

ELECTRONICALLY FILED BY
Superior Court of California,
County of Monterey
On 5/30/2019 4:30 PM
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15 SUPERIOR COURT OF THE STATE OF CALIFORNIA

16 COUNTY OF MONTEREY

17 FRIENDS, ARTISTS AND NEIGHBORS OF
ELKHORN SLOUGH, and LANDWATCH
18 MONTEREY COUNTY,
Petitioners,
19 v.

20 CALIFORNIA COASTAL COMMISSION,
21 COUNTY OF MONTEREY, BOARD OF
SUPERVISORS OF THE COUNTY OF
22 MONTEREY, and DOES 1-50,
23 Respondents.

24 HERITAGE/WESTERN COMMUNITIES
25 LTD, HERITAGE DEVELOPMENT
26 CORPORATION, and DOES 51-100,
27 Real Parties in Interest.
28

Case No. 18CV001000

PETITIONERS' OPENING BRIEF

[CEQA CASE]

Date: September 17, 2019
Time: 9:00 AM
Dept: 13
Judge: Hon. Lydia M. Villarreal
Action Filed: December 7, 2017

TABLE OF CONTENTS

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

TABLE OF AUTHORITIES 3

I. INTRODUCTION 7

II. STATEMENT OF FACTS..... 11

III. LEGAL ARGUMENT 18

 A. Standard of Review 18

 B. The Commission Violated CEQA Because it Approved the Project Without
 Environmental Review and Prior to Making Findings..... 21

 1) The Commission’s Staff Report Must Comply with CEQA Because it is the
 Functional Equivalent of an EIR 21

 2) Approving the Project Prior to Preparing and Considering Environmental Review
 Violated CEQA 22

 C. The Commission Failed to State A Valid Basis for Project Approval and the Revised
 Findings Constitute Improper Post Hoc Rationalizations 26

 1) The Revised Findings Far Exceed the Scope of the Reasoning Provided by the
 Commissioners Who Voted for Project Approval..... 26

 2) The Commission Failed to Cite to Specific Applicable Standards, Policies, and
 Failed to Provide the Analytic Route in Support of Project Approval..... 31

 3) The LCP Policies Do Not Allow for Project Approval Since the Groundwater Basin
 is in Severe Overdraft..... 35

 4) The Post-Approval Findings Deleted the Discussion Regarding ESHA Without a
 Word of Explanation 38

IV. CONCLUSION..... 42

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

TABLE OF AUTHORITIES

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Bam, Inc. v. Board of Police Commissioners (1992) 7 Cal.App.4th 1343 41, 42

Bolsa Chica Land Trust v. Superior Court (1999) 71 Cal.App.4th 493 40

California Oak v. City of Santa Clarita (2005) 133 Cal.App.4th 1219 20

Citizens for Non-Toxic Pest Control v. Department of Food and Agriculture (1986) 187
Cal.App.3d 1575 21

Citizens of Goleta Valley v. Board of Supervisors (1990) 52 Cal.3d 553 19, 20

City of Coronado v. California Coastal Zone Conservation Commission (1977) 69
Cal.App.3d 570 24

County of Santa Cruz v. State Board of Forestry (1998) 64 Cal.App.4th 826, 830 22

Douda v. California Coastal Commission (2008) 159 Cal.App.4th 1181 7

Environmental Defense Fund, Inc. v. Coastside County Water District (1972) 27
Cal.App.3d 695 23

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604 22

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La Costa Beach Homeowners’ Association v. California Coastal Commission (2002)
101 Cal.App.4th 804 27, 28

Landgate, Inc. v. California Coastal Commission (1998) 17 Cal.4th 1006 7

Laurel Heights Improvement Association v. Regents of University of California (1988)
47 Cal.3d 376 18, 19, 20

Mountain Lion Foundation v. Fish & Game Commission (1997) 16 Cal.4th 105 21, 22

No Oil, Inc. v. City of Los Angeles (1974) 13 Cal.3d 68 23

POET, LLC v. California Air Resources Board (2013) 218 Cal.App.4th 681 21, 22

San Mateo County Coastal Landowners’ Association v. County of San Mateo (1995) 38
Cal.App.4th 523 21

1	<i>Santiago County Water District v. County of Orange</i> (1981) 118 Cal.App.3d 818.....	20
2	<i>Save Our Peninsula Committee v. Monterey County Board of Supervisors</i> (2001) 87	
3	Cal.App.4th 99.....	20, 21
4	<i>Save Round Valley Alliance v. County of Inyo</i> (2007) 157 Cal.App.4th 1437.....	33
5	<i>Schoen v. Department of Forestry & Fire Protection</i> (1997) 58 Cal.App.4th 556.....	21
6	<i>Sierra Club v. State Board of Forestry</i> (1994) 7 Cal.4th 1215.....	19
7		
8	<i>Strother v. California Coastal Commission</i> (2009) 173 Cal.App.4th 873.....	24
9	<i>Topanga Association for a Scenic Community v. County of Los Angeles</i> (1974) 11	
10	Cal.3d 506.....	11, 18, 27
11	<i>Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova</i> (2007)	
12	40 Cal.4th 412.....	20, 26
13	Statutes	
14	Code of Civil Procedure § 1094.5.....	18, 27
15	Government Code § 53082.5.....	32
16	Government Code § 56033.5.....	32
17	Government Code § 56375.....	32
18	Government Code § 56425.....	32
19	Government Code § 56430.....	32
20	Public Resource Code § 21168.5.....	19
21	Public Resources Code § 21080.....	23
22	Public Resources Code § 21080.5.....	passim
23	Public Resources Code § 21081.....	23
24	Public Resources Code § 21100.....	22
25	Public Resources Code § 21167.....	22
26	Public Resources Code § 30001.5.....	7
27		
28		

1	Public Resources Code § 30103	7
2	Public Resources Code § 30103.5	7
3	Public Resources Code § 30240	40
4	Public Resources Code § 30315.1	17
5	Public Resources Code § 30500	7
6	Public Resources Code § 30512	7
7	Public Resources Code § 30513	7
8	Public Resources Code § 30801	16
9	Water Code § 13481.7	32
10		
11	Other Authorities	
12		
13	Monterey County Code § 18.40.070.....	13
14	Monterey County Code § 18.40.090.....	14
15	North Monterey County Implementation Plan § 20.144.040	39, 40
16	North Monterey County Implementation Plan § 20.144.070	9
17	North Monterey County Implementation Plan § 20.144.140	30
18	North Monterey County Land Use Plan, Policy 2.3.2.1	39
19	North Monterey County Land Use Plan, Policy 2.3.2.3	9, 36, 39
20	North Monterey County Land Use Plan, Policy 2.5.1	9, 29, 36
21	North Monterey County Land Use Plan, Policy 2.5.2.3	9, 36
22	North Monterey County Land Use Plan, Policy 2.5.3	9, 36
23	North Monterey County Land Use Plan, Policy 4.3.5.7	29
24		
25	Treatises	
26		
27	Kostka & Zischke, Practice Under the California Environmental Quality Act (Cont.Ed.Bar 2d ed. 2013) § 21.2, p. 1084	22
28		

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

Regulations

California Code of Regulations, title 14, § 1305724

California Code of Regulations, title 14, § 1305924

California Code of Regulations, title 14, § 13096passim

California Code of Regulations, title 14, § 133027

California Code of Regulations, title 14, § 133047

California Code of Regulations, title 14, § 1332110

California Code of Regulations, title 14, § 1504223

California Code of Regulations, title 14, § 1509123

California Code of Regulations, title 14, § 1525022

California Code of Regulations, title 14, § 1525121, 25

California Code of Regulations, title 14, § 1527023

1 **I. INTRODUCTION¹**

2 This case challenges the California Coastal Commission’s approval of a Coastal
3 Development Permit (CDP) for the Rancho Los Robles Subdivision (Project) in North
4 Monterey County. The Project applicants are Real Parties in Interest Heritage/Western
5 Communities LTD and Heritage Development Corporation (Real Parties). The procedural
6 events that led to the approval of the Project were aberrant and bereft of environmental analysis.
7 Because the Staff of the California Coastal Commission (Commission) recommended denial of
8 the Project due, *inter alia*, to the severe groundwater overdraft in the region, the Staff did not
9 provide the Commission with environmental review that complies with the California
10 Environmental Quality Act (CEQA—Public Resources Code section 21000 et seq.) because
11 project denials are exempt from environmental review. However, the Commission ignored the
12 Staff recommendation and approved the Project. Since environmental review was necessary
13 prior to approval, the Commission should have continued the matter and asked Staff to provide
14 the requisite environmental analysis before voting to approve the Project. Instead, the
15 Commission approved the Project without any conditions and without any Commission
16 environmental review. Moreover, the approval was contrary to the California Coastal Act and
17 the Local Coastal Program (LCP)² which regulate development in the Coastal Zone.³

18 _____
19 ¹ At the March 12, 2019 Case Management Conference, the Court agreed that the size of the
20 briefs for this matter shall follow the word count limit of 14,000 words for appellate briefing
21 under Rule 8.204(c)(1) of the California Rules of Court. This brief is fewer than 14,000 words.

22 ² The Coastal Act mandates that “[e]ach local government lying, in whole or in part, within the
23 coastal zone shall prepare a local coastal program for that portion of the coastal zone within its
24 jurisdiction.” Pub. Resources Code § 30500(a) (emphasis added). The Coastal Act “requires
25 local governments [within the coastal zone] to develop [LCPs], comprised of a Land Use Plan
26 and a set of implementing ordinances designed to promote the Coastal Act’s objectives of
27 protecting the coastline and its resources... .” *Landgate, Inc. v. California Coastal Com.* (1998)
17 Cal.4th 1006, 1011 (*citing* Pub. Resources Code §§ 30001.5, 30512, 30513). The Coastal
28 Commission is responsible for approving, or “certifying,” LCPs, and their component parts, to
ensure consistency with the Coastal Act. See *Douda v. California Coastal Com.* (2008) 159
Cal.App.4th 1181, 1194; Pub. Resources Code § 30330; Cal. Code Regs., tit. 14, §§ 13302,
13304.

³ The Coastal Zone, a legally designated area along the California coast from Oregon to Mexico
that is supervised by the state. Pub. Resources Code §§ 30103, 30103.5(a).

1 North Monterey County is in a state of severe groundwater overdraft and has been for
2 decades. North County’s groundwater basins, including the Highlands North sub-basin from
3 which the Project would draw water, are supplying water to existing land uses in an amount
4 exceeding the aquifer’s safe-yield state, which is defined as “the yield that a renewable resource
5 can produce continuously over the long-term at a given intensity of management without
6 impairment of the resource...”⁴

7 In 1995, the County of Monterey (County) conducted a groundwater study by Fugro
8 West, which calculated groundwater overdraft for the area’s five groundwater sub-basins to be
9 11,700 acre-feet per year. Seven years later, in 2002, the Monterey County Water Resources
10 Agency prepared the Monterey County Comprehensive Water Resources Management Plan,
11 which calculated groundwater overdraft to be as much as 16,340 acre-feet per year. The 2002
12 study indicates an over 45% increase in the overdraft since 1995 for the Highlands North sub-
13 basin alone. (AR 4725.)

14 The Highlands North sub-basin is in the Pajaro Valley groundwater basin. (AR 128.) In
15 its updated 2014 Basin Management Plan, the Pajaro Valley Water Management Agency
16 concluded, “The Pajaro Valley groundwater basin is in severe overdraft, causing groundwater
17 elevations to drop below sea level ... and leading to sea water intrusion.” (AR 4726.)
18 Additionally, the Basin Plan warned that “[s]eawater intrusion is an immediate and direct threat
19 to the Pajaro Valley economy.” (AR 4726.) The Basin Plan acknowledges that it will take
20 decades to meet its overdraft reduction objectives through conservation strategies. (AR 4728.)
21 In January 2016, the California Department of Water Resources officially designated the Pajaro
22 Valley Groundwater Basin as “critically overdrafted,” which is the most severe level of
23 overdraft assigned by the Department to a groundwater basin. (AR 4729.) This unfortunate
24 reality has led to the disapproval of residential subdivisions in North Monterey County, since
25 approval would be contrary to Monterey County LCP policies that prohibit approval of
26
27

28 ⁴ North County IP Section 20.144.020.VVVV (AR 9130.)

1 residential development when groundwater resources are overdrafted.⁵

2 In early 2017, the Commission evaluated and denied CDPs for Rancho Roberto and
3 Mayr, two residential subdivision projects in North County that were similar but smaller than
4 the Project, due to LCP inconsistencies such as “lack of an available water supply and
5 impermissible development within [an Environmentally Sensitive Habitat Area] (ESHA).” (AR
6 4713.) The Commission Staff Report for the Mayr project explained that the Monterey County
7 LCP prohibits approval of a low-priority development such as residential subdivisions when the
8 groundwater resource is in overdraft:

9 North County’s groundwater basins are not meeting the performance standards
10 and requirements specified in LUP Policies 2.5.2.3 and 2.5.3.A.2, and IP Section
11 20.144.070.E.11, which require North County’s groundwater basins to be within
12 their safe yield extraction level to allow for certain new development, such as
13 that proposed. As such, the proposed project is inconsistent with LUP Policy
14 2.5.2.3, which does not allow development when water supplies are committed
15 beyond their safe yield, and only allows development once additional water
16 supplies are secured to bring the basin into its LCP-required safe yield state.

14 (AR 9720.) The Commission adopted the Staff Report and denied the Mayr project.

15 In July 2017, Commission Staff characterized the Project as having “LCP-impermissible
16 coastal resource impacts of a much more significant magnitude than the Rancho Roberto and
17 Mayr applications because the proposed project is almost twice the size in terms of number of
18 proposed residences as those other two projects *combined*.” (AR 4713.) The Project “proposes
19

20
21 ⁵ 2.5.1. Key Policy - The water quality of the North County groundwater aquifers shall be
22 protected, and new development shall be controlled to a level that can be served by identifiable,
23 available, long term-water supplies. The estuaries and wetlands of North County shall be
24 protected from excessive sedimentation resulting from land use and development practices in
25 the watershed areas. (AR 9291.)

26 Policy 2.5.2.3. New development shall be phased so that the existing water supplies are not
27 committed beyond their safe long term yields. Development levels that generate water demand
28 exceeding safe yield of local aquifers shall only be allowed once additional water supplies are
secured. (AR 9291.)

Policy 2.5.3.A.2. The County’s long-term policy shall be to limit ground water use to the safe-
yield level.... (AR 9292.)

1 a very large suburban-style residential subdivision in a predominantly rural, agricultural area
2 with severe water supply deficiencies, and on land currently comprised of ESHA and bona fide
3 agricultural production.” (AR 3635.) In addition, the Project is located in the Carneros Creek
4 watershed, which provides more than 75% of the freshwater supply that flows into the Elkhorn
5 Slough. (AR 7369.) Commission Staff recommended denial of the Project based on many of
6 the same LCP policies that were also applicable to Rancho Roberto and Mayr. (AR 4711.)

7 At the July 14, 2017 substantial issue hearing on the Project, the Commission continued
8 the hearing on the de novo review of the application based on the Real Parties’ request made
9 that very day.⁶ The Commission approved the Project on November 8, 2017. (AR 7329.)

10 Those who testified in support of the Project believed the Project’s advertisement of community
11 facilities, such as a library. (AR 7401.) However, no condition requires the Project to fund or
12 construct any community facilities. (AR 7424: 1-25, 7425: 1-3.) Moreover, the Real Parties
13 have not even identified an entity that would receive the land dedication for these unformulated
14 benefits. (AR 53-54.)

15 One Commissioner tangentially referenced the Real Parties dubious water claims to
16 support his decision to approve the Project. (AR 7431: 14-17, 21-25; AR 7432: 1-10; AR 7439:
17 16-25.) However, weighing the merits of the Real Parties’ claims, which as will be
18 demonstrated below is unreliable at best, misses the heart of the inquiry. The Project will not be
19 served by an identifiable, available, and long-term water supply, which the LCP requires for
20 Project approval. Uncontested evidence points to the contrary, that there is no available, long-
21 term, and adequate water supply because the groundwater basin itself is in severe overdraft,
22 which means that water is pumped from this aquifer far in excess of the safe yield.

23 This action challenges the Commission’s approval of the Project on the grounds that: (1)
24 the Commission failed to comply with CEQA because the Commission did not consider

25
26 ⁶ There are two steps in a Commission appeal process. The Commission decides to hear an
27 appeal unless it finds that the appeal raises “no substantial issue.” If substantial issue is found,
28 the Commission conducts “a de novo consideration of the application.” Cal. Code Regs., tit. 14,
§ 13321

1 environmental review or make findings in support of its final CEQA determination prior to
2 Project approval; (2) the post-approval findings, prepared almost ten months after the
3 Commission’s approval of the Project, constitute improper post hoc rationalizations; and, (3) the
4 Commission’s approval of the Project in violation of LCP policies protecting groundwater and
5 ESHA constituted a failure to proceed in a manner required by law.

6 All the findings that were available to the Commission at the time the Commission
7 approved the Project were findings for Project denial. (AR 4711.) While the Coastal Act
8 regulations allow for preparation of post-approval findings, the Commission needed to provide
9 the analytic route from evidence to action. See Cal. Code Regs., tit. 14, § 13096 (b); *Topanga*
10 *Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515. The
11 Commission failed to do so, and the approval’s procedural infirmities constitute an abuse of
12 discretion. Furthermore, the Commission Staff Report did not meet the standard of the
13 functional equivalent of environmental review as required by CEQA. Commission Staff
14 recommended denial and claimed an exemption. The post-approval findings, which were
15 approved by the Commission ten months after the Project approval, reversed the CEQA
16 determination from one of statutory exemption to a finding of no adverse effects after the
17 Project had already been approved without the benefit of the Commission’s environmental
18 review.

19 20 **II. STATEMENT OF FACTS**

21 On August 28, 2007, more than a decade ago, the County completed an Environmental
22 Impact Report (EIR) for the Project. (AR 868.) At that time, the Project constituted 97 single-
23 family lots, among other features. (AR 870.)

24 On October 29, 2008, the County Planning Commission (Planning Commission) denied
25 the Project based on LCP inconsistencies with respect to lack of water and traffic congestion.
26 (AR 3638.) The Planning Commission found that the “EIR identifies that the project would
27 result in significant and unavoidable cumulative regional groundwater impacts that would not
28 be mitigated to a less than significant level even with incorporation of mitigation measures from

1 the EIR into the conditions of project approval.” (AR 1680.) The Planning Commission relied
2 on evidence in the record that:

3 The north Monterey County hydrogeologic area is currently in overdraft and reductions
4 in groundwater pumping are necessary to restore balance and halt the advance of
5 seawater intrusion. The project site water balance would remain in deficit (as with
6 virtually all water demanding uses). The proposed project would lower both total
7 withdrawals and the differential between withdrawals and recharge, based on the 20-
8 year historic water use on the project site. With the proposed project, withdrawals
9 would drop from the averaged historic rate of 86.09 acre-feet per year to 41.61 acre-feet
per year, and the net groundwater balance would improve from the averaged historic rate
of minus 64.76 acre-feet per year to minus 31.46 acre-feet per year. The North
Monterey County Hydrogeologic Area is in significant overdraft, and would remain so
with the proposed project.

10 (AR 1680.)

11 The Planning Commission’s decision was appealed to the Board of Supervisors (Board).
12 On December 9, 2008, the Board voted three-to-two to certify the EIR, adopt a statement of
13 overriding considerations, and approve the Project. (AR 3826, 3838-3839.) The Board
14 approved a Project consisting of 76 lots. (AR 3768.)

15 Petitioner Friends, Artists and Neighbors of Elkhorn Slough and two Coastal
16 Commissioners filed appeals with the Commission challenging Project approval. (AR 3840-
17 3849.) In the intervening years, Commission Staff reached out to the Real Parties to see if they
18 still wanted to pursue the Project. (AR 3639.) In 2015, the Real Parties indicated that they
19 were still interested in pursuing the development and “revised their project from the one
20 approved by the County.” (AR 3639.)

21 At the July 14, 2017 substantial issue hearing, Commission Staff recommended that the
22 Commission find that the appeals raised a substantial issue and further recommended that the
23 Commission deny the Project on de novo review because the subdivision would necessitate an
24 additional permanent demand of water “from an already overdrafted groundwater source.” (AR
25 3632.) The Staff Report explained that the Project is “both inconsistent with LCP policies that
26 only authorize a level of development that can be served by the groundwater basin’s safe yield
27 amount, and with policies that dictate residential subdivision to be the lowest priority land use
28 to receive water when supplies are scarce.” (AR 3632.) At the hearing, the Commission

1 unanimously determined that the Project presented a substantial issue and assumed de novo
2 jurisdiction over the CDP application for the Project. (AR 7099.) Based on the Real Parties’
3 request made that very day, the Commission continued the hearing on the de novo review of the
4 application. (AR 7099.)

5 The Real Parties revised the Project in August 2017 to include 53 lots. (AR 4767).
6 While the Real Parties may tout the reduction in units from the original proposal as a benefit,
7 such reduction cannot overcome the fact that residential development is not permitted in an area
8 of severe groundwater overdraft and that the Commission had denied other smaller residential
9 subdivisions in North County for the same reason. The LCP is not subject to compromise
10 merely because an applicant proposes more development at the outset.

11 On October 27, 2017, after the Commission Staff Report for the de novo hearing was
12 released, the Real Parties again changed the Project Description from 53 to 57 lots. (Compare
13 AR 4767 to AR 4928.) While the Real Parties claim that the Project “voluntarily increased [the
14 inclusionary housing units] to 20%” (AR 52), Monterey County’s current Inclusionary Housing
15 Ordinance requires the provision of at least 20% affordable units: “To satisfy its inclusionary
16 requirement on-site, a residential development must construct inclusionary units in an amount
17 equal to or greater than twenty (20) percent of units approved for the residential
18 development...” (Petitioner’s First Request for Judicial Notice, Exh. A, Monterey County Code
19 Section 18.40.070(A)). In addition, the Project proposes to satisfy the minimum 20%
20 affordable units by providing “four (4) low income inclusionary housing rental units (in
21 duplexes on site) and the balance of either 6 inclusionary units shall be satisfied through the
22 payment of in-lieu inclusionary housing fees pursuant to the County’s affordable housing
23 guidelines.” (AR 52-53.) No explanation is provided as to why the Project is allowed to pay an
24 in lieu fee as opposed to providing the requisite inclusionary units on site.⁷ It is also noteworthy

25
26 ⁷ Monterey County Code establishes that a development may qualify to pay in-lieu fees “if the
27 developer demonstrates, in connection with the first approval for the residential development,
28 that specific characteristics of the development site, such as lack of access to services, zoning
which requires large lot development, or potentially high site maintenance costs, make the site

1 that the 2010 General Plan’s Land Use Element raised the minimum affordable housing
2 requirement for all new housing development across the County of Monterey to 25% and
3 committed the County to amending its Affordable Housing Ordinance: “The County shall
4 assure consistent application of an Affordable Housing Ordinance that requires 25% of new
5 housing units be affordable to very low, low, moderate, and workforce income households.”
6 (Petitioner’s First Request for Judicial Notice, Exh. C.) Thus, the Project does not actually meet
7 the current standards for affordable housing in the County. Finally, while the Project touted
8 community benefits, it contained no definite plans for any construction and funding of
9 community and park facilities and instead only proposed dedication of land for future
10 community facilities to a not-yet formed community services district (CSD). (AR 4929-4930.)⁸

11 The Local Agency Formation Commission (LAFCO) of Monterey County wrote to the
12 Commission stating that LAFCO Staff would not recommend the formation of a CSD:

13 LAFCO staff recommends that the project description not identify the formation
14 of a new community services district (CSD) as a future provider of parks and
15 recreation facilities or services ... It would be highly unusual for a new CSD to
be formed in order to provide services to one development of this size.

16 (AR 4931.) “Under these circumstances, it is unlikely that LAFCO staff would be able to
17 recommend approval to our Commission of formation of a new CSD to provide park/recreation-
18 related services to one subdivision, if formation of a new CSD were to be proposed to LAFCO
19 in the future.” (AR 4931.)

20
21
22 unsuitable for households at the required income levels.” (Petitioner’s First Request for Judicial
Notice, Exh. B, Monterey County Code Section 18.40.090(4)).

23 ⁸ While the Real Parties’ Project Description states that under Condition No. 40 of the County’s
24 conditions of approval, the specific park and recreation improvements would be bonded and
constructed (under separate coastal development permits) by the Real Parties as identified
25 through a Park and Recreation Facilities Plan, there is currently no such plan. (AR 4929, fn. 2.)
26 Community members and a Commissioner vocally supported the Project and urged for its
approval based on community benefits. However, the Real Parties never highlighted the fine
27 print for these supporters. Moreover, while Commission Staff acknowledged the importance of
community benefits, there is no provision of the Coastal Act or the LCP that allows policies to
28 be overridden because of proffered benefits when the Project itself fails to conform with LCP
policies.

1 The Commission Staff Report prepared for the November 8, 2017 de novo hearing
2 concluded that the proposed Project

3 constitutes a residential subdivision (a low-LCP-priority use) in an area with
4 known water supply deficiencies, including that the groundwater basin from
5 which the development will receive water is overdrafted and extracted in
6 exceedance of its safe yield state. When such a combination results, the LCP
7 affirmatively requires the proposed development be denied.

8 (AR 4735.) The Commission Staff Report also concluded that the Project proposes to
9 “subdivide 16.5 acres of oak woodland ESHA into residential lots, which is not allowed within
10 this habitat.” (AR 4737.) Five days before the de novo hearing, the Real Parties submitted
11 nearly 500 pages of material to the Commission as further argument for Project approval. (AR
12 4876.) The Real Parties also submitted a revised site plan, revised project description, and
13 revised payment of an affordable housing in-lieu fee. (AR 4876-4877.)

14 The Commission Staff addendum noted that “the Applicant mostly repeats comments
15 that it has previously provided to the Commission and that were a part of the distributed staff
16 report.” (AR 4877.) The Commission Staff’s addendum concluded that none of the additional
17 material altered Commission Staff’s recommendation to deny the proposed Project. (AR 4876.)
18 The Staff addendum stated:

19 Notably, and as made clear in the staff report, while many of the project’s LCP
20 conformance issues could be addressed by project modifications, including with
21 respect to avoidance of residential subdivision and development within oak
22 woodland ESHA ... such modifications are moot because the project is and
23 would remain inconsistent with the LCP’s water supply, groundwater resources,
24 and priority land use policies and standards.

25 (AR 4877.)

26 At the November 8, 2017 de novo hearing, the Commission voted 7-5 to approve the
27 Project. The Real Parties and their self-described consultant and advocate lobbied seven
28 Commissioners the week prior to the hearing, six of whom voted to approve the Project. (AR
7341, 7344-7348, 9758.)⁹ The Project’s alleged “community benefits” were discussed at many

⁹ All but one of the Commissioners who voted in favor of the Project had ex parte communications with the Real Parties’ advocate.

1 of the ex parte meetings. (AR 7344: 9; AR 7345: 17.)

2 Apart from disclosing ex parte communications, only two of the seven Commissioners
3 who voted to approve the Project spoke at the de novo hearing. One Commissioner relied
4 heavily on Senate Bill 244, which directs LAFCOs to consider disadvantaged communities in
5 their approvals, and directs cities and counties to identify sewer and water needs in
6 disadvantaged communities as part of their general plan updates. (AR 7437: 1-6.) As discussed
7 *infra*, Senate Bill 244 is inapplicable to LCPs. The other Commissioner who spoke on the
8 record touched vaguely on standards and issues concerning groundwater without specifically
9 referring to applicable policies or what substantial evidence he was relying on in support of
10 Project approval. (AR 7431: 14-17, 21-25; AR 7432: 1-10; AR 7439: 16-25.) Despite there
11 being no environmental analysis in the Staff Report and the Staff Report only providing
12 findings for denial, the Commission majority approved the Project. (AR 7099, 7444.)

13 The Project ultimately approved by the Commission consisted of:

- 14 • Subdivision of two parcels of 16.96 and 16.62 acres into 57 lots;
- 15 • 50 single-family residential lots, two (2) of which are proposed as workforce
 housing;
- 16 • Two (2) duplex lots with four (4) low income inclusionary rental units;
- 17 • Three (3) mini parks totaling 3.48 acres to be dedicated to the County, though
 there is no plan for construction, operation, or maintenance of any such park
- 18 • One (1) 2.5-acre community recreation parcel;
- 19 • One (1) 17-acre remainder parcel to be donated to a not-yet-formed CSD or
 receiving entity;
- 20 • One (1) 0.6-acre community facilities parcel with an existing single-family
 dwelling to be donated to a not-yet-formed receiving entity; and
- 21 • Payment of in-lieu fees for remainder of six (6) affordable units.

22 (AR 52-54). As stated *supra*, the Project does not require that any receiving entity or CSD be
23 formed or that any community library, playing field, or other community facilities actually be
24 funded, constructed and operated.

25 Any challenge to the Project was required to be filed within 60 days of the November 8,
26 2017 approval under the California Coastal Act (Pub. Resources Code § 30801) and within 30
27 days under CEQA (Pub. Resources Code § 21080.5(g)). As the Commission approved the
28 Project on November 8, 2017 (AR 01), Petitioners Friends, Artists and Neighbors of Elkhorn

1 Slough and LandWatch Monterey County timely filed a Petition for Writ of Mandamus on
2 December 7, 2017.

3 On September 13, 2018, over ten months after the de novo hearing and over nine months
4 after the Petition for Writ of Mandamus was filed, the Commission held a hearing to consider
5 adopting post-approval findings for the November 8, 2017 Project approval. The Coastal Act
6 allows after-the-fact adoption of findings in specific circumstances: “If the commission action is
7 substantially different that that recommended in the staff report, the prevailing commissioners
8 shall state their action in sufficient detail to allow staff to prepare a revised staff report with
9 proposed revised findings that reflect the action of the commission.” Cal. Code Regs., tit. 14, §
10 13096. To adopt post-approval findings, the Coastal Act requires “a majority vote of the
11 members from the prevailing side present at the meeting of the commission, with at least three
12 of the prevailing members present and voting.” Pub. Resources Code § 30315.1. For reasons
13 discussed *infra*, the post-approval findings for the Project here violated CEQA. The post-
14 approval findings materially altered the findings that were in front of the Commission at the
15 time of the de novo hearing, including deleting all references to the project site as ESHA and
16 recasting the CEQA determination to erroneously conclude that the Project “avoids significant
17 adverse effects on the environment within the meaning of CEQA.” (See AR 7485-7486, 7509.)
18 At the September 13, 2018 post-approval meeting, only three of the seven Commissioners who
19 originally voted to approve the Project were present and voted to adopt the revised findings
20 required for the Project. (AR 9787.) Therefore, only three of thirteen Commissioners ever
21 considered the necessary findings for environmental review and Project approval, and these
22 findings were after-the-fact justifications for the Commission’s erroneous approval of the
23 Project.

24 The County was initially a Respondent in this lawsuit. The Petitioners challenged the
25 County’s certification of the EIR for the Project and the Projects inconsistencies with the
26 Monterey County General Plan and zoning ordinances. On November 7, 2018, the County and
27 Real Parties filed a Demurrer on the basis that “the challenged decision of the County has been
28 superseded by the decisions of the Respondent Coastal Commission.” (Notice of Demurrer, p.

1 4.) On December 28, 2018, this Court issued a Ruling sustaining the Demurrer without leave to
2 amend and noted that “the Commission’s review renders the EIR ‘the same as if no previous
3 hearing had ever been held The decision therein ... takes the place of and completely
4 nullifies the former determination of the matter.’ [Citation.]” (Ruling, 5:18-21.) Judgment for
5 Dismissal as to the County was entered on April 2, 2019. Therefore, any challenge to the EIR is
6 now beyond the judicial review in these proceedings.

7
8 **III. LEGAL ARGUMENT**

9 **A. Standard of Review**

10 California Code of Civil Procedure establishes that an inquiry into the validity of any
11 final administrative decision extends:

12 to the question whether the respondent has proceeded without, or in excess of
13 jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse
14 of discretion. Abuse of discretion is established if the respondent has not proceeded in
15 the manner required by law, the order or decision is not supported by the findings, or the
16 findings are not supported by the evidence.

17 Code Civ. Proc. § 1094.5(b). The Commission, in approving the Project contrary to
18 Commission Staff’s strong recommendation for Project denial, failed to disclose the required
19 “analytic route ... traveled from evidence to action.” *Laurel Heights Improvement Assn. v.*
20 *Regents of University of California* (1988) 47 Cal.3d 376, 404. It is a well settled principle in
21 mandamus actions that “implicit in section 1094.5 [of the Code of Civil Procedure] is a
22 requirement that the agency which renders the challenged decision must set forth findings to
23 bridge the analytic gap between the raw evidence and ultimate decision or order. . . . the
24 Legislature sought to direct the reviewing court’s attention to the analytic route the
25 administrative agency traveled from evidence to action.” *Topanga Assn. for a Scenic*
26 *Community v. County of Los Angeles, supra*, 11 Cal.3d at 515.

27 The Coastal Act regulations provide that “[i]f the commission action is substantially
28 different than that recommended in the staff report, the prevailing commissioners shall state the
basis for their action in sufficient detail to allow staff to prepare a revised staff report with

1 proposed revised findings that reflect the action of the commission.” Cal. Code Regs., tit 14., §
2 13096(b)). At the de novo hearing, the prevailing Commissioners failed to state the basis for
3 Project approval in sufficient detail, and the post-approval findings constitute improper post hoc
4 justification for a decision that is unsupported by the record. Nothing in the Commission’s
5 regulations pertaining to revised findings trumps the legal requirement that the Commission’s
6 actions bridge the analytical gap between the evidence presented and the Commission’s ultimate
7 conclusions. Furthermore, the Commission’s decision to approve the Project is not permitted
8 under the plain language of the Monterey County LCP and is wholly inconsistent with recent
9 Commission actions denying similar subdivision applications based on the same LCP Policies at
10 issue.

11 The Commission also violated the procedural mandates of CEQA because it approved
12 the Project prior to environmental review and prior to making written findings. The California
13 Supreme Court has addressed the abuse of discretion standard of review pertaining to CEQA in
14 very clear terms:

15 an agency may abuse its discretion under CEQA either by failing to proceed in
16 the manner CEQA provides or by reaching factual conclusions unsupported by
17 substantial evidence. (§ 21168.5). **Judicial review of these two types of error
18 differs significantly:** While we determine de novo whether the agency has
19 employed the correct procedures, “scrupulously enforc[ing] all legislatively
20 mandated CEQA requirements” (*Citizens of Goleta Valley v. Board of
21 Supervisors* (1990) 52 Cal.3d 553, 564 ...), we accord greater deference to the
22 agency’s substantive factual conclusions. In reviewing for substantial evidence,
23 the reviewing court “may not set aside an agency’s approval of an EIR on the
24 ground that an opposite conclusion would have been equally or more
25 reasonable,” for, on factual questions, our task “is not to weigh conflicting
26 evidence and determine who has the better argument.” (*Laurel Heights
27 Improvement Assn. v. Regents of University of California (Laurel Heights I)*
28 (1988) 47 Cal.3d 376, 393).

24 In evaluating an EIR for CEQA compliance, then, a reviewing court must adjust
25 its scrutiny to the nature of the alleged defect, depending on whether the claim is
26 predominantly one of improper procedure or a dispute over the facts. **For
27 example, where an agency failed to require an applicant to provide certain
28 information mandated by CEQA and to include that information in its
environmental analysis, we held the agency “failed to proceed in the manner
prescribed by CEQA.”** (*Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th
1215, 1236...; see also *Santiago County Water Dist. v. County of Orange*

1 [(1981)] 118 Cal.App.3d [818] at p. 829 [EIR legally inadequate because of lack
2 of water supply and facilities analysis].) In contrast, in a factual dispute over
3 “whether adverse effects have been mitigated or could be better mitigated”
4 (*Laurel Heights I, supra*, 47 Cal.3d at 393), the agency’s conclusion would be
5 reviewed only for substantial evidence. Thus, in *Laurel Heights I*, we rejected as
6 a matter of law the agency’s contention that the EIR did not need to evaluate the
7 impacts of the project’s foreseeable future uses because there had not yet been a
8 formal decision on those uses (*id.* at 393-399), but upheld as supported by
substantial evidence the agency’s finding that the project impacts described in
the EIR were adequately mitigated (*id.* at 407-408). (See also *California Oak [v.*
City of Santa Clarita (2005)] 133 Cal.App.4th [1219] at p. 1244 [absent
uncertain purchase of additional water, as to which the EIR’s discussion is legally
inadequate, “substantial evidence of sufficient water supplies does not exist”].).

9 *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40
10 Cal.4th 412, 435, emphasis added. This CEQA challenge is primarily the type in which this
11 Court is called upon to “determine *de novo* whether the agency has employed the correct
12 procedures, ‘scrupulously enforc[ing] all legislatively mandated CEQA requirements.’”
13 *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564.

14 A challenge to the legal adequacy of environmental review, or in this case the lack
15 thereof, concerns the procedures used. In the case of *Save Our Peninsula Committee v.*
16 *Monterey County Board of Supervisors* (2001) 87 Cal.App.4th 99, the court held,

17 the overriding purpose of CEQA is to ensure that agencies regulating activities
18 that may affect the quality of the environment give primary consideration to
19 preventing environmental damage. [Citation.] CEQA is the Legislature’s
20 declaration of policy that all necessary action be taken “to protect, rehabilitate,
21 and enhance the environmental quality of the state.” [Citation.] “The EIR is the
22 heart of CEQA” and the integrity of the process is dependent on the adequacy of
23 the EIR. [Citations.] “The ultimate decision of whether to approve a project, be
24 that decision right or wrong, is a nullity if based upon an EIR that does not
25 provide the decisionmakers, and the public, with the information about the
26 project that is required by CEQA.” [Citation.] The error is prejudicial “if the
27 failure to include relevant information precludes informed decisionmaking and
28 informed public participation, thereby thwarting the statutory goals of the EIR
process.” [Citations.] When the informational requirements of CEQA are not
complied with, an agency has failed to proceed in “a manner required by law”
and has therefore abused its discretion. [Citations.] “In sum, although the
agency’s factual determinations are subject to deferential review, questions of
interpretation or application of the requirements of CEQA are matters of law.
[Citations.] While we may not substitute our judgment for that of the decision

1 makers, we must ensure strict compliance with the procedures and mandates of
2 the statute.”

3 *Id.* at 117-118.

4 Because only claimed exemptions for Project denial were before the Commission at the
5 time of Project approval, the Commission failed to proceed in a manner required by law when it
6 approved the Project without environmental review and without making the required findings
7 under CEQA prior to Project approval.

8
9 **B. The Commission Violated CEQA Because it Approved the Project Without
10 Environmental Review and Prior to Making Findings**

11 **1) The Commission’s Staff Report Must Comply with CEQA Because it is the
12 Functional Equivalent of an EIR**

13 The Commission has a certified regulatory program pursuant to CEQA. Cal. Code
14 Regs., tit. 14, § 15251(c). Certified regulatory programs are exempt from preparing an EIR if
15 they prepare a “plan or other written documentation containing environmental information.”
16 Pub. Resources Code § 21080.5(a). “Section 21080.5(d)(3)(A) requires a plan submitted in lieu
17 of an environmental impact report to include alternatives to the proposed activity and mitigation
18 measures to minimize any significant adverse environmental impact.” *Schoen v. Dep’t of*
19 *Forestry & Fire Protection* (1997) 58 Cal.App.4th 556, 572. “Certain state agencies, operating
20 under their own regulatory programs, generate a plan or other environmental review document
21 that serves as a functional equivalent of an EIR.” *Mountain Lion Foundation v. Fish & Game*
22 *Com.* (1997) 16 Cal.4th 105, 113 (citing Pub. Resources Code § 21080.5(a)). The certified
23 agency is not required to prepare an EIR because it would essentially duplicate the information
24 required in the functional equivalent document. *Citizens for Non-Toxic Pest Control v. Dep’t of*
25 *Food and Agriculture* (1986) 187 Cal.App.3d 1575, 1584. The rationale for this rule is to avoid
26 the redundancy that would result if environmental issues were addressed in both program-
27 related documents and an EIR. *San Mateo County Coastal Landowners’ Assn. v. County of San*
28 *Mateo* (1995) 38 Cal.App.4th 523, 551-552, *POET, LLC v. California Air Resources Board*
(2013) 218 Cal.App.4th 681, 711.

1 Nevertheless, the Commission’s certified program “remains subject to other provisions
2 in CEQA....” *POET, LLC v. California Air Resources Board, supra*, 218 Cal.App.4th at 711;
3 see Pub. Resources Code, § 21080.5; *Mountain Lion Foundation v. Fish & Game Com.* (1997)
4 16 Cal.4th 105, 114. An agency acting under a certified regulatory program must comply with
5 CEQA’s broad policy goals and substantive standards. *POET, LLC v. State Air Resources Bd.*,
6 *supra*, 218 Cal.App.4th at 710 (citing Cal. Code Regs., tit. 14, § 15250; 2 Kostka & Zischke,
7 Practice Under the Cal. Environmental Quality Act (Cont.Ed.Bar 2d ed. 2013) § 21.2, p. 1084
8 (rev. Mar. 2013)). Section 21080.5 does not grant qualifying agencies blanket exemptions from
9 all of CEQA’s provisions. *Environmental Protection Information Center, Inc. v. Johnson*
10 (1985) 170 Cal.App.3d 604, 616-618. Instead, certified regulatory programs excuse agencies
11 from complying only with Chapters 3 and 4 of the Act (commencing with section 21100),
12 which relate to the EIR process, and from Public Resources Code section 21167, which sets
13 forth statutes of limitation for challenging agency decisions on various CEQA grounds. *Id.*;
14 Pub. Resources Code § 21080.5. The agency must comply with all of CEQA’s other
15 requirements. *Mountain Lion Foundation, supra*, 16 Cal.4th at 105. For example, an EIR
16 functional equivalent will “provide public and governmental decisionmakers with detailed
17 information on the project’s likely effect on the environment, describe ways of minimizing any
18 significant impacts, point out mitigation measures, and identify any alternatives that are less
19 environmentally destructive.” *County of Santa Cruz v. State Board of Forestry* (1998) 64
20 Cal.App.4th 826, 830. The Commission’s Staff Report, as a certified regulatory program, is the
21 functional equivalent of environmental review pursuant to CEQA. Pub. Resources Code §
22 21080.5. Thus, the Commission’s Staff Report must contain all of the substantive information
23 regarding a project’s likely effect on the environment, including but not limited to facts,
24 analysis, mitigation measures, and alternatives required by CEQA.

25
26 **2) Approving the Project Prior to Preparing and Considering Environmental Review**
27 **Violated CEQA**

28 CEQA requires that “*No public agency shall approve* or carry out a project for which an

1 EIR has been certified which identifies one or more significant environmental effects of the
2 project unless the public agency makes one or more written findings for each of those
3 significant effects...” Cal. Code Regs., tit. 14, § 15091, emphasis added. This requirement
4 stems from and is codified in Public Resources Code section 21081. Courts have rejected post-
5 approval environmental analysis to justify a decision as a “‘post hoc rationalization’ of a
6 decision already made... .” *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 74; see
7 also, *Environmental Defense Fund, Inc. v. Coastside County Water Dist.* (1972) 27 Cal.App.3d
8 695, 706. When a resolution approving environmental review is adopted after project approval,
9 “No resolution adopted on that date can constitute that determination of environmental impact
10 prior to approval of the project which the act requires... . In failing to render a written
11 determination of environmental impact before approving the project, the council proceeded in a
12 manner contrary to the requirements of law. [Citation].” *No Oil, Inc. v. City of Los Angeles*,
13 *supra*, 13 Cal.3d at 74.

14 The only findings considered by the Commission at the November 8, 2017 de novo
15 hearing were findings for Project denial, and a determination that the Project was statutorily
16 exempt from CEQA because project denials do not require environmental review. The
17 Commission Staff Report for the de novo hearing correctly concluded as follows:

18 Pursuant to CEQA Guidelines (14 CCR) Section 15042 “a public agency may
19 disapprove a project if necessary in order to avoid one or more significant effects
20 on the environment that would occur if the project were approved as proposed.”
21 Section 21080(b)(5) of CEQA, as implemented by Section 15270 of the CEQA
22 Guidelines, provides that CEQA does not apply to projects which a public
23 agency rejects or disapproves. The Commission finds that denial, for the reasons
24 stated in these findings, is necessary to avoid the significant effects on coastal
25 resources that would occur if the project was approved as proposed.
26 **Accordingly, the Commission’s denial of the project represents an action to
27 which CEQA, and all requirements contained therein that might otherwise
28 apply to regulatory actions by the Commission, do not apply.**

25 (AR 4754, emphasis added.) Thus, the Commission Staff Report that was available at the time
26 the Commission approved the Project did not meet the standard of a functional equivalent of
27 environmental review. There simply was no environmental review since the Staff Report
28

1 claimed an exemption. Since the Commission approved the Project on November 8, 2017,
2 adoption of the CEQA findings ten months later on September 13, 2018 violate the rule that
3 CEQA findings and environmental review must be adopted before decisionmakers act to
4 approve a project. Cal. Code Regs., tit. 14, § 15091.

5 Commission Staff Reports are designed to be the centerpiece of this environmental
6 review process, functioning as the documentary equivalent of an EIR. *Strother v. California*
7 *Coastal Com.* (2009) 173 Cal.App.4th 873, 877-878; Cal. Code Regs., tit. 14, § 13057. To
8 serve as the functional equivalent of an EIR, however, the Staff Report must contain certain
9 basic minimum requirements, including a discussion of impacts, alternatives, mitigation
10 measures, and written responses to comments. Pub. Resources Code § 21080.5(d); *Strother v.*
11 *California Coastal Com., supra*, 173 Cal.App.4th at 878. Crucially, a Staff Report that does not
12 contain these elements fails to act as the functional equivalent of an EIR and does not comply
13 with CEQA. See *City of Coronado v. California Coastal Zone Conservation Com.* (1977) 69
14 Cal.App.3d 570, 582. The Staff Report must be prepared and distributed prior to the public
15 hearing. Cal. Code Regs., tit. 14, § 13059. The Commission failed to satisfy almost every
16 requirement of providing a functional equivalent to an EIR, including failing to present and
17 discuss most environmental impacts of the Project, propose mitigations, provide for written
18 responses to comments, and to provide written findings, as required by section 13057 of the
19 Coastal Act Regulations.

20 To make matters worse, the post-approval findings simply crossed out the statutory
21 exemption wholesale as shown below and instead concluded:

22 ~~Public Resources Code (CEQA) Section 21080(b)(5) and Sections 15270(a) and~~
23 ~~15042 (CEQA Guidelines) of Title 14 of the California Code of Regulations (14~~
~~CCR) state in applicable part:~~

24 ~~**CEQA Guidelines (14 CCR) Section 15042. Authority to Disapprove Projects.**~~
25 ~~[Relevant Portion.] A public agency may disapprove a project if necessary in~~
26 ~~order to avoid one or more significant effects on the environment that would~~
~~occur if the project were approved as proposed.~~

27 ~~**Public Resources Code (CEQA) Section 21080(b)5. Division Application and**~~
28 ~~**Nonapplication. ... (b) This division does not apply to any of the following**~~

1 *activities: ... (5) Projects which a public agency rejects or disapproves.*

2 ~~**CEQA Guidelines (14 CCR) Section 15270(a). Projects Which are**~~
3 ~~**Disapproved. (a) CEQA does not apply to projects which a public agency rejects**~~
4 ~~**or disapproves.**~~

5 14 CCR Section 13096(a) requires that a specific finding be made in conjunction
6 with CDP applications about the consistency of the application with any
7 applicable requirements of CEQA. This report has discussed the relevant coastal
8 resource issues with the proposed project. All above findings are incorporated
9 herein in their entirety by reference. As detailed in the findings above, the
10 proposed project would have significant adverse effects on the environment as
11 that term is understood in a CEQA context.

12 Pursuant to CEQA Guidelines (14 CCR) Section 15042 “a public agency may
13 disapprove a project if necessary in order to avoid one or more significant effects
14 on the environment that would occur if the project were approve as proposed.”
15 Section 21080(b)(5) of CEQA, as implemented by Section 15270 of the CEQA
16 Guidelines, provides that CEQA does not apply to projects which a public
17 agency rejects or disapproves. The Commission finds that denial, for the reasons
18 stated in these findings, is necessary to avoid the significant effects on coastal
19 resources that would occur if the project was approved as proposed.
20 Accordingly, the Commission’s denial of the project represents an action to
21 which CEQA, and all requirements contained therein that might otherwise apply
22 to regulatory actions by the Commission, do not apply.

23 Section 13096 of Title 14 of the California Code of Regulations requires that a
24 specific finding be made in conjunction with coastal development permit
25 applications showing the application to be consistent with any applicable
26 requirements of CEQA. Section 21080.5(d)(2)(A) of CEQA prohibits a
27 proposed development from being approved if there are feasible alternatives or
28 feasible mitigation measures available which would substantially lessen any
significant adverse effect which the activity may have on the environment.

Monterey County, as the lead CEQA agency, certified an EIR (Rancho Los
Robles Subdivision Final Environmental Impact Report, State Clearinghouse
Number 2002091010, the “Rancho Los Robles Subdivision EIR”). The Coastal
Commission’s review and analysis of land use proposals has been certified by
the Secretary of the Natural Resources Agency as being the functional equivalent
of environmental review under CEQA. (14 CCR § 15251(c).) The Commission
has reviewed the relevant coastal resource issues associated with the proposed
project, and has concluded that the project as proposed appropriately addresses
any potential adverse impacts to such coastal resources. All above findings are
incorporated herein in their entirety by reference.

The Commission finds that the proposed project avoids significant adverse

1 effects on the environment within the meaning of CEQA. As such, there are
2 no additional feasible alternatives or feasible mitigation measures available
3 which would substantially lessen any significant adverse environmental effects
4 that approval of the proposed project, as modified, would have on the
5 environment within the meaning of CEQA. The proposed project will not result
6 in any significant environmental effects for which feasible mitigation measures
7 have not been employed consistent with CEQA Section 21080.5(d)(2)(A).

8 (AR 7509 -7510, bold added, underlines and strikeouts in the original.) This revised CEQA
9 determination is nothing more than a conclusory statement. During the de novo hearing on
10 November 8, 2017, the Commissioners voting for Project approval never considered CEQA at
11 all. Nor did the public have an opportunity to consider a functional equivalent document.
12 Therefore, the revised findings' conclusory statement that the Commission found that the
13 Project avoids significant adverse effects on the environment within the meaning of CEQA is
14 nothing more than a bald assertion. “[W]here an agency failed to require an applicant to
15 provide certain information mandated by CEQA and to include that information in its
16 environmental analysis, we held the agency ‘failed to proceed in the manner prescribed by
17 CEQA.’” *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova,*
18 *supra*, 40 Cal.4th at 435. Indeed, quite the opposite was concluded in the Staff Report. Thus,
19 the Commission failed to proceed in a manner required under CEQA.

20 **C. The Commission Failed to State a Valid Basis for Project Approval, and the Revised** 21 **Findings Constitute Improper Post Hoc Rationalizations**

22 **1) The Revised Findings Far Exceed the Scope of the Reasoning Provided by the** 23 **Commissioners Who Voted for Project Approval**

24 As a preliminary matter, and as discussed *supra*, the Commission’s action to approve
25 the Project fails to comport with the procedures set forth in the Coastal Act regulations which
26 require that “[i]f the commission action is substantially different than that recommended in the
27 staff report, the *prevailing commissioners shall state the basis for their action in sufficient*
28 *detail to allow staff to prepare a revised staff report with proposed revised findings that reflect*
the action of the commission.” Cal. Code Regs., tit. 14, § 13096, emphasis added. the

1 Commissioners must provide the reasoning first, and then reach a decision afterward. This is a
2 fundamental principle underlying agency decisionmaking: “We further conclude that implicit in
3 section 1094.5 is a requirement that the agency which renders the challenged decision must set
4 forth findings to bridge the analytic gap between the raw evidence and the ultimate decision or
5 order.” *Topanga Assn. for a Scenic Community v. County of Los Angeles, supra*, 11 Cal.3d 506,
6 515. The post-approval findings, circulated ten months after the de novo hearing, far exceed the
7 scope of reasoning provided by the prevailing Commissioners and ultimately fail to bridge the
8 analytic gap between the evidence and the approval.

9 There are few published cases regarding the propriety of the Commission’s post-
10 approval findings pursuant to section 13096 of the Coastal Act Regulations. *La Costa Beach*
11 *Homeowners’ Assn. v. California Coastal Commission* is instructive by comparison because the
12 revised findings in that case “did nothing more than reflect in writing the rationale that the
13 Commissioners and Staff articulated on the record at the April 12, 2000 public hearing.” *La*
14 *Costa Beach Homeowners’ Assn. v. California Coastal Com.* (“*La Costa*”) (2002) 101
15 Cal.App.4th 804, 819.

16 In *La Costa*, the Commission conducted a public hearing on April 12, 2000 regarding
17 amendments to a CDP which proposed deleting view corridor conditions in exchange for a
18 dedication of a mitigation parcel. *Id.* at 808-809. Commission Staff recommended approval of
19 the amendments and submitted a written Staff Report supporting that action. At the hearing, the
20 Commission approved the project consistent with the Staff recommendation, and made an oral
21 modification which required:

22 [T]hat the mitigation parcel be held in escrow pending any challenge to a
23 decision by the Commission to permit the amendments. If no litigation were filed
24 or if litigation were filed but proved unsuccessful, the deed would be released to
25 the Conservancy. In the event litigation precluded the parcel from being opened
26 to public access, the deed would be returned to real parties and real parties would
pay the Conservancy the greater of \$1 million or, if the parcel were to be sold
within one year of return, the net proceeds of that sale. The money would be
used to open public access elsewhere in Malibu.

27 *Id.* at 811. The oral changes were relatively minor in light of the Staff Report and prepared
28

1 findings.

2 After the April 12, 2000 hearing in *La Costa*, Commission Staff presented proposed
3 revised findings on May 24, 2000, because “additional language had been added to the
4 condition of the amendment regarding the mitigation parcel.” *Id.* at 812 fn. 5. “The proposed
5 revised findings included most of the same information as was set forth in the original staff
6 report.” *Id.* The Commission adopted the revised findings on June 13, 2000. *Id.* at 813. The
7 reviewing court concluded that the “revised findings did nothing more than reflect in writing the
8 rationale that the Commission and staff articulated on the record at the April 12, 2000 public
9 hearing.” *Id.* at 819.

10 In *La Costa*, the Commission articulated with detail an amendment modification at the
11 public hearing. The modified findings simply memorialized what prevailing Commissioners
12 stated at the public hearing prior to the project approval. The modified findings were issued
13 about a month after the public hearing and approved another month thereafter. It did not take
14 ten months for the Commission to memorialize the findings. The time lapse in the case at bar is
15 a result of the failure of the Commission to state a basis for the majority’s action in sufficient
16 detail and the failure to articulate what was approved. This time lapse is strong indication that
17 Commission Staff spent many months attempting to reconcile the approval with the evidence
18 presented at the de novo hearing. The strikeout version of the revised findings is evidence that
19 wholesale revisions had to be made to justify approval. (AR 7450-7511.) Unlike *La Costa*, the
20 post-approval findings invalidly expanded on the scant comments provided at the de novo
21 hearing and failed to “reflect in writing the rationale that the Commission and staff articulated
22 on the record...” *La Costa, supra*, 101 Cal.App.4th at 819.

23 The colloquy between these three Commissioners at the September 13, 2018 hearing
24 plainly demonstrates that the post-approval findings reflect after-the-fact reasoning.

25 So speaking for myself of one of only three, and I think we need all three, I think
26 that generally the staff’s revised findings accurately reflect the hearing, but I also
27 think that **I have no objection to the suggested modifications made by the**
28 **Applicant because I think they also in most cases—they strengthen and**
broaden and add to the findings that were made by the majority at the
hearing. And so I would personally have no objection to incorporating that.

1 (AR 9785: 5-13, emphasis added.)

2 I agree with Commissioner Padilla. The **Applicant’s revised findings do**
3 **adequately reflect what my thought process was** and why I voted the way I
4 did.

(AR 9785: 20-22, emphasis added.)

5 I’ll just say that I agree with my colleagues Howell and Padilla **that the revised**
6 **findings reflect what my thought process was** that day as well.

(AR 9787: 5-8, emphasis added.)

7 One Commissioner supported adopting the Real Parties’ modifications to the findings in
8 order to “strengthen and broaden and add to the findings.” This is prima facie evidence that the
9 findings, as modified, invalidly encompass more than what was stated on the record at the de
10 novo hearing. As to the two other Commissioners who were eligible to vote on the post-
11 approval findings, neither of them had spoken at the de novo hearing and thus they had not
12 stated any reason for their votes, much less provided any detail. (See AR 7431-7439.) Only
13 after Project approval did these two Commissioners agree that “the revised findings reflect what
14 [their] thought process was.” Implicit in this dialogue is the admission that these two prevailing
15 Commissioners failed to state their basis for Project approval on the record at the de novo
16 hearing. The Coastal Act Regulations require the Commissioners to “state their action in
17 sufficient detail” in such circumstances. Cal. Code Regs., tit. 14, § 13096(b). A secret,
18 unspoken thought, even if it exists, is not a statement and provides no detail to support a
19 conclusion contrary to a robust Staff recommendation for denial.

20 The strikeout version of the Staff Report showing the deletions and additions made to
21 the findings after the de novo appeal hearing is illustrative.

22 Thus, With respect to whether there is long term and adequate supply, the
23 groundwater basin’s overdraft status and its resultant seawater intrusion impacts
24 indicate that, in its current state, the basin cannot supply water over the long term
25 in a manner that would not impair the basin and the resources that depend on it,
26 in this case and relying on the Applicant’s Water Balance Report the
27 Commission finds that the project will have a net positive effect on groundwater
28 supplies. Because of this, and because additional recharge associated with the
project is expected to improve groundwater health, the **Commission finds the**
project will have a long-term and adequate water supply, consistent with
relevant LCP policies such as North County LUP Polices 2.5.1, 4.3.5.7, and

1 IP section 20.144.140.1.A. and thus a project that would be served by it cannot
2 be found to have a long term, adequate water supply. Therefore, the proposed
3 project is inconsistent with LUP Policy 2.5.1 (which requires development to be
4 served by identifiable, available, long term water supplies) and with IP Section
5 20.144.1401.A., which requires that adequate water be available to serve non
6 coastal dependent uses. There is not adequate water available for the proposed
7 subdivision (and in fact there is not adequate water at safe yield to serve even
8 *existing* development), which is a non coastal dependent use, and thus the
9 proposed subdivision must be denied.

7 (AR 7476, bold added, strikeouts and underlines in original.) The stricken text is just as
8 revealing as the newly added text.

9 At the November 8, 2017 de novo appeal hearing, the Commission did not provide the
10 basis that the post-approval findings imply. The Commission never expressly denied the state
11 of overdraft in the groundwater basin. And, the Commission never found that the project will
12 have a “long-term and adequate water supply,” as stated in the post-approval findings. The
13 post-approval findings simply did not reflect what occurred at the November 8, 2017 de novo
14 hearing, and invalidly created reasoning for the Commission’s actions that the Commission
15 itself never provided.

16 As noted above, the transcript for the November 8, 2017 de novo hearing reveals that
17 much of the justification provided for Project approval was either off base or vague. Given that
18 the Commission took an action diametrically opposed to the Staff recommendation, the
19 Commission had a responsibility to provide sufficient basis on the record for the public to
20 determine the basis of their reasoning for Project approval. The requirement to provide the
21 analytic route in support of Project approval is all the more pressing in light of the LCP Policies,
22 the severity of the groundwater overdraft and past Commission actions that all favored Project
23 denial. The Commission’s failure to provide such an analytic route constitutes a failure to
24 proceed in a manner required by law.
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1 **2) The Commission Failed to Cite to Specific Applicable Standards, Policies, and**
2 **Failed to Provide the Analytic Route in Support of Project Approval**

3 Of the seven Commissioners who voted to approve the Project at the November 8, 2017
4 de novo appeal hearing, only two spoke. (AR 7436-7442). The reasoning provided was
5 inadequate to justify Project approval. One Commissioner relied on Senate Bill 244, which is
6 inapplicable to the Commission. Senate Bill 244 requires cities and counties to review and
7 update the land use element of their general plan to identify disadvantaged unincorporated
8 communities, to justify his position:

9 Okay. So the County would eventually have to look at its Land Use Element in
10 regards to housing and of development and communities in terms of need a lot of
11 help. Las Lomas would be one of those communities. I see that as qualified for
12 that. And that would be under Senate Bill 244, which requires all cities and
13 counties to go ahead and do that.

14 (AR 7436: 17-25.)

15 It's Senate Bill SB 244. Land use General Plan disadvantaged communities was
16 enacted requiring cities and counties to review and update the Land Use Element
17 of the General Plan to identify disadvantaged unincorporated communities
18 concurrent with the requirement to update their Housing Elements. The intent of
19 SB 244 is to encourage investment and planning to address the regional
20 inequality and infrastructure deficits that exist within disadvantaged
21 unincorporated communities.

22 (AR 7437: 1-10.) The Commissioner saw the Project “as perfectly fitting within that definition
23 of SB 244.” (AR 7437). However, Senate Bill 244 is not germane to the necessary analysis
24 under the Coastal Act and the County’s LCP and falls outside of the Commission’s purview.
25 The Commissioner failed to address any of the relevant LCP Policies concerning groundwater
26 or ESHA, and relying on Senate Bill 244 is a wholly invalid basis for Commission approval of
27 the Project. More importantly, SB 244, which was approved by the Governor on October 7,
28 2011, does *not* call for more development in disadvantaged communities. It instead calls for
consideration of public services and infrastructure needed (e.g., sewer and water facilities) and
funding mechanisms for disadvantaged communities as part of LAFCO approvals (e.g.,
annexations and municipal service reviews) and for cities and counties to identify water,
wastewater, stormwater drainage and structural fire protection needs and deficiencies for

1 disadvantaged communities in their general plan. Government Code §§ 56375, 56425, 56430,
2 53082.5, 56033.5; Water Code § 13481.7. Indeed, under the principles of SB 244, the Project
3 should not be approved because there is not sufficient water to serve development in North
4 Monterey County.

5 The Commissioner who discussed Senate Bill 244 saw the Project as an “opportunity for
6 a developer who is very willing to provide academic amenities, a library, build a library, build a
7 park, fix the streets, do some lighting. That would be an amenity to this unincorporated
8 community that fits the definition of SB 244.” (AR 7437). Not only did the Commissioner
9 have a misunderstanding of the Project description, unfortunately several members of the public
10 were also mistakenly believed that the Project would yield tangible community facilities:

11 “So this project would provide 17 acres of land for us to finally have a small
12 library for our kids after school to do their homework. And we deserve that.”
(AR 7401: 23-25.)

13 “A community park and social hall would afford these privileges to them. Yet,
14 not just our young, but our elderly as well.” (AR 7411: 9-11.)

15 “And I just feel like this would be such a huge, positive impact for the youth, for
16 the elders, for families, for all the generations to come to be able to have an area
17 just to have recreation, to have a library where youth are able to go and study and
have a peaceful time...” (AR 7414: 13-17.)

18 But the Project conditions do not require the Real Parties to construct any academic amenities, a
19 library, a social hall, or recreational facilities. As made clear in the Commission Staff Report:
20 “It appears that these types of amenities and facilities *might* come to fruition under the
21 Applicant’s proposal, but they are not a clearly defined part of the proposal, and **there is little**
22 **way of knowing what exactly would be developed, if anything.**” (AR 4883, emphasis added.)

23 While the Real Parties agreed to dedicate land for community facility purposes, for all
24 intents and purposes, such plans are illusory since the Project does not even identify which
25 entity would receive the land and whether the unidentified entity could ever fund and operate
26 any facilities. (AR 53-54.) LAFCO specifically requested that “the project not identify the
27 formation of a new community services district (CSD) as a future provider of parks and
28

1 recreation facilities or services.” (AR 4931.) The Project cynically dangled elusive community
2 amenities to garner support, but the Project itself contains no assurance as to when or how such
3 facilities would be funded or constructed, if ever. (AR 5442; 4929-4930.) A mere expression
4 of possibility is not a tangible community benefit. And as LAFCO stated, approval of a CSD
5 for such a proposal is unlikely.

6 The other Commissioner who spoke in favor of the Project provided vague and at times
7 contradictory logic in support of Project approval.

8 You know, I agree wholeheartedly with our staff, and I think more often than not
9 I’m in agreement with staff, except tonight. I don’t know what the deal is. But
10 maybe it is my read of the standards and the facts. I agree wholeheartedly that
11 the LCP standards are what they are, that that is the scope of our review, that
12 there are certain other things while very valid before us are not before us. And
13 again, I appreciate and understand that. (AR 110: 17-25.)

14 I think the issue is with the specific language in the standards and in the
15 implementing policies. And I’m just not convinced that my reading of that
16 implementation means that you can really in looking to the language of the
17 standard, that you can cause an exceeding extraction in the words of that
18 standard when you have substantial evidence in the record that the –you know,
19 the development proposed is not, you know, going to have an impact on that.
20 (AR 7440: 1-9.)

21 It appears that on one hand the Commissioner agreed with Staff that the LCP standards “are
22 what they are, that that is the scope of our review.” But on the other hand, the Commissioner
23 claimed that there is “substantial evidence in the record” –which he did not identify—that the
24 development is “not...going to have an impact on that.” The Commissioner suggested that: “I
25 think we can make a finding that, in fact, we’re not going to violate the standard on the aquifer.”
26 (AR 7441: 24-25, 7442: 1.) An agency “must travel that analytic route” from evidence to
27 action. *Save Round Valley Alliance v. County of Inyo* (2007) 157 Cal.App.4th 1437, 1458.
28 Based on the transcript, it is difficult to discern the analytic route the Commissioner took to
conclude that “we’re not going to violate the standard on the aquifer.” This difficulty is
compounded by the fact that the Commissioner failed to identify either the “substantial
evidence” or the “standard on the aquifer” to which he referred.

If the Commissioner was alluding to the Real Parties’ water claims as “substantial

1 evidence,” there are significant problems with characterizing the Real Parties’ claims as
2 “substantial evidence.” The record indicates that at best the Real Parties’ water report is
3 unreliable. In analyzing the water report provided by the Real Parties, the Commission’s own
4 Staff and expert could not accept the water balance report’s assumptions. Commission Staff
5 had concluded that “there are numerous unresolved issues with respect to the Applicant’s water
6 usage assumptions.” (AR 4746.) The Commission Staff Report detailed multiple problems
7 with the Real Parties’ water study:

8 “While the Applicant’s letter asserts that the Commission’s former Staff
9 Geologist, Dr. Mark Johnsson, was ‘satisfied’ with the conclusion that the
10 proposed project would increase groundwater recharge, this statement is
11 inaccurate.” (AR 4746.)

12 “Dr. Johnson did review and comment on the Applicant’s water usage
13 information but had concerns about many of the assumptions being made,
14 including with respect to infiltration rates, low per-capita water usage estimates,
15 and assumptions that were modified from previous analyses and which had the
16 result of maintaining the project’s ‘water positive’ conclusions.” (AR 4746.)

17 “For example, the Applicant prepared multiple analyses with respect to water
18 usage and groundwater recharge. One analysis actually showed that the
19 proposed project would result in a *decrease* in aquifer recharge and an *increase*
20 in estimated water usage over existing conditions.” (AR 4746.)

21 “Thus, it is unclear at best whether the proposed project can even be considered
22 ‘water neutral’ (relative to the current existing use) due to the uncertainties
23 regarding the Applicant’s water analyses and the seemingly unwarranted
24 modification of baseline operating assumptions.” (AR 4747.)

25 The record contains the findings of Dr. Johnsson, the Coastal Commission’s Staff
26 Geologist:

27 To summarize our call, the following are the issues I have with the current water
28 balance:

- 29 - In the proposed condition, water will be imported from offsite wells, but as these
30 wells are in the same aquifer as that underlying the site, this imported water is
31 counted as extracted for water balance purposes.
- 32 - In the proposed condition, some water will be diverted to the Watsonville
33 recycled water treatment plant; it is assumed that a portion of this will infiltrate
34 back into the same aquifer; without knowing exactly how water from the

1 Watsonville plan is to be distributed, this assumption seems a bit sketchy.

- 2 - The per capita water use is very low (65 gpd); coupled with the assumed person
3 per unit this works out to only 190 gpd per unit; much below the “ballpark”
4 number of 400 gpd I often use as a default.
- 5 - Various infiltration rates are used for precipitation, infiltration of irrigated water,
6 and infiltration of detained water (50, 70 and 85%, respectively). Since the soils
7 are assumed to be uniform across the site, it is unclear to me why this is true.
- 8 - You asked if the 17 AF/yr overall use seems reasonable; 52 dwelling units at 400
9 gpd would use about 23.3 AF/yr; much higher than the <12 AF/yr used in the
10 water balance for domestic use and irrigation.

11 (AR 4844.)

12 The Commissioner who spoke on the record questioned Commission Staff’s analysis:

13 And that’s what the staff’s asserting the language conveys in the implementing
14 policies? Because isn’t there testimony that seems to indicate flexibility with
15 respect to that? I mean, if you take your interpretation of the standard out to its
16 next logical conclusion, the responsibility—I mean, it really amounts to an
17 assertion that even if, for example, you accept evidence that this is a positive
18 charge and a water positive project in terms of its impact on the aquifer, that it’s
19 the responsibility of the entire LCP planning are to rectify the negative –or I
20 think we’re calling it the safe yield state of the basin before anything else can
21 happen anywhere. So that really kind of translates into a moratorium on
22 anything. Would that be your simple conclusion?

23 (AR 7431: 21-25, 7432: 1-10.). Commission Staff responded that the County has not adopted a
24 moratorium in the Coastal Zone. (AR 7432.) While the Commissioner asked a few questions,
25 there was no reasoning provided at the de novo appeal hearing that draws the necessary analytic
26 route to the Commission’s approval of the Project, especially in light of the overwhelming
27 evidence to the contrary and the Commission’s recent actions denying Rancho Roberto and
28 Mayr subdivision proposals in North County based on the same LCP Policies. (AR 9663,
9706.)

29 **3) The LCP Policies Do Not Allow for Project Approval Since the Groundwater Basin
30 is in Severe Overdraft**

31 The proper inquiry under the LCP Policies is directed toward the state of the

1 groundwater resource, not whether a project is “water neutral” or even “water positive” as the
2 Real Parties urged. The Real Parties’ water report is not only unreliable, but it is wholly
3 inadequate and inconsequential because it does not prove that the groundwater resource itself is
4 at a safe yield, or not overdrafted, as required by the LCP for development to be approved.

5 Numerous policies and standards in Monterey County’s LCP regarding groundwater
6 preclude developing a residential subdivision when the groundwater resource is in overdraft:

7 2.5.1 Key Policy The water quality of the North County groundwater aquifers
8 shall be protected, **and new development shall be controlled to a level that**
9 **can be served by identifiable, available, long term-water supplies.** The
10 estuaries and wetlands of North County shall be protected from excessive
sedimentation resulting from land use and development practices in the
watershed areas.

11 (AR 9291, emphasis added.)

12 2.5.2.3 New development shall be phased **so that the existing water supplies**
13 **are not committed beyond their safe long term yields. Development levels**
14 **that generate water demand exceeding safe yield of local aquifers shall only**
be allowed once additional water supplies are secured.

15 (AR 9291, emphasis added.)

16 2.5.3.A.2. The County’s long-term policy shall be to limit ground water use to
17 the safe-yield level....

18 (AR 9292.)

19 Given that the groundwater basin is indisputably in severe overdraft, no finding can be
20 made that the Project will be served by current available long term-water supplies within safe
21 yield levels. Commission Staff explained this in detail:

22 The proposed project is inconsistent with LUP Policy 2.5.2.3, which does not
23 allow development when water supplies are committed beyond their safe yield,
24 and only allows development once additional water supplies are secured to bring
the basin into its LCP-required safe yield state.

25 (AR 4729.)

26 In this case, the groundwater basins are already severely overdrafted at a
27 magnitude that will require significant reductions in demand or new water inputs.
28 Thus, *any* subdivision would commit a permanent water supply from a source

1 that is already overdrafted, inconsistent with the LCP. In other words, because
2 safe yield is already significantly exceeded, most all development, and certainly
3 residential subdivisions that create *new* residential demand past the first home on
4 existing legally established lots, is simply not approvable until the underlying
5 aquifers are brought into a condition of safe, long-term yield.

6 (AR 4731.)

7 It is not enough to have a “no net increase” project (or even a slight reduction in
8 water usage as argued by the Applicant in this case, which is also problematic for
9 other priority land use issues as described above); rather the fundamental
10 resource itself [i.e., groundwater] is required to be in a condition of safe, long-
11 term yield to be able to support new development in North Monterey County.

12 (AR 4731.)

13 Even if the LCP included a “no net increase in water demand” criteria (which it
14 does not), the vast majority of existing water use is for a Coastal Act and LCP
15 priority agricultural use, and it is not LCP consistent to convert such high priority
16 use to a proposed 54-unit residential subdivision in an area with known water
17 supply deficiencies. In fact, when water deficiencies of the type currently
18 present in this area exist, the LCP affirmatively *requires* the proposed
19 development to be denied.

20 (AR 4712.)

21 At the de novo hearing, Commission Staff stated unequivocally, “in our view the water
22 balance studies and neutrality and positivity, those are irrelevant to the actual LCP analysis.”

23 (AR 7431: 3-6.) Commission Staff concluded that “while there’s a lot of complicated policies,
24 at the end of the day you can summarize it actually being quite simple and quite straightforward
25 in that if the groundwater basin’s overdrafted, as it currently is, then residential subdivision is
26 simply not allowable.” (AR 7426: 12-16.)

27 As stated *supra*, in 2017, the Commission rejected smaller subdivision projects such as
28 Rancho Roberto and Mayr for similar groundwater overdraft reasons. The Commission Staff
Report recommending denial for Mayr stated:

The LCP requires development in North County to be served by a long-term
water supply, and only allows new development, particularly residential
subdivisions, when the groundwater basin is in its safe yield extraction state.
The proposed project would authorize a subdivision allowing for two future
residences that would demand water from an already severely overdrafted
groundwater basin. The project cannot be found to have a long-term water

1 supply, and cannot be found to be served by water from a groundwater basin in a
2 safe yield state. Furthermore, the proposed two-lot residential subdivision
3 represents a low-LCP-priority land use within an area with known water supply
4 deficiencies. When such a combination results, the LCP affirmatively requires
5 the proposed development be denied.

6 (AR 9707.) Concurring with Commission Staff's analysis and reasoning regarding application
7 of the LCP Policies to Mayr, the Commission adopted the Commission Staff Report, and denied
8 Mayr. (AR 9706.) Rancho Roberto, Mayr, and this Project are all located within North County
9 and face the same groundwater overdraft issues. At the de novo hearing for the Project,
10 Commission Staff stated:

11 We'd also note the Commission recently denied coastal permits for three similar
12 subdivision proposals for similar reasons in the same North County area subject
13 to the same LCP policies in the past year, and we believe that this subdivision
14 must be denied as well.

15 This is the last of the North County subdivision appeals that are pending at the
16 Commission or County levels, and it shares the same fatal flaws as those other
17 denials. **If anything, those flaws are exacerbated as this is the largest of
18 these proposed developments and has the greatest potential adverse impact
19 on protected coastal resources, including ESHA and groundwater resources.**
20 Thus, we recommend that you deny this CDP.

21 (AR 7340: 21-25, 7341: 1-9, emphasis added.)

22 **4) The Post-Approval Findings Deleted the Discussion Regarding ESHA Without a 23 Word of Explanation**

24 The Commission Staff Report analysis for the November 8, 2017 de novo hearing stated:

25 The western portion of the project site, or roughly 16.5 acres, is comprised of
26 oak woodland habitat, which, as described above, the LCP categorically
27 designates as ESHA...

28 (AR 4737.)

The proposed project would subdivide the oak woodland habitat into residential
lots and commit those lots for single-family residences (including removing 17
oak trees). Residential subdivision and development are not allowed uses in
ESHA. Thus, the project as proposed is inconsistent with the LCP's ESHA
protection policies, including those that only allow resource dependent uses
within ESHA and those that prohibit subdivisions when they will adversely

1 impact and/or are within ESHA (LUP Policies 2.3.2.1 and 2.3.2.3 and IP
2 Sections 20.144.040(B)(3) and (B)(4)).

3 (AR 4737.)

4 The Commission Staff Report determined that the western portion of the project site is
5 ESHA and concluded that subdividing ESHA into residential lots violates LCP's ESHA
6 policies. (AR 4737.) At the de novo hearing, Commission Staff stated on the record:

7 As more fully described in the staff report, the proposed residential subdivision
8 and future park uses are not allowed in oak woodland ESHA or on prime and
9 productive agricultural soils. So even if the lack of a sustainable water supply
10 were not an issue, the proposed project impermissibly proposes to convert ESHA
and productive ag soils to residential subdivision. For these reasons, in addition
to water supply, the project is inconsistent with the LCP.

11 (AR 7340: 4-12.)

12 In short, the project proposes a large, suburban-style residential subdivision in a
13 predominantly rural agricultural area with severe water supply deficiencies and
14 on land comprised of oak woodland ESHA and productive agricultural soils.

15 (AR 7340: 14-18.)

16 One Commissioner asked Staff to address the following:

17 There is also some debate with respect specifically to IP 214404 dealing with
18 ESHA and the oak woodlands. And there seems to be specific language in that
19 implementing policy that addresses long-term maintenance and the establishment
of standards. It doesn't seem to be a blanket prohibition on the—disturbing that
forest or the constitution of that forest.

20 Because it wasn't present in the—I believe in the report, so it was raised by the
21 Applicant. And I reviewed it, and it seems to say what the Applicant asserts that
22 it says.

23 (AR 7433: 1-8, 11-14.)

24 In response, Commission Staff explained that:

25 The other thing is even assuming for the sake of argument that you could put a
26 non-resource dependent use in ESHA under this LCP, the LCP's conflict
27 resolution provisions which, you know, other policies say you can't do that,
28 would say that you look to the Coastal Act for guidance, which is 30240, which
doesn't have anything like this is pretty crystal clear that non-resource dependent
issues are not allowed in ESHA.

1 (AR 7434: 4-11.)

2
3 Once you've identified ESHA, it's only resource dependent use that's allowed
4 there notwithstanding when you have policies like this that might suggest that
5 you could do something in there that wasn't resource dependent.

6 (AR 7434: 17-21.)

7 After the discussion with Commission Staff, the Commissioner did not have any further
8 questions pertaining to ESHA and appeared to concur with the Staff's explanation: "All right.
9 Thanks." (AR 7434: 24.) Indeed, Commission Staff's explanation is consistent with the
10 Coastal Act and caselaw. "Environmentally sensitive habitat areas shall be protected against
11 any significant disruption of habitat values, and only uses dependent on those resources shall be
12 allowed within those areas." Pub. Resources Code § 30240(a); *Bolsa Chica Land Trust v.*
13 *Superior Court* (1999) 71 Cal.App.4th 493; See also, *Kirkorowicz v. California Coastal Com.*
14 (2000) 83 Cal.App.4th 980, 995.

15 The Commission Staff Report concluded that the western portion of the project site is
16 ESHA. (AR 4737.) As indicated directly above, one Commissioner asked Staff to expound on
17 the Implementation Plan section 20.144.040.B.3 pertaining to ESHA and long-term
18 maintenance,¹⁰ and after Staff's explanation the Commissioner did not have any further
19 questions. Apart from that single instance of questioning, there was no indication at the de novo
20 hearing that the Commissioners disagreed that the western portion of the Project site is ESHA.

21 _____
22 ¹⁰ North County IP Section 20.144.040.B.3 says "New land uses and new subdivisions on
23 parcels within 100 feet of environmentally sensitive habitats, as identified on the current North
24 County Environmentally Sensitive Habitat resource map, other resource information, or
25 planner's on-site investigation, shall not be permitted where they will adversely impact the
26 habitat's long-term maintenance, either on a project or cumulative basis. As such, a project
27 shall only be approved where sufficient conditions of approval are available, such as for siting,
28 location, design, setbacks, and size, which will mitigate adverse impacts to and allow for the
29 long-term maintenance of the habitat, as determined through the biological survey. Also, a
30 project shall only be approved where the decision-making body is able to make a determination
31 that the project will not set a precedent for continued land development which, on a cumulative
32 basis, could degrade the habitat." (AR 9138.)

1 But, the post-approval findings wholly removed all references to the site as ESHA as indicated
2 by the strikeouts and underlines below. (See AR 7483 – 7486.)

3 *Analysis*

4 The western portion of the project site, or roughly 16.5 acres, is comprised of
5 oak woodland habitat, ~~which, as described above, the LCP categorically
designates as ESHA~~

6 (AR 7485.)

7 *Conclusion*

8 The project proposes to subdivide 16.5 acres of oak woodland ~~ESHA~~ into
9 residential lots, along with the removal of 17 oak trees-ten of which are to be
removed due to poor condition, according to the Forester’s Assessment. The
project also proposes a significant oak woodland restoration component of the
remaining oak woodland habitat to mitigate for oak woodland impacts, as well as
dedicating such restored habitat to a future entity for its continued protection in
perpetuity. The Commission determined that the project minimized oak tree
removal as directed by the LCP, and, along with the restoration component,
found the project consistent with the LCP on these points, which is not allowed
within this habitat. This project inconsistency requires denial for this reason in
addition to the groundwater resources and water supply problems describe
above.

15 (AR 7486.)

16
17 The post-approval findings state “The Commission determined that the project
18 minimized oak tree removal as directed by the LCP.” (AR 7486.) However, the transcript of the
19 de novo hearing demonstrates that the Commission made no such a determination. Similarly,
20 the post-approval findings wholly delete references to the project site as ESHA. This alteration
21 is invalid because no Commissioner stated any disagreement with the determination that the
22 Project site contains ESHA.

23 Findings are not allowed to be post hoc rationalizations for a decision already made.
24 Application of this rule to the facts of this case, where the Commission made a decision
25 contrary to the recommended findings in the Commission Staff Report, is crucial. The
26 Commission rejected Commission Staff’s findings for denial, and the public, as well as the
27 reviewing court, “has to be told why that was done; so it can ‘trace and examine the agency’s
28 mode of analysis.’” *Bam, Inc. v. Board of Police Com’rs* (1992) 7 Cal.App.4th 1343, 1346.

1 The Commission’s post-approval findings fundamentally ignore this procedural requirement.
2 The wholesale reworking of the findings without the requisite reasoning provided at the de novo
3 hearing ultimately left the public “at a loss to understand why the [Commission] did what it
4 did.” *Id.*

5
6 **IV. CONCLUSION**

7 For the foregoing reasons, Petitioners respectfully request that the Court grant the
8 Petition for Writ of Mandamus. The Commission’s lack of environmental review, and lack of
9 basis in adoption of the post-approval findings as to the Project’ consistency with the LCP, were
10 erroneous as a matter of law.

11
12
13 Dated: May 30, 2019

Respectfully submitted,
WITWER PARKIN LLP

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17 By: Pearl Kan
Attorneys for Petitioners
18 Friends, Artists and Neighbors of Elkhorn
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