

JUL 22 2016

ALAN CARLSON, Clerk of the Court

Alan Carlson
BY G. HERNANDEZ *gl*

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7 SUPERIOR COURT OF THE STATE OF CALIFORNIA
8 COUNTY OF ORANGE – CIVIL COMPLEX CENTER
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10 PROTECT OUR HOMES AND
11 HILLS; HILLS FOR EVERYONE;
12 ENDANGERED HABITATS
13 LEAGUE, INC; CALIFORNIA
14 NATIVE PLANT SOCIETY;
15 FRIENDS OF HARBORS,
16 BEACHES AND PARKS, INC.,
17 Petitioners and Plaintiffs,

18 v.

19 COUNTY OF ORANGE; BOARD
20 OF SUPERVISORS OF COUNTY
21 OF ORANGE; CITY OF YORBA
22 LINDA; CITY COUNCIL OF THE
23 CITY OF YORBA LINDA; and
24 DOES 1 through 20, inclusive,
25 Respondents and Defendants.
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YORBA LINDA ESTATES, LLC, an
Arizona Limited Liability Company
and a California Limited Liability
Corporation, and Does 21 through 50,
Real Parties-in-Interest.

30-2015-00797300

STATEMENT OF DECISION

HON. WILLIAM D. CLASTER

Dept. CX102

1 **INTRODUCTION AND OVERVIEW**

2 The trial in this writ of mandate and declaratory relief proceeding took place on May 13
3 and 27, 2016. Prior to the trial, the parties filed various briefs, requests for judicial notice and
4 an administrative record in excess of 26,000 pages. Having considered both the written and
5 oral arguments of the parties, the record in this matter, and Petitioners' objections to the
6 proposed Statement of Decision, the Court issues the following Statement of Decision
7 pursuant to California Code of Civil Procedure Section 632 and California Rule of Court
8 3.1590. Based on the Statement of Decision, Petitioners are to prepare a proposed judgment
9 and proposed peremptory writ of mandate in conformity therewith.

10 This case stems from the County of Orange's (the "County") certification of an
11 Environmental Impact Report (EIR) for a project to build a residential development of up to
12 340 single family homes on approximately 470 acres of undeveloped land in an
13 unincorporated area of the County adjacent to the City of Yorba Linda (the "Project").
14 Petitioners Protect Our Homes and Hills, et al., brought this writ proceeding and declaratory
15 relief action pursuant to the California Environmental Quality Act (CEQA), Public Resources
16 Code § 21000 et seq., and the California Planning and Zoning Law, Government Code §
17 65000 et seq., challenging the County's approval of the Project and adoption of an
18 amendment to the Orange County General Plan and a zoning change. The developer of the
19 Project and the Real Party in Interest in this matter is Yorba Linda Estates, LLC ("YLE").

20 Petitioners' opening brief contends that the EIR is inadequate in at least 10 different
21 respects and that the Project is inconsistent with the County's General Plan in several ways.
22 After careful consideration of the arguments of all parties, as well as the administrative
23 record, the Court finds that virtually all of these arguments are without merit. However,
24 because the EIR impermissibly defers mitigation of greenhouse gas (GHG) impacts and also
25 arbitrarily limits the extent to which these mitigation measures must be considered, the Court
26 intends to issue a writ on this basis.

27 **REQUESTS FOR JUDICIAL NOTICE (RJN)**

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1 **Petitioners' RJN**

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3 The Court grants Petitioners' RJN of Exhibits 1-3 and 5, but denies judicial notice as to
4 Exhibit 4, described below:

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6 **Ex. 1.** Portions of Title 18 Zoning of the Yorba Linda Municipal Code

7 **Ex. 2.** Chapter 3 of the South Coast Air Quality Management District's Interim CEQA
8 Greenhouse Gas (GHG) Significance Threshold

9 **Ex. 3.** Pages from the California Environmental Protection Agency Air Resources
10 Board

11 **Ex. 4.** Miscellaneous documents related to impact issues addressed in the EIR

12 **Ex. 5.** The Dominguez Ranch Planned Community District Regulations
13

14 With respect to Exhibits. 1-3 and 5, the County and YLE correctly note that judicial notice is
15 taken of facts, not documents. (*Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th
16 256, 265.) Thus, judicial notice of a document is typically limited to noticing its existence
17 and its legal effect. (*Ibid.*)
18

19 **YLE's RJN and County's Joinder Thereto**

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21 The Court grants RJN of Exhibits A-C and Fact Nos. 2-3, but denies judicial notice as to
22 Exhibits D-E and Fact Nos. 1, 4-5, as set forth below. With respect to Exhibits A-C, judicial
23 notice will not extend to the truth of any matters asserted therein. (*Fontenot v. Wells Fargo*
24 *Bank, N.A., supra* at 264-265.)
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26 **Ex. A:** The SCAQMD's Draft Guidance Document- Interim CEQA Greenhouse Gas (GHG)
27 Significance Threshold (October 2008) and the SCAQMD's resolution adopting the same
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Fact No 1: The SCAQMD's GHG thresholds were properly adopted by the Governing Board of the SCAQMD, based on the recommendations of its staff, after multiple public working group meetings that included a variety of stakeholders, including: state agencies, OPR, CARB, and the Attorney General's Office; local agencies, city and county planning departments, utilities such as sanitation and power, etc.; regulated stakeholders, industry and industry groups; and organizations, both environmental and professional, and the public.

Fact No 2: The South Coast AQMD developed its GHG significance thresholds based on requests from local public agencies due to the AQMD's "expertise in establishing air quality analysis methodologies and comprehensive efforts to establish regional and localized significance thresholds for criteria pollutants."

Ex. B: Tract Map

Fact No. 3: When Tract No. 9813 was recorded, the Lyon Warmington Associates made an irrevocable offer of dedication to the City of Yorba Linda with regard to "Lot A," as shown on the map, for park purposes. However, on or about September 2, 1986, the City Council of the City of Yorba Linda did not accept the irrevocable offer of dedication for Lot A, but did approve the map pursuant to the provisions of the Subdivision Map Act.

Ex. C: Quitclaim Deed

Fact No 4: On or about November 30, 1989, the Lyon Warmington Associates quitclaimed its interest in Lots A, C, and H of Tract No. 9813 to the City of Yorba Linda, without any conditions that such lots must be preserved as open space or restricted to park uses.

Fact No 5: Yorba Linda Estates has abandoned any and all intention to abandon the Project under Option 2A or Option 28 Project alternatives, as those alternatives are described in the administrative record.

Ex. D: 01/08/16 Letter from City of Yorba Linda City Manager

Ex. E: 02/16/16 letter from Douglas Wymore of YLE

1 **Joint RJN**

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3 The Court grants the request of all parties to take judicial notice of both the existence and
4 substance of the California Air Pollution Control Officers Association (“CAPCOA”) publication,
5 *Quantifying Greenhouse Gas Mitigation Measures*.

6
7 **1. STANDARDS OF REVIEW**

8 The parties dispute the appropriate standard of review with respect to the various issues
9 raised by Petitioners. There are two basic standards—substantial evidence and failure to
10 proceed. As one court has explained: “To establish noncompliance by the public agency in a
11 CEQA proceeding, an opponent must show ‘there was a prejudicial abuse of discretion’
12 ([Pub. Res. Code,] § 21168.5), which occurs when either ‘the agency has not proceeded in a
13 manner required by law or if the determination or decision is not supported by substantial
14 evidence.’” (*Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 530.)

15 In reviewing a claim based on the failure to proceed in the manner required by law, the
16 court determines “*de novo* whether the agency has employed the correct legal procedures,
17 scrupulously enfor[cing] all legislatively mandated CEQA requirements.” (*Vineyard Area*
18 *Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412,
19 435.)

20 A claim that a decision is not supported by substantial evidence concerns factual disputes.
21 (*Ibid.*) “‘Substantial evidence’ . . . means enough relevant information and reasonable
22 inferences from this information that a fair argument can be made to support a conclusion,
23 even though other conclusions might also be reached. . . . Argument, speculation,
24 unsubstantiated opinion or narrative, evidence which is clearly erroneous or inaccurate, or
25 evidence of social or economic impacts which do not contribute to or are not caused by
26 physical impacts on the environment does not constitute substantial evidence.” (California
27 Code of Regulations, Title 14 (“Guidelines”) § 15384.)

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1 Here, because there is some ambiguity as to which standard of review Petitioners seek to
2 apply, the below analysis describes the appropriate standard of review on an issue by issue
3 basis.

4
5 **2. OMISSION OF LOCATION AND ACREAGE INFORMATION FOR CHINO**
6 **HILLS STATE PARK IN THE DRAFT EIR**

7 Petitioners argue that the draft EIR omitted information regarding the location and total
8 acreage of Chino Hills State Park (“CHSP”) in relation to the Project. Specifically, the draft
9 EIR included outdated maps that did not reflect an additional 2,330 acres of CHSP that is
10 situated to the east and north of the Project. (See Administrative Record (AR) C35/8401 for
11 an example of an outdated map; AR E09-26/10612 for correct map.) The Final EIR made a
12 global change to correct the acreage, but Petitioners complain that most of the inaccurate
13 maps were not changed.

14 Petitioners point to three sections of the EIR and conclude that “[i]f the location and
15 extent of CHSP as a significant contributor to the wildfire hazard facing this project has not
16 been accurately described or depicted throughout the EIR, impacts, mitigation, project design
17 features and alternatives have not been comprehensively and properly analyzed.” (Opening
18 Brief p. 8.)

19 It is true that “[a]n EIR must include a description of the physical environmental
20 conditions in the vicinity of the project, as they exist at the time the notice of preparation is
21 published. . . .” (Guidelines § 15125(a).) However, “not all inconsistencies are prejudicial: ‘It
22 is not enough ... that [an environmental impact report] misstate[s] an aspect of a proposed
23 project.’” (*Save Cuyama Valley v. County of Santa Barbara* (2013) 213 Cal.App.4th 1059,
24 1074, quoting *Mount Shasta Bioregional Ecology Center v. County of Siskiyou* (2012) 210
25 Cal.App.4th 184, 226; see also Pub. Res. Code § 21005(b).) “CEQA requires an EIR to
26 reflect a good faith effort at full disclosure; it does not mandate perfection, nor does it require
27 an analysis to be exhaustive. The question whether an EIR is sufficient as an informative
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1 document depends on the lead agency's . . . compliance with CEQA's requirements for the
2 contents of an EIR . . . Therefore, [n]oncompliance with CEQA's information disclosure
3 requirements is not per se reversible; prejudice must be shown."(*City of Long Beach v. Los*
4 *Angeles Unified School Dist.* (2009) 176 Cal.App.4th 889, 897-898 [internal quotes and
5 citations omitted].)

6 The Project description (AR C35/008430) is the first of three EIR sections Petitioners
7 claim is inadequate. "An accurate, stable and finite project description is the *sine qua non* of
8 an informative and legally sufficient EIR." (*County of Inyo v. City of Los Angeles* (1977) 71
9 Cal.App.3d 185, 193.) The court determines whether an agency has proceeded in a manner
10 required by law when deciding whether the agency's project description is accurate, stable
11 and finite. (*San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27
12 Cal.App.4th 713, 730.) Here, the acreage was globally corrected in the Final EIR. (AR
13 C35/009242.) And as noted by YLE, portions of the Draft EIR did contain the correct acreage
14 and map of CHSP. (*E.g.*, AR C02/000505, 000871, 000885, 001075.) Thus, it does not
15 appear as though there was prejudice as a result of the initial inaccuracy of the Project
16 description.

17 With respect to biological resources, it appears that CHSP was properly acknowledged as
18 being situated north and east of the Project area. (AR C35/008584, 008621.) The Biological
19 Resources report also appears to have considered the true location of CHSP. (AR
20 C06/001661["Chino Hills State Park to the north and east"], 001712 [same], 001755
21 ["14,102-acre Chino Hills State Park directly north of the Study Area"], 001769, 001841
22 [maps].) Thus, there is substantial evidence to show that biological resources were analyzed
23 based on an accurate environmental setting.

24 The same appears true for the analysis of hazards and hazardous materials. (AR
25 C35/008740 ["Project Site is located . . . southwest of Chino Hills State Park"], 008745
26 ["Chino Hills State Park to the north and east"]; C12/002516 [Project is located "south and
27 west of Chino Hills State Park"], 002608 [same], 002526 [map].)
28

1 Petitioners rely on *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus*
2 (1994) 27 Cal.App.4th 713 to argue that an inaccurate EIR’s description of the Project and
3 surrounding area render it impossible for the EIR to accurately assess environmental impacts.
4 *San Joaquin Raptor*, however, is distinguishable from this case. In *San Joaquin Raptor*, the
5 EIR “completely fail[ed] to mention and consider a nearby wetland wildlife preserve, San
6 Joaquin Wetlands Farm (SJWF), located adjacent to the San Joaquin River opposite the town
7 of Grayson and the proposed project.” (*Id.* at 725.) The Court of Appeal noted, *inter alia*, that
8 “[b]y avoiding discussion of the San Joaquin River and identification of SJWF, the DEIR
9 precluded serious inquiry into or consideration of wetland areas adjacent to the site or
10 whether the site contained wetland areas.” (*Id.*) In this case, there can be no dispute that the
11 EIR considered and discussed Chino Hills State Park.

12 13 **3. THE PROJECT’S WILDLAND FIRE HAZARDS**

14 Petitioners contend that the EIR fails to properly address the problem of safely and timely
15 evacuating existing and future residents of the Project site and surrounding areas in the event
16 of a fire. Petitioners point to the 2008 Freeway Complex Fire that started in Corona and
17 burned the Project site in fewer than 37 minutes, and argue that the same roads proposed as
18 evacuation routes were incapable of evacuating the existing population in 2008. They add
19 that the EIR and the Fire Protection and Emergency Evacuation Plan fail to discuss how the
20 Project will impact emergency evacuation time for the surrounding areas that will share
21 access to the proposed evacuation roads (Yorba Linda Blvd., San Antonio Road, Via del
22 Agua).

23 Appendix G of the CEQA Guidelines requires the County to consider whether the Project
24 will “[e]xpose people or structures to a significant risk of loss, injury or death involving
25 wildland fires, including where wildlands are adjacent to urbanized areas or where residences
26 are intermixed with wildlands.” (Guidelines Appendix G, ¶ VIII(h); *see also* AR C02/000622
27 [Draft EIR].)

1 Although Petitioners argue that the failure-to-proceed standard applies to this issue, YLE
2 correctly argues that the substantial evidence standard controls. “An EIR will be found
3 legally inadequate—and subject to independent review for procedural error—where it omits
4 information that is both required by CEQA and necessary to informed discussion.’ But CEQA
5 challenges concerning the amount or type of information contained in the EIR, the scope of
6 the analysis, or the choice of methodology are factual determinations reviewed for substantial
7 evidence.” (*Santa Monica Baykeeper v. City of Malibu* (2011) 193 Cal.App.4th 1538, 1546.)
8 As discussed below, the issues that Petitioners contend are not included in the EIR—which
9 might trigger de novo review—are included. As to whether the discussion is sufficient or
10 adequate, the substantial evidence standard applies.

11
12 Contrary to Petitioners’ contention, the EIR does address resident evacuations in case of
13 fire. The EIR contains an extensive analysis of wildfire hazards set forth in the “Hazards and
14 Hazardous Materials” section (§ 5.7) (AR C02/00601 et seq.), and is based on the following
15 information (AR C02/00603):

- 16 1. The “Phase I Environmental Site Assessment Report” dated July 2012 (AR
17 C11/002124 et seq. [Appendix I]);
- 18 2. The “Fire Protection and Emergency Evacuation Plan” dated June 2013 (AR
19 C12/002509 et seq. [Appendix J]); and
- 20 3. The “Preliminary Water Report for Option 1 and Option 2” dated June 2013 (AR
21 C18/005409 et seq. [Appendix P]).

22
23 Responses were also provided to comments regarding fire hazards and the evacuation
24 plan. (AR C29/006632, 006658-006670, C29-F/008131 et seq. [Appendix F – Updated Fire
25 Evacuation Analysis].) Those responses were incorporated by reference into the Final EIR.
26 (AR C29/006637; B5/000161.)

1 In addition to the foregoing citations, there is a specific response to the comment that the
2 2008 Freeway Complex Fire that started in Corona burned the Project site in fewer than 37
3 minutes. In a nutshell, the response was that the Fire Protection and Emergency Evacuation
4 Plan (“FPEP”) used a modeled fire that was faster-moving than the 2008 fire, and as a result,
5 there was no need to revise the analysis:

6
7 Dudek has also reviewed the Metropolitan Water District’s video footage from the
8 2008 Freeway Complex Fire, which was submitted as an attachment to a comment
9 letter on the DEIR. The video indicates that it took roughly four hours for the fire to
10 burn to the Project area from the ignition point and to the perimeter of the Project area,
11 and another 40 minutes for the fire to burn through the Project area. The time frame of
12 this fire spread corresponds very closely to what was calculated in the fire modeling
13 used as the baseline for the FPEP. The FPEP states that the modeled fire would take
14 over three hours to reach the Project area, so the modeling used for the DEIR
15 assessment was based upon a faster-moving, more aggressive fire than actually
16 occurred in the 2008 Freeway Complex Fire.

17
18 (AR C29/006658 [emphasis added].)

19 Petitioners also argue that the FPEP did not discuss how the Project would impact
20 emergency evacuation time for surrounding areas, but this issue was considered in the
21 Updated Fire Evacuation Analysis: “The analysis includes existing residential developments
22 in the vicinity of the Project site during the same incident. Analysis also includes the
23 proposed 112 single-family residential Cielo Vista project and 11 approved but unbuilt homes
24 in Casino Ridge.” (AR C29/006663; *see also* AR C29-F/008133 [“Existing development in
25 the Project vicinity considered in this analysis consists of 771 homes.”].)

26 Petitioners next contend that nothing in the EIR supports the conclusion in the Updated
27 Fire Evacuation Analysis of the estimated evacuation time as being between 1 and 2.5 hours.

28

1 But as noted above, the Updated Fire Evacuation Analysis was incorporated by reference into
2 the Final EIR. (AR C29/006637; B5/000161.) That analysis includes a reasoned explanation
3 for the 1 to 2.5 hour estimate—which assumes that all residents are home, that they will
4 evacuate at the same time, and that each home will evacuate with 2 vehicles. (AR C29-
5 F/008133 [assumptions used in calculating evacuation time], 008134 [Figure 7 analysis
6 summary].)

7 As a final argument, Petitioners contend that a “Fire Protection and Emergency
8 Evacuation Plan that has not been reviewed or approved by the primary fire-fighting agency
9 for the County is inadequate on this basis.” (Opening Brief p. 9, fn. 4.) Significantly,
10 Petitioners do not cite any authority requiring such approvals to be obtained before approval
11 of the Project. Indeed, the opposite appears to be true. *Endangered Habitats League, Inc. v.*
12 *County of Orange* (2005) 131 Cal.App.4th 777 considered the issue in the context of an
13 argument by the petitioner regarding improper deferral of mitigation measures:

14
15 *Fuel modification plans.* Prior to the issuance of a grading permit, a fuel modification
16 plan must be prepared. The plan has to comply with Orange County Fire Authority
17 guidelines for such plans, and it must be approved by the Orange County Fire
18 Authority [OCFA]. This is not improper deferral since, once again, there is a
19 commitment to mitigate and adequate criteria to determine if the plan to be submitted
20 is adequate.

21 (*Id.* at 794.)

22 Applying the reasoning of *Endangered Habitats League, Inc.* to this case, it appears that
23 the County may properly condition the Project on future approvals by the OCFA. The record
24 reflects that the County did just that. (AR B5/000163-0000164 [resolutions 2, 4, 8];
25 B5/000185-000186, 000218 [Haz-5 and Haz-6].)

26
27 **4. ANALYSIS OF IMPACTS TO BIOLOGICAL RESOURCES**

28

1 The CEQA Checklist for the County requires consideration of, among other things,
2 whether the Project will “[h]ave a substantial adverse effect, either directly or through habitat
3 modifications, on any species identified as a candidate, sensitive, or special status species in
4 local or regional plans, policies, or regulations, or by the California Department of Fish and
5 Game or U.S. Fish and Wildlife Service.” (AR C35/008601 [EIR]; *see also* Guidelines
6 Appendix G, ¶ IV(a).) Although Petitioners argue that the failure-to-proceed standard applies
7 to this issue, it appears that the substantial evidence standard controls. “CEQA challenges
8 concerning the amount or type of information contained in the EIR, the scope of the analysis,
9 or the choice of methodology are factual determinations reviewed for substantial evidence.”
10 (*Santa Monica Baykeeper v. City of Malibu* (2011) 193 Cal.App.4th 1538, 1546.)
11 Furthermore, a lead agency’s finding that “[c]hanges or alterations have been required in, or
12 incorporated into, the project which mitigate or avoid the significant effects on the
13 environment” must be supported by substantial evidence. (Pub. Res. Code § 21081(a)(1);
14 Guidelines § 15091(a)(1), (b).)

15 The EIR’s analysis of certain plant and animal species is set forth in the “Biological
16 Resources” section (§ 5.3) (AR C35/008554 et seq.) and is based on the following
17 information:

- 18 1. The “Biological Technical Report for the 504-Acre Esperanza Hills Specific Plan
19 Property” dated March 2013 (revised June 2013, July 2013, and November 2013)
20 (C06/001654 et seq. [Appendix D]); and
- 21 2. Field studies (C35/008602 et seq.).

22
23 Petitioners argue that the EIR’s analysis of biological resources is inadequate for three main
24 reasons discussed below.

25
26 **A. Plants**

1 Petitioners contend that the EIR fails to adequately analyze and mitigate impacts to plants,
2 and that the conclusion that the mitigation measures will reduce impacts to less than
3 significant levels is not supported by substantial evidence. They specifically attack the
4 analysis for Braunton’s milkvetch, the intermediate mariposa lily, and natural vegetation
5 communities, e.g. coast sage scrub, chaparral, grassland and ruderal habitat.

6 On the one hand, “[p]ointing to evidence of a disagreement with other agencies is not
7 enough to carry the burden of showing a lack of substantial evidence to support the [lead
8 agency’s] finding.” (*California Native Plant Soc. v. City of Rancho Cordova* (2009) 172
9 Cal.App.4th 603, 626.) The fact that certain state and federal agencies disagree with the lead
10 agency on findings or issues does not invalidate the EIR: “[t]he court’s rule is not to weigh
11 the evidence adduced before the agency or substitute its judgment for that of the agency.”
12 (*North Coast Rivers Alliance v. Marin Municipal Water District Board of Directors* (2013)
13 216 Cal.App.4th 614, 643.) On the other hand, there must be “substantial evidence that the
14 mitigation measures are feasible or effective in remedying the potentially significant
15 problem.” (*Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1116.) A lead agency’s
16 finding that mitigation measures are effective is not entitled to deference where the “findings
17 are not supported by substantial evidence or defy common sense.” (*Ibid.*) “The issue is not
18 whether other methods might have been used, but whether the agency relied on evidence that
19 a reasonable mind might accept as sufficient to support the conclusion reached in the EIR.”
20 (*North Coast Rivers Alliance, supra*, 216 Cal.App.4th at 642 [internal quotes and citations
21 omitted].)

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26 **(1) Braunton’s milkvetch and the intermediate mariposa lily**

1 In response to comments that the mitigation measures (“MM”) for these two plants, MM
2 Bio-2 and Bio-3 which call for replanting on a 1:1 ratio, were not effective, the EIR noted as
3 to MM Bio-2: “Regarding Braunton’s milk-vetch, GLA was involved in a successful
4 relocation of this species between 1995 and 2005 for the Oak Park Project in Simi Valley.
5 During that time, GLA biologists, working with Rancho Santa Ana Botanic Garden, Wallace
6 Soil Labs, and interested stakeholders, learned a great deal regarding the ecological
7 requirements of this species and how to successfully transplant this species. This knowledge
8 has been incorporated into the Braunton’s milk-vetch restoration program developed for the
9 Proposed Project.” (AR C29/006708 [RTC L3-15].)

10 Petitioners contend that the failure of past mitigation measures regarding the Braunton’s
11 milkvetch means that there is no substantial evidence to support the proposed translocation of
12 these plants. Specifically, Petitioners cite the California Department of Fish and Wildlife
13 response, noting that GLA’s 11/20/15 report regarding the Oak Park relocation efforts of
14 Braunton’s milkvetch resulted in “only one surviving plant” out of 383 by the 10th year. (AR
15 E1357/024340). However, the record establishes that there is in fact substantial evidence
16 supporting this mitigation measure: “The majority of the 383 plants relocated at Oak Park,
17 over a period of years, produced flowers, seed and ultimately all of them senesced (died)
18 naturally consistent with the life history of the plant and currently persist as seed awaiting the
19 next fire or disturbance that will cause germination and a repeat of the life cycle.” (AR E09-
20 26/010684-10685)

21 As to the intermediate mariposa lily, the EIR states “GLA is currently engaged in
22 restoration/translocation efforts for this species within the Orange County Southern
23 Subregion Habitat Conservation Plan area, is aware of past problems with translocation
24 efforts, and is working closely with Tree of Life Nursery in implementing procedures that
25 increase survival of propagated and translocated individuals.” (AR C29/006708 [RTC L3-
26 15].) While there is less evidence of success with the translocation of this plant than the
27 Braunton’s milkvetch, the fact that experts disagree over the potential success of the proposed
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1 mitigation measure does not demonstrate a lack of substantial evidence. (*California Native*
2 *Plant Soc. v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 626.)

3
4 **(2) Natural vegetation communities**

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6 Petitioners also appear to argue the Project will permanently impact 380 acres of habitat
7 and natural vegetation communities, but mitigation measures are limited to a 5.27 acre area in
8 Blue Mud Canyon and are not proposed for coastal sage scrub, chaparral, grassland or ruderal
9 habitat.

10 The EIR's responses to comments explains why this argument is misplaced. First, the
11 comment regarding mitigation being limited to the 5.27-acre area along Blue Mud Canyon is
12 inaccurate. The mitigation area is actually 20 acres. (AR C29/006702 [RTC L3-6], 006681-
13 006682 [Topical Response 7].) Second, "impacts to non-native grasslands, ruderal areas, and
14 a variety of scrub habitats were not determined to be significant pursuant to Appendix G of
15 the CEQA Guidelines, because none of these habitats exhibit special status." (C29/006701
16 [RTC L3-7].) Petitioners do not explain why this reasoning is not supported by substantial
17 evidence, other than to point out that other agencies disagree with the conclusion.

18
19 **B. Wildlife**

20
21 Petitioners argue that the EIR's analysis of wildlife suffers from the same defects as the
22 plant analysis, as set forth above. Specifically, Petitioners point to the analysis with respect to
23 the following birds: the California gnatcatcher, the golden eagle and the least Bell's vireo.
24 There appears to be substantial evidence to support the EIR's analysis.

25
26 **(1) The California gnatcatcher**

1 According to the EIR, a number of surveys were conducted from 2008-2013. The surveys
2 show that vegetation on the Project site is suboptimal for the gnatcatcher, thus explaining the
3 lack of detection over this fairly large site. In addition, focused surveys for the gnatcatcher
4 during the 2002 survey season had negative results, and no gnatcatchers were observed in
5 other site visits from 2006 through 2013, or in any studies conducted by other biologists for
6 adjacent properties, as noted in the Biological Technical Report. (AR C35/008578.) Although
7 the Project site falls in Unit 9 of the existing critical habitat for coastal California gnatcatcher
8 designated by the USFWS, none were detected and the primary constituent elements (PCEs)
9 for the gnatcatcher are severely reduced or lacking due to the 2008 Freeway Complex Fire.
10 (AR C35/008585.) For these reasons, there is substantive evidence for the conclusion in the
11 EIR that impacts to gnatcatcher critical habitat would be less than significant under Option 1
12 and Option 2. (AR C35/008616.)

13
14 **(2) The golden eagle**

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16 “A golden eagle was seen foraging on-site, and a nest was observed north of the site on a
17 cliff face within Chino Hills State Park prior to the 2008 Freeway Complex Fire. However,
18 no suitable nesting or wintering habitat is present on-site, as there are no cliff faces within the
19 site that provide suitable platforms for nesting. . . . A subsequent visit to the former location
20 of the nest in May 2013 revealed that the nest is no longer active, and GLA biologists
21 concluded that it was probably destroyed in the 2008 Freeway Complex Fire.” (AR
22 C35/008579.) “As there is no potential for golden eagle to breed or winter within the Study
23 Area, [the EIR concludes that] impacts to this species associated with Option 1 and Option 2
24 would be less than significant.” (AR C35/008612.)

25
26 **(3) The least Bell’s vireo**

1 “GLA biologists did not observe least Bell’s vireo during focused surveys in 2007;
2 however, this species was observed feeding during other biological surveys in 2010.
3 Additionally, this species was detected by PCR Services Corporation during surveys in 2012
4 within the off-site impact areas on the proposed Cielo Vista project.” (AR C35/008580.)

5 “Under Option 2, riparian vegetation occupied by least Bell’s vireo at the southern edge of
6 the Study Area . . . would be subject to off-site impacts for project construction.
7 Approximately 0.79 acre of mulefat scrub and 0.19 acre of black willow riparian forest
8 vegetation occupied by least Bell’s vireo would be impacted . . . [Thus], direct impacts to this
9 species, including riparian vegetation associated with breeding territories, would be
10 potentially significant.” (AR C35/008612-008613.) As a result, MM Bio-4 and Bio-5 were
11 proposed to reduce this impact. (AR C35/008629.)

12 Petitioners’ arguments regarding the purported inadequacy of the analysis and mitigation
13 efforts merely show disagreement with other agencies and “is not enough to carry the burden
14 of showing a lack of substantial evidence to support the [lead agency’s] finding.” (*California*
15 *Native Plant Soc. v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 626.) That certain
16 agencies disagree with the lead agency on findings or issues does not invalidate EIR: “[t]he
17 court’s rule is not to weigh the evidence adduced before the agency or substitute its judgment
18 for that of the agency.” (*North Coast Rivers Alliance v. Marin Municipal Water District*
19 *Board of Directors* (2013) 216 Cal.App.4th 614, 643.)

20 21 **C. Deferral of Mitigation Measures**

22
23 Petitioners argue that MM Bio-2 and Bio-3 impermissibly defer mitigation of the impact
24 the Project will have on the intermediate mariposa lily and Branton’s milkvetch. “[I]t is
25 sufficient to articulate specific performance criteria and make further [project] approvals
26 contingent on finding a way to meet them.’ Essentially, the rule prohibiting deferred
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28

1 mitigation prohibits loose or open-ended performance criteria.” (*Rialto Citizens for*
2 *Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899, 945.)

3 Here, both mitigation measures require that a detailed restoration program be prepared by
4 a qualified biologist in consultation with the CDFW and the USFWS for approval by the
5 Manager of Planning, OC Development Services, including the planting the specified plants
6 within an undisturbed area of suitable habitat. There is specific performance criteria (the
7 program is successful if at least 80% of plants are observed five years after planting). And
8 there are remedial measures imposed if the program is unsuccessful (replanting). (AR
9 C35/008627, 008629.) Thus, MM Bio-2 and Bio-3 are not impermissibly deferred.

10 11 **5. ANALYSIS OF HAZARDOUS MATERIALS IMPACT AND MITIGATION** 12 **MEASURES**

13 Petitioners argue that there are 3 active and 4 inactive oil wells on the Project site, but that
14 MM Haz-1, Haz-2 and Haz-3 merely call for future preparation of a study after Project
15 approval. They assert that no attempts have been made to identify the presence and specific
16 locations of hazardous gases or reserves of gases or to analyze how they may impact the
17 siting of homes, insofar as homes should not be placed on impacted portions of the site. They
18 argue that the EIR does not provide substantial evidence to support the conclusion that
19 continued operation of oil wells would not create a significant hazard to the public or the
20 environment and that a less than significant impact would occur with regard to future oil
21 operations.

22 Appendix G of the CEQA Guidelines requires the County to consider whether the Project
23 will “[c]reate a significant hazard to the public or the environment through reasonably
24 foreseeable upset and accident conditions involving the release of hazardous materials into
25 the environment.” (Guidelines Appendix G, ¶ VIII(h); *see also* AR C35/008759 [EIR].) The
26 EIR contains a detailed analysis of oil wells hazards set forth in the “Hazards and Hazardous
27 Materials” section (§ 5.7) (AR C35/008753 et seq.), and is based in part on the “Phase I
28

1 Environmental Site Assessment [ESA] Report” dated July 2012 (AR C11/002124 et seq.
2 [Appendix I]; see AR C35/008740).

3 As an initial matter, Petitioners’ concerns with respect to the failure to identify the
4 presence and specific locations of hazardous gases or reserves of gases or to analyze how
5 they may impact the siting of homes appears misplaced. A Phase I ESA researched 15
6 federal records and 11 state standard environmental records and 90 additional available
7 environmental records and databases to evaluate the environmental risk. The ESA identified 3
8 active and 4 abandoned wells and their approximate locations. (AR C35/008753.) A map of
9 the well locations is included. (AR C35/008756.) The EIR provides that no structure will be
10 within 100 feet of an oil well and that the Project will be consistent with all California
11 Department of Conservation, Oil, Gas and Geothermal Resources (“DOGGR”) regulations
12 regarding active and abandoned wells. (AR C35/008794.)

13 The EIR notes, however, that hazardous emissions of oil or hydrocarbon product, if
14 disturbed during development of the property, would be significant without mitigation, and
15 hazardous emissions of combustible gas/methane due to normal oil well operations would be
16 significant without mitigation. (AR C35/008794-008795.) Thus, the following mitigation
17 measures are required before issuance of grading permits. (AR C35/008797.) With
18 implementation of these mitigation measures, the EIR states project impacts related to
19 accidental release of hazardous materials into the environment are less than significant. (AR
20 C35/008880.)

21 MM Haz-1 calls for a Combustible Gas/Methane Assessment Study for approval by the
22 Orange County Fire Authority (OCFA), and in the event a measurable quantity of gas is
23 identified therein, an OCFA-approved Methane Control Plan to control the release of
24 combustible gas/methane from operation oil wells. (AR C35/008797.) “Deferral of the
25 specifics of mitigation is permissible where the local entity commits itself to mitigation and
26 lists the alternatives to be considered, analyzed and possibly incorporated in the mitigation
27 plan.” (*Endangered Habitats League Inc. v. County of Orange* (2005) 131 Cal.App.4th 777,
28

1 793.) Where, as here, an agency-approved plan is required before the Project can proceed, the
2 deferral is not considered impermissible. (*Rialto Citizens for Responsible Growth v. City of*
3 *Rialto* (2012) 208 Cal.App.4th 899, 946; *Oakland Heritage Alliance v. City of Oakland*
4 (2011) 195 Cal.App.4th 884, 906-07.)

5 MM Haz-2 calls for a Phase II ESA to be prepared for approval by the Manager of Orange
6 County Planning, in consultation with a Hazardous Waste Specialist III, to identify the
7 abandoned well locations and any hidden pits or accumulations of drilling mud in the vicinity
8 of the wells. The assessment shall include verification of regulatory compliance of previously
9 abandoned wells and any pits will be sampled for hazardous substances and will be disposed
10 of at a certified hazardous waste facility. (AR C35/008797.) The existing oil wells are subject
11 to oversight by the DOGGR: "Well operators will be responsible for compliance with state
12 regulations if contamination of soil is discovered." (AR C29/007070 [RTC L29-5];
13 C35/008753.)

14 MM Haz-3 calls for a remedial action plan to be prepared consistent with state law to
15 address remedial measures for abandoned oil wells. (AR C35/008797.) Regulatory
16 compliance for all active and abandoned wells will ensure that contaminated soil is
17 remediated and no contaminants will be released. If removal is required, it will be
18 accomplished in accordance with all applicable regulatory requirements for transport and
19 disposal of such material. (AR C29/007072 [RTC L29-7].)

20 To ensure that all of the mitigation measures are implemented, a Mitigation Monitoring
21 and Reporting Program will be adopted if the Project is approved. (AR C29/007170 [RTC
22 L38-6].) In light of the foregoing, it appears that MM Haz-1, Haz-2 and Haz-3 are adequate
23 as they are based on regulatory compliance and further approval by responsible agencies.

24 25 **6. GEOLOGICAL, SEISMIC AND LANDSLIDE HAZARDS**

26 Petitioners have abandoned this issue.
27
28

1 **7. WATER ISSUES**

2 Petitioners argue that the EIR does not consider specific water needs for the Project related
3 to (1) grading and related dust control measures during construction, (2) keeping fuel
4 modification zones green, (3) irrigating landscaped slopes, and (4) proposed habitat
5 mitigation. They argue the County has failed to proceed in a manner required by law in
6 ignoring material impacts and analyzing measures to avoid or mitigate those impacts, and, as
7 a result, conclusions about sufficient water supply are not supported by substantial evidence.

8 Petitioners argue that the analysis of the Project’s water needs does not include water used
9 during the construction of the Project or water for the common areas of the Project
10 development. They contend the EIR analyzes water needs only with respect to the eventual
11 homeowners’ water usage. Appendix G of the CEQA Guidelines requires the County to
12 consider whether the Project has “sufficient water supplies available to serve the project from
13 existing entitlements and resources, or [whether] new or expanded entitlements [are] needed.”
14 (Guidelines Appendix G, ¶ XVI(d); *see also* AR C02/000957-000958 [Draft EIR].)

15 As set forth below, the information in the EIR related to construction and landscaping/fuel
16 modification water needs is sparse. However, given that there is some information on these
17 topics, the substantial evidence standard, not the failure-to-proceed standard, controls:
18 “CEQA challenges concerning the amount or type of information contained in the EIR, the
19 scope of the analysis, or the choice of methodology are factual determinations reviewed for
20 substantial evidence.” (*Santa Monica Baykeeper v. City of Malibu* (2011) 193 Cal.App.4th
21 1538, 1546.)

22 The EIR’s analysis of water needs is set forth in the “Utilities and Service Systems”
23 section (AR C02/000951 et seq.) and is based on the following information:

- 24 1. “Preliminary Water Reports” dated June 2013 (AR C18/005409 [Appendix P]);
25 2. The Northeast Area Planning Study (NEAPS) dated March 2013 (AR C20/005560
26 [Appendix R]);

- 1 3. The “Yorba Linda Water District 2005 Domestic Water System Master Plan” (AR
2 C21/005694 [Appendix S]); and
3 4. The “Yorba Linda Water District 2010 Urban Water Management Plan” (AR
4 C22/006024 [Appendix T]).
5

6 Petitioners’ argument that water needs for irrigation and mitigation are not addressed in
7 the Preliminary Water Reports focuses on the fact that projected water demands appear to be
8 based solely on the number of dwelling units (i.e., the number of gallons to be used within
9 each household): “The projected water demand factor of 1070 gpd/du [gallons per
10 day/dwelling unit] was used to determine the Average Day and Maximum Day Demands for
11 the project (AR C18/005427-005428; *see also* AR C35/009130 [Final EIR]). However, as
12 pointed out by YLE, that projected demand factor takes into account both the needs of each
13 home and water needs for fuel modification areas (“any disturbed area will be irrigated”) and
14 landscaping. (AR C20/005573) Moreover, there is evidence that the overall water demands of
15 the Project were considered both during construction and after completion. (AR E09-
16 26/010724 (“YLWD [Yorba Linda Water District] estimates include water necessary for the
17 proposed project, including general assumptions related to landscaping.”); F05/011672;
18 F08/011751.)
19

20 **8. ISSUES RELATED TO ACCESS TO THE PROJECT**

21 Petitioners argue a variety of points related to access to the Project. None has merit. As to
22 the argument that the Project’s road access is unresolved, Petitioners appear to contend that
23 the Project is legally infeasible because the proposed access roads connecting to the City of
24 Yorba Linda have not been locked down. (Opening Brief pp. 26-28.) The argument misses
25 the point of an EIR, which “is to identify the significant effects on the environment of a
26 project.” (Pub. Res. Code § 21002.1(a) [emphasis added].) As a practical matter, it is of no
27 concern under CEQA whether a proposed project is legally feasible, i.e. whether it can be
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1 developed. It matters only whether the project, if completed, will cause significant
2 environmental impacts.

3 Petitioners' cited cases are inapposite insofar as they concern attacks by project opponents
4 on a lead agency's finding that a proposed alternative was legally infeasible and its resulting
5 decision to reject the alternative. (See *Marin Mun. Water Dist. v. KG Land California Corp.*
6 (1991) 235 Cal.App.3d 1652, 1664-1666 [agency's finding that alternatives are infeasible
7 must be supported by reasoning and facts]; *Habitat and Watershed Caretakers v. City of*
8 *Santa Cruz* (2013) 213 Cal.App.4th 1277, 1303 ["EIR need not study in detail an alternative
9 that is infeasible"]; *City of Maywood v. Los Angeles Unified School Dist.* (2012) 208
10 Cal.App.4th 362, 418 [EIR not required to consider infeasible alternatives, including those
11 inconsistent with regulatory guidelines].)

12 Petitioners' second access argument is that (1) the Yorba Linda City General Plan does not
13 provide for an access route for the Project and this inconsistency should have been analyzed;
14 and (2) the access route would be inconsistent with certain elements and policies of the City
15 General Plan. Neither argument appears fatal to the EIR. As to the first point, the EIR
16 specifically notes that "discretionary approval from the City would be required to provide for
17 access across City open space." (AR C35/009174.) The remainder of the argument appears to
18 be the same "legal infeasibility" contention discussed above. It fails for the same reasons.

19 As to the second point, it is true that the "EIR shall discuss any inconsistencies between
20 the proposed project and applicable general plans, specific plans and regional plans."
21 (Guidelines § 15125(d).) But the EIR in fact analyzes the consistency of the Project with the
22 City General Plan and Zoning. (AR C35/008894-008908.) Petitioners assert that the Project's
23 access road is inconsistent with a Land Use element and Recreational Resources Policy 1.3,
24 but the argument appears to conflate the requirement of analyzing consistency with a general
25 plan with the argument of "legal infeasibility" of the access road. The EIR analyzes the
26 Project's overall consistency with the City General Plan, and it also notes that permission
27 from the City would be required: "[D]iscretionary approval from the City would be required
28

1 to provide for access across City open space.” (AR C35/009174, *see also* AR 008908 [noting
2 the City has not established pre-zoning for the Project Site, and discussing options if Project
3 site is annexed to City].)

4 Petitioners’ next argument relating to access is that there is an insufficient discussion of
5 Option 2B impacts in many of the impact sections. While Petitioners correctly note that the
6 technical reports do not include the words “Option 2B,” it does not necessarily follow that its
7 impacts were not considered or analyzed. The EIR explains: “Option 2B is provided herein as
8 a second Alternative and is substantially the same as Option 2A detailed in Section 6.6 above.
9 The two main differences between Option 2A and Option 2B relate to the provision of a
10 secondary access road and a modification to the grading plan, which will reduce off-site
11 grading and reduce retaining wall heights. All access options are briefly described below, and
12 Option 2B is analyzed with regard to each environmental topic where it differs from the
13 analysis for Option 2A.” (AR C35/009165 [emphasis added].) Further, “the Option 2A access
14 alternative is substantially the same as Option 2.” (*Id.*) Petitioners acknowledge that the EIR’s
15 technical reports address Option 2 (Opening Brief p. 29), and do not contend that Option 2B
16 is materially different from Options 2 and 2A. Thus, it appears that there is substantial
17 evidence in the record to support conclusions with respect to Option 2B.

18 With respect to Petitioners’ arguments in the Reply that Option 2 Modified was not
19 analyzed in the EIR, the Court agrees that this theory was not raised in the opening brief. “It
20 is improper to raise new contentions in the reply brief. Therefore, the contention is forfeited.”
21 (*Inyo Citizens for Better Planning v. Board of Supervisors* (2009) 180 Cal.App.4th 1, 14, fn.
22 2.)

23
24 **9. THE EIR’S CONSIDERATION OF A REASONABLE RANGE OF**
25 **FEASIBLE ALTERNATIVES**

26 Petitioners argue that the EIR fails to include a reasonable range of feasible alternatives
27 for three primary reasons: (1) the alternatives that were analyzed do not reduce the Project’s
28

1 environmental impacts overall; (2) there are other feasible alternatives that should have been
2 included in the analysis; and (3) the EIR should have included an alternative that did not
3 require access across the Cielo Vista property or City-owned land.

4 The purpose of an EIR “is to identify the significant effects on the environment of a
5 project, to identify alternatives to the project, and to indicate the manner in which those
6 significant effects can be mitigated or avoided.” (Pub. Res. Code, § 21002.1(a).) “[I]t is the
7 policy of the state that public agencies should not approve projects as proposed if there are
8 feasible alternatives or feasible mitigation measures available which would substantially
9 lessen the significant environmental effects of such projects [I]n the event specific
10 economic, social, or other conditions make infeasible such project alternatives or such
11 mitigation measures, individual projects may be approved in spite of one or more significant
12 effects thereof.” (*Id.* § 21002.)

13 In the CEQA context, “feasible” means “‘capable of being accomplished in a successful
14 manner within a reasonable period of time, taking into account economic, environmental,
15 social, and technological factors.’ Both the California and the federal courts have further
16 declared that ‘[t]he statutory requirements for consideration of alternatives must be judged
17 against a rule of reason.’” (*Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d
18 553, 565 [internal citations omitted; emphasis added].)

19 “CEQA establishes no categorical legal imperative as to the scope of alternatives to be
20 analyzed in an EIR. Each case must be evaluated on its facts, which in turn must be reviewed
21 in light of the statutory purpose.” (*Id.* at 566.) Rather, the rule is that an EIR “must consider a
22 reasonable range of alternatives to the project, or to the location of the project, which:
23 (1) offer substantial environmental advantages over the project proposal; and (2) may be
24 feasibly accomplished in a successful manner considering the economic, environmental,
25 social and technological factors involved.” (*Id.* [internal quotes, citations, and italics omitted];
26 Guidelines § 15126.6(c).)

27
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1 As a general rule, “[i]t is the project proponent’s responsibility to provide an adequate
2 discussion of alternatives. (Guidelines § 15126(d).) That responsibility is not dependent in the
3 first instance on a showing by the public that there are feasible alternatives. If the project
4 proponent concludes there are no feasible alternatives, it must explain in meaningful detail in
5 the EIR the basis for that conclusion.” (*Laurel Heights Improvement Assn. v. Regents of*
6 *University of California* (1988) 47 Cal.3d 376, 405.)

7 Although the burden is on the project proponent, the failure of a project opponent to
8 identify alternatives meriting analysis “points up the futility of requiring” further analysis.
9 (*Save Our Residential Environment v. City of West Hollywood* (1992) 9 Cal.App.4th 1745,
10 1754.) Furthermore, the project opponent has the burden of showing that an EIR is
11 inadequate; thus, it “may not simply claim the agency failed to present an adequate range of
12 alternatives and then sit back and force the agency to prove it wrong.” (*Mount Shasta*
13 *Bioregional Ecology Center v. County of Siskiyou* (2012) 210 Cal.App.4th 184, 199.)

14 With this general framework in mind, each of Petitioners’ main arguments is discussed
15 separately below.

16
17 **A. Petitioners’ Argument that the EIR Fails to Provide a Reasonable Range of**
18 **Alternatives Because the Alternatives Do Not Reduce the Project’s Impact**
19 **Overall**

20
21 Petitioners’ argument is unpersuasive. They argue that the project alternatives are
22 insufficient because they do not reduce the Project’s impacts overall. It is important to bear in
23 mind that “[t]he purpose of an EIR is *not* to identify alleged alternatives that meet few if any
24 of the project’s objectives so that these alleged alternatives may be readily eliminated.”
25 (*Watsonville Pilots Ass’n v. City of Watsonville* (2010) 183 Cal.App.4th 1059, 1089.)
26 Likewise, “[t]here is no ironclad rule governing the nature or scope of the alternatives to be
27 discussed other than the rule of reason. ‘The alternatives shall be limited to ones that would
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1 avoid or substantially lessen any of the significant effects of the project.’ (Guidelines,
2 § 15126.6(f).)” (*City of Long Beach v. Los Angeles Unified School Dist.* (2009) 176
3 Cal.App.4th 889, 920.) Indeed, a range of alternatives that included only a “no project” has
4 been upheld. (*Mount Shasta Bioregional Ecology Center v. County of Siskiyou* (2012) 210
5 Cal.App.4th 184, 199.)

6 In this case, the EIR sets forth a matrix of the various impacts of each project alternative
7 as compared to the impacts of the Project. (AR C35/009120.) It appears that each alternative
8 has some potential impacts that are less than the proposed Project. Although the access
9 alternatives are similar to one another, Petitioners do not contend that the issue of access was
10 an irrelevant issue. Indeed, Petitioners devote a substantial amount of their briefing to access
11 infeasibility. Nor do Petitioners contend that more varied access options were potentially
12 feasible in light of the location and topography of the Project. Accordingly, “[a]bsent a
13 showing that the EIR failed to include a particular alternative that was potentially feasible or
14 that, under the circumstances presented, including [these particular alternatives] did not
15 amount to a reasonable range of alternatives, [Petitioners’] challenge to the alternatives
16 analysis fails.” (*Mount Shasta Bioregional Ecology Center v. County of Siskiyou* (2012) 210
17 Cal.App.4th 184, 199.)

18 The case (*Big Rock Mesas Property Owners Assn. v. Board of Supervisors* (1977) 73
19 Cal.App.3d 218, 226-27) relied on by Petitioners for the contrary conclusion is
20 distinguishable. There, the project opponents contended that the EIR should have considered
21 alternatives with respect to the amount of grading and location of the proposed access road,
22 and that the EIR failed to consider reasonable alternatives as a result. The case, however, does
23 not stand for the converse—that the lead agency may not consider a project alternative that
24 proposes different access roads.

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1 **B. Petitioners' Argument that Other Feasible Alternatives are Available and Must**
2 **Be Included in the Analysis**

3
4 Petitioners' second argument is that the EIR fails to include the following feasible
5 alternatives suggested by public agencies: (1) an "Annexation" alternative and a "No
6 Annexation" alternative (AR C29/006823); (2) an alternative that avoids drainage and
7 watercourse impacts (AR C29/6783); (3) a "No Project/No Development" alternative and a
8 "No Project/Existing OC Zoning" alternative (AR C29/006941); (4) a different location
9 alternative (AR C29/006721); and (5) a reduced density with single access to Stonehaven
10 alternative (not using the disputed easement through Cielo Vista).

11 "[A] lead agency may reject an alternative as infeasible because it cannot meet project
12 objectives, as long as the finding is supported by substantial evidence in the record." (*Town*
13 *of Atherton v. California High-Speed Rail Auth.* (2014) 228 Cal.App.4th 314, 353.) With the
14 possible exception of proposed alternative (5) above, the EIR responds to each of these newly
15 proposed alternatives: (1) Annexation and No Annexation (AR C29/006824); (2) Avoidance
16 of Drainage and Watercourse Impacts (AR C29/006784-006785); (3) No Project/No
17 Development and No Project/Existing OC Zoning (AR C29/006942); and (4) different
18 location (AR C29/006722). With respect to the reduced density with single access to
19 Stonehaven alternative, it is unclear whether a response was provided. Of note, however, is
20 the fact that a reduced density alternative was analyzed. (AR C35/009193.)

21 Significantly, Petitioners fail to explain, with citations to record, why the County's
22 determinations were not supported by substantial evidence. "To prevail on an argument
23 concerning the sufficiency of the evidence, a party must cite to the relevant evidence, not to
24 arguments about the evidence. (*Defend the Bay v. City of Irvine, supra*, 119 Cal.App.4th at
25 pp. 1265–1266, 15 Cal.Rptr.3d 176.) For this additional reason, [Petitioners] forfeited the
26 sufficiency of evidence argument." (*Tracy First v. City of Tracy* (2009) 177 Cal.App.4th 912,
27 935, fn. 8.)

28

1
2 **C. Petitioners' Argument that the EIR Must Evaluate a Feasible Alternative**
3 **Without Potentially Infeasible Access Across Cielo Vista or City Owned Land**
4

5 This argument is essentially the same “legal infeasibility” argument set forth in the
6 preceding Section of this Decision. It fails for the same reasons.

7
8 **10. ANALYSIS OF THE PROJECT IN CONJUNCTION WITH THE CIELO**
9 **VISTA PROJECT**

10 Petitioners contend that the EIR should have included, but fails to include, the Cielo Vista
11 project in the definition of the Project (Opening Brief p. 36)—resulting in improper
12 piecemeal review of the Project. “Agencies cannot allow ‘environmental considerations [to]
13 become submerged by chopping a large project into many little ones—each with a minimal
14 potential impact on the environment—which cumulatively may have disastrous
15 consequences.’” (*Banning Ranch Conservancy v. City of Newport Beach* (2012) 211
16 Cal.App.4th 1209, 1222.) A *de novo* standard of review is applied to the question of whether
17 two projects are in fact one project such that the lead agency is improperly reviewing in
18 piecemeal fashion. (*Id.* at 1224.)

19 The California Supreme Court’s piecemealing test is as follows: “[A]n EIR must include
20 an analysis of the environmental effects of future expansion or other action if: (1) it is a
21 reasonably foreseeable consequence of the initial project; and (2) the future expansion or
22 action will be significant in that it will likely change the scope or nature of the initial project
23 or its environmental effects. Absent these two circumstances, the future expansion need not
24 be considered in the EIR for the proposed project. Of course, if the future action is not
25 considered at that time, it will have to be discussed in a subsequent EIR before the future
26 action can be approved under CEQA.” (*Laurel Heights Improvement Assn. v. Regents of*
27 *University of California* (1988) 47 Cal.3d 376, 396.)
28

1 “[T]here may be improper piecemealing when the purpose of the reviewed project is to be
2 the first step toward future development.” (*Banning Ranch Conservancy, supra*, 211
3 Cal.App.4th at 1223.) “And there may be improper piecemealing when the reviewed project
4 legally compels or practically presumes completion of another action.” (*Ibid.*) “On the other
5 hand, two projects may properly undergo separate environmental review (i.e., no
6 piecemealing) when the projects have different proponents, serve different purposes, or can
7 be implemented independently.” (*Ibid.*)

8 In this case, and as argued by the County, although the Cielo Vista project can be said to
9 be reasonably foreseeable insofar as development is contemplated, it is not a reasonably
10 foreseeable consequence of this Project. The two projects have different owner developers.
11 (AR C29/006673.) The purpose of this Project is not “to be the first step toward future
12 development” (*Banning Ranch Conservancy, supra*, 211 Cal.App.4th at 1223) of the Cielo
13 Vista project. Petitioners contend that the project “share water and sewer infrastructure,
14 possibly access, [and] reciprocal grading” (Opening Brief p. 35), but they do not adequately
15 explain why these shared components mean that the Project “legally compels or practically
16 presumes completion of” the Cielo Vista project. (*Banning Ranch Conservancy, supra*, 211
17 Cal.App.4th at 1223)

18 Contrary to Petitioners’ argument, the Project does not appear to be mutually dependent
19 on the Cielo Vista project. That the Project would require YLE to obtain certain easements
20 over the Cielo Vista property (AR E0310/16194) does not legally compel or practically
21 presume the completion of the Cielo Vista project. With respect to Petitioners’ contention that
22 the Cielo Vista project is “not viable without water storage that will be constructed” (AR
23 E0310/16195), the argument does not make this Project dependent on the Cielo Vista project.
24 Moreover, and more significantly, it appears that the EIR in fact considered the cumulative
25 impacts of the proposed Cielo Vista project on this Project (AR C29/006674).

26 The same is true with respect to the potential project at nearby Bridal Hills. Petitioners
27 contend that the EIR is missing cumulative impacts analysis for Bridal Hills with respect to
28

1 some aspects: aesthetics, water provision/capacity and biological resources. There is no
2 dispute, however, that the EIR did analyze cumulative impacts from Bridal Hills with respect
3 to air quality, evacuation and traffic.

4 With respect to aesthetics and water capacity, it appears that analysis of Bridal Hills was
5 understandably limited. "Bridal Hills landowners declined to participate in development at
6 the time the Project application was submitted to the County. Furthermore, no project plans
7 have been developed for either property, making any analysis of potential impacts related to
8 such development limited to a 'programmatic' assessment based on the adopted land uses for
9 those properties, which has been included in the DEIR. Any future development of those sites
10 would require specialized surveys for the specific development proposed at that time. . . .
11 Without a specific development plan, it is difficult to assess aesthetics impacts on either
12 property." (AR C29/007448.)

13 With respect to biological resources, the EIR noted that "no biological survey results are
14 available for the Bridal Hills, LLC property" (AR C35/008639), but nonetheless attempts
15 were made to study and discuss the area (C35/008639-008644). In light of the foregoing, it
16 appears that the EIR attempted in good faith to analyze the cumulative impacts of the Bridal
17 Hills property.

18 19 **11. RECIRCULATION OF THE EIR**

20 Petitioners contend that recirculation of the EIR is required in light of the (1) deficiencies
21 related to Chino Hills State Park; (2) open space calculation errors; and (3) the new fire
22 evacuation analysis. Pursuant to Pub. Res. Code § 21092.1 and Guidelines § 15088.5(a),
23 "[o]nce a draft EIR has been circulated for public review, CEQA does not require any
24 additional public review of the document before the lead agency may certify the EIR except
25 in circumstances requiring recirculation. A lead agency must recirculate an EIR when
26 'significant new information' is added to an EIR after the draft EIR has been circulated for
27 public review." (*North Coast Rivers Alliance, supra*, 216 Cal.App.4th at 654.)

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1 “‘Significant new information’ requiring recirculation includes, for example, a disclosure
2 showing that:

3 (1) A new significant environmental impact would result from the project or from a
4 new mitigation measure proposed to be implemented.

5 (2) A substantial increase in the severity of an environmental impact would result
6 unless mitigation measures are adopted that reduce the impact to a level of
7 insignificance.

8 (3) A feasible project alternative or mitigation measure considerably different from
9 others previously analyzed would clearly lessen the significant environmental impacts
10 of the project, but the project’s proponents decline to adopt it.

11 (4) The draft EIR was so fundamentally and basically inadequate and conclusory in
12 nature that meaningful public review and comment were precluded.”

13 (Guidelines § 15088.5(a).)

14 Notwithstanding these examples, recirculation is “an exception, rather than the general
15 rule.” (*Laurel Heights Improvement Assn. v. Regents of the University of California* (1993) 6
16 Cal.4th 1112, 1132.) It is not required when the new information “merely clarifies or
17 amplifies or makes insignificant modifications in an adequate EIR.” (Guidelines §
18 15088.5(b).) “A decision not to recirculate an EIR must be supported by substantial evidence
19 in the administrative record.” (*Id.* § 15088.5(e).)

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21 **A. Chino Hills State Park Information**

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23 Because the Court finds that information relating to Chino Hills State Park was adequate,
24 recirculation is not required.

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B. Open Space

“[A]ll new information occurring after release of the final EIR but prior to certification and project adoption need not be included in the EIR before the agency determines whether the new information is significant so as to trigger revision and recirculation. Moreover, the failure to recirculate the final EIR is not a failure to proceed in the manner required by law unless the [information] meets the factual definition of [s]ignificant new information. A determination whether new information is significant so as to warrant recirculation is reviewed only for support by substantial evidence.” (*South County Citizens for Smart Growth v. County of Nevada* (2013) 221 Cal.App.4th 316, 329-330; [internal quotes and citations omitted].)

Petitioners have not met their burden of showing a lack of substantial evidence to support a determination that the alleged inconsistency in open space calculations constituted “new significant information.” Their argument that the EIR stated 62% of the property would be preserved as open space when in fact it was only 19% is premised on the contention that “open space” is limited to “natural open space” or “biological space.” The EIR characterizes open space as “natural open space, fuel modification zone, retention basin, parks, and trails.” (AR C35/008452.) Significantly, Petitioners fail to explain why “open space” must be only “natural open space.” For this reason, their argument fails.

With respect to Petitioners’ argument that impacts of biological resources “may be greater than first identified” (Opening Brief p. 42), the speculative contention is insufficient to show a substantial increase in the severity of that impact.

C. New Fire Evacuation Analysis

Petitioners essentially argue that the fire analysis must be recirculated because it includes new information—that the evacuation time would be between 45 minutes to 2.5 hours. Based

1 on the prior 37-minute burn time in the Freeway Complex Fire, they contend that this new
2 information is significant and must be recirculated.

3 As explained by the County, this evacuation timing was not “new significant information”
4 because the Draft EIR had concluded that the 37-minute burn time for the Freeway Complex
5 Fire was inapplicable to the Project in light of the other mitigation features. (AR
6 C29/006666.) This reasoning is substantial evidence to support the County’s decision not to
7 recirculate the fire evacuation analysis.

8 9 **12. CONSISTENCY WITH ORANGE COUNTY GENERAL PLAN**

10 Petitioners argue that the Project is inconsistent with the following objectives in the
11 Orange County General Plan: (1) Transportation Element Objective 6.7, (2) Land Use
12 Element Policy 4, and (3) Public Safety Element Objective 1.1. “A project is consistent with a
13 county’s general plan . . . if, considering all its aspects, it will further the objectives and
14 policies of the general plan and not obstruct their attainment. A given project need not be in
15 perfect conformity with each and every general plan policy. To be consistent, a [project] must
16 be compatible with the objectives, policies, general land uses and programs specified in the
17 general plan.” (*Sierra Club v. County of Napa* (2004) 121 Cal.App.4th 1490, 1509 [internal
18 quotations omitted].)

19 Decisions regarding consistency with a general plan are reviewed “under the arbitrary and
20 capricious standard. These are quasi-legislative acts reviewed by ordinary mandamus, and the
21 inquiry is whether the decision is arbitrary, capricious, entirely lacking in evidentiary support,
22 unlawful, or procedurally unfair. [Citations.] Under this standard, [the court] defer[s] to an
23 agency’s factual finding of consistency unless no reasonable person could have reached the
24 same conclusion on the evidence before it.” (*Endangered Habitats League, Inc. v. County of*
25 *Orange* (2005) 131 Cal.App.4th 777, 782.)

26 “In reviewing an agency’s decision for consistency with its own plan, we accord great
27 deference to the agency’s determination. This is because the body which adopted the general
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1 plan policies in its legislative capacity has unique competence to interpret those policies when
2 applying them in its adjudicatory capacity. Because policies in a general plan reflect a range
3 of competing interests, the governmental agency must be allowed to weigh and balance the
4 plan's policies when applying them, and it has broad discretion to construe its policies in light
5 of the plan's purposes. A reviewing court's role is simply to decide whether the city officials
6 considered the applicable policies and the extent to which the proposed project conforms with
7 those policies." (*Sierra Club v. County of Napa, supra*, 121 Cal.App.4th at 1509-10.)

8 As noted by the County, the EIR's discussion of the Project's consistency with the Orange
9 County General Plan includes consideration of approximately 80 policies, objectives, goals
10 and strategies under the General Plan's Land Use, Public Services and Facilities, Resources,
11 Recreation, Noise, Safety, Growth Management, and Housing Elements. (AR C35/008876-
12 008891.) The Court finds that the County's General Plan was considered and that the Project
13 is consistent therewith. In particular, consideration of and consistency with the Transportation
14 element is found at AR C35/008910-008912. More to the point, even if Petitioners were
15 correct that the Project is inconsistent with three components of the General Plan, Petitioners
16 do not provide any reasoned argument as to why a lack of consistency with 3 out of 80
17 components discussed in the EIR would mean that Project does not further the objectives and
18 policies of the General Plan as a whole.

19 20 **13. GREENHOUSE GAS ISSUES**

21 As noted above, in the court's view, the EIR is flawed with respect to issues involving
22 GHG analysis and corresponding mitigation measures.

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A. GHG Analysis

CEQA Guideline § 15064.4 provides that a lead agency should attempt to “describe, calculate or estimate” the amount of greenhouse gases the project will emit, but recognizes that agencies have discretion in how to do so. When assessing the significance of GHG emissions, the agency should consider the following factors, among others: “(1) The extent to which the project may increase or reduce greenhouse gas emissions as compared to the existing environmental setting; [¶](2) Whether the project emissions exceed a threshold of significance that the lead agency determines applies to the project[;] [¶] (3) The extent to which the project complies with regulations or requirements adopted to implement a statewide, regional, or local plan for the reduction or mitigation of greenhouse gas emissions.” (*Id.*, subd. (b); see also *Center for Biological Diversity v. California Dept. of Fish and Wildlife* (2015) 62 Cal.4th 204, 216-17 (“*Newhall*”).)

Here, the EIR acknowledges that the “SCAQMD and the California Air Resources Board (CARB) are the principal agencies charged with managing air quality within” the area in which the Project is located. (AR C35/008723.) The EIR discusses both standards. Petitioners challenge the conclusion in the EIR that a number of statewide programs will theoretically achieve most of the AB 32 emissions reduction goal and that the Project need only reduce GHG emissions by 5% in order to be consistent with AB 32. According to Petitioners, 5% is only 356 metric tons, far short of the 3,604 metric tons needed to be under the 3,000 significance threshold established by the SCAQMD. They also challenge the adoption of a 5% emissions reduction as the required mitigation amount for the Project inasmuch as the Project’s emissions level would still far exceed the SCAQMD standard.

As to Petitioners’ first contention, in enacting the California Global Warming Solutions Act of 2006 (“AB 32”), the “Legislature emphatically established as state policy the achievement of a substantial reduction in the emission of gases contributing to global warming.” (*Center for Biological Diversity v. California Dept. of Fish and Wildlife* (2015) 62

1 Cal.4th 204, 215.) AB 32 “calls for reduction of such emissions to 1990 levels by the year
2 2020.” (*Ibid.*) The CARB, the state agency charged with regulating GHG emissions,
3 explained that this “means cutting approximately 30 percent from business-as-usual emission
4 levels projected for 2020, or about 15 percent from today’s levels.” (*Id.* at 216) The
5 “business-as-usual” (BAU) projection “assumes no conservation or regulatory efforts beyond
6 what was in place when the forecast was made.” (*Id.*)

7 The EIR notes that “[a] reduction in statewide GHG emissions of 28.9% compared to
8 business-as-usual (BAU) conditions has been established as a goal of AB 32. . . . However, a
9 number of statewide programs are in place to achieve GHG emissions reductions that will
10 attain a very substantial fraction of the AB 32 goal, creating a 5% shortfall. . . . Assuming the
11 remaining 5% reductions can be achieved by local initiatives, the Proposed Project would not
12 interfere with timely implementation of AB 32.” (AR C35/008731-008732.) The EIR further
13 explains that “SCAQMD has estimated that the adopted low carbon fuel standard, the
14 enhanced renewable portfolio standard, and required enhanced energy efficiencies will
15 combine to achieve 23.9% of the 28.9% goal. Assuming the remaining 5% reductions can be
16 achieved by local initiatives, the Proposed Project would not interfere with timely
17 implementation of AB 32.” (AR C35/008732.)

18 Although Petitioners cite to *Newhall*, the case is distinguishable. At issue in *Newhall*
19 was whether the EIR could apply AB 32’s goal to a local project to determine the level of
20 significance in GHG emissions. The California Supreme Court concluded that there was no
21 substantial evidence that “*Newhall Ranch’s project-level* reduction of 31 percent in
22 comparison to business as usual [wa]s consistent with achieving A.B. 32’s *statewide* goal of a
23 29 percent reduction from business as usual” (*Newhall*, *supra*, 62 Cal.4th at 225.) The Court
24 held the EIR was deficient because it “simply assumes that the level of effort required in one
25 context, a 29 percent reduction from business as usual statewide, will suffice in the other, a
26 specific land use development,” and that it could not conclude from the information in the
27 administrative record whether such an assumption was right or wrong. (*Ibid.*)

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1 In this case, however, Petitioners “do not attack the significance thresholds used by the
2 EIR.” (Reply p. 10) Thus, there is no dispute whether the EIR could properly adopt AB 32’s
3 statewide reduction goal of 28.9% from BAU. Aside from their reliance on *Newhall*,
4 Petitioners do not otherwise explain why there is a lack of substantial evidence to support the
5 EIR’s conclusion that only 5% of localized GHG reduction efforts are required to satisfy AB
6 32.

7 The Petitioners’ second contention is based on the EIR’s use of the SCAQMD’s 3,000
8 MT CO₂ significance threshold for mixed use projects. (AR C35/008728.) At oral argument,
9 the County and YLE confirmed the applicability the SCAQMD standard to the Project.
10 According to the EIR, “the size of the Proposed Project is such that direct construction GHG
11 emissions and indirect operations GHG emissions will exceed the SCAQMD screening level
12 threshold (3,000 MT CO₂e per year) by a large margin (3,889.6 MT per year). This finding is
13 based on a BAU assumption and does not include statewide or locally sponsored mitigation.
14 State program reductions reduce the emissions in the BAU scenario by 23.9%. Feasible local
15 reductions, with application of RCMs as summarized above, would result in an additional
16 10% reduction.” (AR C35/008735.) The EIR concluded, “[h]owever, even with
17 implementation of required and discretionary GHG reduction measures, annual emissions
18 cannot be reduced below the SCAQMD’s advisory level and the impact remains significant
19 and unavoidable.” (AR C35/008736.)

20 Petitioners’ complaint here is not with the lack of consideration of any particular
21 mitigation measure, but rather with the EIR’s failure to consider any measure beyond that
22 which might satisfy the extra 5% of mitigation calculated under AB 32’s reduction goal. The
23 argument has merit. The EIR’s discussion of reduction of GHG emissions appears aimed
24 solely at a 5% reduction, even though such reduction still renders GHG emissions above
25 SCAQMD standards: “mitigation aimed at achieving a 5% reduction in GHG emissions is
26 included herein.” (AR C35/008732; see also AR C35/008732 [“reasonable and feasible
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1 mitigation measures have been evaluated to achieve the 5% reduction”]; 008735 [“to achieve
2 the required 5% reduction in GHG emissions”].)

3 Furthermore, despite the fact that the EIR suggests that up to a 10% reduction in GHG
4 emissions is possible with implementation of recommended reasonable control measures (AR
5 C35/008734, 008735), MM GHG-2 requires only that the “total benefit of the mitigation
6 strategies must result in a minimum 5% reduction in GHG emissions from the business-as-
7 usual value” (AR C35/008735). Where a lead agency relies on existing numerical thresholds
8 of significance for GHG emissions and determines that there are significant GHG emission
9 impacts, “the lead agency must adopt feasible mitigation measures or project alternatives to
10 reduce the effect to insignificance.” (*Newhall, supra*, 62 Cal.4th at 231.) Accordingly, the
11 EIR is flawed insofar as it arbitrarily limits mitigation requirements to an additional 5%
12 reduction in GHG emissions, fails to mandate analysis of all reasonable mitigation measures
13 beyond the 5% level, and does not require the adoption of all identified reasonable mitigation
14 measures. Such a failure conflicts with Guidelines § 15126.4(a)(1) which requires
15 consideration of all feasible mitigation measures.

16 17 **B. Deferral of Mitigation Measures**

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19 Petitioners also argue that the EIR generally discusses a range of possible mitigation
20 measures for the significant GHG impacts, but does not commit to any specific reduction
21 measures. Although the EIR states that no specific measures are proposed because of
22 “constant advances in emissions control strategies and technologies” (AR C29B/007801), that
23 reasoning does not excuse the adoption of current mitigation measures. As a result, the EIR
24 impermissibly defers formulation of mitigation measures.

25 MM GHG-2 requires that, prior to construction of project, the developer shall at
26 minimum develop a plan for implementation of one or more mitigation strategies for a
27 minimum 5% reduction of GHG emissions from the CAPCOA report. Alternative strategies
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1 not listed in the CAPCOA report may be used with approval of the Orange County Planning
2 Director. The selected strategies, including measures for their long-term maintenance, must
3 be described in a memo submitted to and approved by the County Planning Department prior
4 to initial occupancy of any on-site facility. (C35/08735.)

5 At oral argument, YLE argued that it had considered and incorporated all feasible
6 mitigation measures in design (AR C35/008734), and that the remaining 5% had to do with
7 “operational” issues, which approval could properly be deferred until prior to occupancy.
8 The text of the EIR does not appear to support YLE’s position. Table 5-6-8 (AR C35/008733)
9 lists a host of “Design Control Measures” from CAPCOA. Table 5-6-9 summarizes the GHG
10 reductions attainable with the application of reasonable control measures (RCM).
11 (C35/008734.) The EIR states that the Project “has incorporated all design features feasible to
12 reduce impacts,” which suggests that all the measures set forth in Table 5-6-8 will be
13 implemented and therefore those identified measures are not the “mitigation strategies” set
14 forth in the CAPCOA report and available for selection pursuant to MM GHG-2. A review of
15 Table 4-6-8, however, suggests that “operational” issues are included. For example, the
16 adopted design control measures include “Voluntary Rideshare w/Incentives,” “Use
17 Reclaimed Water,” “Reuse Cut-and-Fill,” and “Local farmer’s markets”—measures which
18 appear to be operational and not an aspect of the Project’s design. Accordingly, there is no
19 apparent distinction in “design” and “operational” measures that would require approval of
20 “operational” measures to be delayed after EIR approval but before occupancy.

21 That MM GHG-2 permits YLE to later choose the specific measures, subject to
22 approval, is not necessarily problematic. “[I]t is sufficient to articulate specific performance
23 criteria and make further [project] approvals contingent on finding a way to meet them.”
24 (*Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899, 945.)
25 GHG-2 contains performance criteria (5% minimum reduction) and makes occupancy subject
26 to the County Planning Department’s approval of the selected mitigation strategies.

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1 The problem lies in the timing of the approval of mitigation strategies, i.e. *prior to*
2 *occupancy*. Using occupancy (as opposed to, for example, issuance of grading permits) as the
3 date for approval of mitigation strategies means that the Project effectively will be built
4 without the requirement of any mitigation measure during the building phase. To the extent
5 that there are mitigation measures that could have been implemented during the build-out of
6 the Project, those opportunities may be lost. Put another way, delaying mitigation until
7 immediately prior to occupancy may have the effect of limiting available measures and cause
8 the Planning Department to consider mitigation only in the context of a nearly-completed
9 project. Thus, even if adoption of the mitigation strategies are subject to County approval, “it
10 is analogous to the sort of post hoc rationalization of agency actions that has been repeatedly
11 condemned in decisions construing CEQA.” (*Communities for a Better Environment v. City*
12 *of Richmond* (2010) 184 Cal.App.4th 70, 92.) As a result, MM GHG-2 is improperly
13 deferred.

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Dated: 7-22-16

William D. Claster

William D. Claster
Superior Court Judge