

Appendix V-A

**SAN BERNARDINO COUNTY
SUPERIOR COURT JUDGMENT & RULING
Case No. CIVDS 1011874,
*Endangered Habitats League, et al. v.
City of Rialto, et al.*
September 30, 2011**

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Development Company; El Rancho Verde Golf,
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FILED
OCT 07 2011

By Sabrina McDavis Dep. Clerk
SAN BERNARDINO COUNTY
SUPERIOR COURT JOSHUA TREE DISTRICT

8
9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **COUNTY OF SAN BERNARDINO**

11 ENDANGERED HABITATS LEAGUE;
12 SAVE LYTLE CREEK WASH,

13 Petitioners,

14 v.

15 CITY OF RIALTO,

16 Respondent.

CASE NO. CIV DS 1011874

[California Environmental Quality Act,
Pub, Res. Code §21000 et seq.]

Assigned To The Honorable Frank Gafkowski, Jr.
(Department M4)

~~PROPOSED~~ JUDGMENT

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18 LYTLE DEVELOPMENT JOINT
VENTURE III, LYTLE DEVELOPMENT
COMPANY; EL RANCHO VERDE GOLF,
19 LLC; PHARRIS SYCAMORE FLATS, LLC;
LYTLE DEVELOPMENT JOINT
20 VENTURE II and DOES 1 TO 10

21 Real Parties in Interest.

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[PROPOSED] JUDGMENT

1 **WHEREAS**, on August 26, 2010, Petitioners Endangered Habitats League, Inc. and Save
2 Lytle Creek Wash (collectively, "Petitioners") filed their Petition for Writ of Mandate and
3 Complaint for Declaratory Relief (the "Petition"), thus commencing this action;

4 **WHEREAS**, substantive briefing in this action has been completed by all Parties herein
5 (Petitioners, Respondent City of Rialto, and Real Parties in Interest);

6 **WHEREAS**, a hearing was scheduled for September 30, 2011, at 1:30 p.m.;

7 **WHEREAS**, on September 27, 2011, having considered the Petition, the Answers, all
8 parties' briefs, the record of proceedings lodged with the Court, and the notices of supplemental
9 authorities the parties filed with the Court, the Court issued a Tentative Ruling granting the
10 Petition in part and denying the Petition in part; and

11 **WHEREAS**, on September 29, 2011, the parties filed a stipulation with the Court
12 informing the Court that all parties waive hearing and submit on the Court's Tentative Ruling,
13 thus allowing the Tentative Ruling to become this Court's Final Ruling on the Petition without
14 oral argument, a copy of which Ruling is attached hereto and incorporated herein.

15 **THEREFORE IT IS ORDERED, ADJUDGED, AND DECREED THAT:**

16 **AS TO THE FIRST CAUSE OF ACTION** petitioning this Court for a peremptory writ
17 of mandate to redress alleged violations of the California Environmental Quality Act (CEQA),
18 the Petition is GRANTED in part and DENIED in part in accordance with the Ruling, and a
19 peremptory writ of mandate shall issue providing as follows:

20 **I. Return to Writ of Mandate**

21 Within 60 days after service of the writ, Respondent City of Rialto (the "City") shall:

- 22 A. Set aside the City's certification of the Environmental Impact Report for the Lytle
23 Creek Ranch Specific Plan ("Project"), SCH No. 2009061113 (the "EIR");
24 B. Set aside the City's adoption of the Findings of Fact and Statement of Overriding
25 Considerations, and Mitigation Monitoring and Reporting Program, all adopted by
26 the City Council in Resolution No. 5862;
27 C. Set aside the City's approval of the Project, including:

28

- 1 1. Ordinance No. 1468 approving the rescission of the El Rancho Verde Specific
- 2 Plan;
- 3 2. Ordinance No. 1469 approving General Plan Amendment No. 29 to designate
- 4 the Project area as a "Specific Plan" overlay on the General Plan Land Use
- 5 Map and amend the text of the General Plan;
- 6 3. Ordinance No. 1470 adopting the Lytle Creek Ranch Specific Plan; and
- 7 4. Ordinance No. 1471 approving a Pre-Annexation and Development
- 8 Agreement between the City and Lytle Development Company, El Rancho
- 9 Verde Golf, LLC, and Pharris Sycamore Flats, LLC; and

10 D. File a return to the writ confirming that the above-described actions have been
11 taken and/or that a notice of appeal has been filed.

12 **II. Retained Jurisdiction**

13 The Court retains jurisdiction over this action as follows:

- 14 A. To ensure compliance with the writ and this judgment;
- 15 B. To ensure that the City shall process any future consideration of the Project in
16 accordance with the Court's Ruling, attached hereto, should an appeal of the writ
17 not be brought;
- 18 C. The Court does not direct the City to exercise its lawful discretion in any
19 particular way nor does it restrict in any way future City action taken in
20 compliance with the law;
- 21 D. Petitioners are entitled to costs in the sum of \$ _____ [to be determined]; and
- 22 E. To consider any motion for attorneys' fees, which shall be addressed either by
23 stipulation among the parties or by noticed motion to this Court.

24 **AS TO THE SECOND CAUSE OF ACTION** seeking a declaration of this Court that
25 the City's actions in approving the Project failed to comply with the law for the same reasons
26 alleged in the first cause of action, that cause of action is rendered moot by the rulings in the first
27 cause of action and therefore, on agreement of all parties as confirmed by their joint submittal of
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1 this proposed judgment, that cause of action is hereby DISMISSED.

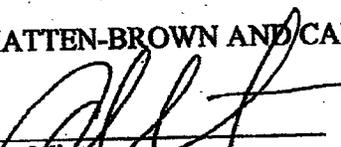
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Thus, this constitutes a judgment concerning all matters raised in the Petition.
THEREFORE IT IS SO ORDERED, ADJUDGED, AND DECREED.

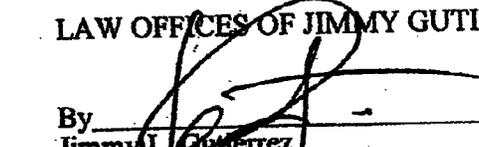
Dated: OCT 07 2011

FRANK GAFKOWSKI, JR.
The Honorable Frank Gafkowski, Jr.
Judge, San Bernardino Superior Court

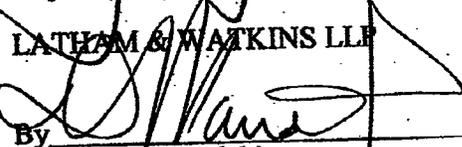
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LLC; Lytle Development Joint Venture II

LA2307513.2

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VIA EMAIL
Electronic Signature
Civil Code 1633.7

TENTATIVE RULING:

*Endangered Habitats League;
Save Lytle Creek Wash*

v.

City of Rialto

Motion: Petition for Writ of Mandate

Moving Party: Petitioners Endangered Habitats League and Save Lytle Creek Wash

Responding Party: Respondents City of Rialto and Real Parties in Interest Lytle Development Joint Venture III; Lytle Development Company; El Rancho Verde Golf, LLC; Pharris Sycamore Flats, LLC; Lytle Development Joint Venture II

Factual and/or Procedural Context

This is an action brought under the California Environmental Quality Act (“CEQA”) by Petitioners Endangered Habitats League and Save Lytle Creek Wash against respondent City of Rialto and Real Parties in Interest following the City’s approval of a major specific plan and general plan amendment.

The project is the adoption and subsequent implementation of the 2,447.3-acre “Lytle Creek Ranch Specific Plan” (LCRSP), authorizing the construction, use, occupancy, and habitation of up to 8,407 dwelling units and up to 849,420 gross leasable square feet of commercial, office, light industrial, manufacturing and distribution uses. The project would

result in the creation and retention of open space and conservation areas, and allow for the development of public, semi-public, and private recreational facilities, schools, and other institutional uses, as well as associated public works and other infrastructure improvements. The project consists of four separate and distinct “neighborhoods,” each comprised of numerous “planning areas.” The four neighborhoods are designated as Neighborhoods I through IV. The anticipated project’s build-out for development within each of neighborhoods is 2030. (AR 2:11:423-425; AR 1:9:197-198.) Petitioners contend that this action does not seek to interfere with the development plans for Neighborhood I and that none of the CEQA violations derive from it.¹ (Petition ¶¶ 1-3.)

Within each planning area, separate project-level activities would be authorized according to land uses and development standards established under the specific plan. (AR 2:11:542.) A portion of the proposed project site is under the jurisdiction of the County. The project includes annexation or phased annexation into the City of those unincorporated County areas. (AR 2:11:542; AR 1:9:198.)

On July 27, 2010, the City certified the EIR. It also made Findings and a Statement of Overriding Considerations. (AR 1:1:1; AR 1:4:43-46; AR 1:9:193-381.) The City approved

¹ **Please Note:** It is not clear how this is the case when some of the issues raised, such as improper findings with respect to climate impacts or improper deferred mitigation with respect to fire impact mitigations measures include project Neighborhoods I through IV.

Neighborhood I is primarily single-family residential housing. Neighborhood II is a gated, active adult community and will include a golf course. Neighborhood III will primarily include a mix of single-family housing and multi-family residential uses, schools and a commercial development. Neighborhood IV will include primarily multi-family residential and commercial development. (AR 2:11:424.)

With respect to Neighborhood I, “a portion is located within but extracted from the boundaries of the 3,400-acre County-approved ‘Glen Helen Specified Plan’ (GHSP). The remaining land includes acreage located within but extracted from the boundaries of the County-approved ‘Lytle Creek North Planned Development Project’ (LCNPD)” With respect to the project at issue, once approved, it “supersede[s] portions of the County-approved GHSP and LCNPD.” (AR 2:11:424.)

Ordinance No. 1468 rescinding the “EI Rancho Verde Specific Plan No. 6;” Ordinance No. 1469 approving “General Plan Amendment No. 29” to designate the project area as “Specific Plan;” Ordinance No. 1470 adopting the “Lytle Creek Ranch Specific Plan No. 12” to establish land use, zoning, and development standards for the project site; and Ordinance No. 1471 approving “Pre-Annexation/Development Agreement No. 170.” (AR 1:1:1; AR 1:5:47-57; AR 1:6:58-89; 1:7:90-96; AR 1:8:97-191.)

On August 26, 2010, Petitioners filed a Petition for Writ of Mandate and Complaint for Declaratory Relief, stating the following causes of action: (1) violations of CEQA; and (2) declaratory relief.² The issues raised in the first cause of action are:

- (1) environmental impacts were not properly analyzed in the Environmental Impact Report (“EIR”) with respect to: (a) deferred mitigation for significant geotechnical risk; (b) GHG emissions impacts; (c) air quality impacts; (d) noise impacts; (e) land use impacts; (f) biological impacts; (g) public safety impacts; (h) water supply impacts; (i) hydrological impacts; (j) traffic impacts; and (k) cumulative direct impacts on mineral resources;
- (2) lack of substantial evidence to support a statement of overriding considerations;
- (3) inadequate and unstable project description; and
- (4) failure to analyze a reasonable range of alternatives.

Petitioners’ prayer seeks:

- (1) stay of the City’s permits, except as they apply to Neighborhood I, until this action can be decided on its merits;
- (2) an alternative and peremptory writ of mandate ordering the City and its agencies to: (a) set aside and vacate its certification of the EIR, Findings, and Statement of Overriding Considerations supporting the Project with respect to Neighborhoods II through IV; (b) set aside and vacate any approvals for the project based upon the EIR

² The second cause of action for declaratory relief seeks a declaration of Petitioners’ rights with respect to the law governing the City’s approval of the project, in particular whether the City violated CEQA when certifying the EIR and adopting the findings and statement of overriding considerations..

Please Note: The declaratory relief cause of action is not at issue with respect to the writ petition hearing. In addition, case law provides that a declaratory relief cause of action that only challenges project approval under CEQA should be brought by mandamus proceedings. (*See East Bay Mun. Util. Dist. v. Dept. of Forestry* (1996) 43 Cal. App. 3d 1113, 1121.)

and Findings and Statement of Overriding Considerations supporting the project; and (c) to prepare and certify a legally adequate EIR for the project;

(3) an order enjoining the City and Real Parties from taking any action to construct any portion of the project or to develop or alter the project site in any way unless and until a lawful approval is obtained from the City after the preparation and consideration of an adequate EIR;

(4) declaratory relief, declaring the City's approval of the Project violates CEQA and is therefore void; and

(5) costs and reasonable attorneys' fees.

Real Parties in Interest Lytle Development Joint Venture III; Lytle Development Company; El Rancho Verde Golf, LLC, Pharris Sycamore Flats, LLC; and Lytle Development Joint Venture II filed an Answer on September 23, 2010.³ The City of Rialto filed its Answer on October 6, 2010.

On February 22, 2011, Petitioners filed their Opening Brief and Statement of Issues, along with an electronic version of the administrative record. On February 23, 2011, Petitioners lodged the administrative record with the Court. On April 12, 2011, the City filed a Responsive Statement of Issues and Opposition. On the same date, Real Parties filed a Responsive Statement of Issues and Opposition Brief. On June 17, 2011, Petitioners filed a Reply brief.

In addition, the City filed three separate Notices of New Cases and Arguments Relying Thereon on May 23, 2011, June 14, 2011, and July 12, 2011 (with an Errata to the July 12 filing filed on July 14, 2011). Petitioners' Reply, filed June 17, 2011, addresses only the case raised in the May 23, 2011 filing.

DISCUSSION

CEQA Standard of Review

³ Petitioners also named Lytle Creek Development as a Real Party in Interest. It was dismissed by stipulation and order dated December 14, 2010.

CEQA (Pub. Res. Code §§ 21000 *et seq.*) establishes as a 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.” (Pub. Res. Code § 21002.) To achieve that goal, CEQA sets forth an environmental review process designed to assist agencies in identifying and disclosing environmental effects and feasible alternatives or mitigation measures which would avoid or substantially lessen the significant effects of proposed projects. (*Id.*)

CEQA establishes that if, after the initial study is conducted, it is determined that the project may have a significant effect on the environment, an EIR is required. (*City of Redlands v. County of San Bernardino* (2002) 96 Cal. App. 4th 398 at 405.)

One function of the EIR is “the informing of the executive and legislative branches of government, state and local, and of the general public of the effect of the project on that revered resource which we call ‘The Environment.’” (*Environmental Defense Fund, Inc. v. Coastside County Water Dist.* (1972) 27 Cal. App. 3d 695, 705.) The EIR “is a document of accountability. If CEQA is scrupulously followed, the public will know the basis on which its responsible officials either approve or reject environmentally significant action, and the public, being duly informed, can respond accordingly to action with which it disagrees. [Citations.] The EIR process protects not only the environment but also informed self-government.” (*Laurel Heights Improvement Assn. v. Regents of Univ. of Calif.* (1988) 47 Cal. 3d 376, 392 (hereafter “*Laurel Heights I*”).)

In *Laurel Heights Improvement Assn. v. Regents of Univ. of Calif.* (1993) 6 Cal. 4th 1112 at 1123-1124 (hereinafter “*Laurel Heights II*”), the Court explained:

When an EIR is required, the lead agency initially prepares a draft EIR. Once the draft EIR is completed, a comment period is provided for the public and interested

agencies. [Citations.] Public hearings to discuss the draft EIR are encouraged, but not required. [Citation.] The comment period is generally no shorter than 30 days and no longer than 90 days. [Citations.]

In the course of preparing a final EIR, the lead agency must evaluate and respond to comments relating to significant environmental issues. [Citations.] In particular, the lead agency must explain in detail its reasons for rejecting suggestions and proceeding with the project despite its environmental effects. [Citations.] “There must be good faith, reasoned analysis in response [to the comments received]. Conclusory statements unsupported by factual information will not suffice.” [Citation.] Thus, it is plain that the final EIR will almost always contain information not included in the draft EIR.

The final substantive step in the EIR review process is certification of the final EIR. The lead agency is required to certify that the final EIR has been completed in compliance with CEQA, and that it reviewed and considered the information in the final EIR prior to approving the project. [Citation.] CEQA also requires that, before approving a project, the lead agency “find either that the project’s significant environmental effects identified in the [final] EIR have been avoided or mitigated or that the unmitigated effects are outweighed by the project’s benefits. [Citations.]” [Citation.]

CEQA is augmented by the State CEQA Guidelines, codified at title 14 of the Cal. Code of Regulations (hereafter, Guidelines, §). The Guidelines are interpreted “in such a way as to ‘afford the fullest possible protection of the environment’” (*Friends of Eel River v. Sonoma County Water Agency* (2003) 108 Cal. App. 4th 859, 868) and are given great weight (*Laurel Heights II, supra*, 6 Cal. 4th at 1123, fn. 4).

Guidelines, § 15151 states “An EIR should be prepared with a sufficient degree of analysis to provide decision-makers with information which enables them to make a decision which intelligently takes account of environmental consequences. An evaluation of the environmental effects of a proposed project need not be exhaustive, but the sufficiency of an EIR is to be reviewed in the light of what is reasonably feasible. Disagreement among experts does not make an EIR inadequate, but the EIR should summarize the main points of disagreement among the experts. The courts have looked not for perfection but for adequacy, completeness, and a good faith effort at full disclosure.”

CEQA provides two statutes governing the standard of judicial review, Pub. Res. Code §§ 21168 and 21168.5. Petitioner's writ was brought pursuant to CCP § 1094.5 and Public Resources Code § 21168. In *Gentry v. City of Murrieta* (1995) 36 Cal. App. 4th 1359, 1374-1375, the Court stated:

"In an action to set aside an agency's determination under [CEQA], the appropriate standard of review is determined by the nature of the proceeding below. . . . [S]ection 21168 'establishes the standard of review in administrative mandamus proceedings' under Code of Civil Procedure section 1094.5 while section 21168.5 'governs traditional mandamus actions' under Code of Civil Procedure section 1085. [Citation.] The former section applies to proceedings normally termed 'quasi-adjudicative,' 'in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in a public agency' [Citations.] The latter section applies to all other actions taken pursuant to CEQA and generally encompasses 'quasi-legislative' decisions made by a public agency. [Citations.]" [Citations omitted.]

The distinction, however, is rarely significant. **In either case, the issue before the trial court is whether the agency abused its discretion. Abuse of discretion is shown if (1) the agency has not proceeded in a manner required by law, or (2) the determination is not supported by substantial evidence.** [Citations omitted.]

"[I]n undertaking judicial review pursuant to Sections 21168 and 21168.5, courts shall continue to follow the established principle that there is no presumption that error is prejudicial." (§ 21005, subd. (b).) However, "noncompliance with the information disclosure provisions of [CEQA] which precludes relevant information from being presented to the public agency, or noncompliance with substantive requirements of [CEQA], may constitute a prejudicial abuse of discretion within the meaning of Sections 21168 and 21168.5, regardless of whether a different outcome would have resulted if the public agency had complied with those provisions." (§ 21005, subd. (a).) (Emphasis added.)

In the Reply brief, Petitioners assert that the City and Real Parties misstate the standard of review to be applied by contending that only the substantial evidence standard applies. Petitioners assert that substantial evidence standard only applies to the adequacy of the City's findings. However, where the issue is whether the correct procedures under CEQA were employed, the Court is to apply a less deferential review standard, determining de novo whether the agency employed the correct procedures, citing *Vineyard Area Citizens For Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal. 4th 412, 435.

Petitioners are correct that judicial review of abuse of discretion for failure to comply with the law does differ from the substantial evidence standard. Whether the agency complied with the law is reviewed “de novo.” (*Id.* at 426.) Nonetheless, the EIR is still presumed to be legally adequate and Petitioners bear the burden of establishing the agency’s failure to meet legal requirements. (*See Sierra Club v. City of Orange* (2008) 163 Cal. App. 4th 523, 530.)

As stated in *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal. App. 4th 713, 721-722:

“[T]he ultimate decision of whether to approve a project, be that decision right or wrong, is a nullity if based upon an EIR that does not provide the decision-makers, and the public, with the information about the project that is required by CEQA.” [Citation omitted.] The error is prejudicial “if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process.” [Citation omitted.]

“[T]he substantial evidence test applies to the court’s review of the agency’s factual determinations.” [Citation omitted.] 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.” (State CEQA Guidelines, § 15384, subd. (a); see also *Laurel Heights Improvement Assn. v. Regents of University of California* (“*Laurel Heights I*”) (1988) 47 Cal.3d 376, 393.)

In applying the substantial evidence standard, “the reviewing court must resolve reasonable doubts in favor of the administrative finding and decision.” (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal. 3d 506, 514.)

Greenhouse Gas Emissions (“GHG”) and Climate Impact

With respect to GHG emissions and climate impact, signed into law on September 27, 2006, was the California Global Warming Solutions Act of 2006, AB 32 (Chapter 448, Statutes 2006). (Health & Safety Code §§ 38500, *et seq.*) AB 32 is legislation directed to California’s effort to reduce GHG emissions. In addition, Senate Bill 97, enacted in 2007, recognized climate change as an important environmental issue requiring analysis under CEQA. SB 97 amended

CEQA to require that regulations be drafted for the feasible mitigation of GHG emissions or the effects of GHG emissions. (Pub. Res. C. § 21083.05.)⁴

Petitioners first contend that the EIR's determination that the project's impact on climate change was not significant is flawed, because it improperly compared the project against a hypothetical future "business as usual" ("BAU") scenario. They argue that under *Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal. 4th 310, 322 (hereinafter "*CBE*"), "using hypothetical allowable conditions as the baseline results in 'illusory' comparisons that 'can only mislead the public as to the reality of the impacts and subvert full consideration of the actual environmental impacts,' a result at direct odds with CEQA's intent." They contend that the City's use of hypothetical future conditions for the purpose of assessing climate change impacts was identical to that used in *CBE* and, therefore, the EIR fails as a matter of law.

The City contends that the EIR does not use a hypothetical BAU scenario as a baseline for assessing impacts. Instead, the EIR uses BAU as a tool to determine whether climate change impacts are significant. It contends that CEQA gives the City discretion to formulate thresholds

⁴ New CEQA Guidelines for addressing GHG emission were approved by the Office of Administrative Law on February 16, 2010, and became effective March 18, 2010. With respect to these new Guidelines, the City's responses to comments on the draft EIR states that the DEIR undertook a thorough quantified analysis of GHG emissions anticipated as a result of the proposed projects and concluded that the project would result in a less-than-significant impact on global climate change. It then states:

Because the Amendments [to the Guidelines] did not go into effect until March 18, 2010, the DEIR was not required to conduct an analysis of the proposed project's impacts on global climate change pursuant to the procedures required by the CEQA Amendments. Accordingly, no new information has been added to the EIR on this issue and recirculation is not required.

(AR 14:15:6128.) While the recently enacted CEQA guidelines are not controlling, they are instructive.

of significance and to determine whether impacts are significant. (City Opp. p. 2:9-14.) The City's opposition also incorporates Real Parties' opposition on this issue. (*Id.* p. 1 fn.1.)

Real Parties asserts that an inventory for the project's GHG emissions was developed and compared to existing conditions, citing AR 4:11:1539. They assert that to determine whether the project's changes to existing conditions would result in significant climate change, the EIR examined whether the project's GHG emissions were consistent with applicable emission reduction strategies and goals set forth in California Assembly Bill No. 32. They contend that the EIR determined the project would meet AB 32's goal that GHG emissions be 28.3 percent below a BAU scenario.

Petitioners respond that it is not enough that GHG emissions are measured against existing conditions, *CBE* requires that the *assessment of significance* be performed using a comparison with existing conditions as a benchmark, not speculative and hypothetical BAU scenarios. They contend that as in *CBE*, the EIR improperly assessed the significance of emissions against a hypothetical BAU. With respect to AB 32, they argue it is irrelevant. The project's consistency with AB 32 is not at issue. They contend that new CEQA guidance on GHG emissions confirm that "a comparison of the project against a 'business as usual' scenario ... would confuse 'business as usual' projections ... with CEQA's separate requirement of analyzing project effects in comparison to the environmental baseline."⁵

⁵ The quote is from the California Natural Resources Agency, *Final Statement of Reasons for Regulatory Action: Amendments to the State CEQA Guidelines Addressing Analysis and Mitigation of Greenhouse Gas Emissions Pursuant to SB 97* (Office of Planning and Research Dec. 2009), p. 24-25. The *Final Statement of Reasons* states that as proposed Guideline § 15064.4(b) was intended to assist lead agencies in collecting and considering information relevant to a project's incremental contribution of GHG emissions and the overall context of such emissions. As explained, the first factor in subdivision (b) asks lead agencies to consider whether the project will "result in an increase or decrease in different types of GHG emissions relative to the existing environmental setting." (*Id.*) In addition, it states:

It is undisputed that the general rule is that the impacts of a proposed project are ordinarily compared to the actual environmental conditions existing at the time of CEQA analysis, rather than to allowable conditions defined by a plan or regulatory framework. (*CBE, supra*, 48 Cal. 4th at 320-321.) The baseline for CEQA analysis cannot be based on the level of development or activity that could or should have been presented according to a plan or regulation. (*Id.* at 321.)

“An 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, or if no notice of preparation is published, at the time environmental analysis is commenced, from both a local and regional perspective. This environmental setting will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant.” (Guidelines, § 15125(a).)

In addition, with respect to evaluating a proposed project’s impacts on the environment, “[a]n EIR shall identify and focus on the significant environmental effects of the proposed project. In assessing the impact of a proposed project on the environment, the lead agency should normally limit its examination to changes in the existing physical conditions in the affected area as they exist at the time the notice of preparation is published, or where no notice of

This section’s reference to the “existing environmental setting” reflects existing law requiring that impacts be compared to the environment as it currently exists. (State CEQA Guidelines, § 15125.) This clarification is necessary to avoid a comparison of the project against a “business as usual” scenario as defined by ARB in the Scoping Plan. Such an approach would confuse “business as usual” projections used in ARB’s Scoping Plan with CEQA’s separate requirement of analyzing project effects in comparison to the environmental baseline.... Business as usual may be relevant, however, in the discussion of the “no project alternative” in an EIR....

(AR 39:191:15645.) ARB refers to the California Air Resources Board. Its AB 32 Scoping Plan outlines a comprehensive set of reduction strategies and measures designed to reduce overall GHG emissions in California by 2020. (*See* Health & Safety Code § 38561.)

preparation is published, at the time the environmental analysis is commenced. Direct and indirect significant effects of the project on the environment shall be clearly identified and described, giving due consideration to both the short-term and long-term effects.” (Guidelines, § 151262.2(a).) “Case law makes clear that ‘[a]n EIR must focus on impacts to the existing environment, not hypothetical situations.’ [Citations.]” (*Sunnyvale West Neighborhood Assn. v. City of Sunnyvale City Council* (2010) 190 Cal. App. 4th 1351, 1373 (hereinafter “*Sunnyvale*”).)

Petitioners essentially argue that to determine whether an impact is significant, the change caused by the proposed project must simply be compared against the existing use of the project. However, Petitioners’ argument fails to acknowledge that whether a change is deemed significant depends on the “threshold of significance.” CEQA Guidelines define the “threshold of significance” as “an identifiable quantitative, qualitative, or performance level of a particular environmental effect, non-compliance with which means the effect will normally be determined to be significant by the agency and compliance with which means the effect normally will be determined to be less than significance.” (Guidelines, § 15064.7(a).)

Therefore, even when a dramatic change in an existing condition is found, whether the change is significant for CEQA purposes requires an analysis of the impact against the threshold of significance. Petitioners conflate the analysis used to determine the extent of an impact with the analysis of whether the identified impact exceeds the identified “threshold of significance.” This conclusion is demonstrated in Petitioners’ argument that “*CBE* requires that that *the assessment of significance* be performed using a comparisons with existing conditions as a benchmark.” (Reply Br. p. 4:28-5:2; *see also* Pet. Br. p. 7:19-24.) *CBE* does not include such a requirement.

In *CBE*, at issue was the evaluation of a petroleum refinery project. The refinery was permitted under its existing permits to operate all four of its boilers at maximum capacity. However, no boilers actually operated at maximum capacity unless another boiler was shut down for maintenance. Therefore, operation of the boilers simultaneously at their collective maximum was not the norm. The Negative Declaration estimated that the project would increase NOx emissions of 201 to 420 additional pounds per day due to increased demand for steam from the boilers, and up to 456 pounds per day in total. The South Coast Air Quality Management (“SCAQM”) District’s “significance threshold” for NOx was 55 pounds per day. Nonetheless, the District concluded the project would not have a significant impact because the increased emissions did not exceed the maximum rate of heat production allowed under existing permits when the refinery was operating at full capacity.

However, the threshold of significance (55 pounds of NOx per day) was not at issue in *CBE*. At issue was that instead of comparing the amount of additional emissions against the threshold of significance (non-compliance with which means the effect will be determined significant), the District simply concluded increased emissions were not part of the project, because total emissions would not exceed the maximum already allowed. The Court found that by considering the maximum capacity as a baseline, the negative declaration diminished the impact of the project on NOx emissions, leading to the conclusion that the project could not have a significant effect on the environment. (*CBE, supra*, 48 Cal. 4th at 509-513.) *CBE* demonstrates the difference in assessing the impact of a proposed project and evaluating whether such impact meets the threshold of significance.

Analysis Regarding GHG Emissions Impact and Threshold of Significance:

The EIR's methodology for its cumulative impact assessment of GHG emissions first calculated the impact of the project's GHG emissions using the existing conditions of the property as a baseline. The existing emissions were found to be de minimis. (AR 4:11:1539; AR 12:14:5214.) The property's current conditions include a golf course and one industrial source. (*Id.*) The EIR then discussed "new" emissions from the project. (AR 4:11:1539-1600.)

With respect to a threshold of significance for evaluating GHG emissions, there is no "gold standard." Under CEQA Guidelines in effect at the time, each public agency was "encouraged to develop and publish thresholds of significance that the agency uses in determination of the significance of environmental effects." (Guidelines, § 15064.7(a).) Such thresholds can be drawn from existing environmental standards, such as other statutes or regulations. "[A] lead agency's use of existing environmental standards in determining the significance of a project's environmental impacts is an effective means of promoting consistency in significance determinations and integrating CEQA environmental review activities with other environmental program planning and regulation." (*Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal. App. 4th 98, 111.)⁶

With respect to the threshold, the EIR discussed GHG emissions and global climate change. (AR 4:11:1493-1496.) It acknowledged that CEQA Guidelines had not been adopted to

⁶ The new guidelines with respect to GHG emissions and climate change do not set a significance threshold. As stated, "[T]he amendments to the CEQA Guidelines developed pursuant to SB 97 do not create new requirements; rather, they interpret and clarify existing CEQA law." (*Final Statement of Reasons, supra*, at p. 18, 29.)

Recently added Guidelines, § 15064.4 provides that analysis of the significance of impacts requires considerations of: (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, and (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. (Guidelines, § 15064.4(b) (emphasis added).) Therefore, even under the new Guidelines, lead agencies still determine the threshold to apply.

provide guidance as to how climate change is to be addressed. (AR 4:11:1494.) The EIR then stated that pending the establishment of Statewide thresholds of significance for GHG emissions, it elected to evaluate significance on a case-by-case basis. In addition, given the effect of the project's emissions on global climate change, significance analysis was found to be more properly assessed on a cumulative basis. (*Id.*) Finally, the EIR stated, "Assessing the significance of a project's contribution to cumulative global climate change involves: (1) determining an inventory of the project's GHG emissions; and (2) considering project consistency with applicable emission reduction strategies and goals, such as those set forth by [AB 32]." (AR 4:11:1494-1495; 1538.)

The EIR discussed that the California Air Resources Board's ("CARB") adopted the "Climate Change Scoping Plan," which concluded that to achieve the reduction of GHG emissions by 2020 to 1990 levels as specified in AB 32, a total reduction 28.3 percent is required. (AR 4:11:1495.) The EIR then states:

With regards to GHGs and global climate change, the proposed project would, therefore, normally be judged to produce a significant or potentially significant effect if the project or project-related activities were to:

- ◆ Impede the State's ability to achieve the reduction to 1990 levels in GHG emissions required by California Global Warming Solutions Act of 2006 (AB 32). An impediment to the achievement of the GHG reduction goals of AB 32 would occur if project-wide emissions are not reduced to achieve a 28.3 percent reduction of GHG emissions over 2020 forecasted BAU conditions.

(*Id.* at 1495.) According to the EIR, CARB defines "business-as-usual" as emissions in the absence of any GHG reduction measures discussed in the "Climate Change Scoping Plan." (AR 4:11:1443, fn. 21 & 1444-1445.) The EIR explained why other thresholds of significance, such as "interim significance thresholds" adopted by CARB and SCAQMD would not be used as threshold of significance. (*Id.* at 1495-1496.)

With respect to the threshold used, Petitioners assert the “straw project” against which the project was compared used different density and design to misleadingly conclude the project impacts would be insignificant. For example, with respect to traffic, the EIR concludes the project will result in a 42 percent reduction in vehicle miles traveled and CO₂e emissions per year when compared with the BAU. They contend such fictional “reductions” underlie the misleading information in the findings. They also contend that this hypothetical future community in the BAU bears no relationship to the existing physical environment and was concocted with assumptions designed to make the project appear sustainable by comparison.

Real Parties contend that the EIR compared the project’s estimated “new” GHG emissions to levels likely to be mandated under AB 32 and determined the project’s per capita emissions would meet AB 32 reduction requirements, citing AR 4:11:1602-1603, 1615; AR 12:14:5252. They then assert that the EIR compared the project’s GHG inventory against a BAU scenario of standard energy use buildings in California in the same climate zone as well as to annual California, national and global emissions and determined they would be less than those resulting from BAU scenarios, citing AR 4:11:1603-1610. They argue that the BAU comparison used represents the GHG emissions inventory “if things were continued to be built according to current standard.”⁷

⁷ On July 12, 2011, the City filed a notice of new case. It City contends that *Citizens for Responsible Equitable Environmental Development v. City of Chula Vista* (June 10, 2011) 197 Cal App. 4th 327 (ordered published July 11, 2011), supports its position regarding the threshold used by the City. Petitioners have not had an opportunity to address this case.

Nonetheless, in *CREED*, at issue was a mitigated negative declaration related to the demolition of an existing Target store and surrounding buildings to build a new Target store. The petitioner argued that the city erred by using AB 32 as a significance threshold. The Court found the city’s use of AB 32 to assess whether the project would result in significant climate change impacts was entitled to deference. The Court also concluded the City’s conclusion impacts would be less than significant was supported by substantial evidence in the record.

While the record supports the threshold of significance used, when the analysis regarding whether the threshold was met is reviewed, the Court cannot conclude that the finding the impact does not meet the threshold is supported by substantial evidence. The record does not contain enough relevant information sufficient to support the conclusion.

The EIR purported to assess whether the project was consistent with the AB 32 goal by achieving a 28.3% reduction of GHG emissions over 2020 forecasted BAU conditions – the threshold of significance. (AR 4:11:1538-1624.) However, it is unclear what exactly is the applicable “BAU” parameters being used to determine whether AB 32’s target of a 28.3 percent below BAU is being met. In its discussion the EIR states:

This analysis is intended to place the GHG emissions from the proposed [project] in the context with respect to intensity, consistency with AB 32 goals, and magnitude. For the intensity comparison, the built environment emissions were compared with that from a BAU comparison of standard energy use for buildings in California in the same climate zone. In addition, anticipated mobile emissions were compared to San Bernardino County and emissions savings from water usage in the development. For comparison with AB 32 goals, the GHG emissions were compared with the levels likely to be mandated under AB 32. Finally, the emissions from the project at build-out were compared to California and global GHG emissions in order to put the project’s emissions in a global context.

(AR 4:11:1602.)

The EIR then discusses a California-wide BAU scenario, stating that to meet AB 32 mandated goals, per capita emissions will have to be at 10.1 tonnes CO₂e. It concludes that the

In coming to this conclusion, the Court discussed that under the “business as usual” model for the existing Target store, 8,280 metric tons of emissions per year was calculated and for the proposed store 10,337 metric tons per year was calculated. BAU was consideration of the project without implementation of energy saving measures. Therefore, without any energy savings measures, the proposed Target store would increase greenhouse gas emissions. However, with the implementation of energy savings measures, the GHG emissions for the proposed store were reduced to 7,381 metric tons per year, or 2,956 metric tons less than “the business as usual” model for the proposed store. This resulted in a 29 percent reduction from business as usual, which met the AB 32 reduction target.

As will be discussed, such a straightforward conclusion cannot be made from a review of the record in this case.

proposed project's estimated emissions are 4.0 tonnes per capita per year. However, the EIR then states, "It is difficult to compare the proposed project's per capita emission to the AB 32 goals as it is not clear what fraction of the reduction will be achieved in which sectors, what portion will be achieved from energy efficiency, and what fraction will be achieved by renewable resources. This is discussed more fully below." (*Id.* at 1602-1603.) From what can be gathered, the EIR appears to concede that the per capita measure is not sufficient to evaluate whether AB 32 goals are being met.

The EIR proceeds to discuss its "BAU comparison." It states:

In order to put the GHG emission inventory into context and justify an improvement heading towards meeting the reduction goals set for 2020, it is necessary to compare the GHG emission inventory expected for the proposed project to the GHG emissions that would occur from a community that would be built today without the project design features and energy reduction commitments made by the Applicant and without the regulations that have been promulgated to comply with AB 32. This baseline comparison is referred to as the BAU scenario.⁸ This represents the GHG emission inventory if things were continued to be built according to current standards, and was the scenario that the CARB used to estimate the required 28.3 percent reduction in emissions. The major categories of the GHG emission inventory are considered separately. These include residential and non-residential buildings, mobile sources, municipal lighting, and water sources. The remaining categories include municipal vehicles and area sources. These categories represent a small fraction of the total inventory and do not have appropriate emission factors to quantify the reductions that are likely to occur at the proposed project compared to BAU.

(AR 4:11:1603.) The conclusion with respect to the analysis then states:

As a result of the various design elements incorporated into the project, the proposed LCRSP meets AB 32's goal of 28.3 percent below BAU overall. As shown in Table 4.7-33 (CO₂e Emissions from Electricity and Natural Gas Usage in Residential Dwelling Units), as designed, the project's homes are expected to be 18 percent more energy efficient than the current housing stock in California. The non-residential buildings are 13 percent more energy efficient than the average California non-residential buildings stock. Vehicular emissions from the project's residents are 43 percent less per dwelling unit than BAU. The

⁸ Petitioner focuses on the use of the term "baseline." However, in its context, the BAU scenario is not meant to calculate the change in the amount of emissions from the project – it is being used to assess whether AB 32 goals are met.

emission savings combined for the proposed project represent a 32.6 percent reduction from a BAU situation taking into consideration changes in emission factors due to implementation of the following two “Climate Change Scoping Plan” measures: (1) RPS; and (2) AB 1493 (Pavley) regulation.

It is yet unclear as to how to compare construction, vegetation change, municipal, and area emissions to AB 32-mandated goals. For the purposes of this comparison, differences between the vegetation change-related emissions in the proposed project scenario and the BAU scenario were annualized over a 40-year project lifetime. Emissions from construction, municipal sources, and area sources were included in the total inventory for both the proposed project and BAU scenarios but no differences between the two scenarios were quantified for these categories.

(AR 4:11:1624; *see also* 4:11:1627.) Therefore, the EIR concludes the emissions savings for the proposed project represents a 32.6 percent reduction from a BAU situation.⁹ (AR 1:9:287.)

However, how this 32.6 percent reduction was calculated is not clear from the discussion.¹⁰ The

⁹ The Statement of Overriding Considerations states:

Numerous “sustainable design features” are included in the proposed LCRSP. As a result of the various design elements incorporated into the project, the proposed LCRSP meets AB 32’s goal of 28.3 percent below “business as usual” (BAU) overall. As designed, the project’s homes are expected to be 18 percent more energy efficient than the current housing stock in California. The non-residential buildings are 13 percent more energy efficient than the average California non-residential buildings stock. Vehicular emissions from the project’s residents are 43 percent less per dwelling unit than BAU. The emission savings combined for the proposed project represent a 32.6 percent reduction from a BAU situation. Because the proposed LCRSP results in an improvement over the BAU-scenario equivalent to the 28.3 percent improvement necessary to achieve AB 32’s mandates, the project’s cumulative impact on GHG emissions and global climate change is considered less than significant.

(AR 1:9:287.)

¹⁰ Adding to the uncertainty is the fact the EIR uses inconsistent figures in discussing emissions. For example, Environmental Impact 7-11 finds that the proposed project will result in 256,432 tonnes of CO₂e one-time GHG emissions, annual emissions of 93,985 tonnes, and annualized total emissions of 100,396 tonnes per year. However, the discussion concludes annual emissions total 98,127 tonnes per year, one-time emissions total 256,432 tonnes per year, and annualized emissions total 104,538 tonnes per year. (AR 4:11:1538.) In a later discussion, the table cited to in support states one-time emissions total of 256,432 tonnes and annual project emissions total 98,059, and the total annualized emissions are 104,470 tonnes per year. (AR 4:11:1600 & Table 4.7-45.)

determination of whether a project may have a significant effect on the environment calls for careful judgment on the part of the public agency involved, based to the extent possible on scientific and factual data. “An EIR ‘must present information in such a manner that the foreseeable impacts of pursuing the project can actually be understood and weighed, and the public must be given an adequate opportunity to comment on the presentation before the decision to go forward is made.’” (*Sunnyvale, supra*, 190 Cal. App. 4th at 1388.) Although Petitioners have the burden to point to areas of deficiency, the discussion leaves the reader in the dark as to how the 32.6 percent reduction was arrived. (AR 4:11:1603-1604; 12:40:5233-5262.) Substantial evidence is not demonstrated to support this conclusion.

Therefore, the Court grants the writ of mandate with respect to the issue regarding GHG emissions. Although the City may establish the threshold of significance to be used, when the analysis is reviewed, the basis for the conclusion cannot be determined from the information in the record, and as a result, it is not supported by substantial evidence.

Traffic Impact

Petitioners contend that the EIR’s traffic analysis violates CEQA by improperly assessing the project’s traffic impacts against future conditions, instead of using existing conditions.

Exhaustion of Administrative Remedies Issue: The City asserts that Petitioners failed to exhaust their administrative remedies with respect to the issue of “traffic impacts,” because they

In the discussion of whether the threshold is met, it states that project’s estimated emissions are 100,396 per year or 4.0 tonnes per capita (based on an estimate of 24,539 residents). (AR 4:11:1603.) Later discussions estimate annualized emissions of 104,538 tonnes per year or 4.3 tonnes per capita (based on 24,539 residents). (AR 4:11:1610.) In the same discussion, the EIR states the proposed project has emissions of 98,127 tonnes per year or 4.3 tonnes per capita (based on 24,539 residents), which is not mathematically correct. (AR 4:11:1624.) While the differences are not substantial, they are not sufficiently explained.

failed to raise the issue during the comment period or the public hearing on project approval.¹¹ It argues that courts are clear that “the exact issue raised in the lawsuit must have been presented to the administrative agency,” quoting *Resource Defense Fund v. LAFCO* (1987) 191 Cal. App. 3d 886, 894 (*disapproved on other grounds in Voices of the Wetlands v. State Water Resources Control Board* (Aug. 15, 2011) 52 Cal. 4th 499). It then cites to other cases in which courts refused to consider arguments from petitioners whose exact arguments were not raised during the administrative process.¹²

Petitioners respond by arguing that less specificity is required to preserve an issue for appeal in an administrative proceeding than in a judicial proceeding, citing *Citizen’s Assn. for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal. App. 3d 151, 163. They assert that the issue of the use of hypothetical methods to reduce claimed traffic impacts was raised by a commenter, citing AR 24:48:9995. They also contend that Petitioner EHL complained about the EIR’s failure to compare the project against existing conditions, citing AR 39:191:15645-46, 15652-53. In its comments, EHL specifically notified the City of the CEQA requirement that impacts be assessed against existing conditions, not against some hypothetical future baseline with no basis in reality, citing AR 39:191:15645. They contend that the hypothetical future baseline comment was not limited to GHG impacts, but applied generally to

¹¹ The City also contends that Petitioners did not raise this specific traffic impact issue in the Petition.

¹² On June 14, 2011, the City filed a Notice of New Case Supporting the City’s Legal Position Re: Exhaustion of Administrative Remedies. It contends the case, *Citizens for Responsible Equitable Environmental Development v. City of San Diego* (May 19, 2011) 196 Cal. App. 4th 515, establishes that general unelaborated objections were not sufficiently specific to provide the agency with an opportunity to evaluate and respond to the objections. The Court also concluded that the exhaustion doctrine is to be followed strictly, especially when a party is represented by counsel at the administrative level.

all impact analyses. They argue that by raising the hypothetical future impacts issue, they provided the City with an “opportunity to act and to render litigation unnecessary.”

Under CEQA, exhaustion is required. (Pub. Res. C. § 21177.) Specifically, no “action or proceeding may be brought pursuant to Section 21167 unless the alleged grounds for noncompliance with this division were presented to the public agency orally or in writing by any person during the public comment period provided by this division or prior to the close of the public hearing on the project before the issuance of the notice of determination.” (Pub. Res. C. § 21177(a).) “That failure to exhaust administrative remedies is a bar to relief in a California court has long been the general rule.” (*Sierra Club v. San Joaquin Local Agency Formation Comm.* (1999) 21 Cal. 4th 489, 495.)

As the parties’ arguments demonstrate, courts have differed as to the degree of specificity with which issues must be raised at the administrative level to satisfy the exhaustion requirement. Some courts have required that the “exact issue” raised in the lawsuit must have been presented to the administrative agency. These courts have reasoned that this strict requirement is necessary to provide the agency with the opportunity to render the litigation unnecessary. (*Resource Defense Fund, supra*, 191 Cal. App. 3d at 894; *Sierra Club v. City of Orange* (2008) 163 Cal. App. 4th 523, 535-536.)

On the other hand, another court has stated that, although parties must “make known what facts are contested,” the fact that parties are generally not represented by counsel in administrative proceedings and cannot be held to knowledge of “the technical rules of evidence” should absolve them of the requirement to make technical legal objections. Accordingly, the court held that “less specificity is required to preserve an issue for appeal in an administrative

proceeding than in a judicial proceeding.” (*Citizens Assn. for Sensible Development of Bishop Area, supra*, 172 Cal. App. 3d at 163.)

Given this background of case law, the grounds for CEQA noncompliance must be raised with enough specificity that the administrative agency has a fair opportunity to consider the legal and factual questions before the petitioner raises those questions in court. As stated in a leading authority, 2 Kostka and Zischke, *Practice Under the California Environmental Quality Act* (CEB, 2nd ed. (1/11)) Issue Exhaustion, § 23.98, p. 1240:

Because it is the body responsible for hearing and resolving questions relating to the adequacy of the environmental document in the first instance, the lead agency must be given the opportunity to correct any factual or legal errors, develop additional evidence, and respond in the record to criticisms, before its actions are reviewed by the courts. A failure to give the lead agency such an opportunity by raising specific objections “would enable litigants to narrow, obscure, or even omit their argument, before the final administrative authority because they could possibly obtain a more favorable decision from the trial court.” *Tahoe Vista Concerned Citizens v. County of Placer* (2000) 81 Cal.App.4th 577, 594.... A project opponent cannot make a skeletal showing during the administrative process and then obtain a hearing on expanded issues in a reviewing court. *City of Walnut Creek v. County of Contra Costa* (1980) 101 Cal.App.3d 1012 [1019-1021].

Moreover, “[t]he petitioner bears the burden of demonstrating that the issues raised in the judicial proceeding were first raised at the administrative level. [Citation.]” (*Porterville Citizens for Responsible Hillside Development v. City of Porterville* (2007) 157 Cal. App. 4th 885, 909.)

When the record is reviewed, Petitioners have met the exhaustion requirement, even if Petitioners themselves did not raise the traffic impact issue. When EHL’s letter of June 18, 2010 is reviewed, it was not sufficiently specific with respect to traffic impacts to raise the issue. (AR 39:191:15641-15660.) The issue of improper impact analysis, as raised in EHL’s comments, was first raised in its specific discussion of inadequate analysis of GHG emissions. (AR 39:191:15644-15646.) The other discussion in EHL’s comments was directed to discussions of the impact of the project’s revetment on hydrology of Lytle Creek. (AR 39:191:15650-15654.)

In this discussion, EHL criticizes the EIR's reliance on "speculation and conjecture," in its conclusions of no significant environmental.

Nonetheless, Petitioners also point to comments made at the hearing by a commenter. (AR 24:48:9995.) The commentator is Dave Maskell. (*Id.*) When speaking, he stated he was continuing "Joe's presentation," and was going to "pick it up where [Joe] left off." (*Id.*) He then proceeds to discuss "Joe's statement" that no information has been provided showing how the city plans to provide for entering and exiting of the traffic safely on Riverside Avenue. (*Id.*) He discusses that [a]lthough there is hypothetical mitigation methods that will address these areas; he complains they have not been discussed with the public. He complains that adding more vehicles to Riverside Avenue will only worsen the traffic problems now experienced daily. He also complains about adding additional residents and businesses for which there is no calculation for the known amount of vehicles predicted to be added. (AR 24:48:9995-9996.)

When the reference to "Joe" is evaluated, it appears to be in reference to speaker Joe Chesley. (AR 24:48:9986-9988.) Mr. Chesley spoke shortly before Mr. Maskell. The record reflects that Mr. Chesley ran out of time in making his comments. (AR 24:48:9988.) Nonetheless, the record also reflects that Mr. Chesley did make written comments to the City regarding the EIR. (AR 15:15:6714-6715.) As part of his comments dated April 9, 2010, he raised the issue that the project would add substantial traffic and cause adverse impact to Riverside Ave. He stated that the impact has not been explained in any detail. He contended impacts should be lowered to less than before planned project levels. (AR 15:15:6715.) The City's response to this letter commented that:

Conditions at the intersections located along Riverside Avenue, a suburban surface street, determine the level of traffic impact along the corridor. As is standard traffic engineering practice, including for projects in the City, intersection traffic conditions were carefully analyzed. Table 4.6-12 (Project

Study Area and County CMP Intersections LOS Summary – Future [2030] Traffic Conditions with Project plus Mitigation) in the DEIR (p. 4.6-78) and Table 12 (intersection Level of Service [2010] with Project plus Mitigation in the TIA (TIA, Table 12, p. 85) presents a listing of intersection conditions following mitigations. As that table shows, none of the project traffic impacts, including those along Riverside Avenue, would be considered significant upon implementation of the recommended mitigation measure.

(AR 14:15:6409.) In addition, by letter dated May 26, 2010, Mr. Chesley made additional comments regarding “Transportation,” in which he commented that with respect to traffic “many references to specific data upon which the Planning Commission is supposed to rely in its planning process are incomplete.” (AR 38:158:15443.) He comments that no information has been provided showing how the City plans provide for entering and exiting of traffic safely onto Riverside Avenue. There also appears to be eight exits and entrances added to Riverside Avenue, yet the plan states under the summary of environmental impacts and level of significance, the areas are insignificant. In addition, hypothetical mitigations methods have not been discussed with the public. He complains that adding more vehicles, residents, and businesses will only worsen traffic problems.” (AR 38:158:15444.)

The comment to Mr. Chesley’s letter includes the statement, “The EIR thoroughly assesses the impacts of additional vehicle traffic on Riverside Avenue. Specifically, the EIR assessed traffic volumes using a level of service (LOS) analysis in 2030 in order to determine potential impacts at various key intersections. The EIR studied intersection impacts at nine intersections on Riverside Avenue and concluded that significant impacts could occur absent mitigation at two of these three intersections....” (AR 20:37:8516.)

When considered, Mr. Chesley’s comments regarding the traffic impact analysis are sufficient to be the City on notice of the traffic impact issue now being raised by Petitioners. Mr. Chesley’s objections fairly apprised the City that he took issue with the analysis of the traffic impact, which was sufficient to give the City an opportunity to respond by correcting any errors

it made in its traffic impact methodology or explaining why it had not erred. Therefore, the issue was sufficiently raised to meet the exhaustion requirement.

Traffic Impacts Issue: Petitioners assert that the traffic analysis fails to analyze the significance of the project's impact against existing conditions. Instead, it assumed a set of future conditions (new roads, future growth, etc.) and compared the project against the future conditions. It contends that as in *Sunnyvale, supra*, assessment the significance of impacts was never made against existing physical conditions.

The City contends that there is no merit to Petitioner's argument that traffic impacts were improperly assessed. It then asserts that even if this occurred, the City's traffic consultant has determined that if traffic resulting from the project was compared to existing conditions, impacts would still be found to be less than significant and no new mitigation measures would be required, citing to new evidence outside the administrative record. The City's brief also incorporates Real Parties' opposition on this issue.

Real Parties assert that this case does not resemble *Sunnyvale*. They contend the EIR compared future traffic volumes with the project against existing conditions to determine whether the LOS¹³ at various intersections would exceed the City's significance standards, citing AR 3:11:1393, 1398-1401, 1410-18; AR 6:12:2402, 2417. They contend that to put potential impacts in context, the EIR also compared future traffic volumes without the project against existing conditions. They argue that potentially significant impacts would occur at 22 locations with or without the project. Therefore, according to Real Parties, the EIR properly used a baseline of existing conditions to determine whether the project would create potentially significant traffic impacts. Despite this argument, they assert that "had anyone raised the issue

¹³ LOS means "level of service" and describes the quality of service as a function of delay. (AR 3:11:1376.)

that Petitioners now seek to litigate during the administrative process, the City's traffic consultant would have concluded that a comparison of project traffic volumes to existing conditions would not have change the EIR's ultimate conclusions about potentially significant traffic impacts," citing to the new evidence. (RPII Opp. p. 10:16-19.)

Petitioners reply that Real Parties do not disclose that the EIR's assessment of the future LOS with the project was never done using the existing transportation network; instead it assumed construction of a hypothetical future expanded network, underestimating the severity of the projected declines in LOS. As for the contention that even if considered the result would be the same, they contend that this essentially concedes the proper analysis was not done. In addition, "new analysis" is precluded, and a revised EIR recirculated for public review and comment is required.

In *Sunnyvale, supra*, 190 Cal. App. 4th 1351, at issue was the approval of a proposed road construction project and certification of the final EIR. In the section concerning transportation impacts, the EIR described the existing roadway network. It also described future transportation conditions in the year 2020 both with and without the proposed construction. The draft EIR assumed numerous roadway improvements in the project area to be in place by the year 2020 regardless of the proposed project. (*Id.* at 1361.) The projected LOS in 2020 with and without the project was compared to determine the impact on intersection operations. The EIR concluded that the project would cause a significant deterioration in operations at one intersection during p.m. peak hours and identified a mitigation measure. No other significant impacts were found. (*Id.* at 1362.) At issue was the failure to use existing physical conditions in the affected area, instead of traffic conditions projected for the year 2020, as the baseline. The

Court found that the failure to assess traffic impacts against the existing conditions resulted in the failure to proceed in the manner required by law. (*Id.* at 1377-1383.)

In this case, the EIR discussed existing traffic volumes and LOS for study area intersections and freeway segments. It then proceeded to discuss future traffic forecasts and modeling. (AR 3:11:1371-1392.) Modeling scenarios developed and analyzed included the following:

- **Existing (2007) conditions.** This scenario replicates existing traffic conditions based on Year 2007 socioeconomic data and existing roadway network conditions. Future growth estimates are determined by comparing traffic model volumes from the future “without project” conditions and existing (2007) conditions.
- **Future (2030) “without project” conditions.** The combined effect of future regional growth in vehicle trips (based on the greater of the EVT¹⁴ growth projections and the growth from known, proposed, or potential projects in the study area), excluding the land-use changes due to the project itself, establish the future conditions that would occur without the development of the proposed project through Year 2030.
- **Future (2030) “with project” conditions.** The combined effect of future regional growth in vehicle trips (including EVT¹⁴ forecasts and information on known, proposed, or potential projects in the study area), including the land-use changes due to the project itself, establish the future conditions that would occur with the development of the proposed project through Year 2030.

(AR 3:11:1384.)

As in *Sunnyvale*, the threshold of significance in which a proposed project would be deemed to produce a significant traffic impact included numerous considerations, including, if the project-related activities were to: “[c]ause an increase in traffic that is substantial in relation to the existing traffic load and capacity of the street system (i.e., result in a substantial increase in either the number of vehicle trips, the volume-to-capacity ratio on roads, or congestion at intersections);” and “[e]xceed, either individually or cumulatively, a level of service standard

¹⁴ This is the City of San Bernardino’s local refinement of the regional travel demand model called “East Valley Transportation Model” (“EVT¹⁴”). (AR 3:11:1377.)

established by the County congestion management agency for designed roads or highways.” (AR 3:11:1393.)

In the EIR, Table 4.6-9 summarizes conditions for intersection traffic volumes as existing, as projected in 2030 without project conditions, and as projected in 2030 with project conditions. (AR 3:11:1410-1414.) Analyzed is the volume-to-capacity (V/C) ratio, delay, and LOS (based on an A – F scale).¹⁵ However, contrary to Real Parties’ assertion, the significance of traffic impact is based on analysis of projected Year 2030 road conditions. The EIR states: “As indicated, based on the analysis of Year 2030 conditions, a significant traffic impact would result at 22 study intersections under the “with project” conditions prior to mitigation.” (AR 3:11:1399.) It then states that feasible roadway improvements and traffic reduction measures designed to mitigate significant traffic impacts of the project at these intersections are identified and described and the implementation of mitigation measures will bring all significantly impacted project area and CMP intersections to an acceptable level of service. (*Id.*)

With respect to freeway segments, Table 4.6-10 only considered the freeway transportation system for 2030 with the project and without the project. (AR 3:11:1415-1418.) Included in the analysis were County CMP freeway improvements approved and reasonably assured to be implemented by 2030. (AR 3:11:1392.) In addition, the construction of several new freeway ramps was included in all future scenarios. (AR 3:11:1392.)

As Petitioners point out, the problem with the models used to assess 2030 traffic conditions is that the assessment of the LOS with the project was not done using the existing transportation network and assumed the construction of a hypothetical future expanded

¹⁵ The LOS scale is explained at Table 4.6-3 (AR 3:11:1376.)

network.¹⁶ When reviewed, the EIR does not compare “existing physical conditions” without the project to the conditions expected to be produced by the project. “Without such a comparison, the EIR [does] not inform decision makers and the public of the project’s significant impacts, as CEQA mandates.” (*CBE, supra*, 48 Cal. 4th at 328.) Such approach contravenes CEQA, regardless of whether the “agency’s choice of methodology for projecting future conditions was supported by substantial evidence.” (*Sunnyvale, supra*, 190 Cal. App. 4th at 1380-1381.)

Use of an incorrect baseline for assessing the impacts of a proposed project is generally treated as a prejudicial abuse of discretion. (*Id.* at 1386.) In this respect, both the City and Real Parties contend that that even if the correct standard was applied, the result would have been the same. Relying on new evidence in the form of the declaration of a senior transportation engineer, they contend that after comparing estimated project traffic volumes to the existing conditions, the EIR’s ultimate conclusions about potentially significant impacts would not have changed. (Rhyner Decl. ¶ 9.) However,

“[T]he conventional “harmless error” standard has no application when an agency has failed to proceed as required by the CEQA.’ [Citations] Thus, even if a complete analysis of the project’s traffic and related impacts on the existing environment would have produced no findings of different or greater significant environmental effects than the city found based on the anticipated traffic conditions in 2020 and such analysis would not have altered the City Council’s decisions, such

¹⁶ This conclusion is confirmed by the declaration of George Rhyner, Senior Transportation Engineer at Crain & Associates, which the City and Real Parties offer in support of their position. He states that prior to approval, he was not informed that a comment had been received criticizing the use of only future traffic conditions in assessing the project’s potential traffic impacts. (Rhyner Decl. ¶ 3.) He states that in response to Petitioners’ assertion that the EIR should have compared traffic resulting from the project against existing condition, he performed an analysis of the Project’s traffic impacts against those existing traffic conditions included in the EIR’s traffic impacts analysis. (Rhyner Decl. ¶ 4.) He states that existing 2007 conditions were used in this new analysis and traffic volumes generated by the project to existing conditions, using existing routes were compared to form the “Existing Plus Project” volumes. (Rhyner Decl. ¶ 6.) He concludes that comparing the project traffic volumes to existing conditions would not have changed the EIR’s ultimate conclusions about potentially significant traffic impacts. (Rhyner Decl. ¶ 9.)

circumstances do not establish a lack of prejudice for purposes of CEQA review. [Citations.] **As the California Supreme Court has stated, “courts are generally not in a position to assess the importance of the omitted information to determine whether it would have altered the agency decision, nor may they accept the post hoc declarations of the agencies themselves. [Citations.]”** A “determination of whether omitted information would have affected an agency’s decision” is “highly speculative, an inquiry that takes the court beyond the realm of its competence.” [Citation.]

(*Sunnyvale, supra*, 190 Cal. App. 4th at 1387 (emphasis added; citations omitted).)

Therefore, the Court finds Petitioners did not fail to exhaust their administrative remedies with respect to the traffic impact issue. The Court grants Petitioners’ writ of mandate, because the City failed to proceed in the manner required by law in assessing traffic impacts.

Mitigation for Potentially Catastrophic Seismic Impacts

Petitioners contend that with respect to mitigating seismic events, Mitigation Measures 3-1 to 3-3 rely on vague measures containing no specific commitments to take particular action or to adhere to specific design standards. They assert these measures rely on the unfettered discretion of a future City Engineer. They argue that reliance on the unfettered discretion of a City official to determine adequate mitigation violates CEQA, citing *Endangered Habitats League v. City of Orange* (2005) 131 Cal. App. 4th 777 (hereinafter “EHL”).

In opposition, the City contends that the project establishes 103 planning areas across the project site, each with a set acreage and maximum amount of dwelling units and non-residential square footage. However, the exact layout has yet to be determined within each planning area. It asserts that Mitigation Measures 3-1 to 3-3 do not improperly defer discretion to the City Engineer. CEQA does not bar absolutely deferred mitigation; instead, all that is required is that specific performance criteria for the mitigation measure be identified at the time of project approval, citing *Sacramento Old City Assn. v. City Council of Sacramento* (1991) 229 Cal. App.

3d 1011, 1029 (hereinafter “SOCA”). It also contends that details of how such mitigation will be accomplished under identified measures can be deferred pending completion of a future study, citing *Cal. Native Plant Soc’y v. City of Rancho Cordova* (2009) 172 Cal. App. 4th 603, 621.

The City argues that Mitigation Measures 3-1 to 3-3 require more detailed site-specific geotechnical studies prior to the approval of later subdivision maps, commencement of on-site grading, issuance of any building permits, and construction infrastructure improvements. It contends that this is consistent with *Cal. Native Plant Soc’y*, where the agency identified specific criteria to mitigate the project’s impact, and thus, “was entitled to rely on the results of a future study to fix the exact details of the implementation of” those measures. It argues that unlike *EHL*, Mitigation Measures 3-1 to 3-3 do not permit the City Engineer to use his discretion to determine whether the required site-specific geological and geotechnical studies meet undefined standards. Rather, substantial evidence in the record demonstrates that studies to be performed prior to implementation of the project must comport with specific requirements, including building code design standards, Special Publication 117, and City and County ordinances.

On May 23, 2011, the City filed a Notice of New Case in Support of its position that seismic mitigation impacts are sufficient, *Oakland Heritage Alliance v. City of Oakland* (May 19, 2011) 195 Cal. App. 4th 884. It contends that the Court of Appeal concluded that imposition of measures that require a site-specific geotechnical study after a project’s approval to define what seismic protections to include, which the city’s building department would then review and approve using building and seismic code standards, was acceptable. As for deferred mitigation, the Court stated, “Although final design of the structures, including seismic safety design, is deferred until a later date, the Revised EIR gives adequate assurance that seismic impacts will be mitigated through engineering methods known to be feasible and effective. Accordingly, we

conclude the Revised EIR does not impermissibly defer mitigation of seismic impacts,” *Id.* at 33. The City contends that as in *Oakland Heritage Alliance*, it did not defer mitigation.

Petitioners reply that the City acknowledges that deferred mitigation must be accompanied by a commitment to specific performance criteria at the time of project approval. They assert that the dispute centers on whether the City followed CEQA’s procedural mandates by making such a commitment in its mitigation measure, citing *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal. App. 4th 70, 90. They argue that none of the standards the City asserts as applying to seismic Mitigation Measures 3-1 to 3-3 is included in the language of the mitigation measures themselves; instead, they come from discussions in the text of the EIR and from recommendations in technical reports. Therefore, they argue, there is no commitment in the seismic mitigation measures to adhere to specific performance criteria articulated at the time of project approval as required.

As for *Oakland Heritage Alliance*, they contend the case supports their position. They argue that the trial court had found that that mitigation measures “did not commit the City to implementing any particular building technique, follow any specified standard (other than Building Code requirements), or incorporate recommendations made by [the project’s technical consultants].” (*Oakland Heritage Alliance, supra*, 195 Cal. App. 4th at 891.) As a result, the City revised the text of its seismic mitigation measures by requiring such measures be taken. They argue it was the revised mitigations measures that the Court of Appeal reviewed and found adequate. (*Id.* at 906-912.)

A mitigation measure is designed to minimize a significant environmental impact. (Pub. Res. C. §§ 21002.1(a), 21100(b)(3); Guidelines, § 15126.4(a)(1).) It may reduce or minimize a significant impact without avoiding the impact entirely. (Guidelines, § 15370(b).) Guidelines, §

15126.4(a) sets forth the general requirements of mitigation measures. “Formation of mitigation measures should not be deferred until some future time.” (Guidelines, § 15126.4(a)(1)(B).) “However, measures may specify performance standards which would mitigate the significant effect of the project and which may be accomplished in more than one specified way.” (*Id.*) In *SOCA, supra*, 229 Cal. App. 3d 1011, 1028-1029, the Court stated:

[F]or kinds of impacts for which mitigation is known to be feasible, but where practical considerations prohibit devising such measures early in the planning process ..., the agency can commit itself to eventually devising measures that will satisfy specific performance criteria articulated at the time of project approval. Where future action to carry a project forward is contingent on devising means to satisfy such criteria, the agency should be able to rely on its commitment as evidence that significant impacts will in fact be mitigated.

Therefore, “[d]eferred 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. [Citation.] On the other hand, an agency goes too far when it simply requires a project applicant to obtain a biological report and then comply with any recommendations that may be made in the report. [Citation.]’ [Citation.]” (*EHL, supra*, 131 Cal. App. 4th at 793.) “If mitigation is feasible but impractical at the time of a general plan or zoning amendment, it is sufficient to articulate specific performance criteria and make further approvals contingent on finding a way to meet them. [Citation.]” (*Id.*)

In *EHL, supra*, the Court found deferred mitigation for a mitigation measure related to noise, supply depots, and vehicle staging areas. The EIR provided “before a grading permit is issued, the developer must submit an acoustical analysis describing the ‘exterior noise environment’ and ‘preliminary mitigations measures, if required.’ Before a building permit may be issued, another acoustical report must be submitted to demonstrate structures have been designed to meet ‘exterior and interior noise standards’ satisfactory to the manager of the county’s building permit division. That individual must also be satisfied the developer will place

supply stockpiles and vehicle staging areas ‘as far [away] as practicable.’” The Court found such measure to be inadequate, because “[n]o criteria or alternatives to be considered are set out. Rather, this mitigation measure does no more than require a report be prepared and followed, or allows approval by a county department without setting any standards.” (*Id.* at 793-794.)

In this case, with respect to “Geology and Soils,”¹⁷ the EIR describes federal, state, county, and city regulations, codes, and requirements with respect to earthquake and seismic hazards. (AR 3:11:941-970.) It also outlines seismic hazards investigations, prior studies, and surveys. (AR 3:970-976, 979-1032, 1032-1034.) In addition, a number of geotechnical studies were conducted to consider the geotechnical feasibility of the project. (AR 3:11:1034-1043.) Geotechnical studies concluded that the project’s development was feasible from a seismic perspective. However, the studies’ conclusions were conditioned on their recommendations being incorporated in the planning, design, grading and construction. (AR 3:11:1042-1043.)

The EIR discussed that the project could result in potentially significant construction and operational impacts related to seismic, geological, liquefaction, and other geotechnical issues (Environmental Impacts 3-1, 3-2, 3-4, 3-6). (AR 1:11:236-245; AR 3:11:1045-1052, 1053-1054, 1065-1066.) For example, under “Seismic Considerations,” the EIR found that “During the life of the project, lands and structures within the project site will be subject to periodic seismic events from localized and regional earthquake faults, producing the potential for damage to property, to the improvements located thereupon, and resulting in health and safety risk to site occupants.” (AR 3:11:1065.) As a result the impact was found “[p]otentially significant unless mitigation incorporated.” (*Id.*)

¹⁷ As defined in the EIR, “‘Geology and soils’ constitutes a broad categorization generally relating to surface and subsurface geology, geotechnical, and seismic considerations, including soils and non-fuel mineral resources.” (AR 3:11:940.)

Mitigation Measures 3-1 through 3-3, identified to mitigate these seismic impacts, state:

- **Mitigation Measure 3-1.** Unless otherwise waived or superceded, all development activities conducted on the project site shall be consistent with the recommendations contained in the following studies: (1) “EIR Level Geotechnical Review, Lytle Creek Ranch Land Use Plan, City of Rialto, San Bernardino County, California” (GeoSoils, Inc., May 22, 2008) and “Updated Geological and Geotechnical EIR Level Review of Documents Pertaining to the Lytle Creek Ranch Land Use Plan, City of Rialto, County of San Bernardino, California” (Pacific Soils Engineering, Inc., September 3, 2008); or (2) such alternative recommendations as may be approved by the City Engineer based on the findings of a project-specific geologic and geotechnical investigation.
- **Mitigation Measure 3-2.** Prior to the approval of a tentative “B” level subdivision map for residential or commercial development (excluding any “A” level subdivision map for financing purposes only), a subsequent site-specific and design-specific geotechnical and geologic report shall be submitted to and, when acceptable, approved by the City Engineer documenting the feasibility of each proposed use and the appropriate geotechnical, geologic, and seismic conditions associated with that use. Unless otherwise modified, any conditions, recommendations, or mitigation measures contained therein, including the imposition of specified setback requirements for proposed development activities within Alquist-Priolo Earthquake Fault Zones, shall become conditions of approval for the requested use.
- **Mitigation Measure 3-3.** In recognition of the potential lateral forces exerted by predicted seismic activities, no habitable structures that may be located on the project site and which are located within the defined Alquist-Priolo Fault-Rupture Hazard Zones shall be over two stories in height. Habitable structures of greater height within defined Alquist-Priolo Fault-Rupture Hazard Zones may only be authorized following the submittal of a subsequent site-specific and design-specific geotechnical and geologic report acceptable to the City Engineer and, at a minimum, the imposition of both the recommendations contained therein and such additional conditions as may be imposed by the City Engineer.

(AR 3:11:1069.) The EIR states:

Although a geotechnical feasibility assessment has determined that the project can be developed from a geologic, geotechnical, and seismic perspective subject to the incorporation of those general recommendations (or their equivalent) contained therein, more detailed parcel-specific and design-specific studies will be required prior to the approval of final subdivision maps, commencement of any on-site grading operations, the issuance of any building permits, and construction of any infrastructure improvements. Any conditions, recommendations, or mitigation measures contained therein, or their equivalent, as may be determined by the City Engineer, will be imposed as conditions of map recordation and/or permit issuance. Preparation of more detailed geotechnical investigations and incorporation of those

conditions, recommendations, and mitigation measures, as identified therein, will reduce potential geologic, geotechnical, and seismic impacts to below a level of significance.

(AR 3:11:1069-1070.)

In support of its contention that specific performance standards are built into each of the measures, the City cites to other parts of the EIR in which items such as seismic shaking and ground deformation were discussed. Statements are made that such effects can be mitigated by proper design and adherence to applicable building codes, as well as current standards of practice. (See AR 3:11:1049-1050 (discussing Environmental Impact 3-1); AR 8:13:3148; AR 3:11:1042-43 (discussing study conclusions); AR 8:13:3151-53.) When reviewed, such statements are made as part of:

- Discussions of GeoSoils, Inc.'s ("GSI") May 22, 2008 report and recommendations, including recommendations that for mitigation of debris flows, flooding, inundation, and seiching should be in accordance with current building code and standards of practice and in accordance with the recommendations of the project design civil engineer. (AR: 3:11:1049-1050.)
- Recommendations of Pacific Soils Engineering, Inc.'s (PSI) September 3, 2008 report stating, "[S]ite-specific geotechnical investigation(s) must be carried out in accordance with standards set forth in the current codes and standards of practice That is 2007 CBC design, Special Publication 117, and local (City/County) ordinances must be complied with and a similar statement should be included in the EIR as part of the mitigation process." (AR 8:13:3148.)
- Discussions of conditions enumerated in GSI's geotechnical review and PSI's third-party assessment that recommendations should be included as part of the mitigation process. (AR 3:11:1042-1043; AR 8:13:3151-3153.)

However, such recommendations are not incorporated in the mitigation measures as required conditions for approval. For example, Mitigation Measure 3-1 provides that development activities conducted on the project site be consistent with recommendations in GSI and PSI's studies, "or such alternative recommendations as may be approved by the City Engineer based on the findings of a project-specific geological and geotechnical investigation."

(Emphasis added.) Therefore, even though the GSI and PSI recommendations were referenced, approval can be made without any reference to these recommendations.

Measure 3-2 states that prior to approval of a tentative “B” level subdivision map for residential or commercial development, a subsequent site-specific and design-specific geotechnical and geological report shall be submitted to and, when acceptable, approved by the City Engineer. Conditions, recommendations or mitigation measures “*contained therein*,” shall become conditions of approval. The conditions being referred to are those in the subsequent site-specific and design-specific geotechnical and geological report.

Finally, Measure 3-3 discussing habitable structures greater than two stories in Alquist-Priolo Fault-Rupture Hazard Zones are authorized following the submission of a site-specific and design-specific geotechnical and geological report acceptable to the City Engineer and impositions of the recommendations in such report and any additional conditions as imposed by the City Engineer.

Contrary to the City’s contentions, the Mitigation Measures do not require that the subsequent studies comport with specific requirements or standards. Instead, the requirements could be those deemed acceptable to the City Engineer at the time and any such additional conditions he or she may impose. There is no requirement that future studies or approval comport to any specific standards, such as building codes, design standards, Special Publication 117, City/County ordinances, or that the City Engineer is bound by such standards. All that may be required is that applicant obtain a subsequent report and when deemed acceptable by the City Engineer, the conditions imposed in the report be complied with. Such mitigation measures do not commit the City to implementing any particular building technique, following any specified standard, or incorporating the recommendations of the GSI and PSI reports. (*See Oakland*

Heritage Alliance, supra, 195 Cal. App. 4th at 889-892.) The Mitigation Measures fail to establish performance standards that will ensure adequate mitigation measures are implemented. (*EHL, supra*, 131 Cal. App. 4th at 793-795.) While the EIR identifies proposed conditions and discusses regulatory schemes to ensure seismic safety, the mitigation measures do not provide adequate assurance that seismic impacts will be mitigated through known feasible and effective mitigations methods. (*See Oakland Heritage Alliance, supra*, 195 Cal. App. 4th at 912.)

Therefore, the Court grants the writ of mandate because the EIR's mitigation measures with respect to seismic hazards (Measures 3.1 to 3.3) improperly deferred mitigation. The City failed to proceed as required by law.

Fire Impact Mitigation

Petitioners present a similar argument with respect to fire impact mitigation measures. Petitioners assert that fire impact mitigation measures improperly relied on an offer by the applicant to negotiate the terms of mitigation sometime in the future. They contend there are no objective standards or other specific performance criterion identified. In addition, there is no commitment to meet any objective standard or other specific performance criterion, such as the National Fire Protection Association's ("NFPA") response times (NFPA 1710). Instead, such criteria can be disregarded in lieu of undefined future actions acceptable to the Rialto Fire Department ("RFD") or jurisdictional agency.

With respect to fire protection, at full project build-out, the project was found to have a potentially significant effect unless mitigation was incorporated. A portion of the project to be located in Neighborhood I is within the County-approved "Lytle Creek North Planned Development Project." (AR 2:11:424.) As a condition of that project, developers are required to

construct San Bernardino County Fire Protection Station 81. (AR 2:11:456, 4:11:1760.) The EIR states:

Pending the commencement of operation of SBCFD Station 81, because adequate response times to Neighborhoods I and IV cannot be reasonably assured, a mitigation measure[] (Mitigation Measure 9-4) has been formulated which would effectively serve to restrict development within Neighborhoods I and IV until such time as SBCFD Station 81 were to commence operation, alternative fire protection and emergency response facilities were to be provided, or evidence of adequate and appropriate services and compensatory fire protection could be provided to the satisfaction of the RPD or the agency with fire protection and emergency services jurisdiction over that area. An additional mitigation measure (Mitigation Measure 9-5) obligating payment of applicable fees and imposing such additional requirements as may be reasonably imposed by the RFD is included herein. Implementation of those measures would reduce project-related impacts on the RFP to a less-than-significant level.

(AR 1:9:301; AR 4:11:1761.) Mitigation Measures 9-4 and 9-5 state:

- **Mitigation Measure 9-4. Fire Protection.** Prior to the issuance of building permits for any habitable use in Neighborhoods I and IV, the Applicant shall demonstrate to the satisfaction of the RFD and/or to the agency with fire protection and emergency service jurisdiction over that area that either: (1) NFPA 1710 response standards can and will be satisfied prior to the issuance of any occupancy permits within those areas; or (2) although NFPA 1710 response standards cannot be satisfied, that alternative actions, measures, and/or design features, acceptable to the RFD and/or the jurisdictional agency, have been incorporated into the project's development plans and/or habitable uses as to constitute an acceptable response standard for those areas.
- **Mitigation Measure 9-5. Fire Protection.** The Applicant shall take such actions and pay such fees as may be reasonably imposed by the RFD to ensure the timely provision of adequate and appropriate fire protection and emergency services to the LCRSP and the uses authorized therein. This measure neither precludes the Applicant from suggesting alternative actions and/or fees which can be demonstrated to result in the attainment of those same or similar objectives nor obligates the RFD to accept those alternative measures and/or fees in lieu of those identified by the RFD. If consensus cannot be reached between the RFD and the Applicant, the City Council shall establish the actions and fees applicable to the proposed project.

Should the City subsequent adopt an impact fee program for fire protection services, unless a substitute measure(s) is imposed by the City, payment of applicable impact fees would effectively mitigation project-related impacts upon fire protection services and serve to fulfill the Applicant's obligations hereunder.

(AR 4:11:1787.)

In opposition, the City contends there is no deferred mitigation, because Mitigation Measure 9-5 is a fee-based mitigation measure, which is appropriate under CEQA when linked to a specific program, which this measure is. It asserts that under the Mitigation Fee Act (Gov. Code §§ 66000-66025), the City adopted measures permitting the collection of a “development impact fee” for fire facilities, citing AR 4:11:1757 and Rialto Mun. Code, ch. 3.60.¹⁸ It contends that Mitigation Measure 9-5 addresses the Applicant’s payment of this impact fee. It also contends that the Applicant has already committed to paying fire protection impact fees in conjunction with implementation of the project. It asserts that after publication of the DEIR, the City and Applicant negotiated a Pre-Annexation and Development Agreement regarding the project, which the City approved on July 27, 2010, citing AR 1:8:97-191; 22:40:9191. It contends the Agreement requires the Applicant to pay fire protection impact fees “in excess of the fees currently charged by the City for other development within the City,” and requires such fees to be paid concurrently with the issuance of a building permit and “calculated based upon the number of residential units or square footage of non-residential development included in such building,” citing AR 1:8:99, 122, 128 and 181. It asserts there is no unfettered discretion to determine whether fees will be paid, because Mitigation Measure 9-5 requires an impact fee.

When reviewed, the fire impact mitigation measures are deferred mitigation measures. As found by the City, mitigation measures are necessary pending the commencement of the proposed fire station and because adequate response times to Neighborhoods I and IV cannot be reasonably assured. (AR 1:9:301; 4:11:1761, 22:40:9190-9191.) Mitigation Measure 9-4 addresses this by stating the applicant must comply with NFPA 1710 or, if such standards cannot

¹⁸ The City requests the Court take judicial notice of Rialto Municipal Code, Chapter 3.60 – Fire Protection Services Development Fee. Petitioners do not oppose the request. The Court grants the request under Evidence Code § 452(b).

be satisfied, alternative actions and measures acceptable to the RFD or other agency having jurisdiction over fire safety. As discussed in the EIR, NFPA establishes organization guidelines followed by many fire departments, including the San Bernardino County Consolidated Fire District and the RFD. (AR 4:11:1671.) With respect to structural fires, NFPA sets forth responsive time objectives that fire department shall establish. The fire department's performance objective may be no less than 90 percent for the achievement of the responsive time objectives in NFPA 1710. (*Id.*)

When considered, no mitigation performance standard has been incorporated into Measure 9-4. Even though it acknowledges NFPA 1710 is a standard to be followed, Measure 9-4 then provides that if such standard cannot be achieved, sufficient mitigation may exist if acceptable to the RFD or other jurisdictional agency. No standard for the RFD or other agency to consider is provided. In addition, when read in conjunction with Mitigation Measure 9-5, the required action in Measure 9-4 becomes even more unclear.

Measure 9-5 is not exclusively a fee-based mitigation measure. It states, "The Applicant shall take such actions and pay such fees...." (AR 4:11:1787.) When read with respect to "actions," it states that if the RFD requires particular actions, the applicant may propose alternatives, and if a concession cannot be agreed on, the City Council shall establish "actions" applicable to the proposed project. This provision potentially annuls Mitigation Measure 9-4. In addition, with respect to fees, while the City asserts that it does not have unfettered discretion to determine what fees will be paid given the Municipal Code, no such standard for fees is established. Measure 9-5 states that "[i]f the City later adopts an impact fee program for fire protection services, unless a substitute measure(s) is imposed by the City, payment of applicable impact fees would effectively mitigate project-related impacts."

Therefore, the Court grants the writ because the EIR's mitigation measures with respect to fire impact (Mitigation Measures 9-4 to 9-5) improperly deferred mitigation. The City failed to proceed as required by law.

Threshold of Significance to Assess Biological Impacts

Petitioners contend that with respect to the San Bernardino Kangaroo Rat (SBKR) the EIR concluded the impact was insignificant by adopting an impermissibly lenient significance threshold standard that focused on local "extirpation" of listed species instead of the "substantial effect" threshold contained in the CEQA Guidelines, citing AR 3:11:1310.¹⁹ Under Guidelines, § 15065(a)(1), a project will have a significant effect on the environment if:

(1) The project has the potential to substantially degrade the quality of the environment; substantially reduce the habitat of a fish or wildlife species; cause a fish or wildlife population to drop below self-sustaining levels; threaten to eliminate a plant or animal community; substantially reduce the number or restrict the range of an endangered, rare or threatened species; or eliminate important examples of the major periods of California history or prehistory.

They contend that neither the EIR's articulated threshold nor the assessment of impacts even address this criterion, citing AR 3:11:1263, fn. 76. Specifically, they argue the study did not address the criterion of whether the impact would substantially "restrict the range" of the SBKR. Instead, the EIR adopted a *de facto* "drop below self-sustaining levels" threshold standard that

¹⁹ This statement is incorrect; the EIR did not find the impact on the SBKR was insignificant. It found the impact potentially significant unless mitigation was incorporated. (AR 3:11:1293.) The page cited to by Petitioners in support states, "In recognition of the designated status of this sensitive species, permanent impacts to about 140.6 acres and temporary impacts to 41.0 acres of SBKR-occupied habitat would be deemed potentially significant and, if avoidance where not possible, compensatory resources would be required to compensate for the loss of this occupied habitat, including the taking of those SBKR that reside within that habitat. A mitigation measure (Mitigation Measure 5-7) has been formulated addressing project-related impacts on SBKR-occupied habitat within the LCRSP study area.... Implementation of the recommended mitigation measure will reduce project-related impacts on SBKR to a less-than-significant level." (AR 3:11:1310.)

violates CEQA. Petitioners contend that under *EHL, supra*, 131 Cal. App. 4th at 793, the use of an erroneous legal standard is a failure to proceed in the manner required by law.

In opposition, the City incorporates the Real Parties' argument on this issue. Real Parties argue that the EIR applied the proper significance thresholds to the SBKR impacts and the conclusions are supported by substantial evidence. They contend that the City's expert evaluated the significance of impacts using the standard set forth in Guidelines, § 15065(a)(1). They argue that although the thresholds articulated used some different wording from the Guidelines, the effect and application is the same. They contend Pub. Res. Code § 21001(c) and Guidelines, § 15065(a)(1) are built into the definition of "substantial adverse effect," used to assess biological impacts, citing AR 3:11:1263-1264; 10:13:4534-4538. They assert that for the SBKR, the EIR's initial determination that impacts would be potentially significant without mitigation specifically takes into account the potential that the project could restrict the SBKR's range.

In reply, Petitioners contend the proper standard was not applied. They argue that when the Biological Resources Assessment's technical analysis is reviewed, it only addressed the standard of whether the SBKR would drop below "self-sustaining levels," in assessing cumulative impacts, citing AR 10:13:4590. They also contend that even if the EIR articulated the proper threshold of significance, the record does not support the conclusion that the proper threshold was even applied. They assert that the EIR's much vaunted mitigation program does not provide substantial evidence that the project will not exceed the thresholds of significance. They argue that reliance on uncertain mitigation directly contravenes the Guidelines threshold's recognition that a project's mere "potential" to reduce the numbers or restrict the range of an endangered species mandates a significance finding.

“An EIR must identify and discuss ‘all significant effects on the environment’ of a proposed project. (Pub. Resources Code, § 21100, subd. (b)(1); CEQA Guidelines [] § 15126(a).)” (*EHL, supra*, 131 Cal. App. 4th at 792 (footnote omitted).) With respect to wildlife, Pub. Res. Code § 21001(c) provides that it is the policy of the State to “[p]revent the elimination of fish or wildlife species due to man’s activities, insure that fish and wildlife populations do not drop below self-perpetuating levels, and preserve for future generations representations of all plant and animal communities and examples of the major periods of California history.”

Assuming the threshold set forth by Petitioners is correct, it is not demonstrated that the City applied an impermissibly lenient threshold to assess biological impacts. In *EHL, supra*, the EIR set out a “threshold of significance” to determine whether the project caused significant environmental impacts on biological resources. “Its test [was] that a significant impact would be identified [if] there [was] a ‘substantial effect’ on enumerated biological resources.” However, “substantial effect” was defined to mean a “significant loss or harm of a magnitude which ... 1) would cause species or a native plant [or] animal community to drop below self-perpetuating levels on a statewide or regional basis; or, 2) would cause a species to become threatened or endangered.” (*EHL, supra*, 131 Cal. App. 4th at 792-793.) The Court found that the standard effectively limited significant environmental impact only to reducing plant or animal communities below statewide or regional self-perpetuating levels or making a species threatened or endangered. It stated, “The proper standard ... is considerably broader.” (*Id.*)

Here, the EIR provided a threshold of significance with respect to biological resources that states in relevant part:

[T]he proposed project would normally be deemed to produce a significant or potentially significant biological resource impact if the project or if project-related activities were to:

- ◆ Have 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 CDFG or USFWS.
- ◆ Have a substantial adverse effect on a riparian habitat or other sensitive natural community identified in local or regional plans, policies, regulations, or by the CDFG or USFWS.
-
- ◆ Interfere substantially with the movement of any native resident or migratory fish or wildlife species or with established native resident or migratory wildlife corridors or impede the use of native wildlife nursery sites.²⁰

(AR 3:11:1263 (footnotes omitted).) "Substantial adverse effect" was defined to mean:

[A] significant loss or harm of a magnitude that, based on current scientific data and knowledge: (1) would cause a species or a native plant or animal community to drop below self-perpetuating levels on a Statewide or regional basis; (2) would cause a species to become threatened or endangered; (3) substantially reduce population numbers of a listed, candidate, sensitive, rare, or other special status species; or (4) eliminate or substantially impair the functions and values of a biological resource in a geographic area defined by interrelated biological components and systems.

(AR 3:11:1263 fn. 76.) The EIR also discussed different state and federal acts designed at protecting wildlife and plants. It then stated:

In accordance with these requirements, the proposed project would normally be deemed to produce a significant or potentially significant biological resource impact if the project or if project-related activities were to:

- ◆ Result in a violation of any applicable regulations promulgated by a State or federal resource agency for the protection of rare, threatened, endangered, or otherwise protected species and their habitats, including wetlands.
- ◆ Result in a violation of any applicable State or federal laws prohibiting the elimination or net reduction in a site's or an area's biological value through either direct removal of sensitive or protected on-site or near-site biological resources or through the direct or indirect disruption or interference with those resources whose impact is not substantially offset through the avoidance of such impacts or through the provision of substitute resources or environs or other measures providing reasonable and relatively equivalent compensation for such impacts.

²⁰ The language in these factors is consistent with CEQA Guidelines, Appendix G with respect to biological resources.

(AR 3:11:1264.) Finally, it states, “Besides the mandatory findings of significance identified in Appendix G of the State CEQA Guidelines, the Lead Agency has not identified other applicable or potentially applicable standards that can appropriately be extracted from other related policy or environmental documents and used as the basis for assessing the significance or potential significance of project-related and cumulative biological resource impacts.” (AR 4:11:1264; *see also* AR 10:13:4534-4538.)

Petitioners focus on the omitted phrase “restrict the range,” from the definition of “substantial adverse impacts.”²¹ However, this does make the threshold too narrow as in *EHL*. In *EHL*, the threshold contained no reference to consideration of the wildlife’s habitat or quality of the environment. It focused only on population levels. In that respect *EHL* is distinguishable. The threshold set forth above is broader.

In addition, Petitioners provide no discussion or explanation of what evaluation of the “range” entails. Based on their argument, the “range” is in reference to the animal’s relevant habitat. For example, Petitioners argue, “the SBKR is on the brink of extinction having lost about 96% of its historic *habitat*. (27:61:11300.)” (Pet. Br. 13:12-13 (emphasis added).) When the cited portion of the record is reviewed, it states, “Agricultural and urban development, flood control projects, mining operations, and other construction projects have reduced the historic *range* of the SBKR by 96%.”²² (AR 27:61:11300 (emphasis added).) Therefore, given Petitioners’ use of the word “habitat” interchangeably with “range” it is reasonable to conclude that reference to “range,” is in terms of the extent of the relevant habitat.

²¹ Guidelines, § 15065(a)(1) includes the factor: “substantially reduce or *restrict the range* of an endangered, rare or threatened species.”

²² This statement is from a study regarding the SBKR as part of a draft EIR prepared for the Lytle Creek North Planned Development Project, dated April 2001, in which the County of San Bernardino was the lead agency.

It is not demonstrated that the stated threshold did not consider the range. The threshold included consideration of whether there would be a substantial adverse effect on the SBKR's habitat, which included consideration of whether the project "would eliminate or impair the functions and values of a biological resource in a geographical area defined by interrelated biological components and systems." (AR 3:11:1263, fn. 76.) It also considered whether the project would result in violations of applicable state or federal laws "prohibiting the elimination or net reduction in a site's or an area's biological value." (AR 3:11:1264.)

Petitioners also are incorrect in their assertion that only a standard of drop below "self-sustaining levels" was considered in assessing cumulative impacts. In support, of this contention, Petitioners quote from a portion of the record at AR 10:13:4590. (Pet. Br. p. 13:25-14:1) However, when citation is reviewed, Petitioners are referring to the Biological Resources Assessment's statement:

Considering the general plan and animal species' populations that are supported by Riversidean alluvial fan sage scrub, **and recognizing that highly localized endemics such as San Bernardino kangaroo rat are addressed separately in this Biological Resources Assessment**, it is expected that a ten (10) percent cumulative loss of habitat would not result in declines of numbers below self-sustaining levels for any particular species and would not result in the remaining Riversidean alluvial fan sage scrub in the region falling below self-sustaining levels as a community."

(AR 10:13:4590 (emphasis added).) As stated, the impact on the SBKR was going to be addressed later. With respect to the SBKR, the Biological Resources Assessment analysis states:

In order to complete an analysis of cumulative impacts to San Bernardino kangaroo rat habitat within the previously defined region, the assessment of cumulative impacts to Riversidean alluvial fan sage scrub habitat within the region was utilized. A total of ten (10) percent or 1,098 acres out of 10,638 acres of Riversidean alluvial fan sage scrub will be cumulatively impacted within the geographically-relevant region. However, not all of this is necessarily considered suitable habitat for the San Bernardino kangaroo rat. For the purposes of this assessment, it is meaningful as an approach to identifying potentially suitable habitat for the San Bernardino kangaroo rat to consider only alluvial scrub that is both within active hydrological regimes and viable in the long-term as suitable habitat (including pioneer Riversidean alluvial fan sage scrub). These categories

total 7,530 acres within the defined region. Of these, 769 acres or ten percent will be cumulatively impacted by approved, planned, or foreseeable projects. **Therefore, on a regional basis, the level of potential cumulative loss is considered to be significant. This determination is based on the endangered status of the species and the degree to which a ten percent cumulative loss, in the absence of mitigation, could accentuate the fragmentation and isolation of existing populations.**

(AR 10:13:4591 (emphasis added).)

In discussing the impacts on the SBKR as potentially significant without mitigation, the EIR took into account that the project would substantially restrict the range of this species by discussing the project's impact with respect to the SBKR on the approximately 702.7 acres the SBKR is known to occupy (the project will permanently impact approximately 140.6 acres). (AR 3:11:1249-1258, 1307-1310, 1336; AR 40:223:16326-16329.) Mitigation measures included those aimed at providing a large enough area of sage scrub habitat to accommodate numbers of animals equal to or greater than lost from the area impacted by the project. (AR 3:11:1309-1310, 1343-1345.)

To the extent Petitioners are arguing that the mitigation measures are not supported by substantial evidence, they do not meet their burden on this issue. As stated in *Oakland Heritage Alliance, supra*, 195 Cal. App. 4th at 898:

“The substantial evidence standard is applied to conclusions, findings and determinations. It also applies to challenges to the scope of an EIR’s analysis of a topic, the methodology used for studying an impact and the reliability or accuracy of the data upon which the EIR relied because these types of challenges involve factual questions.’ [Citation.] Substantial evidence is defined in the CEQA Guidelines [fn. omitted] as ‘enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached.’ [Citation.]” [Citation.] **It also applies to “factual dispute[s] over ‘whether adverse effects have been mitigated or could be better mitigated.’”** [Citation.] (Emphasis added.)

“A court’s task is not to weigh conflicting evidence and determine who has the better argument when the dispute is whether adverse effects have been mitigated or could be better

mitigated. We have neither the resources nor scientific expertise to engage in such analysis, even if the statutorily prescribed standard of review permitted us to do so. (*Id.* at 900.) “Moreover, ‘a public agency may choose between differing expert opinions.’” (*Id.*)

Petitioners argue, without any supporting evidence, that the project’s impacts “are so large as to be essentially unmitigable to a level of insignificance.” In addition, they contend the mitigation offered (consisting of a proposal to create viable habitat where it does not currently exist) cannot equate with the loss of existing, occupied habitat. They assert that the US Fish and Wildlife Service noted in 2009 that “[p]reliminary attempts to re-create habitat for the SBKR in Lytle Creek *have met with mixed success* due to natural floodplain dynamics which cannot be controlled,” citing Petitioners’ comment letter at AR 39:191:15656. (Pet. Br. p. 14:19-24.)

Mitigation of substantial impacts includes: “(c) rectifying the impact by repairing, rehabilitating, or restoring the impacted environment; (d) reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action; and (e) compensating for the impact by replacing or providing substitutes resources or environments.” (Guidelines § 15370(c)-(e).) This is what the Mitigation Measure 5-7 purports to do. (AR 3:11:1343-1345.)

Asserting that a federal agency has raised an issue of the efficacy of creating habitat as a means of mitigation does not show there is insufficient evidence in the record to support the City’s finding. Experts addressed the issues raised by the Petitioners and others, *see e.g.*, AR 22:40:9145-9149; AR 40:223:16326-16332, AR 14:15:6332-6333. Reasoned analysis exists. The City was entitled to choose between differing expert opinions.

Therefore, the Court denies the writ of mandate on the issue that the proper threshold was not applied to the SBKR analysis, because such is not demonstrated. In

addition, Petitioners did not meet their burden of demonstrating the mitigation measures are not supported by substantial evidence.

Cumulative Contribution to a Worsening Jobs/Housing Imbalance

Petitioners assert that under Guidelines, § 15125(d),²³ an EIR must discuss any inconsistencies between the proposed project and applicable regional plans, including regional transportation plans, regional housing plans and regional blueprint plans. The Southern California Association of Governments (SCAG) Compass Blueprint is such a plan. Petitioners contend that the EIR “coyly asserts the Project is ‘not inconsistent’ with this plan and then arbitrarily and inconsistently concludes in the same paragraph that the plan is irrelevant to individual projects...” citing AR 2:11:844. Petitioners assert that this discussion does not meet CEQA’s minimal good faith disclosure requirements. They contend there is no dispute that the project individually and cumulatively significantly worsens the region’s already severe jobs-housing imbalance. Therefore, according to Petitioners, there is no rational basis for the EIR’s conclusion the project is “not inconsistent” with SCAG’s jobs-housing balance plan.

In opposition, the City contends the EIR met the requirement of discussing inconsistencies with applicable general and regional plans. In reviewing consistency with SCAG’s Compass Blueprint, the EIR’s analysis shows that the project would be “not inconsistent” with one goal, “Locate new housing near existing jobs and new jobs near existing

²³ Guidelines, § 15125(d) provides:

(d) The EIR shall discuss any inconsistencies between the proposed project and applicable general plans, specific plans and regional plans. Such regional plans include, but are not limited to, the applicable air quality attainment or maintenance plan or State Implementation Plan, area-wide waste treatment and water quality control plans, regional transportation plans, regional housing allocation plans, regional blueprint plans, plans for the reduction of greenhouse gas emissions, habitat conservation plans, natural community conservation plans and regional land use plans for the protection of the coastal zone, Lake Tahoe Basin, San Francisco Bay, and Santa Monica Mountains.

housing.” It contends that Petitioner’s disagreement with the EIR’s conclusion that the project is not inconsistent with one goal of SCAG plan does not render the EIR inadequate.

Despite the “not inconsistent” statement, on a whole, the EIR sufficiently discusses inconsistencies with the applicable plan as required by Guidelines, § 15125(d). With respect to an analysis of SCAG’s goal to “[l]ocate new housing near existing jobs and new jobs near existing housing,” the finding in the EIR is “not inconsistent.” (AR 2:11:844.) The conclusion goes on to state:

From an overly narrow project-specific perspective, because the [entire Project] is primarily a residential development, it will not individually and independent of other areawide development, serve to promote the attainment of an areawide jobs-housing balance. Since all projects do not include both housing and employment-generating uses, individual projects cannot be realistically held to a jobs-housing balance standard.

(AR 2:11:844.) Later in the EIR, it discusses that SCAG does not possess land-use controls and acknowledges that its Compass Blueprint is only a “guideline.” (AR 2:11:854.) It then discusses that the project is generally consistent with SCAG’s goals, “[h]owever, the proposed project may not further SCAG’s objectives with regards to jobs-housing relationship....” (AR 2:11:854.) It proceeds to discuss the reasons for this conclusion. (AR 2:11:854.) This discussion includes a statement that the project’s projected operational jobs-housing ratio is in the range of between 0.20 and 0.40 jobs per dwelling unit, when a minimal balance of 1.0 or greater is the goal. (*Id.*) The EIR goes on to explain that taken from the broader regional perspective of considering the project of as a whole and the long-term projected build-out, along with housing and employment forecasts for the City according to SCAG’s estimates, it finds the jobs ratio within the City will remain virtually unchanged between 2010 and 2030. (AR 3:11:854-855 & Table 3-5.) The conclusion is that the project is generally consistent with the goals of SCAG Compass Blueprint based on future estimates. (AR 2:11:855.)

In addition, later in the EIR there is a jobs-housing balance discussion in relation to SCAG's assessment of the regional jobs-housing imbalance. (AR 3:11:916-920.) As part of a cumulative impacts discussion, there is further analysis regarding the issue of a jobs-housing imbalance by increasing the City's housing stock. (AB 3:11:937-938.) Included as part of the discussion is the project's impact based on SCAG's projected 2030 housing and employment forecasts. (AR 3:11:938.)

When the discussions in the EIR regarding SCAG's jobs-housing goal are reviewed, to the extent inconsistencies between the proposed project and applicable regional plans exist, the EIR includes a sufficient discussion of the inconsistencies as required by Guidelines, § 15125(d).

Therefore, the Court denies the writ of mandate with respect to the jobs-housing issue, because the EIR sufficiently discussed inconsistencies with SCAG's jobs-housing goal as required by Guidelines, § 15125(a).

Findings Rejecting Alternatives

Petitioners' raise several issues with respect to the City's findings rejecting alternatives.

Findings Regarding Impacts of Alternatives HAA1 and HAA2: Petitioners contend that the findings that alternatives HAA1 and HAA2 would not substantially reduce the impacts of air emissions or noise levels are not supported by substantial evidence. In response, Real Parties contend that with respect to alternatives, analysis need not be exhaustive, it just must include sufficient information about each alternative to allow meaningful evaluation, analysis and comparison with the project, citing Guidelines, § 15126.6(d) and *Sierra Club v. City of Orange* (2008) 163 Cal. App. 4th 523, 546. They contend that the EIR's discussion of alternatives, along with the comparative matrix, is sufficient analysis.

On review, the conclusion that alternatives HAA1 and 2 would not substantially reduce impacts of air emissions or noise levels is not supported by substantial evidence. Guidelines § 15126.6(d) provides:

(d) Evaluation of alternatives. The EIR shall include sufficient information about each alternative to allow meaningful evaluation, analysis, and comparison with the proposed project. A matrix displaying the major characteristics and significant environmental effects of each alternative may be used to summarize the comparison. If an alternative would cause one or more significant effects in addition to those that would be caused by the project as proposed, the significant effects of the alternative shall be discussed, but in less detail than the significant effects of the project as proposed. (*County of Inyo v. City of Los Angeles* (1981) 124 Cal.App.3d 1).

Real parties are correct that the discussion of alternatives need not be exhaustive. (*Sierra Club, supra*, 163 Cal. App. 4th at 547-548.) Nonetheless, sufficient information to provide for an informed comparison of the impacts of the project with those of the alternatives should be provided. In *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal. App. 3d 692, 733-735, the Court concluded that failure to include comparative data in the discussion of alternatives prevented a meaningful consideration of the alternative. In *Laurel Heights I, supra*, 47 Cal. 3d at 404-405 the Court stated, “To facilitate CEQA’s information role, the EIR must contain facts and analysis, not just the agency’s bare conclusions or opinions.”

Here, the project’s impacts that would result in significant effects that could not feasibly be mitigated to below a level of significance included Air Quality Impacts 7-1, 7-2, 7-4, 7-7 through 7-10; Noise Impacts 8-2 and 8-6, and Growth Inducement Impact 15-1.²⁴ (AR 1:9:202-

²⁴ Air quality impacts include items such as the increase in daily emissions resulting from operation of the proposed project are expected to exceed SCAQMD thresholds for VOC, CO, PM₁₀, PM_{2.5}, and NOx. (AR 1:9:207-209 (Air Quality Impact 7-4).) It was based in part on a finding that daily air pollutant emissions associated with the proposed project’s operations would be generated in part by the operation of on-road vehicles. (AR 1:9:207.)

Noise impacts included items such as that upon project completion, vehicular traffic added to off-site roadways within the general project will introduce new mobile noise sources and may create a higher noise exposure to residents and other sensitive receptors beyond the

218; 5:11:2060-2062.) Petitioners do not take issue with the alternatives proposed; their argument is directed to the analysis.

Alternative HAA1 included a total of 7,484 dwelling units and 820,540 square feet of commercial, office, and light industrial uses. It is aimed at the avoidance of potential impacts to the SBKR and the least Bell's vireo. (AR 5:11:2079-2083.) With respect to air quality impacts, the EIR states that under this alternative, the number of dwelling units and total square footage of non-residential units remains generally at the same levels. It concludes, "As a result, under this alternative, construction-term and operational air quality impacts would be similar to but incrementally less than those associated with the proposed project. It would, however, be anticipated that short-term and long-term air quality impacts would remain at levels in exceedance of the SCAQMD's recommended threshold standards and would be similar to the proposed project." (AR 5:11:2081.)

As for noise impacts, the EIR states that "as they relate to Country Club Drive (north of Riverside Avenue) and Riverside Avenue (between Adler Avenue and Locust Avenue), mobile source noise impacts would be similar to but incrementally less than those associated with the proposed project. It would, however, be anticipated that operation noise impacts along [these streets] would remain significant and would be similar to the proposed project." (AR 5:11:2081.)

noise levels currently experienced or otherwise predicted in the absence of the proposed project. (AR 1:9:214-217 (Noise Impact 8.2).)

The Growth Inducement Impact is that "[b]ecause the project's effectuation requires both a General Plan amendment and a zone change, as well as designated sphere of influence areas, the project may result in on-site development activities that exceed current development assumptions. Although the project area has been included in the master plan for services of water and other utilities and is surrounded by other already developed or entitled areas, the project will have growth-inducing effects with respect to sewer as it requires the provision of new facilities that provide additional capacity, thus permitting growth that can use the excess capacity." (AR 1:9:217.)

Regarding regional growth inducement impact, the EIR states that although there would be “an estimated 1,108 job reduction, in primary site employment, the introduction of an additional 5,269 dwelling units” (the amount of dwelling units over those provided under the existing zoning designations), “would result in a substantial increase in residential population.” (AR 5:11:2081-2082.) The conclusion is that the growth inducement impact is significant. (AR 5:11:2082.)

With respect to HAA2, the alternative project included a total of 4,873 dwelling units and 602,827 square feet of commercial, office, and light industrial uses. (AR 5:11:2083-2087.) It seeks to avoid or reduce impacts on the Riversidean alluvial fan sage scrub (“RAFSS”) areas. With respect to air quality, the EIR concludes that construction-term and operation air quality impacts would be incrementally less than those associated with the proposed project. It also states, “Given the level of development proposed under this alternative, it would still be anticipated that short-term (construction) and long-term (operational) air quality impacts would remain at levels in exceedance of the SCAQMD’s recommended threshold standards and short-term and long-term impacts would remain significant under this alternative.” (AR 5:11:2084.)

As for noise, it states under this alternative, mobile source noise impacts on Country Club Drive (north of Riverside Avenue) and Riverside Avenue (between Adler Avenue and Locust Avenue) would be “incrementally less” than the proposed project. The EIR states, “It would, however, be anticipated that operational noise impacts along [the streets mentioned] would remain significant in that the number of vehicle trips under this alternative would still produce a significance increase in mobile source noise and because there exists no feasible mitigation measures to reduce noise impacts to existing residential areas.” (AR 5:11:2085.)

For growth inducement impact, the EIR states there would be an estimated 1,978 job reduction in primary on-site development; however, the introduction of an additional 2,658 dwelling units (the amount over that provided for under the existing zoning designations) would result in a substantial increase in residential population. The conclusion is that as a result, the growth inducement impact is significant. (AR 5:11:2085.)

The matrix including both HAA1 and HAA2 makes findings of significance with respect to air quality and noise impacts stating that the impact would be “[b]elow that associated with the proposed project but still at a level deemed to be significant.” (AR 5:11:2066.) Growth inducement also is found to be significant. (*Id.*)

When this discussion is reviewed, it is impossible to analyze meaningfully the EIR’s conclusions that air quality, noise, and growth inducement impacts are significant. The discussions are conclusory. For example, for air and noise impacts, the language used is that “it would ... be anticipated” that these impacts would remain significant. However, there is no indication of the analysis conducted in support of such conclusions. The EIR in this respect is defective; an EIR’s discussions of alternatives must contain analysis sufficient to allow informed decision making. (*Laurel Heights I, supra*, 47 Cal. 3d at 404.)

Therefore, to the extent the discussion of alternatives HAA1 and HAA2 do not contain sufficient evidence to support the conclusions regarding significant impacts, the Court finds an abuse of discretion and grants the writ of mandate.

Economic Infeasibility: Petitioners next contend that the City’s findings regarding economic infeasibility of alternatives HAA1 and HAA2 lack support. They contend the findings rely on the CBRE Consulting Report’s claim that a 15 to 20 percent rate of return is required to make a project financially feasible and the alternatives would not reach this rate of return. They

argue that the CBRE Report excludes any analysis for the proposed project. They assert that a finding of economic infeasibility for less impactful alternatives is unsupported by substantial evidence if the alternatives are not “evaluated within the context of the proposed project,” citing *Uphold Our Heritage v. Town of Woodside*, (2007) 147 Cal. App. 4th 587, 599. In response to the lack of comparative data for the proposed project, Petitioners contend that CBRE submitted a brief letter in which it acknowledged it was “not retained to analyze the expected rate of return for the proposed project,” but concluded the project would likely have a rate of return of over 10 percent, citing AR 40:223:16333-16334. Petitioners assert this unsupported claim fails to provide the data and analysis required by CEQA and fails to provide substantial evidence to support the finding of economic infeasibility. Finally, they contend that the CBRE Report relied on unsupported and inconsistent assumptions to predict the rate of return for the alternatives.

Real Parties contend that the City was entitled to rely on the expert’s report to find HAA1 and 2 were financially infeasible. It cites to the expert’s conclusion that to obtain financing commitments, developers must demonstrate a strong investment return. Therefore, a 15-20 percent internal rate of rerun (“IRR”) was used. The report detailed that HAA1 and 2 would result in IRRs of only 6.1 percent and 0.8 percent respectively. Therefore, because neither would attract the necessary rate of return, the City rejected them. They contend that although the project’s IRR was not estimated in the Report, based upon data collected for the project and the reasonable assumptions made, the expert concluded that the project would have a rate of return in excess of 10 percent per year compounded, citing AR 40:223:16334. They assert that this conclusion is supported by the project’s lot values being higher than the alternatives due to the loss of project amenities.

The feasibility of alternatives must be evaluated within the context of the proposed project. (*Uphold Our Heritage, supra*, 147 Cal. App. 4th at 599.) “The fact that an alternative may be more expensive or less profitable is not sufficient to show that the alternative is financially infeasible. What is required is evidence that the *additional* costs or lost profitability are sufficiently severe as to render it impractical to proceed with the project.” (*Center for Biological Diversity v. County of San Bernardino* (2010) 185 Cal. App. 4th 866, 883.) “Thus, when the costs of an alternative exceeds the cost of the proposed project, ‘it is the magnitude of the difference that will determine the feasibility of [the] alternative.’” (*Id.*)

The finding of economic infeasibility of these projects was based on their projected IRRs being well below the established threshold level of feasibility. (AR 1:9:355, 360-361.) The findings also concluded that any development on the property would require tremendous investment in infrastructure, which would be imposed on returns from fewer residences and non-residential development. (*Id.*)

However, the feasibility of alternatives must be evaluated within the context of the proposed project. The record demonstrates that in preparation of the CBRE Report, the expert only considered assessment of the financial feasibility of the project alternatives. In response to comments, CBRE stated that it was “not retained to analyze the financial feasibility of the proposed project itself.” (AR 40:223:16333.) It then estimated the IRR for the proposed project. (AR 40:223:16333-34.) There is no evidence in the record to support the project’s IRR. (AR 40:223:16334.)

The expert estimated the IRR for the proposed project was 10 percent “compounded”²⁵ per year. However, the expert previously concluded that the industry standard IRR for this type of development project is 15 to 20 percent per year. (AR 39:205:15789.) There is no explanation as to why the project’s 10 percent IRR does not also make it economically infeasible, if the project and alternatives were judged by the same standard.

In addition, it is not sufficiently demonstrated that a consistent set of assumptions were used for the proposed project and the alternatives in order to calculate the IRRs. For example, CBRE admits that it did not include a build-out projection for the proposed project. (AR 40:223:16334.) If net cash flow of each alternative was computed to determine the IRR and such calculations depended on the projected build-out rate, then it is not demonstrated that the same assumptions for calculating the project’s IRR were used.²⁶ Unsupported conclusions do not constitute evidence, let alone substantial evidence in support of the findings.

Therefore, to the extent that the findings of economic infeasibility for alternatives HAA1 and HAA2 are not supported by the evidence in the record, the Court finds an abuse of discretion and grants the writ of mandate.

²⁵ It is not explained what is meant by the word “compounded” and whether this qualification is significant in terms of the IRR requirements of 15 to 20 percent per year.

²⁶ Petitioners contend the report is not supported by substantial evidence because similar assumptions were not used. For example, they contend the build-out rate used by the CBRE Report was significantly slower than that of the proposed project, citing AR 39:205:15825-15828; AR 18:26:7829; AR 40:218:15879. Real Parties contend the same build-out period of 20 years was assumed, citing AR 39:205:15810, 15823-30; AR 2:11:423, 546. Petitioners respond that the build-out *rate* and build-out *period* are two different measures. On review, Petitioners are correct in these assertions.

These are several examples that support the conclusion the economic infeasibility findings were not supported by substantial evidence.

Findings Regarding Project Objectives: Petitioners also contend the City's findings regarding the reasons to reject alternatives HAA1 and HAA2 for not meeting all of the project's objectives is not supported by the substantial evidence.

Pub Res. C. § 21081(a) requires one or more of three necessary findings for identified significant environmental impacts before project approval, which include:

(3) Specific economic, legal, social, technological, or other considerations, including considerations for the provision of employment opportunities for highly trained workers, make infeasible the mitigation measures or alternatives identified in the environmental impact report.

(b) With respect to significant effects which were subject to a finding under paragraph (3) of subdivision (a), the public agency finds that specific overriding economic, legal, social, technological, or other benefits of the project outweigh the significant effects on the environment. [Emphasis added.]

As further explained in the Guidelines § 15091:

(a) No public agency shall approve or carry out a project for which an EIR has been certified which identifies one or more significant environmental effects of the project unless the public agency makes one or more written findings for each of those significant effects, accompanied by a brief explanation of the rationale for each finding. The possible findings are:

...

(3) Specific 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.

(b) The findings required by subdivision (a) shall be supported by substantial evidence in the record.

(c) ... The finding in subdivision (a)(3) shall describe the specific reasons for rejecting identified mitigation measures and project alternatives.

....

(f) A statement made pursuant to Section 15093 does not substitute for the findings required by this section.

As part of the reasons for rejecting the alternatives, the City's findings conclude that neither HAA1 nor HAA2 would sufficiently achieve the lead agency's objective of "[r]espond[ing] to local and regional needs for additional housing opportunities in response to

anticipated area wide population growth.’ (Project Objective LA-4.)” (AR 1:9:355-356, 361.) The findings go on to state that as estimated by SCAG, the City’s housing need for January 1, 2006 to June 30, 2014 is 4,323 units and the County’s need is for 107,543 units.²⁷ (AR 1:9:356, 361.) The findings also state that these alternatives fall short of the potential to provide housing to meet future needs. (*Id.*) The analysis states the reason has to do with these alternatives providing less housing and also sacrificing some of the project’s “important open space/recreational elements,” such as neighborhood parks.” (AR 1:9:356, 361, 362.)

With respect to housing need, for both these alternatives, the EIR found this goal were “partially attained.” (AR 5:11:2067.) It also found that all other lead agency objectives were attained. (AR 5:11:2067-2068.) The EIR’s analysis for HAA1 with respect to various objectives basically states that this alternative partially meets the City’s and Real Parties’ goals. (AR 5:11:2082-2083.) With respect to HAA2, the focus of the discussion is on the lack of a golf course for this project alternative. As for HAA2 meeting other objectives, the EIR has the same level of analysis as with HAA1. (AR 5:11:2086.)

Petitioners’ point out that given the City’s housing need (4,323 units), both proposed developments would exceed this estimated need. Therefore, the finding is not supported by substantial evidence. In opposition, Real Parties cite to the July 6, 2010 memo of Peter Lewandowski of Environmental Impact Sciences, who addressed the issues raised with respect to the findings. (AR 22:40:9167-9178.) With respect to the housing demand, he cites to the same SCAG estimates for City and County housing needs. (AR 20:40:9175.) He then contends that these alternatives would not meet the goals of a draft general plan for the City, which anticipates the City’s population is expected to continue to grow. (AR 22:40:9175.)

²⁷ There is no discussion of what portion of the County’s estimated housing need is located in the portions to be annexed as part of this project.

However, as Petitioners point out, such draft general plan is unadopted. Lewandowski's memo recognizes this fact. (AR 22:40:9170.) Given that the City has not adopted the draft general plan and made decisions on these growth issues and policies, its reliance on it as setting forth policy is questionable. (See *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal. App. 4th 931, 949-951 (concluding that an EIR that was predicated on a draft general plan was fundamentally flawed).) There is no indication the proposed project was evaluated under the draft general plan. In addition, when this draft general plan is reviewed, it makes the same finding that Rialto's fair share allocation is estimated at 4,323 new housing units for the planning period (2008-2014). (AR 36:124:14552.) Given the above, the City's finding is not supported by substantial evidence.

As for the issue with respect to parks, HAA1 also was found not to sufficiently achieve the project's objectives with respect to open space/recreational elements, such as neighborhood recreational amenities and other neighborhood parks. (AR 1:9:356.) However, the EIR concluded HAA1 would attain the objective related to park and recreational facilities. (AR 5:11:2069 (Objective A-8).)²⁸ The findings also stated this alternative does not sufficiently achieve the project's objective to "[a]ssess the City's current and projected housing needs for all segments of the community by providing a range of family-oriented single- and multi-family residences, as well as an active-adult golf course community.' (Project Objective A-9.)" (AR 1:9:356.) This statement is contrary to the conclusion in the EIR that this objective was attained. (AR 5:11:2070.) So too is the conclusion that the development would not meet, to a reasonable extent, the objectives of: "establish[ing] a mix of land use and local-serving activities that meet

²⁸ Objective A-8 states, "Provides the City and surrounding community with a redesigned public golf course and clubhouse, recreation and open space areas, parks, and trails to meet the City General Plan goals to provide such facilities to maintain and enhance the City's quality of life." (AR 5:11:2069.)

the City General Plan's objectives concerning community character and pedestrian-friendly design' (Project Objective A-10); "[c]oncentrate development within neighborhoods to promote greater efficiency of land use and promote walking and bicycling by providing a network of pleasant, safe, and convenient pedestrian trails and bike lanes' (Projective Objective A-6); and "[i]ncorporate 'green' and sustainable practices, as practicable, in developing buildings and infrastructure.' (Project Objective A-14.)" (AR 1:9:357.) Contrary to the findings, the EIR stated that these goals were attained. (AR 5:11:2069-2071.)

Real Parties contend that feasibility determinations "rest[] not with the drafters of the EIR, but with the agency deciding whether to allow the project to go forward notwithstanding its effects on the environment," citing *County of Napa*, 121 Cal. App. 4th at 1508. However, substantial evidence does not exist to establish findings contrary to those stated in the EIR. The evidence cited to by Real Parties in support, the memo from Peter Lewandowski, does not address that for HAA1, the EIR found these alternative did meet these objectives. (AR 22:40:9176-9177.) Instead, he relies on the draft general plan in support. (AR 22:40:9177.) Once again, reliance on the draft general plan is questionable, given that the City has not yet decided to adopt the stated policies. He also states that the development would discourage pedestrian activity and further shift the emphasis to vehicular travel. However, this statement is contrary to the finding that Project Objective A-6 was found to be met. (AR 5:11:2069.) He does not sufficiently explain the change from the EIR's findings that these objectives were attained. Therefore, the findings are not supported by the substantial evidence.

As for HAA2, the significant aspect of this alternative is that it does not include a golf course (therefore it does not meet the stated goal of providing residents with a golf course) and the effect of the lower number of housing units. (AR 5:11:2069.) Nonetheless, the findings

include similar inconsistencies as found in the HAA1 analysis. For example, statements are made that Project Objectives A-10 and A-14 are not met. (AR 1:9:362.) However, such conclusions are contrary to the findings in the EIR. (AR 5:11:2070.) Not all of the findings with respect to HAA2 are supported by the substantial evidence.

Therefore, the Court grants the writ of mandate. Various findings with respect to alternatives HAA1 and HAA2 not meeting City and project objectives are not supported by substantial evidence.

Summary of Rulings

City's Request for Judicial Notice: The Court grants the City's request for judicial notice.

GHG Emissions: Grant the writ of mandate. Although the City may establish the threshold of significance to measure the impact of GHG emissions, when the analysis is reviewed, the basis for the conclusion cannot be determined, and as a result, it is not demonstrated that substantial evidence supports the conclusion.

Traffic Impact: Find Petitioners exhausted their administrative remedy with respect to the traffic impact issue. **Grant the writ of mandate,** because the City failed to proceed in the manner required by law in assessing traffic impacts.

Mitigation Measures: Grant the writ of mandate, because the EIR's mitigation measures with respect to seismic hazards (Measures 3.1 to 3.3) and fire impacts (Measures 9-4 to 9-5) improperly deferred mitigation. Therefore, the City failed to proceed as required by law.

SBKR Analysis: Deny the writ of mandate, because it is not demonstrated an improper threshold of significance was used. In addition, Petitioners did not meet their burden of demonstrating the mitigation measures proposed are not supported by substantial evidence.

SCAG Jobs-Housing Goals: Deny the writ of mandate. because to the extent the project is inconsistent with SCAG's jobs-housing goals, the EIR sufficiently discussed such inconsistencies as required by Guidelines, § 15125(a).

Findings Regarding Alternatives HAA1 and HAA2: Grant the writ of mandate. The findings regarding significant impacts for alternatives HAA1 and HAA2 are not supported by substantial evidence. The findings of economic infeasibility for alternatives HAA1 and 2 are not supported by substantial evidence. Findings with respect to alternatives HAA1 and 2 not sufficiently meeting stated objectives are not supported by substantial evidence. Taken as a whole, the City abused its discretion with respect to evaluating alternatives HAA1 and HAA2.

Accordingly, the Court should direct the City to set aside all of approvals it made in approving this Project, including: the Pre-Annexation and Development Agreement, rescinding in part the El Rancho Verde Specific Plan No. 6, the General Plan Amendment, the Lytle Creek Specific Plan, certification of the Final Environmental Impact Report, and the Findings of Fact and Statement of Overriding Considerations. The Court should order the City to revise the EIR with respect to the GHG emissions discussion, traffic impact analysis, Mitigation Measures 3.1 to 3.3 and 9.4 to 9.5, and alternatives HAA1 and HAA2 and recirculate those portions of the EIR.