No. H046932

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

LANDWATCH MONTEREY COUNTY, et al.
Petitioner, Respondent, and Cross-Appellant,

vs.

COUNTY OF MONTEREY
Respondent, Appellant, and Cross-Respondent;

HARPER CANYON REALTY, LLC
Real Party in Interest, Appellant, and Cross-Respondent.

Appeal from the Superior Court of California, County of Monterey,
Case No. M131913 and M131893, Consolidated for Trial Only
Hon. Thomas Wills, Judge of the Superior Court

APPLICATION OF THE CALIFORNIA BUILDING INDUSTRY ASSOCIATION, CALIFORNIA BUSINESS PROPERTIES ASSOCIATION, BUILDING INDUSTRY ASSOCIATION OF THE BAY AREA, AND BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION FOR LEAVE TO FILE AN AMICI CURIAE BRIEF IN SUPPORT OF APPELLANTS COUNTY OF MONTEREY AND HARPER CANYON REALTY, LLC; [PROPOSED] AMICI CURIAE BRIEF

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CERTIFICATE OF INTERESTED PARTIES

Pursuant to California Rule of Court 8.208, California Building Industry Association ("CBIA"), California Business Properties Association ("CBPA"), Building Industry Association of the Bay Area ("BIA-BA"), and Building Industry Legal Defense Foundation ("BILD") certify that they are non-profit organizations with no shareholders. CBIA, CBPA, BIA-BA, BILD (collectively, "Amici") and their counsel certify that they know of no other person or entity that has a financial or other interest in the outcome of the proceeding that Amici and its counsel reasonably believe this Court should consider in determining whether to disqualify the Amici under Canon 3E of the Code of Judicial Ethics.

September 22, 2020

/s/ Michael H. Zischke
Michael H. Zischke

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I. APPLICATION FOR LEAVE TO FILE AN AMICI BRIEF

Pursuant to Rule 8.200, subdivision (c), of the California Rules of Court, the Applicants, California Building Industry Association ("CBIA") , California Business Properties Association ("CBPA"), and Building Industry Legal Defense Foundation ("BILD") (collectively, the "Amici"), respectfully request leave to file an Amicus Curiae brief (this "Brief") in this proceeding in support of Appellants County of Monterey ("County") and Real Party in Interest Harper Canyon Realty, LLC ("Real Party") (collectively, "Appellants").

A. AUTHORSHIP AND FUNDING

This Brief was drafted by Michael H. Zischke, Andrew B. Sabey, Linda C. Klein, and Amy Y. Foo of Cox, Castle & Nicholson, LLP on behalf of the Amici as their counsel. No party or counsel for a party in the pending case authored the proposed Brief in whole or in part, directly or indirectly, or made any monetary or other contribution to fund its preparation.

B. STATEMENT OF INTEREST

CBIA is a statewide non-profit trade association comprising approximately 3,000 members involved in the residential

development industry. CBIA and member companies directly employ over one hundred thousand people. CBIA is a recognized voice of all aspects of the residential real estate industry in California. CBIA acts to improve the conditions for this state's residential development community and frequently advocates before the courts in amicus curiae briefs in cases involving issues of concern to its members.

CBPA serves as the California legislative and regulatory advocate for individual companies, as well as the International Council of Shopping Centers, the California Chapters of the Commercial Real Estate Development Association, the Building Owners and Managers Association California, the Institute of Real Estate Management chapters of California, the California Downtown Association, the Retail Industry Leaders Association and the Association of Commercial Real Estate – Southern California, making CBPA the recognized voice of the commercial, industrial, and retail real estate industries in California representing over 10,000 companies.

BIA-BA is a non-profit association representing building, developers, and others involved in the residential construction industry in the San Francisco Bay Area. BIA-BA advocates for its

members' interests, including before the courts in amicus curiae briefs in cases involving issues important to the residential construction industry.

BILD is a non-profit mutual benefit corporation and wholly-controlled affiliate of the Building Industry Association of Southern California, Inc. ("BIA/SC"). BIA/SC, in turn, is a non-profit trade association representing over 1,000 member companies. The mission of BIA/SC is to promote a positive business environment for the building industry. BILD's purposes are, among others, to monitor legal and regulatory developments and to intervene when appropriate to improve the legal climate for the building industry.

This case raises fundamental issues regarding a project applicant's ability to respond to public input during the environmental review process by modifying a proposed project or accounting for new information raised by commenters. The resolution of these issues could have a profound impact on the Amici's ability to timely construct housing development needed to meet the needs of California's diverse population.

C. ISSUES ON WHICH AMICUS CURIAE SEEK TO ASSIST THE COURT OF APPEAL

Amici believe this matter raises important issues for developers and project proponents under the California Environmental Quality Act ("CEQA") (Pub. Resources Code, § 21000 et seq.) and the CEQA Guidelines (Cal. Code Regs., tit. 14, § 15000 et seq.).

A draft EIR typically only has one round of public review and comment, after which a final EIR is prepared. However, according to well-established CEQA standards, the draft EIR must undergo another round of public review and comment if significant new information is added to the EIR such that not recirculating would "deprive[] the public of a meaningful opportunity to comment upon a substantial adverse environmental effect of the project or a feasible way to mitigate or avoid such an effect." (*Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4th 1112, 1129 (*Laurel Heights II*); CEQA Guidelines § 15088.5, subd. (a).)

The trial court's ruling, if upheld, would limit or overturn this long-standing, well-understood CEQA rule and substitute an unprecedented new test for recirculation that is based on whether

a court concludes there are "substantial" differences between a draft and final EIR. This approach is inconsistent with CEQA Guidelines section §15088.5 and leaves recirculation up to a court's discretion, instead of the lead agency's discretion. This holding would create uncertainty for project applicants as to whether changes in an EIR—which the lead agency has determined do not meet the Guidelines' test for recirculation—would still trigger recirculation because a court believes changes to the document are "substantial." This uncertainty will discourage lead agencies from making changes to the draft EIR in response to public comments, undermining the purpose of public participation in the CEQA process.

Amici believe that this Court may benefit from this perspective. Amici's counsel have drafted the accompanying Brief to complement, but not duplicate, the arguments that have already been submitted to this Court by the parties to this case. Amici therefore respectfully request that this Court grant its application and order the accompanying Brief of Amici Curiae to be filed.

DATED: September 22, 2020 Respectfully submitted,

COX, CASTLE & NICHOLSON, LLP

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I. INTRODUCTION

CEQA's public comment and response process is an important opportunity for project applicants to review the adequacy of an EIR and consider changes to correct any purported deficiencies suggested by commenters. (1 Kostka & Zischke, Practice Under the California Environmental Quality Act (2d ed. Cal CEB 2020), § 16.7.) Revising an EIR in response to comments is not only a normal part of the CEQA process, but also a desirable one. Indeed, as the trial court's ruling correctly observes, a "final EIR will almost always contain information not included in the draft EIR given the CEQA statutory requirements of circulation of the draft EIR, public comment, and response to these comments prior to certification of the final EIR." (Joint Appendix ("JA") 1409, citing *South County Citizens for* Smart *Growth v. County of Nevada* (2013) 221 Cal.App.4th 316, 328.)

In enacting CEQA's recirculation provisions, "the Legislature intended to reaffirm the goal of meaningful public participation in the CEQA review process." (*Laurel Heights*

Improvement Assn. v. Regents of University of California (1993) 6 Cal.4th 1112, 1132 (*Laurel Heights II*).) "It is also clear, however, that by doing so the Legislature did not intend to promote endless rounds of revision and recirculation of EIRs. Recirculation was intended to be an exception, rather than the general rule." (*Ibid.*)

Here, CEQA's comment and response process worked exactly as intended. In response to comments on the draft EIR ("Draft EIR") prepared for the Real Party's proposed project ("Project"), the County conducted additional studies that more precisely defined the Project's water supply source. (Joint Opening Brief, at pp. 14–15.) No new impacts were identified, and the Draft EIR's conclusion that the Project would result in a less-than-significant impact to groundwater resources remained unchanged in the Project's final EIR ("Final EIR"). (*Id.* at pp. 15–16.)

That a final EIR contains substantial changes to a draft EIR is not evidence that the draft was "so fundamentally and

basically inadequate and conclusory in nature that meaningful public review and comment were precluded." (CEQA Guidelines, § 15088.5, subd. (a)(4).) It is not the number of changes between the draft and final EIR that matters, but whether the draft EIR was so lacking as to deprive the public of a meaningful opportunity to comment on a project. (§ 15088.5, subd. (a).) Here, the Draft EIR met CEQA's requirements and included enough information to allow the public to make numerous, detailed comments. Further, the lead agency waited almost one and one-half years between circulating the Final EIR and approving the Project, allowing substantial time for additional public comments on the information added to the EIR. (Joint Opening Brief, at p. 15.)

Accordingly, the County properly found that recirculation was not required. (*Id.* at p. 16.)

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

After 14 years of review, the Monterey County ("County") Board of Supervisors approved a 17-lot subdivision on 344 acres

of land (the "Project") proposed by Harper Canyon Realty, LLC ("Real Party"). LandWatch Monterey County and Meyer Community Group (collectively, "Petitioners") challenged the County's approval of the Project, alleging it violated CEQA and was inconsistent with the County's General Plan.

The Petitioners challenged almost every environmental aspect of the project including its analysis of cumulative impacts to groundwater supplies. The Project, with its 12.75-acre feet per year demand, will draw water from the overdrafted Salinas Valley Groundwater Basin.

Both the Draft and Final EIR found that the Project's minimal groundwater demand was less than cumulatively considerable. The Draft EIR concluded that the Project would not result in a significant cumulative impact to groundwater resources because the Project's wells were located in an area with sufficient water from recharge (AR 842–843) and Real Party would pay assessments for established regional groundwater management programs designed to bring the basin into balance

and reduce seawater intrusion (AR 830, 837).

The Final EIR did not alter the Draft EIR's conclusions. In response to comments on the Draft EIR, the Final EIR included a revised version of the Groundwater Resources and Hydrogeology chapter in strike-out format. The revised groundwater analysis included the results of an additional technical study as well as newly available basin maps from the State Department of Water Resources. The new study and maps clarified the Project's groundwater setting and the County updated the Project's cumulative impact analysis accordingly. However, the "less than significant" cumulative impact conclusion remained unchanged in the Final EIR. (AR 363, 377, 384–387.)

The trial court held the Draft EIR should have been recirculated because the text changed too much between the Draft and Final EIRs, citing the uncommon ground of recirculation reserved for a draft EIR that is "so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded." (CEQA

Guidelines, § 15088.5(a)(4).) Both sides appealed to the Sixth District Court of Appeal.

III. ARGUMENT

One of the most difficult aspects of the CEQA process for project proponents is "uncertainty about the requirements for full compliance with CEQA and the CEQA Guidelines." (Kostka & Zischke, *supra*, § 2.5.) "This uncertainty permeates the entire CEQA process," including deciding whether projects are exempt, or whether to prepare a negative declaration or an EIR; determining an appropriate methodology, scope of issues, and range of alternatives to include in an EIR; and evaluating whether impacts analyzed in an EIR can be mitigated to a less-than-significant level. (*Ibid.*)

The trial court's ruling, if upheld, would inject uncertainty into an area where CEQA case law has provided needed certainty for decades. Specifically, the trial court's ruling conflicts with the well-established line of case law that sets forth the legal standards governing when an EIR must be recirculated for a second round of public review before certification. (*Laurel Heights*

II, *supra*, 6 Cal.4th at pp. 1129–30; CEQA Guidelines, § 15088.5, subd. (a).) This Court should not lightly toss aside decades of relative certainty in CEQA practice.

A. Recirculation Under CEQA Guidelines Section 15088.5(a)(4) Is Reserved For Rare Situations In Which A Draft EIR Omits Or Provides Only A Cursory Analysis Of A Mandatory CEQA Topic.

An EIR is normally circulated for only one round of public review and comment. If significant new information is added to an EIR after the draft EIR has been made available for public review, however, a lead agency must recirculate the EIR for a second round of comments before certifying the EIR. (Pub. Resources Code, § 21092.1; CEQA Guidelines, § 15088.5, subd. (a).) New information is "significant" only if as a result of the additional information "the EIR is changed in a way that deprives the public of a meaningful opportunity to comment upon a substantial adverse environmental effect of the project or a feasible way to mitigate or avoid such an effect." (CEQA Guidelines, § 15088.5, subd. (a); *Laurel Heights II*, *supra*, 6 Cal.4th at p. 1129.)

Recirculation is typically triggered by only "significant" new information added to an EIR, meaning information that shows (1) a new, substantial environmental impact resulting from the project or a mitigation measure; (2) a substantial increase in the severity of an environmental impact, unless mitigation is adopted that reduces the impact to insignificance; or (3) a feasible alternative or mitigation measure, considerably different from those considered in the EIR, that would clearly lessen the significant environmental impacts of a project and the project proponent declines to adopt it. (CEQA Guidelines, § 15088.5, subds. (a)(1)–(3); *Laurel Heights II, supra*, 6 Cal.4th at p. 1130.)

A fourth, less common type of "significant" new information triggering recirculation is information that shows "[t]he draft EIR was so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded." (CEQA Guidelines, § 15088.5, subd. (a)(4), citing *Mountain Lion Coalition v. California Fish and Game*

Commission (1989) 214 Cal.App.3d 1043 (*Mountain Lion*)). This test for recirculation applies to the rare situation in which a draft EIR wholly omits an analysis of certain impacts or includes only a conclusory analysis of impacts. (*See Mountain Lion*, *supra*, 214 Cal.App.3d 1043 [draft EIR omitted any analysis to support cumulative impact conclusions]; *Ukiah Citizens for Safety First v. City of Ukiah* (2016) 248 Cal.App.4th 256 [recirculation was required where the EIR did not contain requisite details about the project's energy impacts]; Cal. Natural Resources Agency, Rule Making File, Amendments to the Guidelines for Implementation of the California Environmental Quality Act (1994) (hereafter Rule Making File) § 18 at pp. 12–13 [recirculation under 15088.5, subdivision (a)(4), "is less likely to occur" than under other subdivisions and is "not common"].[1])

By contrast, recirculation is not required when the new information merely clarifies, amplifies, or makes insignificant

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[1] The relevant sections of the Rule Making File cited in this Brief are attached as Exhibit 1 to Amici's Request for Judicial Notice.

modifications to a previously circulated draft EIR. (CEQA Guidelines, § 15088.5, subd. (b). (*Beverly Hills Unified Sch. Dist. v. Los Angeles County Metro. Transp. Auth.* (2015) 241 Cal.App.4th 627, 663 [new fault and tunneling studies included in the final EIR confirmed conclusions in draft EIR; EIR was not changed in manner that deprived public of opportunity to comment on significant impacts]; *Clover Valley Found. v. City of Rocklin* (2011) 197 Cal.App.4th 200, 223 [specific information added to final EIR about cultural resources sites added narrative detail about resources' characteristics but did not add new information affecting EIR's impact findings]; *California Oak Found. v. Regents of Univ. of Cal.* (2010) 188 Cal.App.4th 227, 266 [new seismic study and requests by agencies for further investigation added to the final EIR did not show significant new seismic hazards and recirculation not required].)

Further, as the trial court's ruling correctly states, "[a]n agency's determination not to recirculate an EIR is given substantial deference and is presumed to be correct. A party

challenging the determination bears the burden of showing that substantial evidence does not support the agency's decision." (JA 1409–10, citing *Beverly Hills Unified School District v. Los Angeles County Metropolitan Transportation Authority* (2015) 241 Cal.App.4th 627, 661; CEQA Guidelines, § 15088.5, subd. (e).) As discussed below, the trial court did not abide by this standard.

1. The trial court erred by rejecting the well-established recirculation test under CEQA Guidelines section 15088.5, subdivision (a)(4), in favor of creating an unprecedented new legal test.

Here, the trial court concluded that the Draft EIR must be recirculated under CEQA Guidelines section 15088.5, subdivision (a)(4), because "[t]he extent of the [Final] EIR's revisions, which included a greatly modified environmental setting, reliance upon a new technical study, and a complete re-write of the [Draft] EIR's cumulative impact analysis, was so substantial that it deprived the public of an opportunity to meaningfully participate in the EIR process." (JA 1414; but see Joint Opening Brief, at pp. 47–60 [explaining why none of the revisions showed that the

Draft SEIR was inadequate].) Furthermore, the trial court found that the Draft EIR's cumulative impacts analysis was "wholly deficient" because the Final EIR's cumulative impacts analysis "contained entirely new reasoning in support of its conclusion" and was "based upon an expanded geographic scope of analysis." (*Ibid.*) However, in so reasoning, the trial court created an unprecedented new legal test for recirculation.

The trial court completely ignored the well-established recirculation test under CEQA Guidelines section 15088.5, subdivision (a)(4). As discussed above, the test is not whether there are substantial revisions made between a draft EIR and a final EIR, but rather whether a draft EIR wholly omits or includes only a conclusory analysis of impacts such that it precludes meaningful public review and comment. (*Mountain Lion*, *supra*, 214 Cal.App.3d 1043, 1051.)

Here, the Draft EIR included a thorough, detailed analysis of the Project's impacts to groundwater resources as well as its cumulative impacts and concluded that the impacts would be less

than significant. (Joint Opening Brief, at pp. 44, 47, 58.) Even the trial court acknowledged that "substantial evidence supports the County's conclusion that the Project would not have a cumulative impact on groundwater resources . . . ." (JA 1435.) This finding shows that Petitioners' failed to meet their burden of showing that substantial evidence does not support the agency's decision. (JA 1409–10.)

Furthermore, despite the additional information included in the Final EIR, no new or substantially more severe impacts were identified. (Joint Opening Brief, at pp. 16, 30.) Since no significant new information was added to the Final EIR, the County determined that the additional analysis merely "clarifi[ed] the reasons why the Project would continue to have a less than significant cumulative impact to groundwater resources." (*Id.* at p. 60.) The clarification and amplification at issue here results from the same type of new information other courts have held do not trigger recirculation, including (1) modifying the environmental setting (e.g., *Chaparral Greens v.*

City of Chula Vista (1996) 50 Cal.App.4th 1134, 1148–1151 [additional information from new mapping and habitat studies, the listing of a species as threatened, and issuance of draft conservation regulations and guidelines did not require EIR recirculation]), (2) adding new technical studies (e.g., *Mount Shasta Bioregional Ecology Center v. County of Siskiyou* (2012) 210 Cal.App.4th 184, 220–221 [new noise measurements and two noise studies included in the final EIR did not require recirculation]; *California Oak Found.*, *supra*, 188 Cal.App.4th at pp. 266–267 [recirculation not required where final EIR included a new geotechnical report]), and (3) adding a new reason for reaching the same conclusion as already disclosed in a draft EIR (e.g., *Residents Against Specific Plan 380 v. County of Riverside* (2017) 9 Cal.App.5th 941, 966 [recirculation not required despite inclusion in the final EIR of new analysis of a modified project that confirmed the impact conclusions of the draft EIR]). In sum, the County's decision not to recirculate the EIR was supported by substantial evidence (AR 825–844) and is consistent with

published case law. The trial court erred in substituting its own judgment for the County's and ruling that recirculation was required. (JA 1413.)

2. Petitioners mischaracterize the legal standard for recirculation under CEQA Guidelines section 15088.5, subdivision (a)(4).

Petitioners claim that "the paradigm recirculation case" under CEQA Guidelines section 15088.5, subdivision (a)(4) is not *Mountain Lion*, *supra*, 214 Cal.App.3d 1043, but *Sutter Sensible Planning, Inc. v. Board of Supervisors* ("*Sutter*") (1981) 122 Cal.App.3d 813 (Joint Opposition Brief, at p. 52.) Petitioners contend *Sutter* holds that Section 15088.5, subdivision (a)(4), recirculation is not limited to the rare situation in which a draft EIR omits analysis entirely or provides only a conclusory discussion. Instead, Petitioners argue recirculation may be required despite a draft EIR's substantive discussion where subsequent information in the final EIR discloses that the draft EIR was so inadequate as to preclude meaningful public

comment, despite no changes to the impact conclusions. (*Id.* at p. 55.)

However, Petitioners mischaracterize the legal standard for recirculation under Section 15088.5 subdivision (a)(4). First, the plain text of Section 15088.5 subdivision (a)(4) cites to *Mountain Lion, supra*, 214 Cal.App.3d 1043. Second, the Rule Making File for Section 15088.5 confirms that the Resources Agency intended to limit recirculation under Section 15088.5 subdivision (a)(4) to fact patterns like *Mountain Lion*:

> Subsection (a)(4) codifies the ruling in *Mountain Lion Coalition v. California Fish and Game Commission* (1989) 214 Cal.App.3d 1043 as interpreted in *Laurel Heights II*. In the *Mountain Lion Coalition* case, the court ruled that a draft EIR had to be recirculated where the draft was cursory in its treatment of several issues and the lead agency tried to cure the defects in a greatly expanded final EIR. The court was critical of the practice of deferring a detailed analysis to the final EIR because the final EIR is not circulated for public review.

(Rule Making File, § 14 at p. 8.) In contrast, the Rule Making File specifies that "Subsection (a)(2) codifies the ruling in *Sutter*

Sensible Planning, Inc. v. Board of Supervisors (1981) 122 Cal.App.3d 813." (Rule Making File, § 14 at p. 7.)

In limiting the application of recirculation under Section 15088.5 subdivision (a)(4), the Resources Agency emphasized the importance of promoting certainty for project applicants: "In order to provide some certainty to public agencies and project applicants, the language of this subsection sets a high standard, such that recirculation would not be expected to occur as frequently as under other circumstances."[2] (Rule Making File, § 9 at p. 8.)

As discussed in the next section, Petitioners' mischaracterization of the Section 15088.5 subdivision (a)(4) recirculation test would tip the balance in favor of unnecessary additional procedural requirements that could have a chilling

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[2] When initially introduced, the language that became codified as Section 15088.5, subdivision (a)(4), was labeled subdivision (a)(5). (Rule Making File, § 18 at p. 11.)

effect on housing development by imposing additional delays and financial burdens on project applicants.

B. The Policy Implications Of The Trial Court's Ruling Would Have Far-Reaching Consequences.

We urge the Court to refrain from injecting further uncertainty and legal exposure into an already complex process. While this case addresses technical issues endemic to Monterey, the implications of an appellate ruling on recirculation will reverberate across the entire state and across all EIR topics.

There would be great uncertainty about what information triggers recirculation if the trial court's "substantial changes" rule replaces the existing "significant" new information rule. What may seem like a substantial number of changes to one lead agency and court may not to another. Faced with such uncertainty, lead agencies are bound to err on the side of undue caution and to recirculate draft EIRs under circumstances where recirculation would not be required by the plain language of Section 15088.5. This Court should be hesitant to expand the existing interpretation of Section 15088.5. (See Pub. Resources

Code, § 21083.1 ["It is the intent of the Legislature that courts . . . shall not interpret this division or the state guidelines adopted pursuant to Section § 21083 in a manner which imposes procedural or substantive requirements beyond those explicitly stated in this division or in the state guidelines."].)

The practical effect of affirming the trial court on project applicants would be twofold.

First, project applicants will be less willing to agree to project changes in response to comments since project changes (such as changes to the mix of uses) made after the release of the draft EIR could trigger recirculation. But the purpose of the draft EIR public comment period is to elicit feedback to make the project better. (See, e.g., *Residents Against Specific Plan 380*, *supra*, 9 Cal.App.5th at pp. 953–955, 967–968 [numerous project changes made after the release of the draft EIR to address neighbor and lead agency concerns held not to require recirculation where new analysis showed the modified project would have the same or less environmental impacts as the project

analyzed in the draft EIR]; *Western Placer Citizens for an Agricultural & Rural Environment v. County of Placer* (2006) 144 Cal.App.4th 890, 894–895, 903 [recirculation not required where project was modified to minimize environmental impacts to agricultural lands after the release of the final EIR but before approval].) The Court should be wary of discouraging project applicants from revising the project to respond to comments or information arising during the CEQA process.

Second, EIRs will take longer and be more expensive, as new information or changes in circumstances often occur during the two and one-half years it typically takes to entitle a housing project requiring an EIR (Legislative Analyst's Office (Mar. 17, 2015) *California's High Housing Costs, Causes and Consequences* (hereafter LAO Report), p. 18, available at https://lao.ca.gov/reports/2015/finance/housing-costs/housing-costs.pdf [as of September 19, 2020]). The facts of this case prove the point: the 17-home Project took 14 years to approve and during that time, changes occurred. The Court must be careful

not to lose sight of how often new information emerges during the EIR process and to not disturb the settled rules for recirculation. (E.g., *Chaparral Greens*, *supra*, 50 Cal.App.4th at p. 1149 [changes after the release of the draft EIR, including the listing of bird as threatened and the issuance of a proposed special rule precluding development in the bird's habitat areas by the Fish and Wildlife Service not significant new information requiring recirculation of the EIR before certification]; see *Fort Mojave Indian Tribe v. Department of Health Servs.* (1995) 38 Cal.App.4th 1574, 1590 [a new regulation designating critical habitat for an endangered species not "significant new information" requiring a supplemental EIR because the issue of impacts to the species had been addressed in the original EIR].)

Under the trial court's rule, the typical lengthy EIR process could be lengthened by multiple rounds of recirculation even if the new information would not alter the Draft EIR's impact conclusions. For housing projects, the resulting additional entitlement cost ultimately will be passed on to homebuyers,

exacerbating California's housing affordability crisis (see LAO Report, *supra* [documenting the housing affordability crisis]).

Such an outcome is undesirable, unnecessary, and contrary to CEQA.

IV. CONCLUSION

The trial court erred in ignoring CEQA's longstanding recirculation standard. Here, in line with CEQA's purposes and policies, the County conducted additional analysis in response to public comments on the Draft EIR. The County's analysis amplified and provided further reasons for the conclusions in the draft EIR, which should not trigger recirculation. The trial court, by overturning the well-established recirculation standard under CEQA Guidelines section 15088.5, which has helped to promote certainty in the last three decades, exacerbates the uncertainty abounding in the CEQA process. Additional uncertainty will increase development costs, result in projects that are less responsive to public comments, and exacerbate the existing housing affordability crisis.

The Amici appreciate the opportunity to provide this perspective to the court.

Respectfully submitted,

DATED: September 22, 2020 COX, CASTLE & NICHOLSON, LLP

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CERTIFICATE OF WORD COUNT

[Cal. Rules of Court, Rule 8.204(c)]

Pursuant to Rule 8.204(c) of the California Rules of Court, I hereby certify that this **[PROPOSED] AMICI CURIAE BRIEF** contains 3,599 words, according to the word counting function of the word processing software used to prepare this brief.

Executed on September 22, 2020, at San Francisco, California.

/s/ Michael H. Zischke
Michael H. Zischke

PROOF OF SERVICE AND CERTIFICATION

CASE NAME: ***Landwatch Monterey County, et al. v. County of Monterey***
CASE NUMBER: **Sixth Appellate District, Case No. H046932**
TRIAL COURT: **Superior Court – Monterey County**
Case No. M131913 & M131893, Consolidated for Trial Only

I am employed in the County of San Francisco, State of California. I am over the age of 18. My business address is 50 California Street, Suite 3200, San Francisco, California, and my email address is psanchez@coxcastle.com.

On September 22, 2020, I caused the foregoing documents described as:

1) **APPLICATION OF THE CALIFORNIA BUILDING INDUSTRY ASSOCIATION, CALIFORNIA BUSINESS PROPERTIES ASSOCIATION, AND BUILDING INDUSTRY ASSOCIATION OF THE BAY AREA FOR LEAVE TO FILE AN AMICI CURIAE BRIEF IN SUPPORT OF APPELLANTS COUNTY OF MONTEREY AND HARPER CANYON REALTY, LLC; [PROPOSED] AMICI CURIAE BRIEF**
2) **AMICI'S REQUEST FOR JUDICIAL NOTICE SUPPORTING [PROPOSED] AMICI CURIAE BRIEF**

to be sent to the persons at the electronic addresses listed below.

Superior Court of California Monterey County Courthouse Clerk's Office 1200 Aguajito Road Monterey, California 93940 ***Courtesy copy via U.S. Mail***	**Attorneys for Plaintiff & Appellant** **Landwatch Monterey County** John Hawks Farrow M R Wolfe & Associates, P.C. 580 California Street, Suite 1200 San Francisco, CA 94104 *Telephone: 415-369-9400* *Email:* jfarrow@mrwolfeassociates.com
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BY ELECTRONIC TRANSMISSION: I personally electronically served all parties the foregoing documents described above through **TrueFiling**. Upon completion of the electronic file transmission, an electronic filing receipt page was issued as confirmation that the documents were received, filed and served. [CCP §1010.6; CRC §2.251, et seq.]

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 22, 2020, at San Francisco, California.

/s/ Peggy Sanchez
Peggy Sanchez