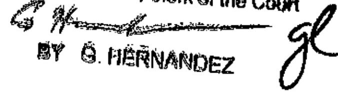
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28



JUL 22 2016

ALAN CARLSON, Clerk of the Court

BY G. HERNANDEZ

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE – CIVIL COMPLEX CENTER

PROTECT OUR HOMES AND HILLS; HILLS FOR EVERYONE; ENDANGERED HABITATS LEAGUE, INC; CALIFORNIA NATIVE PLANT SOCIETY; FRIENDS OF HARBORS, BEACHES AND PARKS, INC.,
Petitioners and Plaintiffs,
v.
COUNTY OF ORANGE; BOARD OF SUPERVISORS OF COUNTY OF ORANGE; CITY OF YORBA LINDA; CITY COUNCIL OF THE CITY OF YORBA LINDA; and DOES 1 through 20, inclusive,
Respondents and Defendants.

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

INTRODUCTION AND OVERVIEW

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

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

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

REQUESTS FOR JUDICIAL NOTICE (RJN)

Petitioners' RJN

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

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

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

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

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

Ex. 5. The Dominguez Ranch Planned Community District Regulations

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

YLE's RJN and County's Joinder Thereto

The Court grants RJN of Exhibits A-C and Fact Nos. 2-3, but denies judicial notice as to Exhibits D-E and Fact Nos. 1, 4-5, as set forth below. With respect to Exhibits A-C, judicial notice will not extend to the truth of any matters asserted therein. (*Fontenot v. Wells Fargo Bank, N.A.*, *supra* at 264-265.)

Ex. A: The SCAQMD's Draft Guidance Document- Interim CEQA Greenhouse Gas (GHG) Significance Threshold (October 2008) and the SCAQMD's resolution adopting the same

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

Joint RJN

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

1. STANDARDS OF REVIEW

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

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

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

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

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

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

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

It is true that "[a]n EIR must include a description of the physical environmental conditions in the vicinity of the project, as they exist at the time the notice of preparation is published. . . ." (Guidelines § 15125(a).) However, "not all inconsistencies are prejudicial: 'It is not enough ... that [an environmental impact report] misstate[s] an aspect of a proposed project.'" (*Save Cuyama Valley v. County of Santa Barbara* (2013) 213 Cal.App.4th 1059, 1074, quoting *Mount Shasta Bioregional Ecology Center v. County of Siskiyou* (2012) 210 Cal.App.4th 184, 226; see also Pub. Res. Code § 21005(b).) "CEQA requires an EIR to reflect a good faith effort at full disclosure; it does not mandate perfection, nor does it require an analysis to be exhaustive. The question whether an EIR is sufficient as an informative

document depends on the lead agency's . . . compliance with CEQA's requirements for the contents of an EIR . . . Therefore, [n]oncompliance with CEQA's information disclosure requirements is not per se reversible; prejudice must be shown."(*City of Long Beach v. Los Angeles Unified School Dist.* (2009) 176 Cal.App.4th 889, 897-898 [internal quotes and citations omitted].)

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

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

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

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

3. <u>THE PROJECT'S WILDLAND FIRE HAZARDS</u>

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

Appendix G of the CEQA Guidelines requires the County to consider whether the Project will "[e]xpose people or structures to a significant risk of loss, injury or death involving wildland fires, including where wildlands are adjacent to urbanized areas or where residences are intermixed with wildlands." (Guidelines Appendix G, ¶ VIII(h); *see also* AR C02/000622 [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.)
27
28

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

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

(AR C29/006658 [emphasis added].)

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

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

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

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

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

(*Id.* at 794.)

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

4. <u>ANALYSIS OF IMPACTS TO BIOLOGICAL RESOURCES</u>

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

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

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

Petitioners argue that the EIR's analysis of biological resources is inadequate for three main reasons discussed below.

A. ***Plants***

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

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

(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
28

mitigation measure does not demonstrate a lack of substantial evidence. (*California Native Plant Soc. v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 626.)

(2) Natural vegetation communities

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

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

B. Wildlife

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

(1) The California gnatcatcher

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

(2) The golden eagle

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

(3) The least Bell's vireo

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

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

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

C. <u>Deferral of Mitigation Measures</u>

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

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

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

5. ANALYSIS OF HAZARDOUS MATERIALS IMPACT AND MITIGATION MEASURES

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

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

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

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

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

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

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

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

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

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

6. GEOLOGICAL, SEISMIC AND LANDSLIDE HAZARDS

Petitioners have abandoned this issue.

7. **WATER ISSUES**

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

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

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

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

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

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

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

8. ISSUES RELATED TO ACCESS TO THE PROJECT

Petitioners argue a variety of points related to access to the Project. None has merit. As to the argument that the Project's road access is unresolved, Petitioners appear to contend that the Project is legally infeasible because the proposed access roads connecting to the City of Yorba Linda have not been locked down. (Opening Brief pp. 26-28.) The argument misses the point of an EIR, which "is to identify the significant effects on the environment of a project." (Pub. Res. Code § 21002.1(a) [emphasis added].) As a practical matter, it is of no concern under CEQA whether a proposed project is legally feasible, i.e. whether it can be

developed. It matters only whether the project, if completed, will cause significant environmental impacts.

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

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

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

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

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

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

9. THE EIR'S CONSIDERATION OF A REASONABLE RANGE OF FEASIBLE ALTERNATIVES

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

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

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

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

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

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

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

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

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

Petitioners' argument is unpersuasive. They argue that the project alternatives are insufficient because they do not reduce the Project's impacts overall. It is important to bear in mind that "[t]he purpose of an EIR is *not* to identify alleged alternatives that meet few if any of the project's objectives so that these alleged alternatives may be readily eliminated." (*Watsonville Pilots Ass'n v. City of Watsonville* (2010) 183 Cal.App.4th 1059, 1089.) Likewise, "[t]here is no ironclad rule governing the nature or scope of the alternatives to be discussed other than the rule of reason. 'The alternatives shall be limited to ones that would

avoid or substantially lessen any of the significant effects of the project.' (Guidelines, § 15126.6(f).)" (*City of Long Beach v. Los Angeles Unified School Dist.* (2009) 176 Cal.App.4th 889, 920.) Indeed, a range of alternatives that included only a "no project" has been upheld. (*Mount Shasta Bioregional Ecology Center v. County of Siskiyou* (2012) 210 Cal.App.4th 184, 199.)

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

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

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

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

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

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

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

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

10. ANALYSIS OF THE PROJECT IN CONJUNCTION WITH THE CIELO VISTA PROJECT

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

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

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

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

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

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

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

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

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

11. RECIRCULATION OF THE EIR

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

"'Significant new information' requiring recirculation includes, for example, a disclosure showing that:

> (1) A new significant environmental impact would result from the project or from a new mitigation measure proposed to be implemented.
>
> (2) A substantial increase in the severity of an environmental impact would result unless mitigation measures are adopted that reduce the impact to a level of insignificance.
>
> (3) A feasible project alternative or mitigation measure considerably different from others previously analyzed would clearly lessen the significant environmental impacts of the project, but the project's proponents decline to adopt it.
>
> (4) The draft EIR was so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded."
>
> (Guidelines § 15088.5(a).)

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

A. __Chino Hills State Park Information__

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

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

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

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

12. CONSISTENCY WITH ORANGE COUNTY GENERAL PLAN

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

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

"In reviewing an agency's decision for consistency with its own plan, we accord great deference to the agency's determination. This is because the body which adopted the general

plan policies in its legislative capacity has unique competence to interpret those polices when applying them in its adjudicatory capacity. Because policies in a general plan reflect a range of competing interests, the governmental agency must be allowed to weigh and balance the plan's policies when applying them, and it has broad discretion to construe its policies in light of the plan's purposes. A reviewing court's role is simply to decide whether the city officials considered the applicable policies and the extent to which the proposed project conforms with those policies." (*Sierra Club v. County of Napa*, *supra*, 121 Cal.App.4th at 1509-10.)

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

13. GREENHOUSE GAS ISSUES

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

*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

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

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

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

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

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

Petitioners' complaint here is not with the lack of consideration of any particular mitigation measure, but rather with the EIR's failure to consider any measure beyond that which might satisfy the extra 5% of mitigation calculated under AB 32's reduction goal. The argument has merit. The EIR's discussion of reduction of GHG emissions appears aimed solely at a 5% reduction, even though such reduction still renders GHG emissions above SCAQMD standards: "mitigation aimed at achieving a 5% reduction in GHG emissions is included herein." (AR C35/008732; see also AR C35/008732 ["reasonable and feasible

mitigation measures have been evaluated to achieve the 5% reduction"]; 008735 ["to achieve the required 5% reduction in GHG emissions"].)

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

B. <u>Deferral of Mitigation Measures</u>

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

MM GHG-2 requires that, prior to construction of project, the developer shall at minimum develop a plan for implementation of one or more mitigation strategies for a minimum 5% reduction of GHG emissions from the CAPCOA report. Alternative strategies

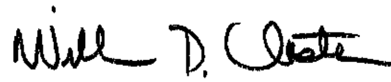
1 not listed in the CAPCOA report may be used with approval of the Orange County Planning
2 Director. The selected strategies, including measures for their long-term maintenance, must
3 be described in a memo submitted to and approved by the County Planning Department prior
4 to initial occupancy of 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.
27
28

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

Dated: 7-22-16



William D. Claster
Superior Court Judge