2-21 9142

Highland Springs Conference and Training Center, ***Petitioner***

v.

City of Banning, ***Respondent***

SCC/Black Bench, LLC, ***Real Party***

and all consolidated cases

RIC 460950 (master file); RIC 460967; RIC 461035; RIC 461069

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF RIVERSIDE
JAN 29 2008
K. Rahlwes

JAN 31 2008

RULING ON SUBMITTED MATTER

PRELIMINARY NOTE

The court will refer to the administrative record by tab and page number, consistent with the method used by the parties. Thus, "T28 AR 1936" refers to tab 28, page 1936 of the record.

The final Environmental Impact Report ("EIR") contains two exhibits labeled 4.1-4. The first of these exhibits appears at T28 AR 2060, and is entitled, "Relationship of the Proposed Access Road to Existing Off-Site Trails." It has been relabeled as 4.1-3 in the enlarged format that was introduced as exhibit 2 at the hearing of the petition. The same exhibit also appears in the draft EIR at T27 AR 1552A, but there it is correctly labeled as 4.1-3. (The actual exhibit 4.1-4 is at T28 AR 2061, and is entitled "TTM 31614.")

For convenience the court will sometimes refer to respondents and real party jointly as "respondents."

INTRODUCTION

In these consolidated actions petitioners challenge certain decisions of respondent City of Banning, claiming an abuse of discretion under the California Environmental Quality Act ("CEQA"). The issues pertain to a proposed housing project on the "Black Bench," an area at the southern base of the San Bernardino Mountains.

All four petitions name the City of Banning ("the City") as respondent, and two of the cases (RIC 460967 and RIC 461069) also name the City Council of the City of Banning as a second respondent. All four petitions name real party developer, SCC/Black Bench, LLC, dba SunCal Companies ("SunCal").

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In RIC 460950 (master file) petitioner is Highland Springs Conference and Training Center, dba Highland Springs Resort ("Highland Springs"). Petitioner is a nature resort, with many hiking trails, located immediately to the south of the project site. The petition is formatted into five causes of action: (1) violation of CEQA for inadequate analysis of impacts; (2) violation of CEQA for inadequate analysis of mitigation measures and alternatives; (3) violation of CEQA for adoption of deferred and vague mitigation measures; (4) violation of CEQA for lack of substantial evidence to support the statement of overriding considerations; and (5) procedural violations in the processing of the EIR.

In RIC 460967 petitioner is Center for Biological Diversity, a public interest corporation dedicated to environmental and species-preservation issues. The petition is formatted into three causes of action: (1) violation of CEQA for inadequate analysis of impacts; (2) violation of CEQA for inadequate analysis of mitigation measures and alternatives; and (3) violation of CEQA for lack of substantial evidence to support the statement of overriding considerations.

In RIC 461035 petitioners are Cherry Valley Pass Acres and Neighbors, and Cherry Valley Environmental Planning Group (jointly "Cherry Valley" herein). These petitioners are non-profit corporations comprised of residents of Cherry Valley, an unincorporated area of Riverside County located to the west of the proposed project. Their petition is not formatted into causes of action, but seeks mandate under CEQA on many of the same grounds asserted in the other three cases.

In RIC 461069 petitioner is Banning Bench Community of Interest Association, Inc. ("Banning Bench"), a non-profit corporation comprised of property owners in the Banning Bench, an unincorporated area of Riverside County located just to the east of the proposed project. Its petition is formatted into three causes of action: (1) for mandate under PRC §21168 for failure to comply with CEQA; (2) for mandate under CCP §1085 for failure to comply with the State Planning and Zoning Law; and (3) for declaratory relief as to interpretation of a Development Agreement entered into in 1994 between respondent and the predecessor in interest of real party.

By way of background, in 1993 the City annexed approximately 1000 acres, comprising the easterly portion of the proposed project, pursuant to an annexation agreement with SunCal's predecessor in interest. The annexation was approved by the Local Agency Formation Commission, and was followed by a development agreement in 1994. T28 AR 2063; T37 AR 4105-4119. That agreement anticipated development of the site, approximately 1500 acres in total, involved in this litigation. The location and general nature of the site are shown in certain exhibits to the final EIR, at T28 AR 2001-2003 and T28 AR 2080. The San Bernardino National Forest abuts it to the north and east. T28 AR 2003. A large unincorporated area lies just to the south of the site, separating it from the historic boundaries of the City of Banning, and the Highland Springs resort is located in that unincorporated area. T28 AR 2002, 2179.

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The development agreement provided that the City would, upon request of the landowner, redesignate the property as a "Specific Plan Overlay Development Zone." Such redesignation would require the landowner "to prepare and process a 'Specific Plan' detailing the permitted uses of the Property." T37 AR 4107. The development agreement went on to set forth certain provisions to be included in the specific plan. For instance, the specific plan would need to provide for at least 500 acres of open space, and would authorize subdivision of the property into as many as 1,500 residential lots. *Id.* The agreement also recited that future processing of a specific plan and subdivision map was subject to "appropriate environmental documentation, which may include an environmental impact report...." T37 AR 4108. The development agreement reserves to the City "its absolute discretion to take any action in conformance with, allowed by or required by CEQA," and includes a waiver by landowner of any right to sue the City for taking any such action. The agreement also reserves to the landowner "the right to refrain from proceeding with development of the Property," if the landowner determines "that any environmental mitigation or condition makes the project infeasible, or for any other reason." T37 AR 4109.

The proposed project then sat dormant for nine years, until fall of 2003, when the current owner of the property started to prepare the required documents. T38 AR 4121-4122. The project as proposed involves construction of 1,453 residential units, a school site, neighborhood park, nature park, and related roadways and utilities. T28 AR 1952; T289 AR 12760.

ACTIONS TAKEN BY THE CITY OF BANNING

Petitioners challenge four actions taken by the City:

(1) Adoption of Resolution No. 2006-128 on October 11, 2006, certifying the Final Environmental Impact Report in reference to the three other actions enumerated below, and adopting a statement of overriding considerations and mitigation monitoring program;
(2) Adoption of Resolution No. 2006-129 on October 11, 2006, approving General Plan Amendment #06-2502 to modify the circulation element of the General Plan to accommodate the project;
(3) Adoption of Resolution No. 2006-130 on October 24, 2006, approving Lot Split #04-4509 (Tentative Tract Map 34001); and
(4) Adoption of Ordinance No. 1353 on November 14, 2006, approving Specific Plan #04-209.

Documentation of those official actions appears at T284 AR 12740-12743 (EIR certification); T264 AR 11901-11904 (change to circulation plan); T289 AR 12759-12763 (tentative tract map approval); and T304 AR 13059-13061 (approval of specific plan). The final EIR appears in two volumes at T28 AR 1936-2441, followed by another volume setting forth responses to comments as well as certain attachments. The General Plan appears at T32 AR 3664-4086, and the changes to the circulation element are

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described in the resolution itself, and also at T227 AR 11428-11429. The tentative tract map appears at T28 AR 2442. The specific plan is at T19 AR 524-739.

HEARING ON THE PETITIONS

The matter was argued on December 19, 2007. Jan Chatten-Brown appeared on behalf of petitioner Highland Springs. Matthew Vespa appeared on behalf of petitioner Center for Biological Diversity. Robert C. Goodman and D. Kevin Shipp appeared on behalf of the Cherry Valley petitioners. John G. McClendon and Alisha M. Santana appeared on behalf of petitioner Banning Bench Community of Interest Association. Geralyn L. Skapik and Amy E. Morgan appeared for respondents City of Banning and City Council of the City of Banning. Edward J. Casey, Shiraz D. Tangri, and Tammy L. Jones appeared on behalf of real party SCC/Black Bench, LLC.

At the hearing petitioners' exhibits 1, 2, and 3, consisting of enlargements of items already part of the administrative record, were received into evidence. Respondents sought to introduce their exhibits A and B, but petitioners objected on the ground that each of those exhibits consists of an amalgamation of data in the record, and accordingly they each constitute late briefing. In addition, petitioner Highland Springs objected that Exhibit A was inaccurate. The court overruled those objections, stating that the exhibits would be received, and that if there were any inaccuracies the court would take that point into account in determining their weight. (This ruling is modified slightly, hereinbelow.)

All of the requests for judicial notice were granted without objection, except for one item that was taken under submission and is determined in the ruling set forth hereinbelow.

All issues in the petitions were argued and taken under submission.

STANDARD OF REVIEW

It is the function of this court to determine if there was a prejudicial abuse of discretion by the public agency. "Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence." PRC §21168.5. The court is also cognizant of the deference that must be accorded an agency determination under 14 CCR 15268 subd. (a), and applicable caselaw.

SUMMARY OF CONCLUSIONS

Having in mind the statutory standard of review, the court concludes that mandate must be granted because the City of Banning abused its discretion as follows:

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1. The City did not proceed in a manner required by law because it relied upon an EIR that did not analyze water supply according to the legal principles set forth by statute and by applicable case authorities; and because the EIR did not set forth information on water supply that was sufficiently reliable for the City and the public to make an informed decision.
2. There is no substantial evidence in the record to support the finding in the EIR, relied upon by the City, that there is adequate water supply for the project.
3. The City did not proceed in a manner required by law because it piecemealed this project, leaving the selection of an access road for later determination.
4. There is no substantial evidence in the record to support the finding in the EIR, relied upon by the City, that the proposed project is consistent with the goals and objectives of the Air Quality Management Plan of the South Coast Air Quality Management District.
5. The City did not proceed in a manner required by law because it relied upon an EIR that did not analyze growth-inducing aspects of the project according to the approach required by the CEQA Guidelines as set forth in the California Code of Regulations.
6. Because of uncertainty as to the location of the access road, there is no substantial evidence in the record to support the findings in the EIR, relied upon by the City, that the project would have less than significant effects (after mitigation) on historical and archeological resources, land use and aesthetics, noise impacts, hydrology, and certain aspects of traffic and circulation.
7. The City did not proceed in a manner required by law because it relied upon an EIR that assumed that a local noise ordinance made CEQA analysis of construction noise unnecessary.
8. The City did not proceed in a manner required by law because it rejected two alternative proposals without providing legally sufficient reasons.
9. The City did not proceed in a manner required by law because the EIR acknowledged that the impact of the project on air quality, and on traffic at certain intersections, could not be mitigated, yet the statement of overriding considerations was insufficient under the applicable statute.

RULINGS

Exhibits A and B, offered by respondents at the hearing, are not received as evidence or as part of the administrative record. They will be considered by the court as permissible argument, in conjunction with respondents' oral presentation. The court finds that petitioners are not prejudiced by the late tender of those documents.

Respondents' objection to item 3 of petitioners' supplemental request for judicial notice (a document from the California Department of Fish & Game) is sustained.

The petitions for mandate are granted. It is ordered that a peremptory writ of mandate issue directing that respondent City of Banning set aside its certification of the

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Environmental Impact Report and its approval of the project, including its adoption of Resolution No. 2006-129, Resolution 2006-130, and Ordinance 1353.

Pursuant to PRC §21168.9 subd. (a)(2), the court finds that any amount of grading, or any other physical commencement of the project will prejudice alternatives such as the 330 home alternative, the 1,192 home alternative, and the "no project" alternative, all of which were discussed in the EIR. Pursuant to the same code provision the court finds that any amount of grading, or any other physical commencement of the project will prejudice a variety of mitigation measures that are set forth in the EIR. Therefore respondent and real party are hereby enjoined from proceeding with grading, construction, or any other physical implementation of the project, until such time as the project is brought into compliance with the California Environmental Quality Act.

Because petitioner Banning Bench Community of Interest Association, Inc., included a cause of action for declaratory relief (its third cause of action), and that part of the case remains pending, the court cannot issue the writ or a final judgment at this time. See *Morehart v. County of Santa Barbara* (1994) 7 Cal. 4th 725, 733-734. Accordingly the court hereby sets a status conference for February 21, 2008, 10:00 AM, in Dept. 42.

After judgment the court shall retain jurisdiction over the proceedings pursuant to PRC §21168.9 subd. (b) and (c), but the judgment to be entered shall be final and appealable. Costs may subsequently be claimed according to law.

The court does not direct respondent City to exercise its lawful discretion in any particular way. Nothing in this ruling should be construed as requiring respondent or real party to go forward with the project, reapprove the project, or to take any particular action other than as specifically set forth herein.

REASONS

A. *Water supply*

The law requires a Water Supply Assessment ("WSA") to be prepared in connection with environmental review of any residential development exceeding 500 units. WC §§10910,10912. Further, the law requires a written verification from the proposed supplier, confirming that there is sufficient supply for the proposed development. GC §66473.7. The WSA need not be composed on a blank slate; if the proposed project "was accounted for" in the City's last Urban Water Management Plan ("UWMP") then the WSA may incorporate information from that document. WC §10910 subd. (c)(2).

That is the approach taken by respondents herein. The WSA borrows heavily from the city's UWMP, incorporating much of the language and many of the tables. The EIR then reiterates much of the same material. Again, this approach is permissible, but it means that the court must start with the UWMP in order to review the water supply issues in this mandate proceeding.

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The City adopted its most recent UWMP in 2005, pursuant to the requirements of the *Water Code* (sections 10620, *et. seq.*). That document, including its appendices, is set forth in the administrative record. T2 AR 20-212. Appendix C to the UWMP is a stipulated judgment from 2004 in Riverside Superior Court case no. RIC 389197, adjudicating groundwater rights in the Beaumont Basin. T2 AR 120-174. The judgment recites that the maximum safe yield from the basin is 8,650 afy (acre feet per year), and that total groundwater production has consistently exceeded that figure. T2 AR 122. The judgment notes a "temporary surplus" in the basin (with a technical definition provided at T2 AR 144), justifying an allowance to the City of 5,910 afy for 10 years. T2 AR 45, 167. After that, according to the UWMP, the City's share from the basin will be reduced to "a minimum of 400" afy. T2 AR 45.

It is difficult to find the 400 afy figure in the stipulated judgment, though it is obvious from the judgment that the City's share will substantially diminish after those first ten years, so the court will simply accept the UWMP's figure of 400 afy. Further, ten years from the judgment would put us at 2014, yet table 2-1 in the UWMP shows the reduction from 5,900 to 400 occurring in 2010. T2 AR 46. That table also shows water from that source increasing from 400 afy to 4,000 afy in 2025, but the court is not able to find anything in the UWMP to explain that projected increase.

The same table (at T2 AR 46) shows various other sources of water for the City, including non-adjudicated groundwater basins, and anticipated flow from the State Water Project ("SWP"). It shows SWP supply to the City increasing from zero in 2005 to 8,771 afy by 2015, yet gives scant explanation of those figures.

According to the EIR that 8,771 afy is comprised of 4,667 afy by way of "SWP Table A Entitlement" plus 4,104 afy from "SWP Additional Table A." Phase I of the East Branch Extension of the SWP is apparently almost operational, and involves a contractual "entitlement" for the San Gorgonio Pass Water Agency ("SGPWA") of 8,650 afy. Phase II of that extension is in the environmental review phase, and if built, may involve an additional contractual entitlement of 8,650 afy. T2 AR 54; T3 AR 228; T28 AR 2308-2310. A report from 2001 notes that the SWP has been able to deliver on average only 71% of contractual entitlements each year. *Id.* In the past, allocation of water among the various agencies comprising SGPWA has been accomplished pro rata based upon assessed valuation, and the UWMP predicts that the additional SWP water from the East Branch Extension will be allocated by that same method, and will likely result in the City obtaining 38% of that water. *Id.* Thus, 8,650 afy for each phase would be 17,300 afy in total; 71% of that figure equals 12,283; and 38% of that figure equals 4,667 afy. Again, that number appears as "SWP Table A Entitlement" on Table 2-1 of the UWMP. The court is not able to find in the UWMP any explanation of the other entry, for another 4,104 afy, other than a conclusory statement that additional water "can easily be taken" based upon anticipated flow capacity of the two phases of the East Branch Extension. T2 AR 54. Of course, the anticipated flow capacity of a pipe or aqueduct is to be distinguished from legal entitlement, and both are to be distinguished from the physical quantity of water that nature will actually provide. See, *e.g.*, *Planning*

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& Conservation League v. Department of Water Resources (2000) 83 C.A. 4th 892, 908; *Santa Clarita Organization for Planning the Environment v. County of Los Angeles* (2003) 106 C.A. 4th 715, 720-722. Moreover, as suggested by the discussion above, even the first 4,667 afy is subject to considerable doubt because Phase II of the East Branch Extension is still in the planning stage, and it also remains uncertain how much water SGPWA will receive from Phase I.

The EIR and the WSA both incorporate Table 2-1 from the UWMP. It appears as Table 4 in the WSA. T171 AR 10144. It appears as Table 4.11-7 in the EIR. T28 AR 2310. The table has been changed slightly, however for incorporation into these documents. Specifically, both the WSA and the EIR lump together the 4,667 afy that is explained by the UWMP with the 4,104 that is not explained, in order to present one combined figure for SWP water. Thus, the table as presented in those documents simply shows 8,771 afy from SWP for 2015. That figure also increases to 9,266 afy, without explanation, starting in 2020.

The Supreme Court has recently clarified the law in this area, in the important case of *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova, et. al.* (2007) 40 Cal. 4th 412. In that case the County of Sacramento had approved a community plan for a large mixed-use development, as well as a specific plan for its first phase, and a focused EIR for those plans. Several organizations sought mandate, challenging the development on a variety of grounds including insufficient study of water supply. The trial court and Court of Appeal had denied mandate, but the Supreme Court reversed, finding that the EIR did not adequately inform decision makers or the public of the plan for long-term provision of water. The Court reached that result although the EIR had relied upon an extensive prior analysis and report with regard to water issues in the region.

In granting mandate, the Court cited section 21100 of the *Public Resources Code*, which requires that an EIR "shall include a detailed statement setting forth...¶...[a]ll significant effects on the environment of the proposed project." The Court then identified the issue in the case as "what level of uncertainty regarding the availability of water supplies can be tolerated in an EIR for a land use plan." *Vineyard, supra*, at 428. The Court favorably cited *Santa Clarita, supra*; and with respect to water anticipated from SWP "entitlements" the court stated: "[B]ecause the State Water Project [has] never been fully constructed 'there is a huge gap between what is promised and what can be delivered,' rendering State Water Project entitlements nothing more than 'hopes, expectations, water futures or, as the parties refer to them, "paper water."'" *Vineyard, supra*, at 430 [citing from *Planning & Conservation League, supra*]. The Court also cited *Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 C.A. 4th 342 to emphasize that, when uncertainty exists as to one anticipated source of water, an EIR then must then address alternative sources and discuss 'at least in general terms' the environmental consequences of tapping such resources." *Vineyard, supra*, at 430, 432. The Court insisted upon "an analytically complete and coherent explanation," not merely an acknowledgment that future sources are possible and will be subjected to later environmental review. *Supra* at 440.

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Vineyard goes on to articulate four controlling principles in this issue area: "First, CEQA's informational purposes are not satisfied by an EIR that simply ignores or assumes a solution to the problem of supplying water to a proposed land use project. Decision makers must, under the law, be presented with sufficient facts to 'evaluate the pros and cons of supplying the amount of water that the [project] will need.'" *Supra* at 430-431 [citing from *Santiago County Water Dist. v. County of Orange* (1981) 118 C.A. 3d 818].

"Second, an adequate environmental impact analysis for a large project, to be built and occupied over a number of years, cannot be limited to the water supply for the first stage or the first few years. ... [T]he future water sources for a large land use project and the impacts of exploiting those sources are not the type of information that can be deferred for future analysis." *Supra* at 431.

"Third, the future water supplies identified and analyzed must bear a likelihood of actually proving available; speculative sources and unrealistic allocations ('paper water') are insufficient bases for decisionmaking under CEQA." *Supra* at 432 [citing *Santa Clarita, supra*]. An EIR for a land use project must address the impacts of *likely* future water sources, and the EIR's discussion must include a reasoned analysis of the circumstances affecting the likelihood of the water's availability. *Id.* [citing *California Oak Foundation v. City of Santa Clarita* (2005) 133 C.A. 4th 1219]; emphasis in original.

"Finally, where, despite a full discussion, it is impossible to confidently determine that anticipated future water sources will be available, CEQA requires some discussion of possible replacement sources or alternatives to use of the anticipated water, and of the environmental consequences of those contingencies." *Id.* [citing *Napa Citizens, supra*].

Before applying these four principles to the case at bar, it is necessary to recognize a factual distinction between *Vineyard* and our case. In *Vineyard* the EIR addressed a community plan and a specific plan, but not a tract map. This is important because it means that the level of specificity and analysis required by each of these four principles is even more stringent in our case than in *Vineyard.* Thus, the Court states: "The plans and estimates that *Water Code* section 10910 mandates for future water supplies at the time of *any* approval subject to CEQA must, under *Government Code* section 66473.7, be replaced by firm assurances at the subdivision map approval stage. To interpret CEQA itself as requiring such firm assurances of future water supplies at relatively early stages of the land use planning and approval process would put CEQA in tension with these more specific water planning statutes. ...¶ ...Consistent with the foregoing, we emphasize that the burden of identifying likely water sources for a project varies with the stage of project approval involved; the necessary degree of confidence involved for approval of a conceptual plan is much lower than for issuance of building permits." *Supra* at 434; emphasis in original.

When we then apply the first three *Vineyard* principles herein, it becomes clear that the analysis of water supply set forth in the EIR is insufficient, and that mandate must be

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granted. As discussed above, the EIR assumes that 8,771 afy will be forthcoming from SWP by 2015 (and that the flow will increase to 9,266 afy in 2020 and subsequent years). T28 AR 2310. As to the first 2,333 afy of the 8,771 afy, it is a close question as to whether the analysis is good enough. Respondents represent that Phase I of the East Branch Extension is nearly on line; that SGPWA's entitlement from that phase is 8,650 afy; that the pattern of utilizing assessed valuation for pro-rata distribution is likely to be followed in the future; and that 38% of 71% of the entitlement is a reliable estimate based upon past experience. Is this a "reasoned analysis of the circumstances affecting the likelihood of the water's availability," under the third *Vineyard* principle? It might have been, if more substance had been offered, as to the method of negotiating the 38% allocation in the past, the reasons why the same negotiation pattern would prevail in the future, and the current and projected demands of other constituent users of SGPWA water. We do not see that information in the EIR, however, and indeed, this EIR ignores the requirement that more certainty is required once we get to the stage of a tentative tract map. Thus, even for the "most likely" 2,333 afy of the 8,771 afy anticipated by the EIR, the analysis is not adequate under the principles established by the Supreme Court in the *Vineyard* case. With regard to the next 2,333 afy, anticipated from the unbuilt Phase II, this conclusion follows *a fortiori*, and needless to say, the hope of buying yet another 4,104 afy on the basis of pipeline capacity falls far short of the analysis required by *Vineyard*.

Moreover, the EIR offers nothing to fulfill the fourth principle of *Vineyard*, which requires analysis of alternate sources, and the environmental effects of utilizing them, if uncertain anticipated sources fail to materialize. The EIR does mention a "worst-case scenario," in which it is assumed that the aforementioned 4,104 afy in SWP water will not be available, and states that groundwater supplies would be sufficient to make up the difference. There is no discussion, however, of what the City will do if the first 4,667 afy does not materialize, or even what it will do if half of the first 4,667 afy (the half dependent on Phase II) never comes about. Moreover, in reviewing the supply and demand figures for the "worst case scenario," in Table 4.11-12 of the EIR, one can see the anticipated surplus go as low as 383 afy by 2020, based upon the projected population increase—but then the margin grows in 2025 because the draw from the adjudicated Beaumont Basin is assumed to increase from 400 afy to 4,000 afy. T28 AR 2310, 2314. Again, that tenfold increase does appear in Table 2-1 of the UWMP, and is perpetuated in the WSA and the EIR, but it is not explained. Absent that assumption, Table 4.11-12 would show large shortfalls in 2025 and 2030.

If we delete SWP water, then, from the supply figures in Table 4.11-7 of the EIR (Table 2-1 of the UWMP), and also assume that the City's draw from the Beaumont Basin will not increase in 2025, we have supply figures from that table as follows: in year 2010, 11,663 afy; in year 2015, 12,246 afy; in year 2020, 12,832 afy; in year 2025, 13,415 afy; and in year 2030, 13,996 afy. T28 AR 2310.

Comparing those figures to projected demand, we have: in year 2010, demand of 12,651 afy (shortfall of 988 afy); in year 2015, demand of 15,002 afy (shortfall of 2,756 afy); in year 2020, demand of 17,380 afy (shortfall of 4,548 afy); in year 2025, demand of

19,726 afy (shortfall of 6,311 afy); and in year 2030, demand of 22,051 afy (shortfall of 8,055 afy). T28 AR 2312. Even if we were to adjust these figures to assume that 2,333 afy in SWP water will really be forthcoming (from Phase I of the East Branch Extension), the figures would reflect a significant shortfall.

Of course this court is not purporting to *predict* a shortfall. It is not for the court to practice water science or determine water policy. From a legal standpoint, however, the analysis in the EIR is neither sufficient as to the likelihood of SWP water becoming available, nor as to the likelihood of increasing the city's draw from the Beaumont Basin in 2025. Therefore, it is worthwhile to compare the amount expected from the other supply sources to the projected demand as set forth in the EIR, and if we do that, as just seen, the figures reveal a substantial shortfall.

These concerns are significant, not just from a cumulative-impacts perspective, but in absolute terms. The proposed project will generate demand of 1,149 acre-feet per year. T28 AR 2311. When we see overall city supply figures in the range of only 11,000-14,000 afy, a decision to increase demand by 1,149 afy has substantial significance.

One could go further and question the demand assumptions that the EIR incorporates from the UWMP. Specifically, the UWMP states: "In 1990 the demand on the City's water supply was 4,096 acre-feet. In the [*sic*] 2000, the demand almost doubled at 8,032 acre-feet. During this period, the population grew from an estimated 20,570 to 23,662. This large increase in water demand in relation to population growth is due, in part, to increased commercial consumption and irrigation." T2 AR 56. The text of the UWMP goes on to mention certain specific commercial and irrigation water users. Table 3-1 on the next page, however, shows that residential use increased from 2,319 afy in 1990 to 4,715 afy in 2000, so residential demand more than doubled with a 13% increase in population. T2 AR 57. One could jump to various conclusions from this apparent anomaly, but petitioners did not raise the issue in their opening brief. Since respondents have had no chance to argue this point, the court did not list it above as one of the reasons for granting mandate.

Petitioners make other meritorious arguments with regard to water supply. They point out that the Engineers Annual Report for SGPWA for 2002-2003 discussed SWP water principally as a source for replenishing groundwater basins in overdraft. T3 AR 222, *et. seq.* The same report notes the "State of Overdraft" in the basin. T3 AR 235. As noted above, the judgment in RIC 389197 stated that the basin was consistently in overdraft, and that tapping the "temporary surplus" would be done, in deliberate excess of "safe yield," to allow more room for water storage and avoid wasting water. T2 AR 122, 144, 153. The WSA acknowledges that "initial deliveries of SWP water will be used to recharge the Beaumont Basin...." T171 AR 10138. It also states that "imported water... will be used to mitigate the overdrafting of groundwater...." T171 at 10134; and see T171 AR 10142. Taking all of this data together, it appears that the EIR and WSA may be counting the SWP water twice, once to recharge the basin and again as an independent source. The opposition brief at page 30 cites to an engineer's letter in this regard, at T223 AR 11375, but the text of that letter does nothing to allay the court's concern. Of

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course, the point is not to determine on mandate (after close analysis by court and counsel) whether this fallacy in fact undermines the EIR—the problem is that a crucial informational document, "the heart of CEQA," does not provide sufficient information to the public or the city when it slights an issue of this importance. *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal. 3d. 553, 564. A proper EIR "protects not only the environment but also informed self-government." *Laurel Heights Improvement Assn. v. Regents of University of Calif.* (1988) 47 Cal. 3d 376, 390.

Thus, the analysis of SWP water not only leaves its availability in doubt, as noted previously, but that possible source may have been counted twice in the EIR.

(Thus, it might not be a coincidence that the adjudicated safe yield from the Beaumont Basin is 8,650 afy, the same figure as the SWP entitlement from Phase I of the East Branch Extension—perhaps the numbers are the same because the one source is intended to replenish the other. It would be interesting to learn the history of the relevant negotiations, to see if this is so, but it does not matter for the legal analysis of the case at bar.)

Petitioners also note that the WSA assumes the City can take 100% of the safe yield of certain specific groundwater units, without analyzing the quantities drawn from those same storage units by other users. [Pet. Brief at 24, lines 18-24.] The opposition brief then dismisses this concern by citing tables "that illustrate the historically low pumping by these pumpers." [Opp. Brief at 29, 13-22.] After reviewing respondent's math in that portion of the brief, the court is uncertain as to whether the effect actually has been *de minimus*. Moreover, even if the amounts pumped are "historically low," the WSA, and the EIR that relied upon it, should tell us about the present and try to anticipate the future, rather than assume that historical numbers are still reliable. (Perhaps increased development in nearby areas will increase the competition for this same water.) Again, as noted hereinabove, it is not for the court to figure out these numbers and their effect by a close study of the record. The EIR should have analyzed the likely demand by other users of the storage units in question, so that the public and the Banning City Council could have had more complete and reliable data.

Finally, petitioners are correct to point out the uncertainty as to recycled water. The WSA and the EIR assume that 1,504 afy will be available from this source in 2010, and that the amount will gradually increase to 2,816 afy in 2030—yet the City used no recycled water at all in 2005. Both documents simply talk about "developing a program" and say that "The City has recently updated its Irrigation Feasibility Study to determine the current cost of implementing Phase I and Phase II of the proposed recycled water system." T28 AR 2309-2310; T171 AR 10143-10144. This analysis fails under all four principles articulated in *Vineyard, supra.* Moreover, the WSA states that the recycled water will be used to recharge the groundbasins in overdraft, so it seems to be counting this speculative source twice. T171 AR 10134.

Thus, the City did not proceed in a manner required by law, because it relied on an EIR that did not analyze water supply issues according to the legal principles imposed by

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statute and caselaw; and that EIR did not provide sufficiently reliable information regarding water supply for the benefit of the decision-makers and the public. The court is required to grant mandate on these grounds.

B. *Access Roads*

Both sides acknowledge that the law requires two access roads for the project, one for primary access, and another for secondary access. The "Executive Summary" portion of the EIR states that primary access would be provided by building a four-lane road that would extend Highland Home Road northerly, thus bisecting the Highland Springs resort; and that secondary access would be provided by constructing a roadway easterly to connect to Bluff Street. T28 AR 1951; and see the maps at T28 AR 2003 [exhibit 3-3 to the EIR, and enlarged as exhibit 1 at the hearing] and T28 AR 2060 [erroneously labeled as exhibit 4.1-4 to the EIR but enlarged as exhibit 2 at the hearing, and there correctly labeled as 4.1-3]. The body of the EIR again sets forth this scenario at T28 AR 2038, and environmental analysis is presented accordingly. See, *e.g.*, T28 AR 2178-2223.

The Executive Summary of the EIR also mentions two alternative locations for the primary access road. One alternative is to extend Highland Springs Road northeasterly to the project site, and another is to construct a road from the southern property boundary in a southeasterly direction to connect with Sunset Avenue at the intersection with Mesa Street. T28 AR 1955. The Sunset Avenue alternative is similar to the Highland Home Road alternative, in that it also involves building a four-lane road through the Highland Springs resort, but it would be situated farther to the east. The body of the EIR then sets forth an abbreviated environmental analysis of the Highland Springs Road alternative and a more extensive analysis of the Sunset Avenue alternative. T28 AR 2380-2431.

At some point the City imposed a condition of approval with regard to access that was interlineated into the EIR. T28 AR 2224-2226. That condition of approval implies that the Highland Springs Road alternative was no longer under consideration and states that the primary access road will either involve extending Highland Home Road or building a connector to Sunset Avenue as mentioned above. T28 AR 2224.

The condition of approval, in its original form (and as set forth in the EIR) would have allowed grading to commence before a legal right to primary access was obtained. *Id.* The City then revised the condition of approval to delete this portion. In relevant part the final version reads as follows: "City and Applicant acknowledge that a portion of the property needed to secure each of these road access alignments is on private property outside of City boundaries and not owned or controlled by Applicant. The Applicant shall bear the full burden of securing necessary property rights for the road alignments which are not currently owned or controlled by Applicant in order to achieve either the Highland Home Road Alignment or the Sunset Avenue Alignment. City shall not issue grading or building permits until such time as applicant has provided proof satisfactory to the City that Applicant has secured necessary property rights for either the Highland Home Road Alignment or Sunset Avenue Alignment. In the event Applicant is unable to secure such alignment through private acquisition, Applicant may request that the City or

other governmental agency exercise its power of eminent domain to secure the property for one of the road access alignments. However, Applicant acknowledges that the City shall be under no obligation in any way to exercise its power of eminent domain and shall only exercise such power, if at all, in its sole and absolute discretion in accordance with California eminent domain laws and regulations." T289 AR 12768-12769.

The condition of approval then goes on to say: "If either the Highland Home Road Alignment or the Sunset Avenue Alignment are not secured by the Applicant and City or any other governmental agency to whom such a request is made decline to exercise rights of eminent domain, then Applicant shall secure access to the Black Bench project through another road access area alternative (Third Access Alternative). The Third Access Alternative shall require City review and the City shall have the ability to require that the Applicant submit to the City a request for (1) an amendment to the circulation element of the General Plan, (2) an amendment to the Black Bench Specific Plan, and (3) an amendment to Lot Split #04-4509 (TTM 34001) to the extent that the Third Access Alternative is inconsistent with such plans and maps. The Third Access Alternative shall also require further environmental review under the California Environmental Quality Act (CEQA)." T289 AR 12770.

This approach constitutes impermissible piecemealing of the project. "'Project'" means the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change...." 14 CCR 15378. Numerous case precedents preclude piecemealing, and the Supreme Court has set forth a legal test in this regard. In the case of *Laurel Heights Improvement Association v. Regents of the University of California* (1988) 47 Cal. 3d 376, 396 the Court stated that "an EIR must include an analysis of the environmental effects of future expansion or other action if: (1) it is a reasonably foreseeable consequence of the initial project; and (2) the future expansion or action will be significant in that it will likely change the scope or nature of the initial project or its environmental effects." *Id.* Under this test it is obvious that the access roads to a project of this size must be analyzed in the EIR, yet there is no environmental analysis whatsoever of the unspecified "Third Access Alternative."

This is not a hypothetical problem. The condition of approval puts upon SunCal the obligation of persuading petitioner Highland Springs to sell some of their land so that the primary access road can be constructed. One can easily discern that said petitioner is unlikely to sell. Eminent domain is the only other possibility, if Highland Home Road is to be extended, or if a connector road is to be built from the project to the Sunset/Mesa intersection. As noted in the condition of approval, no promise has been made or can be made as to the chance of obtaining access by that means. It would seem difficult for respondents to predict whether the County of Riverside will agree to take the land of petitioner Highland Springs for this purpose. (Also, as an incidental point, the condition of approval recites that the City can exercise its power of eminent domain only "in accordance with California eminent domain laws and regulations," but does not mention that constitutional law is also involved.) Thus, there is a very real possibility that if this project is to be built, the unknown "Third Access Alternative" will serve as the primary

access road. Again, since that alternative is not analyzed in the EIR, the environmental analysis herein fails the Supreme Court's test as set forth in *Laurel Heights, supra.* Moreover, SunCal proposes to run utility lines "within existing and future roadways," yet no environmental analysis is presented as to whether the site of the "Third Access Alternative" is environmentally appropriate for those utility lines. T28 AR 2299, 2314-2315, 2320-2321, 2323. Obviously there cannot be such analysis, since we don't know where that road will be.

Respondents point out in their brief and in oral argument that, under the revised conditions of approval, the project cannot commence until and unless the primary access road is secured and subjected to CEQA review (such review to be required if the "Third Access Alternative" is chosen). Petitioners meet this argument in their reply brief by citing *Concerned Citizens of Costa Mesa, Inc. v. 32nd District Agricultural Association* (1986) 42 Cal. 3d 929, at 935 and 938, in which the Supreme Court holds that the project as described in the EIR must be "stable and finite," to the end of "precluding stubborn problems...from being swept under the rug." The court has carefully reviewed that case precedent, and agrees that it requires the City to make the hard decisions now, as to access, so that the environmental effects of the entire project can be analyzed up front. The court also notes that, if some of the project is to be approved now, and CEQA analysis of the "Third Access Alternative" is to be done later, it will skew that later environmental analysis. Specifically, SunCal will at that point be armed with a potent overriding consideration—the prior approval of 1,453 houses, and the reliance interest (or momentum) implicit in that approval.

The City ultimately agreed that the secondary access road connecting to Bluff Street will be designed for emergency traffic only. T28 AR 2457-2458. Thus, the primary access road will bear almost 100% of the traffic to and from this housing project. Under these circumstances the importance of identifying that road and its likely environmental effects is heightened.

The Supreme Court decisions cited hereinabove set forth clear principles construing CEQA, and the Court's analysis is entirely applicable to our present case. The Banning City Council, in approving this project without choosing an access road, thus deferred a controversial and environmentally important issue. That decision constituted piecemealing of the project, and it was contrary to the law as explained by the Supreme Court in such cases as *Laurel Heights* and *Concerned Citizens of Costa Mesa, supra.* The court is required to grant mandate on this ground.

C. *Air Quality*

The City's "Final Findings of Fact and Statement of Overriding Considerations" with respect to the EIR acknowledges that the short-term and long-term effects of the project would generate emissions that exceed thresholds of significance adopted by the South Coast Air Quality Management District ("SCAQMD"). That same document finds that there are no feasible mitigation measures to reduce the air-quality impact to a level that is less than significant. T227 AR 11521-11530. Therefore the air quality aspect of this

case must be considered in connection with the City's statement of overriding considerations (see below).

Petitioners do, however, identify an aspect of the EIR that deserves discussion. The EIR appropriately quotes the *CEQA Handbook* from SCAQMD: "New or amended GP Elements (including land use, zoning and density amendments), Specific Plans, and significant projects must be analyzed for consistency with the AQMP." T28 AR 2238. (The "AQMP" is SCAQMD's Air Quality Management Plan.) The EIR then sets forth a paragraph concluding that the Black Bench project is "consistent with the goals and objectives of the AQMP." T28 AR 2239. A few pages later we see some text stating that "the proposed project is consistent with the AQMP assumptions." T28 AR 2247.

The court has looked carefully in the record, and believes that the parties did not include the 1997 AQMP, the 2003 AQMP, or the draft 2007 AQMP. The record in this case is lengthy, however, and it is possible that the court simply cannot find those documents. Often petitioners bear the burden of making sure something is included in the administrative record, but here we have an EIR that acknowledges an environmental effect that cannot be mitigated, yet concludes that the project is still consistent with a regional environmental document. Under those circumstances it would seem to be respondents' responsibility to proffer that document. Moreover, even if an AQMP does appear somewhere in the record, the EIR does not explain how this project can generate emissions substantially over threshold for numerous pollutants, yet still be consistent. At respondents' request the court has taken judicial notice of the *CEQA Handbook*, and reviewed the paragraph (cited in the opposition brief at p. 51) that discusses consistency findings. Perhaps one can agree, based upon that paragraph, that the focus should be on "assumptions and objectives of the regional air quality plans, and thus if [the project] would interfere with the region's ability to comply with federal and state air quality standards." The EIR does set forth a few lines indicating that the proposed development is consistent with growth forecasts utilized in the AQMP, but does not discuss any other assumptions of the AQMP, and certainly does not tell us how the project is consistent with its goals or objectives. Nor does it tell us why the project would not interfere with the region's ability to comply with air quality standards.

The EIR and respondents also assert that the air quality effects of this project will be insignificant when considered in conjunction with all the air pollution that already exists, saying: "...the emissions from this project are projected to be a fraction of a percentage of the basin-wide emissions." T28 AR 2247; Opp. brief p. 51. In response petitioners appropriately cite *Communities for a Better Environment v. California Resource Agency* (2002) 103 C.A. 4th 98, which clarifies the law of cumulative impacts in this context. That case makes clear that we do not have a "one additional molecule" rule, but at the same time warns that we should not "turn cumulative impact analysis on its head by diminishing the need to do a cumulative impact analysis as the cumulative impact problem worsens." *Communities for a Better Environment, supra*, at 103 C.A.4th at 117.

At page 49 of the opposition brief respondents cite from the *CEQA Handbook* as follows: "...projects consistent with local general plans are considered consistent with the air

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quality related regional plans." This quote is from page 12-2 of the handbook but follows two other sentences that do require consistency review for general plan amendments, specific plans, and significant projects. In the case at bar that is exactly what we have: an amendment to the general plan, an approval of a specific plan, and a tract map for a significant project.

Of course projects still get approved and many withstand environmental analysis on mandate, but this project exceeds emissions standards, so the air quality aspect must be considered in the context of overriding considerations. We therefore have a ground for mandate, because the finding in the EIR of consistency with the AQMP is not supported by substantial evidence. In this regard the EIR did not provide reliable information for the public or for the city council, and the court is required to grant mandate on this ground.

The court finds petitioners' other arguments with regard to air quality to be unpersuasive, generally for the reasons set forth in the opposition brief. (See the discussion in the briefing of non-criteria pollutants, sensitive receptors, and $PM_{2.5}$ methodology.)

D. *Growth-Inducing Impacts*

Petitioners correctly contend that the EIR insufficiently analyzes the possible growth-inducing effect of this project. They note that any north-south roadway, with utility lines underneath, would make it easier to develop various parcels that lie between the proposed project and the historical boundaries of the City.

The discussion in the EIR is limited to four paragraphs. The first paragraph introduces the issue, and the second paragraph offers an abbreviated definition of "growth-inducing impacts." The third paragraph points out that City approved the initial development agreement with SunCal's predecessor in interest back in 1994, so the *project itself* does not represent unforeseen growth. The fourth and final paragraph is the only one to confront the issue, and says only the following: "In addition, areas within the San Bernardino National Forest or conservation areas identified in the Western Riverside MSHCP surround the project site. As described in Section 4.12, Recreation, the National Forest is public land set aside for the conservation of natural resources such as trees, water, minerals, livestock range, recreation, and wildlife. Therefore, these areas surrounding the project site would not allow future development, thereby limiting the developable land in the vicinity of the project site." T28 AR 2434-2435.

Petitioners point out that only a portion of the project is abutted by National Forest land. Some of the other nearby land is situated in an MSHCP conservation area, but some is not, and MSHCP land can still be developed by way of environmental trades and other changes in land use designations. Pet. brief at 68-70; T28 AR 2060 [exhibit 2 at the hearing]. They cite *Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1955) 33 C.A. 4th 144, 156-57, which held that an environmental impact report for a proposed golf course and country club was necessary in order to consider growth-inducing impacts, even though the surrounding land was zoned agricultural, because "Zoning is subject to

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change and amendment of a General Plan is not a rare occurrence." They also cite *City of Antioch v. City Council of the City of Pittsburg* (1986) 187 C.A. 3d 1325, which required an EIR for construction of a road and sewer, because that infrastructure would promote housing growth.

Respondents acknowledge that a north-south roadway will facilitate additional growth, but state that the General Plan anticipates such growth, and that some of the projects to be served by such a road have already been approved and passed environmental review. Opp. brief at 83-85. They point out that the cases cited by petitioner are distinguishable on their facts and, more importantly, with regard to the applicable standard of review, since both involved a negative declaration whereas in our case we have an EIR. They cite *Napa Citizens for Honest Government v. Napa County Board of Supervisors* (2001) 91 C.A.4th 342, which upheld an EIR despite its less-than-perfect discussion of growth inducement.

In their reply brief at page 34 petitioners argue: "Respondents ...distinguish between anticipated and unanticipated growth no fewer than ten times. ... This fixation is both illogical and irrelevant. Even if a General Plan anticipates growth, it does not follow that such growth would not have environmental impacts."

There are not many applicable case precedents in this area. Also, CEQA cases tend to be unique on their facts, so it is frequently easy for each side to distinguish the citations offered by the other. Under these circumstances it is helpful to refer to the administrative law that the state has adopted to guide public agencies in determining whether to certify an EIR.

Specifically, the CEQA Guidelines require the following: "Discuss the ways in which the proposed project could foster economic or population growth, or the construction of additional housing, either directly or indirectly, in the surrounding environment. Included in this are projects which would remove obstacles to population growth (a major expansion of a waste water treatment plant might, for example, allow for more construction in service areas). Increases in the population may tax existing community service facilities, requiring construction of new facilities that could cause significant environmental effects. Also discuss the characteristic of some projects which may encourage and facilitate other activities that could significantly affect the environment, either individually or cumulatively. It must not be assumed that growth in any area is necessarily beneficial, detrimental, or of little significance to the environment." 14 CCR 15126.2 subd. (d).

If we then compare that paragraph of the guidelines to the final paragraph on page 2435 of the record, it can be seen that the analysis falls far short of that required by law. Again, it does not matter if the parties can set forth reasoning that might persuade this court that the project does or does not have an impermissible growth-inducing effect. The point is that an EIR is an informational document that must discuss the issue in accordance with the principles set forth in the Guidelines and it did not do so. Therefore the City did not proceed in a manner required by law because it certified an EIR that did

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not include the required analysis of growth-inducing impacts. The court is required to grant mandate on this ground.

E. *Other Impacts*

The court rejects petitioners' contentions as to wildfire risk, global warming, and biological resources. As for archeology/history, land use and aesthetics, and hydrology, the petitions have merit because the issue of the primary access road remains unresolved. The petitions have merit with regard to traffic and with regard to noise impacts for that same reason and for additional reasons as well.

One should not minimize the risk of fire in developments adjacent to forested land, but it is not for the court to set public policy in this regard. The EIR thoroughly discusses the risks and adopts mitigation measures. T28 AR 2005, 2284-2285, 2297-2299. The City clearly relied upon substantial evidence in this regard. Further, the court rejects the argument that the EIR was deficient for failing to perform CEQA analysis on the fire station proposed as a mitigation measure, and finds that *County of Amador v. City of Plymouth* (2007) 149 C.A. 4th 1089, is not on point.

Again, the court understands the importance of greenhouse gas emissions, but as pointed out in the opposition brief and at oral argument, no law required the Banning City Council to consider global warming at the time it approved this project.

With regard to biological resources, the EIR appropriately analyzed the project within the context of the Multiple Species Habitat Conservation Plan ("MSHCP"). It is permissible to rely on the mitigation measures included in that plan, and petitioners' argument as to implicit tiering is without merit. The EIR relied upon a number of independent studies as to plant and animal species, and found that no federally listed species are present on the land in question. Certain special status plants were found, and five special status wildlife species were determined to be potentially present, but the EIR found that the impacts were less than significant. T28 AR 2144-2177; T167 AR 9141-9207. The City relied upon substantial evidence in this regard.

With regard to impacts upon historical and archeological resources, the petitions must be granted, again because we do not know the location of the access road. (Thus, it is not possible to evaluate the adequacy of the proposed mitigation measures.)

With regard to land use issues and aesthetics, the petitions have merit for the same reason—the EIR did not address that subject matter with regard to the "Third Access Alternative." With regard to the on-site portion of the development, the City's decision was supported by substantial evidence as to land use consistency and aesthetics. T28 AR 2055-2099; and see Table 4.1-1 at 2071-2075. General plan consistency is determined by asking whether a project is in overall conformity; it is not required that every goal set forth in the general plan be advanced by the project. *San Franciscans Upholding the*

Downtown Plan v. City and County of San Francisco (2002) 102 C.A. 4th 656, 677-678. Respondent City has broad discretion in setting its policies in this regard, and is entitled to deference. *Id.*

Similarly, the court has carefully reviewed the discussion of hydrology and water quality in the EIR, and finds that the uncertainty as to the access road undermines the analysis. T28 AR 2122-2143. The Highland Home Road alignment involves construction of a bridge over Smith Creek, on the land of Highland Springs Conference Center (T28 AR 2132), and as noted previously, that petitioner does not appear to be a willing seller. It is uncertain if a bridge would be necessary if the Sunset alignment is utilized, and of course we don't know what the hydrology analysis would be under the "Third Access Alternative." On the other hand, the court questions petitioners' claim that the EIR neglects to address channel stability and neglects to analyze adequately the potential for hydromodification. T217 AR 11261-11265. In fact the EIR does address the risks set forth by petitioners' expert, although it does not always use the same terminology.

With regard to traffic and circulation, again the petitions have merit because the EIR did not address that subject matter with regard to the unknown "Third Access Alternative." The EIR sets forth an extremely detailed analysis of traffic flow at various City intersections, and discusses mitigation, yet we still don't know where the access road will be. T28 AR 2178-2230. In addition the EIR acknowledges that the project will have a "significant and unavoidable" effect on various intersections that are outside of the City's jurisdiction. T28 AR 2230. Thus, even apart from the problem of the unknown access road, we have an unmitigated environmental effect from this project, that can be overcome only by proper analysis of project alternatives and overriding considerations.

Petitioners are correct that the EIR failed adequately to address noise impacts, both as to short-term effects from construction and long-term effects from traffic. The EIR states: "The City of Banning Noise Ordinance limits the exterior noise levels from non-transportation sources at residential units to 45 dBA from the hours of 10:00 p.m. to 7:00 a.m. and 55 dBA from the hours of 7:00 a.m. to 10:00 p.m. Construction noise is exempt from this requirement." T28 AR 2262. It goes on to say: "Additionally, the Noise Ordinance excludes control of construction activities during the hours of 7:00a.m. to 6:00 p.m. Therefore, any noise generated by construction activities during those hours is not considered to have a significant noise impact." T28 AR 2263-2265. This reasoning is contrary to law, since nothing in the *Public Resources Code* or the Guidelines permits a public agency to rely upon a local ordinance in order to avoid CEQA analysis of an admitted environmental impact. With respect to long-term noise impacts from traffic, the EIR is not based on substantial evidence because it does not analyze the noise to be generated, and the effects on those nearby, from the "Third Access Alternative." Therefore the court must grant mandate on this ground.

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F. *Rejection of Alternatives, and Statement of Overriding Considerations*

Petitioners are correct that the EIR inadequately analyzes alternatives to the project, and that the Statement of Overriding Considerations is deficient. These are related topics, so the court will discuss them together.

Section 21002 of the *Public Resources Code* states that public agencies should not approve a project as proposed if there are feasible alternatives or feasible mitigation measures available that would substantially lessen the significant environmental effects of the project. The same section says that "in the event specific economic, social, or other conditions make infeasible such project alternatives or such mitigation measures, individual projects may be approved in spite of one or more significant effects thereof." Section 21081 of the code then describes the situation that might justify proceeding with a project in spite of significant environmental effects: "...[(a)](3) Specific economic, legal, social, technological, or other considerations, including considerations for the provision of employment opportunities for highly trained workers, make infeasible the mitigation measures or alternatives identified in the environmental impact report." That latter code section goes on to say that the project may proceed despite "significant effects which were subject to a finding under paragraph (3) of subdivision (a), [when] the public agency finds that specific overriding economic, legal, social, technological, or other benefits of the project outweigh the significant effects on the environment."

In our case, as noted hereinabove, the EIR acknowledges that the project will generate emissions that exceed the applicable thresholds for several pollutants, and that no mitigation measure will be sufficient to change that fact. Therefore, the EIR is required to discuss, and does discuss, project alternatives that might obviate that significant environmental effect on air quality. T28 AR 2358-2433. Similarly, the EIR acknowledges "significant and unavoidable" effects on certain intersections outside of City jurisdiction, so again, discussion of alternatives is required.

Petitioners first contend that the EIR improperly rejected the alternative of situating the project at a different site. The analysis of this point in the EIR (T28 AR 2359) is less than satisfactory, but on the other hand nothing appears in the record to show that SunCal owned or could acquire any other site. Respondents correctly point out that the City is required to take this point into account. 14 CCR 15126.6 subd. (f)(1). The City therefore acted within its discretion in rejecting the possibility of an alternative site.

Petitioners next argue that the City should have considered their suggestion of a large lot alternative, involving 100-acre parcels. Specifically, petitioner Banning Bench had suggested this alternative to the City, and asserted that the County of Santa Barbara had successful taken such an approach to its Hollister Ranch development. T249 AR 11677. Respondents dismiss this idea in one sentence (Opp. Brief at p. 97, lines 9-12), by quoting the guidelines to the effect that only a reasonable range of alternatives needs to be considered.

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This raises an interesting point. As mentioned above, one of the petitioners did present this alternative to the City, but it was simply mentioned in the last paragraph of a four-page letter setting forth various objections to the project. T249 AR 11677. Petitioners' brief does not cite any part of the record that further explains this idea. Is the EIR then defective for not fully analyzing an alternative that was so obliquely proposed? This court cannot accept that proposition, and will find that a general reference in a lengthy letter to an approach taken in another county, without further explanation or advocacy at the administrative level, is not enough to find that the City failed to consider a reasonable range of alternatives. Accordingly the court will not grant mandate on this ground.

The conclusion is different, however, for petitioners' next point. They note that a 330 home development, with access from Bluff Street, was identified in the EIR as an environmentally superior alternative. Specifically, the EIR states: "Because this alternative involves construction of only 330 dwelling units, the number of vehicle trips would be substantially reduced in comparison to the proposed project, as discussed above. With the reduced vehicle trips, long-term operational emissions from vehicles would be reduced to a level considered less than significant. Therefore, this alternative would avoid the long-term air quality impact resulting from implementation of the project." T28 AR 2378. It also states: "This alternative would reduce the extent of significant environmental impacts resulting from development on- and off-site compared to the proposed project. Under this alternative the potentially significant, unavoidable long-term air quality and traffic impacts would be avoided. As with the proposed project, potentially significant unavoidable short-term construction-related air quality impacts would be reduced with the implementation of the identified mitigation program, but not to a level considered less than significant." T28 AR 2380.

The EIR then rejects this alternative, saying that it "would not implement most of the primary objectives identified for the proposed project...." T28 AR 2380. Specifically, the EIR states that a development of only 330 homes would: (1) frustrate the implementation of the 1994 development agreement with SunCal's predecessor; (2) deny to the City a new north-south access road; (3) deny to the City the dedicated open space that is contemplated as part of the project as proposed; and (4) not contribute as effectively to fulfill regional housing needs.

These reasons for rejecting the 330 home alternative are not legally sufficient. The first reason involves circular logic, and in any event, nothing in the 1994 development agreement mandates 1,453 homes. The second reason is startling, because the rest of the EIR assumes that we need a new road if we are to have a big project, but the passage just cited suggests that we need a big project in order to justify a new road. (Also, since the EIR does not tell us where the new road will be, it is hard to accept the idea that the project should go forward so that the City can receive the benefit of that unknown road.) The third reason seems illogical, since the land now is all open space, and presumably there would be even more open space left over if the project is to be limited to 330 homes. The fourth reason lacks evidence in the record, as to what unfulfilled housing needs the City is attempting to satisfy (see petitioners' opening brief at p. 92, lines 16-24).

In their brief respondents provide a reason for rejecting this alternative that might have constituted substantial evidence, if it had been included in the EIR. They point out that any alternative that uses Bluff Street for primary access, even for a 330 homes, might have adverse environmental effects on the Banning Bench community. Opp. brief at p. 97, lines 26-28. Once again, however, the EIR is an informational document, and it did not discuss that possible shortcoming in discussing this alternative.

Similarly, the EIR discusses an alternative involving 1,193 homes, acknowledges that it will have a reduced environmental impact, but rejects that option. T28 AR 2370-2373. The reasons for rejecting it are: (1) "it would not be consistent with the approved Development Agreement for the project site which provides for the development of 1,500 units"; and (2) it would "not contribute to regional housing needs to the same extent as the proposed project due to the reduction in the number of units...." T28 AR 2373. Thus, these reasons overlap those given for rejecting the alternative of 330 homes, and they are not valid for the reasons set forth above.

We are left, then, with an EIR that identifies two alternatives as environmentally superior, and offers no good reason for rejecting them.

The Statement of Overriding Considerations may be found at T227 AR 11560-11561. Seven items are set forth therein. Item #1 states that the project will provide housing opportunities, but there is no evidence in the record of demand for such housing, or that the City or region is facing a shortage of housing. Again, the court finds persuasive the argument presented in petitioners' brief on this issue. On the other hand, respondents' arguments on this point, as set forth on page 99 of the opposition brief, essentially state that the population of the City is expected to grow, that the General Plan anticipates growth, and that population cannot grow without new houses. The court again finds this reasoning circular, and reminds the parties of the legal requirement that we not assume that growth is beneficial or detrimental. Cf. 14 CCR 15126.2 subd. (d).

Items #2, #3, #4, and # 6 are simply characteristics of the project. By example, item #2 states that the project will include recreational facilities for the residents, and item #6 says that some trails will be created for bicycle-riding and hiking in the project area. These are not overriding considerations at all—presumably the people who will move into the 1,453 new houses already have some means of recreation in their present places of residence, and we do not know if they will have more recreation or less if the Black Bench becomes their new locale. Similarly, item #3 reminds us that 869 acres of the project site would be preserved as open space, but as noted above, all 1,488 acres are open space now. It is not an overriding consideration to point out that the project design may be attractive, or that it does not consume all of the open space on the site. Item #4 just reminds us that some of the open space contemplated by this project would fall into a "Criteria Cell" area under the MSHCP. Again, it is not an overriding consideration that some natural habitat is preserved on the project site. More generally, simply restating a characteristic of the project falls short of the standard for overriding considerations as set forth in section 21081 as cited above.

Item #5 states that construction of a north-south highway is an overriding consideration, but it is not, for the reasons set forth in the discussion of project alternatives, hereinabove. In addition, respondents again assume that "full build-out of the City" according to population growth projections, will require such a road "as the City continues to grow." Opp. brief at 99. Again, these arguments are tautological.

Finally, item #7 states that the project will bring revenue into the city, but there is no discussion of what ongoing costs it will impose, and we see no economic analysis that would permit the court to evaluate this possible overriding consideration. Respondents cite *Uphold Our Heritage v. Town of Woodside* (2007) 147 C.A. 4th 587 for the proposition that such economic analysis is required only in the context of evaluating the feasibility of project alternatives, but the case does not say that. In that case the court simply affirmed a trial court finding that an economic evaluation was necessary for a proposed alternative. In our case respondents are relying upon an economic reason as an overriding consideration, and certainly a party that relies upon an economic reason should offer an economic analysis.

Returning to the statute, none of the listed overriding considerations herein meet the standard of "specific economic, legal, social, technological, or other considerations..." PRC §21081 subd. (a)(3). Thus, since the EIR acknowledges that the project will have an unmitigated negative effect on air quality and traffic, and since no legally sufficient overriding considerations are set forth, mandate must be granted on this basis as well.

G. *Non-CEQA Contentions*

Petitioner Banning Bench attempts to set forth a non-CEQA basis for mandate in its second cause of action. The court finds that the contentions set forth therein lack merit. In the administrative proceedings respondents may indeed have assumed that implementation of the 1994 Development Agreement had importance, but it does not necessarily follow that the public hearings were a sham or that the applicable provisions of the *Government Code* were violated. Moreover, the Development Agreement specifically provided that future processing of a specific plan and subdivision map were subject to further requirements, including CEQA review.

CONCLUSION

As explained herein, the actions taken by the City of Banning with regard to the Black Bench project were in many respects contrary to the requirements of CEQA. Mandate must be granted for the reasons set forth above.

DATED: Jan. 29, 2008

T. Cahraman

THOMAS H. CAHRAMAN
JUDGE OF SUPERIOR COURT

24/24
RIC 460950

SUPERIOR COURT OF CALIFORNIA, COUNTY OF RIVERSIDE
www.riverside.courts.ca.gov
[X] 4100 Main Street, Riverside, CA 92501
[ ] 4050 Main Street, Riverside, CA 92501
[ ] 4175 Main Street, Riverside, CA 92501
[ ] 880 N. State Street, Hemet, CA 92543
[ ] 41002 County Center Dr. #100 Temecula, CA 92591
[ ] 135 N. Alessandro Rd. Banning, CA 92220
[ ] 505 S. Buena Vista Ave., Corona, CA 91720
[ ] 13800 Heacock #D201, Moreno Valley, CA 92553

CLERKS CERTIFICATE OF MAILING

APPELLANT: CITY OF BANNING
VS.
RESPONDENT: HIGHLAND SPRINGS CONFERENCE AND TRAINING
Case No. RIC460950

TO:

I, clerk of the above entitled court, do hereby certify I am not a party to the within action or proceeding; that on the date below indicated, I served a copy of the attached 01/29/08 by depositing said copy enclosed in a sealed envelope with postage thereon fully prepaid in the mail at Riverside, California addressed as above.

CLERK OF THE COURT

Dated: 01/29/08

By: _____
KATHY D RAHLWES

Notice 'CCM' has been printed for the following Attorneys/Firms or Parties for Case Number RIC460950 on 1/29/08:

CHATTEN-BROWN & CARSTENS
2601 OCEAN PARK BOULEVARD
SUITE 205
SANTA MONICA, CA 90405

WESTON, BENSHOOF, ROCHEFORT, RUBAL
333 SO. HOPE STREET
16TH FLOOR
LOS ANGELES, CA 90071-2901

LEIBOLD, MCCLENDON, & MANN
23422 MILL CREEK DRIVE
SUITE 105
LAGUNA HILLS, CA 92653

BURKE, WILLIAMS, & SORENSEN
2280 MARKET STREET
SUITE-300
RIVERSIDE, CA 92501-2121

MATTHEW VESPA
1095 MARKET ST.
SUITE 511
SAN FRANCISCO, CA 94103

ROBERT C. GOODMAN
177 POST STREET
SUITE 750
SAN FRANCISCO, CA 94108