SUPERIOR COURT OF CALIFORNIA,
COUNTY OF MONTEREY

Highway 68 Coalition; Landwatch Monterey County **Petitioners,** **vs.** **County of Monterey; Monterey County Board of Supervisors** **Respondents,**	**Case No. M130660** **[consolidated with M130670]** **Intended Statement of Decision**
Domain Corporation, Ferrini Oaks, LLC, Islandia 29, a Delaware Limited Partnership **Real Parties in Interest.**	

This matter came on for court trial on September 6, 2016, December 5, 2016, February 21, 2017, and March 8, 2017. All sides were represented through their respective attorneys. At the court's request, the parties submitted additional briefing on May 24, 2017. 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 or about April 2005, the applicant proposed the Ferrini Ranch Project as a 212-parcel development on 870 acres south of Highway 68 between River Road and San Benancio Road in Monterey County. As ultimately approved, the vesting tentative map calls for the creation of 185 lots comprised of 168 market rate single family and 17 lots of moderate income inclusionary

housing units; the creation of three open space parcels totaling 700 acres; and the construction of a new four-way signalized intersection on Highway 68 and widening of Highway 68 from two lanes to four lanes for 1.2 miles.

CEQA review included a 2012 draft EIR (DEIR), a 2014 recirculated draft EIR (RDEIR),[1] and a 2014 final EIR (FEIR) (collectively, the EIR.). The Project developed into a variant of Alternative 5, developed after the FEIR was complete and after three Planning Commission hearings held on October 8, October 29, and November 12, 2014. On December 16, 2014, the County Board of Supervisors (the Board) voted 3-2 to adopt Resolution No. 14-370, certify the EIR and adopt a Statement of Overriding Considerations. The Board also adopted Resolution No. 14-371, approving the Combined Development Permit consisting of a Vesting Tentative Map, two use permits, and a mitigation monitoring and reporting plan.

Petitioners Highway 68 Coalition and Landwatch Monterey County filed separate petitions challenging various aspects of the Board's approvals related to, inter alia, the EIR's water supply analysis, traffic impact analysis, and aesthetics impact analysis. On April 14, 2015, the court ordered the petitions consolidated.

Additional factual discussion accompanies each substantive area of analysis.

Administrative Record

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

Requests for Judicial Notice

Highway 68 requests judicial notice of: 1) "Board of Supervisors June 8, 1999 Approval of Monterey County 21st Century Work Program and Authorize Approval of Contracts Not to Exceed $660,000 and Transfer Funds to Information Technology and Environmental Resource

[1] The DEIR was recirculated only as to its Air Quality, Biological Resources, Greenhouse Gas Emissions, and Alternatives sections. (See AR 2493.)

Policy and Exhibit 1 (Monterey County 21st Century)"; 2) "Board of Supervisors September 21, 1999 Approval of Monterey County 21st Century Public Participation Plan, Staff Recommendation, Roster of Focus Groups, and Executive Summary"; 3) MCC sections 16.70.10-16.70.030 and 19.050.070; 4) Monterey County Board of Supervisors Resolution No. 13-291, dated August 27, 2013; 5) a document entitled "Staking and Flagging Criteria" which Highway 68 claims the Board adopted in 1994; 6) Planning Commission Resolution No. 09023, dated April 8, 2009; 7) "Draft Findings of the Monterey County LCP Periodic Review, Chapter 7: Scenic Resources," prepared by the California Coastal Commission; and 8) Board Resolution No. 08-338.

The court takes judicial notice of the code sections, as it must, under Evidence Code section 451, subd. (a). Further, the court takes judicial notice of Board Resolutions 08-338 and 13-291 and Planning Commission Resolution No. 09023 as official acts of a government agency under Evidence Code section 452, subd. (c). However, the court declines to take judicial notice of the remainder of the items because Highway 68 has not met its burden to show that they are relevant. (See *ITT Telecom Prods. Corp. v. Dooley* (1989) 214 Cal. App. 3d 307, 313, fn. 4.)

Landwatch requests judicial notice of portions of the 2010 Monterey County General Plan Draft EIR . The court takes judicial notice of the existence of these documents as official acts of government entities – but not of the truth of their contents – under Evidence Code section 452, subdivision (c). (See *Fowler v. Howell* (1996) 42 Cal.App.4th 1746, 1750; *Herrera v. Deutsche Bank Nat. Trust Co.* (2011) 196 Cal.App.4th 1366, 1375.)

Standard of Review

Public Resources Code section 21168.5 provides the standard for actions "to attack, review, set aside, void or annul a determination, finding, or decision of a public agency on the

grounds of noncompliance with [CEQA]." Under that section, this court must determine "whether there was a prejudicial abuse of discretion. An abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence." (Pub. Resources Code, § 21168.5.) "Judicial review of these two types of error differs significantly: While we determine de novo whether the agency has employed the correct procedures, scrupulously enforcing all legislatively mandated CEQA requirements, we accord greater deference to the agency's substantive factual conclusions." (*Citizens for a Sustainable Treasure Island v. City and County of San Francisco* (2014) 227 Cal.App.4th 1036, 1045.)

An agency's factual determinations are reviewed for substantial evidence. (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 571.) For purposes of CEQA, 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." (Cal. Code of Regs., tit. 14, § 15384, subd. (a) (the Guidelines).) "Argument, speculation, unsubstantiated opinion or narrative, [or] evidence which is clearly erroneous or inaccurate . . . does not constitute substantial evidence." (*Ibid.*)

By contrast, questions concerning the proper interpretation or application of CEQA's requirements are matters of law. (See *Save our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 118.) "CEQA requires that an EIR include detailed information concerning, among other things, the significant environmental effects of the project under consideration. (Pub. Resources Code §§ 21100, 21100.1.) When an EIR does not satisfy CEQA's informational requirements, the agency fails to proceed in a manner required by law and abuses its discretion." (*Save Our Peninsula, supra,* 87 Cal.App.4th at pp. 117–118.) "'The EIR is

the heart of CEQA' and the integrity of the process is dependent on the adequacy of the EIR. [Citations.]" (*Ibid.*)

In reviewing an agency's action, the court must recognize that "the Legislature intended the act 'to be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.'" (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 390 [*Laurel Heights I*].) "The EIR is the primary means of achieving the Legislature's considered declaration that it is the policy of this state to 'take all action necessary to protect, rehabilitate, and enhance the environmental quality of the state.' [Citation.] . . . An EIR is an 'environmental "alarm bell" whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return.' [Citations.] The EIR is also intended 'to demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action.' [Citations.] Because the EIR must be certified or rejected by public officials, it 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." (*Id.* at p. 392.)

Indeed, "'[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.] The error is prejudicial 'if the failure to include relevant information precludes informed decision making and informed public participation, thereby thwarting the statutory goals of the EIR process.'

[Citation.]" (*San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 721–722.)

Nevertheless, "[i]n reviewing the sufficiency of an EIR, the rule of reason applies." (*A Local & Regional Monitor v. City of Los Angeles* (1993) 12 Cal.App.4th 1773, 1793, 16 Cal.Rptr.2d 358.) "CEQA requires an EIR to reflect a good faith effort at full disclosure; it does not mandate perfection, nor does it require an analysis to be exhaustive . . . . The absence of information in an EIR, or the failure to reflect disagreement among the experts, does not per se constitute a prejudicial abuse of discretion. [Citation.]" (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 712.) A petitioner must demonstrate the absent information "is both required by CEQA and necessary to informed discussion. [Citations.]" (*California Native Plant Society v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 986, 99 Cal.Rptr.3d 572.)

Finally, the EIR is presumed legally adequate (*Al Larson Boat Shop, Inc. v. Board of Harbor Commissioners* (1993) 18 Cal.App.4th 729, 740; Pub. Resources Code, § 21167.3), and the agency's certification of the EIR is presumed correct (*Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 530.) Those challenging an EIR therefore bear the burden of proving both that it is legally inadequate and that the agency abused its discretion in certifying it. (*Ibid*; *Al Larson Boat Shop, Inc.*, *supra*, 18 Cal.App.4th at p. 740.)

Discussion

Petitioners challenge the adequacy of the EIR's water supply, traffic, and aesthetic impacts analyses, as well as procedural steps taken by the County subsequent to EIR certification in these substantive areas and as to parkland mitigation. Petitioners also challenge the EIR's alternatives analysis, responses to comments, cumulative biological impact analysis, and discussion of the Project's consistency with general plan policies. Finally, Petitioners raise non-

CEQA challenges under the Subdivision Map Act regarding the Project's conformity with the County's 1982 General Plan. The court will address each substantive area in turn.

1. Water Supply

1.1 Factual Background

The Project would require the use of 91.13 acre-feet per year (afy) of water. (AR 20391.)[2] Cal Water's Salinas District will supply water to meet project demand through wells in the Spreckels area of the 180/400-Foot Aquifer Subbasin (also referred to as the "Pressure Subarea").[3] The 180/400-Foot Aquifer is one of the eight subbasins making up the Salinas Valley Groundwater Basin ("Basin"). (AR 452.) The 180/400-Foot Aquifer Subbasin includes the lower reaches and mouth of the Salinas River. It has an estimated total storage capacity of 7,240,000 acre-feet of groundwater, with the two main water-bearing units being the 180-Foot Aquifer and the 400-Foot Aquifer (named for the average depth at which they occur). (AR 459.)

Seawater intrusion is the migration of seawater inland into fresh water aquifers. The condition is caused by overdraft, i.e. water being pumped from the Basin faster than the aquifers can be recharged resulting in a lowering of groundwater elevations. Seawater intrusion in the Basin was first documented in the 1930s. (AR 465.) As of 2009, 27,791 acres of land were underlain by seawater intrusion in the 180-Foot Aquifer and 12,097 acres were underlain by seawater intrusion in the 400-Foot Aquifer. (AR 467.)

To combat seawater intrusion, the Monterey County Water Resources Agency (MCWRA) devised a three-part strategy: (i) developing a surface water source to replace groundwater, (ii) stopping pumping along the coast, and (iii) moving surface water to the northern portions of the

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[2] "An acre-foot is 43,560 cubic feet" or "the quantity of water required to cover an acre of land to a depth of one foot." (*Brydon v. East Bay Mun. Utility Dist.* (1994) 24 Cal.App.4th 178, 182, fn. 1.)

[3] The Department of Water Resources has stated that the boundaries of the "180/400 Foot Aquifer Subbasin" generally coincide with those of MCWRA's "Pressure Subarea." (AR 21962.)

Salinas Valley to reduce groundwater pumping. MCWRA implemented the strategy by creating a "Project Suite." To develop a surface water source, MCWRA constructed the Nacimiento and San Antonio Reservoirs, which store water from Salinas River tributaries of the same names. Nacimiento Reservoir has a maximum capacity of 377,900 acre-feet and a maximum elevation of 800 feet. San Antonio Reservoir has a maximum capacity of 335,000 acre-feet and a maximum surface elevation of 800 feet. (AR 25271.) An engineer contracted by MCWRA estimates that the reservoirs have increased groundwater storage by 30,000 afy and reduced seawater intrusion by 7,000 afy due to the increases in groundwater storage and recharge. (AR 16370.)

To help stop pumping along the coast, MCWRA implemented the Monterey County Water Recycling Project, which includes the Salinas Valley Reclamation Project and the Castroville Seawater Intrusion Project (CSIP). (AR 16437.) The Project provides recycled water for irrigation in the Castroville area to conserve coastal groundwater. (AR 18420.) These projects consist of a 19,500 afy tertiary treatment plant and distribution system that provides about 13,000 afy of recycled water to 12,000 acres of Castroville area farms. (AR 468, 18420.) MCWRA implemented the project in 1998; by 2002, the annual average rate of seawater intrusion declined from 15,600 afy to approximately 9,000 afy. (AR 26057.)

To move surface water to the northern portions of the Salinas Valley, MCWRA implemented the Salinas Valley Water Project (SVWP). The SVWP "provides for the long-term management and protection of groundwater resources in the basin by meeting the following objectives: stopping seawater intrusion and providing adequate water supplies and flexibility to meet current and future (year 2030) needs. Through the construction of a variety of improvement projects at the San Antonio and Nacimiento Reservoirs and along the Salinas River, the

SVWP provides the surface water supply necessary to attain a hydrologically balanced groundwater basin in the Salinas Valley." (AR 466.)

In June 2002, MCWRA certified a final EIR for the SVWP. (AR 16351.) Through use of the Salinas Valley Integrated Ground and Surface Water Model (SVIGSM), the SVWP EIR evaluated the effectiveness of the SVWP, in combination with the CSIP, at halting seawater intrusion. (AR 26063-26064.) SVWP EIR modeling assumed the Ferrini Ranch Project's water demands as part of its analysis. (AR 4113.) The SVWP modeling concluded that without the SVWP, 10,500 afy of intrusion would occur. Based on 1995 water demands, the modeling showed that the SVWP, in conjunction with the CSIP, would halt seawater intrusion. (AR 25281.) For the year 2030, the modeling indicated that seawater intrusion might be at 2,200 afy. (AR 5185, 25281.) However, the SVWP modeling concluded that without the SVWP, 10,500 afy of intrusion would occur. (AR 26110.) The SVWP EIR explained that the SVWP could halt seawater intrusion completely, but given the uncertainties inherent in long-term water modeling, it was not possible to draw such a conclusion at the time of EIR preparation. (AR 25281.)

Funding for the SVWP, including funding for operation and maintenance of the Nacimiento and San Antonio Reservoirs, is provided by the payment of assessment fees by projects located within a special assessment zone, MCWRA's Zone 2C. (AR 467, 16341.) The Ferrini Ranch project site is located within Zone 2C and thus the property owner contributes financially towards the SVWP. (AR 490, 4113.) Land uses that require relatively small amounts of water, such as grazing, are assessed at a much lower rate than more water intensive uses, such as irrigated agriculture and residential uses. (AR 16383.) Accordingly, the assessment imposed on the Ferrini Ranch property would increase were it to become subject to residential uses.

1.1.1 The EIR

The DEIR examined whether the Project's groundwater pumping requirements would result in a significant direct impact on groundwater resources. The DEIR concluded "[s]ince the project site is located within Zone 2C, the property owner contributes financially towards the SVWP. For these reasons, the proposed project is considered to have a long-term sustainable groundwater supply, and this would be considered a **less than significant impact.**" (AR 490)

Similarly, the DEIR cited the Project's location in Zone 2C in support of its conclusion that "the cumulative effect of the project and water demand is considered **less than significant**" noting that "[t]he project applicant contributes financially to the SVWP and its groundwater management strategies. The project's impact on the groundwater basin is therefore mitigated by this contribution." (AR 492.) The DEIR explained:

> "Since the SVWP went into operation in 2010, the entire basin appears to be becoming more hydrologically balanced, as a noticeable change in depth to groundwater levels has been observed in most subbasins. [¶] Although the SVWP will not deliver potable water to the project site, it was developed to meet projected water demands based on development and population forecasts. Development forecasts for the project site previously assumed a maximum allowable buildout of 447 units. The proposed project now includes only 212 residential lots and has been deemed consistent with AMBAG's 2008 population forecasts. The higher density (and associated water consumption) was accounted for in the SVWP." (*Id.*)

Finally, the DEIR again cited the Project's location within Zone 2C in support of its conclusion that the project "would have a **less than significant impact** on nearby wells." (AR 491.) The DEIR elaborated:

> "According to the CWSC [California Water Service Company], the wells in the Spreckels area of the Salinas District have a design capacity of producing approximately 4,260 gallons per minute (GPM). Currently, CWSC are serving approximately 2,216 connections with an average demand of 1,464.72 AFY (approximately 908 GPM) (He 2007). The project's estimated water use of 95 AFY represents a 6 percent increase over existing demand from these wells. However, the wells in this area are operating at only 34 percent of their capacity.

> The project's water demand, relative to the size of the groundwater basin and capacity of the existing water delivery system, is not significant with respect to neighboring wells and stabilizing groundwater levels in the basin as a whole." (*Id.*)

Landwatch and other commentators raised a number of concerns regarding water supply including concerns about the acceleration of seawater intrusion and overdraft of the Basin, water supply, and the viability of the SVWP. The FEIR addressed many of these concerns in its "Master Response 2 - Water Supply and Related Issues":

"PROJECT WATER SOURCE . . . .

The water will be provided by Cal Water which has prepared an Urban Water Management Plan (UWMP.) Cal Water does not anticipate ever having the demand for the amount of water that they have the capacity to provide. The projected water use identified in the UWMP has been anticipated in the projections for the [SVWP] and so impacts associated with seawater intrusion and declining ground water levels have been addressed on a cumulative basis through the set of projects associated with the SVWP.

"The Cal Water Urban Water Management Plan (UWMP, 2010) notes that existing supply to this municipal system is considered the amount that Cal Water can pump. Cal Water currently has the design capacity to pump 50,000 acre feet per year; however, projections of customer use through year 2040 are 25,572 acre feet per year . . . .

"EXISTING CONDITIONS FOR WATER ANALYSIS

Comments are correct that the Notice of Preparation for the project was issued in 2005. Existing conditions for the water analysis were the conditions of the Salinas Valley Groundwater Basin as known in 2005 based on various previously prepared reports, including 2004 aquifer storage data from DWR [the Department of Water Resources] (DEIR page 3.6-9). Section 3.6 of the DEIR is the resulting synthesis of several sources of information available over time,

including reports by Kleinfelder, Fugro, Geosyntec, CWSC (Cal Water) and information provided by the Monterey County Water Resources Agency (WRA). The County WRA assisted with the review and organization of all data sources to present a current and accurate section of the EIR. Several references to the 'baseline year' used for the SVWP EIR are noted.

"RELATIONSHIP TO THE SVWP

The water analysis for the proposed project does not rely solely on the SVWP and SVWP EIR for the adequacy of water supply. The DEIR uses a combination of factors when evaluating the impacts to water associated with this project. First as noted above, the proposed project will receive water from Cal Water (CWSC) for which a UWMP has been prepared. The UWMP for CWSC identifies that CWSC has more than sufficient water supply capacity to serve the proposed project. The CWSC's UWMP identifies the source of this water as the Salinas Valley Ground Water Basin. The impacts associated with the CWSC UWMP is [*sic*] included within the pumping demand assumed by SVWP on the basin.

"The subject property was included within the original Zone 2a. Zone 2 was the benefit zone originally defined for the Nacimiento Reservoir, which was built in 1957. Zone 2A was the benefit zone defined for the San Antonio Reservoir, which was built in 1967. In Zone 2/2A was expanded to include Fort Ord and Marina in the 1990s. Zone 2B is the benefit area for the Castroville Seawater Intrusion Project (CSIP) project near Castroville. Zone 2C is the benefit zone defined for the [SVWP] and new reservoir operations. These regional improvements were developed to better manage groundwater resources within the Salinas Valley Groundwater Basin. The project site is within Zone 2C, and the property owner pays Zone 2C assessments. Accordingly the owner is making a fair share contribution toward these groundwater management projects, which include the two reservoirs, CSIP, and the SVWP. As previously

mentioned, the proposed project would not directly rely on water produced through the SVWP or other projects, but relies on the overall benefits provided from the suite of projects mentioned previously.

"A comment asked whether the baseline for the SVWP EIR included the Ferrini property. The growth projections from AMBAG that were used for the SVWP EIR are conservative and did contemplate development at a level which would have included this property. Thus the SVWP EIR assumed development of this property in its analysis.

"The WRA continues to monitor groundwater levels within the basin in order to assess the long term effect of current management efforts and projects over wet and dry years, including the SVWP. The most recent WRA groundwater data (2013) demonstrates near-term benefits of these management efforts, with an understanding that monitoring will be ongoing. Although the proposed project will cause an increase the demand on the Salinas Valley Groundwater Basin, it would not be to a level that wasn't already analyzed and disclosed through preparation of the UWMP or the SVWP EIR.

"GROUNDWATER SOURCE AND PROJECT IMPACTS

As identified [in the] DEIR, the project water source, the 180/400-Foot Aquifer, a subbasin of the SVGB has an estimated total storage capacity of approximately 7,240,000 acre-feet of groundwater. As identified in the DEIR . . . and its supporting reference documents, the Salinas Valley Groundwater Basin as an entire unit is in an overdraft condition; however, some subbasins have better groundwater yields than others. The 180/400 Foot Aquifer Subbasin is recognized as a subbasin that has historically experienced overdraft conditions and, as a result, saltwater intrusion has progressed (DEIR 3.6-15).

"The project is estimated to have a total demand on this subbasin of 95 acre feet per year. The DEIR found this demand on the subbasin was less than significant due to a combination of factors. First is the insignificant demand (95 acre feet per year) versus the total storage capacity of the subbasin (7.24 million acre feet per year). Second is the small demand of this project (95 AFY) in relation to the overall annual demand for the subbasin in 2005 of 118,372 AFY (Agricultural Pumping: 97,028 and Urban Pumping 21,344 ([MCWRA] 2007).) It should be noted that the total pumping from the SVGB is 500,000 AFY with a 90/10 split between agriculture and urban uses. Third is the consistency with the CWSC Urban Water Management Plan, and fourth is the positive influence of the suite of projects implemented to combat seawater intrusion; the [SVWP], CSIP, Lake Nacimiento and Lake San Antonio. [The] DEIR . . . provides graphs demonstrating that the rate seawater intrusion [sic] has been slowing since 2005. The most recent data from the MCWRA shows a continued slowing of the seawater intrusion . . . .

"GROUNDWATER BASIN

The Salinas Valley Groundwater Basin, including the 180/400-Foot Aquifer subbasin, is in overdraft and has experienced seawater intrusion. The MCWRA and the Monterey Regional Water Pollution Control Agency (MRWPCA) operate two major capital projects, [SVWP] and the Salinas Valley Reclamation Project (SVRP) . . . to provide better management of groundwater quality and halt the long-term trend of seawater intrusion and groundwater overdraft.

"The Salinas Valley Integrated Ground and Surface Water Model (SVIGSM) is a tool that was used for planning the development of the [SVWP] and analyzing potential hydrologic impacts.

"A question was raised about whether the SVIGSM included the Ferrini property since the Toro/Fort Ord area was left out of the Historical Benefit Analysis in 1998 because at the time the area was believed to be not part of the main Salinas Valley Groundwater Basin . . . . [I]t is now understood that the Corral de Tierra Area Subbasin is clearly hydrologically connected to and part of the Salinas Valley Groundwater Basin. In addition when the SVWP was modeled in 2002 the SVIGSM was updated using Association of Monterey Bay Area Governments (AMBAG) growth assumptions. This includes the water connections anticipated as part of Cal Water Services UWMP.

"The SVWP provides additional releases of water to the Salinas River upstream, which provides recharge to the groundwater aquifers, increasing the amount of subsurface water. The CSIP/SVRP supplies irrigation water to farmlands in the northern Salinas Valley, allowing the farmers to reduce pumping a like amount, which counteracts the seawater attempting to intrude the aquifers thus reducing the advance of seawater intrusion.

"As stated previously, the Ferrini Ranch project site would be served by wells that are located within the 180-/400-Foot Aquifer Subarea (also referred to as MCWRA's Pressure Subarea) of the Salinas Valley Groundwater Basin and the project site is located within Zone 2C, which means the wells and water source that would serve the proposed project are served by the projects managed by MCWRA to address seawater intrusion, and the property owner is assessed fees to fund these projects. Through payment of the Zone 2C fees, the property owner funds its proportionate fair share towards regional improvements to help better manage the basin as a whole. This would be similar to paying toward Regional Development Impact Fees for roadway network improvements mitigating for cumulative traffic impacts.

"URBAN WATER MANAGEMENT PLAN

The proposed project would have potable water provided by California Water Service Company (CWSC). All urban water suppliers, providing water for municipal purposes either directly or indirectly to more than 3,000 customers or supplying more than 3,000 acre-feet annually are required to prepare an Urban Water Management Plan (UWMP). An UWMP is a foundation document and source of information for a Water Supply Assessment (WSA); a written verification of water supply; and serves as a long-range planning document for water supply, source data for development of a regional water plan, a source document for cities and counties as they prepare their General Plans, and a key component to Integrated Regional Water Management Plans. California Water Code §10644(a) requires CWSC to file a copy of its UWMP with the Department of Water Resources, the California State Library, and any city or county within which the supplier provides water supplies no later than 30 days after adoption. The ability for CWSC to serve its service area is addressed in the UWMP for the Salinas District, which is updated at least every five years. The 2010 UWMP for the Salinas District was adopted in June 2011. The 2010 UWMP describes the service area, system supply and demand, water supply reliability and water shortage contingency planning, demand management measures and climate change . . . .

"INCREASED DEMAND ON THE WATER PURVEYOR

Although the eastern parcel is located within CWSC's service area, the proposed project would require the expansion of the CWSC service area to include the eastern parcel. The expansion of the service area is subject to PUC approval. The proposed project's potable water demand would be met by water procured from existing wells in CWSC's Salinas Hills system as noted on 3.10-21 of the DEIR. The total design capacity of the Salinas Hills System is 4,260

gallons per minute (GPM). Based on an estimated water demand of 95.17 AFY, the proposed project would increase the demand on the Salinas Hills System by approximately 58.8 GPM. According to CWSC, the Salinas Hills System currently has 2,216 service connections and the existing demand is approximately 1,464.72 AFY (or 907.41 GPM) (He 2007). The increased potable water demand would result in a total demand of 1,559.89 AFY (or 966.21 GPM). The Salinas Hills System has the design capacity to accommodate the service connections to serve the proposed project, provided the PUC approves annexation into the service area.

"INCREASED DEMAND ON GROUNDWATER RESOURCES

Long-Term Water Supply (safe yield) (as defined in Monterey County Code Title 19, section 19.02.143) is the amount of water that can be extracted continuously from the basin or hydrologic sub-area without degrading water quality, or damaging the economical extraction of water, or producing unmitigatable adverse environmental impacts. The proposed project's long term impact on groundwater resources is addressed under Impact 3.6-2 starting on page 3.6-31 of the DEIR.

"MCWRA requires a project to estimate pre- and post-project water demand. As shown in . . . the DEIR, the proposed project would result in an estimated gross water demand of 95.17 AFY, which is approximately 94.67 AFY greater than the pre-project water demand of 0.5 AFY. Although the project would increase CWSC's demand for groundwater resources, the demand is well within the forecast identified within CWSC's 2010 Urban Water Management Plan (UWMP). The 2010 UWMP estimates the target water demand (demand with conservation savings) based on SBx7-7 target gpcd values or 132 gpcd in year 2015 and 117 gpcd in year 2020 multiplied by the projected population. Based on this methodology, the estimated 668 person increase in population generated by the proposed project . . . would result in a target water

demand of 78,156 to 88,176 gpd (87.5 to 98.9 AFY), which is comparable to the gross water demand estimated in Table 3.6-3 of the DEIR.

"The UWMP estimated the water demand through 2040 by applying a projected growth rate of 0.91, which projected an increase of 7,480 total services by 2040. Eighty-five percent of the total connections (or 6,392) would be residential connections. The proposed 212 residential units would each have one service connection, which would represent a total of 3.3 percent of the forecasted residential connections. The agricultural industrial use would have a maximum of three service connections (one fire service, one commercial service and one agricultural service) which would represent 0.8 percent of the forecasted non-residential connections. Combined, the residential and agricultural industrial uses would represent approximately 3 percent of CWSC's total forecasted service connections anticipated by 2040. The 2010 UWMP analyzed the ability to meet the forecasted water demand under normal year, single dry year and multiple dry year conditions. The UWMP concluded that Cal Water has more than sufficient capacity to provide water to the subject site." (AR 4111-4122.)

1.1.2 The County's Approvals

The County's CEQA findings did not address water supply. This is presumably because the EIR found that the Project had no significant impact on water supply.

The County addressed the water supply issue in the context of its approval of the combined development permit and Vesting Tentative Map, however.

In Finding 7 (**"1982 GENERAL PLAN POLICY 26.1.18- PUBLIC FACILITIES"**), the County concluded:

"The approved project is consistent with the provisions of this policy which states, "*Development proposals which are consistent with the land use designation (Figures 13a, 13b,*

and 13c) may be denied due to factors including, but not limited to, lack of public facilities and services, infrastructure phasing problems, water availability and sewage problems, or presence of environmental and/or plan policy constraints which cannot be mitigated. The project is served by adequate public facilities providing both water and sewer infrastructure, and is served by adequate public services.

"**EVIDENCE:** a) A Can and Will serve letter has been received from California Water Services Company (Cal-Water) for potable water and from California Utilities for Wastewater treatment. Cal-Water's Urban Water Management Plan indicates that Cal Water has the capacity to serve the Project.

b) The project . . . has adequate water availability (see Finding 21 below) . . . ." (AR 26.)

Finding 21 ("**ASSURED LONG-TERM WATER SUPPLY AND ADEQUATE WATER SUPPLY SYSTEM**") provided:

"The project has a long-term water supply, both in quality and quantity, and an adequate water supply system to serve the development." The Board provided the following evidence in support of this finding:

"a) The project will receive potable water from California Water Services Company (Cal-Water). According to Figure 21-3 and Appendix B of the 2011 Urban Water Management Plan (UWMP), the eastern portion of the project site is located within the Indian Springs/Salinas Hills/Buena Vista service area of the Salinas District. Cal-Water prepared an UWMP which identified that Cal-Water has the capacity to provide 50,000 acre feet of water per year; however their customer demand through the year 2040 is 25,572 acre feet per year; therefore the capacity to serve the project is available.

"b) The 212 unit original project was estimated to have a total demand of 95 acre feet. Cal-Water will provide water from their wells near Spreckels. Those wells draw water from the 180/400-foot Pressure Subbasin of the Salinas Valley Groundwater Basin. The EIR found this demand on the subbasin to be less than significant. The General Manager of the Monterey County Water Resources Agency has recommended that a finding of an assured long term water supply can be made based upon the small amount of water demand for the project in relation to the water use in the basin, and the projects which have been designed and are ongoing to address seawater intrusion. The overall annual demand on the Pressure subbasin is approximately

117,242 acre feet per year, of which 19,101 is attributed to urban development. The total storage capacity of the Pressure subbasin is 6.8 million acre feet, while approximately 19 million acre feet are stored within the Salinas Valley Groundwater Basin as a whole. The estimated use of 95 acre feet by this project is approximately .08% of the water in the Pressure area subbasin, and approximately 0.0013% of the water in the Salinas Valley Groundwater Basin as a whole.

"c) The Salinas Valley Groundwater Basin, including the 180/400-Foot Aquifer subbasin, is in overdraft and has experienced seawater intrusion. The Monterey County Water Resources Agency (MCWRA) and the Monterey Regional Water Pollution Control Agency (MRWPCA) operate two major capital projects, [SVWP] and the Salinas Valley Reclamation Project (SVRP), to provide better management of groundwater quality and halt the long-term trend of seawater intrusion and groundwater overdraft.

"d) The subject property is included within Zone 2c. Zone 2 was the benefit zone originally defined for the Nacimiento Reservoir, which was built in 1957. Zone 2A was the benefit zone defined for the San Antonio Reservoir, which was built in 1967. Zone 2/2A was expanded to include Fort Ord and Marina in the 1990s (including the subject site.) Zone 2B is the benefit area for the Castroville Seawater Intrusion Project (CSIP) project near Castroville. Zone 2C is the benefit zone defined for the [SVWP] and new reservoir operations. These regional improvements were developed to better manage groundwater resources within the Salinas Valley Groundwater Basin. The project site is within Zone 2C, and the property owner pays Zone 2C assessments. Accordingly the owner is making a fair share contribution toward these groundwater management projects, which include the two reservoirs, and the SVWP.

"e) The Monterey County Water Resources Agency and as its predecessor, the Monterey County Flood Control and Water Conservation District, implemented a long-term strategy to combat Seawater Intrusion. The strategy was (and is): 1) develop a new water source, 2) move that new water to the coast to replace the water being pumped, and 3) stop pumping along the coast. The strategy has been implemented by the following projects: 1) new water source: Nacimiento and San Antonio reservoirs, 2) move that new water to the coast to replace pumping: the [SVWP], and 3) stop pumping along the coast: Monterey County Water Recycling Projects. This "Project Suite" is the foundation of the projects to stop seawater intrusion; though more are necessary and are currently being worked on. Additional projects include: A) the Salinas River Stream Maintenance (which helps with flood control, though it also removes vegetation from the channel that uses water, thus not allowing the water to be delivered to the coast), B) the Monterey County RCD Arrundo removal project (same premise as previous project, Arrundo is presumed to transpire somewhere between 40,000 and 60,000 acre-feet of water per year), C) the Interlake Tunnel Project, and D) the SVWP Phase II, which is currently scheduled to be on line in 2026.

"f) The MCWRA continues to monitor groundwater levels within the basin in order to assess the long term effect of current management efforts and water supply projects over wet and dry years, including the SVWP. The most recent MCWRA groundwater data (2013) demonstrates near-term benefits of these management efforts, with an understanding that monitoring will be ongoing.

"g) Although the proposed project will cause an increase in demand on the Salinas Valley Groundwater Basin, it would not be to a level that wasn't already analyzed and disclosed through preparation of the UWMP or the SVWP.

"h) The SVWP provides additional releases of water to the Salinas River upstream, which provides recharge to the groundwater aquifers, increasing the amount of subsurface water. The CSIP/SVRP supplies irrigation water to farmlands in the northern Salinas Valley, allowing the farmers to reduce pumping a like amount, which counteracts the seawater attempting to intrude the aquifers thus reducing the advance of seawater intrusion.

"i) The Ferrini Ranch project site would be served by wells that are located within the 180-/400-Foot Aquifer Subarea (also referred to as MCWRA's Pressure Subarea) of the Salinas Valley Groundwater Basin and the project site is located within Zone 2C, which means the wells and water source that would serve the proposed project are served by the projects managed by MCWRA to address seawater intrusion, and the property owner is assessed fees to fund these projects. Through payment of the Zone 2C fees, the property owner funds its proportionate fair share towards regional improvements to help better manage the basin as a whole. This is similar to paying toward Regional Development Impact Fees for roadway network improvements mitigating for cumulative traffic impacts.

"j) Cal-Water provided a will serve letter in 2004, pending the Public Utilities Commission (PUC) approval of the expansion of the Salinas area district. The annexation has not yet occurred. The PUC approval process requires Cal-Water to document their ability to serve the annexed service area with existing resources while remaining consistent with statewide demand reduction policies. If the annexation were not approved, there would be no water to serve the development proposed on the western portion of the project, and no building permits would be issued for those lots. For this reason, a condition is added to the Tentative Map requiring that no final map creating lots within the Cal-Water service area can be recorded until the lots outside of the service area have been annexed by California Water Service Company (Condition 16).

"k) The water quality for the water source complies with all requirements of Chapter 15.04 of the Monterey County Code and Chapter 15 of Title 22 of the California Code of Regulations. Water will be provided by California Water Service Company, a public water provider, regulated by the PUC. Cal-Water is required to provide potable water which meets or exceeds all applicable water quality standards. The Environmental Health Bureau found that Cal-Water is in compliance with drinking water standards. Cal Water has the capacity and ability to provide the project with sufficient water supply and pressure for fire suppression needs, as required by 1982 General Plan Policy 17.3.4. Monterey County Regional Fire Protection District reviewed and conditioned the project to provide adequate fire flow and the installation of hydrants as required under State Fire Code (Conditions 41 and 42)." (AR 35-38.)

1.1.3 **Cumulative impact law**

Landwatch does not challenge the EIR's conclusion that the direct impacts of the Project on water supply would be less than significant. Instead, it challenges the County's conclusion that the Project would have a less than significant cumulative impact.

"'One of the most important environmental lessons evident from past experience is that environmental damage often occurs incrementally from a variety of small sources. These sources appear insignificant, assuming threatening dimensions only when considered in light of the other sources with which they interact. . . . [¶] CEQA has responded to this problem of incremental environmental degradation by requiring analysis of cumulative impacts.' [Citation.]" (*Kings County, supra*, 221 Cal.App.3d at pp. 720–721.)

"'[C]onsideration of the effects of a project or projects as if no others existed would encourage the piecemeal approval of several projects that, taken together, could overwhelm the natural environment and disastrously overburden the man-made infrastructure and vital community services. This would effectively defeat CEQA's mandate to review the actual effect of the projects upon the environment.' [Citation.]" (*Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1214-1215.) Thus, "[c]umulative impact analysis 'assesses cumulative damage as a whole greater than the sum of its parts.' [Citation.]" (*Association of Irritated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1403.)

"'[T]he relevant issue to be addressed in an EIR is not the relative amount of impact resulting from a proposed project when compared to existing environmental problems caused by past projects, but rather *whether the additional impact associated with the project* should be considered significant in light of the serious nature of the existing problems.' [Citation.] (*City of Long Beach v. Los Angeles Unified School Dist.* (2009) 176 Cal.App.4th 889, 905-906.)

Consequently, an EIR need only discuss the cumulative impacts of a project "when the project's incremental effect is cumulatively considerable." (Guidelines, § 15130, subd. (a).)

"'Cumulatively considerable' means that the incremental effects of an individual project are significant when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects.'" (Guidelines, § 15065, subd. (a)(3).) This determination necessitates a two-step analysis. First, the court determines whether the combined effects from the proposed project and other projects would result in a "significant cumulative impact." (Guidelines, § 15130, subd. (b).) If so, the court then examines whether the proposed project's "incremental effect" is "cumulatively considerable," and hence represents a significant impact. (*Id.* at subd. (a).)

The first step requires an EIR to provide either a list approach, i.e. a list "of past, present, and probable future projects producing related or cumulative impacts" or "[a] summary of projections" adopted in a planning document that evaluates conditions contributing to the cumulative impact. (*Id.* at subd. (b)(1)(A), (B).) An EIR may comply with the latter method through use of a computer model that includes data equivalent to an EIR summary of projections. (*Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899, 930.)[4]

In step two, the agency must consider whether the project's contribution to the significant cumulative impact identified in step one is itself considerable. In making this determination, the relevant question "is not how the effect of the project at issue compares to the preexisting cumulative effect, but whether 'any additional amount' of effect should be considered significant

[4] Nevertheless, "'[t]he discussion of cumulative impacts shall reflect the severity of the impacts and their likelihood of occurrence, but the discussion need not provide as great detail as is provided of the effects attributable to the project alone. The discussion should be guided by the standards of practicality and reasonableness.' . . . [A] good faith and reasonable disclosure of such impacts is sufficient. [Citation] . . . . [E]xhaustive analysis is not required. [Citations.]" (*Association of Irritated Residents*, *supra*, 107 Cal.App.4th at p. 1404, quoting Guidelines, § 15130, subd. (b).)

in the context of the existing cumulative effect. This does not mean, however, that *any* additional effect in a nonattainment area for that effect *necessarily* creates a significant cumulative impact; the 'one [additional] molecule rule' is not the law." (*Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 120, fns. omitted, disapproved on another ground in *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1109, fn. 3.) "In the end, the greater the existing environmental problems are, the lower the threshold should be for treating a project's contribution to cumulative impacts as significant." (*Ibid*, fn. omitted.)

Finally, "[w]here a lead agency is examining a project with an incremental effect that is not 'cumulatively considerable,' a lead agency need not consider that effect significant, but shall briefly describe its basis for concluding that the incremental effect is not cumulatively considerable." (Guidelines, § 15130, subd. (a).) "A project's contribution is less than cumulatively considerable if the project is required to implement or fund its fair share of a mitigation measure or measures designed to alleviate the cumulative impact. The lead agency shall identify facts and analysis supporting its conclusion that the contribution will be rendered less than cumulatively considerable." (Guidelines, § 15130, subd. (a)(3).)

1.2 Introduction

Landwatch challenges the EIR's water supply cumulative impact conclusions on both procedural and substantive grounds. As to the former, Landwatch contends that the EIR falsely claims that the SVWP would halt seawater intrusion, precluding "informed decision-making." As to the latter, Landwatch contends the EIR's claim the SVWP would halt seawater intrusion is not supported by substantial evidence.[5] Landwatch bases both claims on three sentences in the EIR:

[5] During argument, Landwatch claimed its objection was solely informational in nature and that it was not contending that it was the Project's responsibility to solve the basin's seawater intrusion problem. This claim is at

> "The [SVWP] provides for the long-term management and protection of groundwater resources in the basin by meeting the following objectives: stopping seawater intrusion and providing adequate water supplies and flexibility to meet current and future (year 2030) needs." (AR 466.)
>
> "The SVWP provides for the long-term management and protection of groundwater resources by stopping seawater intrusion and providing adequate water supplies and flexibility to meet the current and future water demand. In addition, the SVWP provides the surface water supply necessary to attain a hydrologically balanced groundwater basin." (AR 489.)

Relatedly, the DEIR concludes that payment of its fair share contribution to the SVWP adequately mitigates the Project's use (by groundwater pumping) of 95 acre-feet per year of water.[6] (AR 492.) The DEIR explains:

> "Property owners in Zone 2C are assessed a special tax to fund the SVWP. Although the SVWP does not physically deliver potable water to urban users, it does provide water to agricultural users, which in turn reduces pumping of groundwater for agricultural uses and makes more groundwater available for urban uses. The project site is located in Zone 2C and will obtain its water source from the Salinas Valley Groundwater Basin that benefits from the SVWP. Since the project site is located within Zone 2C, the property owner contributes financially towards the SVWP. For these reasons, the proposed project is considered to have a long-term sustainable groundwater supply, and this would be considered a **less than significant impact**." (AR 489-490.)

Landwatch argues that evidence that the SVWP would not halt seawater intrusion undermines this conclusion. Landwatch further argues that the failure to include this evidence in the EIR precluded informed decision-making. Additionally, Landwatch contends no substantial evidence supports the DEIR's statement that the SVWP will halt seawater intrusion. There are three problems with this reasoning.

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odds with Landwatch's implicit assumption that the EIR's statement that the SVWP would halt seawater intrusion is essential to the EIR's cumulative impact finding.

[6] The DEIR assumed a buildout of 212 lots. The Board ultimately approved a variant of Alternative 5, a scaled-back plan that contained only 185 lots. (AR 11-14.) Under this reduced plan, the amount of water required is 91.13 acre-feet. (AR 20391.)

First, read together and in context, these excerpts do not compel the reading that Landwatch suggests. They equally permit the inference that the SVWP — an ongoing project, not a purely historical set of limited actions — has the *goal* of halting seawater intrusion.

Second, the statements that the SVWP will "stop[] seawater intrusion"[7] are incidental to the DEIR's conclusion that the Project's Zone 2C fair share contribution to the SVWP adequately mitigates its impact. Whether the SVWP will halt seawater intrusion is immaterial; the pertinent inquiry is whether the Project's contribution to the SVWP adequately mitigates the cumulative impact of the Project's groundwater pumping.

Third, the legally relevant inquiry is the cumulative effect of *this* project's contribution to the seawater intrusion problem, *not* whether this project or another larger scheme completely solves it. Landwatch's argument erroneously assumes that the County may only approve the Project if a complete solution to the seawater intrusion problem is in place. However, "CEQA . . . is concerned with the environmental impacts of the project under consideration. (§ 21100.) Thus, the ultimate question the EIR had to address was not the extent to which [a groundwater] [b]asin was in overdraft, but whether and to what extent . . . this project . . . would impact the [] Basin's overdraft conditions *beyond existing conditions.*" (*Cherry Valley Pass Acres and Neighbors v. City of Beaumont* (2010) 190 Cal.App.4th 316, 346.) The EIR "was not required to resolve the overdraft problem, a feat that was far beyond its scope." (*Watsonville Pilots Assn v. City of Watsonville* (2010) 183 Cal.App.4th 1059, 1094.)

Landwatch contends that the EIR claims the SVWP is a complete solution to the seawater intrusion problem when, in fact, additional water projects — with potential undisclosed impacts of their own – will be required to halt seawater intrusion. Landwatch also argues that the

[7] At trial, Landwatch referred to the claims that the SVWP would halt seawater intrusion as "thresholds of significance." This mischaracterizes the EIR, which explicitly sets forth its thresholds of significance. None relate to the halting of seawater intrusion in the Basin. (AR 480.)

Project's payment of Zone 2C assessments is insufficient mitigation because the assessment will not go toward these future water projects.

Watsonville Pilots concerned a challenge to the City of Watsonville's 2030 General Plan EIR on several grounds, including the City's purported failure to adequately analyze the impact of the Plan on the City's water supply. (*Id.* at p. 1065.) Watsonville's groundwater supply comes from a subunit of the Pajaro Valley groundwater basin, a basin that had been "in overdraft . . . for decades." (*Id.* at p. 1091.) Although seawater had intruded into the basin, it had not yet reached the City's production wells. (*Ibid.*)

To address the issue, the FEIR proposed construction of a pipeline and a coastal distribution system. The local water agency intended to obtain "a substantial quantity of water" which would be imported through that pipeline and into the coastal distribution system. (*Ibid.*) Importation of this water "would substantially alleviate the overdraft situation." (*Ibid.*) The local water agency proposed two additional water supply projects, one of which it specifically targeted at overdraft conditions. (*Id.* at p. 1094, fn. 27.) Further, the FEIR concluded that the impact of new development contemplated by the 2030 General Plan would be offset by conservation measures, decreased water usage, and the conversion of agricultural land to urban use. (*Id.* at pp. 1092, 1094.)

The *Watsonville Pilots* petitioners raised several objections. Among them was "the FEIR's failure to pinpoint a solution to the overdraft problem." (*Id.* at p. 1094.) The court rejected this premise: "The purpose of an EIR is to identify and discuss the impact of the *proposed project* on the existing environment. The FEIR concludes that the impact of the new development contemplated by the 2030 General Plan will be offset . . . . Thus, the overdraft problem will remain but will not be exacerbated by the proposed project. The FEIR was not

required to resolve the overdraft problem, a feat that was far beyond its scope." (*Ibid*, italics added.)

The petitioners also claimed the FEIR was deficient because it failed to discuss the water agencies' potential funding for the proposed water supply projects. (*Id.* at p. 1094.) The court disagreed, explaining:

> "The speculative possibility that [the water agency] might encounter future difficulties in financing various water supply projects was not necessary to the validity of any of the FEIR's conclusions. [The water agency's] water supply projects were discussed in the FEIR as efforts that were anticipated to be made to help resolve the long-term overdraft problem. Yet the FEIR was not tasked with proposing solutions to the overdraft problem, and its conclusions remained valid regardless of whether [the water agency] was likely to resolve the overdraft problem in the foreseeable future. Speculation about [the water agency's] possible future funding problems was not necessary to support the FEIR's analysis of the impact of the 2030 General Plan on the existing environment, one in which, as the FEIR acknowledged, the long-term overdraft problem will continue to be a concern regardless of the 2030 General Plan." (*Id.* at p. 1094, fn. omitted.)

Although *Watsonville Pilots* concerned a project-level challenge to a general plan EIR, rather than a cumulative impact challenge to an individual project, its analytical principles apply with equal force here. A general plan EIR serves as a long-term planning document, and therefore necessarily examines the cumulative impacts of development. (See *O'Loane v. O'Rourke* (1965) 231 Cal.App.2d 774, 782 [a general plan is "a constitution for all future developments"]; Guidelines, § 15130, subd. (b)(1)(B).) It further follows that, if a general plan is not tasked with solving a basin-wide seawater intrusion problem, a relatively small development project bears no such responsibility. Finally, as in *Watsonville Pilots*, the EIR here concluded that the proposed mitigation measures adequately offset project impacts. (AR 489-490.)

The mitigation measure here is the Project's contribution to Zone 2C water supply projects intended to reduce seawater intrusion. This "project suite" includes the SVWP, CSIP, and maintenance of the Nacimiento and San Antonio reservoirs. (AR 4113.) The EIR concluded

that this financial contribution would mitigate the Project's cumulative water supply impact. (AR 489-492, 4113-4114.)

1.3 Informational Challenges

Landwatch contends that the EIR's analysis of water supply impacts fails to meet CEQA's informational requirements. Landwatch argues that 1) the EIR did not adequately assess cumulative conditions because it did not disclose cumulative supply and demand data for the Basin; 2) the DEIR improperly relies upon data drawn from Cal Water's Urban Water Management Plan (UWMP); 3) that the EIR fails to disclose the need for groundwater management projects beyond the SVWP to halt seawater intrusion; 4) that the EIR "fails to provide a legally adequate assessment of whether the Project makes a considerable contribution to a significant cumulative impact"; and 5) that the FEIR failed to adequately respond to Landwatch's comments seeking cumulative demand and supply information. The court will address each claim in turn.

1.3.1 Cumulative supply and demand data

According to Landwatch, the EIR "fails to provide cumulative supply and demand data for the Basin, the 180/400 Foot Aquifer, or Zone 2C." Quoting *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 441, Landwatch contends that CEQA requires the EIR to provide this data so that the public can determine whether there would be "an approximate long-term sufficiency in water supply." Landwatch further asserts that this determination is bound up in the cumulative impact analysis. There are a few problems with this assertion.

First, CEQA does not require as much in-depth analysis or information for a cumulative impact analysis as for a direct impact analysis. (Guidelines, § 15130, subd. (b) [The cumulative

impact discussion "need not provide as great detail as is provided for the effects attributable to the project alone . . . . [it] "should be guided by the standards of practicality and reasonableness . . . "].) Even *Vineyard*, a direct rather than cumulative impact analysis case, does not require as much data as Landwatch urges. Thus, *Vineyard* held that an EIR must show only "a *likelihood* water would be . . . available, over the long term, *for this project*." (*Vineyard, supra*, 40 Cal.4th at p. 441.) "CEQA does not require a city or county, each time a new land use development comes up for approval, to reinvent the water planning wheel." (*Id.* at p. 434.)

Second, even if *Vineyard* required more, this project is not a "large-scale development project[]." (*Cherry Valley, supra*, 190 Cal.App.4th at 341.) Such projects raise significant land-use planning concerns not present here. (*Vineyard, supra*, 40 Cal.4th at p. 432 ["[r]equiring certainty when a long-term, large-scale development project is initially approved would likely be unworkable, as it would require water planning to far outpace land use planning"].)

In short, CEQA does not require an EIR for a relatively small development, such as Ferrini Ranch, to provide basin-wide cumulative supply and demand data.[8] Given the size of the project and its projected water demand, the EIR's cumulative impact discussion satisfies CEQA. (Guidelines, § 15130, subd. (b).)

1.3.2 Demand Projections

Landwatch asserts the EIR did not provide an adequate discussion of significant cumulative impacts because it "[m]erely referenc[ed]" the SVWP EIR without providing its summary of projections.

[8] Nevertheless, the FEIR contains *some* quantitative cumulative supply and demand data. It presents 2005 cumulative supply and demand data for the 180/400 Foot Subbasin (AR 4114) and 2040 cumulative supply and demand data for Cal Water's Salinas District (AR 4111).

"Where an EIR or negative declaration uses incorporation by reference, the incorporated part of the referenced document shall be briefly summarized where possible or briefly described if the data or information cannot be summarized. The relationship between the incorporated part of the referenced document and the EIR shall be described." (Guidelines, § 15150, subd. (c).)

Here, the EIR provided all necessary information regarding the SVWP EIR. The EIR clearly sets forth the nature of the SVWP (AR 466) and explains its relevance to the Project: "In order to fund the improvements provided by the SVWP, the MCWRA established a special assessment zone, Zone 2C (formerly Zones 2a and 2b) . . . . Zone 2C benefits are deemed special benefits received by only those parcels that fund the SVWP . . . . The proposed Ferrini Ranch project is located in . . . Zone 2C" (AR 467).

Moreover the EIR incorporates the SVWP EIR in only a single respect, the SVWP EIR's computer model:

> "The Salinas Valley Integrated Ground and Surface Water Model (SVIGSM), a planning tool, was used to evaluate hydrologic effects of operations under Alternatives A and B of the SVWP (MCWRA 2002). The analysis relied on assumptions about future population growth and water demand in the Salinas Valley, hydrology (patterns of wet and dry years), and regional economic trends, which were based on historical records and predictive tools used by the Association of Monterey Bay Area Governments (AMBAG) and local planning departments." (AR 466; see also AR 4115-4116.)

This paragraph adequately alerts the reader that the SVIGSM computer model supported the SVWP EIR's assumptions. Further, the EIR's references specifically cite six pages of the SVWP EIR in support of the EIR's conclusions. (AR 494.) This is a sufficient "road map" as to the information the EIR intended to convey. (*Vineyard, supra*, 40 Cal.4th at p. 443; Guidelines, § 15150, subd. (c).)[9] CEQA requires nothing more.[10]

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[9] In any event, the EIR was not required to provide the SVWP EIR's summary of projections because it relied upon the SVIGSM computer model. The SVIGSM computer model includes data equivalent to an EIR's summary of projections. (See *Rialto Citizens for Responsible Growth, supra*, 208 Cal.App.4th at p. 930.)

1.3.3 Reliance on Cal Water and its UWMP

Landwatch contends the EIR erroneously limited its cumulative impact analysis to urban uses within the Cal Water service area, notwithstanding that a significant portion of water use in the Basin is agricultural.

Landwatch's argument conflates two distinct (albeit closely related) questions: 1) whether there is adequate water supply to meet long-term project needs; and 2) assuming adequate water supply, whether the use of that water supply causes a significant cumulative impact on the Basin by increasing overdraft, and by extension, seawater intrusion.[11] The Ferrini Ranch EIR primarily relies on data obtained from Cal Water and its Urban Water Management Plan (UWMP) to answer the first question in the affirmative.[12]

> "CEQA . . . does not require a city or county, each time a new land use development comes up for approval, to reinvent the water planning wheel. Every

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[10] Additionally, the EIR's analysis was not limited to the 2002 SVWP EIR's projections. Instead, it presented historical graphs based upon MCWRA data through showing "that the cumulative rate of seawater advancement is slowing and stabilizing, while the annual advance is beginning to decrease." (AR 466-468, 4117-4118.)

[11] Obviously, there is overlap between these issues. Thus, "[a]n EIR for a land use project must address the impacts of *likely* future water sources, and the EIR's discussion must include a reasoned analysis of the circumstances affecting the likelihood of the water's availability. [Citation.]" (*Vineyard, supra*, 40 Cal.4th at p. 432, italics in original.) Here, the distinction is reflected in the thresholds of significance that the DEIR establishes:

> "For the purposes of this Draft EIR, impacts are considered significant if the following could result from implementation of the proposed project: . . . . [2] Substantially deplete groundwater supplies or interfere substantially with groundwater recharge such that there would be a net deficit in aquifer volume or a lowering of the local groundwater table level (e.g., the production rate of preexisting nearby wells would drop to a level which would not support existing land uses or planned uses for which permits have been granted) . . . . [4] Lack availability of sufficient water supplies to serve the project from existing entitlements and resources, or require new or expanded entitlements." (AR 480.)

These thresholds are virtually identical to sample questions provided in Appendix G to the Guidelines. (Guidelines, Appendix G, ¶ XI (b) [impact of use of water supply]; XVII(d) [water supply].)

[12] Nevertheless, the EIR integrates the UWMP and SVWP. (AR 4111 ["The projected water use identified in the UWMP has been anticipated in the projections for [SVWP] and so impacts associated with seawater intrusion and declining ground water levels have been addressed on a cumulative basis through the set of projects associated with the SVWP"]; AR 4113 ["The impacts associated with the CWSC' UWMP is included within the pumping demand assumed by SVWP on the basin"].) Thus, the SVWP EIR considered and accounted for both the Project's water demand and the impact of that demand on seawater intrusion.

> urban water supplier is already required to prepare and periodically update an 'urban water management plan,' which must, inter alia, describe and project estimated past, present, and future water sources, and the supply and demand for at least 20 years into the future. (Wat. Code, §§ 10620–10631.) When an individual land use project requires CEQA evaluation, the urban water management plan's information and analysis may be incorporated in the water supply and demand assessment required by both the Water Code and CEQA '[i]f the projected water demand associated with the proposed project was accounted for in the most recently adopted urban water management plan.' (Wat., Code, § 10910, subd. (c)(2).) Thus the Water Code and the CEQA provision requiring compliance with it (Pub. Resources Code, § 21151.9) contemplate that analysis in an individual project's CEQA evaluation may incorporate previous overall water planning projections, assuming the individual project's demand was included in the overall water plan." (*Vineyard, supra*, 40 Cal.4th at pp. 434-435.)

"The ability for CWSC to serve its service area is addressed in the UWMP for the Salinas District, which is updated at least every five years." (AR 4116.) Cal Water's 2010 UWMP "describes the service area, system supply and demand, water supply reliability and water shortage contingency planning, demand management measures and climate change." (*Ibid.*) The UWMP "notes that existing supply to this municipal system is considered the amount that Cal Water can pump. Cal Water currently has the design capacity[13] to pump 50,000 acre feet per year; however, projections of customer use through year 2040 are 25,572 acre feet per year." (AR 4111.) "Although the project would increase [Cal Water's] demand for groundwater resources, the demand is well within the forecast identified within [Cal Water]'s 2010 [UWMP]." (AR 4122). The FEIR describes the methodology behind the application of the UWMP's forecast to

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[13] The EIR and County findings repeatedly used the term "capacity" and "supply" interchangeably. (E.g., AR 26, 30, 35-36, 4111, 4113-4114.) The terms are not equivalent. For example, a car may have a 10-gallon capacity, but it does not follow that the car actually contains 10 gallons of fuel. The findings are unclear on this point, reciting that the "total *storage capacity* of the Pressure subbasin is 6.8 million acre-feet, while approximately 19 *million acre-feet are stored* within the Salinas Valley Groundwater Basin as a whole. The estimated use of 95 acre feet by this project is approximately .08% of the *water in the* Pressure area subbasin, and approximately 0.0013% of the water in the Salinas Valley Groundwater Basin as a whole." (AR 36, italics added.)

In fact, the *amount of water* in the subbasin is 6.8 million acre-feet, while the *capacity* of the subbasin is 7.24 million acre-feet. (AR 5313, 20370, 20401, 21964.) Nevertheless, Cal Water's treatment of supply as equivalent to design capacity was reasonable, since Cal Water could not supply any more water than it had the ability to pump.

the Project in detail. (*Ibid.*) Accordingly, the EIR properly incorporated the UWMP's water supply analysis. (AR 4111, 4116, 4122; *Vineyard, supra*, 40 Cal.4th at pp. 434-435.) Doing so did not limit the EIR's cumulative impact analysis. Rather, it justified the EIR's conclusion that adequate water supply is (and will be) available to serve the Project

1.3.4 Ratio Theory

Landwatch argues that the EIR improperly relied on the "ratio" approach rejected in *Kings County* to find a less than considerable contribution to a significant cumulative impact.

In *Kings County*, the court found several deficiencies in an EIR for a proposed 26.4-megawatt coal-fired cogeneration plant. Among these defects was an inadequate analysis of the cumulative impacts of the project on air quality. (*Kings County, supra*, 221 Cal.App.3d 692, 718-721.) Although the EIR acknowledged that cumulative ozone impacts of area energy development projects were potentially significant, it concluded that the project's incremental effects were insignificant because the project "would contribute less than one percent of area emissions for all criteria pollutants." (*Id.* at p. 719.) The court rejected this "ratio theory" because it precluded an analysis of "the severity of the problem and allow[ed] the approval of projects which, when taken in isolation, appear insignificant, when viewed together, appear startling." (*Id.* at p. 721.) The "ratio theory" created the false impression that "the greater the overall problem, the less significance a project has in a cumulative impacts analysis." (*Ibid.*)

Subsequent decisions have cautioned that it would be improper to deem a project's cumulative environmental impact insignificant "solely because its individual contribution to an existing environmental problem is relatively small. [Citations.]" (*San Francisco Baykeeper, Inc., supra*, 242 Cal.App.4th at p. 223.) In fact, "the greater the existing environmental problems are,

the lower the threshold should be for treating a project's contribution to cumulative impacts as significant." (*Communities for a Better Environment, supra*, 103 Cal.App.4th at p. 120.)

Here, the EIR's use of a "ratio" related not to the Project's environmental impact, i.e. the impact on overdraft and seawater intrusion, but rather, to the availability of water supply to serve the Project: "the insignificant *demand* (95 acre feet per year) versus the total *storage capacity*[14] of the subbasin (7.24 million acre feet per year) [and]... the small demand of this project (95 AFY) in relation to the overall annual demand for the subbasin in 2005 of 118,372 AFY." (AR 4114, italics added.) When the question is whether there is adequate water supply to serve the project, comparing the project's demand to total supply is logical. Such an approach does not implicate the concerns of *Kings County* and its progeny because it does not minimize the Project's environmental impacts.

1.3.5 Comment Responses

Landwatch argues the County failed to adequately respond to its comment seeking baseline and future projections of basinwide cumulative supply and demand and a comparison of this data to supply and demand projections in the SVWP EIR.

A lead agency is required to evaluate public comments on a DEIR and to provide written responses for inclusion in the FEIR. (Pub. Resources Code, § 21091, subd. (d).) This requirement "helps to ensure that the lead agency will fully consider the environmental consequences of a decision before it is made, that the decision is well informed and open to public scrutiny, and that public participation in the environmental review process is meaningful." (*City of Long Beach, supra*, 176 Cal.App.4th at p. 904.)

[14] Because capacity does not necessarily equal supply, this factor is inapt on its face. (See fn. 13, *ante*.)

"When a comment raises a significant environmental issue, the lead agency must address the comment 'in detail giving reasons why' the comment was "not accepted. There must be good faith, reasoned analysis in response. Conclusory statements unsupported by factual information will not suffice." (*Flanders Foundation v. City of Carmel-by-the-Sea* (2012) 202 Cal.App.4th 603, 615, quoting Guidelines, § 15088, subd. (c).) Nevertheless, "[r]esponses to comments need not be exhaustive . . . . The determination of the sufficiency of the agency's responses to comments on the draft EIR turns upon the detail required in the responses. Where a general comment is made, a general response is sufficient. An EIR is presumed adequate, and the petitioner in a CEQA action has the burden of proving otherwise. Satisfactory responses to comments may be provided by reference to the EIR itself." (*Gilroy Citizens for Responsible Planning v. City of Gilroy* (2006) 140 Cal.App.4th 911, 937, internal citations omitted.) "CEQA does not require a lead agency to conduct every test or perform all research, study, and experimentation recommended or demanded by commentors. When responding to comments, lead agencies need only respond to significant environmental issues and do not need to provide all information requested by reviewers, as long as a good faith effort at full disclosure is made in the EIR." (Guidelines, § 15204, subd. (a).)

Additionally, courts have cautioned against allowing the comment-and-response process to become little more than a series of litigation interrogatories or "simply a means by which project opponents can subject a lead agency's staff to an onerous series of busywork requests and 'go fetch' demands." (*City of Irvine v. County of Orange* (2015) 238 Cal.App.4th 526, 558.) This is, in part, because "unlike the typical discovery process in litigation, the recipient of onerous demands for information by a project opponent has no recourse to the courts for relief (such as a protective order or other legal device) to prevent the comment-and-response process from being

abused by project opponents." (*Id.* at p. 549.) Finally, the court must remain mindful "that CEQA does not require exhaustive analysis of cumulative impacts." (*Paulek v. California Department of Water Resources* (2014) 231 Cal.App.4th 35, 51 (citing Guidelines, § 15130, subd. (b).)

1.3.5.1 Demands for information

Landwatch seeks a projection of "cumulative future agricultural demand" and "projected cumulative urban demand," i.e. a "current projection of 2030 urban water use to be supplied by the SVGB." (See AR 3564-3567.) Landwatch also requests that the County "[i]dentify the population served for this domestic cumulative baseline water supply and explain how this was determined" so that Landwatch can "determine current per capita water baseline water use with reference to actual data for domestic water use in the SVGB" to assess Basin compliance with SBX77. (AR 3566-3567.)

Not only are these requests unduly onerous, but they demand information that is outside the EIR's scope; "CEQA does not require exhaustive analysis of cumulative impacts." (*Paulek, supra*, 231 Cal.App.4th at p. 51.) Moreover, these comments are misdirected because CEQA is concerned with the *incremental effect* of the Project on the cumulative overdraft problem, not whether the SVWP halts *all* seawater intrusion in the basin. (Guidelines, § 15130, subd. (a) [an EIR "shall discuss cumulative impacts of a project when the project's incremental effect is cumulatively considerable. . . . ."]; *Cherry Valley, supra*, 190 Cal.App.4th at p. 346; *Watsonville Pilots, supra*, 183 Cal.App.4th at p. 1094.) The FEIR's response is thus adequate:

> "The water analysis for the proposed project does not rely solely on the SVWP and SVWP EIR for the adequacy of water supply. The DEIR uses a combination of factors when evaluating the impacts to water associated with this project. First . . . the proposed project will receive water from Cal Water (CWSC) for which a UWMP has been prepared. The UWMP . . . identifies that CWSC has more than sufficient water supply capacity to serve the proposed project. The CWSC's UWMP identifies the source of this water as the Salinas Valley Ground Water

> Basin. The impacts associated with the CWSC' UWMP is included within the pumping demand assumed by SVWP on the basin." (AR 4113.)

Further, updated data from MCWRA shows "a continued slowing of the seawater intrusion" since preparation of the DEIR (and since the SVWP was implemented.) (AR 4113-4114, 4117-4118; AR 20401-20402 [The Project "will not exacerbate overdraft conditions in the Basin over and above what has already been accounted for in the SVWP technical analysis"].)

1.3.5.2 The statement that SVWP EIR projections were "conservative"

Landwatch criticizes the FEIR's "conclusory and inaccurate response — that the SVWP EIR demand projections were conservative." Landwatch argues that this response is misleading because "urban use is only 10% of cumulative demand" and because overall pumping exceeded the SVWP's projections. There are several problems with this criticism.

First, the County's response was to a comment inquiring, "whether the baseline for the SVWP EIR included the Ferrini property." (AR 4113.) The County responded, "[t]he growth projections from AMBAG that were used for the SVWP EIR are conservative and did contemplate development at a level which would have included this property. Thus the SVWP EIR assumed development of this property in its analysis." (*Ibid.*) In fact, in forecasting projected water demands, the SVWP EIR "assumed a maximum allowable buildout of 447 units" on the Project site. (AR 492.) The approved Project contemplates the development of less than half that amount of units. (AR 21.) Thus, the Project's water demand is significantly less than the SVWP EIR's projections. It is in *this* sense that the FEIR termed the SVWP EIR's growth projections "conservative." (AR 4113.)

Second, the focus on urban growth is appropriate to the extent that the FEIR is addressing the question of water supply as opposed to the question of seawater intrusion.[15] The water supply is provided by Cal Water, which *serves virtually entirely urban customers.*[16] (AR 29304-29306.) As to seawater intrusion, the FEIR explains:

> "The water will be provided by Cal Water which has prepared an Urban Water Management Plan (UWMP.) Cal Water does not anticipate ever having the demand for the amount of water that they have the capacity to provide. The projected water use identified in the UWMP has been anticipated in the projections for the [SVWP] and so impacts associated with seawater intrusion and declining ground water levels have been addressed on a cumulative basis through the set of projects associated with the SVWP." (AR 4111.)

Thus, the FEIR concluded, "[a]lthough the proposed project will cause an increase the demand on the Salinas Valley Groundwater Basin, it would not be to a level that wasn't already analyzed and disclosed through preparation of the UWMP or the SVWP EIR." (AR 4114.)

In sum, the FEIR contains "good faith, reasoned analysis" in response to Landwatch's comments. (See Guidelines, § 15088, subd. (c).)

1.4 Substantial Evidence Review

Landwatch asserts the record does not contain substantial evidence in support of the EIR's cumulative impact analysis. Specifically, Landwatch argues that the EIR "fails to present facts and analysis to support the claim that the SVWP or other existing groundwater management efforts are sufficient to balance the basin or halt seawater intrusion." Landwatch also argues that the evidence, in fact, shows that existing groundwater management projects are insufficient to halt seawater intrusion.

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[15] In any event, the SVWP EIR assumptions not only underestimated basinwide urban demand, but also underestimated *combined* agricultural and urban demand for the 180/400 foot subbasin. (AR 20401.)

[16] Landwatch also argues that the FEIR "does not identify the level of supply that could be maintained without significant impacts, instead disclosing only that Cal Water is pumping capacity." However, Cal Water's UWMP "notes that existing supply to this municipal system is considered the amount that Cal Water can pump." (AR 4111.) Moreover, "[t]he impacts associated with the CWSC' [*sic*] UWMP is included within the pumping demand assumed by SVWP on the basin." (AR 4113.)

For purposes of CEQA, "substantial evidence" "includes fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact." (Pub. Resources Code, § 21080, subd. (e)(1); see also Guidelines, § 15384, subd. (b).) Guidelines section 15384, subdivision (a), defines "substantial evidence" 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." "Substantial evidence is not argument, speculation, unsubstantiated opinion or narrative, evidence that is clearly inaccurate or erroneous, or evidence of social or economic impacts that do not contribute to, or are not caused by, physical impacts on the environment." (Pub. Resources Code, § 21080, subd. (e)(2).) In applying the substantial evidence standard, a court "must indulge all reasonable inferences from the evidence that would support the agency's determinations and resolve all conflicts in the evidence in favor of the agency's decision. [Citation.]" (*Mani Brothers Real Estate Group v. City of Los Angeles* (2007) 153 Cal.App.4th 1385, 1397.)

Further, "[a] court may not set aside an agency's approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable. [Citation.] 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. Our limited function is consistent with the principle that 'The purpose of CEQA is not to generate paper, but to compel government at all levels to make decisions with environmental consequences in mind. CEQA does not, indeed cannot, guarantee that these decisions will always be those which favor environmental considerations.' [Citation.]" (*Laurel Heights I, supra*, 47 Cal.3d at p. 393.)

1.4.1 The "claim" that the SVWP will halt seawater intrusion

As discussed in more detail *supra*, Landwatch's substantial evidence argument is predicated on a fundamental misreading of the EIR. Landwatch assumes the EIR's conclusions regarding the Project's cumulative impact on groundwater supplies relied upon the SVWP halting basin seawater intrusion. In fact, the EIR based its cumulative impact conclusion upon the Project's financial contribution to MCWRA's project suite (not merely the SVWP), which the EIR concluded adequately mitigated the Project's cumulative impact. (AR 492, 4113-4114.) It is thus irrelevant whether substantial evidence supported the claims that the SVWP would halt seawater intrusion or hydrologically balance the basin.

1.4.2 The basis for the DEIR's conclusion that demand on the subbasin was less than significant

Moreover, substantial evidence in the record supports the EIR's cumulative impact analysis. The FEIR's conclusion that the Project's demand on the subbasin was less than significant was based upon four factors:

> "First is the insignificant demand (95 acre feet per year) versus the total storage capacity of the subbasin (7.24 million acre feet per year). Second is the small demand of this project (95 AFY) in relation to the overall annual demand for the subbasin in 2005 of 118,372 AFY (Agricultural Pumping: 97,028 and Urban Pumping 21,344 (Monterey County Water Resources Agency 2007).) It should be noted that the total pumping from the SVGB is 500,000 AFY with a 90/10 split between agriculture and urban uses. Third is the consistency with the CWSC Urban Water Management Plan, and fourth is the positive influence of the suite of projects implemented to combat seawater intrusion; the [SVWP], CSIP, Lake Nacimiento and Lake San Antonio. DEIR page 3.6-17 provides graphs demonstrating that the rate seawater intrusion has been slowing since 2005. The most recent data from the MCWRA shows a continued slowing of the seawater intrusion." (AR 4114.)

Landwatch again conflates the questions of water supply and the impact of the use of that supply. The Ferrini Ranch EIR primarily relies on data obtained from Cal Water and its UWMP to answer the first question in the affirmative. Thus, to address water supply, the DEIR identifies

the water supplier, Cal Water, and describes that company's available supply and the Project's projected water demand. (AR 460, 481-488.) The FEIR further notes, "[a]lthough the Project would increase CWSC's demand for groundwater resources, the demand is well within the forecast identified within CWSC's 2010 Urban Water Management Plan (UWMP)." (AR 4122, 4111 (["Cal Water currently has the design capacity to pump 50,000 acre feet per year; however, projections of customer use through year 2040 are 25,572 acre feet per year"].) It is in *this sense* that the FEIR concludes the Project is consistent with the UWMP. And, because the UWMP included the expected water supply demand for the Project in its "future demand accounting," the County was justified in relying on it in determining that there is — and will be — adequate water supply to serve the Project. (*Vineyard, supra*, 40 Cal.4th at pp. 446-447.)

Finally, the FEIR concludes that the Project's water supply demand may be easily served because it is "insignificant" compared to the total storage capacity of the subbasin, the overall annual demand on that subbasin, and to that of the Basin as a whole.[17] (AR 4114.) Substantial evidence supports this conclusion. (AR 481-490, 494, 21964, 22806.)

1.4.3 The effect of the project suite on seawater intrusion in the 180-/400-Foot Subbasin

"An EIR may determine that a project's contribution to a significant cumulative impact will be rendered less than cumulatively considerable and thus is not significant. A project's contribution is less than cumulatively considerable if the project is required to implement or fund its fair share of a mitigation measure or measures designed to alleviate the cumulative impact. The lead agency shall identify facts and analysis supporting its conclusion that the contribution will be rendered less than cumulatively considerable." (Guidelines, § 15130, subd. (a)(3).)

[17] As discussed in Section 1.3.4 *ante*, these comparisons are appropriate to the determination whether there is adequate water supply to serve the project.

With respect to seawater intrusion, the FEIR cites MCWRA's "project suite" including the SVWP, the Castroville Seawater Intrusion Project (CSIP), and the continued operation of the Lake Nacimiento and Lake San Antonio reservoirs, all of which are paid for by MCWRA's Zone 2C assessments and all of which directly benefit Zone 2C. This "project suite" is intended to address both seawater intrusion and water supply, Since the Project is in Zone 2C, it pays the assessment, and hence both the DEIR and the FEIR conclude that the Project's cumulative incremental impact on seawater intrusion will be adequately mitigated. (AR 492, 4114.) Substantial evidence supports this conclusion.

MCWRA data shows "that the cumulative rate of seawater advancement is slowing and stabilizing, while the annual advance is beginning to decrease." (AR 466-468.) And, although the SVWP did not go into operation until 2010 (AR 489), the Zone 2C assessment supports not only the SVWP, but MCWRA's other projects, including the CSIP which was implemented in 1998. (AR 4113, 26057.) Since CSIP implementation, the seawater intrusion rate in the 180-Foot and 400-Foot Aquifers has substantially decreased. (AR 467, 5569, 4117-4118, 16400.)

The FEIR supplies updated figures showing the declining rate of seawater intrusion through 2011, while other parts of the record show that rate continued through at least 2013. (AR 4117-4118, 5157, 5166-5167, 5189, 20381-20382.) Additionally, substantial evidence confirms a causal connection between MCWRA's project suite and the rapid decrease in the rate of seawater intrusion the 180-Foot and 400-Foot Aquifers since 2000. (AR 5157-5158, 5189, 16399, 29426.)

Moreover, the record contains two expert opinions in support of the County's conclusion that the Project's incremental contribution to groundwater impacts is not cumulatively considerable. (See *Lewis v. Seventeenth Dist. Agricultural Association* (1985) 165 Cal.App.3d 823, 831 [an agency "may use the opinion evidence of experts as substantial evidence on which

to base its decision"].) MCWRA, the agency responsible for County water management (see Wat. Code App., § 52-8), opined, "the Project has a Long-term Assured Water Supply." (AR 29426.) Additionally, William L. Halligan of Luhdorff and Scalmanini Consulting Engineers, a company involved in the development and technical analysis of the SVWP EIR/EIS, concluded "the Project will not exacerbate overdraft conditions in the Basin over and above what has already been accounted for in the SVWP technical analysis." (AR 20401-20402.)

In sum, substantial evidence supports the County's factual conclusion that the Project's incremental contribution to groundwater impacts is not cumulatively considerable. (AR 36-37.)

1.5 Recirculation

Finally, Landwatch contends that recirculation of the water supply analysis was necessary because "the efficacy of the SVWP to mitigate cumulative impacts was misplaced" and new information purportedly shows that "(1) the SVWP will not halt seawater intrusion if demand exceeds 1995 levels;[18] (2) demand does exceed 1995 levels; (3) post-DEIR studies show that the basin is out of balance, pumping is not sustainable, and additional projects are required."

Recirculation is required only "when significant new information is added to the EIR after public notice is given of the availability of the draft EIR for public review . . . but before certification." (Guidelines, § 15088.5 subd. (a); Pub. Resources Code, § 21092.1.) "Significant new information' requiring recirculation include, for example, a disclosure showing that: [¶] (1) A new significant environmental impact would result from the project or from a new mitigation measure proposed to be implemented. [¶] (2) A substantial increase in the severity of an environmental impact would result unless mitigation measures are adopted that reduce the impact to a level of insignificance ... [¶] (4) The draft EIR was so fundamentally and basically

[18] This assertion fails, among other reasons, because it is not "new information." The SVWP EIR explicitly acknowledged as much. (AR 15612, 25281.)

inadequate and conclusory in nature that meaningful public review and comment were precluded. [Citation.]" (Guidelines, § 15088.5, subd. (a)(1)-(2), (4).)

"[R]ecirculation is not required simply because new information is added . . . '[r]ecirculation was intended to be an exception, rather than the general rule.' [Citation.]" (*South County Citizens for Smart Growth v. County of Nevada* (2013) 221 Cal.App.4th 316, 328.) "An agency's determination not to recirculate an EIR is given substantial deference and is presumed to be correct. A party challenging the determination bears the burden of showing that substantial evidence does not support the agency's decision not to recirculate. [Citation.]" (*Beverly Hills Unified School District v. Los Angeles County Metropolitan Transportation Authority* (2015) 241 Cal.App.4th 627, 661.)[19]

"New information added to an EIR is not 'significant' unless the EIR is changed in a way that deprives the public of a meaningful opportunity to comment upon a substantial adverse environmental effect *of the project* or a feasible way to mitigate or avoid *such an effect* (including a feasible project alternative) that the project's proponents have declined to implement." (Guidelines, § 15088.5, subd. (a), italics added.) In other words, new information cannot be significant unless it relates to a project's impact. Here, the new information concerns the efficacy of the SVWP and new studies showing "that the basin is out of balance, pumping is not sustainable, and additional projects are required," and not to any adverse environmental impact *of the Project*.

[19] By contrast, a challenge asserting that recirculation was required because the DEIR "was so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded" is a matter of law, and hence, "[t]he relevant question is whether the lead agency failed to proceed as required by law. [Citation.]" (*Bakersfield Citizens*, *supra*, 124 Cal.App.4th at p. 1208.)

Landwatch's arguments again assume the EIR's cumulative water supply impact conclusion relied upon the SVWP halting seawater intrusion basin-wide.[20] In fact, the EIR based its cumulative impact conclusion upon the Project's financial contribution to MCWRA's project suite (not merely the SVWP), which the EIR concluded adequately mitigated *the Project's* cumulative impact. (AR 492, 4113-4114.) Substantial evidence supports this finding. MCRWA's project suite has significantly slowed seawater intrusion. (AR 466-467, 469, 471, 491-492, 4117-4118, 5157, 5166-5168, 5189, 16399, 20401, 29426.) The County reasonably concluded that purported problems with the SVWP EIR's demand assumptions and/or the potential need for new groundwater management projects would have no effect on the EIR's cumulative water supply impact conclusion. Accordingly, the public was not deprived "of a meaningful opportunity to comment upon a substantial adverse environmental effect." (Guidelines, § 15088.5, subd. (a).)

Finally, because the EIR did not rely upon the SVWP halting seawater intrusion basin-wide, purported problems with the SVWP EIR's demand assumptions and/or the potential need for new groundwater management projects do not render the DEIR "so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded." (Guidelines, § 15088.5 subd. (a)(4).) In short, recirculation was not required.[21]

2. Traffic

The Project fronts on State Route 68 (SR 68.) (AR 1895, 2449.) SR 68 is a two-lane rural highway connecting State Route 1 in Monterey and U.S. Highway 101 in Salinas. SR 68 is the

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[20] Landwatch assumes that the Project could not be approved unless it solved the seawater intrusion problem. However, the Project "was not required to resolve the overdraft problem, a feat that was far beyond its scope." (*Watsonville Pilots*, *supra*, 183 Cal.App.4th at p. 1094; *Cherry Valley*, *supra*, 190 Cal.App.4th at p. 346.)

[21] Landwatch also argues that the County failed to make a recirculation finding. However, an agency need not make an express finding whether new information is significant; "it is implied from the agency's decision to certify the EIR without recirculating it. [Citations.]" (*South County Citizens for Smart Growth*, *supra*, 221 Cal.App.4th at p. 328.) In any event, although in the "evidence" as opposed to the "findings" section, the County expressly stated, "[n]o new information was added to the FEIR that requires recirculation." (AR 7.)

primary commuter route between Salinas and Monterey and functions as a scenic tourist route to the Monterey Peninsula. (AR 635.) To the west of the Project, SR 68 is a two-lane road with signalized intersections. (AR 1898-1900.) To the east of the Project, SR 68 includes three segments of four-lane roadway. (AR 2455.)

Traffic at most points along the SR 68 corridor is, and for the next 20 years likely will be, at unacceptable levels of service. (AR 643-646, 687.) The same is true for a two-lane portion of Davis Road, including its intersections with Blanco and Reservation Roads. (*Ibid.*)

Using a realistic baseline of 2015 "opening day" conditions (which took into account future traffic arising from other projects already approved but not yet built), the DEIR concluded that the Project's direct traffic impact would be significant and unavoidable. (AR 674.) As mitigation, the County ultimately imposed a condition of approval that required Real Parties to construct, at their expense, a new signalized intersection and 1.2 mile long widening of SR 68. (AR 69.) Despite the Project's significant and unavoidable direct traffic impact, the County found overriding considerations justified approval. (AR 19.) The County reasoned that the widening of SR 68 would eliminate traffic cutting through the residential Toro Park Estates and school which adjoin SR 68; improve safety along that stretch of roadway by eliminating uncontrolled turning movements at that neighborhood/school location; accomplish widening of 1.2 miles of the congested SR 68 corridor much sooner than if only impact fees toward that end were imposed; and, in conjunction with other planned or completed improvements, would reduce travel time between Salinas and Monterey. (AR 19.) The latter 1.2-mile widening is approximately half the section that is planned in the future to widen some, though not all, of SR 68, where nine of the 19 adjacent intersections currently suffer from unacceptable levels of service by Caltrans standards. (AR 639, 643-645, 650.) Although some infrastructure

improvements are presently completed or scheduled, widening of a large portion of SR 68 is not. (AR 3290, 3587.)

The EIR stated and the County found that payment by Real Parties of impact fees collected and administered by the Transportation Agency of Monterey County ("TAMC") — which includes Real Parties' construction of the new widening and intersection — would mitigate the Project's cumulative impact, as measured against 2030 traffic conditions, (AR 10, 688-689.) These fees go into a Regional Development Impact Fee Program ("RDIF") which in turn contributes to long-term traffic improvement projects such as the SR 68 Commuter Improvement Project, affecting SR 68, and the Marina-Salinas Corridor Project, affecting traffic between Marina and Salinas, presently the only two routes between the Monterey Peninsula and Salinas. (AR 649-650.) Unfortunately, the County can only use RDIF fees to fund 16.5% of the SR 68 Commuter Project and 22.5% of the Marina-Salinas Corridor Project. (AR 15632-15633.) And TAMC does not currently anticipate the funding necessary for completion of the projects for approximately the next 20 years. (AR 16728, 16577-16578.) Simply stated, the plans are there but the money is not.

Petitioners have raised a number of objections to the EIR and County's traffic analysis. Those objections include challenges to the baseline for measuring impacts; propriety of the mitigation program where there is no definite, funded plan for construction of all necessary improvements; and to the conclusion that the proposed improvements would be effective mitigation. Petitioners also contend the Project is inconsistent with several General Plan policies.

2.1 Factual Background

The Project fronts on State Route 68 (SR 68.) (AR 1895, 2449.) SR 68 is a two-lane rural highway connecting State Route 1 in Monterey and U.S. Highway 101 in Salinas. SR 68 is the

primary commuter route between Salinas and Monterey and functions as a scenic tourist route to the Monterey Peninsula. (AR 635.) To the west of the Project, SR 68 is a two-lane road with signalized intersections. (AR 1898-1900.) To the east of the Project, SR 68 includes three segments of four-lane roadway. (AR 2455.)

The EIR studied 22 intersections and 17 roadway segments in the immediate project area. The bulk of the intersections and roadway segments are along SR 68, though the Project also affects Davis Road, a rural road forming the western limit line for the City of Salinas. (AR 637.)

2.1.1 The DEIR

The DEIR analyzed traffic conditions under, inter alia, "Background plus Project Conditions" (existing conditions plus project traffic plus "traffic generated from approved, but not yet constructed developments in the area"); and "Cumulative Conditions" (existing conditions plus project traffic plus "the estimated traffic generated by all approved and cumulative projects in the vicinity of the project site . . . . Cumulative projects include developments that are in the review process but have not yet been approved.") (AR 640.)

The DEIR assesses the significance of traffic impacts with reference to levels of service (LOS), ranging from LOS A (no congestion) to LOS F (highly congested traffic with unacceptable delay to vehicles at intersections.) (AR 638-639.)[22] SR 68 and adjacent roads are highly congested. Under existing conditions, 12 of the 22 intersections and 13 of the 17 roadway segments were operating below applicable LOS standards. (AR 644.)

The DEIR evaluated both direct (2015) and cumulative (2030) traffic impacts against the

[22] Highway 68 falls under Caltrans' jurisdiction. (AR 664.) Caltrans' LOS standard is the transition between LOS C and LOS D. (AR 639.) As to county roads, the 1982 Monterey County General Plan applies. That Plan states that the objective for optimum driving conditions is LOS C or better. (*Ibid.*)

"Background Plus Project Conditions" and "Cumulative Conditions" baselines, respectively. (AR 640, 665-675, 683-689.) The DEIR considered the Project's traffic impact significant if it would (1) cause intersection or segment service to deteriorate from acceptable to unacceptable LOS; (2) increase the volume-to-capacity ratio by 0.01 at intersections operating at LOS D or E; or (3) add any traffic to an intersection or segment operating at LOS F. (AR 661.)

2.1.1.1 Direct Impact

Under Background Plus Project Conditions, 14 of the 22 intersections and 13 of the 17 roadway segments would continue to operate at unacceptable levels of service. (AR 665-670.) The DEIR found this to be a significant impact. (AR 666.) Nevertheless, the DEIR adopted mitigation measures intended to remediate a portion of this impact. Under these measures, the applicant would be required to pay TAMC's RDIF impact fees.[23] (AR 671-673, 688.) Payment of RDIF fees supports transportation improvement projects identified in TAMC's regional transportation plan (RTP). The RTP, updated every three to five years, allocates funds to transportation projects over a 25-year period. (AR 27747; Gov. Code, § 65080.)

Among the projects identified in the RTP are two that would directly affect LOS in the Project area: the SR 68 Commuter Improvements Project and the Marina-Salinas Corridor project. The SR 68 Commuter Improvements Project would widen Highway 68 to four lanes for 2.3 miles between the existing four-lane highway at Toro Park and Corral de Tierra Road. (AR 671.) The EIR concluded implementation of these improvements would mitigate impacts to three intersections and three segments by restoring acceptable levels of service. (*Ibid.*) The Marina-Salinas Corridor project would widen Davis Road to four lanes and improve intersections at

[23] Other mitigation measures required the Project to pay its fair share of the City of Salinas Traffic Impact Fee, and County ad hoc mitigation fees, both of which would contribute toward recommended improvements. (AR 688.)

Blanco and Reservation Roads. (AR 650.) The EIR concluded implementation of these improvements would adequately mitigate impacts to two additional intersections.

Even with implementation of both projects, the EIR concluded impacts to five intersections and five segments would remain significant and unavoidable because, although payment into the RDIF "is intended to improve conditions along the SR 68 corridor as a whole," programs intended to address these impacts "are not currently included in any fee program." (AR 674.)

2.1.1.2 Cumulative Impact

Under Cumulative Conditions, 19 of 22 intersections and 13 of 17 segments would operate at unacceptable LOS. (AR 686-687.) Accordingly, the Project "contributes to the cumulative level of service degradation throughout the roadway network." (AR 687.)

To mitigate these measures, the DEIR again required the applicant to pay the Project's "fair share of traffic impact fees" including TAMC RDIF fees, City of Salinas Traffic Impact Fee, and County ad hoc mitigation fees. (AR 688.) The DEIR explained that payment of these fees "would directly contribute to identified improvements such as the SR 68 Commuter Improvements and Marina Salinas Corridor projects, which would help offset any [Project] cumulative traffic impacts . . ." (*Ibid.*) The DEIR did not address mitigation of cumulative impacts to LOS. Instead, the DEIR concluded that payment of fees mitigated the Project's contribution to cumulative impacts, because the fees "will be used over the long term to address ongoing improvements to the regional circulation system." (AR 689.)

2.1.2 Alternative 5 and Physical Improvements

The DEIR evaluated two primary access options to the project: a primary access point at

the existing entrance of Toro County Park, with a new "Ferrini Ranch Road" traveling through a portion of the County-owned park; and, as part of Alternative 3B, an alternative primary access point at SR 68 near Torero Drive. (AR 733-742.) The existing un-signalized Torero Drive (in the Toro Estates neighborhood) would close at SR 68; traffic would be diverted to either the new intersection or the Portola Drive interchange. (AR 734.) The County determined Alternative 3B was the environmentally superior alternative. (AR 761.)

The County later recirculated the Alternatives analysis, adding a new alternative, Alternative 5. Both the revised Alternative 3B and Alternative 5 contemplated the applicant would pay to widen SR 68 to four lanes from the existing four-lane section through a new signalized intersection near Torero Drive and up to the west end of Toro Parks Estate (approximately 1.2 miles of the 2.3-mile SR 68 Commuter Improvements Project) (the "proposed improvements"). (AR 2671.)

In support of the RDEIR, the County and applicant commissioned a new traffic study, the 2012 Wood Rogers study, to "determine the improvements needed on SR 68 to accommodate the project's additional traffic and new signalized access while improving traffic . . ." (AR 3282.)

The study concluded that the proposed improvements would have several beneficial effects: 1) a significant reduction in cut-through traffic on Portola Drive/Torero drive through a residential area/school zone during the morning commute; 2) improved safety and reduced delays for motorists on southbound Torero Drive at SR 68; 2) attendant reduced delays for residents on the southbound approach to Torero Drive; and 3) a 2.3-minute decrease in travel time caused by Project traffic. (AR 3290-3291.)[24]

[24] Wood Rogers later prepared an additional report (the "2014 Wood Rogers study"). The "2014 Wood Rogers study concluded a significant portion of the travel time caused by Project traffic stemmed from the reduction in cut-through traffic. (AR 15196-15197.)

2.1.3 The County's CEQA Resolution

The County adopted the EIR's traffic conclusions. It concluded the Project's direct traffic impact was significant and unavoidable. (AR 11.) However, the County found that overriding considerations justified approving the Project. (AR 19.) The County cited the elimination of neighborhood cut-through traffic and safety benefits of the widening. (AR 19.) The County also noted that the Project would install the proposed improvements "much earlier" than if the County funded improvements solely through RDIF collection. (*Ibid.*)

The County concluded the Project's cumulative impact on traffic was significant, but that RDIF fees would mitigate the impact. (AR 10.) It explained that the widening and new intersection and installing the traffic signal would "maintain the overall function of the regional road network." (*Ibid.*) The County further noted, "It is County practice to deem the cumulative traffic impact mitigated through payment of TAMC Fees when they are associated with an identified TAMC project. The Highway 68 Commuter Improvement Project is an identified project funded by the TAMC fees. In addition, the project shall pay its fair share of the City of Salinas Traffic Impact Fees and any other Monterey County ad hoc Traffic Mitigation Fees." (*Ibid.*)

2.2 Informational Challenges

Petitioners challenge the County's traffic findings on both procedural and substantive grounds.

As to the former, Petitioners contend 1) the use of a 2015 "opening day" [i.e., the date the project would be built] baseline for measuring impacts was improper; 2) the EIR's analysis used an incorrect baseline; 3) the EIR's traffic analysis was misleading, precluding informed decision-making; 4) payment of RDIF fees is inadequate to mitigate cumulative impacts because there is

no presently funded, scheduled construction of improvements to remedy both overall corridor and project-level impacts; and 5) there are procedural defects in the EIR's cumulative impact analysis which preclude informed decision-making.

As to the latter, Petitioners argue that 1) the County's conclusion that mitigation was adequate to minimize the Project's cumulative impact was unsupported by substantial evidence; and 2) the EIR's direct impact conclusion was unsupported by substantial evidence.

Additionally, Petitioners contend the County's General Plan consistency findings as to three specific traffic policies were conclusory and hence, insufficient. Petitioners further contend that the Project was inconsistent with these policies.

2.2.1 Whether the EIR used the correct baseline

Highway 68 contends that the "Background Conditions" baseline (existing traffic "plus traffic generated from approved, but not yet constructed developments in the area") is an inappropriate, speculative baseline that minimizes the effects of Project traffic on existing conditions. (AR 640.) Highway 68 further contends the EIR does not contain analysis necessary to justify the use of a future conditions baseline. The County counters that it did not use a "future conditions" baseline, but rather used a "date-of-implementation" baseline, approved by the California Supreme Court in *Neighbors for Smart Rail v. Exposition Metro Line Const. Authority* (2013) 57 Cal.4th 439.

Neighbors for Smart Rail concerned a light rail line project. (*Id.* at p. 445.) That project exclusively employed a 2030 baseline. (*Ibid.*) The petitioners argued this was improper because conditions at the time the notice of preparation is published, "'will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant.'" (*Id.* at p. 448, quoting Guidelines § 15125, subd. (a).)

The Court acknowledged reliance on an "existing conditions" baseline was the norm. However, it noted that a "future conditions" baseline may sometimes be used "as the sole baseline for impacts analysis if their use in place of measured existing conditions . . . is justified by unusual aspects of the project or the surrounding conditions." (*Id.* at p. 451.) Thus, an agency could choose to omit an "existing conditions" baseline "when inclusion of such an analysis would detract from an EIR's effectiveness as an informational document, either because an analysis based on existing conditions would be uninformative or because it would be misleading to decision makers and the public." (*Id.* at p. 452.)

The Court clarified that, by "future conditions," it meant a "more distant future . . . well beyond the date the project is expected to begin operation . . . ." (*Id.* at p. 453.) The Court distinguished a distant future baseline from a "date-of-implementation" baseline, i.e., "a baseline of conditions expected to obtain at the time the proposed project would go into operation," which it characterized as, essentially, an "existing conditions analysis." (*Id.* at p. 452.) "In so adjusting its existing conditions baseline, an agency exercises its discretion on how best to define such a baseline under the circumstance of rapidly changing environmental conditions. [Citation.] . . . CEQA imposes no 'uniform, inflexible rule for determination of the existing conditions baseline,' instead leaving to a sound exercise of agency discretion the exact method of measuring the existing environmental conditions upon which the project will operate." (*Id.* at pp. 452-453.)

An agency may use a "date-of-implementation" baseline in "appropriate circumstances . . . to account for a major change in environmental conditions that is expected to occur before project implementation . . . . such a date-of-implementation baseline does not share the principal problem presented by a baseline of conditions expected to prevail in the more distant future

following years of project operation—it does not omit impacts expected to occur during the project's early period of operation." (*Id.* at pp. 452-453.)

Here, the County properly used a "date-of-implementation" baseline. The "Background Conditions" baseline does not apply to a date in the "distant future." (*Id.* at p. 453.) Rather, it encompasses "traffic generated from approved, but not yet constructed developments in the area." (AR 640, 651-654.) The EIR justified the use of the baseline by explaining it was

> . . . more consistent with the project's lengthy approval, permitting, and construction timeline. The application was deemed complete in 2005, and nine years later a decision on the project has yet to take place. If approved, several state and/or federal permits will still need to be obtained, and then construction will not take place all at one time. An 'existing plus project' scenario would indeed be misleading and uninformative, because assuming the presence of the project on the existing (2010) roadway network is a physically impossible scenario that would not serve the public in determining the effects of the project. (AR 3943.)

These are the type of "factual circumstances" which the *Neighbors for Smart Rail* Court contemplated would justify use of a "date-of-implementation" baseline. (*Neighbors for Smart Rail, supra,* 57 Cal.4th at p. 453.) Indeed, use of a "date-of-implementation" baseline here serves CEQA's informational purpose by insisting that "CEQA analysis employ a realistic baseline that will give the public and decision makers the most accurate picture practically possible of the project's likely impacts. [Citation.]" (*Id.* at p. 449.)

Highway 68 also objects that some of the projects considered part of "Background Conditions" are several miles away from the Project site. The traffic impact analysis relied upon in the EIR acknowledged that the list of approved projects includes projects in surrounding cities. (AR 1917.) However, the analysis explained that "[i]t is anticipated that the trips generated by the approved projects will impact the study street network prior to impacts being experienced by the proposed project." (*Ibid.*) The County has discretion to determine "the exact method of

measuring the existing environmental conditions upon which the project will operate." (*Neighbors for Smart Rail, supra*, 57 Cal.4th at pp. 452-453.)

2.2.2 Thresholds of significance and the adequacy of mitigation

Landwatch claims the EIR falsely represented it was not using travel time as a significance threshold. Landwatch contends that this representation was a "bait and switch" because the County subsequently relied partially upon a travel-time metric to assess whether the Project's cumulative impact mitigation was adequate. Consequently, Landwatch argues the EIR failed as an informational document.

Landwatch's arguments conflate the concepts of thresholds of significance and adequacy of mitigation. "CEQA grants agencies discretion to develop their own thresholds of significance." (*Save Cuyama Valley v. County of Santa Barbara* (2013) 213 Cal.App.4th 1059, 1068, citing Guidelines, § 15064, subd. (d).) "[W]here substantial evidence supports the approving agency's conclusion that mitigation measures will be effective, courts will uphold such measures against attacks based on their alleged inadequacy. [Citation.]" (*Sacramento Old City Assn. v. City Council* (1991) 229 Cal.App.3d 1011, 1027.)

A project-level (direct) impact is a "physical change in the environment which is" either "caused by and immediately related to the project" or a reasonably foreseeable impact "not immediately related to the project, but which is caused indirectly by the project." (Guidelines, § 15064, subd. (d)(1), (2).) Direct impacts are micro-level impacts that necessitate micro-level mitigation. (See Guidelines, § 15370, subd. (a)-(d).) In the context of *cumulative* impacts, however, mitigation addresses the sum of many impacts caused by many projects, often over a broader geographical area. (Guidelines, §§ 15065, subd. (a)(3), 15355, subd. (b).) Hence,

mitigation of cumulative impacts often requires bigger-picture solutions. (See Guidelines, §§ 15370, subd. (d), 15130, subd. (b)(5).)

Here, the EIR directed mitigation of the Project's direct impact toward remedying deficient LOS at certain affected intersections and segments to below the levels set forth as thresholds of significance. (AR 671-675.) Its treatment of the Project's cumulative impact was different. The EIR reflected this distinction in its significance conclusion; the Project's cumulative impact was significant because the Project "would contribute to the *cumulative* level of service degradation *throughout the roadway network.*" (AR 687, italics added.) Indeed, "[t]he project's contribution of traffic in general – not a specific number of trips – is the 'considerable' factor in the cumulative analysis." (AR 3588.) Thus, the County concluded the improvements would mitigate the Project's cumulative impacts by "maintain[ing] the overall function of the regional road network." (AR 10, see Guidelines, § 15370, subd. (e) [mitigation may include "[c]ompensating for the impact by replacing or providing substitute resources or environments"]; AR 4107.)

Landwatch errs when it refers to the use of corridor travel time as a "significance threshold." The EIR did not use corridor travel time as a significance threshold; it was used as a basis for determining the adequacy of mitigation intended to "maintain the overall function of the regional road network." (AR 10.) Landwatch overlooks the distinction between the two, claiming the EIR "specifically assured the public that . . . LOS-based significance thresholds are used to assess both the significance of impacts and whether cumulative impacts 'are adequately mitigated.'" In fact, the DEIR distinguishes travel time from LOS thresholds, stating, "[a]lthough conventional thresholds of significance are recognized and used . . . the County considers [a study of travel time and delay] to be an important discussion with respect to understanding

corridor operations and the relative net effect of the proposed project on those operations." (AR 664; see also AR 688-689.)

Landwatch also claims that the EIR "expressly disavows use of the travel time metric to determine the adequacy of mitigation." But the EIR statements Landwatch cites do not support these claims; they address thresholds, not mitigation. (See, e.g. AR 3588 ["The *significance thresholds* for project-specific and cumulative impacts associated with the project are the same . . . ."]; 3943 ["The comment is correct that travel time was not used in the TIA *as a significance threshold*, although travel time was analyzed and presented in the EIR"], italics added.) The EIR consistently reflects this distinction. (See, e.g., AR 662, 664, 3586; *Al Larson Boat Shop, Inc. v. Board of Harbor Commissioners* (1993) 18 Cal.App.4th 729, 748 ["If the EIR, 'read as a whole, adequately deals with the question of cumulative impacts, it will suffice'"].)

2.2.3 Whether impact fee mitigation was permissible in light of the inability to remedy all corridor traffic problems

Landwatch argues that payment of impact fees is an inadequate mitigation measure for the Project's cumulative traffic impact because necessary improvements to fix traffic problems along *the entire corridor* are not included in a committed, funded plan. Landwatch cites several statements in the EIR that concede there is no identified program to widen SR 68 in its entirety or to achieve and maintain acceptable LOS at all potential effects at segments and intersections. (See, e.g. AR 648-649, 657.)

Similar to its arguments with respect to water supply, Landwatch assumes Real Parties are responsible for fixing all traffic problems along the corridor. But Real Parties are responsible for mitigating their own impacts, not for resolving the traffic problem in its entirety. (*Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 364 ["Mitigation measures must be roughly proportional to the impacts of a project"];

Guidelines, §§ 15126.4, subd. (a)(4)(B), 15130 subd. (a)(3); *see Koontz v. St. Johns River Water Management Dist.* (2013) 133 S.Ct. 2586, 2595 [government "may not leverage its legitimate interest in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to those impacts"].) Consequently, this argument fails.

2.2.4 Whether impact fee mitigation is permissible where funding is uncertain

Landwatch argues that impact fee mitigation is not permissible because there is no presently funded, scheduled plan to construct the specific improvements upon which the Project relies. The County responds that 1) its fee program is sufficient to satisfy CEQA; and 2) even if it were not, construction of a new signalized intersection at Torero Drive and the widening of a 1.2-mile section of SR 68 to four lanes is a definite, reasonable plan for mitigation.

"Fee-based infrastructure mitigation programs have been found to be adequate mitigation measures under CEQA. [Citations.]" (*Save our Peninsula, supra*, 87 Cal.App.4th at p. 140.) Such mitigation "can be particularly useful where, as here, traffic congestion results from cumulative conditions, and not solely from the development of a single project. [Citation.]" (*Napa Citizens for Honest Government, supra*, 91 Cal.App.4th at p. 363; Guidelines, § 15130, subd. (a)(3) [authorizing fair-share fee-based programs to mitigate cumulative impacts].) Fee-based mitigation programs are adequate if they are "part of a reasonable plan of actual mitigation that the relevant agency commits itself to implementing." (*Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173, 1188.) However, "[a] commitment to pay fees without any evidence that mitigation will actually occur is inadequate. [Citation.]" (*Save our Peninsula, supra*, 87 Cal.App.4th at p. 140.) Moreover, where a fee-based mitigation program is relied upon, an agency must "identify facts and analysis supporting its conclusion that the [Project's]

contribution will be rendered less than cumulatively considerable." (Guidelines, § 15130, subd. (a)(3).)

As Landwatch points out, the FEIR concedes the relevant road improvement projects are not currently "funded or scheduled for completion," and the RTP does not currently project funding for either project before 2035. (AR 3587, 16577, 16728.) Indeed, fee-based infrastructure programs may be problematic when it is unclear whether fees paid will translate into actual mitigation. (*Anderson First Coalition, supra*, 130 Cal.App.4th at p. 1188; *Kings County, supra*, 221 Cal.App.3d at pp. 727-728.) Here, however, there can be no such concern.

In the RTP, TAMC specifically identified projects designed to mitigate traffic impacts in the immediate project area, namely the SR 68 Commuter Improvements Project and the Marina-Salinas Corridor Project. (AR 16488.) In lieu of fees to support these and other projects, Real Parties are required to construct a new signalized intersection along SR 68 and widen a 1.2-mile portion of SR 68 to four lanes. (AR 6, 19, 69.)[25] The widening alone constitutes more than half of the planned SR 68 Commuter Improvements Project. (AR 650.)[26]

The Project's construction mitigation mirrors two mitigation measures addressed in *Anderson First.* Those mitigation measures involved the construction of a road and the realignment of another road. There, the EIR conditioned project approval on their completion. Consequently, the court concluded, "[t]hese are not speculative mitigation measures . . . the

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[25] It is true that the proposed mitigation would not complete the *entire* SR 68 Commuter Improvements Project or any of the Marina-Salinas Corridor project. But Real Parties are responsible for mitigating their own impacts, not for shouldering the bulk of the expense for mitigating a significant cumulative impact. (*Environmental Council of Sacramento v. City of Sacramento* (2006) 142 Cal.App.4th 1018, 1040 ["Mitigation measures must be roughly proportional to the impacts of a project"]; Guidelines, §§ 15126.4, subd. (a)(4)(B).)

[26] The County will credit the cost of this construction against Real Parties' RDIF fees, essentially serving as an "in-kind" substitute for those fees. (AR 10, 69.) Real Parties will still be required to pay their "fair share of the City of Salinas Traffic Impact Fees and any other Monterey County ad hoc Traffic Mitigation Fees." (AR 10.)

project cannot take place without them." (*Anderson First, supra*, 130 Cal.App.4th at pp. 1186-1187.)

Similarly, here, Real Parties are required to construct the proposed improvements before securing final approvals from the County, Caltrans, and TAMC. (AR 10, 69, 4107.) The proposed mitigation is not speculative; "mitigation will actually occur." (*Save our Peninsula, supra*, 87 Cal.App.4th at p. 140.) Nothing in CEQA prohibits such "in-kind" mitigation.

2.2.5 The cumulative traffic impact analysis

Highway 68 argues that the DEIR's cumulative traffic analysis violates CEQA because 1) "it fails to identify which intersections and segments will make a considerable traffic contribution"; and 2) it "fails to undertake the two-step process."

The DEIR treated the Project's cumulative traffic impact as a singular, aggregate impact. (AR 683, 686.) The DEIR reflected this distinction in its significance conclusion; the Project's cumulative impact was significant because the Project "would contribute to the *cumulative* level of service degradation *throughout the roadway network.*" (AR 687, italics added.) Indeed, "[t]he project's contribution of traffic in general – not a specific number of trips – is the 'considerable' factor in the cumulative analysis." (AR 3588.) "CEQA grants agencies discretion to develop their own thresholds of significance (CEQA Guidelines, § 15064, subd. (d).)" (*Rominger v. County of Colusa* (2014) 229 Cal.App.4th 690, 716.) Accordingly, the granular information Highway 68 seeks is irrelevant to the County's cumulative impact analysis.

Highway 68's argument that the DEIR fails to undertake the two-step process also lacks merit. The DEIR detailed cumulative plus project conditions, concluding that, under these conditions, 19 intersections and 13 segments would operate at unacceptable LOS, a cumulatively significant impact. (AR 686-687.) The DEIR then analyzed project impacts with reference to

impact thresholds, concluding that the Project's incremental contribution to the cumulative impact was considerable. (*Ibid.*) The DEIR is clear that there is a significant cumulative impact to traffic and that the Project's incremental contribution to that impact is cumulatively considerable. CEQA requires nothing more. (See Guidelines, § 15130.)[27]

2.3 Substantive Challenges

2.3.1 Whether there is substantial evidence that the proposed improvements will mitigate cumulative impacts

Landwatch argues that substantial evidence does not support the County's conclusion that the improvements would adequately mitigate the Project's cumulative traffic impacts. Landwatch contests the County and EIR's claim that the proposed improvements would "result in a corridor travel time neutral condition." (AR 2667.)

The travel time claim stems from the Wood Rogers studies. The 2012 Wood Rogers study concludes Project traffic would increase aggregate corridor travel time (the sum of morning and evening eastbound and westbound commutes) by 5.2 minutes. (AR 3291.) However, implementing the 1.2-mile widening would reduce that impact by 3.3 minutes, leading to a 1.9 minute increase in aggregate corridor travel time. (*Ibid.*) The 2014 Wood Rogers study notes that a reduction in cut-through traffic generated by the widening is responsible for one minute of this increased corridor travel time (AR 15196-15197.) Thus, the Project's as-mitigated contribution to aggregate corridor travel time would be 0.9 minutes.

[27] Highway 68 also argues — in a single sentence — that the FEIR "failed to respond to comments regarding critical information missing from the cumulative traffic assessment." Highway 68 identifies neither to which comments it refers nor cites to the record. Moreover, Highway 68 neglects to present the County's response to Comment 36-52, which is responsive on this issue. (AR 3588.) Highway 68 must support its arguments with reference to the record. It has failed to do so. Consequently, the argument is forfeited. (See *South County Citizens for Smart Growth, supra,* 221 Cal.App.4th at p. 330 ["'As with all substantial evidence challenges, [a petitioner] challenging an EIR for insufficient evidence must lay out the evidence favorable to the other side and show why it is lacking. Failure to do so is fatal"'].)

The Wood Rogers studies, then, suggest that the proposed improvements would significantly mitigate the impacts of Project traffic on corridor travel time. However, the Wood Rogers analysis uses an "existing plus project" baseline, not a cumulative conditions baseline. (AR 3289.) The analysis therefore is not substantial evidence in support of the relevant inquiry, whether the widening would mitigate the Project's impact on *cumulative* traffic conditions.

Nevertheless, Wood Rogers concluded the proposed improvements would have several other tangible benefits, such as 1) approving safety and reducing delays for motorists on southbound Torero Drive at State Route 68; 2) reducing the number of accidents per year; 3) reducing potential conflicts [i.e., accidents] between vehicles and pedestrians; and 4) eliminating westbound cut-through traffic up to 200 cars through an existing residential area/school zone during the AM peak hour. (AR 3290, 3292, 4107.) In addition, the widening represents substantial progress toward completion of the SR 68 Commuter Improvements Project. (*Ibid.*) These benefits constitute substantial evidence that the proposed improvements would mitigate the Project's cumulative impacts on the overall circulation system.

2.3.2 Whether substantial evidence supports the EIR's direct impact conclusion

The DEIR concluded that funding the RDIF and, specifically, the SR 68 Commuter Improvements and Marina-Salinas Corridor projects, would effectively mitigate project impacts to five intersections and four segments, but that project-level impacts to six intersections and five and segments were significant and unavoidable. (AR 674-675.) Consequently, the DEIR concluded the Project's direct traffic impact as a whole was significant and unavoidable. (AR 674-675.) The County adopted these findings, noting that "[t]he Highway 68 commuter improvements will not improve the functioning of failed intersections on Highway 68 beyond the boundaries of the project area . . . . No feasible mitigation . . . is available to avoid or

substantially lessen this impact." (AR 11.) However, the County adopted a Statement of Overriding Considerations finding that installation of the proposed improvements justified moving forward. (AR 18-19.)

Landwatch does not challenge the Statement of Overriding Considerations. Instead, Landwatch challenges the EIR's conclusion that the improvements would effectively mitigate some direct project impacts. Landwatch contends the projects necessary to mitigate these impacts are not certain to be timely funded or scheduled for completion. The County responds that there is substantial evidence that the required improvements will be funded and implemented. The County further argues that, because it concluded that the overall direct impact is significant and unavoidable, Landwatch cannot show prejudice.

The Project's widening of SR 68 is a substantial step toward completion of the SR 68 Commuter Improvements Project. However, it will not mitigate deficiencies in LOS at the two Davis Road intersections and one Davis Road segment affected by Project traffic. (See AR 671.) Thus, while substantial evidence supports the County's conclusion that the proposed improvements are adequate mitigation for the Project's *cumulative* traffic impact, substantial evidence does not support the conclusion that payment of RDIF fees or construction of the improvements would remedy the Project's *direct* impact.

But this defect is not prejudicial because the County concluded the Project's direct traffic impact was significant and unavoidable. (AR 11.) Landwatch disputes this conclusion arguing, "an agency is not relieved of its obligation to provide accurate analysis of impacts simply by labeling them significant and unavoidable," citing *Berkeley Keep Jets Over the Bay Committee v. Board of Port Comrs* (2001) 91 Cal.App.4th 1344, 1371. Indeed, labeling an effect significant "without accompanying analysis of the project's impact" does not satisfy CEQA. (*Id.* at p. 1371.)

Such a practice would contravene CEQA's informational goals, allowing an agency to "travel the legally impermissible easy road to CEQA compliance." (*Ibid*; see Guidelines, § 15201.) Here however, the EIR did not simply label the Project's direct impact significant and unavoidable. Instead, it contained a lengthy analysis of that impact. (AR 664-675.) The EIR did not deprive the public of any significant information. Accordingly, there is no prejudice.

2.4 General Plan consistency

Petitioners contend the County's General plan consistency findings were inadequate as to three General Plan traffic policies. Petitioners contend that the findings were both inadequate as a matter of law and unsupported by substantial evidence.

2.4.1 The Adequacy of the Findings as a Matter of Law

Petitioners argue the County abused its discretion by failing to make express findings sufficient to disclose the County's reasoning. The County argues that its findings were sufficient.

"[I]mplicit in section 1094.5 is a requirement that the agency which renders the challenged decision must set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order." (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515 ["*Topanga I*"]) Agencies are required to make express findings as to whether a proposed subdivision is consistent with the relevant general plan. (*Woodland Hills Residents Assn., Inc. v. City Council* (1975) 44 Cal.App.3d 825, 837.) Nevertheless, an agency's findings "do not need to be extensive or detailed. '[W]here reference to the administrative record informs the parties and reviewing courts of the theory upon which an agency has arrived at its ultimate finding and decision[,] it has long been recognized that the decision should be upheld if the agency 'in truth found those facts which as a matter of law are essential to sustain its ... [decision].'" [Citation.] On the other hand, mere conclusory findings

without reference to the record are inadequate. [Citation.]" (*Environmental Protection & Information Center v. California Dept. of Forestry & Fire Protection* (2008) 44 Cal.4th 459, 516-517 ["*EPIC*"].)

Further, while the best practice is to cite to specific portions of the administrative record supporting the agency's conclusions, findings will still be upheld if a court has "no trouble under the circumstances discerning 'the analytic route the administrative agency traveled from evidence to action.' [Citations.]" (*Id.* at p. 517.) "[F]indings are to be liberally construed to support rather than defeat the decision under review." (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1989) 214 Cal.App.3d 1348, 1356 ["*Topanga II*"].) The court "must resolve all conflicts in the evidence in favor of the judgment or decision of the tribunal below and indulge in all legitimate and reasonable inferences to support it. [Citation.]" (*Id.* at p. 1357.)

During the EIR process, Landwatch objected that the Project conflicts with General Plan Policy 37.2.1, which provides, "Transportation demands of proposed development shall not exceed an acceptable level of service for existing transportation facilities, unless appropriate increases in capacities are provided for." After the FEIR was issued, Landwatch objected that the Project conflicts with General Plan Policies 39.1.4 ["New development shall be located where there is existing road and highway capacity or where adequate road and highway capacity will be provided"]; and 26.1.4. ["The County shall designate growth areas only where there is provision for an adequate level of services and facilities such as water, sewerage, fire and police protection, transportation, and schools. Phasing of development shall be required as necessary in growth areas in order to provide a basis for long-range services and facilities planning"].)

The County's findings explain that the Project "has been reviewed for consistency with the text, policies, and regulations in: the 1982 Monterey County General Plan . . . ." (AR 22.)

The findings further note, "[n]o communications were received during the course of review of the project indicating any inconsistencies with the text, policies, and regulations in [the General Plan]." (AR 22.) The County found the Project consistent with the General Plan. (AR 22, 31.)

Landwatch objects that the findings are factually inaccurate because Landwatch communicated its objections to the County. But the County states that it did not receive communications "indicating any *inconsistencies*." This suggests that the County concluded Landwatch's objections had no merit, not that the County did not consider those objections. (See *Topanga II, supra*, 214 Cal.App.3d at p. 1357.) This is particularly so because, in the FEIR, the County indicated its awareness of Landwatch's objection regarding Policy 37.2.1, stating that it "must make findings regarding General Plan consistency." (AR 3588.)

Landwatch further objects that these findings are perfunctory. The findings quoted above are indeed sparse. However, the EIR serves as an extended set of findings. (*Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3rd 247, 270; *EPIC, supra*, 44 Cal.4th at pp. 516-517.) By certifying the EIR, the Board indicated its agreement with its contents. (See *Environmental Council of Sacramento, supra*, 135 Cal.App.3d at p. 438 ["when the decision-making body of a public agency certifies as adequate and complete an EIR prepared by staff[,] . . . it adopt[s] the findings of the preparers"].)

For example, although it did not discuss Policy 37.2.1, the DEIR cited the Policy in full when detailing relevant traffic policies. (AR 659.) Further, the FEIR directly addressed Landwatch's objection to the Project's consistency with Policy 37.2.1, stating, "[t]he County acknowledges that the project's impacts will contribute to existing thresholds that are now exceeded at specific locations. Mitigation has been provided to the extent feasible to address those impacts . . . . The County will be required . . . to make findings regarding General Plan

consistency." (AR 3588.) Additionally, the EIR's extended discussion regarding levels of service, RDIF fees, and physical improvements to the circulation system as mitigation for Project impacts shows the County considered these issues — all of which bear directly on the Project's consistency with the challenged Policies — in reaching its consistency finding. (E.g, AR 635-690, 2670-2672, 3586-3589, 3900-3901, 4107-4108.)

Accordingly, based on the findings, the EIR, and the requirement that the court liberally construe the findings to support the decision (*Topanga II, supra*, 214 Cal.App.3d at p. 1356) the court has "no trouble . . . discerning 'the analytic route the administrative agency traveled from evidence to action.' [Citations.]" (*EPIC, supra*, 44 Cal.4th at p. 517.)

2.4.2 Whether the findings are supported by the evidence

Petitioners argue the Project violates three General Plan traffic policies. The County argues the Project does not violate the relevant policies.

"A project is consistent with the general plan 'if, considering all its aspects, it will further the objectives and policies of the general plan and not obstruct their attainment.'" [Citation.] A given project need not be in perfect conformity with each and every general plan policy. [Citation.] To be consistent, a subdivision development must be 'compatible with' the objectives, policies, general land uses and programs specified in the general plan." (*Families Unafraid to Uphold Rural El Dorado County v. Board of Supervisors* (1998) 62 Cal.App.4th 1332, 1336.)

"A city's determination that a project is consistent with the city's general plan 'carries a strong presumption of regularity. [Citation.] This determination can be overturned only if the [city] abused its discretion—that is, did not proceed legally, or if the determination is not supported by findings, or if the findings are not supported by substantial evidence. [Citation.] As for this substantial evidence prong, it has been said that a determination of general plan

consistency will be reversed only if, based on the evidence before the local governing body, "... A reasonable person could not have reached the same conclusion" [Citation.].' [Citation.]" (*Clover Valley Foundation v. City of Rocklin* (2011) 197 Cal.App.4th 200, 238.)

2.4.2.1 Policy 37.2.1

Policy 37.2.1 provides, "Transportation demands of proposed development shall not exceed an acceptable level of service for existing transportation facilities, unless appropriate increases in capacities are provided for."

Petitioners argue that the Project is inconsistent with Policy 37.2.1 because 1) the Project would significantly impact intersections and segments under 2030 conditions since "the EIR admits that widening all of SR 68 is infeasible"; and 2) the EIR's admission of significant and unavoidable direct (2015) project impacts shows that Project demands will exceed an acceptable LOS without a correspondingly appropriate increase in capacity.

Petitioners assume no development is possible until the *entire* SR 68 corridor achieves acceptable LOS. But the applicant is not responsible for remediating non-project impacts. (*Napa Citizens for Honest Government, supra*, 91 Cal.App.4th at p. 364; Guidelines, § 15126.4, subd. (a)(4)(B).) Moreover, Petitioners' interpretation of Policy 37.2.1 would conflict with other General Plan objectives and policies identified in the General Plan. Specifically, Petitioners' urged interpretation of Policy 37.2.1 would conflict with Objective 39.1, which recognizes the need to balance available funding with needed transportation improvements, and with Policy 39.1.2's admonition that all property owners that benefit from such improvements shall equitably share in their funding.

Additionally, Policy 37.2.1 does not define an "appropriate increase" in capacity. As the County points out, this language does not necessarily indicate an "appropriate increase" in

capacity must achieve acceptable LOS. The determination whether the Project provides for an "appropriate increase" in capacity is within the County's sound discretion. (*Save our Peninsula, supra*, 87 Cal.App.4th at p. 142.) Here, the County impliedly found that the new intersection and 1.2-mile widening of SR 68 constituted an "appropriate increase" in capacity. (See AR 10, 19, 31.)

The proposed improvements will not resolve all capacity issues. For example, the DEIR found that implementation of the 2.3-mile SR 68 Commuter Improvements Project would improve operation of only three impacted intersections to acceptable LOS. (AR 671.) And the proposed mitigation would account for only 1.2 miles of the project. However, the Policy does not state that an "appropriate increase" in capacity *must* achieve acceptable LOS. And Real Party is not responsible for remediating non-project impacts. (*Napa Citizens for Honest Government, supra*, 91 Cal.App.4th at p. 364; Guidelines, § 15126.4, subd. (a)(4)(B).) The County could reasonably have concluded that the improvements were an "appropriate increase." The court cannot say that the County's conclusion is one with which no reasonable person could agree. (*Clover Valley, supra*, 197 Cal.App.4th at p. 238.)

2.4.2.2 Policy 39.1.4

Policy 39.1.4 provides, "New development shall be located where there is existing road and highway capacity or where adequate road and highway capacity will be provided." Petitioners assert existing capacity and that the County will not provide adequate capacity. The definition of "adequate capacity" is, again, in the County's discretion. The terms "appropriate increase in capacity" and the requirement to provide "adequate . . . capacity" are functionally equivalent. The court therefore incorporates its reasoning on this issue from the section addressing Policy 37.2.1, *ante*.

2.4.2.3 Policy 26.1.4.

Policy 26.1.4 provides, "The County shall designate growth areas only where there is provision for an adequate level of services and facilities such as water, sewerage, fire and police protection, transportation, and schools. Phasing of development shall be required as necessary in growth areas in order to provide a basis for long-range services and facilities planning."

By its terms, this Policy applies to the designation of "growth areas" and the need to provide adequate level of services to such areas, not to individual projects. And, even if this Policy did apply, Petitioners' argument is essentially a repeat of their arguments as to Policies 37.2.1 and 39.1.4. The court therefore incorporates its reasoning on this issue from the section addressing Policy 37.2.1, *ante*.

3. Aesthetic Impacts

"The project site consists of rolling hills and flat meadows" and "contains annual grasslands, coast live oak woodland/savanna, coastal scrub, riparian, and wetlands habitats." (AR 239). It includes "some of the most visually sensitive features within the Toro Planning Area" such as Toro Park, surrounding ridgelines, and the SR 68 scenic corridor. (*Ibid.*) The Toro Area Plan has designated portions of the site as "areas of visual sensitivity," the most sensitive of which are designated as "critical viewshed." (AR 239-240.) Areas of visual sensitivity typically include "ridgelines, slopes, hillsides, open meadows, natural landmarks, and unusual vegetation, such a [*sic*] prominent stands of (or individual landmark) trees. Many of these features are visually prominent from roadways and trails around the project area, particularly from the State Route 68 scenic corridor and hiking trails of adjacent public and parklands." (AR 240.) SR 68 is a state designated scenic highway. The County has designated roadways adjacent to the project

as scenic routes. (*Ibid.*) Real Parties intend to designate 700 of the Project's 870 acres as permanent open space. (AR 14.)

3.1 Factual Background

3.1.1 The DEIR

The DEIR includes 70 pages of analysis on aesthetics and potential visual impacts of the Project, including photographs, color maps, and photo simulations from designated viewpoints. (AR 239-308.) The DEIR considered project impacts significant if the project could:

> "1) Result in visually prominent development in critical viewsheds or areas of visual sensitivity inconsistent with County policies and resource maps.
>
> 2) Have an adverse negative effect on a scenic view or vista.
>
> 3) Damage individual or iconic scenic resources, including but not limited to, trees, rock outcroppings, and historic buildings within the project site or within a state scenic highway.
>
> 4) Degrade the existing visual character or quality of the site and its surroundings as experienced by the viewer.
>
> 5) Create new source of light or glare, which would adversely affect day or nighttime views in the area." (AR 256.)

The DEIR analyzed seven project-specific impacts and one cumulative impact. (AR 256-308.) It concluded that five project-specific aesthetic impacts and the cumulative aesthetic impact were either less than significant or could be mitigated to less-than-significant levels. Two impacts were significant and unavoidable. Petitioners do not challenge three potential impacts: Impact 3.1-3 ("Impacts to Individual Scenic Resources"), Impact 3.1-5 ("Visual Character of the Site and 30 Percent Slope Alteration"), and Impact 3.1-7 ("Create New Sources of Light or Glare"). Information on the remainder follows.

3.1.1.1 Impact 3.1-1 ("Development Within Critical Viewsheds and Areas of Visual Sensitivity") [Significant, unavoidable impacts found]

The DEIR observed that several lots and other project features were located within the critical viewshed (and/or the 100-foot setback) or in areas of visual sensitivity. (AR 256-257.)

3.1.1.1.1 The Critical Viewshed

Toro Area Plan Policy 40.2.5 "require[s] newly created parcels to have building sites outside the critical viewshed." (AR 248.) Policy 40.2.4 requires a 100-foot building setback from scenic routes and critical viewshed. (*Id.*) Figure 9 of the Toro Area Plan provides rough boundaries of the areas of visual sensitivity and the critical viewshed. (AR 20455) The County prepared a map that overlaid these sensitive areas onto the Project site. (AR 241, 243.)

The map revealed that 16 regular lots, Parcel E's affordable housing lots, a portion of Ferrini Ranch Road (the Project's main access road) running through Toro Park and adjacent to SR 68, and the River Road access point were all located in the critical viewshed and/or 100-foot setback. (AR 256.) As to seven lots and Parcel E's affordable housing lots, the DEIR explained that it might be possible to avoid the critical viewshed "through building envelope placement and placement of easements on lot." (AR 257.) Real Parties would have to relocate the remainder of the affected lots, however. To ensure this would occur, the DEIR adopted MM 3.1-1:

> "Prior to final map approval, the project applicant shall reconfigure the lot and development pattern to relocate building sites for residential lots outside of the critical viewshed areas and 100-foot scenic roadway setback. Buildings on lots where building sites cannot be fully located outside the critical viewshed must not be visible from scenic roadways (SR 68, River Road, or San Benancio Road)." (AR 259.)

The DEIR also adopted mitigation measures MM 3.1-1b (recordation of easements for open space parcels) and MM 3.1-1c (application of the B-6 overlay, which would prohibit future

subdivision). The DEIR concluded these mitigation measures would fully mitigate the Project's impacts upon the critical viewshed. (*Ibid.*)

As to roads, the River Road access point and the portion of Ferrini Ranch Road adjacent to SR 68 "are permanent project features within the critical view shed that have limited flexibility in terms of location." (AR 257.) The DEIR found impacts from the River Road access point insignificant, since it is "similar to other existing property access locations within the critical viewshed." However, the DEIR concluded the Ferrini Ranch Road impact was significant and unavoidable. (AR 260.)

3.1.1.1.2 Areas of Visual Sensitivity

Dozens of lots on the Project's western parcel and all of Parcel D (winery/visitor center) and its surrounding lots are partially or fully located in visually sensitive areas. (AR 241, 243, 257.) Toro Area Plan Policy 26.1.6.1 authorizes development in visually sensitive areas only if the Board finds "that such development will not adversely affect the natural scenic beauty of the area." Moreover, areas of visual sensitivity "shall be reviewed critically for landscaping and building design and siting which will enhance the scenic value of the area." (AR 258.)

At the time of the project application, the County had zoned only three of nine Project parcels "with different [unspecified] Design Control zoning overlays." (AR 257.) The DEIR indicated the County intended to reclassify the *entire* project site with one overlay: LDR/2.5-VS-D zoning. (AR 257). "D" or "Design Control" zoning districts "regulate the location, size, configuration, materials, and colors of structures and fences through a design approval process." (AR 258.) "VS" or "Visual Sensitivity" zoning districts "designate areas of the county that require protection of common public viewing areas. Development within a Visual Sensitivity district requires approval of a Use Permit and a design that is in accordance with the

development standards provided in [MCC] 21.46.060." The DEIR concluded that compliance with these development standards and design review provisions would adequately mitigate Project impacts to areas of visual sensitivity. (*Ibid.*)

3.1.1.2 Impact 3.1-2 ("Effects on Scenic Views or Vistas") [No significant impact found]

This Impact relates to views from Laureles Grade Road, BLM Lands, and Toro County Park. To assess impacts to these views, DEIR presented photo-simulations from nine viewpoints.

The DEIR anticipated that impacts to views from Laureles Grade Road would be "minimal and inconsequential" with "low viewer sensitivity." Views from Laureles Grade Road "do not constitute a significant vista toward the project site." Further, all potentially visible lots would be subject to the design and siting controls of the "D" (Design Control zoning districts) and "S" (Site Plan Review zoning districts) zoning overlays. (AR 260.)

The County's photo-simulations revealed that the Project would likely impact views from certain BLM locations, but only from a relatively high elevation. Thus, the DEIR concluded, "given the physical challenges of accessing the higher BLM trails, with no designated vista point, the BLM trails are not considered by the County to be 'common public viewing areas' as defined by Title 21." (AR 281.)[28] Additionally, the DEIR concluded 1) existing zoning overlays would significantly mitigate any impacts to views from BLM trails of Lots #1-65; 2) the County "intends to apply" LDR/2.5-VS-D zoning to Lots #66-144; and 3) Monterey County General Plan Policy 21.46.060 requires any development to observe specific standards for visually sensitive areas. (*Ibid.*)

[28] MCC section 21.06.195 defines a "common public viewing area" as "a public area such as a public street, road, designated vista point, or public park from which the general public ordinarily views the surrounding viewshed." (AR 28830.)

As to Toro County Park views, only "park users from the more remote trail system" would have affected views; ". . . given the physical challenges of accessing the higher Toro Park trails and lack of designated vista points, the higher trails within the park are not considered by the County to be 'common public viewing areas' as defined by Title 21." (AR 281-282.)

3.1.1.3 Impact 3.1-4 ("Impact to State Route 68 Scenic Corridor and Scenic Roads") [Significant and unavoidable impacts found]

This analysis deals with the impact of construction on scenic roads (San Benancio and River Roads) and with potential impacts to the SR 68 scenic corridor.

The DEIR found impacts to both the San Benancio and River Road access points insignificant. (AR 284.)

As to SR 68, the DEIR noted the Project's design would mitigate most visual impacts, as Real Parties planned the Project to "take advantage of screening by existing topography and vegetation." (AR 283.) Nevertheless, visual simulations showed the Project would still cause aesthetic impacts to one viewpoint. Accordingly, the tentative map and project description contemplated an 800-foot landscaped berm in the meadow area between SR 68 and "Road B" (the Lupine Field.) (*Ibid.*)[29] As with Impact 3.1-1, the DEIR concluded impacts from the construction of the portion of Ferrini Ranch Road within 100 feet of, and adjacent to, the SR 68 scenic corridor were significant and unavoidable. (AR 285.)

As to Parcel E, the DEIR found no significant impacts for two reasons. (AR 284.) First, an existing masonry wall would screen development on all but Parcel E's easternmost portion. Second, proposed VS-overlay zoning would mitigate any impacts from Project development on the remainder of Parcel E. (*Ibid.*)

[29] Confusingly, the DEIR refers to this berm as both a "contoured berm," and as "a landscaped berm," without making it clear whether it is referring to the same berm. (AR 283.) Further, neither the DEIR nor the findings explain the location of the "lupine field." The reader must infer the location from adjacent lot locations.

3.1.1.4 Impact 3.1-6 ("Ridgeline Development") [No significant impact found]

1982 Monterey County General Plan Policy 26.1.9 prohibits ridgeline development without a permit. The General Plan defines ridgeline development as "development on the crest of a hill which has the potential to create a silhouette or other substantially adverse impact when viewed from a common public viewing area." A permit authorizing ridgeline development will be granted only upon a finding the development "will not create a substantially adverse visual impact when viewed from a common public viewing area." (AR 247.) The DEIR considered whether the Project had the potential to create a silhouette when viewed from 1) SR 68; 2) River Road; 3) Toro County Park; and 4) BLM Public lands.

As to views from SR 68, the DEIR found no potential for ridgeline development except as to some parts of Parcel D. To mitigate that impact, Real Parties proposed recessing buildings 10 feet into the existing topography of Parcel D and, to further screen rooftops, constructing a 10-foot berm along the ridgeline. (AR 288.)[30] The DEIR adopted MM 3.1-6 to implement these proposals, and to require Real Parties to "modify the site plan and improvement plans to relocate structures, reduce the development footprint of the proposed buildings, and move structures further back from ridgelines in order to screen visibility and minimize the size of the berm." (AR 291.) The County also required Real Parties to, prior to approval of the final map, supply a revised visual analysis to verify the changes effectively mitigated ridgeline development. (*Ibid.*)

The DEIR concluded that no potential for a silhouette existed as to River Road and Toro County Park views. As to views from BLM lands, the DEIR concluded any silhouettes caused by ridgeline development would not be visible from a "common public viewing area" and hence were insignificant. (AR 291-292.)

[30] Although the Parcel D berm would result in long-term changes to the ridgeline, the DEIR did not consider the berm ridgeline "development." (*Ibid.*)

3.1.1.5 Impact 3.1-8 ("Cumulative Degradation of Visual Character") [No significant impact found]

The DEIR conceded that the Project, in combination with other cumulative development "would result in a permanent, but visually subtle, change to the area." Nevertheless, the DEIR concluded that the Project's *incremental* impact would be less than significant due to its consistency with the General Plan and Toro Area Plan, proposed mitigation measures, and Real Parties' designation of 600 acres of the site as open space. (AR 307.)

3.1.2 Alternatives and the RDEIR

The DEIR analyzed four different alternatives before concluding that Alternative 3B ("Reduced Impact" Subdivision Design) would be the environmentally superior alternative. (AR 722-762.) The RDEIR proposed a fifth alternative, the "Reduced Impacts/Reduced Density" Alternative, essentially identical to Alternative 3B, but featuring only 185 lots instead of the originally proposed 212 lots. (AR 2685-2701.) Under both Alternatives 3B and 5, construction of the portion of Ferrini Ranch Road that runs through Toro Park and is parallel and immediately adjacent to SR 68 would be unnecessary because both alternatives would replace that access point with "a new signalized at-grade intersection along State Route 68 approximately 800 feet southwest of Torero Drive." (AR 2650, 2657.) This would mitigate significant and unavoidable visual impacts that Ferrini Ranch Road would otherwise cause. (AR 2694.)

Alternative 5 also added "three landscaped berms [on Parcel D] designed to follow the natural contours of the land and planted with native vegetation to appear indistinguishable from the existing natural hillside," and significantly reduced development on Parcels D and E. (AR 2686.)[31] In addition, Alternative 5 made "beneficial changes to the lot configuration" to remove

[31] Curiously, the Alternative 5 map did not contain the Lupine Field berm. (AR 2691.) It is unclear if this omission was intentional. The Lupine Field berm does appear on the final map, however. (AR 107.)

certain lots from view from SR 68. (AR 2693-2694.) The RDEIR concluded that Alternative 5 was the environmentally superior alternative. (AR 2700-2701.)

3.1.3 The FEIR

The FEIR revised MM 3.1-1a as follows:

> "~~Prior to final map approval, the~~ The project applicant shall reconfigure the lot and development pattern to relocate building sites for residential lots outside of the critical viewshed areas and 100-foot scenic roadway setback. Buildings on lots where building sites cannot be fully located outside the critical viewshed must not be visible from scenic roadways (SR 68, River Road, or San Benancio Road). The applicant shall demonstrate to the County that lots can be built upon meeting this visual criteria prior to recording the final subdivision map. Where berms are currently proposed for screening and view protection along the State Route 68 Scenic Corridor, the applicant shall provide sufficient detail in the improvement plans with the final map to allow verification by the County of berm appearance and effectiveness as a screen." (AR 4129.)

The FEIR also addressed numerous comments submitted by Landwatch and other parties.

Landwatch objected that the DEIR did not base its visual analysis on a complete and stable project description because it did not identify the exact location of building sites and full site plan. (AR 3531, 3908). The FEIR replied,

> ". . . impacts have been analyzed assuming the lot layout of the Vesting Tentative Map, even though precise home sites or home designs are not available at this point in project and subdivision review. As the applicant is not proposing to physically build these units, and considering that the units will likely be 'attached' housing product, the parcel does not require subdivision into individual 'lots' or parcels for each unit . . . . . The DEIR analyzes the project application and Vesting Tentative Map as submitted and deemed complete. Consistent with subdivision review procedures for projects elsewhere in the county (such as the Santa Lucia Preserve), large-lot subdivisions anticipating custom homes are ultimately developed lot by lot within the parcel footprint. The majority of the proposed lots in the Ferrini Ranch project are 0.5 to 1 acre in size. Although foundation and driveway locations are not known, lots of this size present a fairly small development envelope. The County assumes that potential development could occur anywhere within the lot. The 'actual site plan' in this case has been reviewed and analyzed by the DEIR as submitted." (AR 3574-3575.)

Landwatch objected that proposed mitigation measures called for post-approval relocation of lots, which may be infeasible or cause secondary impacts. (AR 3534, 3908). The FEIR responded:

> "With respect to the overarching concept that mitigation measures call for revisions to the site plan and lot layouts, it is County's opinion that such measures are integral to the effectiveness of the CEQA process. The environmental review, per the intent of CEQA, should result in mitigation or changes to the project that will reduce or eliminate significant environmental effects. The specific measures cited in the comment and contained through the DEIR are designed to avoid specific impacts, resulting in an environmentally superior project. The specific reasons for the recommended revisions focus on avoidance of sensitive resources, which are well documented and disclosed throughout the DEIR." (AR 3574.)

Landwatch objected that locating building sites in the critical viewshed violates Toro Area Plan policies (AR 3533). The FEIR responded:

> ". . . Policy 40.2.5 of the *Toro Area Plan* states, 'The County shall require newly created parcels to have building sites outside of the critical viewshed.' Mitigation measure MM 3.1-1a . . . requires the applicant to reconfigure the lot and development pattern to relocate building sites for residential lots outside of the critical viewshed or otherwise not be visible. Critical viewshed maps are illustrated in Figures 3.1-1A and 3.1-1B. The Vesting Tentative Map shows six lots or partial lots within the critical viewshed on the western parcel and two lots on the eastern parcel. The intent of the measure is to relocate the building sites out of the critical viewshed. The mitigation measure is worded to be consistent with the intent of Policy 40.2.5 by effectively eliminating the visibility of any new buildings in the event that relocation or redesign of lots is not feasible due to site constraints." (AR 3577).

Caltrans objected that the DEIR's discussion of the Lupine Field berm omitted information as to the berm's dimensions and form, rendering it impossible to assess the berm's efficacy. Caltrans noted, "an improperly designed berm can create an unnatural appearing landform which could result in secondary visual impacts." (AR 3396.) Caltrans suggested adoption of a mitigation measure requiring validation of the berm's effectiveness and natural appearance. The FEIR responded:

> "[P]lease see Figure 3.1-13. This figure provides an example of a contoured berm with native grasses similar to the existing condition, providing a subtle rise in topography to screen homes in the background. The impact is addressed by mitigation measure MM 3.1-1a, which has been augmented to address this specific location: . . . .
>
> "[¶] Where berms are currently proposed for screening and view protection along the State Route 68 Scenic Corridor, the applicant shall provide sufficient detail in the improvement plans with the final map to allow verification by the County of berm appearance and effectiveness as a screen." (AR 3399.)

Landwatch objected that the DEIR does not explain why the Parcel D berm[32] is not ridgeline development, or address potential secondary impacts to biological resources. (AR 3534.) The FEIR responded:

> "Mitigation measure MM 3.1-6 does not require the berm on Parcel D; rather, the measure provides performance standards for its effectiveness. The berm is identified as a component of the project description . . . . The environmental effects of the entire project, including biology, are addressed within all sections of the EIR, including construction on Parcel D.
>
> Policy 26.1.9.1 of the Toro Area Plan states, 'Development on ridgelines and hilltops or development protruding above ridgelines shall be prohibited. Additionally, only minimal development on steeper and critical viewshed slopes shall be allowed.' County staff have reviewed and interpreted this policy, concluding that the creation of a berm for the purposes of visual screening does not constitute 'ridgeline development.'" (AR 3578.)

Finally, Caltrans objected to the lack of analysis of the aesthetic impacts of the new entryway and SR 68 improvements. (AR 3775.) The FEIR responded:

> "The analysis of Alternative 5 . . . acknowledges that a new at-grade intersection would be visibly located along the highway. Compared to the project as proposed, however, degree of impact would be significantly lessened by removing a long stretch of new roadway within the 100-foot scenic route setback. As an alternative to the project, the RDEIR provides a level of detail appropriate for the comparative analysis of the concept. Figure 4-1D provides a schematic of the new interchange concept and widening. The level of detail requested by Caltrans for each alternative, including visual simulations and other studies, is more

[32] Because the FEIR addressed comments on the original map proposed in the DEIR, both the comment and response referred to a single Parcel D berm. Alternative 5 recommended (and the Board ultimately adopted) three berms on Parcel D. (AR 2686, 20259, 25.)

appropriate for a NEPA document . . . as may be required during the detailed design phase of any improvements along the state highway." (AR 3783).

3.1.4 Planning Commission Hearings

Staff recommended that the Planning Commission adopt Alternative 5 and based its analysis on that alternative. (AR 4190, 4233.) Alternative 5 would remove 27 lots and reconfigure several more. (AR 2693.) These changes necessitated a reexamination of the critical viewshed and ridgeline development analyses. As to the critical viewshed, the boundaries provided on Toro Area Plan Figure 9 were imprecise. (AR 27, 20455.) Staff thus concluded Figure 9 did not give adequate guidance as to the boundaries of the critical viewshed. (AR 4185.) Staff advised the Planning Commission to interpret critical viewshed boundaries to conform to the intent of the Toro Area Plan as expressed in its text. (AR 4188, 15083.) Consequently, staff recommended relocation of seven lots. (AR 5406.) Staff also recommended that 1) Real Parties relocate two lots to avoid ridgeline development and 2) the County place a note on the final map stating that ridgeline development would not be permitted on four additional lots. (AR 5406-5407; see AR 50 [Condition 18].)

The Planning Commission approved these changes without a final map. (AR 5408.) Instead, it directed Real Parties to provide the Board of Supervisors with a revised VTM that incorporated the suggested lot relocations. (AR 5408-5409.) The staff report for the December 2, 2014 Board meeting included that final map, which came to be known as Alternative 5 PC. (AR 4551-4552.)

Staff also recommended new conditions of approval for the Lupine Field and the portions of Parcel D within the area of Visual Sensitivity. (AR 29419-29420.) Those conditions required the creation of CC&Rs — to which the County would be a party — to establish design criteria for development of lots within these areas. The County would enforce those CC&Rs through the

discretionary permit process. (*Ibid.*) Staff's intent was to provide "an equal level of protection to visual resources" as a VS zoning overlay. (AR 7-8.) While staff intended to recommend that the Board adopt such an overlay for the entire Project area as part of 2010 General Plan implementation, it acknowledged that such zoning was not part of the Project and that an ordinance would be required. (AR 7.)

On November 12, 2014, the Planning Commission adopted a resolution recommending that the Board certify the FEIR, adopt a Statement of Overriding Considerations, and approve a Combined Development Permit based upon the final Alternative 5 VTM (Alternative 5 PC). (AR 4335-4361, 4551-4552.)

3.1.5 Board of Supervisors Hearings

The Board of Supervisors considered the Project on December 2, 5, and 16, 2014. In making its decision, the Board reviewed the revised VTM. (AR 4551-4552, 4986-4987.) The revised VTM reconfigured, relocated, and in some cases renumbered, all seven lots previously in the critical viewshed and the three lots the Planning Commission concluded had the potential for ridgeline development (AR 25, 28.)[33]

On December 16, 2014, the Board adopted the Commission's recommendation and approved Alternative 5 PC, including Condition 80.[34] (AR 3, 10-11, 71.) Condition 80 provides,

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[33] Oddly, staff nevertheless recommended that the Board adopt Condition 80, which required Real Parties to relocate the seven lots previously in the critical viewshed. (AR 71.) The court found this inconsistency extremely confusing. Many of the lots Condition 80 required Real Parties to relocate no longer existed on the final VTM that the board approved. The court spent significant time tracing the progression of lot numbers and relocations across various iterations of the tentative map and staff reports. Moreover, the County was unable to explain satisfactorily why the Board adopted Condition 80 or even to explain clearly the sequence of events.

[34] Given the resources the court was forced to devote to untangling lot locations, the high speed at which the project proceeded from FEIR (October 1, 2014) to approval (December 16, 2014), and the fact the Board adopted Condition 80 despite the relocations ordered within having already taken place, it is possible the Board may not have fully understood the Project it was approving. However, since the goal of lot relocation was ultimately satisfied, no harm resulted.

"The project applicant shall reconfigure the lot and development pattern to relocate building sites for residential lots outside of the critical viewshed areas and 100-foot scenic roadway setback. Alternative 5 Lots 83, 83A, 84, 82A, 138, 138a, and 139 shall be relocated. Where berms are currently proposed for screening and view protection along State Route 68 Scenic Corridor, the Applicant shall provide sufficient detail in the Improvement Plans with the Final Map to allow verification by the County of berm appearance and effectiveness as a screen. Relocated lots shall be placed in areas that are either proposed for existing lots by compressing lots or in areas where slopes are less than 30 percent, such as the area behind Lot 40b and the area between lots 70 and 80, and not in areas which have sensitive biological resources." (AR 71.)

3.1.6 CEQA Findings

The Board found, "impacts on aesthetics and visual resources are mitigated to less than significant levels." (AR 7.) This finding was based upon: (a) the "placement of a berm around Parcel D on the mesa[35] and lowering the finished grade by 10 feet to ensure that there will not be ridgeline development" (AR 7); (b) Conditions of Approval 19 and 83 requiring Design Criteria that provide protection to visual resources (AR 7-8); and (c) the numerous mitigation measures adopted in the final MMRP. (AR 42-106). Specifically, the Board concluded, the following measures would mitigate the Project's significant visual impacts:

1) "[I]mplementing Critical Viewshed policies requiring new structures to be outside of the Critical Viewshed and associated 100 foot setback, and by limiting the height, design and visibility of structures within areas of visual sensitivity. To ensure protection of this visually sensitive area, conditions have been added requiring design guidelines to be implemented through CC&R's which limit building height, night time glare, and structure visibility. In addition, the EIR identified that the base 212 unit project design with Ferrini Ranch Road running parallel to Highway 68 through Toro Park within the Critical Viewshed is an Unavoidable Significant Adverse Impact. Alternative 5 relocated Ferrini Ranch Road from running parallel with Highway 68 within the 100 foot setback through Toro Park and reduced this impact to a less than significant level"; and

2) "placement of a berm around Parcel D on the mesa and lowering the finished grade by 10 feet to ensure that there will not be ridgeline development. Ideally, VS zoning would be applied to the entire property which will require

[35] The reference to a single berm on Parcel D is perplexing, since the final map contained three berms on Parcel D. (AR 20259.) Further, the County's Resolution approving the VTM refers to "berms . . . on the Mesa." (AR 25.)

development of individual lots to be reviewed for their visual impacts through an administrative permit process. If there is the potential for an adverse visual impact, a Use Permit will be required. Individual homes will not be approved administratively in a manner that causes ridgeline development. Staff intends to propose a VS zoning overlay to the entire site as part of implementation of the 2010 General Plan, but such zoning, which would require an ordinance adopted pursuant to the procedures set forth in Government Code sections 65854 to 65857, is not part of the project and is not required to find the impact less than significant. Conditions of approval have been added requiring Design Criteria that provide an equal level of protection to visual resources are being [*sic*] implemented through CC&Rs applied to the residential lots and Parcel D (Conditions 19 & 83 (MM 3.1-6))." (AR 7-8.)

Condition 19 provides:

"CC&R's shall establish design criteria for development of lots within areas of Visual Sensitivity. The County shall be made a party to the design criteria within the CC&R's and shall administer the provisions of the design criteria through review of a discretionary permit (Administrative or Use Permit) based upon visually sensitive zoning overlay criteria. The Design Criteria shall include the following provisions:

1. Building height shall not exceed 20 feet above average natural grade.
2. The structures shall be of a low profile design, using the natural topography and vegetation to minimize visibility and reduce visual impacts.
3. Structure colors shall be natural earth tones. No white colors or bright colors contrasting with the natural setting are permitted.
4. Materials shall use finishes that minimize reflective surfaces.
5. Lighting shall be carefully controlled to maintain the quality of darkness." (AR 50.)

Condition 83 provides:

"CC&R's shall establish design criteria for development of Parcel D and lots on the Mesa within the area of Visual Sensitivity. The County shall be made a party to the design criteria within the CC&R's and shall administer the provisions of the design criteria through review of a discretionary permit (Administrative or Use Permit) based upon Visually Sensitive criteria. The Design Criteria shall include the following provisions:
1. No structures shall be visible from Highway 68 or from River Road
2. Lighting shall be limited to bollard style lighting and not result in any glare or light spillover visible from Highway 68 or River Road.
3. Building Design shall preclude light spillover from internal or exterior lighting.
4. Landscaping trees shall be limited to native oak trees and shall not include ornamental trees and other landscape materials that would appear out of place at this highly visible location.

5. Building height shall not exceed 20 feet above average natural grade." (AR 72.)

Relatedly, Condition 17 provides design criteria for the Lupine Field:

> "The grading of the Lupine Field will be designed to achieve visual screening of the proposed development around the perimeter of the Lupine Field and retain the existing character of the Lupine Field by achieving the following design objectives:
> 1. The new berm shall be designed to retain the natural overall character of the Lupine Field, including the gentle slope of the site and preserve as large an area of visual lupine growth as possible visible from Highway 68.
> 2. The new high point in the Lupine Field shall be capable of completely screening new homes and associated development on lots 16-21 and 24-28 from view on Highway 68.
> 3. A re-vegetation plan shall be prepared by a County approved biologist to preserve the existing seedstock and re-establish the lupine field's existing quality . . ." (AR 50.)

Condition 20 provides standards for the design of the berms on Parcel D:

> "The berms on Parcel D shall be designed and constructed to maintain the existing slopes and topographic features of the natural hillside. The berms shall appear as a continuation of the existing slopes and natural landforms. The berms shall be capable of completely screening future buildings from view. The height and design of the berms shall be demonstrated by flagging and staking in the field prior to approval of the improvement plans. The design of the berms shall be shown on the grading and improvement plans, and berms shall be installed as part of the subdivision improvements." (*Ibid.*)

3.1.7 The Resolution approving the Subdivision Map

The County's resolution approving the VTM also addressed the Project's aesthetic impacts. First, the County addressed zoning, noting that it intended "to apply zoning to the site consistent with the 2010 General Plan designation." Specifically,

> ". . . staff intends to propose that the zoning include a 20-foot height limit in the area identified as 'Visually Sensitive' in the Toro Area Plan and Visual Sensitivity and Design Control Overlays. This zoning designation would comply with the underlying 'Low Density Residential' land use designation and the scenic policies of the 2010 General Plan . . . . Such zoning is not, however, required for approval of this project and would be processed independent of this approval. In the event that the intended zoning is not adopted, conditions of approval have been added to the Tentative Map requiring that CC&R's be applied to the development that

contain design criteria to protect the visual quality of the area consistent with Toro Area Plan policies (See Finding Nos. 5, 9, 10, and 11)." (AR 22-23.)

The County next addressed the Project's consistency with particular General Plan Policies. Policy 26.1.10 prohibits development on slopes greater than 30% unless the County makes a finding that either no alternative exists or the proposed development "better achieves the resource protection objectives and policies" contained in relevant land use plans. The County made both findings. (AR 24.)

As discussed *ante*, General Plan Policy 26.1.9 and Toro Area Plan 26.1.9.1(T) prohibit ridgeline development. The County found that the Project proposed no such development. (AR 25.) Real Parties relocated or reconfigured most lots with the potential for ridgeline development as part of the revised VTM under Alternative 5 PC. (*Ibid.*) As to the remainder, Condition of Approval 18 directed that Real Parties place a note on the final map stating that the County prohibits ridgeline development on these lots. (AR 50.)

The County made the following additional relevant findings:

> "9. **FINDING: TORO AREA PLAN POLICY 26.1.6.1(T) -VISUAL SENSITIVITY**
>
> The approved project is consistent with the provisions of this policy which states, *'Within areas of visual sensitivity as indicated on the Toro Visual Sensitivity Map, no development shall be permitted without a finding by the Board of Supervisors or its designee that such development will not adversely affect the natural scenic beauty of the area. Additionally, areas of visual sensitivity shall be reviewed critically for landscaping and building design and siting which will enhance the scenic value of the area.'* The development will not adversely affect the natural scenic beauty of the area. The visually sensitive areas including ridgelines, mountain faces, hillsides, open meadows, natural landmarks, and unusual vegetation visible from scenic roadways have been retained in their natural state.
>
> **EVIDENCE:** a) The project design has avoided the slope faces which dominate the Highway 68 Scenic Corridor, has avoided the scenic flat areas adjacent to Highway 68 and has been conditioned to or designed to preclude development within the Critical Viewshed.

b) The proposed project includes development within an area of visual sensitivity. The project has been conditioned to develop Design Criteria within the CC&R's to govern development within areas of Visual Sensitivity. As a party to the CC&R's, the County will administer the provisions of the design criteria through review of a subsequent discretionary permit based upon the Visual Sensitivity criteria (Condition 19). As part of implementation of the 2010 General Plan, County Staff intends to propose to the Board of Supervisors to add zoning to the subject site including the Visually Sensitive (VS) and Design Control (D) overlays. The application of these zoning overlays would require full flagging and staking on proposed development areas, prior to approval of additional discretionary and construction permits. The implementation of the zoning overlays would ensure that future development will not adversely affect the natural scenic beauty of the area. Amendment of zoning as part of General Plan implementation is scheduled to be considered in calendar year 2015 but is independent of this project. The project has been conditioned so that the CC&R's will protect the visual quality of the area.

c) The project has been conditioned to include development design guidelines which will be implemented as part of the future review of development. The design guidelines include provisions addressing color, materials, lighting, screening and visibility.

d) The future development behind the Lupine Field and on the Mesa will be placed behind berms and designed so that development will not be visible from Highway 68 or River Road (Conditions 17 and 20).

"10. **FINDING: TORO AREA PLAN POLICY 40.2.5(T) CRITICAL VIEWSHED**

The approved project is consistent with the provisions of this policy, which states, *'The County shall require newly created parcels to have building sites outside of the critical viewshed. **(ADDED** 7/31/84).'* No building sites are created within the critical viewshed. Critical viewshed areas will be retained in open space.

EVIDENCE: a) Figure 9 of the Toro Area Plan itself is not drawn at a scale to accurately identify the exact location of the critical viewshed, but portrays the general area of the designated 'critical viewshed.' There is a meadow with surrounding hillsides in the vicinity of lots 81-85. Based on the intent of the Toro Area Plan, the line defining the Critical Viewshed in this area should surround this meadow to protect the scenic nature of the meadow and adjacent hillsides. The intent of the Toro Area Plan as explained in

the description of Figure 9 (Areas of Visual Sensitivity) is to provide protection to 'ridgelines, mountain faces, hillsides, and open meadows,' (page 34) The applicant prepared an exhibit showing the Critical Viewshed in relation to the Vesting Tentative Map that would not center the Critical Viewshed on the meadow but in fact would designate areas hidden by hills as Critical Viewshed. Staff prepared a modified exhibit showing where the Critical Viewshed should be drawn based on the Toro Area Plan language. The Planning Commission recommended that the lots shown in this area be relocated based on the Toro Area Plan policy. The applicant prepared a modified Vesting Tentative Map dated November 19, 2014, showing the relocation of lots from this area. The November 19, 2014 Vesting Tentative Map is in compliance with the Critical Viewshed policy.

b) Proposed lots in the eastern portion of the project proposed entirely within the mapped Critical Viewshed area have been relocated as shown on the Vesting Tentative Map being considered by the Board of Supervisors.

"11. **FINDING: TORO AREA PLAN POLICY 40.2.4(T) -100 FOOT SETBACK**

The approved project is consistent with the provisions of this policy, which states, '*The County shall require a 100 foot building setback on all parcels adjacent to County and State scenic routes. The 100 foot-setback will also apply to areas designated on the Toro Visual Sensitivity Map (Toro Area Plan, Figure 9) as critical viewshed . . . . Critical viewshed areas shall also have open space zoning applied to the 100 foot setback area. . . .*' The 100-foot building setback from County and State scenic route and the critical viewshed has been maintained as part of project design.

"**EVIDENCE:** Within the project area, three State or County designated scenic roadways exist: Highway 68, San Benancio (western parcel) and River Road (eastern parcel). The revised Vesting Tentative Map dated November 19, 2014 locates newly created parcels outside of the required 100 foot building setback from these designated scenic roadways with the exception of Lots 1a, 1c and 15a (portion). Lot 15a contains existing development which will remain on site and the development will be considered 'legal non-conforming' as related to the 100 foot Critical Viewshed setback requirement. Lots 82-84 are a

> reconfigured design, with lots 81a, 82a, 83a, and 84a being relocated. Lots 1b, 1c and 16b, 19b, and 20b are newly configured lots in the revised Vesting Tentative Map to account for relocated lots. Additionally, the policy requires a 100' setback from the edge of the critical viewshed. All building areas are located outside of the 100' scenic road and critical viewshed setback." (AR 27-28, italics in original)

3.2 Introduction

Two related points drive the bulk of Petitioners' arguments. First, Petitioners claim changes to the Project that occurred both during the EIR and post-EIR periods resulted in a "shifting" project description in violation of CEQA. Second, Petitioners contend the County's post-FEIR changes to the Project contravened CEQA's informational function.

Petitioners also argue the EIR was deficient because 1) it did not disclose building envelopes; 2) the County did not require flagging and staking; 3) mitigation was impermissibly deferred until after project approval; 4) the County improperly concluded that impacts to views on higher elevation Park trails were insignificant; 5) the EIR's cumulative impact analysis was defective; and 6) the EIR's responses to certain comments was inadequate.

3.3 The Critical Viewshed and Ridgeline Development

Petitioners make a number of arguments concerning the County's interpretation of the Toro Area Plan's critical viewshed and ridgeline development policies.

Petitioners object that 1) the County abrogated its duty to use its independent judgment in preparing the DEIR because it relied on an "applicant supplied" critical viewshed map and photo-simulations; 2) the County misinterpreted the Toro Area Plan critical viewshed policy; 3) the County improperly modified the VTM post-FEIR; 4) the EIR's description of the Project's environmental setting was inaccurate because it relied upon an erroneous map of the critical viewshed and incorrectly stated there would be no ridgeline development; and 5) the DEIR's

description of the critical viewshed was inaccurate and hence, the project description was "shifting" and uncertain.

3.3.1 Independent Judgment

Petitioners contend the County abrogated its duty to use independent judgment in preparing the DEIR. (See Pub. Resources Code, § 21082.1.) Petitioners claim this is evidenced by the County's use of an "applicant supplied mapping" of the critical viewshed area and "misleading" photo-simulations provided by the applicant. Petitioners argue reliance on this evidence ultimately resulted in last minute changes to the Project and the County failing to assess adequately visual impacts. The record does not support these claims.

The applicant did not supply its own critical viewshed map. The DEIR contains maps of the project area with an overlay of the critical viewshed based, in part, on information provided by the applicant. (AR 241, 243, 4185.) It is not improper to rely upon such information. (*Friends of La Vina v. County of Los Angeles* (1991) 232 Cal.App.3d 1446, 1455 ["[T]he 'preparation' requirements of CEQA (§§ 21082.1, 21151) and the Guidelines turn not on some artificial litmus test of who wrote the words, but rather upon whether the agency sufficiently exercised independent judgment over the environmental analysis and exposition that constitute the EIR"].)[36] Indeed, the Guidelines contemplate that an applicant may need to supply information to assist in preparing the DEIR. (Guidelines, § 15084, subd. (b).)

Petitioners' arguments regarding photo simulations fare no better. Petitioners claim County staff "acknowledged" that the DEIR "provided misleading applicant-supplied photo-simulations that represented smaller houses and a different angle or perspective." However,

[36] Even if the County had relied on an "applicant supplied" map in the DEIR, such reliance would have no bearing on the County's decision to subsequently relocate lots. The County relocated lots as part of its adoption of Alternative 5. (AR 2685-2686.) The County later adopted staff's recommended interpretation of critical viewshed boundaries. (AR 27-28.) That interpretation — not the DEIR's map — resulted in additional lot relocations.

although Real Parties prepared photo-simulations (supplementary to the County's photo-simulations), Petitioners, not staff, characterized the photo-simulations as "misleading." (See AR 253, 255, 5237-5238.) Additionally, the DEIR disclosed that Real Parties based their photo-simulations upon different assumptions than the ones upon which the County based its photo-simulations. (AR 255.)

Regardless, Petitioners do not explain why it matters that there were two sets of photo-simulations. Petitioners claim the County's reliance upon both sets of photo-simulations "resulted in substantial revisions of the project" post-FEIR, but provide no support for this claim. In fact, as discussed *ante*, the Board's adoption of Alternative 5 was primarily responsible for post-FEIR lot relocations. (AR 4223-4224.) Petitioners neither cite contrary evidence nor provide an alternative explanation for the referenced revisions.

3.3.2 The County's interpretation of the Critical Viewshed Map and Toro Area Plan

Petitioners argue the County misinterpreted the Toro Area Plan critical viewshed policy.

"The body that adopts general plan policies in its legislative capacity has unique competence to interpret those policies when applying them in its adjudicatory capacity." (*Napa Citizens for Honest Government, supra*, 91 Cal.App.4th at p. 386.) Accordingly, "[c]ourts accord great deference to a local governmental agency's determination of consistency with its own general plan . . . ." (*Eureka Citizens for Responsible Government v. City of Eureka* (2007) 147 Cal.App.4th 357, 373.) And, "[b]ecause policies in a general plan reflect a range of competing interests, the governmental agency must be allowed to weigh and balance the plan's policies when applying them, and it has broad discretion to construe its policies in light of the plan's purposes. [Citations.] A reviewing court's role 'is simply to decide whether the [public] officials

considered the applicable policies and the extent to which the proposed project conforms with those policies.' [Citation.]" (*Save Our Peninsula*, *supra*, 87 Cal.App.4th at p. 142.)

Policy 40.2.5 of the Toro Area Plan states, "The County shall require newly created parcels to have building sites outside of the critical viewshed." (AR 248.) Policy 40.2.4 requires a 100-foot building setback from scenic routes and critical viewshed. (*Id.*) The Toro Area Plan generally identifies the critical viewshed and areas of visual sensitivity in its Figure 9. (AR 20455). Figure 9 is a hand-drawn map not drawn to scale, intended only to "portray[] the general area of the designated 'critical viewshed.'" (AR 27.)

In the DEIR, the County attempted to overlay its interpretation of these boundaries upon the Project map. (AR 241, 243.) Based on this interpretation, the DEIR concluded that several lots on the proposed VTM would be either within the critical viewshed or within the 100-foot setback area. (AR 257.) To mitigate what would otherwise be a significant impact, the DEIR adopted MM 3.1-1a, which provides, "[p]rior to final map approval, the project applicant shall reconfigure the lot and development pattern to relocate building sites for residential lots outside of the critical viewshed areas and 100-foot scenic roadway setback. Buildings on lots where building sites cannot be fully located outside the critical viewshed must not be visible from scenic roadways." (AR 259-260.)

Following completion of the FEIR, staff recommended that the County adopt Alternative 5. (AR 4430.) Alternative 5 would remove 27 lots and reconfigure several more. (AR 2693.) These changes necessitated a reexamination of the critical viewshed issue. Staff concluded the hand-drawn Figure 9 was too imprecise to give appropriate guidance as to the boundaries of the critical viewshed. (AR 4185.) According to the narrative text of the Toro Area Plan, Figure 9 "shows ridgelines, mountain faces, hillsides, open meadows, natural landmarks, and unusual

vegetation which are visually prominent from various roadways." (AR 15083.) Staff therefore recommended the Board interpret critical viewshed boundaries so as to protect open foothills and meadows on the site, opining that this proposed boundary would better reflect the [Toro Area Plan's] intent to protect the visual resource of the meadow and adjacent hillsides." (AR 4188.) The Board adopted staff's recommended interpretation. (AR 27-28.)

Petitioners argue that the County's description of "the environmental setting" is incorrect because it "misrepresents the location of the critical viewshed" and "misrepresents the consistency of the proposed project" with the Toro Area Plan.

Petitioners' implicit suggestion that there is an absolute, defined location of the critical viewshed is erroneous. Figure 9 is simply too imprecise to provide clear guidance on critical viewshed boundaries as applied to the project area; some interpretation was necessary. (AR 4185, 5149, 20455.)[37] The County concluded it made little sense for the critical viewshed to include land naturally shielded from development. If development would not be visible, the County reasoned, it could have no aesthetic impact. (AR 4186-4189.) The court must accord great deference to this interpretation. (*Eureka Citizens for Responsible Government, supra*, 147 Cal.App.4th at p. 373.) The court concludes the County's interpretation was reasonable.

3.3.3 Post-FEIR project changes

Petitioners contend that the County erred by adopting new analysis and altering mitigation measures after the EIR process was complete. Petitioners argue that any post-EIR change to a project deprives the public of both the necessary information to evaluate the Project and the opportunity to object.

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[37] Highway 68 contends that staff "disclosed" that the critical viewshed maps used in their DEIR "were supplied by [Real Parties] and were not precise, it was a best guess scenario." Highway 68 mischaracterizes both the DEIR and staff's statements. The County's EIR consultant, not Real Parties, created the DEIR's critical viewshed map, using information from the County's records, *and* "information provided by" Real Parties. (See, e.g. AR 241 ["Source: Monterey County RMA 2010"]; 4185.)

The court disagrees; CEQA does not *per se* bar changes to a project post-FEIR. "The 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. [Citation.]" (*County of Inyo*, *supra*, 71 Cal.App.3d at p. 199.) "'[I]t is doubtful that any agency, however objective, however sincere, however well-staffed, and however well-financed, could come up with a perfect environmental impact statement in connection with any major project. Further studies, evaluations and analyses by experts are almost certain to reveal inadequacies or deficiencies. But even such deficiencies and inadequacies, discovered after the fact, can be brought to the attention of the decision-makers, . . .' [Citations.]" (*Residents Ad Hoc Stadium Com. v. Board of Trustees* (1979) 89 Cal.App.3d 274, 285.) CEQA's informational function is satisfied so long as both the public and decision makers "ha[ve] the opportunity to consider the alleged deficiencies and comment" upon them. (*Kings County*, *supra*, 221 Cal.App.3d at p. 727.)

Petitioners rely upon *Environmental Defense Fund, Inc. v. Coastside County Water Dist.* (1972) 27 Cal.App.3d 695, 706-708 and *Laurel Heights I*, *supra*, 47 Cal.3d at pages 403-404. Neither case applies. Both addressed omissions of requisite EIR elements, not a lead agency's reliance on post-EIR information or decision to make changes to a project post-EIR. *Environmental Defense Fund, Inc.* concerned 1) the EIR's failure to discuss the full scope of the project; and 2) an "extensive" expert report dealing with possible adverse impacts presented *prior* to EIR preparation. (*Environmental Defense Fund, Inc.*, *supra*, 27 Cal.App.3d at pp. 706-708.) In *Laurel Heights I*, the agency failed to include an adequate discussion of project alternatives in the EIR, conducting such analysis in private. (*Laurel Heights I*, *supra*, 47 Cal.3d at pp. 403-404; *Citizens of Goleta Valley*, *supra*, 52 Cal.3d at p. 564 [the mitigation and project

alternative sections are "the core of an EIR"].) It was in this context that the Court quoted *Environmental Defense Fund, Inc.* for the proposition that "'whatever is *required* to be considered in an EIR must be in that formal report.'" (*Laurel Heights I, supra*, 47 Cal.3d at p. 405, quoting *Environmental Defense Fund, Inc., supra*, 27 Cal.App.3d at p. 706, italics added.) Petitioners do not claim that the Ferrini Ranch EIR lacked requisite EIR elements.

Petitioners also rely on *Save Our Peninsula* for the proposition that "[l]ast-minute changes to mitigation in staff reports and errata cannot substitute for the discussion that is required to be in the EIR." (*Save Our Peninsula, supra*, 87 Cal.App.4th at p. 130.) The court agrees that new information or analysis may necessitate an additional public comment period, but only to the extent that such information or analysis constitutes "significant new information." (Pub. Resources Code, § 21092.1.) Thus, in the passage immediately following the one Petitioners cite, *Save Our Peninsula* concludes that recirculation is the appropriate lens through which to examine an agency's decision to change a project post-EIR and/or rely upon new information discovered post-EIR. (*Save Our Peninsula, supra*, 87 Cal.App.4th at p. 130.)

3.3.4 Recirculation

CEQA requires a lead agency to recirculate an EIR for additional public comment when an agency adds "significant new information" to an EIR prior to certification. (Pub. Resources Code, § 21092.1.) The court evaluates new information or project changes *not* added to the EIR under the same legal standard. (*Western Placer, supra*, 144 Cal.App.4th at p. 899; *Save Our Peninsula, supra*, 87 Cal.App.4th at p. 131.)[38]

"Significant new information" includes a disclosure showing, inter alia, that 1) a new significant environmental impact would result from the project or from a new mitigation

[38] By extension, a lead agency need not add new information or project changes that do not require recirculation to the final EIR. (*South County Citizens for Smart Growth, supra*, 221 Cal.App.4th at p. 329.)

measure; or 2) that "[a] substantial increase in the severity of an environmental impact would result unless mitigation measures are adopted that reduce the impact to a level of insignificance." (Guidelines, § 15088.5, subd. (a)(1)-(2); *Laurel Heights II, supra*, 6 Cal.4th at p. 1130.) In challenging the County's decision not to recirculate, Petitioners "bear[] the burden of proving a double negative, that the County's decision not to revise and recirculate the final EIR is not supported by substantial evidence." (*South County Citizens for Smart Growth, supra*, 221 Cal.App.4th at p. 330.) The court must "'resolve reasonable doubts in favor of the administrative finding and decision.' [Citation.]" (*Spring Valley Lake Association v. City of Victorville* (2016) 248 Cal.App.4th 91, 107.)

By definition, purely beneficial changes to a Project do not trigger recirculation; recirculation is required when new information or project changes would *cause* significant environmental impacts or *increase the severity* of an existing environmental impact. (Guidelines, § 15088.5, subd. (a)(1)-(2).) Thus, the *Western Placer* court concluded changes to a mining project's phasing were not "significant new information" because the record revealed these changes *reduced* environmental impacts. (*Western Placer, supra*, 144 Cal.App.4th at pp. 898-903.)

Nevertheless, "beneficial" project changes may trigger recirculation to the extent they cause secondary significant impacts and/or exacerbate existing impacts. (See Guidelines, §§ 15088.5, subd. (a)(1)-(2), 15126.4(a)(1)(D); *River Valley Preservation Project v. Metropolitan Transit Development Bd.* (1995) 37 Cal.App.4th 154, 169.)

Here, the County decided to relocate lots post-FEIR for the express purpose of reducing or eliminating aesthetic impacts to the critical viewshed and to avoid ridgeline development. (AR 4223.) On their face, the relocations are beneficial changes that do not trigger recirculation.

(*Western Placer, supra,* 144 Cal.App.4th at pp. 898-903.) Petitioners object that the relocations *might* cause unexamined secondary impacts but do not suggest what these impacts might be. CEQA does not require an EIR to consider an entirely *speculative* environmental impact. (*Mission Bay Alliance v. Office of Community Investment and Infrastructure* (2016) 6 Cal.App.5th 160, 186; *Dry Creek Citizens Coalition v. County of Tulare* (1999) 70 Cal.App.4th 20, 26 ["CEQA requires an EIR to reflect a good faith effort at full disclosure; it does not mandate perfection, nor does it require an analysis to be exhaustive."].) Moreover, the County examined this issue and concluded the relocations did not "result in a new significant impact or substantial increase in the severity of an environmental impact analyzed in the EIR. The new lots *are placed in locations where the EIR had analyzed lot locations* and thus there are no new potential impacts which need to be analyzed." (AR 18, italics added.) The County's conclusion is supported by substantial evidence.

Finally, recirculation is not required when changes merely clarify, amplify, or make insignificant modifications to an adequate EIR. (*Laurel Heights II, supra,* 6 Cal.4th 1112, 1130; Guidelines, § 15088.5, subd. (b).) The Planning Commission's alterations to the VTM affected 13 of 185 lots, only nine of which were removed or relocated. (AR 5406-5407.) The relocations constitute insignificant modifications insufficient to require recirculation.

3.3.5 The "Shifting" Project Description

Petitioners assert the County's post-FEIR decisions to move some lots to avoid impacts to the critical viewshed and ridgeline development rendered the EIR's project description "shifting" and uncertain because the County changed the map post-EIR.

"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 curtailed, enigmatic or unstable project description draws a red herring across the path of public input." (*Id.* at p. 197-198.) "[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]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, supra*, 71 Cal.App.3d at p. 199.) 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." (*Ibid.*)

"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.)

Petitioners cite several cases in which courts have found project descriptions to be inadequate. In *County of Inyo*, *supra*, the EIR initially described the project as an increase in groundwater pumping intended solely for "unanticipated" uses within a certain geographical area. (71 Cal.App.3d at p. 189.) 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 extraction of groundwater at a significantly higher rate than delineated in the initial project description. (*Id.* at p. 190.) Further, the EIR shifted between these descriptions repeatedly, as did the final approval resolution. The court found that this uncertainty "vitiate[d] the City's EIR process as a vehicle for intelligent public participation." (*Id.* at p. 197.)

An unstable or shifting project description may also obscure reasonably foreseeable project impacts. *San Joaquin Raptor*, *supra*, concerned a proposed expansion to a mining operation. (149 Cal.App.4th at pp. 650-651.) The DEIR provided that the expansion would not substantially increase production. However, the proposed Conditional Use Permit provided for a substantial increase in production, leading to unexamined environmental impacts and public confusion. (*Id.* at p. 655.) Hence, the court held that "[b]y giving such conflicting signals to decision makers and the public about the nature and scope of the activity being proposed, the Project description was fundamentally inadequate and misleading." (*Id.* at p. 656.)

Finally, *CBE v. City of Richmond*, *supra*, 184 Cal.App.4th at pages 75-76, addressed the proposed upgrade of refinery facilities to increase production. The EIR contained conflicting statements about project objectives and differed considerably from a version of the project described in a concurrent SEC filing. (*Id.* at p. 83.) The court therefore found that the EIR "fail[ed] as an informational document." (*Id.* at p. 89.)

All of these cases involved fundamental changes to an initial project description. With the objectives and scope of the affected projects unclear, EIR analysis was often inconsistent, compromising CEQA's informational function. The facts here are distinguishable. The project description did not "shift" throughout the EIR process. The changes Petitioners identify primarily occurred over the course of three Planning Commission hearings. More importantly, the changes are minor. In all, the Planning Commission's alterations to the VTM affected 13 of 185 lots, only nine of which were removed or relocated. (AR 5406-5407.) These are far from fundamental changes to the Project. And, while the location of specific lots changed, the "precise location and boundaries of the proposed project," set forth in some detail in the EIR, did not. (AR 199-238; Guidelines, § 15124.)

3.4 Post-Approval Changes to Lot Locations/Potential Impacts

Petitioners also argue that the project description is "shifting" because Conditions of Approval 18 (ridgeline development); 80 (lots in the critical viewshed); 85, 86, and 95 (biological resources); 94 (riparian habitat); and 105 and 106 (cultural resources) will require Real Parties to relocate lots subsequent to Project approval. Petitioners contend any such relocation could cause unexamined, undisclosed impacts.

The County notes that the approved tentative map has *already* complied with all required relocations pertaining to critical viewshed, ridgeline development, riparian habitat, and cultural resources. (AR 25, 28, 71, 82, 2695.) As to Conditions of Approval 85, 86, and 95, relocation is *possible* but not mandatory; relocation will only be necessary if certain conditions occur, and even then, only "to the extent feasible." (AR 74-75, 83.) Additionally, these Conditions contain specific performance standards that ensure the necessary level of impact reduction. If Real

Parties do not meet these Conditions, the County will be unable to approve the final map. (*Youngblood v. Board of Supervisors* (1978) 22 Cal.3d 644, 652; Govt. Code, § 66458, subd. (a).)

Although Conditions 85, 86, and 95 do contain performance standards, they do not address potential *visual* impacts resulting from lot relocation. (AR 74-75, 83.) However, there is no reason to believe lot relocations would generate significant visual impacts. Real Parties may only relocate lots "to the extent feasible." (AR 74-75, 83.) Real Parties cannot relocate lots to ridgelines, the critical viewshed, or the 100-foot setback. (AR 50, 71.) Any lots moved to areas of visual sensitivity are subject to CC&Rs and their attendant design standards to minimize potential impacts. (AR 51.) And, contrary to Petitioners' claims, lot relocations are not necessarily required; all three Conditions of Approval require relocation only under certain circumstances. (*Ibid.*) Any potential impacts are purely speculative and hence, the EIR need not consider them. (*Mission Bay Alliance, supra*, 6 Cal.App.5th at p. 186; *Dry Creek Citizens Coalition, supra*, 70 Cal.App.4th at p. 26.)

3.5 Flagging and Staking

Petitioners argue that the County Code required the County to condition subdivision approval upon flagging and staking of the entire project area. Petitioners further argue that Resolution 09-360 – or alternatively, its predecessor — requires flagging and staking. The County contends that the County Code contains neither requirement.

MCC section 21.46.060 applies to "all development and subdivisions in the 'VS' combining district." (AR 28977.) The County must conduct an initial on-site inspection within 30 days of receipt of a project application to determine whether a project has "the potential to create a substantially adverse visual impact when viewed from a common public viewing area in terms of normal, unaided vision for any length of time." (*Ibid*; MCC, § 21.46.060, subd. (B)(1).)

Should any portion of a project meet this criteria, the County must flag and stake the project before the County may deem the project application complete. (*Ibid*; MCC, § 21.46.060, subd. (B)(2)-(3).)

Only a single 0.7 acre lot on the Project site is zoned "VS." (AR 250.)[39] Development on that lot is not contingent on project approval; the lot is an "existing lot of record" occupied by a house. (See AR 2686, 3322, 15451.) The only change the Project would cause that would affect this lot is the placement of a flat road behind an existing 10-foot masonry wall. (AR 227, 284, 15451.) Under those conditions, the inspector could have reasonably concluded the Project had no "potential to create a substantially adverse visual impact when viewed from a common public viewing area." (AR 28977.) Accordingly, the Project never triggered the flagging and staking requirement.

As to the remainder of the project site, Highway 68 contends that the EIR improperly neglected to apply County flagging and staking criteria. Highway 68 cites Board Resolution 09-360, which adopted "revised" flagging and staking criteria that would apply to the project site. (AR 15710-15714.) However, the County adopted Board Resolution 09-360 on July 23, 2009, *over four years after* it deemed Real Parties' project application complete. (AR 5, 15709.) Consequently, Board Resolution 09-360 does not apply to the Project. (Gov. Code § 66474.2 subd. (a) [a project applicant is bound only by "those ordinances, policies, and standards in effect" on the date the agency determines the application is complete].)

Highway 68 concedes this may be the case, but suggests that application of a prior version of the Resolution would result in the same outcome. However, the earlier version of the Resolution provided that staff had discretion whether to require staking and flagging. (Highway

[39] Portions of the project site are located within an "*area of visual sensitivity*" as defined by the Toro Area Plan, but the terms are not equivalent. (AR 239-240.)

68's Third Supplemental Request for Judicial Notice, Ex. 6, p. 1.) A Project application checklist reflects that staff exercised this discretion by not requiring flagging and staking. (AR 5710.)[40]

3.6 Building Envelopes

Highway 68 argues that the County Code required Real Parties to provide exact building envelopes for each proposed lot. Highway 68 further argues that the lack of building envelopes contributed to the project description being unstable and inaccurate by not providing "the degree of specificity mandated by CEQA." The County responds that the EIR satisfies CEQA requirements, that building envelopes are not required under the County Code, and that the Project would merely create lots to be sold for future development. Those lots, the County reasons, would be subject to the County's site and design review process and its attendant protections against potential aesthetic impacts.

3.6.1 CEQA Requirements

Highway 68 provides no authority to explain what it means by "the degree of specificity mandated by CEQA." In fact, other than reference to two County Code sections, discussed below, Highway 68's two-page discussion contains no citations to authority at all. (See *In re S.C.* (2006) 138 Cal.App.4th 396, 408 ["[t]o demonstrate error, [a litigant] must present meaningful legal analysis supported by citations to authority . . ."].)

Nevertheless, CEQA does not support Highway 68's claim. *Citizens for a Sustainable Treasure Island, supra*, 227 Cal.App.4th at pages 1052-1053 is apposite. There, the petitioner claimed the project description for a mixed-use community was unstable because "the specific configuration and design of particular buildings" was "left for future review" and because the "street network and layout is only conceptual at this point." (*Ibid.*) The court rejected these

[40] Highway 68 erroneously contended that evidence of this exercise of staff discretion was not in the record. Ironically, in its briefing, Highway 68 cited to the very page in the record containing that evidence. (AR 5710.)

criticisms, noting that the EIR made "an extensive effort to provide meaningful information about the project, while providing for flexibility needed to respond to changing conditions and unforeseen events that could possibly impact the Project's final design." (*Id.* at p. 1053.) The EIR explained that the underlying zoning provided "flexibility about siting particular buildings, while maintaining tight controls on absolute building heights and development patterns." (*Id.* at pp. 1053-1054.) Moreover, to ensure accurate impact analysis, the EIR assumed "maximum development . . . including impacts of the Project on scenic vistas." (*Id.* at p. 1053.)

The court conceded many project features were "subject to future revision" but explained the "EIR cannot be faulted for not providing detail that, due to the nature of the Project, simply does not now exist." (*Id.* at p. 1054.) That an "EIR does not anticipate every permutation or analyze every possibility" does not make a project description "misleading, inaccurate and vague." (*Ibid.*)

Similarly, here, the Project contemplates the creation of lots that Real Parties will sell for future development; specific building design, subject to zoning and permitting requirements, will be left to future developers. Thus, "[c]onsistent with subdivision review procedures for projects elsewhere in the county . . . large-lot subdivisions anticipating custom homes are ultimately developed lot by lot within the parcel footprint. The majority of the proposed lots . . . are 0.5 to 1 acre in size. Although foundation and driveway locations are not known, lots of this size present a fairly small development envelope. The County assumes that potential development could occur anywhere within the lot." (AR 3575.)

Additionally, the County's assumption that development "could occur anywhere within the lot" is akin to the *Treasure Island* EIR's assumption of "maximum development . . . including impacts of the Project on scenic vistas." (*Treasure Island, supra*, 227 Cal.App.4th at p. 1053.)

The Ferrini Ranch EIR effectively evaluated the worst-case development scenario for each lot. Any proposed development would be subject to zoning and permitting requirements, such as flagging and staking, building siting, and the Project's Conditions of Approval. (AR 3760.) For example, under Condition 19, the County would enforce design criteria as to each new structure through its discretionary permit process. (AR 51.)

Given the nature of the project, a subdivision creating lots to be sold for future development, it would be impractical for the County to require Real Parties to provide building dimensions at this early stage. Doing so would limit the "flexibility needed to respond to changing conditions and unforeseen events that could possibly impact the Project's final design." (*Treasure Island, supra*, 227 Cal.App.4th at p. 1053.) Further, the EIR is not short on detail; it contains a 40-page "Project Description" chapter including the proposed VTM, maps, the project location, and project characteristics and objectives. (AR 199-238.) In short, the EIR satisfies CEQA's project description requirements. (Guidelines, § 15124.)

3.6.2 County Code Requirements

The only other authority Highway 68 provides is MCC sections 21.40.060, subdivisions (C)1-3, and 19.05.040.L3C, subdivision (3). Highway 68 asserts that the sections mandate that subdivision plans contain building envelopes. Neither section so does.

MCC section 21.40.060, subdivision (C)1-3, contains structure height and setback regulations. Highway 68 does not explain how these restrictions mandate building envelopes. In any event, they apply to use permits, not VTMs. And, although MCC section 19.05.040.L3C, subdivision (3), applies to VTMs, it relates to water issues not aesthetic impacts, and is hence inapplicable.

3.7 Lupine Field and Parcel D Berms

To screen development from view, the DEIR proposed a contoured berm in the Lupine Field and another berm along the northern ridge of Parcel D. (AR 227, 288.) In the RDEIR, staff proposed Alternative 5, which, as ultimately adopted, modified Parcel D to include three berms in total. (AR 2693.) The FEIR then modified MM 3.1-1a to provide that Real Parties were required to "provide sufficient detail in the improvement plans with the final map to allow verification by the County of berm appearance and effectiveness as a screen." (AR 3399.)

The Board ultimately adopted Conditions of Approval 17 and 20. Condition 17, addressing the Lupine Field, required that the berm 1) "be designed to retain the natural overall character of the Lupine Field, including the gentle slope of the site and preserve as large an area of visual lupine growth as possible visible from Highway 68" and 2) that lot 16-21 and 24-28 be completely screened. (AR 50.) Similarly, Condition 20 required that the Parcel D berms "be designed and constructed to maintain the existing slopes and topographic features of the natural hillside. The berms shall appear as a continuation of the existing slopes and natural landforms. The berms shall be capable of completely screening future buildings from view." (AR 51.)

Petitioners contend that 1) the EIR improperly treats the berms as project features as opposed to mitigation, resulting in inadequate disclosure of environmental impacts and a failure to consider potential alternative mitigation measures; and 2) the County improperly deferred berm design to the final map stage, meaning that, at the time the Board approved the project, the berms were not known to constitute feasible mitigation. The County responds that 1) the berms are integral components of the project with defined performance standards precluding significant impacts; 2) enforceable conditions of approval contain these performance standards; and 3) there is no evidence that the berms would cause significant impacts.

3.7.1 Project Feature/Mitigation

Petitioners argue that the FEIR improperly characterized the Lupine Field berm described in the DEIR as part of the project description rather than as mitigation. Petitioners claim that this characterization made it impossible to determine whether mitigation measures are required or whether alternative mitigation was appropriate.

The Guidelines define a "project" as "the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment." (Guidelines, § 15378.) A mitigation measure involves "feasible changes in any or all activities involved in the project in order to substantially lessen or avoid significant effects on the environment." (Guidelines, § 15041.) Typically, the applicant prepares a project description, while the agency (or the public) suggests mitigation.

The distinction between elements of a project and mitigation measures is sometimes difficult to draw. (*Lotus v. Department of Transportation* (2014) 223 Cal.App.4th 645, 657, fn.8.) For example, in *Lotus*, a Caltrans roadway proposal would potentially impact adjacent redwood trees and root zones. (*Id.* at pp. 648-651.) The court explained that the use of certain paving material "'to minimize the thickness of the structural section, provide greater porosity, minimize compaction of roots, and minimize thermal exposure to roots from Hot Mix Asphalt paving' might well be considered to define the project itself" while "restorative planting and replanting, invasive plant removal, and use of an arborist and of specialized equipment . . . are plainly mitigation measures and not part of the project itself." (*Ibid.*)

Nevertheless, the distinction between elements of a project and mitigation measures is significant "only if it precludes or obfuscates required disclosure of the project's environmental impacts and analysis of potential mitigation measures." (*Mission Bay Alliance, supra,* 6

Cal.App.5th at p. 185.) For example, in *Lotus*, Caltrans' decision to characterize mitigation measures as project features compounded its EIR's failure to apply a standard of significance to project impacts upon the root system of old-growth redwood trees. The court explained,

> "Absent a determination regarding the significance of the impacts to the root systems of the old growth redwood trees, it is impossible to determine whether mitigation measures are required or to evaluate whether other more effective measures than those proposed should be considered. Should Caltrans determine that a specific tree or group of trees will be significantly impacted by proposed roadwork, that finding would trigger the need to consider a range of specifically targeted mitigation measures, including analysis of whether the project itself could be modified to lessen the impact. [Citations.] . . . Simply stating that there will be no significant impacts because the project incorporates 'special construction techniques' is not adequate or permissible." (*Id.* at pp. 656–657.)

Similarly, in *Mission Bay Alliance*, *supra*, 6 Cal.App.5th at page 185, the court rejected the petitioner's contention that an EIR for an entertainment complex improperly characterized a special event transit service plan (TSP) as a project feature. The court found that the characterization "did not . . . interfere with the identification of the transportation consequences of the project or the analysis of measures to mitigate those consequences." (*Ibid.*) The court noted that the EIR fully disclosed the environmental impacts of the project on vehicle traffic and transit, included analysis both with and without implementation of the TSP, and applied the same threshold standards to determine the significance of those impacts. (*Ibid.*) The analysis revealed that TSP implementation would reduce impacts to a less than significant level, but that the impact without the TSP remained significant and unavoidable, even with alternative mitigation measures. (*Ibid.*)

Here, the County's characterization of the Parcel D berm as a project feature is not reasonable. The berm was not an integral part of the project; Real Parties clearly intended that the berm would mitigate potential visual impacts of the Project. Nevertheless, creation of the berm would not "preclude[] or obfuscate[] required disclosure of the project's environmental

impacts and analysis of potential mitigation measures." (*Mission Bay Alliance, supra*, 6 Cal.App.5th at p. 185.) The EIR thoroughly disclosed the Project's potential aesthetic impacts and analyzed those impacts based upon specific thresholds of significance. (AR 252-307.) Moreover, the DEIR relied upon photo simulations and line-of-sight analysis to examine the Project's impacts on views both with and without the berms, providing evidence in support of their potential effectiveness. (AR 289, 293.)

Further, Landwatch fails to identify any feasible mitigation measures that the Project ignored. Landwatch claims that Caltrans "requested consideration of alternatives or mitigation." In fact, Caltrans requested that the County add a mitigation measure requiring "validation of the berms' effectiveness and natural appearance" and noted that the County should consider other mitigation measures or alternatives only if the County could not verify the berm's effectiveness. (AR 3396.) The County accepted this proposal, modifying MM 3.1-1a to require Real Parties to "provide sufficient detail in the improvement plans with the final map to allow verification by the County of berm appearance and effectiveness as a screen." (AR 3399.) And, as approved, the Project contained Conditions 17 and 20, which provide both explicit design standards and a mechanism for their enforcement. (AR 50 [Condition 17], 51 [Condition 20]; see Guidelines, § 15126.4, subd. (a)(1)(B).)

3.7.2 Deferral/Feasibility

Petitioners contend the County's proposals to modify berms were untimely because they were first proposed post-EIR. As discussed *ante*, mitigation measures proposed post-EIR trigger recirculation when they would either cause new, substantially adverse environmental impacts or exacerbate existing impacts. (Guidelines, section 15088.5, subd. (a)(1)-(2); *Save our Peninsula, supra*, 87 Cal.App.4th at pp. 130–131; *River Valley Preservation Project, supra*, 37 Cal.App.4th

at p. 169; *Western Placer*, *supra*, 144 Cal.App.4th at p. 902.) Petitioners do not show the berms meet this standard.

Petitioners also contend that the County improperly deferred development of berm design until after project approval. Such deferral is ordinarily inappropriate. (Guidelines, § 15126.4, subd. (a)(1)(B).) Nevertheless, "[d]eferral of mitigation specifics is permissible where the relevant agency commits itself to mitigation and articulates specific performance criteria or standards that must be met for the project to proceed. [Citations.]" (*Friends of Oroville v. City of Oroville* (2013) 219 Cal.App.4th 832, 838; Guidelines, § 15126.4, subd. (a)(1)(B).) The Project meets this standard because the Conditions of Approval contain detailed performance standards to ensure the berms' efficacy. (AR 50 [Condition 17], 51 [Condition 20], 71 [Condition 80].)

Finally, Petitioners object that the Lupine Field berm may not be feasible because Conditions of Approval 85, 86, 95, 105, and 106 could result in post-approval map revisions that "may render the lots undevelopable and/or an effective berm infeasible." (AR 74-75, 90-91). But any such outcome is purely speculative; CEQA does not require an EIR to consider such an impact. (*Mission Bay Alliance*, *supra*, 6 Cal.App.5th at p. 185.) Additionally, if the Lupine Field berm proves infeasible, the County would be unable to approve the final map, as Real Parties will not have satisfied the Conditions of Approval. (AR 50, 71; Govt. Code, § 66458, subd. (a).) In that instance, there would be no project and hence no risk of adverse visual impacts.

3.8 CC&Rs

Landwatch argues that the County committed a "bait and switch" by shifting from a reliance on zoning overlays to mitigate visual impacts in the EIR to the use of CC&Rs and design criteria post-EIR. Landwatch also argues there is no evidence these CC&Rs and design criteria provide protections equivalent to zoning overlays.

As discussed *ante*, there is nothing *per se* improper with modifying mitigation measures post-EIR. The County's decision to switch to CC&Rs post-EIR is problematic only if the County improperly failed to recirculate in light of this change. (Guidelines, § 15088.5(a); *South County Citizens for Smart Growth, supra*, 221 Cal.App.4th at pp. 329-330.) Landwatch bears the burden of showing the County's decision not to recirculate was not supported by substantial evidence. (*South County Citizens for Smart Growth, supra*, 221 Cal.App.4th at p. 330.)

Staff's statement of intent to propose a VS zoning overlay to the entire site was not binding on the Board. (AR 7, 3574.) Even if the Board adopted that recommendation, imposing the overlay was not a part of the Project. (*Ibid.*) Absent the adoption of CC&Rs, no equivalent aesthetic protections would be in place between certification and Board action. Consequently, imposing design criteria through CC&Rs is a beneficial change to the project, which generally would not trigger recirculation. (See *Western Placer, supra*, 144 Cal.App.4th at pp. 898-903.) Petitioners do not suggest these changes would cause secondary impacts sufficient to trigger recirculation. (See *Save our Peninsula, supra*, 87 Cal.App.4th at pp. 130-131; *River Valley Preservation* Project, *supra*, 37 Cal.App.4th at p. 169.)

Moreover, substantial evidence supports the conclusion that zoning and CC&Rs provide protections equivalent to imposition of VS zoning overlay. Indeed, the relevant Conditions of Approval mandate that Real Parties adopt design criteria *based upon* VS zoning overlay criteria. (AR 51, 72.) Further, Conditions 19 and 83 exceed those requirements by limiting building heights to 20 feet above average natural grade, a criterion that does not appear in the MCC chapters concerning "D,", "S," or "VS" districts. (*Ibid*; see MCC chapters 21.44-21.46.)

Landwatch argues that the enumeration of specific design criteria in Conditions 19 and 83 of the Conditions of Approval "may be exhaustive, not illustrative," and therefore less protective

than the VS zoning overlay. This argument is unfounded. Conditions 19 and 83 provide that the CC&Rs "shall establish design criteria," that such criteria "shall" both be based upon visually sensitive zoning overlay criteria, and "shall include" certain enumerated provisions (e.g., the building height limitation, low profile design, natural earth tone colors, and materials that minimize reflective surfaces). (AR 51, 72.) Nothing in this language suggests design criteria would be limited to the enumerated provisions; Conditions 19 and 83 provide additional, rather than exclusive, criteria requirements.

Finally, Landwatch contends that Conditions 19 and 83 are not equivalent to zoning overlays because they "omit the Design Control and Site Plan Review zoning overlay protections under [MCC] Chapters 21.44 and 21.45." But neither Chapter 21.44 ("D") nor Chapter 21.45 ("S") provide design criteria; both chapters are procedural. Both chapters prescribe the procedure to apply for design approval. (MCC §§ 21.44.030, 21.45.030.) These procedures are unnecessary here, since the Conditions require the County to administer the CC&Rs through review of discretionary permits. (AR 51, 72.)

3.9 The County's Analysis of Proposed Road Improvements

Petitioners contend the EIR lacks sufficient analysis of the aesthetic impacts of the new at-grade intersection. The County argues that its alternatives analysis is both technically sufficient and supported by substantial evidence.

"The core of an EIR is the mitigation and alternatives sections." (*Citizens of Goleta Valley, supra*, 52 Cal.3d at p. 565.) "The purpose of an [EIR] is to identify the significant effects of a project on the environment, 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, subd. (a).) An alternatives analysis must compare the adverse impacts of the alternative

with those of the proposed project by comparing the project's impacts against existing baseline physical conditions. (*In re Bay-Delta Programmatic Envt'l Impact Report Coordinated Proceedings* (2008) 43 Cal.4th 1143, 1168.) Hence, "[t]he EIR shall include sufficient information about each alternative to allow meaningful evaluation, analysis, and comparison with the proposed project." (Guidelines, § 15126.6, subd. (d).) "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. [Citation.]" (*Ibid.*)

As originally proposed, the Project required the construction of Ferrini Ranch Road, a portion of which would run through Toro Park and be adjacent to SR 68. Real Parties intended that portion of Ferrini Ranch Road to serve as the Project's primary access point. (AR 231.) That portion of the new road, however, would be in the critical viewshed. (AR 256.) This would not necessarily cause a significant impact; other "roads and/or access points along Highway 68" have been constructed within the critical viewshed without causing significant impacts. (AR 257.) However, Ferrini Ranch Road would have several "unique characteristics in terms of length and location" that the EIR concluded would cause significant and unavoidable aesthetic impacts. (AR 257, 260.) Specifically, a portion of Ferrini Ranch Road would be located within 100 feet of, and run directly parallel to, SR 68. (AR 284.) In addition, Ferrini Ranch Road's proximity to SR 68, taken together with related cuts and tree removal would cause Ferrini Ranch Road to be "highly visible to those traveling eastbound along State Route 68." (AR 2662.) Construction of the road would also require Real Parties to convert existing open space to public park land. (*Ibid.*)

To remediate these issues, the County proposed Alternative 3B. Alternative 3B included an alternative primary access point through a new at-grade intersection and related grading and improvements, and relocated the problematic portion of Ferrini Ranch Road. (AR 744.) Although the at-grade intersection would be visible along the SR 68 corridor, its incorporation would eliminate the bulk of the aesthetic impacts caused by the problematic portion of Ferrini Ranch Road. (AR 2694.) Using the same reasoning, the County incorporated the new signalized intersection option as part of Alternative 5. (*Ibid.*)

Petitioners are correct that the EIR's analysis is *primarily* comparative, but this is not a defect. The point of an alternatives analysis is to require agencies to minimize environmental impacts by identifying feasible alternatives that would "attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of Project . . . ." (Guidelines, § 15126.6, subd. (a).) Here, the EIR establishes the significant aesthetic impacts unique to the problematic portion of Ferrini Ranch Road and explains how the new intersection and widening would not result in such impacts. (AR 2662, 2694.) Moreover, the EIR includes a visual schematic of the layout of the new intersection. (AR 2659). This satisfies CEQA's requirement that an EIR contain "sufficient information about each alternative to allow meaningful evaluation, analysis, and comparison with the proposed project." (*Id*, subd. (d).)

Petitioners also object that the EIR does not include an analysis of secondary significant impacts. However, such an analysis is required only if the proposed improvements would actually cause such impacts. (Guidelines, § 15126, subd. (a).) Petitioners do not identify any such potential impacts; the EIR was not required to address speculative impacts. (*Mission Bay*

Alliance, *supra*, 6 Cal.App.5th at p. 186; *Dry Creek Citizens Coalition*, *supra*, 70 Cal.App.4th at p. 26.) Accordingly, the EIR's discussion of the proposed improvements was adequate.[41]

Lastly, even if such a discussion were required, a writ would not necessarily issue. In reviewing agency action under CEQA, "there is no presumption that error is prejudicial." (Pub. Resources Code, § 21005(b).) When assessing whether a failure to satisfy CEQA's informational requirements is prejudicial, the court must determine whether "the failure to include relevant information precludes informed decision making and informed public participation, thereby thwarting the statutory goals of the EIR process. [Citations.]" (*Dry Creek Citizens Coalition*, *supra*, 70 Cal.App.4th at p. 26.) Thus, a failure to comply with CEQA is not prejudicial error if there is no basis to conclude a properly conducted analysis "would have produced any substantially different information." (*Neighbors for Smart Rail*, *supra*, 57 Cal.4th at p. 463.)

Here, the record contains the design of the intersection and widening, an expert report on the effect of the widening, a visual simulation of the proposed entryway, and discussion of the visual simulation. (AR 2649-2662, 3282-3292, 15460-15461, 17030, 5202.) Consequently, "the public and the decision makers were informed" of the existence of project features with potential aesthetic impacts "and could readily understand that they might be visible from outside the project." (*Save Round Valley Alliance v. County of Inyo* (2007) 157 Cal.App.4th 1437, 1469.) The error (if any) was non-prejudicial.

3.10 Visual Impacts to Park Views

Petitioners contend substantial evidence does not support the County's conclusion that visual impacts to Fort Ord National Monument and Toro Park views would be insignificant. The

[41] In addition, the record reflects that the County expressly considered whether the new intersection would generate secondary impacts, implicitly concluding they would not. Real Parties presented the Planning Commission with a two-page comparison of existing conditions at the proposed intersection site and a visual simulation of conditions with the new intersection installed. (AR 5202, 15460-15461, 17030.)

County insists the EIR's interpretation of the term "common public viewing area" (as used in the MCC) is correct. The County further contends that it has broad discretion to interpret its own ordinances and that the court owes deference to this interpretation.

"An EIR must identify the 'significant environmental effects' of a proposed project. (§ 21100, subd. (b)(1); [ ] Guidelines, § 15126, subd. (a).) . . . However, a lead agency has the discretion to determine whether to classify an impact described in an EIR as 'significant,' depending on the nature of the area affected. ([] Guidelines, § 15064, subd. (b); *National Parks & Conservation Assn. v. County of Riverside* (1999) 71 Cal.App.4th 1341, 1357 . . . [varying thresholds of significance may apply depending on the nature of area affected].) In exercising its discretion, a lead agency must necessarily make a policy decision in distinguishing between substantial and insubstantial adverse environmental impacts based, in part, on the setting. ([] Guidelines, § 15064, subd. (b).)" (*Mira Mar Mobile Community v. City of Oceanside* (2004) 119 Cal.App.4th 477, 492-493.)

Moreover, "[w]here an EIR contains factual evidence supporting the conclusion that aesthetic impacts will be insignificant, that conclusion must be upheld. [Citation.]" (*North Coast Rivers Alliance v. Marin Municipal Water District Board of Directors* (2013) 216 Cal.App.4th 614, 627.) Courts "may not set aside an agency's approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable." (*Citizens of Goleta Valley, supra*, 52 Cal.3d at p. 564; *North Coast, supra*, 216 Cal.App.4th at p. 626 ["the issue is whether substantial evidence supports the agency's conclusions, not whether others might disagree with those conclusions"].)

Based on photo simulations, the DEIR observed that some lots would be visible from certain vantage points at higher elevations in both Fort Ord National Monument and Toro Park.

(AR 260, 281.) However, "given the physical challenges of accessing" the high trails required to reach the affected viewpoints and the "lack of designated vista points" along those trails, the DEIR concluded that the impacted areas were not "common public viewing areas" within the meaning of MCC section 21.06.195. (AR 281-282, 28830.) Consequently, the DEIR determined that impacts to views from these higher elevation viewpoints were less than significant. (*Ibid.*)

MCC section 21.06.195 defines a "common public viewing area" as "a public area such as a public street, road, designated vista point, or public park from which the general public ordinarily views the surrounding viewshed." (AR 28830.) The County reasons that the first three examples all "focus on public vantage points that are accessible by car." Petitioners respond that MCC section 21.06.195 specifically contemplates that a "public park" is a "common public viewing area."

Petitioners ignore that the term "public park" is modified by the subsequent phrase "from which the *general* public *ordinarily* views the surrounding viewshed." (MCC, § 21.06.195, italics added; AR 28830.) Substantial evidence supports the County's conclusion that higher-elevation trails inaccessible to cars exclude the "general public" from "ordinary" viewing of the viewshed. Additionally, the County's conclusion is a policy decision well within its discretion. (*Mira Mar*, *supra*, 119 Cal.App.4th at p. 493; Guidelines, § 15064, subd. (b).) That Petitioners are able to present a reasonable argument to the contrary is insufficient grounds to set aside the County's approvals. (*North Coast*, *supra*, 216 Cal.App.4th at p. 626; *Clover Valley Foundation v. City of Rocklin* (2011) 197 Cal.App.4th 200, 243.)

3.11 Secondary Impacts of Noise Mitigation Measures

Highway 68 argues that the DEIR's aesthetic impact analysis ignores that one potential chosen mitigation measure for noise impacts — sound attenuating berms — could cause

significant visual impacts. Highway 68 refers to MM 3.11-4d, which, in the DEIR, required Real Parties to take one of several actions to mitigate Project noise impacts. Prior to issuance of building permits for certain lots, Real Parties could submit plans that include "features that shield exterior activity areas from the line of sight of State Route 68 and San Benancio Road (Lots #1, #10, and #11 only)." (AR 629.) This shielding "may include . . . terrain features (berms), walls, or solid fencing between the source and the receptor." (*Ibid.*) Alternatively, "individual building permit applications may include a lot-specific acoustical analysis for review and approval by the Director of Planning. The findings of any such analysis shall . . . [if necessary] provide effective attenuation measures to achieve compliance with . . . noise standards." (AR 629-630.)

Highway 68 observes that the County has not analyzed the potential aesthetic impacts of the construction of sound berms. This is correct; however, such a discussion is required only if such mitigation "*would* cause one or more significant effects . . . ." (Guidelines, § 15126.4, subd. (a)(1)(D), italics added.) The County's silence on this point is an implicit conclusion that no analysis is required. Highway 68 bears the burden of overcoming the presumption that this conclusion was correct. (*Al Larson Boat Shop, Inc., supra*, 18 Cal.App.4th at p. 740.) Highway 68 has not met this burden.

Petitioner offers no justification for the claim that berms would cause significant visual impacts. Petitioner's objection is hypothetical; an EIR need not consider "entirely speculative" impacts. (*Mission Bay Alliance, supra*, 6 Cal.App.5th at p. 186.)[42] In any event, there is no reason to believe sound berms "*would* cause one or more significant effects . . . ." (Guidelines, § 15126.4, subd. (a)(1)(D), italics added.) MM 3.11-4d does not require berms. Real Parties may

[42] To underscore how speculative such an impact is, the court notes that, in the final version of the mitigation measure, the County eliminated "requirements for structures in visually sensitive areas, relying instead on the acoustical analysis required by the Mitigation Measure." (AR 17; 103.) Further, even if Real Parties ultimately built such berms, the Project's final Conditions of Approval would limit any resulting aesthetic impacts. (See, e.g., AR 51 [Condition 19].)

employ a berm or berms, but equally, could choose to use walls, solid fencing, or instead opt to require builders to provide the County with lot-specific acoustical analyses. (AR 529.) And, even if Real Parties opted to use sound berms, MM 3.11-4d requires that any such berm be earthen, a performance standard that would mitigate any resulting aesthetic impact. (*Ibid*; see *Friends of Oroville*, *supra*, 219 Cal.App.4th at p. 838; Guidelines, § 15126.4, subd. (a)(1)(B).)

3.12 Cumulative Visual Impacts

Highway 68 claims the EIR's analysis of the Project's cumulative aesthetic impacts is deficient. Highway 68 argues that the cumulative impact analysis fails to identify other projects that would contribute to the cumulative impact and is "amazing for its brevity."

An EIR is required to discuss a project's cumulative impacts "when the project's incremental effect is cumulatively considerable." (Guidelines, § 15130, subd. (a).) "'Cumulatively considerable' means that the incremental effects of an individual project are significant when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects." (Guidelines, § 15065, subd. (a)(3).) This determination requires a two-step analysis. The court first assesses whether the combined effects from the proposed project and other projects would result in a "significant cumulative impact." (Guidelines, § 15130, subd. (b).) If so, the court examines whether the proposed project's "incremental effect" is "cumulatively considerable." (*Id*, subd. (a).)

The first step requires an EIR to provide either a list approach, i.e. a list "of past, present, and probable future projects producing related or cumulative impacts" or "[a] summary of projections" adopted in a planning document that evaluates conditions contributing to the cumulative effect." (Guidelines, § 15130, subd. (b)(1)(A), (B).) Using this information, the lead

agency must decide whether the proposed project, in combination with the projects identified, would result in a cumulative impact. (*Id*, subd. (a)(1).)

In step two, the agency must consider whether the project's incremental contribution to the cumulative impact identified in step one is "cumulatively considerable." (Guidelines, § 15130, subd. (a).) The court must examine "not the relative amount of impact resulting from a proposed project when compared to existing environmental problems caused by past projects, but rather *whether the additional impact associated with the project* should be considered significant in light of the serious nature of the existing problems.' [Citation.]" (*City of Long Beach, supra*, 176 Cal.App.4th at pp. 905-906, italics in original.)

"Where a lead agency is examining a project with an incremental effect that is not 'cumulatively considerable,' a lead agency need not consider that effect significant, but shall briefly describe its basis for concluding that the incremental effect is not cumulatively considerable." (Guidelines, § 15130, subd. (a).) Moreover, an EIR may determine that mitigation measures render a project's incremental contribution to a cumulative effect insignificant. The agency must "identify facts and analysis" supporting this conclusion. (*Ibid.*)

Here, Highway 68's assertion that the County did not identify relevant projects is erroneous. The County provided a lengthy list of such projects. (AR 767-770.) Next, it concluded that these projects, considered together with the proposed project, would have a cumulative impact because development would "continue to urbanize the State Route 68 corridor" and "result in a permanent, but visually subtle, change to the area." (AR 771.)

The County then analyzed whether the incremental effect of the Project was cumulatively considerable. The County concluded any such incremental effect was adequately mitigated because 1) the development was consistent with the low-density designation of the project site;

2) a substantial portion (69%) of the project site would be designated as open space, "most of which is located in the most visually sensitive portions of the site"; and 3) General Plan policies and mitigation measures MM 3.1-a through MM 3.1-C, and MM 3.1-6 would "limit development in the vicinity of the project site and impose strict design guidelines to ensure limited impact of visual character." (AR 771.) This analysis satisfies the County's disclosure obligation under CEQA. (Guidelines, § 15130, subd. (a)(3).)

3.13 The County's Responses to Comments

Highway 68 contends that the County did not provide adequate responses to: 1) a Caltrans comment regarding the potential secondary impacts of the new proposed intersection and berms (AR 3774); and 2) a Department of Fish and Wildlife comment addressing the feasibility and timing of mitigation measures (AR 3787).

A lead agency must evaluate comments regarding the draft EIR and include its responses in the final EIR. (Pub. Resources Code § 21091, subd. (d); Guidelines, §§ 15088, 15132, subd. (d), 15204, subd. (a).) The agency is only required to respond to any "significant environmental issue" raised by commentators. (Pub. Resources Code § 21091, subd. (d)(2)(b); Guidelines, §§ 15088, subd. (c), 15132, subd. (d), 15204, subd.(a).) However, when a commentator raises a significant environmental issue, the agency must provide a "detailed" response containing "good faith, reasoned analysis." (Guidelines, § 15088, subd. (c).) "The requirement of a detailed written response to comments helps to ensure that the lead agency will fully consider the environmental consequences of a decision before it is made, that the decision is well informed and open to public scrutiny, and the public participation in the environmental review process is meaningful." (*City of Long Beach v. Los Angeles Unified Sch. Dist.* (2009) 176 Cal.4th 899, 904.)

Nevertheless, a lead agency need not "perform all research, study, and experimentation recommended or demanded by commenters" nor "provide all information requested by reviewers, as long as a good faith effort at full disclosure is made in the EIR." (Guidelines, § 15204, subd. (a).) A response is legally adequate if it provides a good faith analysis and contains a level of detail that matches the level of detail presented in the comment. (*Pfeiffer v City of Sunnyvale* (2011) 200 Cal.App.4th 1552, 1568.)

3.13.1 Comment RD-1-2

Caltrans' comment concerns, in relevant part, the new entryway and proposed berm mitigation. (AR 3774-3775.) Highway 68 claims that the County's responses to both portions of Caltrans' comment were inadequate.

3.13.1.1 The New Entryway

Caltrans commented that the RDEIR's alternatives analysis concerning the new entryway provided insufficient analysis to determine whether it would have independent, secondary impacts. (AR 3775.) Caltrans requested "supplemental information such as photo-simulations, sight-line studies or other data to confirm claims of minimal visibility and noticeability." (*Ibid.*) The County's response opines that Caltrans requested a "level of detail for each alternative, including visual simulations and other studies, [] more appropriate for a NEPA document . . . as may be required during the detailed design phase of any improvements along the state highway." (AR 3783.) Highway 68 quotes this statement and claims the County's response is inadequate because it "sweep[s] the lack of visual impact assessment under the rug."

However, Highway 68 misrepresents the County's response by excerpting only a single sentence from a lengthy, multiple paragraph response. (AR 3783-3784.) Highway 68 has a duty to accurately represent the record; its failure to do so is fatal. (See *South County Citizens, supra,*

221 Cal.App.4th at p. 330; *Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1266 ["A reviewing court will not independently review the record to make up for [Petitioner's] failure to carry his burden"].) Highway 68's omission is especially egregious here when its substantive argument is that the County's response is dismissive and lacks detail.

Regardless, Highway 68's argument is meritless. The response does not "sweep the lack of visual impact assessment under the rug." Instead the County presents several points justifying the adequacy of the DEIR's visual impact analysis as to the new entryway including that 1) the new entryway would avoid the significant impacts of the originally proposed entryway; 2) SR 68 is subject to County zoning and design requirements that would restrict the new entryway; and 3) the facility is "scenic with minor issues," a designation that contemplates that certain "visual intrusions," including roads, are already present along the corridor, and specifically, are in the immediate area of the proposed new intersection. This constitutes a good faith effort at full disclosure. (Guidelines, § 15024, subd. (a).)

3.13.1.2 Berms

Caltrans commented that the DEIR and RDEIR did not provide sufficient detail to determine whether proposed berms would be effective mitigation and/or blend in with the natural environment. (AR 3774.) Caltrans also commented that the County should add a mitigation measure "which requires that prior to project approval, validation of the berms effectiveness [*sic*] and natural appearance be conducted, certified, and if the effectiveness cannot be verified, other mitigation measures or project alternatives should be developed." (AR 3774-3775.)

The County's answer referred Caltrans to its responses to Letter D, a different Caltrans letter. There, the County adopted Caltrans' suggestion by augmenting mitigation measure MM 3.1-1a to provide, "[w]here berms are currently proposed for screening and view protection . . .

The applicant shall provide sufficient detail in the improvement plans with the final map to allow verification by the County of berm appearance and effectiveness as a screen." (AR 3399.)

Highway 68 asserts that the mitigation measure is "an impermissible deferral" of analysis of potential secondary impacts of the berms and the berms' feasibility. Highway 68 also claims that the response is inadequate because it is nonresponsive to this argument.

As stated *ante*, "[d]eferral of mitigation specifics is permissible where the relevant agency commits itself to mitigation and articulates specific performance criteria or standards that must be met for the project to proceed. [Citations.]" (*Friends of Oroville*, *supra*, 219 Cal.App.4th at p. 838; Guidelines, § 15126.4, subd. (a)(1)(B).) Here, the Conditions of Approval contain performance standards to ensure the berms' efficacy. (AR 50 [Condition 17], 51 [Condition 20].) Moreover, the County pointed to DEIR photo simulations showing "an example of a contoured berm with native grasses similar to the existing condition, providing a subtle rise in topography to screen homes in the background." (AR 3399.) The County's response was adequate.

3.13.2 Comment RD-2-2

The Department of Fish and Wildlife commented that the DEIR "fails to provide a Project Description that includes Project redesign elements required by various mitigation measures; and further, fails to identify whether mitigation measure are feasible, since redesign to address an impact may not be consistent with redesign to avoid or minimize another impact." (AR 3787.)

The County responded by 1) referencing its response to Landwatch's Letter RD-14 (see AR 3940); 2) discussing the RDEIR's alternatives analysis and the advantages of Alternative 5; and 3) stating that proposed mitigation measures have performance standards and hence, that they are not impermissibly deferred. (AR 3809.)

Highway 68 argues that the County's response is inadequate because it does not address purported deficiencies in the EIR such as deferral of mitigation and building envelopes. But Highway 68 only presents the EIR's reference to its response to Landwatch's Letter RD-14 and the relevant contents of that response. It fails to acknowledge the remainder of the County's response, which, at least in part, addresses Highway 68's concerns. (AR 3809.) Highway 68 has again failed to represent the record accurately; this omission is fatal. (See *South County Citizens*, *supra*, 221 Cal.App.4th at p. 330; *Defend the Bay*, *supra*, 119 Cal.App.4th at p. 1266.) In any event, Highway 68's objection is a repetition of its arguments regarding deferral of mitigation and building envelopes, arguments the court addressed and rejected *ante*.

4. Density

Highway 68 argues that the County incorrectly calculated the permissible number of units on the project site. Highway 68 contends that applicable General Plan policies permitted a maximum of 193 units and that the DEIR's conclusion of 348 units was erroneous. Consequently, Highway 68 asserts that the EIR suffered from 1) an "inaccurate project description"; and 2) a failure to present a reasonable range of alternatives, since, under the "correct calculation," only a single project alternative was feasible.

Highway 68's arguments stem from two October 2014 staff reports to the Planning Commission that concluded only 193 units were permissible on the Project site. (AR 4158-4159, 4198-4199.) The County responds that this conclusion was a "minor mistake . . . not repeated in any of the future staff reports" and that the calculation did not factor into the Board's decision to approve the Project.

Toro Area Plan Policy 36.0.4(T) provides:

> "1. One factor in density determination shall be the land use designation. The maximum density allowed under the Area Plan land use designation for a parcel

shall be divided into the total number of acres found within the parcel. For example, a 100-acre parcel with a maximum density of 1 unit per 2.5 acres would have a density of 40 sites.

2. The slope of the property shall be determined and the slope density formula defined in Policy 3.2.4 (T) applied. For example, a 100-acre parcel might consist of 50 percent of the land having a slope of over 30 percent and the other 50 percent below 19 percent. The maximum density allowable on that parcel as calculated according to slope would be 50 sites.

3. All of the policies of the Area Plan and countywide General Plan must be applied to the parcel. Any policies resulting in a decrease in density must be tabulated. The decrease in density would then be subtracted from the maximum density allowable under the slope formula.

4. The maximum density allowable according to the Area Plan land use designation (Step 1 above) and the maximum density allowable according to Plan policies (Steps 2 and 3 above) shall then be compared. Whichever of the two densities is less shall be established as the maximum density allowable under this Area Plan." (AR 23800-23801.)

To summarize, the Toro Area Plan contemplates calculation of both the land use designation density (step 1) and the slope density (step 2), provides that the slope density shall be reduced by the amount provided by any General Plan or Toro Area Plan policy that would result in a decrease in density (step 3), and concludes that the lesser of the land use designation density and the slope density controls (step 4).

Toro Area Plan Policy 3.2.4(T) provides the slope-density formula:

"1. Those portions of parcels with cross-slope of between zero and 19.9 percent shall be assigned 1 building site per each 1 acre.

2. Those portions of parcels with a cross-slope of between 20 and 29.9 percent shall be assigned 1 building site per each 2 acres.

3. Those portions of parcels with a cross-slope of 30 percent or greater shall be assigned zero building sites.

"The density for a particular parcel shall be computed by determining the cross-slope of the various portions of the parcel, applying the assigned densities listed above according to the percent of cross-slope, and by adding the densities derived from this process. The maximum density derived by the procedure shall be used

as one of the factors in final determination of the actual density that shall be allowed on a parcel . . . ." (AR 23797.)

The slope density calculation is straightforward. The site contains 294.4 acres with a cross-slope between 0% and 19.9%. (AR 546.) Assigning one building site for each such acre yields 294 building sites. The site contains 186.7 acres with a cross-slope between 20% and 29.9%. (*Ibid.*) Assigning one building site for each two of such acres yields 93 building sites. The total maximum density permitted under the slope density formula is 387 units. Highway 68 cites no policy in either the General Plan or the Toro Area Plan that would reduce this number.[43]

As to the land use designation density, the site was designated "Low Density Residential 5-1 acres per unit," or a permissible range of one acre per unit to five acres per unit, or between 174 and 870 units. (AR 22.) In 1993, consistent with this designation, the Board of Supervisors determined that the site was entitled to a maximum allowable buildout of 447 units. (AR 201-202, 23894-23896.)

Under Toro Area Plan Policy 36.0.4(T), the maximum allowable density is the lesser of the two calculations, 387 units. The Project is well below that threshold at 185 units, or 1 unit per 4.7 acres. The Board therefore correctly concluded that the proposed number of lots was consistent with the General Plan Land Use Designation. (AR 22.)[44]

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[43] Highway 68's argument that this calculation should have accounted for "the reduced acreage that would be available after the unbuildable steep slope acreage was deducted" is meritless; the slope-density formula already accounts for such reduced acreage by assigning zero building sites for each acre with a cross slope of 30% or greater It is unclear whether Highway 68 intends this argument to also apply to the land use designation density calculation. If so, it also lacks merit. Toro Area Plan Policy 3.2.4(T) requires that the County make this calculation with reference to the "*total* number of acres found within the parcel." (AR 23797.) Regardless, Highway 68 raised this argument for the first time in its reply brief so the court cannot fairly consider it. (*American Drug Stores, Inc. v. Stroh* (1992) 10 Cal.App.4th 1446, 1453["Points raised for the first time in a reply brief will ordinarily not be considered, because such consideration would deprive the respondent of an opportunity to counter the argument"].)

[44] Moreover, the County has stated it intends to zone the Project site LDR/2.5 to conform to the 2010 Monterey County General Plan. (AR 202.) Under this overlay, the land use designation would yield a maximum permissible density of 348 units. (AR 549.) The Project is well below that threshold as well.

Consequently, the court concludes both that the project description was accurate and that the EIR presented a reasonable range of alternatives.

5. Parkland Mitigation

Landwatch contends the County's post-FEIR decision to modify mitigation for the Project's impact on park demand is not supported by substantial evidence. The County claims its thinking on this matter "evolved over time" and that it is not bound by the EIR. Landwatch replies that the County did not adequately explain the reason for its decision to change mitigation.

5.1 Factual Background

MCC section 19.12.010B provides, "As a condition of approval of a tentative map, the subdivider shall dedicate land, pay a fee in lieu thereof, or both, at the option of the County, for park or recreational purposes at the time and according to the standards and formula contained in this Chapter." The County decides whether to require land dedication, payment of an in-lieu fee, or a combination of both based on several factors including General Plan policies, characteristics of the underlying land, and the Project's proximity to existing park property (MCC, § 19.12.010H) and on the recommendation of the Monterey County Parks Department Director (MCC, § 19.12.010.J.1).

Here, the Monterey County Parks Department Director opined, "paying a fee in-lieu of providing on-site parkland is not an option for a subdivision of over 50 single family and multi-family dwelling units. In other words, PARKS places importance on requiring the dedication of parkland within the subdivision to specifically meet the needs of the residents of the subdivision as opposed to the services for the general public at neighboring Toro County Park." (AR 6038, emphasis and capitalization in original.) The DEIR accepted the Director's recommendation.

(AR 576.) Staff therefore proposed MM 3.10-3, which required Real Parties to "dedicate a minimum of 2 acres of onsite parkland to serve project residents." (AR 577.) Implementation of this measure "would ensure that the proposed project's increased demand for local parkland be accommodated through dedication of on-site parkland." (*Ibid.*)

The County now asserts that its "thinking on the best way to mitigate the Project's park impacts evolved over time." Specifically, staff first recommended the switch from dedication of land to in-lieu fees in its October 8, 2014 report to the Planning Commission, stating:

> "The proposed subdivision project would result in several hundred acres to be zoned open space/permanent grazing, and additionally [*sic*] scenic and conservation easements. According to the Recreational Requirements in Section 19.12, this does not count towards dedication of park and recreational facilities; therefore the project would be subject to in-lieu fees. The nature of this subdivision is to be subordinate to the topography, existing grazing activities, and natural environment that currently exist on the land. Staff recommends that passive open space and scenic/conservation easements are the more appropriate choice than dedication of, and development of, recreational facilities." (AR 4167.)

Consistent with staff's recommendation, the Planning Commission adopted the following finding:

> "MM 3.10-3 recommended the applicant dedicate a minimum of 2 acres of on-site parkland to serve project residents; parks shall be 'neighborhood scale' ranging in size from 0.50-1.0 acre in size. In this particular case, the payment of fees in-lieu of land dedication is deemed to be greater [*sic*] regional recreational benefit to the County as whole, because the payment of fees could be used to upgrade the recreational facilities within Monterey County. The replacement of the recommended mitigation measure MM 3.10-3 with a condition requiring the payment of in-lieu fees is equal or more effective mitigation in this case." (AR 4355.)

The Board accepted the mitigation recommendation, finding, "[p]otentially significant impacts on park facilities have been mitigated to less than significant level through payment of in lieu park fees, and Alternative 5 which would not use Toro Park for access." (AR 10, 99.)

5.2 The Project's increased demand for parks is not a "significant impact" under CEQA

Landwatch is correct that the County's reasoning is conclusory. The Planning Commission advised that fees are appropriate "in this particular case" because the County could use them to upgrade other County recreational facilities. But this is true of *any* project. The County never explains what about *this* project justifies fees as opposed to land dedication. Instead, the County provides broad, unsupported statements. Fees are "equal or more effective mitigation in this case," "the more appropriate choice," and "deemed to be greater . . . benefit." (AR 4167, 4335.) The County omits the basis for these conclusions. Nevertheless, Landwatch's argument fails because the public's demand for parks is not an impact subject to CEQA.

CEQA requires agencies to prepare an EIR when a project "may have a significant effect on the environment." (Pub. Resources Code, § 21100, subd. (a).) A "significant effect on the environment shall be limited to substantial, or potentially substantial, adverse changes in *physical conditions* which exist within the area." (Pub. Resources Code, § 21151, subd. (b), italics added; Guidelines, § 15358, subd. (b) ["[e]ffects analyzed under CEQA must be related to a physical change"].) "An economic or social change by itself shall not be considered a significant effect on the environment." (Guidelines, §§ 15382; 15064, subd. (e); see *Preserve Poway v City of Poway* (2016) 245 Cal.App.4th 560, 576 [the social and psychological effects of a project's change to community character are not environmental impacts subject to CEQA].) Thus, "[e]vidence of economic and social impacts that do not contribute to or are not caused by physical changes in the environment is not substantial evidence that the project may have a significant effect on the environment." (Guidelines, § 15064 subd. (f)(6).)

An increased demand on public facilities, such as parks, does not necessarily cause a physical change to the environment. Accordingly, unless it will trigger a physical change to the

environment, increased demand on parks is not an environmental impact that an agency must either evaluate in an EIR or mitigate. (*City of Hayward v. Board of Trustees of the California State University* (2015) 242 Cal.App.4th 833, 843; *Goleta Union School Dist. v. Regents of University of California* (1995) 37 Cal.App.4th 1025, 1031-1034.)

City of Hayward is instructive. There, an EIR for a university expansion project determined the resulting increase in campus population would not cause a significant environmental impact to fire and emergency medical services provided by the City. (*City of Hayward, supra*, 242 Cal.App.4th at p. 840.) The EIR acknowledged that the additional population would trigger the need for an additional 11 firefighters and a new fire station,[45] but still concluded this impact was insignificant and that no mitigation was required. (*Ibid.*) The City objected that mitigation was necessary because the increased population could cause endanger public safety by causing "dangerously long response times." (*Id.* at p. 843.) The court rejected this argument, reasoning, "the need for additional fire protection services is not an *environmental* impact that CEQA requires a project proponent to mitigate." (*Ibid*, italics in original.)

City of Hayward relied upon *Goleta Union.* There, an EIR for a university expansion found that the project would cause overcrowding in local elementary schools. (*Goleta Union, supra*, 37 Cal.App.4th at pp. 1029-1030.) The local elementary school district objected that the overcrowding was a significant environmental impact that the university was required to mitigate by funding a new school. (*Id.* at p. 1029.) The court rejected this argument, holding, "[b]ecause the projected increases in student enrollment here do not in themselves constitute a significant

[45] Nevertheless, the EIR conceded, "'[c]onstruction associated with expanding or adding additional fire station facilities within the [city] would be subject to environmental review under CEQA. However, expansion or construction of a fire station would not result in significant environmental impacts due to the limited area that is typically required to build a fire station (between 0.5 and 1 acre) and its urban location. Therefore, the impact related to the provision of fire services to the campus would be less than significant.'" (*Ibid.*)

physical impact on the environment, no findings were required . . . to show that the Plan alleviates increased enrollment." (*Id.* at p. 1033.)

Similarly, here, the increased demand for park services caused by the increased population the Project would bring is not a "substantial, or potentially substantial, adverse change[] in *physical conditions*" in the area. (Pub. Resources Code, § 21151, subd. (b), italics added.) Such an impact might arise if the increased demand necessitated the construction of new park facilities. (Guidelines, § 15064, subd. (e).) But that is not the case here. The DEIR's standards of significance — based on Appendix G of the Guidelines — reflect this distinction. The DEIR states that a significant environmental impact would occur if project impacts "result in substantial adverse physical impacts associated with the provision of new or physically altered government facilities, the construction of which could cause significant environmental impacts, in order to maintain acceptable service ratios, response times, or other objectives for . . . Parks." (AR 571.)

Landwatch argues that *City of Hayward* supports a contrary conclusion. Landwatch points out that, although the court found the increased demand for fire protection services not to be a significant environment impact, it also concluded the EIR did not meaningfully analyze the extent of the impact the project would have on *neighboring parklands*. (*City of Hayward, supra,* 242 Cal.App.4th at p. 859.) Landwatch is correct, but it neglects a key distinction. The EIR at issue in *City of Hayward* addressed whether the proposed development would "increase the use of existing neighborhood and regional parks . . . such that *substantial physical deterioration* of the facility would occur or be accelerated." (*Id.* at p. 858, fn. 13.) The effect of park demand on physical facilities represents a change to the physical environment. Thus, "the physical change may be regarded as a significant effect in the same manner as any other physical change resulting

from the project." (Guidelines, § 15064, subd. (e).) Here, there is no evidence that increased demand for parks would result in any physical change in the environment. (Guidelines, § 15358, subd. (b) ["[e]ffects analyzed under CEQA must be related to a physical change"].) Accordingly, increased demand for parks was not a "significant effect on the environment" that would trigger CEQA review and mitigation.[46]

6. Greenhouse Gases

Petitioners challenge the adequacy of the County's response to a Landwatch comment suggesting 27 potential mitigation measures to lessen the Project's greenhouse gas impacts. Although the County responded to the letter generally, it did not directly address each proposed mitigation measure. Real Parties contend that the County's response was adequate, characterizing the list of suggestions as generic and insufficiently related to the Project to warrant a point-by-point response. Real Parties also provide a detailed chart delineating how the FEIR purportedly addressed each mitigation measure.

"Although an EIR must identify proposed mitigation measures for adverse effects of the project, 'CEQA does not require analysis of every *imaginable* alternative or mitigation measure; its concern is with *feasible* means of reducing environmental effects.' [Citation]." (*Concerned Citizens of South Central L.A. v. Los Angeles Unified School Dist.* (1994) 24 Cal.App.4th 826, 841, italics in original.) "[A] mitigation measure is 'feasible' if it is 'capable of being accomplished in a successful manner within a reasonable period of time, taking into account

[46] Landwatch's argument might have merit if applied to the County's approval of the Vesting Tentative Map. The lack of a reasoned explanation for the County's decision renders it difficult to trace the "analytic route . . . from evidence to action." (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515.) However, Landwatch has not made this argument. In any event, Landwatch failed to raise this issue below, and consequently, has failed to exhaust its administrative remedies on this issue. (*Evans v. City of San Jose* (2005) 128 Cal.App.4th 1123, 1136 [exhaustion "is a jurisdictional prerequisite"]; *Coalition for Student Action v. City of Fullerton* (1984) 153 Cal.App.3d 1194, 1198 [the exhaustion doctrine is intended to allow an agency to "receive and respond to articulated factual issues and legal theories *before* its actions are subjected to judicial review"].)

economic, environmental, social, and technological factors.' (§ 21061.1; and see Guidelines, § 15364.)" (*Los Angeles Unified School Dist. v. City of Los Angeles* (1997) 58 Cal.App.4th 1019, 1029.) Thus, a lead agency "must respond to specific suggestions for mitigating a significant environmental impact unless the suggested mitigation is facially infeasible. [Citations.]" (*Ibid.*) And, although any such response "need not be exhaustive, it should evince good faith and a reasoned analysis. [Citations.]" (*Ibid*; Guidelines, § 15088, subd. (b).)

Nevertheless, a lead agency is not required to "adopt every nickel and dime mitigation scheme brought to its attention or proposed in the project EIR"; a mitigation measure need only be adopted if it would "'substantially lessen'" a significant environmental impact. (*San Franciscans for Reasonable Growth v. City and County of San Francisco* (1989) 209 Cal.App.3d 1502, 1519, quoting Pub. Resources Code, § 21002; Guidelines, § 15021, subd. (a)(2).) Nor must an EIR perform detailed analysis of mitigation measures it concludes are infeasible. (*Cherry Valley, supra,* 190 Cal.App.4th at p. 352.) Further, commenters are required to "explain the basis for their comments." (Guidelines, § 15204, subd. (c).) An EIR is not required to explain why proposed mitigation measures that commenters describe in general terms not specific to the project are infeasible. (*Santa Clarita Org. for Planning the Envt v. City of Santa Clarita* (2011) 197 Cal.App.4th 1042, 1055.)

Here, Landwatch proposed 27 mitigation measures including water-efficiency measures, solid-waste recycling measures, energy efficiency measures, and measures to reduce greenhouse gases. (AR 3918-3920.) Landwatch did not explain how any of these measures specifically applied to the Project.

Some of the mitigation measures Landwatch proposed, such as a prohibition on lawns and a ban on cleaning outdoor surfaces with water (AR 3919) are facially infeasible and hence,

no response was required. (*Los Angeles Unified School Dist., supra*, 58 Cal.App.4th 1019, 1029.)

As to the remainder, the County responded:

> "Many of measures [*sic*] listed in the comment are not included in MM 3.13-1 because they are duplicative of other mitigation measures or standard requirements, such as Title 24 standards, including the new California Building Code. Table 3.13-12 demonstrates the project's compliance with AB 32 strategies, including Title 24 standards for water use efficiency. Other measures suggested, such as requiring recycled water, would not be feasible to the subdivision. MM 3.13-1 addresses demolition and construction waste, tree planting, bicycle parking, etc., as suggested. Although currently not required, a large percentage of new homes would be expected to incorporate solar panels into new construction based on increased affordability and advances in solar technology.
> "See also responses to letter RD-6, as well as the Amendments section of the Final EIR which now includes requirements within MM 3.13-1 for electric vehicle charging pre-wiring within residential garages." (AR 3944.)

The County's response to letter RD-6 describes several mitigation measures adopted in MM 3.13-1, and adopts additional measures addressing electrical vehicle charging and construction impacts. (AR 3831-3832; see also AR 2628-2632.)

This response is adequate. The 27 mitigation measures are generic; Landwatch has failed to "explain the basis for their comments." (Guidelines, § 15204, subd. (c).) An EIR is not required to explore generic proposed mitigation measures. (*Santa Clarita Org. for Planning the Envt, supra*, 197 Cal.App.4th at p. 1055.) Regardless, the response actually addresses all proposed mitigation measures, albeit in general terms.[47]

7. General Plan Consistency

Highway 68 asserts that the County's approval of use permits for the Project is void because of purported deficiencies in the County's 1982 General Plan.

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[47] To demonstrate the comment's responsiveness to Landwatch's suggestions, the County provides a table tying elements of its response to each proposed mitigation measure. Petitioners claim the court must disregard the table because it is not in the EIR. But the table is akin to demonstrative evidence, in that it points to the portions of the record that address each proposed mitigation measure. (See *People v. Diaz* (2014) 227 Cal.App.4th 362, 384, fn. 19.) Petitioners also claim that certain of their proposals are marginally more effective than the mitigation the County adopted. Even assuming *arguendo* this is true, the result is the same; an agency need only adopt a mitigation if it would "*substantially* lessen" a significant environmental impact. (Pub. Resources Code, § 21002, italics added; *San Franciscans for Reasonable Growth v. City and County of San Francisco* (1989) 209 Cal.App.3d 1502, 1519.)

"Each county is required to adopt a 'comprehensive, long-term general plan for ... [its] physical development ....' (§ 65300.) The plan must include, inter alia, a statement of policies and nine specified elements: land use, circulation, housing, conservation, open-space, seismic safety, noise, scenic highway, and safety. (§ 65302.) [¶] Under state law, the propriety of virtually any local decision affecting land use and development depends upon consistency with the applicable general plan and its elements . . . . [A]bsence of a valid general plan, or valid relevant elements or components thereof, precludes enactment of zoning ordinances and the like. [Citations.]" (*Resource Defense Fund v. County of Santa Cruz* (1982) 133 Cal.App.3d 800, 806.)

Government Code section 65009, subdivision (c)(1)(A), establishes a 90-day statute of limitations to challenge an agency's decision to adopt or amend a general plan. The Legislature intended the statute to "provide local governments with certainty, after a short 90-day period for facial challenges, in the validity of their zoning enactments and decisions." (*Travis v. County of Santa Cruz* (2004) 33 Cal.4th 757, 774.) A petitioner may not circumvent the statute by using a challenge to a land use permit as a vehicle for an untimely collateral attack on a general plan. (*A Local & Regional Monitor v. City of Los Angeles* (1993) 16 Cal.App.4th 630, 648.) To prove a challenge is not facial, a petitioner must show a "nexus of relevancy" between the claimed legal inadequacies in the General Plan and the Project. (*Garat v. City of Riverside* (1991) 2 Cal.App.4th 259, 289-290 ["only those portions of the general plan which are impacted or influenced by the adoption" of a project are subject to challenge], disapproved on other grounds in *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 743, fn. 11; *Flavell v. City of Albany* (1993) 19 Cal.App.4th 1846, 1853.)

Here, the County's 1982 General Plan, which the County adopted more than 90 days before the filing of this action, applies to the Project. (AR 199.) Accordingly, any facial challenge to the 1982 General Plan would be time-barred. (Gov. Code, § 65009, subd. (c)(1)(A).)

Highway 68 raises three general plan challenges. Highway 68 claims that 1) the 1982 General Plan is out-of-date; 2) the land use and circulation elements are inconsistent; and 3) the General Plan is inadequate because, at the time the Project was approved, the County was "missing the maps defining the Critical View-shed."

7.1 The claim the 1982 General Plan is outdated

Highway 68 notes that County documents from 1999 and 2000 concede that the General Plan is outdated. (AR 16909-16913, 16873.) Highway 68 asserts that the outdated nature of the plan has led to level of service deficiencies. But Highway 68 fails to establish a nexus between level of service deficiencies and the Plan's purported obsolescence. (See *Flavell*, *supra*, 19 Cal.App.4th at p. 1853; *Garat*, *supra*, 2 Cal.App.4th at p. 290.) Accordingly, this claim is time-barred. (Gov. Code, § 65009, subd. (c)(1)(A).)

7.2 The claim that the land use and circulation elements are inconsistent

Highway 68 contends that the General Plan is deficient because its land use and circulation elements are inconsistent. Specifically, Highway 68 asserts that the County has not adequately applied Plan Policies 26.1.4, 37.2.1, and 39.1.4 to ensure roadway capacity met demand. The result, Highway 68 argues, has been a failure to provide roadway capacity improvements in proportion to the intensification of County land uses over time on SR 68.

Claims of inconsistency between the land use and circulation elements are direct attacks on the general plan because "correlation" between these elements is a mandatory requirement for a general plan. (Gov. Code, § 65302, subd. (b); *A Local & Regional Monitor v. City of Los*

Angeles (1993) 12 Cal.App.4th 1773, 1816.) Accordingly, this claim is time-barred. (Gov. Code, § 65009, subd. (c)(1)(A).)

Moreover, Highway 68 has not shown a "nexus of relevancy" between the purported plan deficiencies and the Project. (*Garat, supra*, 2 Cal.App.4th at p. 290.) The County's statement concerning Policies 26.1.4, 37.2.1, and 39.1.4 occurred in 1999; there is no evidence of any such concession in the present. (AR 16888.) In fact, the record reveals that the County adopted the RDIF program in 2008. That program exacts proportional fees on new development that go directly to improve the regional transportation program. (AR 16779, 16676-16677, 16481.)

Additionally, Highway 68 asserts that project traffic "will further deteriorate" levels of service without corresponding increases in capacity. Highway 68 neglects to mention that the Board of Supervisors expressly conditioned project approval upon Real Parties constructing roadway capacity improvements (e.g., the new intersection and widening). (AR 19, 104.) The Board impliedly found these improvements constituted an appropriate increase in capacity. (See AR 10, 19, 31.) That determination is entitled to substantial deference. (*Clover Valley, supra*, 197 Cal.App.4th at p. 238.) Highway 68 has not shown grounds to overcome the "strong presumption of regularity" to which the County's finding is entitled. (*Ibid.*)

7.3 The claim the Plan is inadequate due to "missing maps"

Lastly, Highway 68 contends that "missing maps" depicting the Toro Area Plan's critical viewshed rendered the General Plan incomplete, impairing the County's ability to make legally adequate land-use decisions.

The "missing" map to which Highway 68 refers is a large scale drawing of Figure 9 of the Toro Area Plan. (AR 4185.) The County maintains a smaller version of Figure 9. (AR 20455.) Highway 68 explains neither why this smaller version is inadequate nor provides authority for its

claim that a large-scale version of Figure 9 was required to render the General Plan "complete." Consequently, this argument is meritless. (See *Atchley v. City of Fresno* (1984) 151 Cal.App.3d 635, 647 ["[w]here a point is merely asserted by . . . counsel without any argument of or authority for the proposition, it is deemed to be without foundation and requires no discussion by the . . . court"].) For the same reason, Highway 68 has not met its burden to show a "nexus of relevancy" between the "missing maps" and the Project. (*Garat, supra*, 2 Cal.App.4th at p. 290.) Consequently, this claim is time-barred. (Gov. Code, § 65009, subd. (c)(1)(A).)

8. Cumulative Biological Impacts

Highway 68 argues that the EIR's cumulative biological impact analysis is inadequate on two grounds. First, Highway 68's cites comments from other entities on the DEIR that challenged the cumulative biological impact analysis. The fact that other entities commented on the EIR's cumulative biological impact analysis does not constitute argument; it is Highway 68's burden to demonstrate error. (*San Diego Citizenry Group v. County of San Diego* (2013) 219 Cal.App.4th 1, 13 ["the EIR is presumed to be legally adequate, and the party challenging the legal adequacy bears the burden of establishing otherwise"]; see *In re S.C.* (2006) 138 Cal.App.4th 396, 408 ["[t]o demonstrate error, [a litigant] must present meaningful legal analysis supported by citations to authority and citations to facts in the record that support the claim of error"].)

In any event, the County fully responded to these comments. (AR 3604, 3948-3949.)

Second, Highway 68 argues — in a single sentence — that the EIR's cumulative biological impact analysis does not follow the two-step cumulative impact analysis, again citing comments from another entity. Again, this is not argument. Highway 68's conclusory assertion is insufficient to meet its burden to demonstrate error. (*San Diego Citizenry Group, supra*, 219

Cal.App.4th at p. 13; see *Golden Drugs Co., Inc. v. Maxwell-Jolly* (2009) 179 Cal.App.4th 1455, 1468 [the court is "not required to entertain contentions lacking adequate legal analysis"].) Further, it is substantively inaccurate.

The DEIR lists approved projects used in its cumulative analysis. (AR 767-770.) The FEIR further clarifies that based on that list, "projects in the general vicinity of Ferrini Ranch would include existing development, the Corral de Tierra shopping center, the Harper Canyon subdivision (and existing Broccoli 14 lots of record), and to a lesser extent, the Wang subdivision several miles to the west." (AR 3948.) This satisfies the requirements for step one of the cumulative analysis. (Guidelines, § 15130, subd. (b).) The FEIR concludes that proposed on-site mitigation measures will fully mitigate biological resource impacts, and that consequently, the Project will not have a significant cumulative impact. (AR 2598, 3948-3949.) This discussion satisfies the requirements for step two of the cumulative impact analysis. (See *Communities for a Better Environment, supra*, 103 Cal.App.4th at p. 120; Guidelines, § 15130 subd. (a).)

Disposition

The petition for writ of mandate is denied. The court directs Real Parties' attorney to prepare appropriate judgments consistent with this ruling, present them to opposing counsel for approval as to form, and return them to this court for signature.

Dated: 8/3/17

HON. THOMAS W. WILLS
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. On August 4, 2017 I served the within document:

INTENDED STATEMENT OF DECISION

by transmitting via email the document(s) listed above to the e-mail address(es) set forth below on this date during regular business hours.

Alexander Henson zancan@aol.com	Richard Rosenthal rrosenthal62@sbcglobal.net	John Farrow jfarrow@mrwolfeassociates.com
James Moose jmoose@rmmenvirolaw.com	Anthony Lombardo tony@alombardolaw.com	Michael Whilden whildenm@monterey.ca.us
Matthew Gifford matthew.gifford@rocketmail.com	Matthew Francois mfrancois@rutan.com	Michael Zischke mzischke@coxcastle.com

Date: AUG 0 4 2017

Clerk of the Superior Court,

P. Conder, Deputy Clerk