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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

PROTECT OUR HOMES AND HILLS, et al.,

Plaintiffs and Appellants,

v.

COUNTY OF ORANGE, et al.,

Defendants and Respondents;

YORBA LINDA ESTATES, LLC,

Real Party in Interest and Respondent.

G055716

(Super. Ct. No. 30-2015-00797300)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, William D. Claster, Judge. Reversed with directions.

Kevin K. Johnson, Kevin K. Johnson and Jeanne L. MacKinnon for Plaintiffs and Appellants.

Leon J. Page, County Counsel, and Nicole M. Walsh, Deputy County Counsel for Defendants and Respondents.

Remy Moose Manley, James G. Moose and L. Elizabeth Sarine for Real Party in Interest and Respondent.

* * *

This ongoing legal battle between Protect Our Homes and Hills and others (collectively, Protect) on one side, and the County of Orange (County) and real party in interest, Yorba Linda Estates, LLC, on the other, concerns the County's compliance with the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.; CEQA) in relation to a residential development to be located in the hills adjacent to the City of Yorba Linda (Project). Protect appeals from the discharge of the first of two preemptory writs of mandate issued by the trial court, with the discharge being based on the court's determination that the County fully complied with the writ's directives.

In addition to asserting the trial court erred in finding it was precluded from raising certain issues in opposition to the County's discharge request, Protect contends the court incorrectly concluded the revised final environmental impact report for the Project (revised FEIR) remedied the greenhouse gas-related shortcomings previously identified by the court—the improper deferral of mitigation and the placement of an arbitrary limit on the required efficacy of future mitigation. Specifically, Protect argues that (1) although the County imposed concrete mitigation measures to remedy the deferral problem, it erroneously failed to consider and evaluate the impact reduction potential of additional mitigation measures that were brought to its attention prior to certification of the revised FEIR; and (2) there is no evidence in the administrative record to support the revised FEIR's conclusion that requiring each residence to be equipped with solar photovoltaic (PV) roof panels is infeasible.

Although we find one of Protect's arguments was not properly before the court due to waiver, and we find no merit in its contention that the County violated

CEQA by failing to analyze certain mitigation measures, we nevertheless conclude it was error for the trial court to discharge the writ of mandate. The writ required the County to remedy the court-identified deficiencies in the FEIR by, inter alia, revising it "in accordance with CEQA [and] the CEQA Guidelines[.]"[1] The County failed to do so because the revised FEIR's infeasibility conclusion concerning the use of solar panels to mitigate the Project's greenhouse gas impacts is not supported by any evidence.

FACTS[2]

The 340-single family home Project proposed by developer and real party in interest Yorba Linda Estates, LLC, is to be located on a previously undeveloped site situated in an unincorporated area of Orange County. An initial study performed by the County concerning the Project led it to conclude an environmental impact report (EIR) needed to be prepared. The County, as the lead agency, prepared a draft EIR (DEIR) and circulated it for public review and comment in accordance with CEQA and the CEQA Guidelines. Following the submittal of thousands of comments concerning the Project and the DEIR from members of the public, federal and state agencies, and other government entities, responses by the County to those comments, certain revisions to information in the DEIR, and noticed public meetings, the County board of supervisors certified a final environmental impact report (FEIR). It also adopted a statement of overriding considerations concerning the Project's significant unavoidable impacts, adopted a mitigation monitoring and reporting program, and granted the associated Project approvals.

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[1] All references to the "CEQA Guidelines" are to the state regulations which implement the provisions of CEQA. (Cal. Code Regs., tit. 14, § 15000 et seq.).

[2] Because of the limited scope of this appeal, we provide an abbreviated version of the background facts. A more detailed version can be found in our opinion addressing the underlying merits of Protect's writ petition. (*Protect Our Homes & Hills v. County of Orange* (Oct. 13, 2017, G054185) [nonpub. opn.].)

Protect filed a petition for writ of mandate challenging certification of the FEIR and the land use approvals. The CEQA-related allegations in the petition concerned, inter alia, the Project description, the analyses of cumulative impacts, aesthetics, air quality, biological resources, geology and soils, wildland fire hazards, greenhouse gas emissions, recreation, traffic, noise, and water supply availability, and the purported deferral of mitigation of various significant impacts to a later time.

Although the trial court rejected most of the challenges, it found merit in Protect's arguments concerning the FEIR's greenhouse gas analysis and the related discussion of impact mitigation. Specifically, the court concluded (1) the greenhouse gas analysis was flawed because it arbitrarily limited consideration of mitigation measures rather than following CEQA's mandate of adopting all feasible mitigation measures to reduce impacts to a less than significant level; and (2) formulation of mitigation concerning greenhouse gas impacts was impermissibly deferred to a time too late in the development process.

The trial court entered judgment and issued a corresponding preemptory writ of mandate (first writ).[3] The first writ specified steps for the County to take concerning the FEIR and the Project approvals, including: (1) vacate certification of the FEIR, as well as adoption of the mitigation and monitoring program and statement of overriding considerations; (2) vacate all Project approvals based on those documents; (3) revise the FEIR "in accordance with CEQA, the CEQA Guidelines, the [s]tatement of [d]ecision, the [j]udgment, and [the] [w]rit, to bring the EIR into compliance with CEQA by resolving the deficiencies identified by the [c]ourt in its [s]tatement of [d]ecision"; and

[3] Protect filed a motion for attorney fees based on the court's partial judgment in its favor and grant of a limited writ. The trial court awarded Protect approximately $409,000 in attorney fees and $16,000 in costs. Real party in interest appealed the award, but we affirmed it in an unpublished decision. (*Protect Our Homes & Hills v. County of Orange* (Oct. 25, 2018, G054631) [nonpub. opn.].)

(4) consider whether to recirculate and certify the revised FEIR and whether to issue any Project-related approvals.

Protect appealed challenging limited portions of the partial denial of its petition. It did not raise any greenhouse gas-related issues. This court affirmed the trial court's judgment, in part, and reversed, in part. (*Protect Our Homes & Hills v. County of Orange*, *supra*, G054185) We found the FEIR did not contain the requisite accurate and stable description of the Project's environmental setting, and it failed to properly analyze water supply availability and adequately mitigate fire hazard impacts. We remanded the matter to the trial court, ordering it to modify the judgment and issue another preemptory writ of mandate (second writ) directing the County to take steps similar to those specified in the first writ to correct the additional deficiencies we identified. (*Ibid*.)

While that appeal was pending, the County took actions which it believed were in compliance with the first writ. It assembled a list of mitigation measures it determined would be feasible, a consultant assessed the contribution those measures, individually and collectively, would make toward reducing the Project's greenhouse gas impacts, and a different consultant conducted a peer review of the assessment to identify any concerns and recommend revisions. Using the finalized technical assessment, the County revised the FEIR's greenhouse gas analysis and recommended imposition of 40 mitigation measures. Even with imposition of those measures, the County determined the Project's greenhouse gas impacts would remain significant.

The County planning commission and board of supervisors held multiple public meetings concerning the revised FEIR, and the County received many comments with respect thereto. At one of the meetings, the board of supervisors vacated the resolutions which certified the FEIR and granted the related Project approvals. Approximately six months later, it certified the revised FEIR, adopted a statement of overriding considerations, granted new Project approvals, and adopted a mitigation and

monitoring program which included the roughly 40 greenhouse gas mitigation measures set forth in the revised FEIR.

Thereafter, the County filed a motion in the trial court seeking an order discharging the first writ. Protect opposed the motion, contending the revised FEIR only partially corrected the greenhouse gas-related defects identified in the trial court's prior statement of decision. From its perspective, the County continued to arbitrarily limit the extent to which reasonable mitigation measures were considered, failed to analyze and adopt all reasonable mitigation measures, including a requirement that solar PV roof panels be installed on each residence, and provided no evidence to support its finding that certain mitigation measures were infeasible.

The trial court heard the matter, took it under submission, and subsequently issued a detailed minute order granting the County's discharge motion. It concluded the County complied with the writ "in all respects." In doing so, the court deemed the following two of Protect's assertions waived due to its failure to raise the arguments in its original challenge to the FEIR: (1) the County erroneously failed to consider and analyze certain greenhouse gas-related mitigation measures; and (2) the revised FEIR unwarrantedly accounted for mitigation of "statewide programs having no connection to the Project's impacts" in its qualitative greenhouse gas analysis of the Project's greenhouse gas impacts. The court also found the revised FEIR's infeasibility conclusions were supported by substantial evidence.[4]

[4] During the pendency of this appeal, the County acted in an attempt to comply with the second writ and filed a return to that writ. We deny the County's request for judicial notice of excerpts of the board of supervisors resolution associated with the return. In subsequent trial court proceedings related to the return on the second writ, the trial court concluded the County fully complied with the second writ and entered an order discharging it. We take judicial notice of such order on our own motion for factual background purposes only. (Evid. Code, §§ 452, subd. (d)(1); 459.) That order is the subject of a separate pending appeal filed by Protect.

DISCUSSION

Protect challenges two aspects of the trial court's order discharging the first writ. First, it contends the court erred by finding it was barred from raising certain of its arguments, and it asks we consider those arguments in the first instance on appeal. Second, it argues the court erroneously concluded substantial evidence supported the revised FEIR's finding that certain mitigation measures are infeasible.

A. Preliminary considerations

Relying on *Ballona Wetlands Land Trust v. City of Los Angeles* (2011) 201 Cal.App.4th 455 (*Ballona*), the trial court held Protect was precluded from asserting two of its challenges because they were "new" and they arose "'from the same material facts in existence at the time of the judgment.'" It reasoned the arguments could have been made during the initial proceedings regarding the FEIR, and Protect's failure to do so precluded it from introducing them in connection with the revised FEIR. Protect contends the court wrongly "expand[ed] the holding in *Ballona* beyond its express terms and essentially created a duty on the part of petitioners to not only identify an EIR deficiency[,] but [also] to cure it." We agree that one of the contentions disregarded by the trial court was properly before it and should have been addressed on the merits, but conclude Protect waived the right to assert the other.

Apart from ruling on limited types of motions, a trial court's entry of judgment ordinarily terminates it's jurisdiction to adjudicate the merits of the case. (*APRI Ins. Co. v. Superior Court* (1999) 76 Cal.App.4th 176, 181.) It nevertheless may retain jurisdiction to enforce the judgment. (Code Civ. Proc., § 128, subd. (a)(4); *Fairfield v. Superior Court* (1966) 246 Cal.App.2d 113, 120.) This is no less true in situations where a preemptory writ of mandate is issued; the court retains jurisdiction to ensure full compliance with the writ. (Code Civ. Proc., § 1097; *Professional Engineers in Cal. Government v. State Personnel Bd.* (1980) 114 Cal.App.3d 101, 109.)

In the CEQA context, this means a court presented with a return to writ must determine whether the public agency charged with compliance has, in fact, fully complied. (*City of Carmel-By-The-Sea v. Board of Supervisors* (1982) 137 Cal.App.3d 964, 971; *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 204.) Public Resources Code section 21168.9 clarifies that the court's duty extends to "determin[ing] that the public agency has complied with [CEQA]" (Pub. Resources Code, § 21168.9, subd. (b)), and the first writ in this case so stated. As identified in the first writ, compliance with CEQA in this case meant revision of the FEIR to "resolv[e] the deficiencies identified by the [trial] [c]ourt in its [s]tatement of [d]ecision."

Given the procedural posture, the trial court's obligation in considering the County's motion to discharge the first writ was to evaluate whether the County corrected the previously identified flaws in a manner consistent with CEQA and the CEQA Guidelines. (See *POET, LLC v. State Air Resources Bd.* (2017) 12 Cal.App.5th 52, 62 [attempt to comply with writ in CEQA case is, "for all practical purposes, an attempt to comply with CEQA"] (*POET*).) This necessarily required consideration of the County's arguments as to how it did so, as well as Protect's assertions to the contrary.

The shortcomings identified by the trial court in the statement of decision which led to the first writ included: an improperly deferred formulation of greenhouse gas-related mitigation measures—i.e., a timing issue; and, an arbitrary numerical limit on the required efficacy of future formulated mitigation measures—i.e., a failure to comply with CEQA's mandate of adopting all feasible mitigation measures to reduce the Project's greenhouse gas impacts to an insignificant level.

One of Protect's arguments below went to the heart of whether the modifications included in the revised FEIR corrected the FEIR's shortcomings in a manner consistent with CEQA and the CEQA Guidelines. Specifically, it asserted that in eliminating the improper deferral of mitigation through the imposition of concrete mitigation measures, the County failed to consider and evaluate the impact reduction

potential of additional measures that Protect and others brought to the County's attention (e.g., solar PV roof panels, density reduction). The trial court should have considered and ruled on the merits of this contention. (Pub. Resources Code, § 21168.9, subd. (b).)

Ballona, which County continues to cite on appeal, is inapposite. In that case, the trial court issued a preemptory writ of mandate directing the lead agency to vacate its certification of an EIR and related project approvals, and to revise the EIR to remedy CEQA-related deficiencies identified on appeal from the court's decision on the merits of the underlying petition. (*Ballona, supra*, 201 Cal.App.4th at p. 463.) The deficiencies included the following: (1) a land use analysis which materially mislead the public concerning the project's impact on the amount of development allowed on the project site; (2) a failure to discuss preservation in place as a means of mitigating the project's impacts on historical archaeological resources; and (3) an inadequate analysis of the project's wastewater impacts. (*Ibid*.) After the lead agency certified a revised EIR, it sought to have the writ discharged. The petitioners opposed the request. (*Id*. at p. 464.) Among other assertions, they claimed the revised FEIR's project description was deficient for a reason not identified in their original challenge. (*Id*. at p. 479.)

On appeal, the court found the additional project description argument to be a "newly asserted challenge[]" which fell outside the scope of the trial court's retained jurisdiction. (*Ballona, supra*, 201 Cal.App.4th at p. 480.) It explained that the new challenge was based on material facts in existence at the time of the original judgment, the challenge could have been brought in the underlying proceeding, and considering such an argument in the context of a return to a preemptory writ of mandate would "undermine the finality of the judgment." (*Ibid*.)

Here, the situation is different. Protect's argument concerning the County's failure to evaluate a few specific potential mitigation measures was not based on "material facts in existence at the time of the [original] judgment." (*Ballona, supra*, 201 Cal.App.4th at p. 480.) The FEIR completely deferred mitigation of greenhouse gas

impacts to a later time; no specific mitigation measures were analyzed therein. In contrast, the revised FEIR evaluated and imposed a number of tangible mitigation measures. Protect did not take a second swing at the FEIR's original analysis by asserting the County's attempt to remedy the deferral problem (i.e., comply with the writ) was not done in a manner consistent with CEQA's mandates. (See *County of Inyo, supra*, 71 Cal.App.3d at pp. 188, 203-205 [entertaining argument, and holding, that EIR did not comply with CEQA in appeal concerning discharge of writ which ordered that EIR be prepared].)

Accepting the County's position would lead to an absurd result. A lead agency could forever insulate itself from a mitigation-related challenge by deferring the formulation of mitigation concerning one or more impacts until a later time. Even if the deferral was later held to be improper and a writ issued, no one would ever be permitted to challenge the lead agency's subsequent consideration, analysis, adoption and/or rejection of mitigation. Such a result respects wrongdoing and runs completely contrary to the public discourse and environmental protection principles underlying CEQA. (See *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 563-564 [describing CEQA's core principles].)

We do, however, find one of Protect's contentions to be barred due to common law waiver principles. In opposition to the County's request to discharge the first writ, Protect argued the revised FEIR impermissibly accounted for greenhouse gas reductions projected to come from statewide programs when discussing the Project's compliance with state legislation requiring a reduction in the state's overall greenhouse gas emissions levels. (Health & Saf. Code, § 38500 et seq., added by Stats. 2006, ch. 488, § 1.) Though spun in a slightly different way, this is the same argument Protect made in its underlying challenge to the FEIR. At that time, the trial court expressly rejected the contention on the merits. But Protect did not dispute that aspect of the

court's decision in its appeal from the original judgment, and it thus waived the issue. (*Gonzales v. R.J. Novick Constr. Co.* (1978) 20 Cal.3d 798, 804-805.)

Accordingly, and because, as we explain below, our review extends to a de novo determination of whether the County abused its discretion under CEQA, we will address each of the arguments made by Protect in this appeal except for its challenge to the revised FEIR's discussion of greenhouse gas reductions resulting from statewide programs.

B. Standards of review

"On appeal from an order discharging a [preemptory] writ [of mandate], the issue is whether the trial court erred in ruling that the respondent . . . complied with the writ." (*Los Angeles Internat. Charter High School v. Los Angeles Unified School Dist.* (2012) 209 Cal.App.4th 1348, 1355.) Because assessment of compliance with a writ in the present context involves determining whether the County "has complied with [CEQA]" (Pub. Resources Code, § 21168.9, subd. (b)), the usual standard of review applicable in CEQA cases is implicated. (See *Citizens of Goleta Valley, supra*, 52 Cal.3d at pp. 563-564; *Ballona, supra*, 201 Cal.App.4th at pp. 467-468.)

"In reviewing a . . . challenging [to] the legality of a lead agency's actions under CEQA, . . . [w]e review the agency's actions, not the trial court's decision[.] . . . [O]ur inquiry extends 'only to whether there was a prejudicial abuse of discretion' on the part of the agency." (*Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899, 923.)

"'[A]n agency may abuse its discretion under CEQA either by failing to proceed in the manner CEQA provides or by reaching factual conclusions unsupported by substantial evidence. [Citation.]'" (*Banning Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal.5th 918, 935 (*Banning Ranch*).) "Judicial review of these two types of error differs significantly[,]" (*ibid.*), thus a reviewing court must adjust its scrutiny to the nature of the alleged defect, depending on whether the claim is predominantly one of

improper procedure or a dispute over the facts. (*Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1236.) "'While we determine de novo whether the agency has employed the correct procedures, "scrupulously enforc[ing] all legislatively mandated CEQA requirements" [citation], we accord greater deference to the agency's substantive factual conclusions.'" (*Banning Ranch*, at p. 935.) Accordingly, in reviewing factual conclusions, we do """not to weigh conflicting evidence and determine who has the better argument[,]""" meaning we """may not set aside an agency's approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable[.]""" (*Ibid*.)

C. Consideration and feasibility of potential mitigation measures

In this appeal, Protect challenges the County's compliance with only one of the two primary mandates set forth in the first writ. It contends the revised FEIR did not cure the failure to analyze and adopt all feasible mitigation measures that would reduce the Project's greenhouse gas impacts to a less than significant level. Instead, so its argument goes, the County completely ignored certain potential mitigation measures identified by Protect, and it rejected others as infeasible without any evidence to support its conclusion. We find no abuse of discretion concerning the former, but we do find the revised FEIR's feasibility conclusion concerning the mitigation of greenhouse gases through the use of solar PV roof panels is not supported by the requisite substantial evidence.

Though distinct concepts, consideration and feasibility are analytically intertwined in the context of mitigation measures. "'The Legislature has declared "it is the policy of the state that public agencies should not approve projects as proposed if there are . . . feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects . . . ." [Citation.]'" (*Residents Against Specific Plan 380 v. County of Riverside* (2017) 9 Cal.App.5th 941, 969 (*Residents*).) Accordingly, an EIR must identify feasible mitigation measures for each significant

impact. (*Clover Valley Foundation v. City of Rocklin* (2011) 197 Cal.App.4th 200, 244 (*Clover*).) In this context, "'[f]easible' means capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors." (Pub. Resources Code, § 21061.1.) "'Our Supreme Court has described the . . . mitigation section[] as "the core" of an EIR.' [Citation.]" (*Residents,* at p. 970.)

An EIR generally does not need to identify and discuss mitigation measures that are infeasible because "'"'CEQA does not require analysis of every *imaginable* . . . mitigation measure; its concern is with *feasible* means of reducing environmental effects.'" [Citation].' [Citation.]" (*Clover, supra,* 197 Cal.App.4th at p. 244.) At the same time, however, an EIR "'must respond to specific suggestions for mitigating a significant environmental impact unless the suggested mitigation is facially infeasible. [Citations.] While the response need not be exhaustive, it should evince good faith and a reasoned analysis.' [Citation.]" (*Residents, supra,* 9 Cal.App.5th at p. 970, citing *Los Angeles Unified School Dist. v. City of Los Angeles* (1997) 58 Cal.App.4th 1019, 1028-1029.) For all responses, including those indicating that suggested mitigation measures are infeasible, "[c]onclusory statements unsupported by factual information will not suffice." (CEQA Guidelines, § 15088, subd. (c); see *Residents,* at p. 971.)

Protect specifies two greenhouse gas-related mitigation measures that it and other members of the public brought to the County's attention in response to the draft revised FEIR, but which Protect claims the County failed to analyze: density reductions and solar PV roof panels.[5] We take each in turn.

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[5] Protect also calls out a category of "other mitigation measures." Although it lists in that category seven additional measures, it fails to develop any argument beyond a conclusory statement that they were not addressed in the EIR. We do not consider matters that are unsupported by argument and legal authority. (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852.)

As for density, Protect argues the County should have analyzed a density reduction mitigation measure. In doing so, it recognizes the FEIR and the revised FEIR included a "reduced density alternative[,]" but it claims that does not resolve the issue because the alternative discussion did not analyze or quantify the greenhouse gas emission reductions that would result from the reduced density alternative.

The identification and analysis of alternatives and mitigation measures serve similar purposes, namely to inform the decisionnmakers and the public of potential ways in which a project's significant environmental impacts may be substantially reduced or avoided altogether. (Pub. Resources Code, § 21002; CEQA Guidelines, § 15002, subd. (a)(3); *California Native Plant Society v. City of Santa* Cruz (2009) 177 Cal.App.4th 957, 978 (*CNPS*).) Though a reduction in density may sometimes be characterized as a mitigation measure and other times as an alternative, the label ascribed to it is unimportant. (*City of Rancho Palos Verdes v. City Council* (1976) 59 Cal.App.3d 869, 893; 1 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act (Cont.Ed.Bar 2d ed. 2018) § 15.15, p. 15-24.) The substance of the analysis is the lynchpin. (*City of Rancho Palos Verdes*, at p. 893.)

To the extent Protect is arguing the revised FEIR was required to discuss a reduced density mitigation measure in the context of greenhouse gases even though a lower density option, was already analyzed in the alternatives section of the document, it provides no supporting legal authority for such a proposition. And we are not aware of any statutory or decisional authority to that effect.

Protect's objection appears to be directed more at the alleged lack of a greenhouse gas discussion in the reduced density alternative section, as well as County staff's alleged failure to comply with certain County board of supervisors and planning commission directives to consider a reduced unit project. The latter is not a cognizable challenge under CEQA. And as for the former, the revised FEIR contained the same reduced density alternative analysis as the FEIR. Any alleged deficiencies concerning it

should have been raised in the original proceedings concerning the FEIR; they are not proper for consideration in this appeal.

Turning to solar PV roof panels, Protect faults the revised FEIR for having "no analysis or consideration of how solar panels could reduce project [greenhouse gas] emissions." But the lack of an analysis concerning the reduction potential is neither here nor there under the circumstances because the revised FEIR stated that requiring installation of solar PV roof panels on each residence was infeasible. (*Clover, supra*, 197 Cal.App.4th at p. 244.) The more apt question, therefore, is whether the infeasibility conclusion is supported by a good faith, reasoned explanation and substantial evidence.

Within the greenhouse gas section of the revised FEIR, the County included a table of potentially applicable mitigation measures that it took from a California Air Pollution Control Officers Association publication which identified them as having the potential for reducing greenhouse gas emissions. For each measure, the revised FEIR indicated whether it was being adopted for the Project or whether the County deemed it infeasible, along with the reasons for the infeasibility finding.

The use of "solar power" as part of "[e]stablish[ing] on-site renewable energy systems" was among the mitigation measures the County included but labeled as "infeasible." The revised FEIR provided the following reasons: "[R]esidential development, not commercial development, and no location or ability to install on site solar power plant. Also cost prohibitive. Most residences do not have sufficient resources to install solar generation, due to location or design, and there are no regulations in place for production and/or sale of the electricity to Southern California Edison. It would also change aesthetic appearance of neighborhood."

Not only are the County's explanations conclusory, but in digging deeper it is evident certain are devoid of record support and others have no tie to CEQA's definition of feasibility. To begin, there is no evidence to support the County's conclusions that the installation of solar generation on residences is "cost prohibitive"

and "most residences do not have sufficient resources." The record contains no financial information concerning solar PV roof panels. (See *County of San Diego v. Grossmont-Cuyamaca Community College Dist.* (2006) 141 Cal.App.4th 86, 108 [economic based infeasibility finding not supported by substantial evidence because final EIR contained no estimate or discussion of costs].) Nor is there any information concerning the proclaimed aesthetic differences.

Additionally, we fail to see how a difference in aesthetic appearance demonstrates that the proffered measure is "[in]capable of being accomplished in a successful manner within a reasonable period of time." (Pub. Resources Code, § 21061.1.) That something may be less desirable does not make it infeasible for purposes of an EIR's discussion of potential mitigation measures. The same is true for the statement regarding the alleged lack of a regulatory scheme for the production and/or sale of electricity to the local investor-owned utility. Solar PV roof panels was suggested as a means of mitigating greenhouse gas impacts because electricity generated could be used at each residence to reduce the amount needed to be purchased from the local utility. The viability of selling the generated electricity to the utility says nothing about the feasibility of onsite generation and use.

The County directs us elsewhere in the administrative record to a separate document which it claims contains four policy based reasons for why the County found the installation of rooftop solar on each home to be infeasible. Citing a few cases, it asserts it was "perfectly appropriate [under CEQA] for the County to find [a rooftop solar panel requirement] infeasible because it is undesirable from a policy perspective."

There are two glaring problems with the County's contention. First, the document it relies upon is a *draft* resolution. The explanation to which the County directs us is not included in the actual County board of supervisors resolution certifying the revised FEIR. In other words, the board of supervisors never made the policy based findings on which the County attempts to rely.

Second, the County conflates two separate stages in the CEQA EIR process. As with alternatives, the feasibility of mitigation measures comes into play at two different times. (See *San Diego Citizenry Group v. County of San Diego* (2013) 219 Cal.App.4th 1, 17-18, citing *CNPS, supra*, 177 Cal.App.4th at p. 1000.) The first feasibility analysis occurs within the EIR as part of the discussion of potential mitigation measures. (*Ibid*.) At that time, the question is whether a particular mitigation measure is "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors." (Pub. Resources Code, § 21061.1.) The second consideration of feasibility takes place at the time the lead agency's decisionmaking body is considering whether to certify a final EIR. "At [this] project approval stage, 'the agency considers whether "[s]pecific economic, legal, social, technological, *or other considerations* . . . make infeasible the mitigation measures or alternatives identified in the environmental impact report." ([Pub. Resources Code,] § 21081, subd. (a)(3).)'" (*Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899, 948, italics added (*Rialto*); see CEQA Guidelines, § 15091, subd. (a)(3) [possible finding at certification stage is that "[s]pecific economic, legal, social, technological, or other considerations, including provision of employment opportunities for highly trained workers, make infeasible the mitigation measures or project alternatives identified in the final EIR"].)

Broader considerations come into play when the decisionmaking body is considering actual feasibility, as compared to when the EIR preparer is assessing potential feasibility of mitigation measures. (*CNPS, supra*, 177 Cal.App.4th at p. 1000.) For example, while policy matters are not appropriate for consideration during the first stage feasibility analysis, they certainly may play a role in the decisionmakers' determination of whether to impose mitigation measures set forth in the EIR. (See e.g., *Rialto, supra*, 208 Cal.App.4th at pp. 947-948.) Thus, "'[a]t [the later] juncture, the decision makers may reject as infeasible alternatives [or mitigation measures] that were

identified in the EIR as potentially feasible.'" (*San Diego Citizenry Group, supra*, 219 Cal.App.4th. at p. 18; see also *CNPS, supra*, 177 Cal.App.4th at p. 999; *No Slo Transit, Inc. v. City of Long Beach* (1987) 197 Cal.App.3d 241, 256 ["Mitigation measures are suggestions which may or may not be adopted by the decisionmakers. There is no requirement in CEQA that mitigation measures be adopted"].) Such a rejection, however, may not justify and does not remedy a failure to include in the FEIR a good faith, reasoned explanation, supported by substantial evidence, as to whether a concrete mitigation measure brought to the lead agency's attention by the public is potentially feasible.

To be clear, we are not holding or implying the County was obligated to find solar PV roof panels feasible. "'The purpose of CEQA is not to generate paper, but to compel government at all levels to make decisions with environmental consequences in mind.'" (*A Local & Regional Monitor v. City of Los Angeles* (1993) 12 Cal.App.4th 1773, 1809.) Consistent with that foundational principle, we are charged with assessing whether the revised FEIR met CEQA's information disclosure requirements. In this case, it did not because the revised FEIR's feasibility conclusion concerning solar roof panels was not supported by substantial evidence. (CEQA Guidelines, § 15088, subd. (c); see *Residents, supra*, 9 Cal.App.5th at p. 971.)

"'The preparation and circulation of an EIR is more than a set of technical hurdles for agencies and developers to overcome. The EIR's function is to ensure that government officials who decide to build or approve a project do so with a full understanding of the environmental consequences and, equally important, that the public is assured those consequences have been taken into account.'" (*Banning Ranch, supra*, 2 Cal.5th at p. 941.) In a situation such as this where "the informational requirements of CEQA are not complied with, an agency has failed to proceed in 'a manner required by law' and has therefore abused its discretion. [Citations.]" (*Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 118.) And

because the failure to comply with the first writ's mandate of revising the greenhouse gas section of the FEIR in accordance with CEQA resulted in omitting information that is necessary to an informed discussion and informed decisionmaking, the noncompliance was prejudicial. (*POET, supra*, 12 Cal.App.5th at p. 84.)

D. Remedy

"[W]hen an appellate court determines a public . . . agency has failed to comply with a writ of mandate, the basic components of appellate relief are (1) reversal of the order discharging the writ and (2) instructions to the trial court to issue (a) an order directing the public . . . agency to comply with the writ and (b) any further appropriate orders to compel obedience to the writ." (*POET, supra*, 12 Cal.App.5th at pp. 85-86.) In determining what further orders may be appropriate in a CEQA case, we consider the types of provisions CEQA allows to be selected for inclusion in a writ. (*Ibid*.) These include directing the agency "'1) to void, in whole or in part, a determination, finding or decision, (2) to "suspend any or all specific project activity or activities' if certain conditions exist, or (3) to take specific action necessary to bring the determination, finding or decision tainted by the CEQA violation into compliance with CEQA.' [Citation.]" (*POET*, at p. 86, citing Pub. Resources Code, § 21168.9, subd. (a)(1)-(3).)

Based on responses to our inquiries at oral argument, it is evident the parties are at odds concerning the appropriate remedy. Protect posits that nothing short of decertification of the revised FEIR and vacation of all Project-related approvals would be proper. The County contends a far more limited remedy is viable under the circumstances. We agree with the County.

"'Section 21168.9 was enacted in 1984 to give the . . . courts some flexibility in tailoring a remedy to fit a specific CEQA violation.'" (*Center for Biological Diversity v. Department of Fish & Wildlife* (2017) 17 Cal.App.5th 1245, 1253 (*CBD*).) "'[A] reasonable, commonsense reading of [it] plainly forecloses [the] assertion that

a . . . court must mandate a public agency decertify the EIR and void all related project approvals in every instance where the court finds an EIR violates CEQA.'" (*Ibid*.)

Partial decertification is an available option, among others, as is leaving some project approvals in place pending the public agency's compliance with CEQA. (*CBD, supra,* 17 Cal.App.5th at pp. 1253-1255.) Indeed, a more limited remedy along these lines is *required* "if a court finds that (1) the portion or specific project activity or activities are severable, (2) severance will not prejudice complete and full compliance with [CEQA], and (3) the court has not found the remainder of the project to be in noncompliance with [CEQA]." (Pub. Resources Code, § 21168.9, subd. (b).)

Such is the case here. The sole deficiency we identify in this appeal concerns one particular aspect of the Project, namely construction of the homes. And because the County already included a mitigation measure requiring that all homes be constructed "solar ready," the deficiency is even more narrowly related to one of the final steps in construction—the decision whether to actually install solar PV roof panels on each home. Under the circumstances, we find this latter portion of the Project severable; it may be ordered suspended pending the County's compliance with CEQA without impacting the status of the remainder of the Project.

We also find that severance will not prejudice the County's full and complete compliance with CEQA. To the extent the County has or obtains evidentiary support for the reasons underlying its infeasibility conclusion, it may include the support in a further revised FEIR. And in the event it is unable to factually support the infeasibility conclusion, it may exercise its discretion to determine how to otherwise bring the revised FEIR into compliance with CEQA. All other deficiencies in the County's CEQA documents previously identified by this court are the subject of other orders and will not be impacted by the disposition of this appeal.

Our detailed disposition in this case reflects these findings. (See *POET, supra,* 12 Cal.App.5th at p. 90 [appellate court has authority to prepare terms of order to

be issued on remand when it finds noncompliance with preemptory writ issued pursuant to CEQA].)

DISPOSITION

The order discharging the preemptory writ of mandate is reversed. The trial court is directed to vacate that order and enter a new order (1) stating the County's return did not demonstrate compliance with paragraph (c) of the peremptory writ of mandate, and (2) denying the County's request for an order discharging the writ.

The trial court shall also issue further orders compelling the County to comply with the preemptory writ and CEQA by modifying the writ to require the County to take the following action:

(1) Decertify the parts of the revised FEIR for the Project addressing solar-related energy options in the greenhouse gas context;

(2) Modify the revised FEIR for the Project in accordance with CEQA, the CEQA Guidelines and this opinion, to bring it into full compliance with CEQA;

(3) Proceed in the manner required by CEQA for all procedural matters; and

(4) Suspend all Project activities regarding the installation, or noninstallation, of solar PV roof panels on each residence unless and until the County complies with CEQA.

Pursuant to Public Resources Code section 21168.9, the trial court shall retain jurisdiction over the County's proceedings by way of a return to the modified peremptory writ until it has determined that the County has complied with CEQA. Should the County fail to proceed diligently and in subjective good faith while implementing corrective action pursuant to the modified writ and filing a final return, the trial court shall modify the writ to order that the County decertify the revised FEIR in full, vacate all Project-related approvals and suspend all Project-related activity pending its compliance with CEQA.

In the interest of justice, the parties shall bear their own costs on appeal.

THOMPSON, J.

WE CONCUR:

O'LEARY, P. J.

MOORE, J.