SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF MONTEREY

Carmel Valley Association, Inc., a California nonprofit corporation, Petitioner vs. County of Monterey; Board of Supervisors of the County of Monterey, and DOES 1 THROUGH 15, Respondents, Rancho Canada Venture LLC, Carmel Development Company; R. Alan Williams; Does 16 through 30, inclusive Real Parties in Interest.	CASE NO.: 17CV000131 **Intended Decision**

This matter came on for court trial on February 2, 2018. All sides were represented through their respective attorneys. The matter was argued and taken under submission.

This intended decision resolves factual and legal disputes, and shall suffice as a statement of decision as to all matters contained herein. (Cal. Rules of Court, rule 3.1590(c)(1).)

Background

On April 22, 2004, the Lombardo Land Group submitted a development project application to the County of Monterey. (AR 7222-7225.) The application was for a Combined Development Permit, rezoning, use permit, General Plan Amendment, a Specific Plan, and a Vesting Tentative Map for a "a proposed mixed-income new neighborhood." (AR 7222, 7224.) The Applicant proposed 280 units,[1] of which 50% would be deed-restricted Affordable and Workforce units. (AR 7224.)

In January 2008, the County circulated a Draft Environmental Impact Report (DEIR) for what it identified as the "Rancho Canada Village Specific Plan." (AR 214.) That DEIR received

[1] The Applicant subsequently changed its proposal to seek the creation of 281 units. (AR 237.)

56 comment letters, many of which criticized its adequacy on a number of substantive grounds. (See, e.g., AR 8923, 9397-9401, 9596-9608, 19050-19116.) At that time, the firm preparing the DEIR was also working on an EIR for the County's General Plan update. That project took priority, forcing the Applicant to wait for its completion to proceed. (AR 11347-11348.)

The new General Plan went into effect on October 26, 2010. (AR 13574.) It included changes to the Carmel Valley Master Plan (CVMP). CVMP Policy CV-1.6 established a new residential subdivision building limit of 266 new residential lots or units in Carmel Valley. (AR 103, 11807, 11824.)[2] In recognition of the proposed Project, the 2010 General Plan established a Special Treatment Area (CVMP Policy CV-1.27) of "[u]p to 40 acres" for the Project site. (AR 14036.) Within that Special Treatment Area, residential development was allowed at "a density of up to 10 units/acre,"[3] and was required to include "a minimum of 50% Affordable/Workforce Housing." (*Ibid.*)

Further, the 2010 General Plan raised the minimum affordable housing requirement for all new housing development across the County to 25%, and committed the County to amending its Inclusionary Housing Ordinance, Monterey County Code Chapter 18.40 (Inclusionary Housing Ordinance or Ordinance) to reflect this change. (AR 13583.) To date, no such amendment has occurred.

---

[2] The findings, General Plan EIR, and Final EIR all recite that the original version of the 2010 General Plan contained a residential unit cap of 266 units. (AR 103, 3738, 11807, 11824.) However, the actual language of the General Plan refers to a residential unit cap of *200* units. (AR 13616.) No party explains this discrepancy. The difference, however, is irrelevant to the court's analysis. For ease of reference, the court assumes throughout this decision that the initial cap was 266 units.

[3] Notwithstanding this density designation, the Special Treatment Area is still subject to the building cap. (AR 13616 ["[n]ew residential subdivision Carmel Valley *shall be limited* to creation of 200 new units"], 14031.)

Finally, the General Plan mandated that, within 12 months, the County develop a Development Evaluation System (DES) in order to assess new development projects proposed outside of certain priority development areas based on a pass-fail grading system. (AR 13578-13579.) The General Plan defines "Community Areas, Rural Centers and Affordable Housing Overlay districts" as "the top priority for development in the unincorporated areas of the County." (AR 13578.) The County has not yet promulgated the DES.

Following the adoption of the General Plan, several lawsuits were filed, including one brought by Petitioner. (AR 19524.) Petitioner and the County ultimately reached a settlement, agreeing to an amendment to CVMP Policy CV-1.6 to reduce the residential subdivision limit in Carmel Valley from 266 new units to 190 new units. (AR 19964-19983; see also AR 3738.) The Board approved this amendment on February 12, 2013. (AR 14031-14032.) Of the 190-unit cap, 24 of the units were reserved for another property, meaning that, absent a general plan amendment, the Project was limited to 166 units. (AR 13617, 3738.)

Rather than abandoning the Project and commencing the permitting and environmental review process anew, Real Parties developed a new 130-unit alternative (Alternative), which it claimed was intended to "respond[] to various concerns raised by the public during the processing of the [] [P]roject." (AR 18768.) Real Parties explained to the County that the Alternative addressed "most, if not all, of the concerns expressed by the public, and which include[d] flood control, utility, recreational, water supply, moderate income housing and other features that would benefit the community." (AR 18771.) Real Parties provided the County with extensive information on the Alternative, including proposed maps, property development standards, and a detailed description of the specific Project impacts the Alternative would alleviate. (AR 18768-18782.) Nevertheless, Real Parties insisted that the Alternative was "not a resubmittal for a new project." (AR 18770.)

Real Parties then worked with the County and its EIR consultant to prepare a Recirculated Draft Environmental Impact Report (RDEIR), to include, inter alia, a lengthy discussion of the Alternative. (AR 17126-17130, 1348-1372.) Real Parties asked the EIR consultant to "provide an equal level of analysis of the 130-unit alternative" and the Project. (AR 17142.) To accomplish this task, the EIR consultant was forced to put the analysis of the Alternative in the "Project Description" chapter along with the Project, rather than in the Alternatives chapter.

On June 1, 2016, the County released the RDEIR. (AR 18541.) The RDEIR's "Project Description" chapter discussed both the Project and the Alternative, in significant, and roughly equivalent, detail. (AR 1321, 1348-1372.) The remaining six alternatives were described as before, in less detail, in the RDEIR's alternatives chapter. The RDEIR concluded that the 130-unit Alternative was the "environmentally superior alternative." (AR 18537, 18541-18543.) In November 2016, the County issued its Final Environmental Impact Report (FEIR).[4]

On November 9, 2016, County Planning Staff recommended that the Planning Commission advise the County Board of Supervisors (the Board) to approve the 130-unit Alternative and certify the EIR. (AR 4099.) Staff also explained that, under the Alternative, an amendment to the Special Treatment Area language in CVMP Policy CV-1.27 would be required to reduce the affordability requirement from 50% to 20%. (AR 4107.) At the subsequent hearing on November 16, 2016, the Planning Commission voted 4-3 to adopt staff's recommendation to recommend approval of the Alternative and certification of the FEIR. (AR 5256-5279.) However, the Planning Commission did not recommend that the Board adopt the proposed General Plan amendment, because it did not secure a majority of the Commission's vote. (AR 5347-5348.)

[4] The FEIR eliminated one alternative due to a change in ownership of the relevant property. (AR 134, 3803-3806, 3808-3809.)

On December 13, 2016, the Board unanimously approved the 130-unit Alternative based upon a revised vesting tentative map submitted by Real Parties in Interest (Real Parties). (AR 5360-5361.) The Board also approved a General Plan amendment to the CMVP Policy CV-1.27 Special Treatment Area for the Rancho Canada property, reducing the 50% of affordable/workforce housing to 20%, and rezoning the Property from public quasi-public to Medium Density Residential for 129 lots, and Low Density Residential for the Alternative's Lot 130. (AR 5361.) As to inclusionary housing, the Board stated:

"Finding NO. 18: INCLUSIONARY HOUSING: The Alternative complies with the Inclusionary Housing Ordinance requirement to provide a minimum of 20% onsite affordable housing units. (MCC, Chapter 18.40) Unusual circumstances exist making it appropriate to modify the requirements of the Inclusionary Ordinance so that 20% Moderate-income housing, as proposed by the Alternative, is allowed in-lieu of the 8% Moderate-income, 6% Low-income and 6% Very Low income." (AR 143.)

Finally, the Board adopted Condition No. 112, which required Real Parties to comply with the Ordinance by constructing 25 on-site rental units affordable to moderate-income households. (AR 211.)

Administrative Record

The court admitted the approximately 30,000-page administrative record into evidence.

Together with its opposition brief, the County filed a supplemental administrative record comprised of 1) omitted public comments on the 2008 DEIR; 2) the County 2015-2023 Housing Element, dated January 26, 2016; and 3) a Board Order entitled "2016 Annual Progress Report for the General Plan and Housing Element, and accompanying staff report," dated July 18, 2017.

Petitioner does not object to the addition of omitted public comments on the 2008 DEIR. Consequently, the court admits these comments into the administrative record.

Petitioner does object, however, to the additions of the Housing Element and Board Order to the record. Petitioner notes that the Housing Element "does not qualify as part of the record of proceedings" under Public Resources Code, § 21167.6, subdivision (e). Petitioner maintains that the Board Order should not be part of the record because it did not exist at the time the Board approved the Project, December 13, 2016, and is hence "extra-record evidence."

Petitioner has two claims against the County: 1) its claim that the County has failed to implement the General Plan, brought under Code of Civil Procedure section 1085; and 2) its claim that the County improperly approved the Project in violation of the California Environmental Quality Act (CEQA),[5] brought under Code of Civil Procedure section 1094.5. The County offered both the Board Order and the Housing Element in response to Petitioner's General Plan implementation arguments under Code of Civil Procedure section 1085, not as to project approval. "[A] proceeding in mandate [under section 1085] may consider 'all relevant evidence, including facts not existing until after the petition for writ of mandate was filed.' [Citations.]" (*Negro v. Superior Court* (2014) 230 Cal.App.4th 879, 895.) Accordingly, whether the Housing Element is deemed "part of the record of proceedings" under Public Resources Code, § 21167.6, subdivision (e), is irrelevant. Similarly, the fact that the Board Order did not exist at the time the Board approved the Project is immaterial, since the Order does not relate to Petitioner's project-specific claims.

Consequently, the court admits both documents into the administrative record.

Requests for Judicial Notice

The County seeks judicial notice of three documents: 1) MCC Chapter 18.40; 2) the County's 2015-2023 Housing Element; and 3) Petitioner's Petition for Writ of Mandate against the County filed on November 24, 2010 in this court, case number M109442.

---

[5] See Public Resources Code section 21000 et seq.

The court takes judicial notice of MCC Chapter 18.40, as it must since it is relevant, under Evidence Code section 451, subdivision (a).

The County intended its request as to the Housing Element as an alternative ground for admission should this court deny the County's attempt to amend the administrative record. Because the court has admitted this document into the record, judicial notice is unnecessary.

The court takes judicial notice of Petitioner's Petition for Writ of Mandate against the County filed on November 24, 2010, case number M109442, as a record of a court of this state, under Evidence Code section 452, subdivision (d)(1).

Discussion

1.0 Petitioner raises several claims under Code of Civil Procedure section 1085.

Petitioner seeks writs of traditional mandate under Code of Civil Procedure section 1085. Petitioner argues that 1) the County must be compelled to implement the DES; 2) the County must be compelled to amend its Inclusionary Housing Ordinance to conform to the 2010 General Plan; 3) the County erred in finding that the Alternative was consistent with General Plan Policy LU-1.19; 4) the Alternative is inconsistent with the Ordinance, because the County erred in its calculation of the minimum number of affordable housing units; and 5) the County erred by departing from the Ordinance's requirement that the affordable housing units provided be distributed among households of varying defined levels of income.

The County responds that 1) its decision not to implement the DES and failure to amend its Ordinance were legislative acts justified by the County's prioritization of other tasks; 2) the Alternative was consistent with General Plan Policy LU-1.19 because although there is no DES, the Board analyzed the Alternative against the criteria set forth in Policy LU-1.19; 3) the Board's calculation of the minimum number of affordable housing units was not arbitrary and capricious; and 4) unusual circumstances supported excepting the Alternative from the

Ordinance's requirement that the affordable housing units provided meet specified income requirements.

Additionally, 1) the County contends that Petitioner has waived its right to challenge the County's failure to timely adopt the DES; and 2) that Petitioner has failed to exhaust its administrative remedies as to its claims that the County did not timely adopt the DES or amend its Inclusionary Housing Ordinance. Because these arguments are threshold matters, the court will address them first.

1.1 Petitioner has not waived its right to challenge the County's failure to timely adopt the DES.

The County maintains that, by virtue of a clause in a settlement agreement, Petitioner has waived its right to challenge the County's failure to timely adopt the DES. Petitioner responds that the release does not cover such claims.

On November 24, 2010, Petitioner filed a petition for writ of mandate against the County alleging CEQA violations relating to the 2010 General Plan Update. The parties eventually entered into a settlement agreement. (AR 19964-19983.) As part of that agreement, executed on September 24, 2012, Petitioner released the County and its Board from all claims as of the Agreement's effective date "arising from or relating to certification of the Final EIR for the 2010 Monterey County General Plan and approval of the 2010 Monterey County General Plan as adopted by the Board of Supervisors on October 26, 2010." (AR 19967.) The County notes that Petitioner's claim regarding the County's failure to timely promulgate the DES within 12 months of the 2010 General Plan's effective date was ripe on October 26, 2011. It therefore contends that the claim was subject to the release.

The County's argument is without merit. The release related only to claims concerning the certification of the FEIR and the County's approval of the General Plan. Petitioner's claim

regarding the timeliness of the DES implementation is not such a claim; it relates to the implementation of the General Plan, not the General Plan's FEIR, or approval process.

1.2 Petitioner's claims are not barred for failure to exhaust its administrative remedies.

The County asserts that Petitioner has failed to exhaust its administrative remedies as to its claims that the County did not timely adopt the DES or amend its Inclusionary Housing Ordinance. The County insists that Petitioner was required to exhaust all available administrative appeals and to raise its precise objections to the County's General Plan implementation "in a manner that [would have given] the County notice of and an opportunity to act on the issue."

1.2.1 The "Appeal Exhaustion" doctrine does not apply.

The County insists that Petitioner's objections to the County's General Plan implementation efforts were never properly before the Board of Supervisors because those objections were only raised in the context of the Project approval process.

"[W]here an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act." (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 292.) "Exhaustion of administrative remedies is a jurisdictional prerequisite to resort to the courts." (*Campbell v. Regents of University of California* (2005) 35 Cal.4th 311, 321, internal citations omitted.) Nevertheless, the exhaustion doctrine does not apply when the relevant statute under which review was offered does not establish "clearly defined machinery for the submission, evaluation and resolution of complaints by aggrieved parties." (*Rosenfield v. Malcolm* (1967) 65 Cal.2d 559, 566.)

The County fails to identify any procedure in the County Code or General Plan that Petitioner could have followed to place their specific objections before the Board outside the context of the Project. Simply put, no such administrative remedy was available, and hence, the exhaustion doctrine does not apply. (*Id.* at p. 566.)

1.2.2 The "Issue Exhaustion" doctrine does not apply.

The County argues that Petitioner is required to satisfy what it calls "issue exhaustion." According to the County, Petitioner was required to present its exact objections below so that the County would have had the opportunity to act and render litigation unnecessary.

The County's argument relies entirely on citations to CEQA and administrative mandate cases. (See, e.g., *Resource Defense Fund v. Local Agency Formation Com.* (1987) 191 Cal.App.3d 886, 894 [CEQA]; *Evans v. City of San Jose* (2005) 128 Cal.App.4th 1123, 1136 [County redevelopment plan reviewed under Code Civ. Proc., § 1094.5].) This is no accident. CEQA expressly mandates such "issue exhaustion." (Pub. Resources Code, § 21177, subd. (a).) The rule also applies in administrative mandamus petitions under Code of Civil Procedure section 1094.5 (*City of Walnut Creek v. County of Contra Costa* (1980) 101 Cal.App.3d 1012, 1019.) In both cases, the actions are direct appeals from administrative proceedings at which an agency could act to resolve a party's objections, such as by modifying the project or rejecting it in its entirety. Were there no such rule, a party could "withhold any defense then available to [her] or make only a perfunctory or 'skeleton' showing in the hearing and thereafter obtain an unlimited trial de novo, *on expanded issues*, in the reviewing court. [Citation.]" (*Pegues v. Civil Service Com.* (1998) 67 Cal.App.4th 95, 104, italics in original.) The rule is thus necessary "'to preserve the integrity of the administrative proceedings and to endow them with a dignity beyond that of a mere shadow-play.' [Citation.]" (*Id.* at pp. 1019-1020.)

Here, Petitioner's challenges to the County's General Plan implementation are brought as part of its petition for writ of *traditional* mandate under Code of Civil Procedure section 1085, not section 1094.5. It is true that Petitioner simultaneously seeks CEQA relief for its claims related to the Project, but the County's exhaustion argument does not relate to those claims. As to Petitioner's general plan implementation claims, no hearing or other administrative process

occurred.[6] Nevertheless, the County complains that Petitioner raised the relevant issues but only did so "in conjunction with the Project." But as discussed *ante*, the County does not identify any administrative procedure during which Petitioner could have raised these issues outside the context of the Project approval process. Regardless, Petitioner stated its precise objections in detail below, both orally and in writing. (E.g., AR 5422, 5435, 20102, 20105, 20333.)

1.3 Standard of Review.

Petitioner seeks writs of mandate compelling the County to implement the DES and to amend its Inclusionary Housing Ordinance to conform to its General Plan. The County contends that its failure to take either action stemmed from deliberate decisions to prioritize other mandatory General Plan tasks. The County insists that these decisions were legislative in character. Petitioner responds that the decisions were not legislative because they did not involve enacting or amending the General Plan but rather, 1) as to the DES, failing to implement that Plan's mandatory direction; and 2) as to the Inclusionary Housing Ordinance, failing to implement the Government Code's mandatory statutory command.

Code of Civil Procedure section 1085 "permits judicial review of ministerial duties as well as quasi-legislative and legislative acts. Mandate will lie to compel performance of a clear, present and usually ministerial duty in cases where a petitioner has a clear, present and beneficial right to performance of that duty. [Citation.]" (*County of Del Norte v. City of Crescent City* (1999) 71 Cal.App.4th 965, 972.) "A ministerial act is an act that a public officer is required to perform in a prescribed manner in obedience to the mandate of legal authority and without regard to his own judgment or opinion concerning such act's propriety or impropriety, when a

---

[6] Code of Civil Procedure section 1085 nonetheless applies when one of the three mandatory criteria of Code of Civil Procedure section 1094.5 are not met. (See *O.W.L. Foundation v. City of Rohnert Park* (2008) 168 Cal.App.4th 568, 585.) These criteria include whether the agency decision was "made as a result of a proceeding 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." (*Ibid*, internal citations omitted.)

given state of facts exists. Discretion, on the other hand, is the power conferred on public functionaries to act officially according to the dictates of their own judgment. [Citation.]" (*Rodriguez v. Solis* (1991) 1 Cal.App.4th 495, 501-502.) Hence, "[w]here a statute or ordinance clearly defines the specific duties or course of conduct that a governing body must take, that course of conduct becomes mandatory and eliminates any element of discretion." (*Great Western Savings & Loan Assn. v. City of Los Angeles* (1973) 31 Cal.App.3d 403, 413.) "Mandamus has long been recognized as the appropriate means by which to challenge a government official's refusal to implement a duly enacted legislative measure." (*Morris v. Harper* (2001) 94 Cal.App.4th 52, 58; *Brown v. Chiang* (2011) 198 Cal.App.4th 1203, 1231.)

Legislative action is the formulation of a rule to be applied in future cases. (*McGill v Regents of Univ. of Cal.* (1996) 44 Cal.App.4th 1776, 1785.) Legislative action includes the adoption or amendment of a general plan (*Yost v. Thomas* (1984) 36 Cal.3d 561, 570), "investigation and information gathering in aid of, or as a basis for, prospective legislation" (*Carrancho v. California Air Resources Bd.* (2003) 111 Cal.App.4th 1255, 1266), adoption of a general zoning ordinance (*San Diego Bldg. Contractors Assn. v. City Council* (1974) 13 Cal.3d 205, 212), and the determination of jurisdictional boundaries (*City of Santa Cruz v. Local Agency Formation Com.* (1978) 76 Cal.App.3d 381, 387). "Review of a local entity's legislative determination is through ordinary mandamus under section 1085." (*Mike Moore's 24-Hour Towing v. City of San Diego* (1996) 45 Cal.App.4th 1294, 1303.) "Such review is limited to an inquiry into whether the action was arbitrary, capricious or entirely lacking in evidentiary support. [Citation.]" (*Corona-Norco Unified School Dist. v. City of Corona* (1993) 17 Cal.App.4th 985, 992.) When undertaking this inquiry, "the court may not substitute its judgment for that of the agency, and if reasonable minds may disagree as to the wisdom of the agency's action, its determination must be upheld. [Citation.]" (*Helena F. v. West Contra Costa Unified School Dist.* (1996) 49 Cal.App.4th 1793, 1799.) Moreover, the court "'must ensure that an

agency has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute.' [Citation.]" (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 577.) Courts conduct this limited review "out of deference to the separation of powers between the Legislature and the judiciary, to the legislative delegation of administrative authority to the agency, and to the presumed expertise of the agency within its scope of authority." (*California Hotel & Motel Assn. v. Industrial Welfare Com.* (1979) 25 Cal.3d 200, 212, recognized as superseded on other grounds in *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1036, fn. 14.)

Accordingly, the court must determine "whether the [County] had a ministerial duty capable of direct enforcement or a quasi-legislative duty entitled to a considerable degree of deference." (*Carrancho*, *supra*, 111 Cal.App.4th at p. 1266.) Because they involve discretionary decisions within the core ambit of an agency, "[q]uasi-legislative administrative decisions are properly placed at that point of the continuum at which judicial review is more deferential; ministerial and informal actions do not merit such deference, and therefore lie toward the opposite end of the continuum." (*Western States Petroleum Assn.*, *supra*, 9 Cal.4th at p. 576.) Whether the provision at issue "impose[s] a ministerial duty, for which mandamus will lie, or a mere obligation to perform a discretionary function is a question of statutory interpretation. [Citation.]" (*AIDS Healthcare Foundation v. Los Angeles County Dept. of Public Health* (2011) 197 Cal.App.4th 693, 701.) In making such a determination, "[w]e examine the 'language, function and apparent purpose' of the statute. [Citation.] . . . 'Even if mandatory language appears in [a] statute creating a duty, the duty is discretionary if the [public entity] must exercise significant discretion to perform the duty.' [Citation.]" (*Ibid.*)

1.4 The County's failure to implement the DES was not arbitrary or capricious.

General Plan Policy LU-1.19 mandates that the DES "shall be established within 12 months of adopting this [2010] General Plan," or October 26, 2011. The DES has not yet been implemented.

Petitioner argues that the County had a mandatory, ministerial duty to comply with this Policy by timely promulgating the DES. The County contends that its failure to act was a legislative decision based on 1) numerous obstacles to the task's completion, including lawsuits, resultant amendments to the General Plan, and reduced staffing; and, based in part on these obstacles, 2) a discretionary choice to prioritize other mandatory General Plan tasks. The County notes that, over the past three years it has worked with the public and stakeholders to develop the DES and that "the final development of the DES will be a priority" going forward. It maintains that its decision to prioritize other tasks was not arbitrary or capricious. Petitioner responds that the County's inaction was not a legislative act because while amending a General Plan may be legislative, implementing Plan policies is not.

General Plan Policy LU-1.19 contains mandatory language. Nevertheless, the County must exercise "significant discretion" in developing the DES. (*Sonoma AG Art, LLC v. Department of Food and Agriculture* (2004) 125 Cal.App.4th 122, 127, citation omitted.) Policy LU-1.19 requires the County to develop "a pass-fail system" to assess proposed projects and their impact on County resources. (AR 13579.) Additionally, the County must devise "a mechanism to quantitatively evaluate development in light of the policies of the General Plan and the implementing regulations, resources and infrastructure, and the overall quality of the development." (*Ibid.*) That mechanism must include nine criteria, but the County has the discretion to include additional criteria if it deems them necessary. (*Ibid.*)

Further, the County must make discretionary decisions with respect to the devotion of limited resources to the development of the DES. The County is in a far better position than this court to allocate these resources appropriately in light of other priorities and budgetary

constraints. Consequently, the court concludes that the County's decision as to the timing of its implementation of the DES is legislative in character, and may be overridden only if it is "arbitrary, capricious or entirely lacking in evidentiary support. [Citation.]" (*Corona-Norco Unified School Dist.*, *supra*, 17 Cal.App.4th at p. 992.)

The 2010 General Plan required the County to draft over 100 new ordinances, plans, and programs to implement the Plan's Policies and goals. (AR 21029, 21034.) This process has required "interdepartmental coordination, obtaining technical information from county consultants, and scoping with stakeholders through extensive public outreach." (AR 21034.) Moreover, since the Plan's adoption, the County's Planning Department has experienced significant turnover, with several key positions still vacant. (AR 21029.) In addition, litigation over the General Plan led to settlements requiring the adoption of General Plan amendments. (AR 21035-21036.) These issues required the County to "reallocate staff resources to process current planning entitlements, in accordance with the Permit Streamlining Act." (*Ibid.*) Nevertheless, the County has applied the DES' criteria to projects where applicable, ensuring the intent of the Policy has been observed. (AR 106.) Finally, the County has shown that development of the DES remains a priority. (See, e.g. AR 21026, 21030, 21040-21041.)

The court cannot therefore say that the County's decision to prioritize other legislative tasks is arbitrary and capricious so as to entitle Petitioner to a writ of traditional mandate.[7]

1.5 The County's failure to timely amend the Inclusionary Housing Ordinance was arbitrary and capricious.

General Plan Policy LU-2.13 requires "consistent application of an Affordable Housing Ordinance that requires 25% of new housing units be affordable to very low, low, moderate, and

[7] This conclusion should not be construed as an approval of the County's lengthy period of inaction. The court concludes only that, in the absence of arbitrary and capricious decision-making, the question whether the County's inaction was appropriate is a political one, which lies outside the court's purview.

workforce income households." (AR 13583.) Policy LU-2.13 also mandates that any such ordinance require that 6% of units be affordable to "very low-income households"; 6% of units be affordable to "low-income households"; 8% of units be affordable to "moderate-income households"; and 5% of units be affordable to "Workforce I income households." (AR 13584.)

The Ordinance is inconsistent with Policy LU-2.13's 25% affordable housing requirement, because it requires only 20% of "the total number of units approved for the residential development" to be inclusionary. (MCC, § 18.40.070.A.) The Ordinance is also inconsistent with Policy LU-2.13's mandated distribution of housing units among different income levels, because it does not require that 5% of new inclusionary units be affordable to "Workforce I income households." (See MCC, § 18.40.110.A.)

Although the General Plan does not contain a specific time trigger for the necessary amendments, state planning and zoning law provides that the County "shall" amend the Ordinance "within a reasonable time so that it is consistent with the general plan as amended." (Gov. Code, § 65860, subd. (c).) No such amendment has yet occurred. Accordingly, Petitioner argues that the County had a mandatory, ministerial duty to comply with state planning and zoning law by timely amending its Inclusionary Housing Ordinance to conform to the General Plan. Petitioner further argues that the more than seven years since the General Plan was enacted — and hence, when the inconsistency arose — is not a "reasonable time" in which to act. The County contends that its failure to act was a legislative decision based on 1) a weighing of "competing interests," such as "the economic downturn"; 2) the fact that "very few inclusionary units [] have been produced"; and 3) "outside deadlines" such as "the deadline to adopt the Housing Element." The County claims it has been proceeding "diligently" as to the amendment process in the past few years.

Government Code section 65860, subdivision (c), mandates that the County amend its Ordinance to conform to the 2010 General Plan "within a reasonable time." "The obvious

purpose of subdivision (c) is to ensure an orderly process of bringing the regulatory law into conformity with a new or amended general plan . . . ." (*Lesher Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 546.) But while that section contains mandatory language, the enactment and amendment of zoning ordinances are legislative acts. (*Johnston v. City of Claremont* (1958) 49 Cal.2d 826, 835; *Yost*, *supra*, 36 Cal.3d at pp. 570-571.) Consequently, the arbitrary and capricious standard applies to the question of whether the County has unreasonably delayed its amendment of the Ordinance. (*Corona-Norco Unified School Dist.*, *supra*, 17 Cal.App.4th at p. 992.)

The County's delay was arbitrary and capricious. The County delayed its amendment on many of the same grounds as it deferred development of the DES, namely myriad other important tasks necessitated by the amendment of the General Plan and a paucity of staff available to address those tasks. (AR 21029, 21034-21036.) But unlike the DES, which as discussed *ante*, required significant time and discretion to develop, amending the Ordinance to conform it to the General Plan would require nothing more than approving the specific percentages already decided by the County, as set forth in Policy LU-2.13. (AR 13583-13854.)

Further, the suggestion that this act was not a priority for the County is unreasonable. The general plan is the "constitution for future development located at the top of the hierarchy of local government law regulating land use." (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 773, internal citations omitted.) Hence, "[a] zoning ordinance that is inconsistent with the general plan is invalid when passed [citations] and one that was originally consistent but has become inconsistent *must be brought into conformity with the general plan.* [Citation.]" (*Lesher*, *supra*, 52 Cal.3d at p. 541, italics added; Gov. Code, § 65860, subd. (a) [zoning ordinances *shall be consistent with the general plan . . .*"].)

The County's attempt to justify its inaction based on "competing interests and outside deadlines" is also unpersuasive. The County references a passage in its Housing Element in

which it states, "due to the recent economic crisis, very little new development has been constructed in the County and few new inclusionary units have been produced." (AR 20914.) Contrary to the County's suggestion, the observation that little development, including "few new inclusionary units" underscores the need for *more* inclusionary development. Regardless, the statement is conclusory, and the County has not cited supporting evidence in the record. (See *People v. Bassett* (1968) 69 Cal.2d 122, 139 [substantial evidence "must be reasonable in nature, credible, and of solid value; it must actually be 'substantial' proof of the essentials which the law requires in a particular case"].) Similarly, the County's statement in briefing that "outside deadlines (such as deadlines to receive grant monies)" justify its failure to act is unsupported by either explanation or citation to the record. Further, the other statement the County references from its Housing Element, that it "anticipates revisiting the Inclusionary Housing Ordinance to ensure consistency with the General Plan and reflect market condition" (AR 20980), is inadequate assurance in light of the County's already considerable delay. Finally, the fact that the County has discussed the need to revise the Ordinance at a Housing Advisory Committee meeting is insufficient to establish that the County is acting diligently. (AR 17705-17709.)

The court recognizes that it owes the County significant deference in reviewing its inactivity under the arbitrary and capricious standard. (*California Hotel & Motel Assn.*, *supra*, 25 Cal.3d at p. 212.) Nevertheless, even that broad deference has limits. (*American Coatings Assn., Inc. v. South Coast Air Quality Dist.* (2012) 54 Cal.4th 446, 461 [even under arbitrary or capricious review, a "reasonable basis for the decision" is required]; see also *Halaco Engineering Co. v. South Central Coast Regional Com.* (1986) 42 Cal.3d 52, 79 [the arbitrary or capricious standard "encompasses," inter alia, "conduct not supported by a fair or substantial reason"].) In short, the County's delay of over seven years in implementing a simple amendment to its Inclusionary Housing Ordinance was arbitrary and capricious. (See Gov. Code, § 65860,

subd. (c) [the County must amend an inconsistent zoning ordinance to conform to its general plan "within a reasonable time"].)

1.6 The Alternative is consistent with General Plan Policy LU-1.19.

Petitioner contends that the County erred in finding that the Alternative was consistent with General Plan Policy LU-1.19. Petitioner further contends that without a DES, any finding of consistency with that Policy is *per se* improper. The County responds that although it has not enacted a DES, it nevertheless evaluated the Alternative in light of the criteria prescribed by Policy LU-1.19. (See AR 106-109.) Petitioner does not challenge the substance of the County's evaluation. Instead, Petitioner replies that these criteria were nonexclusive and that their application is valid only in the context of a quantitative, pass-fail system, as the Policy envisions the DES will be.

As to the County's general plan consistency findings, the court must assess whether the County "acted arbitrarily, capriciously, or without evidentiary basis. [Citation.]" (*Concerned Citizens of Calaveras County v. Board of Supervisors* (1985) 166 Cal.App.3d 90, 96.) The County's consistency findings "can be reversed only if [they are] based on evidence from which no reasonable person could have reached the same conclusion. [Citation.]" (*A Local & Regional Monitor v. City of Los Angeles* (1993) 16 Cal.App.4th 630, 648.) The Board's reading of its General Plan "comes to this court with a strong presumption of regularity." (*Sequoyah Hills Homeowners Assn. v. City of Oakland* (1993) 23 Cal.App.4th 704, 717.) "This is because the body which adopted the general plan policies in its legislative capacity has unique competence to interpret those policies when applying them in its adjudicatory capacity. [Citation.]" (*Save our Peninsula Committee v. Monterey County Board of Supervisors* (2001) 87 Cal.App.4th 99, 142.) This court's role "is simply to decide whether [County] officials considered the applicable policies and the extent to which the proposed project conforms with those policies. [Citations.]" (*Sequoyah Hills*, *supra*, 23 Cal.App.4th at pp. 719-720.)

The Board determined that the purposes underlying Policy LU-1.19 could be adequately served by evaluating the Alternative in light of the Policy's minimum criteria. Specifically, it found, "the fact that the County has not adopted the DES does not preclude consideration of the project. This resolution includes evaluation of this development in accordance with Policy LU-1.19." (AR 106.) The Board explained that "based on the specific facts associated with this application it is determined that the project would pass the DES, if a pass/fail scoring system were in place." (*Ibid.*) And, after a discussion of the Alternative's consistency with the majority of the criteria, the Board concluded that the Alternative was consistent with Policy LU-1.19. (AR 107-109.)

The Board engaged in a thorough analysis of the DES' criteria; its finding that the Alternative is consistent with Policy LU-1.19 is not "arbitrar[y], capricious[], or without evidentiary basis. [Citation.]" (*Concerned Citizens of Calaveras County*, *supra*, 166 Cal.App.3d at p. 96.) The court cannot say "no reasonable person could have reached the same conclusion. [Citation.]" (*A Local & Regional Monitor*, *supra*, 16 Cal.App.4th at p. 648.) It is possible that the Board would have reached a different conclusion if a formal DES were existent, but it is not this court's role to so speculate. (*Sequoyah Hills*, *supra*, 23 Cal.App.4th at pp. 719-720.)

Petitioner argues that even if the above is so, the use of a pass-fail system is a fundamental, mandatory policy to which the Alternative must conform. The court disagrees. It is true that "the nature of the policy and the nature of the inconsistency are critical factors to consider." (*Families Unafraid to Uphold Rural El Dorado County v. El Dorado County Bd. of Supervisors* (1998) 62 Cal.App.4th 1332, 1341.) "A project is inconsistent if it conflicts with a general plan policy that is fundamental, mandatory, and clear. [Citation.]" (*Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 782.) "In other words, a project's consistency with a general plan's broader policies cannot overcome a project's inconsistency with a general plan's more specific, mandatory and fundamental policies. [Citations.]" (*Spring*

Valley Lake Association v. City of Victorville (2016) 248 Cal.App.4th 91, 101.) But these principles do not apply here.

Policy LU-1.19 provides that, for certain areas, including the one in which the Project is located, a DES "shall be established . . . . *The system* shall be a pass-fail system and shall include a mechanism to quantitatively evaluate development in light of the policies of the General Plan and the implementing regulations, resources and infrastructure, and the overall quality of the development." (AR 13578-13579, italics added.) Policy LU-1.19's mandatory language applies to the requisite elements of the DES *once established*, not to specific projects.

1.7 The Alternative is only partially consistent with the Inclusionary Housing Ordinance.

Petitioner argues that the Alternative is inconsistent with the Inclusionary Housing Ordinance in two ways. First, Petitioner maintains that the County erred in its calculation of the minimum number of affordable housing units by considering only new units as opposed to total units. Second, Petitioner asserts that the County erred by departing from the Ordinance's requirement that the affordable housing units provided be distributed among moderate-, low-, and very-low-income households.

Before reaching these arguments, it is necessary to address the standard of review. Petitioner argues that the court independently reviews the County's interpretation of the ordinance. The County responds that its determination that the Alternative conformed to its ordinance is entitled to deference.

Petitioner is correct that, to the extent that the Board's decision rests on its interpretation of the ordinance, "a question of law is presented for our independent review. [Citation.]" (*MHC Operating Limited Partnership v. City of San Jose* (2003) 106 Cal.App.4th 204, 219.) However, the County is correct that its interpretation is entitled to deference. (*Ibid.*) Indeed, "[t]he appropriate mode of review . . . is one in which the judiciary, although taking ultimate

responsibility for the construction of the statute, accords great weight and respect to the administrative construction." (*International Business Machines v. State Bd. of Equalization* (1980) 26 Cal.3d 923, 931, fn. 7.) "How much weight to accord an agency's construction is situational, and greater weight may be appropriate when an agency has a comparative interpretive advantage over the courts, as when the legal text to be interpreted is technical, obscure, complex, open-ended, or entwined with issues of fact, policy, and discretion." (*American Coatings Assn., Inc.*, *supra*, 54 Cal.4th at p. 461, internal citations omitted.) Further, a body which adopts an ordinance "in its legislative capacity has unique competence to interpret th[e] [ordinance] when applying [it] in its adjudicatory capacity." (*Save our Peninsula Committee*, *supra*, 87 Cal.App.4th at p. 142.)

1.7.1 The County's calculation of the minimum number of affordable housing units was reasonable.

Petitioner contends that the County erred in its calculation of the minimum number of affordable housing units. The Inclusionary Housing Ordinance provides, "To satisfy its inclusionary requirement on-site, a residential development must construct inclusionary units in an amount equal to or greater than twenty (20) percent of the total number of units approved for the residential development . . . ." (MCC, § 18.40.070.A.)[8] The Project will provide 25 such units. The Project consists of 130 units, but five of these units already exist. If the calculation is based on the total number of units, the Ordinance would require 26 units. If instead, as the

---

[8] Normally, General Plan Policy LU-1.19 would require development in the Project area to contain 35% affordable housing. (AR 13579.) Additionally, Policy LU-2.13 requires amendment of the Ordinance to mandate that "25% of new housing units be affordable to very low, low, moderate, and workforce income households." (AR 13583.) However, as part of the approvals, the Board amended the text of CVMP Policy CV-1.27, which addresses the specific area in which the Project is located, to clarify, "*Notwithstanding any other General Plan policies*, residential development may be allowed with a density of up to 10 units/acre in this area with a minimum 20% affordable housing." (AR 145, italics in original.) The amended language effectively renders the portions of General Plan Policies LU-1.19 and LU-2.13 quoted above inapplicable to the Project.

County determined, only new units need be considered, only 25 units would be required. Petitioner argues that the term "total number of units" means what it says. The County interprets the Ordinance to refer only to new construction, noting that the County Code defines "residential development" as the construction of "new or additional dwelling units and/or lots." (MCC, § 18.40.040.Y.)

Petitioner's interpretation is not without merit. However, this court owes considerable deference to the Board because that body adopted the Ordinance in its legislative capacity (*Save our Peninsula*, *supra*, 87 Cal.App.4th at p. 142) and because interpretation of the Ordinance is "entwined with issues of fact, policy, and discretion." (*American Coatings Assn., Inc.*, *supra*, 54 Cal.4th at p. 461, internal citations omitted.) Moreover, the County's interpretation is both reasonable and supported by the text of the Ordinance.

As used in MCC section 18.40.070.A, the term "total number of units approved" is modified twice by the term "residential development," which is defined as the construction of "new or additional dwelling units and/or lots." (MCC, § 18.40.040.Y.) This is logical; the term "development" implies new or modified property. Likewise, the Ordinance's stated purpose repeatedly emphasizes development:

"The purposes of this Chapter are to enhance the public welfare, benefit the property being *developed*, assure compatibility between future housing *development* and the housing units affordable to persons of very low, low, and moderate income, and ensure that remaining *developable* land in the County is utilized in a manner consistent with State and local housing policies and needs." (MCC, § 18.40.030, italics added.)

In short, the County did not err in its interpretation of the Ordinance.

1.7.2 The County's decision to exempt the Project from the normal distribution of affordable housing units was not supported by substantial evidence.

Finally, Petitioner disputes the Board's finding that the Project complied with the Ordinance notwithstanding that it would construct 25 rental units affordable to moderate-income households only. The County claims that "unusual or unforeseen circumstances" justified this departure from the normal distribution of affordable housing units among households of different income levels.

MCC section 18.40.110.A requires projects to set aside 8% of the total units in the development for moderate-income households, 6% for low-income households, and an additional 6% for very-low-income households.[9] The Ordinance also provides that this distribution may be departed from where "as a result of unusual or unforeseen circumstances, it would not be appropriate to apply, or would be appropriate to modify, the requirements of this Chapter . . . based on substantial evidence, supporting that determination." (MCC, § 18.40.050.B.2.)

Here, the Board found "unusual or unforeseen circumstances" present. Although not expressly stated, it appears the Board concluded that the reduction in the area unit cap effected by the County's 2013 amendment to the CVMP was the relevant unforeseen circumstance.[10] Thus, the Board cited the applicant's representation "that due to the significant reduction in units

---

[9] The Ordinance defines these terms as referring to households "with an annual income which does not exceed one hundred twenty (120) percent of the median income, adjusted for household size" [moderate-income household]; "with an annual income which does not exceed HUD's annual determination for low income households with incomes of eighty (80) percent of the median income, adjusted for household size" [low-income household]; and "with an annual income which does not exceed HUD's annual determination for very low income households earning fifty (50) percent of median income, adjusted for household size" [very-low-income household]. (MCC, § 18.40.040.Q, T, and BB.)

[10] By contrast, the County's choice of the 130-unit Alternative alone was not an "unusual or unforeseen circumstance." The County had the power to approve the Project or an alternative, especially if the County adjudged that alternative less harmful to the environment than the Project. (Pub. Resources Code, §§ 21002-21002.1, 21004; Guidelines, § 15002, subd. (a)(3); *Dusek v. Redevelopment Agency* (1985) 173 Cal.App.3d 1029, 1041 [rejecting claim that CEQA was violated where the agency approved a narrower project than the one described in an EIR].)

proposed between the Project and the Alternative it is not financially feasible to comply with the Inclusionary Ordinance's requirements, particularly related to providing low and very low-income units." (AR 143.) In support of this finding, the County referenced two letters from local banks, both of which state that bank financing would not be available if the Alternative complied with the Ordinance's requirements. (AR 20413-20414.) Petitioner contends that this evidence is insufficient because, inter alia, it is unsure "what these letters are responding to and the nature of the request."[11] Petitioner does not elaborate, but the court agrees with its underlying sentiment; the bank letters lack sufficient foundation to constitute substantial evidence.

"'Substantial evidence'[12] requires evidence of 'ponderable legal significance.' [Citation.] It is not synonymous with 'any' evidence." (*Newman v. State Personnel Bd.* (1992) 10 Cal.App.4th 41, 47.) Thus, "[s]ubstantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. Such evidence must be reasonable, credible, and of solid value." (*California Youth Authority v. State Personal Bd.* (2002) 104 Cal.App.4th 575, 584-585, internal citations omitted.) Further, substantial evidence "'must actually be 'substantial' proof of the essentials which the law requires in a particular case.' [Citations.]" (*United Professional Planning, Inc. v. Superior Court* (1970) 9 Cal.App.3d 377, 392-393.)

---

[11] Petitioner further contends that 1) it is "unclear" whether Real Parties "currently have bank financing for the Project"; and 2) "difficulty obtaining bank financing" is not an unusual or unforeseen circumstance. Petitioner's arguments mischaracterize the County's point. It is irrelevant whether Real Parties currently have bank financing. The County relies on the letters to support the applicant's claim that it would be financially infeasible to comply with the Ordinance's prescribed allocation of affordable housing units. Moreover, "difficulty obtaining bank financing" is not the unusual or unforeseen circumstance at issue. Rather, as stated above, the amendment of the CVMP's unit cap and resulting development of the Alternative was the "unforeseen circumstance" that the applicant argued rendered strict compliance with the Ordinance economically infeasible. (See AR 20413-20414.)

[12] MCC Chapter 18.40 does not define "substantial evidence." The court presumes that the County intended the term to be defined and applied as it has been in other contexts, such as, for example, in review of a petition for writ for administrative mandate. (Code Civ. Proc., § 1094.5, subd. (c).)

Expert opinion may constitute substantial evidence, but only if the expert's opinion is "based on conclusions or assumptions supported by evidence in the record. Opinion testimony which is conjectural or speculative 'cannot rise to the dignity of substantial evidence.' [Citation.]" (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651.)

Neither letter is of "'ponderable legal significance'" because 1) neither letter explains in sufficient detail how the "unforeseen circumstance" rendered it economically infeasible for Real Parties to comply with the Inclusionary Housing Ordinance; and 2) the record does not document any of the assumptions upon which the relevant opinions are based. (*Newman*, *supra*, 10 Cal.App.4th at p. 47.) The first letter, from Monterey County Bank, states "the loss in revenue generated by an increase in the percentage or allocation of inclusionary housing renders your project economically infeasible to enable us to offer you bank financing. These requested changes to the inclusionary housing would result in insufficient cash flow and profit necessary to support bank financing." (AR 20413.) The letter does not provide any basis for its conclusion of a potential "loss in revenue." (*Ibid.*) The letter details neither the revenue the Project would generate nor the resulting loss in revenue from complying with the Ordinance. Similarly, the letter speaks of "insufficient cash flow and profit," but because the bank does not tie these terms to specific numbers, it is impossible to determine whether this conclusion is reliable. (*Ibid.*)

Nor is the 1st Capital Bank letter substantial evidence of financial infeasibility. The Bank states that financing is "problematic" and that "in discussions" between unnamed parties "we have considered the inclusion of 6% low and 6% very low levels of affordability for the inclusionary homes in rendering this determination." (AR 20414.) The Bank follows with a conclusory paragraph suggesting that only Real Parties' preferred outcome "may be considered to qualify for loan financing." (*Ibid.*) The letter provides no support for either point.

Finally, the County asserts that the Board of Supervisors also based its decision on the belief that "moderate income housing fit the particular needs of Carmel Valley." The County

bases this claim on a single statement by a Supervisor made at the December 13, 2016 Board of Supervisors meeting at which the Alternative was approved. (AR 5485.) There, the Supervisor opined that exempting the Alternative from the normal distribution of affordable housing was "eminently reasonable" based on, inter alia, "the area's existent affordable housing including the Pacific Meadow and more." (AR 5485:5-8.) The Supervisor offered no further explanation or supporting facts. (*Ibid.*) Likewise, the County fails to cite to evidence in the record substantiating the comment. Absent evidentiary support, the comment does not constitute substantial evidence. (See *California Youth Authority*, *supra*, 104 Cal.App.4th at pp. 584-585.)

Put simply, the conclusory opinions set forth in the bank letters and in the aforementioned testimony "'cannot rise to the dignity of substantial evidence.'" (*Roddenberry*, *supra*, 44 Cal.App.4th at p. 651, citation omitted.)

2.0 Petitioner brings several CEQA Claims.

Petitioner raises a number of claims under CEQA. Specifically, Petitioner contends that 1) the EIR's Project Description is unstable and "shifting"; 2) Real Parties effectively abandoned the Proposed Project in favor of the Alternative, but feigned otherwise; and 3) the EIR did not analyze a reasonable range of alternatives.

Real Parties respond that 1) the Project Description is not unstable because the 281-Unit Project and the 130-Unit Alternative are differentiated throughout the EIR; 2) the Project remained the true project throughout the EIR process; and 3) the EIR analyzed a sufficient range of legally feasible alternatives.

2.1 The EIR's Project Description is not "shifting" or "unstable."

Petitioner argues that the EIR's Project Description "straddles" both the Project and the Alternative, impermissibly shifting between them, causing confusion, and vitiating the EIR's function as a vehicle for public participation in the environmental review process.

"The purpose of an environmental impact report is to identify the significant effects on the environment of a project, to identify alternatives to the project, and to indicate the manner in which those significant effects can be mitigated or avoided." (Pub. Resources Code, § 21002.1.) To meet these goals, an EIR must adequately define the project. "[A]n accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR. The defined project and not some different project must be the EIR's bona fide subject." (*County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 199.) "[O]nly through an accurate view of the project may the public and interested parties and public agencies balance the proposed project's benefits against its environmental cost, consider appropriate mitigation measures, assess the advantages of terminating the proposal and properly weigh other alternatives. [Citation.]" (*San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 655.) "A curtailed, enigmatic or unstable project description draws a red herring across the path of public input." (*County of Inyo*, *supra*, 71 Cal.App.3d at pp. 197-198.) Nevertheless, "[t]he CEQA reporting process is not designed to freeze the ultimate proposal in the precise mold of the initial project; indeed, new and unforeseen insights may emerge during investigation, evoking revision of the original proposal." (*Id.* at p. 199.)

"With respect to an EIR's project description, only four items are mandatory: (1) a detailed map with the precise location and boundaries of the proposed project, (2) a statement of project objectives, (3) a general description of the project's technical, economic, and environmental characteristics, and (4) a statement briefly describing the intended uses of the EIR and listing the agencies involved with and the approvals required for implementation. (Guidelines, § 15124.)" Aside from these four items, the Guidelines advise that the project description should not 'supply extensive detail beyond that needed for evaluation and review of the [project's] environmental impact.' (Guidelines, § 15124.)" (*California Oak Foundation v. Regents of University of California* (2010) 188 Cal.App.4th 227, 269-270.)

Petitioner's argument relies heavily on *County of Inyo*, *supra*, 71 Cal.App.3d 185. There, the City of Los Angeles proposed to increase groundwater pumping to supply growing water needs. (*Id.* at p. 189.) The EIR initially described the project as "a proposed increase of 51 cfs[13] in the long-term subsurface extraction rate and an increase of 65 cfs in the high-year rate, these increases being destined solely for 'unanticipated' uses within the Owens Valley." (*Ibid.*) However the EIR went on to discuss proposals "far broader than the initially described project" including a water conservation program, rearrangement of reservoir operations, and the extraction of groundwater at a significantly higher rate than proposed in the initial project description. (*Id.* at p. 190.) Further, the EIR shifted between these descriptions repeatedly, as did the final approval resolution. (*Id.* at pp. 190-191.) Consequently, the court concluded the City's "selection of a narrow project as the launching pad for a vastly wider proposal frustrated CEQA's public information aims." (*Id.* at pp. 199-200.)

County of Inyo is distinguishable. Here, the RDEIR does not shift between differing descriptions of the project. Instead, the Project Description chapter of the RDEIR demarcates between the 281-Unit Proposed Project and the 130-Unit Alternative:

"The Rancho Cañada Village Project (Proposed Project) would develop an 81-plus-acre area within the West Course at Rancho Cañada Golf Club in Carmel Valley, California, an unincorporated area of Monterey County (County). The project site would be comprised of a mix of residential and recreational uses, including a 281-unit residential neighborhood and 39 acres of permanent open space and common areas within the 81-plus acres.

"The 130-Unit Alternative is proposed as a planned unit development (PUD) on approximately 82 acres. This alternative proposes similar uses as the Proposed Project but with a lower number of overall units and lower density." (AR 1348, fn. omitted.)

---

[13] The term "cfs" denotes "cubic feet per second" of water extracted.

The RDEIR goes on to note that the Project and the Alternative are proposed for the same geographical location. (AR 1349.) However, it then describes them separately. The RDEIR begins with a detailed description of the Project, setting forth the distribution of proposed housing, open space and common areas, a restoration and mitigation plan, neighborhood parks, a circulation framework, utilities, drainage, design guidelines, and construction plans. (AR 1352-1364.) The RDEIR then presents a similar level of detail as to the Alternative. (AR 1364-1373.) Throughout the RDEIR, the Project and the Alternative are clearly differentiated (see, e.g., AR 18430), and the Project is consistently identified (See, e.g. AR 1315, 1352 [describing the Project as "a 281-unit residential neighborhood"]; 1840).[14]

Accordingly, Petitioner's claim that the Project Description is "unstable" is meritless.

2.2 The EIR's Project Description is not accurate.

Petitioner also argues that the EIR's Project Description is inaccurate to the extent it suggests that the Proposed Project, not the Alternative, is the true project.

"The EIR's function is to ensure that government officials who decide to build or approve a project do so with a full understanding of the environmental consequences and, equally important, that the public is assured those consequences have been taken into account." (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 449.) These goals cannot be accomplished without an accurate project description. (*County of Inyo*, *supra*, 71 Cal.App.3d at p. 199 ["an accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR"].) "An accurate project description is necessary for an intelligent evaluation of the potential environmental effects of a proposed activity." (*San Joaquin Raptor*, *supra*, 27 Cal.App.4th at p. 730.)

---

[14] Additionally, the Project did not proceed from a narrow description to a "vastly wider proposal." (*Id.* at pp. 199-200.) In fact, the reverse is true. The Alternative is significantly narrower than the Project; it was designed in part to reduce Project impacts. (AR 1365, 18541, 18768.)

As the RDEIR recognized, the 2010 General Plan and 2013 amendment to the CVMP effectively limited residential subdivision development in Carmel Valley to 166 new units. (AR 1319.) To facilitate the Project, then, "the residential unit cap from residential subdivision would need to be raised to 305 units." (*Ibid.*) Shortly thereafter, Real Parties developed the 130-unit Alternative. (AR 18768.)

Real Parties provided the County with extensive information on the Alternative, including proposed maps, property development standards, and a detailed description of the specific impacts the Alternative would alleviate. (AR 18768-18782.) Real Parties asked the EIR consultant to "provide an equal level of analysis of the 130-unit alternative" and the Project. (AR 17142.) However, to accomplish this task, the EIR consultant was forced to put the analysis of the Alternative in the "Project Description" chapter along with the Project, rather than in the Alternatives chapter. (*Ibid.*) Thus, the RDEIR's "Project Description" chapter discussed both the Project and the Alternative, in significant, and roughly equivalent, detail. (AR 1321, 1348-1372.)

The remaining six alternatives were described as before, in much less detail, in the RDEIR's alternatives chapter. (AR 1843-1856.) Neither Real Parties nor the County offer any explanation why the Alternative was treated differently than the other six alternatives. Only the Alternative was analyzed "at a level of detail equal to that for the Proposed Project." (AR 1321.) Of the remaining six alternatives,[15] only two, Alternatives 1 (the No-Project Alternative) and 4 (the Low Density Alternative) would satisfy the CVWP's unit cap. (AR 1322-1323, 1325.) The RDEIR rejected both of these alternatives for failure to meet basic project objectives. (AR 1322, 1325.) Perhaps most tellingly, the Project itself failed to meet the CVWP's unit cap, a point the County expressly discussed in its findings. (AR 135.)

---

[15] As mentioned *ante*, the FEIR subsequently eliminated one of these alternatives due to a change in ownership of necessary land. (See fn. 2, *supra*; AR 134, 3803-3806, 3808-3809.)

Real Parties note that CEQA does not prohibit the County from structuring its EIR in this fashion. Indeed an EIR need not follow any particular format so long as it contains the information required by CEQA and the Guidelines. (Cal. Code of Regs., tit. 14 (Guidelines), § 15120, subd. (a).) Lead agencies may tailor their EIRs "to different situations and intended uses . . . consistent with the guidelines . . . ." (Guidelines, § 15160.) Here however, the error is not specifically the way in which the EIR is structured. Rather, the EIR's structure evinces that the Alternative was the actual project under consideration.

"The defined project and not some different project must be the EIR's bona fide subject." (*County of Inyo*, *supra*, 71 Cal.App.3d at p. 199.) The Project's history demonstrates that the "Alternative" effectively replaced the Project as the true project under consideration, and that consequently, the existing Project Description is inaccurate. Absent an accurate project description, the EIR could not fulfill its central function to provide sufficient information to allow the public and decision-makers to "ascertain the project's environmentally significant effects, assess ways of mitigating them, and consider project alternatives." (*Sierra Club*, *supra*, 163 Cal.App.4th at p. 533; *County of Inyo*, *supra*, 71 Cal.App.3d at pp. 192-193.) In short, the EIR's inaccurate project description violated CEQA.[16]

2.3 The EIR's Alternatives analysis does not satisfy CEQA.

---

[16] Petitioner asserts a number of other indicators in the record in support of this conclusion. None are persuasive. For example, Petitioner observes that the vesting tentative map approved by the Board was not the original map, but rather, "a wholly new map" for the Alternative. (AR 98.) However, CEQA authorizes the County to adopt an alternative rather than the project proposed, particularly if the County determines that alternative would be less harmful to the environment. (Pub. Resources Code, §§ 21002-21002.1, 21004; Guidelines, § 15002, subd. (a)(3).) "Decisionmakers . . . have the flexibility to implement that portion of a project which satisfies their environmental concerns." (*Dusek*, *supra*, 173 Cal.App.3d at p. 1041.) Additionally, Petitioner erroneously suggests that the Alternative, rather than the Project was considered by the Planning Commission. In fact, the staff report reveals that both were considered. (AR 4104-4119.) The page that Petitioner cites in the record (AR 4123) is a page from staff's Draft Resolution to the Planning Commission. Regardless, the court's conclusion makes it unnecessary to discuss these and Petitioner's other arguments along these lines.

Finally, Petitioner argues that the six alternatives analyzed in the EIR[17] do not represent a reasonable range of alternatives. The court notes that, because the Alternative was actually the Project, only five true alternatives were considered. The court also notes that the alternatives analysis was fatally skewed because it was undertaken in comparison to the Project, not the Alternative. (Pub. Resources Code, § 21002.1 [one purpose of an EIR is "to identify alternatives to the project"]; Guidelines, § 15126.6 ["[t]he EIR shall include sufficient information about each alternative to allow meaningful evaluation, analysis, and comparison *with the proposed project*"].) But even were this not the case, the alternatives analysis would still be deficient.

Petitioner contends that three of the alternatives were infeasible because they proposed densities in excess of the 190-unit cap established by CVMP Policy CV-1.6. Real Parties respond that the settlement did not divest the County's land use authority or police power to approve alternatives in excess of the cap through a general plan amendment, and hence the alternatives were legally feasible.

"The core of an EIR is the mitigation and alternatives sections." (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 565.) An EIR must examine "a range of reasonable alternatives." (Guidelines, § 15126.6, subd. (a).) CEQA establishes no categorical legal imperative as to the scope of alternatives to be analyzed in an EIR; no set number of alternatives is necessary to constitute a legally adequate range. (*Citizens of Goleta Valley*, *supra*, 52 Cal.3d at p. 566.) The court will uphold the County's "selection of alternatives unless it is 'manifestly unreasonable' or inclusion of an alternative does not 'contribute to a reasonable range of alternatives.' [Citation.]" (*Bay Area Citizens v. Association of Bay Area Governments* (2016) 248 Cal.App.4th 966, 1018.) This determination is "subject to a rule of

---

[17] Petitioner focuses on the RDEIR, which contained *seven* alternatives, overlooking that the change to *six* alternatives did not occur until the FEIR. (See fn. 2, *supra*.) This distinction does not affect the court's analysis, however.

reason." (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 407.)

Additionally, the alternatives examined must be "potentially feasible." (Guidelines, § 15126.6, subd. (a).) For these purposes, "feasible" is defined as "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social, and technological factors." (Guidelines, § 15364.) "[A]n alternative is not feasible where there is no way to legally implement it. [Citation.]" (*Uphold Our Heritage v. Town of Woodside* (2007) 147 Cal.App.4th 587, 602.)

As discussed *ante*, CVMP Policy CV-1.6 limits development in the relevant area to 190 new units, for which 24 are already accounted. (AR 14031-14032.) And, as Petitioner suggests, three of the five true alternatives proposed exceed the Policy's unit cap; both the FEIR and the County's findings acknowledge that approving any of these alternatives would require a General Plan amendment. (AR 135-136, 3738.) It is also true that the settlement agreement between Petitioner and the County does not "restrict the County's land use authority or police power in any way with respect to future legislative, administrative or other actions by the County." (AR 19972.) Hence, Real Parties are correct that the three alternatives were legally feasible. Indeed, had the Board approved one of the three relevant alternatives, it could have simultaneously amended the general plan to raise the unit cap. The Board took exactly this step by amending CMVP Policy CV-1.27 as part of its Resolution certifying the FEIR and approving a Combined Development Permit for the Alternative. (AR 98, 102.)

But the mere fact that the three relevant alternatives were legally feasible does not mean they were *practically* feasible. Amending the General Plan to enlarge the cap would have violated the County's settlement agreement with Petitioner. (AR 3738.) While the County had the power to do this, it is clear that it did not have the will. The County's own findings explain that the inconvenience, expense, and political costs to the County were too great to make any of

the four relevant alternatives "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social, and technological factors." (Guidelines, § 15364; see *Citizens for Open Government v. City of Lodi* (2012) 205 Cal.App.4th 296, 313 [EIR properly rejected alternative uses for a site because the site was zoned only for a particular use].) Hence, as to Alternative 3, which proposed a 186 unit project (AR 1849-1852), the County explained:

> "The 190-unit cap was instituted as a result of settlement of litigation and retaining the cap avoids unnecessary controversy over the maximum level of residential development that is allowable within the CVMP area and avoids potential renewal of litigation under the settlement agreement. From a policy standpoint, the Medium-Density Alternative is not acceptable because it does not comply with the CVMP unit cap" (AR 135).

The County drew the same conclusion as to Alternatives 5 and 6, both of which proposed 281-unit projects (AR 136), and as to the "Proposed Project" itself (AR 135).

Only two alternatives, Alternatives 1 (the No-Project Alternative) and 4 (the Low Density Alternative) would satisfy the CVWP's unit cap. (AR 1322-1323, 1325.) Although CEQA requires an EIR to explore a "no project" alternative (Guidelines, § 15126, subd. (e)), that "alternative" is not a true alternative because, by definition, it would meet "*almost none* of the project's objectives." (*Watsonville Pilots Assn v. City of Watsonville* (2010) 183 Cal.App.4th 1059, 1090, italics in original.) Consequently, the EIR effectively examined only a single feasible alternative.

CEQA requires that an EIR provide "enough of a variation to allow informed decision making. [Citation.]" (*Mann v. Community Redevelopment Agency* (1991) 233 Cal.App.3d 1143, 1151.) A single alternative cannot fairly be termed a "reasonable range of potentially feasible alternatives that will foster informed decision-making and public participation." (Guidelines, § 15126.6, subd. (a).) The court therefore concludes that the County's selection of alternatives was "manifestly unreasonable," in violation of CEQA. (*Federation of Hillside and Canyon Associations v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1265.)

Disposition

The petition for writ of mandate is partially granted. Petitioner's request for a writ compelling the County to develop and promulgate the DES is denied. The remainder of the requested writ relief is granted.

The court directs Petitioner's attorney to prepare an appropriate judgment and writ consistent with this ruling, present them to opposing counsel for approval as to form, and return them to this court for signature.

Dated: JUN 07 2018

LYDIA M. VILLARREAL

HON. LYDIA M. VILLARREAL
Judge of the Superior Court

CERTIFICATE OF MAILING
(Code of Civil Procedure Section 1013a)

I do hereby certify that I am employed in the County of Monterey. I am over the age of eighteen years and not a party to the within stated cause. I placed true and correct copies of the **Intended Decision** for collection and mailing this date following our ordinary business practices. I am readily familiar with the Court's practices for collection and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Services in Salinas, California, in a sealed envelope with postage fully prepaid. The names and addresses of each person to whom notice was mailed is as follows:

William P. Parkin, Esq.
Yuchic Pearl Kan, Esq.
WITTWER PARKIN LLP
147 S. River Street, Suite 221
Santa Cruz, CA 95060

Kelly L. Donlon
Deputy County Counsel
Office of the County Counsel
Count of Monterey
168 W. Alisal Street, Third Floor
Salinas, California 93901-2653

Jacqueline M. Zischke. Esq.
Attorney at Law, PC
P.O. Box 1115
Salinas, California 93902

Dated: JUN 07 2018

Chris Ruhl, Clerk of the Superior Court,

Sally Lopez, Deputy Clerk

Sally Lopez