EIR fully complies with CEQA.

X. THE CITY'S ASSESSMENT AND MITIGATION OF ACCESS AND OTHER TRAFFIC ISSUES EXCEEDED CEQA'S REQUIREMENTS

Vehicular access to the Project Site and related traffic issues were a major focus of the planning efforts that went into the Project and the EIR. The Project will construct a secondary highway connecting the northern part of the City as its primary access, and will substantially improve an existing local road for secondary (i.e., emergency) access. Those routes were identified and selected in early consultation with the surrounding communities, including two of the Petitioners. Apparently acknowledging that the General Plan has designated a new secondary highway near its complex for over 20 years and that it never challenged that Plan, the Resort at that time simply asked SunCal to ensure that the EIR provided a comprehensive evaluation of two alternative routes for that road farther east away from the Resort's existing complex.[24] The Resort's later refusal to allow access across any portion of their property is at direct odds with those earlier cooperative efforts between SunCal and the Resort to identify a feasible route with the least environmental impacts. Similarly, SunCal and the City developed numerous measures to eliminate local impacts attributable to the secondary access road based on the Community of Interest's proffered "deal." That deal, however, was unilaterally broken by that Petitioner by the final Council hearing. These tactics, however, cannot change the unassailable fact that the EIR provides a thorough assessment of feasible access routes and identifies mitigation for all traffic impacts. Accordingly, Petitioners' access and traffic arguments must be denied.

A. A New Primary Access Road Is Required By The General Plan

Construction of the access road is not only a critical element of the Project, but it also fulfills the City's long-term transportation planning goal. The Circulation Element of the City's General

[24] The Resort's current owners purchased the Property in 1990, after the General Plan amendment designated the road alignment across the Resort's property.

Plan has long identified the need for a new north-south secondary highway connecting the Black Bench area and intermediate development parcels to the central portion of the City via Highland Springs Avenue. T32:3729.

After consultation with Resort officials, SunCal determined that the General Plan's proposed route was not ideal due to potential impacts on the Resort's most frequently used trails, Resort buildings and a prominent oak tree. T28:2497. As a result, SunCal formulated an alternate access route via Highland Home Road that is not visible from Resort buildings and significantly reduces impacts by avoiding the Resort's primary loop trail system, prominent oak trees and Resort buildings. See id. The Resort responded by suggesting a different alignment across the Resort property and located along a streambed. T28:2497, 2499. After evaluating that proposal, the City determined that the Resort's proposed alignment would have greater environmental impacts to the natural drainage system. Instead, SunCal developed a second alignment, one using Sunset Avenue, which would avoid impacts to all primary trails. T28:2497, 2500. These two proposed alignments created in response to the Resort's comments were the primary routes evaluated in detail in the EIR. 28.2384-2431. The Final EIR included a comparison of these two alignments against the General Plan alignment, and the alignment proposed by the Highland Springs Resort. T28:2497, 2499. Ex. D hereto depicts all of the primary access routes considered by SunCal. After thoroughly evaluating the environmental impacts of the proposed access roads, the City approved the two most feasible routes, with a preference for the Easterly Access Alternative, and allowed flexibility for SunCal to consider a third access route, subject to further environmental review.

1. Project Access Via Highland Home Road

Section 4.6 of the Draft EIR summarizes the comprehensive traffic impact analysis ("TIA") prepared for the Highland Home Road access and is attached as Appendix F to the EIR. T168:9209, et seq. The TIA employed the County-approved methodology for determining the study area intersections and studied existing traffic conditions, as well as projections of future conditions in the years 2008, 2010, 2012, and General Plan build-out. T168:9230, 9252-57. For each time frame studied, the TIA evaluated traffic conditions both with and without the Project to identify the Project's contribution to any adverse traffic impacts. The TIA also included an evaluation of

cumulative traffic impacts based on other projects approved or proposed within the study area. T168:9273.

The Traffic section of the EIR also analyzed the Project's consistency with transportation-related planning documents, including the City's General Plan Circulation Element, the County's General Plan Circulation Element, the County's Pass Area Plan and SCAG's Regional Transportation Plan. T28:2210-2215. The EIR proposes an extensive list of project design features, standard conditions and mitigation measures to reduce traffic impacts to less than significant levels. T28:2216-30. These measures include a combination of mitigation and fair-share fees, physical improvements, and plans for regulatory approval. T28:2226-30. Further, the EIR proposes mitigation measures for intersections located in the County and the City of Beaumont to reduce potential traffic impacts outside the City's boundaries. T28:2227-29 (MM 6-3, 6-4).

2. Site Access Via The Easterly Access Alternative

The second access option via Sunset Avenue, referred to as the "Easterly Access Alternative," is analyzed in Section 5.3.6 of the Final EIR and depicted in Ex. E hereto. T28:2384 et seq. The EIR reviews this alternative in significant detail, including a consideration of each impact area studied for the Highland Home Road alignment. The assessment of this alternative included preparation of several technical analyses, including an off-site water and sewer report, view simulations, geologic and geotechnical engineering report, drainage report, biological resource assessment, traffic impact analysis, and noise analysis. T30:2820 et seq. Like the TIA for the Highland Home Road alignment, the traffic impact analysis for the Easterly Access alternative provides a comprehensive analysis of the Project's contribution to traffic impacts, both direct and cumulative. Section 5.3.6 of the EIR also specifies the individual project design features, standard conditions and mitigation measures that would need to be modified to address the different traffic impacts associated with the Easterly Access Alternative. T28:2416-23.

3. Secondary Access To The Project Via Bluff Street

The EIR also considered a third access alternative, via the existing Bluff Street. T28:2373-80. Based on the width and condition of Bluff Street, the EIR determined that its available capacity would limit the Project to 330 homes. T28:2373. Because this substantially reduced Project would

not satisfy multiple project objectives (see infra, Section XX), the City determined that this alternative was not preferable as a primary access road.

Nonetheless, the Project will incorporate Bluff Street as a secondary access road. A secondary access route is necessary both for emergency access and to allow construction of the Project. Officials from the Riverside County Fire Department ("RCFD")[25] confirmed that Bluff Street will provide adequate secondary access to the Site. T281:12348-54. To ensure that the capacity of Bluff Street is not exceeded by Project-related traffic, the City imposed a condition of approval that creates gated access between the Project and Bluff Street. T28:2226. The gate will be locked except for emergency access or egress. See id. In addition, the City required SunCal to improve Bluff Street to satisfy County standards between the Project boundary and City/County limits, and to repair any damage to Bluff Street that may be caused by construction traffic. T289:12770. Banning Bench Community testified at the Planning Commission that these measures would satisfy their objections to the Project. T192:10568-75.

Based on all of this substantial evidence and analysis, the City approved the Project incorporating either of the two studied access routes, with a stated preference for the Easterly Access alternative as the feasible option with the least impacts on the Resort. In addition, the City approved the use of Bluff Street for secondary access, subject to conditions limiting the use of that route for construction and emergency purposes.

B. Petitioners' Traffic Arguments Are Not Supported By The Evidence Or CEQA

Petitioners assert three main arguments regarding traffic and access: (1) the EIR did not study a feasible primary access route, (2) Bluff Street does not provide an adequate secondary access route, and (3) Project-generated traffic will create negative impacts not properly assessed or mitigated in the EIR. Each of these arguments fails, as the City approved feasible primary and secondary access routes, and imposed mitigation of all traffic impacts.

1. The City Approved A Feasible Access Route Consistent With CEQA

Petitioners argue that the City's approval of the two primary access alternatives violates

[25] The City provides fire services through a contract with the RCFD. T28:2296.

CEQA because neither of these routes is "certain." See Op. Br. at 13:5-6. Petitioners claim these routes are not feasible because both the Highland Home Road and Easterly Access alternatives cross the Highland Springs Resort property, and the Resort has not agreed to allow construction of the road on its property. See Op. Br. at 13:6-9. Accordingly, Petitioners contend that the Project will be forced to construct the access road using a third alignment not studied in the EIR, thereby resulting in improper "piecemealing" of environmental review. See Op. Br. at 13:16-24.

Petitioners' argument is both legally and factually deficient. "Piecemeal" environmental review of a proposed project occurs when an EIR examines only a portion of the "whole" project. See CEQA Guidelines § 15378(a) (defining "project" to mean "the whole of an action"); Laurel Heights Improvement Association, 47 Cal. 3d at 396. See Association for a Cleaner Environment v. Yosemite Community College District, 116 Cal. App. 4th 629, 639 (2004) (multiple related activities that were "all part of a single, coordinated endeavor" constituted a "project"). Piecemealing does not occur simply because a project must secure additional permits or approvals after the lead agency certifies the EIR and approves the project. Indeed, CEQA expressly contemplates that "responsible" agencies (agencies other than the lead agency) will be acting on approvals for the project after the lead agency certifies the EIR. See CEQA Guidelines § 15378(c). If such a subsequent approval is denied or not obtained by the project applicant, then the project either does not proceed or it is changed to account for the denied approval. When a project is so modified after lead agency approval, CEQA simply requires the preparation of a "subsequent" or "supplemental" EIR, but it does not invalidate the original EIR previously certified by the lead agency. See CEQA Guidelines § 15162(c) (information requiring subsequent environmental review does not require reopening the previous approval).

That well recognized CEQA process is applicable to the Project's EIR and the City's entitlement decision. At the time the Draft EIR was published, the two routes approved by the City were determined to be potentially feasible based on coordination with Resort officials. T28:2497. Indeed, despite submitting a six-page comment letter on the EIR, the Resort did not expressly refuse to allow construction of the access road on its property prior to filing this lawsuit. In fact, the Resort identified a third access route across its property. T28:2497. Despite the Resort's subsequent

refusal to allow access, that matter could be resolved amicably in the future, or through eminent domain to acquire the Resort property necessary for development of the road. Thus, either route is potentially feasible within the meaning of CEQA. Further, the City took the extra step and expressly provided in the Project's Conditions of Approval that additional CEQA review will be required if SunCal acquires rights to a third alternative route, which would alter the Project. T289:12770. Thus, the City addressed all possible scenarios in the EIR and the Conditions of Approval.

Petitioners argue that the asserted lack of "certain access" is akin to a lack of consistency in an EIR's project description. See Op. Br. at 16:1-14. Yet, Petitioners concede that the Black Bench project description never changed. See Op. Br. at 16:15-16. In fact, the City approved the Project contingent on construction of one of the two access routes studied in the EIR, conditioned the Project so that no construction can proceed until SunCal secures all rights to one of those routes, and expressly required additional CEQA review if SunCal ever proposes a third access route. T289:12768-70. The policy underlying CEQA's requirement of a stable project description has clearly been satisfied. See San Joaquin Raptor Center v. County of Merced, 149 Cal. App. 4th 645, 654 (2007) (accurate project description allows the public and lead agency to fairly evaluate environmental risks, mitigation measures and project benefits).

Petitioners cite no legal authority for their fundamental argument that CEQA is violated unless a "known primary access" route is selected by the City. See Op. Br. at 15:27-28. Petitioners vainly argue that the asserted lack of "certain access" is analogous to approving a project without confirming the availability of an adequate water supply, citing to Vineyard, 40 Cal. 4th 412 (2007). Petitioners' attempt to analogize to the Vineyard is inapposite. First, the persuasive value of that case on this issue is limited because water is a finite resource, subject to specific statutory requirements for consideration in an EIR. See supra, Section VI. More importantly, the analysis in the EIR satisfies the California Supreme Court's guidance that where the availability of a particular resource is not certain, an EIR should include discussion of "possible replacement sources or alternatives. . . and of the environmental consequences of those contingencies." See Vineyard, 40 Cal. 4th at 432. Here, the EIR fully discloses the potential inability to obtain access via Highland Home Road, and discusses the environmental consequences of two potential replacements: the

Easterly Access Alternative and the Bluff Road alternative.

In summary, Petitioners have provided no CEQA authority requiring guaranteed access to the Project prior to approval by the lead agency. Both the approved routes were feasible options within the meaning of CEQA. As such, the City's approval was consistent with CEQA's requirements.

2. Secondary Access Via Bluff Street Was Fully Assessed And Conditioned

Petitioners argue that the approved use of Bluff Street for emergency and construction access was improper because Bluff Street is a narrow road incapable of handling the traffic that will be generated by the Project. See Op. Br. at 14:15-21. This argument ignores the detailed mitigation measures imposed to ensure that the limited capacity of Bluff Street is kept available only for emergency access by creating locked and gated access between the Project and Bluff Street. T28:2226. This measure prevents Project residents from using Bluff Street for egress except in emergency situations as specifically requested by the Banning Bench Community. T192:10568-75. Further, the City required SunCal to improve Bluff Street to satisfy County standards between the Project boundary and City/County limits, and to repair any damage to Bluff Street caused by construction traffic. T289:12770. In addition, the City approved the use of Bluff Street for emergency access, after specifically discussing this route with RCFD. T28:2536. RCFD officials confirmed that they agreed with the selection of this emergency access route. T281:12348-54. Petitioners' lay opinions to the contrary do not outweigh the considered opinions of responsible agencies with relevant expertise. See Citizens' Committee to Save Our Village v. City of Claremont, 37 Cal. App. 4th 1157, 1168 (1995) (agency may rely on evidence that rebuts or contradicts lay opinion from project opponent).

3. The EIR Assessed And Mitigated The Other Traffic Issues Raised By Petitioners

Despite Petitioners' suggestions to the contrary, the EIR includes an analysis of geotechnical hazards posed by the proposed access routes. T28:2109-10. The EIR's geotechnical analysis determined that the Highland Home Road access road crosses an earthquake fault, and the Easterly Access road crosses two "Hazard Management Zones." T28:2401. However, as discussed in the EIR, those risks can be fully mitigated to less than significant levels. See id.

Finally, Petitioners also incorrectly assert that SunCal is not required to comply with mitigation outside of the City's jurisdiction. Op. Br. at 60:7-11. The EIR proposes mitigation measures for intersections located in the County and the City of Beaumont designed to reduce potential traffic impacts outside the City's boundaries. T28:2227-29. These measures prohibit SunCal from obtaining certificates of occupancy until it has reached an agreement for traffic improvements with that jurisdiction, or paid necessary fees for those improvements. id.[26]

XI. THE EIR PROPERLY ANALYZED POTENTIAL RISKS FROM WILDFIRES AND OTHER FIRE HAZARDS, AND ALL NECESSARY MITIGATION WAS IMPOSED WITH APPROVAL FROM FIRE OFFICIALS

Petitioners' arguments regarding wildfire risks are little more than scare tactics. The Project was designed to minimize fire risks by locating homes away from high fire risk areas, and using fuel modification and other state of the art measures to further protect homes. The EIR provided a detailed assessment of wildfire risks posed by the Project, including the potential impacts on fire services. Responding to input from the public and the RCFD, the local agency providing fire services to the City, the City adopted a number of mitigation measures and other conditions of approval to ensure that wildfire risks would be reduced to less than significant levels. Together with intelligent project design, these conditions, including expanded fire department services and a secured secondary access route, will ensure adequate provision of fire safety – a fact confirmed by RCFD.

A. The EIR's Thorough Analysis And Mitigation Of Wildfire Risks

The Project's potential wildfire risks are addressed in multiple sections of the EIR. First, the EIR primarily details the Site's wildfire risks in Section 4.9, Hazards and Hazardous Materials. T28:2278 et seq. That section notes that the location of homes and other development was selected for the eastern portion of the Site, which is generally in a low wildfire zone. T28:2284. The western portion of the Site, which lies in a high wildfire zone, will be preserved as open space. See id. Section 4.9 also provides a specific evaluation of each of the wildfire risks identified by Petitioners, addresses the potentially significant impacts associated with placing new development adjacent to

[26] Petitioners' claim concerning cumulative traffic impacts is addressed infra at p. 91.

high wildfire zones, and formulates mitigation measures to mitigate those impacts to less than significant levels. T28:2285. Fire risks are further lowered through a variety of project design features, including "implementation of a fuel modification plan; structural fire protection design features; water supply for fire protection; and circulation and access considerations for emergency vehicles." T28:2284. The Project's fire safety risks are also reduced by imposition of other City project-specific conditions of approval and the City's Fire Services Standard Conditions of Approval. T289:12783-86; T5:295-300. This extensive list of requirements will be monitored and enforced by the RCFD to ensure compliance.

The EIR also addressed the Project's potentially significant impact on fire protection services in Section 4.11, its discussion of Public Services and Utilities. T28:2296 et seq. The City provides fire services through a contract with the RCFD. Id. In 2004, the City approved its Fire Protection Master Plan, which establishes an objective of having a fire station within five miles of risk areas like the Project Site and a goal of a five-minute response time for emergencies. T28:2298. The two closest fire stations are over five miles away from the Project Site and response times from these stations would be 15 minutes. T28:2298. Because the Project would not meet the City's five-minute service goal by relying solely on those existing stations, the EIR concludes that the Project would have a potentially significant impact on fire protection services without mitigation. T28:2298.

To mitigate against this risk, the City imposed a condition that the Project cannot be occupied until adequate fire protection facilities are in place, including a new fire station. Specifically, Mitigation Measure 11-1 requires SunCal to "provide written evidence to the Building Department that adequate fire protection services/facilities are available to meet the requirements of the Riverside County Fire Department, Banning Fire Services, including response times." T28:2299 (emphasis added). The EIR notes that multiple sites for future fire stations that can serve the Project within the five-minute response time have already been identified as part of other projects that have been under review and approved by the City. T28:2297. As part of the City's comprehensive planning efforts, the ultimate location of the new fire station will be determined and developed prior to issuance of any occupancy permits for the Project. T28:2300. T289:12786 (Project Conditions of Approval 191 & 192 requiring (1) fire station site to be selected and approved by the Fire Chief, and

(2) the station to be fully staffed and operational). The City also imposed Standard Condition 11-1, which requires payment of the City's fire facility fees to reflect the increased levels of service created by the Project. T28:2299. The City also imposed measures to ensure that the limited capacity of Bluff Street is kept available for emergency access only by creating locked and gated access between the Project and Bluff Street. T28:2226.

B. Petitioners' Fire Hazard Arguments Are Unsupported By Fact Or Law

In contrast to the detailed discussion in the EIR, Petitioners attempt to over-inflate wildfire risks with out-of-context statements. For example, Petitioners cite the City's General Plan to assert that clustered development increases fire hazard risk, but fail to mention the General Plan's conclusion that this increased risk is avoided by allowing at least three feet between structures. T32:3986. The Project exceeds the General Plan's recommendation, as all buildings will be required to be at least 20 feet apart. T5:296-97.

Equally disingenuous is the citation to the RCFD's comment letter as evidence that the EIR ignored the potential fire risk posed by use of offsite roads. See Op. Br. at 34:13-18. The City fully responded to the referenced comment from the RCFD in the Final EIR (T28:2536), and that response, together with all the measures fully mitigating that risk, satisfied the Fire Marshal's concerns. As a result, RCFD representatives appeared at the final Council hearing and testified in support of the Project. T281:12348-54. The detailed review and input from the RCFD belies Petitioners' claim that the City's review of fire risks was a superficial sham.

Petitioners also assert that the Project description should have included construction of a new fire station. Op. Br. at 35:12-17. This demand is improper because SunCal is not obligated to construct a new fire station. Instead, the City will construct the station pursuant to its Fire Protection Master Plan after the RCFD approves a final location from one of the previously identified candidate sites. T28:2297-99. SunCal will pay its fair share of fees for that construction. id.

Petitioners then shift their position and claim that the EIR failed to fully analyze all aspects of a new fire station. As part of the City's comprehensive planning efforts, however, a new fire station that can serve the Project within the five-minute response time will be developed and staffed prior to issuance of occupancy permits for the Project. T28:2301. Because potential locations for

these stations have already been identified, it is not necessary for those locations to be studied in the Project EIR.[27] Thus, Petitioners' argument that this measure is improper "piecemealing" or "deferral" fails because the EIR contains a full analysis of the Project's fire services demands and imposed full mitigation, including compliance with the City's response time performance standards. CEQA Guidelines § 15126.4(a)(1)(B) ("measures may specify performance standards which would mitigate the significant effect of the project"); Schaeffer Land Trust v. San Jose City Council, 215 Cal. App. 3d 612, 624-25 (1989) (where mitigation measure imposes a specific requirement that the applicant comply with the lead agency's performance standards to address an impact, no improper deferral has occurred).

Given that level of CEQA review and the mandatory requirements for creation of a new fire station, the case cited by Petitioners is completely irrelevant. See County of Amador v. City of Plymouth, 149 Cal. App. 4th 1089, 1099-1100 (2007). There, no CEQA environmental review was conducted by the local lead agency (or any other entity) in connection with a City's vacation of a city road and remodel of an existing fire station for a proposed Indian casino. See id. at 1094. Here, the EIR fully analyzed the Project's need for additional fire services and imposed all necessary mitigation measures, and the City's Conditions of Approval prevent SunCal from occupying the Project until such mitigation is in place.

Petitioners' claim that Bluff Street is not an appropriate route for secondary emergency access. See Op. Br. at 36:16-26. Petitioners simply miss the point when they assert that Bluff Street cannot handle a full-scale emergency evacuation from the Project Site. Secondary access is required by the RCFD to ensure that emergency vehicles have more than one option for accessing the Site, not for mass evacuation purposes. T281:12348-49. While Petitioners do not inform the Court of the RCFD's final position on this issue, RCFD officials specifically advised the City Council at the final hearing that the safer practice is for residents to stay on-site, allowing fire and other emergency vehicles to get to the Project unimpeded. T281:12353-54. Accordingly, the RCFD concurred in all

[27] Indeed, as the public agency that will be carrying out the construction of the new fire station, the City will be obligated to perform any additional CEQA review that may be necessary (if any) once the final site is selected by the City.

of the fire protection measures imposed on the Project. T281:12350-51.

Further, RCFD fire officials testified that on-site safety would be ensured by other Project conditions and mitigation measures, including fuel modification to create "defensible space" around homes. T281:12349. Pursuant to PDF 9-1, the Project will reduce the amount of flammable vegetation near homes and developed areas through a fuel modification plan. T28:2284 and 2287. The plan consists of two irrigation zones and/or plant thinning to ensure adequate fire protection. T28:2033. The fuel modification plan must meet the standards of the RCFD, and requires review and approval by the RCFD. Because this measure imposes an appropriate performance standard to ensure avoidance of significant effects, it is an effective mitigation measure under CEQA. Endangered Habitats League v. County of Orange, 131 Cal. App. 4th 777, 793 (2005) (upholding mitigation measure requiring preparation of fuel modification plan subject to county fire authority guidelines and approval). In response, Petitioners misconstrue the RCFD's Batallion Chief as stating that there may be areas of the Project where the fuel modification plan cannot be implemented. See Op. Br. at 34:12-17. Read in context, the Batallion Chief's comments simply provide an example of the specific circumstances in which the RCFD may require residential fire sprinklers for additional fire protection as part of approving the final fuel modification plan. T298:12994-96.

Given the serious nature of wildfires and the risks posed to residents, the City took all steps necessary to extensively analyze those risks in the EIR and adopt an exhaustive number of mitigation measures. Petitioners' hollow cries of deficiencies cannot alter that fact.

XII. THE EIR FULLY ANALYZED POTENTIAL HYDROLOGICAL EFFECTS AND THE PROJECT HAS BEEN CAREFULLY DESIGNED TO MAINTAIN PRE-DEVELOPMENT WATER FLOWS

Like their unsubstantiated claim of rampant wildfires, Petitioners also make the exaggerated assertion that there could be "flooding of streets where the natural water courses located on the site are interrupted by the development." Op. Br. at 4. Contrary to these assertions, the record clearly indicates that the Project will fully comply with all of the flood control measures and runoff contained in the City's General Plan as well as in the Flood Control and Water Conservation District's ("Flood Control District") Master Drainage Plan. In addition to those measures, the

Project had been conditioned to maintain the level of pre-existing stormwater runoff and engineering for severe flood events up to a "100-year" flood event, leading the Flood Control District to support Project approval.

The City's General Plan provides a series of goals, policies and programs that provide protection from potential flood and associated hazards, including: 1) incorporating adequate flood mitigation concerning grading and siting of structures located within flood plains; 2) providing adequate drainage facilities and flood control channels; 3) paying fair share fees for bridge construction needed to serve projects; and 4) mitigating any adverse impacts on local and regional storm drain systems. T28:2128, 2139-2140. The Project incorporates each of these measures. T28:2139. The Project must also comply with other City flood control regulations, including Chapter 34 ("Stormwater Management and Discharge Controls") of the Banning Municipal Code and California Building Code Appendix Chapter 33 ("Excavation and Grading"). T28:2142-43.

In addition, the Project is located within the Flood Control District's boundaries. As such, the Project incorporates additional mitigation measures imposed by the Flood Control District, which include: 1) an on-site storm drain system; 2) a detention basin to maintain pre-development discharges; 3) a bridge to be constructed where "A" Street crosses Smith Creek; 4) debris basins; and 5) the secondary eastern access road crossing over Smith Creek to be constructed with a soft bottom channel. T28:2141. In compliance with these mitigation measures, the Project's design includes a detention basin that will reduce the peak flow in the Smith Creek Tributary from the existing rate of 1,937 cubic feet per second (cfs) to 1,911 cfs post-development. Thus, this detention basin will maintain the development's stormwater runoff rates at or below pre-development levels. That standard has been incorporated into the Project's Condition of Approval number 121: "[T]he design of the development shall not cause any increase in flood boundaries, levels or frequencies in any area outside the development." T198:11058.

In light of these mitigation measures and project design features, the Flood Control District submitted a comment letter on the EIR concluding that the Project's "Master Drainage Plan facilities will provide flood protection to relieve those areas within the plan of the most serious flooding problems and will provide adequate drainage outlets." T28:2526.

Compliance with these mitigation measures and corresponding performance standards defeats Petitioners' arguments concerning hydrology. For example, Petitioners insist that the EIR should have analyzed impacts to the stability of water channels in the area. Yet, the Project will maintain water runoff to pre-development levels, which will necessarily preclude any adverse impacts to existing water channels. Petitioners also claim that the EIR should have analyzed impacts attributable to flow frequencies from a smaller flood event such as a 10-year flood (a concept called "hydromodification" by Petitioners). In fact, the City conditioned the Project to mitigate all flooding impacts up to a 100-year storm event. No more is required.

XIII. THE EIR PROVIDES DETAILED AND SCIENTIFIC ANALYSIS AND MITIGATION OF THE PROJECT'S POTENTIAL CONSTRUCTION, TRAFFIC AND OTHER OPERATIONAL NOISE IMPACTS

Petitioners' allegations that the EIR improperly "downplays" potential noise impacts are at odds with the extensive and detailed noise analyses considered by the City. The EIR applied well-accepted scientific techniques to assess each of the Project's noise sources, including construction and traffic. As discussed in Section 4.8 of the Draft EIR, the potential noise impacts of the Highland Home access road were studied as part of the overall noise impacts in a technical noise study prepared by Urban Crossroads and attached as Appendix H to the EIR. T106:6710 et seq. The EIR also included a detailed assessment of noise impacts for the proposed Easterly Access option using Sunset Avenue, based on the technical report entitled Black Bench Specific Plan Alternative Access Noise Analysis. T28:2425-2427; T164:8419-8551. In both options, the Project was designed to minimize noise impacts to the Resort and other sensitive receptors, including the construction of a bridge to elevate the access road approximately 55 feet away from hiking trails and using natural vegetation to screen the roadway and its slopes. These reports assessed potential impacts from construction activities, traffic, and other uses planned for the Project Site, including school, neighborhood parks, water pumps and the sewage lift station facility. T106:6764-73; T164:8425-28. The analyses for each alternative included both on-site impacts and off-site impacts, and examined both project-specific and cumulative impacts.

The EIR formulated a number of conditions and mitigation measures to ensure that the Project's noise impacts are mitigated to less than significant levels, and these measures were adopted

by the City in approving the Project. The technical reports concluded that, under either alternative access route, the increase in noise created by the Project would be less than "barely perceptible" and not exceed any applicable noise standards. T106:6717; T164:8425-8429. Based on the information in the two technical reports, the EIR fully assessed and proposed mitigation for the Project's short and long-term noise impacts.

A. The EIR Applied Appropriate Thresholds And Imposed Extensive Mitigation To Address Short-Term Noise Impacts From Construction Activities

CEQA encourages agencies to establish thresholds of significance, quantitative or qualitative, to assess environmental impacts. CEQA Guidelines § 15064.7(a). However, Petitioners assert that the EIR relied on an "improper" threshold in finding no significant construction noise impact when relying on the City's Noise Ordinance that permits construction activities during the hours of 7:00 a.m. to 6:00 p.m., claiming that the case is analogous to Mejia v. City of Los Angeles, 130 Cal. App. 4th 322, 342 (2005). Op. Br. at 63:13-26. In Mejia, the City of Los Angeles relied on a traffic impact threshold as the sole basis its refusal to conduct a traffic study to support a mitigated negative declaration, despite a recommendation from planning staff that a study be prepared. Id. at 341-42. That holding has little relevance here, since the EIR prepared a comprehensive technical analysis of construction noise impacts was prepared, regardless of the provision in the City Code authorizing construction activity during certain hours. Unlike Mejia, the EIR's full disclosure of potential impacts and imposition of mitigation demonstrates that the City did not apply a threshold or regulatory standard in a way that foreclosed consideration of other evidence regarding the significance of construction noise impacts.

In fact, the technical reports prepared for the Project specifically estimate noise levels that would be generated by the types of construction equipment that will be used at the Project Site, and analyzes the rates at which this noise attenuates over distance. Applying a "worst-case" analysis, the EIR discloses that a small number of existing homes approximately 300 feet east of the Project could experience a potential noise impact. T28:2263. The City properly exercised its discretion to determine that this impact was not significant because (i) the impact would be limited in duration, and (ii) the impact would be reduced by comprehensive mitigation measures to reduce construction

noise, including the use of mufflers on all construction equipment and placing construction equipment away from sensitive receptors. T28:2277. See also Mira Mar Mobile Community, 119 Cal. App. 4th at 493-94 (lead agency has discretion to determine whether an impact is significant).

Petitioners' argument regarding the application of the City Noise Ordinance is also undermined by Petitioners' failure to accurately describe the provisions in that Ordinance. Op. Br. at 63:27-64:4. Petitioners claim that an exception in the Ordinance limits construction noise exceeding 55 dBA to 15 minutes per hour, but they fail to tell the Court that this limit is "measured in the interior of the nearest occupied residence or school." T106:6783-84 (emphasis added). As discussed in the technical noise reports, building structural elements create a significant reduction in interior noise levels, generally ranging from 25 dBA to 30 dBA under "windows closed" conditions. T106:6770. This data demonstrates that the 55 dBA interior level set in the "construction exception" would be achieved even at the homes closest to the Project. As a conservative example, a home 200 feet from construction would experience exterior noise levels of 77 dBA during grading activities. T106:6771. This exterior level would be reduced to a range of 47 dBA to 52 dBA in the interior of the home. Given that the nearest homes are approximately 300 feet away, there is ample evidence in the EIR to demonstrate that the Project will mitigate construction noise to acceptable levels. In fact, the homeowner closest to the Project site testified in support of the Project. T281:12254-56.

Equally misplaced are Petitioners' arguments that the EIR ignored noise thresholds other than the City's Noise Ordinance, such as the limits applicable to County and National Forest property. As the EIR notes, the County's exterior and interior noise standards are consistent with the City's standards; therefore, the EIR's noise analysis is adequate to address applicable County standards. T28:2260. Petitioners' assertion that the EIR should have applied noise standards applicable to the National Forest is undermined by their failure to identify those standards or point to any evidence that Project noise would exceed those unidentified standards. As such, Petitioners' arguments are mere speculation that do not constitute substantial evidence. See CEQA Guidelines § 15384(a) (substantial evidence does not include "[a]rgument, speculation, unsubstantiated opinion or narrative, [or] evidence that is clearly inaccurate or erroneous"). In the absence of applicable National Forest or federal noise standards, the Court of Appeal has affirmed a lead agency's

application of its own residential noise standard – the same 65 dBA level applied by the City – as appropriate for assessing noise impacts to a national park. See National Parks, 71 Cal. App. 4th at 1358-59.

Moreover, the EIR's analyses demonstrate that any noise the Project would generate will be substantially attenuated at the Project boundary, and would thus have minimal impacts on National Forest property. T106:6717-18. It is significant to note that the National Forest properties closest to the Project are used for helipad landing and a ranger station manned only during fire season. T28:2392. Trails and recreational areas within the National Forest are substantially farther from the Project's boundaries. T106:2057 ("There are no Forest-Service authorized trails or mapped trails on Forest lands surrounding the Project site."). As the Court of Appeal stated with regard to national forest land adjacent to a development site, "There is no requirement that all noise from the project be mitigated to a level of inaudibility, particularly as to nonwilderness parklands because. . . the standards for assessing impacts of a project require careful judgment on the part of the public agency involved, based to the extent possible on scientific and factual data." See National Parks, 71 Cal. App. 4th at 1359. Here, the EIR's technical analyses of noise impacts against residential standards provided the scientific data on which the City correctly exercised its judgment to determine that the Project would not cause any significant noise impact to the National Forest.

Finally, Petitioners' argument regarding noise impacts from blasting and rock crushing is contrary to the evidence. The noise analysis identified blasting as the only potential source of groundborne vibration, and the EIR proposed Mitigation Measure 3-4, which requires a detailed blasting plan that will achieve performance standards developed by the U.S. Department of the Interior's Office of Surface Mining. T28:2120, T106:6771. Further, perceptible vibration effects are limited to a 200-foot radius from the blast, whereas the nearest homes are approximately 300 feet away from the Project. T106:6773. Similarly, the noise analysis determined that rock crushing noise is attenuated to acceptable standards within approximately 720 feet, and the City adopted Mitigation Measure 8-4, which prohibits rock crushing less than 750 feet from residences. T28:2277, T106:6773.

B. The EIR Fully Analyzed And Mitigated Noise Impacts Attributable To Traffic

Petitioners' argument that the EIR failed to assess or mitigate traffic noise is unsupported. The noise analyses prepared for each access route alternative includes assessment of both on- and off-site traffic noise. T106:6744 et seq., T164:8452 et seq. These analyses included project-specific and cumulative traffic noise impacts, and evaluated traffic conditions through General Plan build-out. T106:6744, 6760. For each of those traffic scenarios, the reports generated contours reflecting the distance from each studied road that would experience various noise levels. T106:6744. The EIR summarized the conclusion of these analyses: "The proposed project is not expected to increase traffic noise levels by 3 dBA during any future year scenario." T28:2269. Because 3 dBA is the level of "barely perceptible" sound, the EIR concludes that no significant impacts will result from traffic noise.

Despite this careful technical analysis, Petitioners argue that the Resort's trails will be negatively impacted from traffic noise. First, this argument ignores the planning efforts made to avoid the Resort and its trails, which resulted in two access route alternatives with reduced impacts. See supra, Section X. The EIR analyzed noise from those access roads by employing the conservative residential noise standard, even though acceptable noise levels at parks and other recreational uses are typically higher than those for residential uses. T106:6730. This analysis demonstrated that noise from traffic on the access route would be audible only at a discrete portion of the Big Ditch trail. However, to further reduce the noise levels at that discrete location, the Project was designed so the access road will be elevated 55 feet above that portion of the trail and screened by landscaping. Adding another level of conservative protection, the City adopted a condition that allows it to require noise barriers to further reduce the noise impacts to the Resort's trails. T28:2277 (MM 8-1); 28:2097-98.[28]

Thus, given the road's elevation and the fact that the road crosses the trail in a perpendicular manner, as opposed to running alongside the trail for some distance, the EIR determined that the noise exposure for trail users would be temporary. T28:2502-03 (users of the Big Ditch trail would

[28] Further, trails passing under roadways are not uncommon, as confirmed by several examples of major public trail systems that cross major roadways cited in the EIR. T28:2498

be exposed to road noise above the City's residential standard for less than 150 feet along a multiple-mile trail loop system). In the absence of any standard determining otherwise, the City was within its discretion to determine that this short-term noise impact is less than significant. See Mira Mar Mobile Community, 119 Cal. App. 4th at 493-94. T28:2255 (noting that significant community noise problems typically arise based on specific time periods, generally one hour or 24 hours).

In response to all of this detailed analysis, the only technical evidence that Petitioners cite is a letter submitted well after the close of the EIR comment period, in which a purported expert asserts that noise levels will exceed the City's 65 dBA exterior noise standard and impact the Resort. T214:11197. However, Petitioners' expert's flawed calculation of traffic noise was "not consistent with the current County of Riverside Noise guidelines" because it was based on "incorrect vehicle mix, the incorrect volume, incorrect day/evening/night splits, and a different vehicle speed than what is required by the County of Riverside." T225:11395, 11398. Given the patent lack of competence in Petitioners' purported evidence, the City appropriately rejected that data, and relied instead on the EIR's analysis based on current and approved methodology. Cal. Pub. Res. Code § 21080(e)(2); CEQA Guidelines § 15384(a) ("Unsubstantiated opinions, concerns, and suspicions about a project, though sincere and deeply felt, do not rise to the level of substantial evidence supporting a fair argument of significant environmental effect"). Leonoff v. Monterey County Board of Supervisors, 222 Cal. App. 3d 1337, 1351-52 (1990); CEQA Guidelines § 15151 (disagreement between experts does not make an EIR inadequate). For all these reasons, Petitioners' claims concerning noise must be denied.

XIV. THE PROJECT WAS DESIGNED AND SITED IN A MANNER THAT REDUCES POTENTIAL AESTHETIC IMPACTS AND NECESSARY MITIGATION WAS IMPOSED BY THE CITY

Respectful of the Project's surrounding environment and neighbors, SunCal conducted extensive public workshops and other outreach efforts – including discussions with the Resort – to develop project design features and mitigation measures that reduce aesthetic impacts to a less-than-significant level. Section 4.2 of the EIR presents a comprehensive analysis of the Project's potential aesthetic impacts, including off-site impacts on the Resort and the National Forest. T28:2077 et seq. Even though the City's General Plan does not identify any scenic vistas in Banning, the EIR treated

the views of the mountain ranges to the north and south of the Site as scenic. T28:2077. The Project protects these views by using land-form grading, balancing earthwork on-site and locating the majority of the development to the relatively flat mesa portion of the Site. T28:2094-95. View impacts are further reduced by clustering residences on the eastern portion of the Site. T28:2094. These design features avoid grading or development on prominent ridgelines and minimize the amount of land alteration required. T28:2094-95.

The EIR's assessment of off-site aesthetic impacts included preparation of simulated views of the Project from key visually-sensitive vantage points. T28:2087-94. These view simulations confirmed that existing hills and mountains surrounding the Project would block views of the Project from the south and the west, including from the Resort buildings. The EIR acknowledges that the Project will have some aesthetic impacts on a small number of secondary Resort trails attributable to the access road if the Highland Home alternative is implemented. T28:2500. However, because those impacts will be mitigated by landscaping and are limited to infrequently experienced views from the Resort's private property, the EIR concluded that the aesthetic impacts would be less than significant. See Ocean View Estates Homeowners Assoc., Inc. v. Montecito Water District, 116 Cal. App. 4th 396, 402 (2004) ("That a project affects only a few private views may be a factor in determining whether the impact is significant."); Bowman v. City of Berkeley, 122 Cal. App. 4th 572, 586-87 (2004) ("obstruction of a few private views in a project's immediate vicinity is not generally regarded as a significant environmental impact."). Similarly, the Project's aesthetic impacts on the National Forest's recreational areas are limited to an unused and overgrown part of a single trail. T28:2094. The City's planning staff was entitled to rely on its expertise and experience to determine that the limited view impacts from a small number of public and private trails were less than significant. See Gentry v. City of Murrietta, 36 Cal. App. 4th 1359, 1380 (1995) (county planning department entitled to rely on its own expertise, without studies or reports, to determine that scenic resources would not be impacted).

In addition, the City adopted specific measures to reduce these limited impacts below significant levels, including requirements for landscaping, screening of infrastructure, lighting and grading. T28:2097-98. The efficacy of those measures on limiting aesthetic impacts to the Resort or

the San Bernardino National Forest is reviewed in the EIR. T28:2533-34; T28:2497-2500. The incorporation of these measures distinguishes the Project from the facts of the Ocean View Estates case cited by Petitioners. There, the lead agency proposed no landscaping to mitigate views of a water reservoir cover, arguing that private views were not significant under CEQA. See 116 Cal. App. 4th at 402. The Court of Appeal ruled that the lead agency's determination could not be supported where photographic evidence in the record demonstrated that the cover would be visible from public trails. Id. Here, the EIR provides for landscaping of the graded slopes of the access road to limit its visibility from public and private views, including the Resort. T28: 2498-2500.

Petitioners' final argument concerning aesthetics involves the mitigation of potential lighting impacts. Mitigation Measure 2-1 requires preparation of a detailed lighting plan for approval by the City. T28:2098. That measure requires the final lighting plan to comply with City regulations as well as County of Riverside Ordinance No. 655. Id. Accordingly, because significant lighting impacts will be avoided by compliance with the appropriate performance standards in those regulations, MM 2-1 is an effective mitigation measure under CEQA. Endangered Habitats League, 131 Cal. App. 4th at 794 (approving mitigation measure requiring preparation of a plan complying with county standards and subject to agency approval). In making their conclusory assertion that those regulations and measures will not reduce lighting impacts, Petitioners cite to no specific inadequacy or deficiency. Accordingly, Petitioners have not identified any significant land use or aesthetic impacts that are not adequately assessed in the EIR or mitigated by the City.

XV. LAND USE IMPACTS ARE AVOIDED DUE TO THE PROJECT'S ENVIRONMENTALLY SENSITIVE DESIGN AND CONSISTENCY WITH APPLICABLE LAND USE PLANS

As discussed throughout this Brief, the Project was carefully designed to avoid conflicts with surrounding land uses. The Project's land use and planning impacts are comprehensively evaluated in Section 4.1 of the EIR. T28:2055 et seq. The EIR reviewed the Project's consistency with all applicable land use planning documents, including the 1994 Development Agreement, the City's General Plan, the County's General Plan, and SCAG's Regional Comprehensive Plan and Guide. T28:2063-66. In addition, the EIR concluded that the Project is compatible with surrounding land uses, including open space and recreational uses. T28:2070-75. Replete with legal flaws,

Petitioners' manufactured arguments of land use inconsistency and incompatibility are simply thinly veiled policy disagreements over the siting of development contemplated by years of City planning.

A. The Project Is Consistent With The City's General Plan Goals And Policies

The City is entitled to significant deference in interpreting its land use plans. "Because policies in a general plan reflect a range of competing interests, the governmental agency must be allowed to weigh and balance the plan's policies when applying them, and it has broad discretion to construe its policies in light of the plan's purposes." San Franciscans Upholding the Downtown Plan, 102 Cal. App. 4th at 678. Thus, "[C]ourts accord great deference to a local agency's determination of consistency with its own general plan." Id. at 677. The so-called "arbitrary and capricious" standard applies to review of local agency decisions regarding consistency with applicable general plans. Concerned Citizens of Calaveras County v. Board of Supervisors, 166 Cal. App. 3d 90, 96 (1985).

Out of all the applicable policies and goals in the City's General Plan, Petitioners can point to only two policies in claiming the Project is inconsistent with the General Plan. Yet, the EIR analyzed the Project against 19 separate land use-related goals and policies in the General Plan. Consistency is determined by whether a project is in general "agreement or harmony" with the land use plan, and "rigid conformity with every detail thereof" is not required. San Franciscans Upholding the Downtown Plan v. City and County of San Francisco, 102 Cal. App. 4th 656, 678 (2002). Thus, by conceding that the Project meets 17 out of 19 applicable goals and policies, Petitioners cannot demonstrate a General Plan inconsistency as a matter of law.

Further, Petitioners can offer no substantial evidence to support their claim on the two remaining General Plan policies. Petitioners claim that the Project is inconsistent with Goal 3, Policy 4 of the City's General Plan Housing Element, which limits residential development in areas of significant fire hazard risk. As discussed above in Section XI, this claim fails because the EIR provided the City with substantial evidence that the Project's potential fire hazard risks could be mitigated to less than significant levels. T28:2284, T28:2294. Second, Petitioners claim that the Project cannot be consistent with the City's General Plan goal of preservation or enhancement of existing neighborhoods ignores their own nearby Highland Springs Resort and the homes of the

Black Bench Community of Interest Association. The EIR reviews a number of neighboring residential developments, and rightfully concludes that the proposed Project density falls within the range of those planned developments. T28:2058 64. The City's conclusion that the Project will preserve and enhance neighborhoods is adequately supported by the record, including the testimony from one of the homeowners closest to the Project. T281:12254-56.

Like Petitioners' arguments about consistency with the City's General Plan, Petitioners have no support for their claim that the Project is inconsistent with National Forest planning policies. Op. Br. at 57:1-7. That claim is belied by the complete absence of any objection to the Project or the EIR by the National Park Service ("NPS"). As confirmed in the EIR, the City coordinated with the NPS in developing the Project. T28:2478. The EIR specifically reviews the Forest's applicable land use policies and concludes that the Project is consistent. T28:2478-80. The Resort's letter asserting negative impacts to the National Forest was forwarded directly to the NPS for their input. T181:10341. No objections were received from the NPS. Since Petitioners do not even identify any Forest policies with which the Project is inconsistent, their claim must be rejected.

B. The EIR Properly Determined That The Project Is Compatible With Existing And Future Surrounding Uses Within The Meaning Of CEQA

Equally unsupported are Petitioners' arguments that the "density" of the Project is incompatible with surrounding open space and recreational uses, including the San Bernardino National Forest and the Highland Springs Resort. Op. Br. at 55:9 10. In making that argument, Petitioners fail to focus on the governing test for determining land use compatibility under CEQA, namely, whether a project would physically divide an established community or conflict with land use and conservation plans, policies or regulations. CEQA Guidelines, Appendix G. It is beyond dispute that the Project does not divide any established communities. T28:2066.

In the end, Petitioners' objections of incompatibility are no more than policy disagreements with the City and its decision to approve additional homes near Petitioners' existing development. Yet, the City was entirely within its power to decide what land uses to permit in its territory, and Petitioners cite no authority to the contrary. Berman v. Parker, 348 U.S. 26, 32-33 (1954) (city's police power is the legal basis for planning and land use regulations). Further, the Project's overall

density will be approximately one dwelling unit per acre – the same density permitted on the Resort property to the south and the Banning Bench community to the east under the County General Plan's applicable zoning.[29]

Petitioners' assertion that the Project will be incompatible with open space and recreational uses on the Resort and National Forest properties is a thinly-disguised demand for a "zero-impact" standard for those uses, a demand not recognized by case law. National Parks & Conservation Assoc. v. County of Riverside, 71 Cal. App. 4th 1341, 1357 (1999). In that case, the Court of Appeal rejected a claim for such a "buffer zone" around national parks, especially where those uses are not immediately adjacent to the proposed project. Id. Where, as here, the park's recreational areas are distant from the Project boundary, the court concluded "the record does not support any claim that no impacts from the project, whether significant or not, whether in a wilderness area or not, should be allowable, merely because of the proximity of the project to the [national park]." Id. This rationale is applicable because the National Forest lands nearest the Project are used for a helipad and ranger station manned only during fire season, not recreational uses. T28:2392.

Nor can Petitioners support their claim of incompatibility by referencing the comment from the County's Transportation and Land Management Agency. T28:2529. The City responded to that comment by referencing detailed information in the EIR regarding the Project's compatibility with both the National Forest, the Resort and other nearby communities. T28:2533-34. The inclusion of this additional information into the Final EIR obviously satisfied the County as it did not submit further comments or oppose the Project.

In summary, none of the responsible planning agencies reviewing the Project – the City, the County, SCAG, or the National Forest – determined that the Project was inconsistent with their respective land use plans or policies, or incompatible with surrounding uses. Absent substantial evidence to the contrary, which Petitioners have not provided, the City's findings of land use consistency and compatibility must be upheld: "A city's findings that [a] project is consistent with its general plan can be reversed only if [they are] based on evidence from which no reasonable

[29] The concentration of dwelling units in designated areas of the Project Site pursuant to the Specific Plan is a function of the Project's use of clustered development to minimize impacts.

person could have reached the same conclusion." A Local & Regional Monitor v. City of Los Angeles, 16 Cal. App. 4th 630, 648 (1993) (citations omitted).

XVI. THE CITY APPROVED THE PROJECT TO PROPERLY ACCOMMODATE GROWTH THAT IS BOTH EXPECTED AND PLANNED FOR IN THE RECENTLY UPDATED GENERAL PLAN

Turning a blind eye to the extensive City, County and regional planning efforts that preceded the development and approval of the Project, Petitioners claim that the Project will induce unanticipated population growth through construction of the access road and extension of utilities and that the impacts of such unforeseen growth should have been analyzed in the EIR. See Op. Br. at 69:4-5. This contention ignores the fact that the City's General Plan was recently updated to reflect the increased need for housing to accommodate anticipated regional population growth, and the Project and the access road will accommodate a portion of that anticipated growth. Petitioners never challenged that Plan, and cannot use this Project to overturn that City planning decision.

Residential projects like Black Bench are not growth-inducing in and of themselves. Rather, they are necessitated by the accelerating population increases experienced across Riverside County. The City determined its future housing needs based on data from the County and SCAG to estimate increased population in the area and the percentage that can be expected to re-locate to Banning. T28:2289-90. The City updated its General Plan in 2006 to reflect those future needs, and that update includes the Project's development as necessary additional housing. T32:4084. The City's General Plan has also included for over [25] years the development of an additional north-south secondary highway. As explained in the EIR, because the Project's new homes and road respond to this planned growth, they cannot be said to induce unexpected or unplanned growth. T28:2293. The City is entitled to deference on its determination of the credibility of evidence regarding growth inducing impacts. Stanislaus Audubon Society, Inc. v. County of Stanislaus, 33 Cal. App. 4th 144, 151 (1995).

Petitioners cite two cases for the proposition that the Project's amenities can induce growth via development of surrounding parcels. Op. Br. at 70:4-11. These cases are distinguishable, not least because both involved negative declarations, subject to a less deferential standard of review than an EIR. Stanislaus Audubon Society, 33 Cal. App. 4th at 149-50; City of Antioch v. City

Council of Pittsburg, 187 Cal. App. 3d 1325, 1330-31 (1986). In Stanislaus, the lead agency approved a negative declaration and ignored ample evidence that a proposed golf course and country club would have a potential growth-inducing impact, including an initial study stating that the project would be a catalyst for unexpected residential development. 33 Cal. App. 4th at 152-53. The Court of Appeals remanded for preparation of an EIR because "approval of the proposed project may set a precedent for growth not anticipated by the general plan." Id. at 154. By contrast, the Project here accommodates growth specifically anticipated by the City's General Plan.

The City of Antioch case is also inapplicable to the careful and comprehensive planning efforts that preceded the Project's approval. The project in that case was the construction of a proposed road across undeveloped parcels. As in Stanislaus, the lead agency's planning department specifically noted that "construction of the roadway will have a cumulative impact of opening the way for future development." Id. at 1334. The Court of Appeals held that the project's minimal environmental review failed to satisfy CEQA since "the sole reason to construct the road and sewer project is to provide a catalyst for further development in the immediate area." Id. at 1337.

Here, the construction of the primary access road will achieve General Plan buildout and serve the residences within the Project. The access road will also accommodate development projects in the vicinity of the Project that have already been approved by the City (refer to the specific plans discussed at p. 8, supra). Environmental review of the impacts for those other anticipated projects has already been conducted. Further, the EIR notes that the expansion of utilities to the Site area will be site-specific, thereby limiting any potential to induce other growth. T28:2435. Thus, Petitioners cannot cite any evidence demonstrating an unanticipated growth-inducing impact. Indeed, they are left only with innuendo regarding certain undeveloped parcels near the Project Site. Op. Br. at 69:19-24. Such speculation and conjecture do not constitute substantial evidence of unanticipated growth that will be generated by the Project. CEQA Guidelines § 15384(a) (substantial evidence does not include "[a]rgument, speculation, unsubstantiated opinion or narrative, [or] evidence that is clearly inaccurate or erroneous"). The EIR's growth-inducing analysis must be upheld by the Court. Napa Citizens for Honest Government v. Napa County Board of Supervisors, 91 Cal. App. 4th 342, 371 (2001) (upholding EIR's growth-

inducing impact analysis as adequate assessment of commercial/industrial project's potential for increasing housing demand in adjacent areas).

XVII. THE EIR'S CONCLUSION OF NO SIGNIFICANT ARCHAEOLOGICAL AND HISTORICAL IMPACTS WAS REACHED AFTER CONSULTATION WITH NATIVE AMERICAN GROUPS AND IMPOSITION OF CONSERVATIVE MITIGATION MEASURES

In close consultation with the appropriate stakeholder groups, a cultural resources assessment was prepared for the Project consisting of an assessment of archaeological, paleontological and historical resources.[30] T28:2343. The City consulted with the Native American Heritage Commission, which conducted a "record search of the sacred land file" and determined the absence of any Native American Cultural resources in the immediate area. T122: 7438. Further, although not required, the City notified local Native American tribes for the purpose of offering consultation regarding any cultural resources that may exist in the planning area. T28:2343.

The EIR included its own cultural resources records search for both on-site and off-site Project areas. T28:2343. That search indicated that nine previous surveys had been conducted within one mile of the Project site. T28:2343. Three of those surveys covering portions of the Project site identified no archaeological resources. Id. Further field surveys were conducted to ensure the absence of any archaeological resources. Id. Based on those field surveys, seven potential archaeological sites were identified within the Project area. Id. This survey work then determined that no archaeological resources existed on five out of the seven sites. T28:2344. Of the remaining two, the data was inclusive to determine the presence or absence of any significant resource (only minor resources were identified). T28:2349. Consequently, mitigation measures were imposed on the Project, including the retention of an on-site archaeologist to continually monitor the site for archaeological resources during excavation operations and to preserve any resources should they be discovered during such a survey. T28:2353. By incorporating these mitigation measures into the Project, the EIR properly concluded that impacts to archaeological

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[30] CEQA defines a historical resource to include those resources listed in, or determined to be eligible for listing, in the California Register of Historical Resources, a local register of historical resources or identified in a historical resources survey. CEQA Guidelines, § 15064.5(a).

resources would be less than significant. T28:2349. Thus, despite Petitioners' unsupported argument that "Highland Springs serves as a significant archaeological site for local Native American tribes," substantial evidence in the record confirmed that the Project's impacts on archaeological resources will be less than significant.

With respect to historical resources, the EIR determined that two stagecoach stops within Highland Springs are historically significant, Highland Springs and Gilman Ranch. T28:2347. However, as noted in the City's responses to comments, the Project will not impact either of these stagecoach stops.[31] The Highland Springs stagecoach stop is over one-half mile from the nearest Project road and the Gilman Ranch stagecoach stop is "over two miles from the proposed off-site development area and is visually blocked by the intervening terrain." T28:2502.

The EIR also addressed the "Bradshaw Trail," which may connect the two stagecoach stops. Although the trail has never been evaluated for historical significance under either state or federal registries of historical resources, preliminary research indicates that the trail may be eligible for listing on those registries. T28:2347. Consequently, the EIR undertook archival research and other investigations to determine the location of the trail and whether a Project road would intersect the trail. T28:2343. That investigation did not lead to an identification of the trail by anyone, including any of the Petitioners. T28:2347.

Nonetheless, the EIR conservatively concluded that the Project may have a significant impact on a portion of this trail if it is ever discovered during construction of the intersecting access road. T28:2502. Because of that potential impact, mitigation measures were imposed. For example, if the trail is discovered during grading, appropriate actions such as data recovery, recordation and the "placement of a commemorative marker denoting the significance of the Bradshaw Trail" are required. T28:2353. Use of such markers will allow recognition of the trail's overall "historical path," which case law has held to be sufficient under CEQA. Gentry v. City of Murrieta, 36 Cal.

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[31] Notably, other historical resources at the Resort property have been long destroyed. For instance, the adobe home built by Isaac Smith has been replaced by a swimming pool at the Resort, and rather than rebuild the original Highland Home Hotel, which had been destroyed by fire, a banquet hall and luxury suites was built instead. T28:2501.

App. 4th 1359, 1418 (1995).[32] Based on the application of these mitigation measures, the EIR concluded that any potential impacts to a portion of the undiscovered Bradshaw trail would be reduced to a level considered less than significant. T28:2502.

XVIII. PETITIONERS' CLAIM THAT THE EIR EMPLOYED AN IMPROPER BASELINE IS MERELY A DISGUISED DISAGREEMENT OVER THE LEAD AGENCY'S SELECTION OF SIGNIFICANCE THRESHOLDS

Petitioners' overall game plan of raising every conceivable CEQA issue possible, extends to Petitioners' arguments concerning baseline. But, upon closer examination, Petitioners' baseline arguments are really a disagreement over the City's choice of significance thresholds. Thus, while this Brief addresses baseline issues in connection with particular impact areas covered in the preceding sections, the additional flaws in Petitioners' baseline arguments are addressed further in this Section XVIII.

To determine significance thresholds, the EIR reviewed the existing environmental conditions in not one, but two different ways. First, in Section 3.2 of the Draft EIR, entitled "Environmental Setting," the existing physical conditions of the Project site and the surrounding vicinity were reviewed. That existing setting was described for each and every one of the impact issues that are reviewed in detail in the Draft EIR. Secondly, for each of the impact areas analyzed in Section 4.1 through 4.13 of the Draft EIR, the "existing conditions" relevant to those impacts are further detailed. T28:2053.

The City's comprehensive approach to assessing the environmental baseline extends to the very impact areas noted in Petitioners' argument concerning the EIR's baseline, namely, population and housing, noise and water. First, with respect to population and housing, Section 4.10 of the Draft EIR points out the existing population and housing numbers both for the Project and the City as a whole. T28:2289. Then the EIR identifies the additional residential population and housing

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[32] These facts render the holdings in League for Protection of Oakland's Architectural and Historic Resources v. City of Oakland, 52 Cal. App. 4th 896 (1997), and Architectural Heritage Association v. County of Monterey, 122 Cal. App. 4th 1095 (2004), inapposite. In those cases, an entire historic structure was demolished, and the use of commemoration markers and photographs were held to be inadequate mitigation. Here, by contrast, any potential impacts are to a portion of a historic trail that has yet to be discovered by an intersecting road that will be mitigated by appropriate markers since the historic path of the overall trail will be recognized and maintained.

units that the Project would generate, as well as the percentage increase that the Project's population represents over existing conditions. T28:2293. After (1) describing the levels of the existing population and housing, and (2) determining the Project's quantitative increase in those existing population and housing numbers, the EIR then takes the third step required by CEQA, namely, qualitatively assessing the significance of the Project's increase in population and housing.

To perform this qualitative assessment, the City properly exercised its judgment and used the population goals and projections in its General Plan to assess the significance of the housing increase attributable to the Project. T28:2071. Use of policies and criteria in land use plans to assess the significance of a project's impacts is permissible. Mira Mar, supra, 119 Cal. App. 4th at 493-94 (lead agency properly relied on its general plan and local coastal plan in determining the significance of view impacts). Further, CEQA clearly affords a significant amount of discretion to a lead agency in determining whether an impact is significant. See supra, p. 15. Indeed, that fundamental CEQA rule has led courts to routinely conclude that "whether a project will have a significant effect is a matter of judgment, and it is recognized that an 'ironclad definition of significant effect is not always possible.'" Napa Citizens for Honest Government v. Napa County Board of Supervisors, 91 Cal. App. 4th 342, 360 (2001); see also National Parks And Conservation Association v. County of Riverside, 71 Cal. App. 4th 1341, 1355 (1999) (citing to CEQA Guidelines, § 15064).

The EIR's noise and water analyses adhered to this thorough approach in determining the proper baseline. In Section 4.8 of the Draft EIR, the existing ambient noise levels were provided. T28:2257-58. Then, the anticipated increases in noise levels attributable to the Project are reviewed in Section 4.8. T28:2263-69. The significance of those increases was assessed against various technical criteria adopted per City Code. T28:2269. With respect to water, the EIR also considers the environmental baseline. Because the Project will not entail any on-site production wells (T28:2283 and 2314), the EIR instead analyzes the impacts to existing and future water sources such as the groundwater produced from wells off, and away from, the Project Site. Data concerning those existing and future water sources is provided in the EIR, as described in Section VI of this Brief (at

pp. 18-27.)[33]

Despite this thorough approach to assessing and analyzing the environmental baseline, Petitioners try to misdirect the Court's attention away from these portions of the EIR, by vaguely asserting the EIR is predicated on an improper environmental baseline. But in addition to being contrary to the facts presented above, the only case cited by Petitioners on this issue is clearly distinguishable. In Woodward Park Homeowners Association v. City of Fresno, 150 Cal. App. 4th 683 (2007), the EIR was invalidated because of errors made in the first two steps of its impact analysis, namely, describing the existing conditions and quantifying the impact of the proposed project. One example of that erroneous approach pointed to by the Court was in the EIR's air pollution analysis. Instead of quantifying the increase in air pollutants against a zero baseline due to the subject property's vacant status, the EIR quantified the project's net increase in air pollutants by subtracting the air pollutants that would be caused as if the property had already been developed under the existing zoning. Id. at 708. According to the Court, "readers who have been told that the air pollution impact is slight and that the traffic generated will be less than the given benchmark should not have to stop and puzzle it out that these conclusions are based on a comparison with a large office park that is not, in fact, there." Id. at 708-09.

That flaw, however, is not present anywhere in the EIR in the instant case. The EIR faithfully followed CEQA's three-step process for determining a significant impact – describe the existing conditions; quantify the impact of developing 1,500 homes on the existing site; and assess the significance of the impacts based on the City's significance criteria. Petitioners' disagreement with the City's policy decision to use approved regional plans (such as the General Plan or the regional plan for water supply) as the basis for the significance thresholds cannot create a flaw in the EIR's baseline when there is none. By following this comprehensive approach, the City was able to thoroughly analyze the Project's impacts in relation to other projects planned for the area. This analysis allowed the City to determine cumulative impacts of the region as a whole.

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[33] It should also be noted that the EIR did provide information concerning the groundwater below the Project site. T28:2137, 2480-81.

XIX. THE EIR'S CUMULATIVE IMPACTS ANALYSIS PROPERLY RELIED ON THE CITY'S GENERAL PLAN

To evaluate cumulative impacts, the lead agency must identify related projects using one of two approaches: (1) a list of existing and future projects producing related impacts the ("list method") or (2) a summary of projections from an adopted general plan describing area-wide conditions contributing to cumulative impacts ("plan method"). CEQA Guidelines § 15130(b). See Communities For A Better Environment v. California Resources Agency, 103 Cal. App. 4th 98, 120 (2002). The EIR primarily uses the second approach, relying on the City's comprehensive General Plan in "assessing the significance of potential cumulative impacts in the context of citywide growth projections based on current land use policies incorporated into the Comprehensive General Plan (2006)." T28:2048. The City's General Plan was developed in conjunction with the Regional Housing Needs Assessment and other regional planning tools, which take into account the growth in the nearby communities listed by Petitioners. T28:2289. The EIR's reliance on the General Plan's projections was particularly appropriate since it had been comprehensively updated only two months before the Draft EIR was released for the Project. See T28:2063. Neither that General Plan Update nor the EIR certified for that Update was challenged by any of the Petitioners.

In addition to the City's General Plan, the EIR relied on other regional plans addressing specific resources. As noted in the EIR, "specific cumulative study areas designated by respective agencies for regional or area-wide conditions" was used for biological resources, water supply and air quality. T28:2050. Finally, the EIR included a list of specific related projects in assessing cumulative traffic impacts and traffic-related noise. The assessment of cumulative traffic-related impacts were therefore even more conservative, because that analysis included both specific related projects and areawide growth in assessing future traffic conditions. See T168:9273-78, 9305.

Petitioners' attack on this conservative cumulative impact study cannot withstand attack. First, Petitioners claim that the City should not have relied on the General Plan or used the plan method in calculating cumulative impacts. However, the plan method is well-established under CEQA, and the lead agency retains the discretion to select the plan method over the list method. Las Virgenes Homeowners Federation, Inc. v. County of Los Angeles, 177 Cal. App. 3d 300, 306-7 (1986) (court upholds cumulative analysis which relied on county general plan and specific plan);

Bakersfield Citizens for Local Control v. City of Bakersfield, 124 Cal. App. 4th 1184, 1217 (2004) (plan approach relying on recent planning documents upheld). Petitioners offer no legally cognizant reason why the Court should disregard the City's proper exercise of its planning discretion in selecting the planning method.

Next, Petitioners' claim that the cumulative impact analysis was of inadequate geographic scope. Ebbetts Pass Forest Watch v. Department of Forestry and Fire Protection, 123 Cal. App. 4th 1331, 1351 (2004) ("[T]he selection of the assessment area is left to the Department's expertise, and absent a showing of arbitrary action, we must assume the Department exercised its discretion appropriately."). Petitioners have made no such showing.

Finally, Petitioners claim that the EIR's cumulative traffic study was flawed because it did not include certain related projects identified by Petitioners. Yet, the City had recently updated, as part of the 2006 General Plan Update, its list of all related projects including a vast majority of the projects cited by Petitioners. T28:2477. In addition, the EIR's cumulative traffic study used a five-mile radius, far in excess of industry standards. T28:2477-78. The potential projects in farther locales (such as Calimesa) cited by Petitioners did not have to be considered. CEQA requires analysis of only foreseeable projects, and need not consider future projects "that are merely contemplated or a gleam in a planner's eye." Laurel Heights Improvement Association v. Regents of the University of California, 47 Cal.3d 376 (1988). As such, Petitioners' arguments regarding the EIR's general approach to cumulative impacts is both legally and factually unsupported.[34]

XX. THE CITY SELECTED THE PROJECT AS THE MOST ENVIRONMENTALLY-SENSITIVE FEASIBLE ALTERNATIVE THAT ACHIEVED KEY PROJECT OBJECTIVES

The EIR's discussion of alternatives reflected the same level of careful planning and analysis that characterizes its impact assessment. CEQA requires that EIRs discuss "a range of reasonable alternatives to the project, or to the location of the project, which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of

[34] Petitioners' remaining arguments concerning cumulative impacts relate to specific impact areas, and those arguments are addressed in this Brief in the relevant impact area. Similarly, Petitioners' arguments concerning mitigation measures in Section VI of their brief are addressed in the section of this brief covering the relevant impact area.

the project." CEQA Guidelines § 15126.6(a). An EIR is not required to consider "every conceivable alternative," but rather a sufficient range of alternatives to allow for public input and an informed decision by the lead agency. Id. The range of alternatives is governed by a "rule of reason," limiting the list of alternatives to those that could conceivably avoid or lessen the significant environmental impacts of the proposed project. CEQA Guidelines § 15126.6(f). The alternatives must also be potentially feasible, as determined by consideration of "site suitability, economic viability, availability of infrastructure, general plan consistency, other plans or regulatory limitations, jurisdictional boundaries ., and whether the proponent can reasonably acquire, control or otherwise have access to the alternative site." CEQA Guidelines § 15126.6(f)(1).

The seven alternatives discussed in the EIR reflect a reasonable range of alternatives that demonstrated a wide variety of development options. Each alternative was analyzed at a level of detail, including preparation of necessary technical reports, that far exceeds the cursory evaluation of alternatives found in many EIRs. The EIR specifically analyzes whether each alternative considered meets the six primary objectives identified for the Project: (1) implementing the City's General Plan polices and goals, (2) implementing the Development Agreement, (3) implementing the MSHCP, (4) contributing to regional housing needs, (5) providing a range of lot sizes compatible with surrounding cities and communities, and (6) providing a safe and efficient transportation system for the Project and surrounding community. T28:1953. In addition, the EIR considers the alternatives' ability to achieve the four secondary project objectives: (1) effectively use land resources by maintaining the integrity of the natural environment, (2) preserve and conserve open space, (3) provide recreational and open space amenities, and (4) provide a diverse trail system. T28:1953-54. CEQA provides that an alternative is not feasible if it does not meet most of the project objectives. CEQA Guidelines § 15126.6(c) (reasonable alternatives means those "that could feasibly accomplish most of the basic objectives of the project.")

The EIR provided a detailed comparison of the proposed 1,500 single-family home Project against four alternatives: (1) No Project/No Action, (2) Reduced Development Area, (3) Reduced Density, and (4) Single Access from Bluff Street. T28:2358-59. In addition, the EIR analyzed three alternative access routes for the Project: (1) Primary Access from Highland Springs Avenue, (2)

Restricted Access from Bluff Street, and (3) Primary Access from Sunset Avenue (also known as the "Easterly Access Alternative"). T28:2359. For each alternative, the EIR conducted a comparative analysis of each environmental impact area discussed in the EIR, and a conclusion regarding the environmental impacts of the alternative and whether it achieved the Project objectives. CEQA Guidelines § 15126.6(a). The EIR ultimately concluded that the No Project/No Action alternative was the environmentally superior alternative. T28:2431. Pursuant to CEQA Guidelines § 15126.6(e)(2), the EIR concluded that the next environmentally superior alternative was the Single Access from Bluff Street proposal; however, that alternative would not meet most of the primary project objectives, including implementation of the General Plan's goals for residential build-out and construction of a secondary highway connecting the northern portion of the City. T28:2380.

Despite this extensive assessment of numerous alternatives, Petitioners ask the Court to reject the EIR based on claims that (1) the City's selection of the Project was "predetermined" based on its interpretation of the Development Agreement, (2) no off-site alternatives were considered, and (3) a lower density alternative should have been considered and selected as environmentally superior. Petitioners' arguments challenging the EIR's alternatives analysis fall flat, as Petitioners are unable to describe a single feasible alternative that should have been considered or selected over the Project ultimately approved by the City.

A. Petitioners' "Predetermination" Argument Ignores Years Of Careful Planning, Public Input And Reasoned Decisionmaking By The City

Throughout alternatives arguments, Petitioners assert that various feasible alternatives were ignored or rejected because the City had "predetermined" the selection of a 1,500 home development. Op. Br. at 87:26-27, 90:2-3. Petitioners contend that the City believed the Development Agreement "mandated" a 1,500 home development, and that the environmental review process conducted prior to approval was a "sham." Op. Br. at 90:4-12. This assault on the integrity of the City's elected officials is both insulting and incorrect. The sheer volume of the technical reports, responsible agency consultation and public hearing transcripts that preceded approval of the Project demonstrate that the City's approval was not a sham, but resulted from considerable planning and public input, including imposing numerous detailed mitigation measures. SunCal and the City

consulted with multiple responsible agencies and other interested parties – including the Resort – for more than two years before the Project was finally approved. Multiple public hearings and workshops were conducted to obtain and consider public input, culminating in a six-hour City Council debate and vote on the Project. These efforts stand in stark contrast to the case cited by Petitioners, which involved a single hearing to "rubber stamp" a predetermined result. See Redevelopment Agency v. Norm's Slauson, 173 Cal. App. 3d 1121, 1127 (1985).

Nor can Petitioners justify their contention that any alternative was rejected solely on the City's determination that the Development Agreement mandated 1,500 homes. Op. Br. at 87:26-88:15. The EIR makes no such assertion, and the two pages of hearing transcripts referenced by Petitioners contain no discussion of whether the Development Agreement required approval of any particular number of homes. T281:12168; T281:12221. Ultimately, of course, the City approved a tentative tract map with 1,453 homes – demonstrating that the City did not believe its approval to be constrained to 1,500 homes. T289:12759 et seq.

In addition, there is no evidence that any alternative was rejected solely for failing to achieve the primary objective related to implementation of the Development Agreement. The EIR states that each of the land use alternatives failed to meet multiple primary project objectives. T28:2364-65, 2370, 2373, 2380. In addition, each of the studied alternatives failed to reduce air quality impacts to less-than-significant levels. CEQA does not require a lead agency to approve an alternative over the studied project unless the alternative can mitigate or avoid the project's significant impacts. Cal. Pub. Res. Code § 21002.1(b). Accordingly, Petitioners have no factual support for their claim that the approval of the Project was "predetermined," and the Court should reject this unwarranted attack on the integrity of the City and its approval process.

B. The EIR Properly Rejected An Off-Site Development As Infeasible

In full compliance with CEQA, the EIR specifically considered off-site alternatives. T28:2359-60. The CEQA Guidelines expressly identify the factors the EIR should take into account in determining whether an off-site alternative is feasible, including "whether the proponent can reasonably acquire, control or otherwise have access to the alternative site." CEQA Guidelines § 15126.6(f)(1). Here, the EIR discloses that an off-site alternative was infeasible because no

alternative location suitable to accommodate this type of project was available to SunCal. T28:2359. In addition, the EIR determined that an off-site alternative did not warrant further consideration because any alternative location would not mitigate the Project's only significant impacts to air quality and traffic. T28:2359; Cal. Pub. Res. Code § 21002.1(b).

The Supreme Court of California has also held that off-site alternatives need not be considered where a site has been selected by an extensive planning process. Goleta, supra, 52 Cal. 3d at 573. Here, the City properly relied on the Development Agreement and its General Plan, both of which reflected years of careful planning for selection of a site for the Project. Thus, as required by Goleta, the EIR fully disclosed the reasons for its rejection of an off-site alternative as both (1) infeasible because no other suitable area was available to SunCal and (2) incapable of mitigating or avoiding the Project's significant air quality impacts. T28:2359.

Against this backdrop of CEQA compliance, Petitioners press for greater exploration of off-site alternatives (obviously keeping with their desire to prevent any development anywhere near their own residences). Yet, Petitioners offer no other viable site where 1,500 homes could be built within the City. Notably, neither of the comment letters referenced by Petitioners identifies any particular parcel of land as a feasible off-site location. T28:2473; T224:11379-86. Instead, Petitioners contend that the City should have considered "alternatively sized projects" for alternative locations. This argument quickly becomes circular – if an alternative is both a different size and location from the studied project, how can the environmental impacts of the two be meaningfully compared? CEQA avoids this slippery slope by expressly stating that "an EIR need not consider an alternative whose effect cannot be reasonably ascertained and whose implementation is remote and speculative." CEQA Guidelines § 15126.6(f)(3).

The two cases cited by Petitioners are factually inapposite. The Court in San Bernardino Valley Audubon Society, Inc. v. County of San Bernardino, 155 Cal. App. 3d 738 (1984), specifically stated that an alternate available site of equal value – and thus presumably economically feasible – had been identified but not considered. Id. 155 Cal. App. 3d at 752. Evidence of such an alternate site has not been proffered in this case by anyone. In Citizens of Goleta Valley v. Bd. Of Supervisors, 197 Cal. App. 3d 1167 (1988) ("Goleta I"), the Court of Appeals noted that it was

improper for an EIR to fail to consider alternatives sites based solely on the developer's lack of ownership of other sites. Id. at 3d 1167, 1179-80. Here, the EIR detailed the number of reasons why off-site alternatives were not feasible in addition to the applicant's lack of control over other sites.[35]

In summary, the record contains substantial evidence supporting the EIR's conclusion that no feasible off-site locations exist, and Petitioners' demand for more CEQA review of off-site alternatives must be rejected.

C. The EIR Considered And Rejected Various Lower Density Alternatives As Infeasible Or Environmentally Inferior To The Project

Despite the evaluation of seven different alternatives, Petitioners argue that the EIR should have considered and approved a lower-density alternative, such as a "large lot" development or the 330-home alternative studied in the EIR. Op. Br. at 89:14-18; 92:7-8. In fact, the EIR specifically considered lower density options, and properly rejected them as infeasible and not capable of avoiding significant air quality impacts. T28:2359-60.

1. A Larger Lot Alternative Would Be Environmentally Inferior

The EIR first considered a less dense alternative that would be comprised of larger lots with 1,500 homes distributed evenly across the Site. T28:2360. However, the alternative would disturb most of the Project Site, including MSHCP Critria Cell #227 and existing ridgelines and canyons. T28:2360. This alternative would also result in greater landform alteration, which would cause additional increased impacts to biological and cultural resources, drainage patterns, aesthetics, and air quality. Id. Further, this one acre-lot alternative fails to meet critical project objectives, including dedication of open space and implementation of the MSHCP. The EIR's comparative analysis of environmental impacts provides substantial evidence demonstrating that the one acre-lot alternative would be environmentally inferior to the Project. Thus, the cases cited by Petitioners on page 90 of their Opening Brief regarding the economic infeasibility of alternatives are inapplicable here, since the City's rejection of the large-lot alternative was based on environmental concerns.

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[35] Petitioners' reference to Government Code section 65589.5(c) does not compel analysis of an off-site development. That section, although not noted by Petitioners, applies only to "prime agricultural lands," which are not at issue here.

In addition, the EIR conducted a thorough analysis of another reduced density alternative; an alternative that would reduce the number of residential units by over 20% to 1,193. T28:2370. To avoid the impacts of the one-acre lot project, the reduced density option limits the development footprint to the disturbed and flat areas of the Site, like the approved Project. T28:2371. However, because the reduced density alternative would continue to create significant and unmitigated air quality impacts, the EIR concluded that it was not environmentally superior to the Project.

In summary, the EIR's reasonable range of alternatives included consideration of two different options for reducing the Project's proposed density. Neither alternative proved to be environmentally superior to the Project. Petitioners' demand for analysis of yet another alternative premised on "very large parcel homes," of 100 acre-lots flies in the face of CEQA's mandate that "every conceivable alternative" need not be analyzed, only a reasonable range of alternatives. CEQA Guidelines § 15126.6(f). Thus, the Court must uphold the City's selection of the Project over lower-density alternatives since it was supported by substantial evidence.

2. The EIR Properly Rejected The 330-Home Alternative Because It Failed To Achieve Project Objectives Or Avoid Significant Air Quality Impacts

Petitioners argue that the City was obligated to approve the 330-home alternative with single access from Bluff Street because it was identified as environmentally superior to the Project and claim that the City improperly rejected this alternative based on the project objectives. See Op. Br. at 92:7-11. At the outset, the Court should note that Petitioners fail to demonstrate that any of the project objectives were defined so narrowly as to preclude consideration of legitimate alternatives. Compare City of Santee v. County of San Diego, 214 Cal. App. 3d 1438, 1455 (1989).

The 330-home alternative would not meet such key planning project objectives as implementation of the General Plan's requirements for a new secondary highway, dedication of significant open space acreage, contribution to regional housing demands, provision of a variety of lot sizes, and development of an efficient transportation system. T28:2380. Implementation of general plan policies is a legitimate project objective. Further, this alternative, which would use Bluff Street for primary access, is also at odds with public comments submitted by Petitioners and others objecting to the addition of significant traffic volumes to Bluff Street. Op. Br. at 14:15-21.

The City responded to those objections by imposing conditions restricting vehicular access to the Project via Bluff Street and limiting its use for emergency access. See supra, Section X. The implementation of these limitations demonstrates that using Bluff Street for primary access would not have achieved the project objective of implementing a safe and efficient transportation system. A lead agency may properly reject an alternative that fails to achieve project objectives, even if it is environmentally superior to the project approved. Sierra Club v. County of Napa, 121 Cal. App. 4th 1490, 1507-08 (2004).

In sum, Petitioners have not identified a single feasible alternative that would avoid or reduce the Project's significant environmental impacts and satisfy most of the Project objectives. Accordingly, the Court should deny Petitioners' alternative argument because the EIR analyzed a reasonable range of alternatives.

XXI. THE STATEMENT OF OVERRIDING CONSIDERATIONS REFLECTS THE EXTENSIVE AND RIGOROUS PLANNING AND DESIGN THAT LEAD TO APPROVAL OF THE PROJECT

The City's approval of the Project included its adoption of a Statement of Overriding Considerations ("SOC") because the Project will result in certain environmental impacts (air quality) that cannot be mitigated to less-than-significant levels. T227:11559-61. Adoption of a statement of overriding considerations authorizes a lead agency to approve a project with significant environmental impacts. Cal. Pub. Res. Code § 21081(d); CEQA Guidelines § 15021(d), 15093. A lead agency approving such a project must make findings that economic, social, technological or other project benefits outweigh any significant environmental impacts. San Franciscans Upholding the Downtown Plan, 102 Cal. App. 4th at 690. The SOC lists seven benefits that will derive from implementation of the Project, including: (1) housing opportunities for local and regional residents; (2) 81.2 acres of recreational facilities; (3) 869 acres of open space; (4) critical habitat preservation pursuant to the MSHCP; (5) construction of the secondary highway required by the City's General Plan; (6) connections to regional trails; and (7) substantial financial revenues for the City. As noted in the SOC, many of these benefits are described in detail in the Final EIR, and additional evidence supporting the Project's benefits is found throughout the administrative record. T227:11559-60. San Franciscans Upholding the Downtown Plan v. City and County of San Francisco, 102 Cal. App.

4th 656, 690 (2002) (findings supporting SOC can be based on substantial evidence in the entire record and not just in the EIR).[36]

Petitioners' challenge to the Statement of Overriding Considerations is illogical and does not present a viable claim under CEQA. Petitioners first claim that the SOC "fails to comply with CEQA's mandatory procedures for a Statement of Overriding Considerations," but does not specify any such procedures, or how the SOC does not comply. Op. Br. at 94:7-8. Case law citations supporting any of Petitioners' objections to the SOC are notable by their absence.

Even without any legal authority to support their position, Petitioners still make a number of attacks against the SOC. For example, Petitioners argue that the Project's provision of housing is not supported by evidence of a demand for housing. Op. Br. at 94:16-18. They attempt to justify their argument by pointing to data in the EIR stating that the City needs to provide 17,371 homes for residents by 2025 to accommodate planned-for growth and that 9,700 units currently exist. T28:2289. Petitioners ignore the City's General Plan, which demonstrates that as of January 2006, a total of 20,543 additional residential units would be needed to accommodate full build-out of the City, *which extends beyond the year* 2025. T32:3685. The Project's 1,453 homes will therefore provide some, but not all, of the over 20,000 homes that will be needed in the City to house expected population growth by 2025.

Next, Petitioners assert that the provision of trails, other recreational facilities, and the preservation of open space and critical habitat are "simply Project characteristics," not benefits that justify the findings in the SOC. Op. Br. at 95:1-10. Petitioners cite no authority for their assumption that a project benefit in a SOC must be something other than an inherent characteristic of a project.

Equally false is Petitioners' contention that the secondary highway that will be developed for Project access is required only as a result of the Project's approval. Op. Br. at 95:11-15. This assertion ignores the City's General Plan Transportation Element, which mandates construction of this road to provide necessary north-south access as the City continues to grow. Thus, the Project

[36] Notably, these benefits would not have been created by alternative projects located on the same site. For example, the EIR rejected an alternative with 1500 homes spread across the entire Project area because it would have preserved substantially less open space and required a greater amount of grading and other land alteration. T28:2360.

benefits the City by providing this necessary infrastructure project, thereby fulfilling an important policy objective under the General Plan.

Finally, the Petitioners' contentions regarding the Project's financial benefits are not consistent with CEQA's requirements. The SOC specifically states that the City will benefit from over $50 million in infrastructure improvements, as well as the collection of development and public service fees. T227:11561. The EIR contains substantial evidence of the access road and other extensive infrastructure that the Project will create. Petitioners' demand for a comparative economic analysis for the SOC is not supported by CEQA, since such an analysis is required only as a basis for rejecting an alternative project as financially infeasible. See Uphold Our Heritage v. Town of Woodside, 147 Cal. App. 4th 587, 598-601 (2007).

In sum, the SOC was amply supported with substantial evidence demonstrating each proposed benefit that will be generated by the Project. Here, the EIR, the conditions of approval and the project findings provide that evidence of many Project benefits, such as the provision of new housing, trails, recreation areas, roads and other infrastructure, and the permanent preservation of *open space and sensitive habitat. Case law confirms that such a SOC must be upheld.* San Franciscans Upholding the Downtown Plan, 102 Cal. App. 4th at 690.

XXII. CONCLUSION

Based on the foregoing, the Petitions should be denied in their entirety.

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Respectfully submitted,

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