Case No. G045622

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

BANNING RANCH CONSERVANCY

Petitioner and Appellant,

vs.

CITY OF NEWPORT BEACH AND CITY OF NEWPORT BEACH CITY COUNCIL

Respondents,

NEWPORT BANNING RANCH LLC, AERA ENERGY LLC, CHEROKEE NEWPORT BEACH LLC, AND DOES 1-20

Real Parties in Interest and Respondents.

Appeal From a Judgment Entered in Favor of Respondent
Orange County Superior Court Case No. 30-2010-00365758
Honorable Gail A. Andler, Judge

APPELLANT'S REPLY BRIEF

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PRELIMINARY STATEMENT

The brief submitted by Respondent City of Newport Beach ("City"), and joined by Real Parties in Interest (referred to herein as Newport Banning Ranch or "NBR") (collectively "Respondents"), consists of a series of evasions. While Respondents appear to recognize the California Environmental Quality Act's ("CEQA's") requirements for full information disclosure, they distort key facts to avoid *applying* those requirements to the deficient Environmental Impact Report ("EIR") for the City's Sunset Ridge Park ("Park" or "Project").

With respect to Appellant Banning Ranch Conservancy's ("Conservancy" or "Appellant") segmentation claim, Respondents acknowledge long-standing CEQA law: an agency must examine the environmental consequences of the ultimate planned development prior to approving a first step toward that development. Respondents' Brief ("RB"):21 (citing *Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 279-85). However, when faced with indisputable evidence that the challenged Park approvals include the first step toward a massive development on the neighboring NBR property, Respondents simply assert that "the City took no action to approve or advance the NBR project when it approved the Park Project." RB:21-22. This bald statement cannot stand. In fact, the record demonstrates that the City *entered into a contract* with NBR, obligating the City to construct, as part of the Project, particular

roadway and other infrastructure designed to serve the NBR development. The City's failure to analyze the NBR project prior to these approvals violates CEQA. *Bozung*, 13 Cal.3d at 279-85.

Respondents defend the City's action by urging that alleged constraints on the City-owned property compelled it to enter the agreement with NBR for alternate access. RB:9-10. In reaching this agreement, Respondents argue, it is "hardly surprising" that NBR would require the infrastructure to be built to its specifications. RB:23. This argument misses the point. It may have made sense from the City's and NBR's perspective to reach their *quid pro quo*: the City gains access to the Park without having to buy land, while NBR receives infrastructure needed for its proposed development. But this convenient arrangement does not justify the City's avoidance of CEQA. To the contrary, because the two actions are legally linked in this fashion, the City must analyze the environmental consequences of the Park and the NBR development *together* so that the public and decisionmakers are aware of the full consequences of the City's approval. *See Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora* (2007) 155 Cal.App.4th 1214, 1226 ("*Tuolumne*").

Respondents insist that the City's small Park could not possibly be related to a private developer's large residential and commercial project. RB:15. However, the projects' relative size is irrelevant to whether the

City improperly piecemealed review for the "whole of an action." Guidelines § 15378(a).[1] In fact, CEQA's prohibition on segmentation is designed precisely to ensure that an agency does not chop "a large project into small pieces in order to avoid detailed environmental review." *Berkeley Keep Jets Over the Bay v. Bd. of Port Comrs.* (2001) 91 Cal.App.4th 1344, 1357. Here, the approval of the City's "small" Park includes major elements of the infrastructure providing vital access to the NBR project. If the City had approved *only* this infrastructure, there would be no question that such action triggers CEQA review of the entire NBR development. *See Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 396-98. This result does not change merely because the City approved its Park at the same time.

It also makes no difference under CEQA that the Park is a City project and NBR is a private one. *See, e.g., Plan for Arcadia, Inc. v. Arcadia City Council* (1974) 42 Cal.App.3d 712, 720, 726. Because the Access Agreement is a public-private contract that legally links the two endeavors, they must be reviewed together. *Id.* Moreover, the record reflects that the City and NBR actively coordinated the environmental review for the Park and NBR project, even using the same environmental

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[1] The CEQA Guidelines, Cal. Code Regs, tit. 14 § 15000 *et seq.*, are referred to as "Guidelines."

consultant. *E.g.*, Administrative Record ("AR"):2433-34, 2470-72. Thus, the City could have easily combined the EIRs for the two actions, but declined to do so. Instead, the City took pains to isolate the environmental reviews, even jettisoning NBR project information from the Park EIR. *E.g.*, AR:10082, 10297, 10609. Such actions contravene CEQA's mandate to interpret the term "project" as broadly as possible so as to "maximize protection of the environment." *Tuolumne*, 155 Cal.App.4th at 1222-23.

In a final attempt to defend the EIR's failure to consider NBR as part of the Project, Respondents distort the City's General Plan provisions relating to Bluff Road. After vehemently arguing that the Park approvals do not include construction of Bluff Road (RB:22), Respondents switch gears to assert that the City has always planned to build Bluff Road "independent" of the NBR project. RB:27-28. This ploy cannot succeed. In fact, the General Plan clarifies that Bluff Road is planned *only if NBR is developed*. AR:6889. There is no evidence that the City intends to construct Bluff Road independent of NBR.

Respondents likewise fail to justify the EIR's omission of a proper analysis of the Project's cumulative and growth-inducing impacts. As Respondents acknowledge (RB:29-31), even if the Park and the NBR development could be viewed separately, CEQA requires such analyses to ensure that the City does not consider the projects in isolation. Respondents expressly concede that the EIR's cumulative traffic analysis

did not include the NBR project. RB:33. This omission is fatal: because NBR is a neighboring project currently undergoing environmental review, CEQA mandates that it be included in the cumulative impacts analysis. *Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo* ("*Bishop*") (1985) 172 Cal.App.3d 151, 168. As for the Project's growth-inducing impacts, Respondents admit that the Park's drainage improvements were "oversized" to accommodate the NBR development. RB:48. Yet, even though CEQA requires disclosure of the Project's ability to facilitate the NBR development through such oversizing of infrastructure (*City of Antioch v. City of Pittsburg* (1986) 187 Cal.App.3d 1325, 1335-36), the EIR omitted the analysis.

Respondents attempt in litigation to rely on the General Plan EIR to substitute for the missing cumulative and growth-inducing analysis. RB:36-37, 45. This tactic fails for two reasons: (1) the City's post-hoc rationalizations cannot cure the Project EIR's omissions, and (2) the General Plan EIR lacks the required analysis.

Respondents also cannot justify their abbreviated analysis of the Project's extensive biological impacts. While they claim that the EIR need not have considered "significant" the Project's proposed destruction of acres of "disturbed" habitat for the federally threatened Coastal California Gnatcatcher ("gnatcatcher") (RB:50-54), the undisputed evidence is otherwise. In fact, because gnatcatchers actually use these areas, the U.S.

Fish and Wildlife Service ("FWS") has designated them as critical habitat for the species. 72 Fed.Reg. 72069. And, if the City would cease its illegal mowing, much of this habitat would be restored. AR:424, 1741-47.

Respondents next attempt to dismiss the Project's consistency with the California Coastal Act as irrelevant to the CEQA analysis for the Project. RB:57-61. Again, Respondents are mistaken. As the EIR acknowledges, the CEQA Guidelines require the EIR to include such an analysis because the Project is subject to the Act; indeed, the Project cannot proceed without a permit from the California Coastal Commission. AR:210-11; Guidelines, App. G § X(b).

Finally, Respondents offer erroneous procedural arguments. They distort the applicable standard of review, urging the Court to apply the "substantial evidence" test to Appellant's claims. However, this test does not apply where, as here, an EIR fails to include sufficient information about the Project and its potential impacts. *E.g.*, *Citizens to Preserve the Ojai v. County of Ventura* (1985) 176 Cal.App.3d 421, 428 ("Certification of an EIR which is legally deficient because it fails to adequately address an issue constitutes a prejudicial abuse of discretion . . . ."). In those circumstances, the Court must determine, as a matter of law, whether the EIR "failed to comply with the information disclosure provisions of CEQA." *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1208. Furthermore, even if the substantial

evidence test applied, it does not give the City carte blanche to ignore record evidence or to rely on conclusory statements for its actions. § 21082.2(c).[2]

Respondents also claim the Conservancy did not exhaust its administrative remedies. RB:33-34, 55-56. CEQA's standard for exhaustion, however, demands far less detail than Respondents suggest. All that is required is that the comments "fairly apprise[]" the agency of the "substance" of the issue. *Save Our Residential Environment v. City of West Hollywood* ("*SORE*") (1992) 9 Cal.App.4th 1745, 1750. Each of the issues raised in this action was squarely presented to the City prior to the Project's approval, and is properly before this Court.

Because the City prejudicially abused its discretion in certifying a deficient EIR, the Conservancy respectfully requests the Court to grant the appeal.

ARGUMENT

I. Respondents Cannot Justify "Piecemealing" the Review for the Sunset Ridge and NBR Projects.

A. The Fourth District Has Held that "Project Description" Claims Must Be Reviewed as a Matter of Law.

As Appellant's opening brief explained, the trial court employed the wrong standard of review for the Conservancy's segmentation claim by

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[2] Unless otherwise noted, all statutory references are to the Public Resources Code.

relying on the substantial evidence test. Appellant's Opening Brief ("AOB"):17-18. Under settled law, the Court reviews such claims as a matter of law. *See, e.g.*, *Tuolumne*, 155 Cal.App.4th at 1223-24; *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 82-83 ("*CBE*"). Respondents concede that the Fifth District has held that the substantial evidence test does not apply to piecemealing claims, but assert that this "appears to be a question of first impression for the Fourth District." RB:15. It is not.

On at least two occasions, the Fourth District held that, "[i]f a final EIR does not 'adequately apprise all interested parties of the true scope of the project for intelligent weighing of the environmental consequences of the project,' informed decisionmaking cannot occur under CEQA and the final EIR is inadequate as a matter of law." *Riverwatch v. Olivehain Municipal Water District* (2009) 170 Cal.App.4th 1186, 1201, 1203 (activities related to trucking recycled water were part of whole project to be reviewed) (quoting Fourth District opinion in *City of Santee v. County of San Diego* (1989) 214 Cal.App.3d 1438, 1454-55). Other Districts have cited *Riverwatch* and *Santee* as establishing the correct standard of review for segmentation claims. *See, e.g.*, *CBE*, 184 Cal.App.4th at 82-83 (citing *Riverwatch*); *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 730 (citing *Santee*).

Thus, there is no question that this Court reviews Appellant's "piecemealing" claim as a matter of law, based on the undisputed facts in the record.

B. Respondents Are Wrong in Claiming that the City Has Approved No Element of the NBR Project.

Respondents concede that where an agency's "approval was the first step in [a] plan to develop [a] property," the agency must "consider the impacts of the ultimate development." RB:21 (citing *Bozung*, 13 Cal.3d at 279-85). Nevertheless, Respondents claim the Project EIR properly excluded analysis of the proposed NBR development because "the City has not approved *any* element of the NBR project." RB:22 (emphasis in original). They even state that, other than "the alignment for a short segment of a single roadway, [the projects] share no other commonalities." RB:15.

Respondents are wrong. In fact, the record is replete with evidence demonstrating that, as part of the Park approval, the City authorized the key first steps towards the NBR project by approving specific features of that project's primary roadway and related infrastructure. The City violated CEQA by failing to evaluate the NBR project's ultimate planned development. *Bozung*, 13 Cal.3d at 279-85.

1. The City Has Approved the First Phase of Bluff Road, the "Primary Roadway" Serving the NBR Project.

The City approved, as part of Sunset Ridge, the first phase of Bluff Road, the road planned as the "primary roadway" through the NBR project. AR:8082-83. The City's attempts to rebut this fact are unavailing.

First, the City claims "the park access road is not Bluff Road as it is envisioned . . . as part of the NBR project." RB:22. However, the record clarifies that the access road was *purposely* designed to serve the NBR project. As the City's engineer stated, the City went through "a lot of pain to get [NBR's] road in at [NBR's] grades." AR:7961. Respondents do not address this comment and do not dispute that it is relevant evidence in determining the Conservancy's segmentation claim. *See Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1380; *Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 155 (statement from planning department constitutes relevant evidence).

Similarly, other staff communications reveal the Project was contingent upon "agreement as to the location and alignment of the access road for both Banning Ranch and Sunset Ridge Park." AR:8105. While the City asserts that it is "hardly surprising that the easement grantor had input into [the road's] design and construction" (RB:23), NBR had more than mere "input." In fact, the City agreed to build the first phase of NBR's proposed development in exchange for an easement across its property to

access the Park. AR:2648-52. Under CEQA, the consequence of this arrangement is that the City must review both projects *together*. *See Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 431 (EIR "must assume that all phases of the project will eventually be built," even if further approvals are necessary); *Tuolumne*, 155 Cal.App.4th at 1231 (projects that are legally linked must be analyzed together).

Second, the City argues that "the park access road is not Bluff Road as it is envisioned in the City's General Plan and the [Master Plan of Arterial Highways]." RB:22. However, in its next breath, the City admits that it "agreed to use the 'Bluff Road' alignment [for its access road], which makes sense because the City identified a 'Bluff Road' through the property in its General Plan." RB:23. The Court should not countenance such "bureaucratic doubletalk." *City of Davis v. Coleman* (9th Cir. 1975) 521 F.2d 661, 674. Throughout the administrative process, the City repeatedly acknowledged that the Park access road *was* Bluff Road. *See, e.g.*, AR:309 (EIR traffic analysis depicting Bluff Road on Project site), 1562 (EIR acknowledging NBR project "would take access from the same roadway" as Park), 2659 (Access Agreement depicting access road from Pacific Coast Highway ("PCH") as "Proposed Bluff Road"), 8443-44 (coordination of hydrological issues for "Bluff Road" as they apply to Sunset Ridge and NBR), 8450 (City engineer describing "park access road"

as "ultimate Bluff Road"). Furthermore, the Access Agreement legally binds the City to construct the Park access road in the same alignment as Bluff Road. AR:2648.

Third, the City repeatedly claims that the access road is "gated," implying that only Park users will be able to use the road. *See, e.g.*, RB:23. This is not the case. As Respondents concede (RB:23), the Access Agreement specifically allows NBR to use the road for its development. AR:2648, 2650.

Finally, the City argues the access road is relatively short compared to what is ultimately planned for Bluff Road and therefore "cannot reasonably be characterized" as serving the NBR project. RB:22-23. Respondents miss the point. The fact that the road will be further widened and extended in conjunction with the NBR project does not erase the reality that the City has *already approved* the first phase of that road, in an alignment serving the NBR project. AR:8082-83, 7961. It is this "first step" that triggers CEQA's requirement that the City examine the entire NBR project, regardless whether it requires further discretionary approvals. *City of Carmel-By-the-Sea v. Bd. of Supervisors* (1986) 183 Cal.App.3d 229, 243-44. Even though this initial step may be "small" in the City's eyes, it is crucial for the NBR project. Once access to this currently undeveloped property is achieved, there will be significant "bureaucratic

and financial momentum" to approve the remainder of the development. *Laurel Heights*, 47 Cal.3d at 395-96.

2. The City Has Approved a Traffic Signal on Pacific Coast Highway, Whose "Main Reason" Is to Serve the NBR Project.

The City's approvals also include construction of a signalized intersection on PCH. AR:123, 2650-51. As Caltrans explained, "the main reason behind [the signal] is to provide motorists access to the Banning Ranch Development." AR:1899; *see also* AR:1477 (EIR acknowledging that Park alone would not generate enough traffic for signal on PCH). In response, the City admits that "the park itself does not meet signal warrant standards," but claims that without the traffic signal, turning into the Park would be "constrained." RB:24. This argument strains credulity. Caltrans concluded that a signalized intersection will "seriously disrupt progressive traffic flow" on one of the City's major thoroughfares. AR:1479. More importantly, no credible evidence supports the City's claim that a signal is needed for the 173 cars per day entering the Park. AR:313.

The City then argues that the Access Agreement, which requires the City to construct the signal, recognizes that the signal must receive Caltrans approval. RB:24. Thus, the City claims, Caltrans is free to reject the signal if it determines it is unwarranted. *Id.* This argument fails for two reasons. First, the fact that another agency may have approval authority over the signal does not make the City's current approval of the signal any less

critical to the NBR project. *See Bozung*, 13 Cal.3d at 279 (That future approvals may never occur "does not retroactively turn a project into a nonproject.").

Second, as Respondents fail to acknowledge, the City—rather than Caltrans—may ultimately have approval authority over the signal. AR:12288-89. Under AB 344, now codified at Streets and Highways Code section 301.3, the California Transportation Commission ("CTC") can relinquish Caltrans' control over a portion of PCH, including the intersection with Bluff Road, to the City. AR:12896. If the CTC approves such relinquishment, "the [C]ity could install the proposed traffic signal without approval from [Caltrans]." AR:14709. Indeed, the City has actively pursued relinquishment since its last General Plan update in 2006. AR:7324, 2895.

In sum, the record reveals that the Project includes a traffic signal primarily serving the NBR development. The City fails to provide any credible evidence to the contrary. Under CEQA, the EIR must analyze the ultimate consequences of this initial commitment to the NBR project. *Bozung*, 13 Cal.3d at 279-85.

3. The City Deliberately Sized the Project's Entryway from Pacific Coast Highway to Accommodate the NBR Project.

The Sunset Ridge approvals also include the widening of PCH to accommodate a four-lane divided entryway planned for the NBR project.

AR:123, 186, 2651, 8078, 8082. In response, the City states only that "NBR's owners agreed to donate additional property in fee to facilitate a turn lane from Coast Highway at no cost with the proviso that the City would have to pay for the improvements for that turn lane." RB:24.

But the donated land did not come at "no cost." In fact, the record demonstrates that the City's agreement to widen PCH and build the four-lane entryway deliberately accounted for the extra space needed "for future improvements to the intersection by Banning Ranch." AR:8449 (City's engineering and EIR consultants providing road-widening specifications to be used "for both the Sunset Ridge Park EIR and the Newport Banning Ranch EIR").

By thus altering its Project components to accommodate the NBR development, the City took an initial step toward that development. Under CEQA, this step must be analyzed in the Project's EIR. *Fullerton Joint Union High School Dist. v. State Bd. of Education* (1982) 32 Cal.3d 779, 795 (disapproved on other grounds) (EIR must evaluate "a necessary step in a chain of events which would culminate in physical impact on the environment").

4. The City Purposely Sized the Project's Hydrological Improvements to Serve the NBR Project.

Respondents concede the City agreed to construct the Project's water quality, drainage, and erosion control improvements "in accordance with

the specifications provided by" NBR. RB:23 (citing AR:1338, 2649). Nevertheless, Respondents claim, without citation, that this was to "assure [NBR] that the road did not impair its property." *Id.* The record is otherwise.

In fact, the City designed the hydrological improvements for the precise purpose of accommodating the full amount of development planned by NBR. *See* AR:8443-46. For example, the City's consultant assured NBR in writing that the City intended, as part of Sunset Ridge, to "size the [storm drain] connection [on Bluff Road] for ultimate Q [(flow rate)] from Banning and to provide a stub for [NBR's] future connection. Fuscoe [(NBR's engineer)] will provide the Q [(flow rate)] and pipe size for [NBR's] ultimate design." AR:8444; *see also* AR:8954-56 (City and NBR representatives coordinating hydrological components).

Thus, the record evidence, unquestioned by Respondents, demonstrates the City's deliberate decision to incorporate hydrological elements of the NBR project into its Sunset Ridge approvals. Nothing in the record supports Respondents' theory that a more limited approach (i.e., sizing the drainage improvements to serve only the Park access road) somehow posed a safety risk.

5. The Park Project Includes Provisions for Development-Ready Fill on the NBR Project Site.

Finally, the Project includes provision of 35,000 cubic yards of "engineered" (or pre-compacted) fill to the NBR property. AR:123, 2650. Respondents explain that grading is necessary to "level and stabilize" the Park site. RB:24-25. However, they fail to address why such fill must be "engineered" and placed in canyon areas on the NBR site—actions that would help level the NBR site for development. AR:11280; *see also* AR:8045 (City's EIR consultant noting concerns of "co-mingling" projects by providing compacted fill), 8083-84.

The City attempts to minimize this Project element by comparing it to the larger volume of grading the NBR project will ultimately require. RB:25. Yet, the relative "smallness" of the current approval is legally irrelevant. In *Bozung*, LAFCO attempted to characterize the annexation it approved as insignificant compared to later approvals necessary for the large proposed development there. 13 Cal.3d at 278-79, 282. The Supreme Court rejected this theory, reasoning that LAFCO's approval, though relatively minor, was a first step toward the ultimate planned development. *Id.* at 279, 281. Because CEQA requires an agency to provide environmental information "at the earliest possible stage," the EIR must be completed before such an initial step is taken. *Id.* at 282.

In sum, the record evidence amply demonstrates that the City approved, as part of the Project, initial components of the NBR project. By preparing an EIR for the Park alone, and completely excluding the NBR project from its analysis, the City impermissibly "chopp[ed] a large project" into smaller pieces. *Bozung*, 13 Cal.3d at 283-84. Respondents attempt to distinguish *Bozung* on the grounds that "the City's EIR analyzed the impacts of the entire Sunset Ridge Park" (RB:21), but that is beside the point. *Bozung* dictates that the EIR must analyze the full NBR project prior to approving the first steps toward that development. 13 Cal.3d at 279.

C. Under *Laurel Heights*, the City Should Have Reviewed the Whole NBR Project Before Approving Key Elements of That Project.

Despite Respondents' arguments to the contrary, *Laurel Heights* supports Appellant. While Respondents argue that the NBR project is not a "foreseeable consequence" of its approval under *Laurel Heights* (RB:18), the argument falls flat.

First, Respondents claim that the City did not need to conduct further environmental review because "the City has no plans to expand the Park Project." RB:17. But this is a non sequitor. Appellant is not concerned about *the Park's* expansion. Rather, the roadway and other infrastructure approved as part of Sunset Ridge are the first phase of the larger NBR development. Furthermore, unlike in *Laurel Heights*, where the proposed expansion was not contemplated for nearly a decade (47

Cal.3d at 396-97), NBR has already designed and proposed—and the City is already reviewing—its complete development project. AR:8067-87; Joint Appendix ("JA"):48:448 (NBR stating at trial, "[t]he record is replete with evidence indicating the landowner has plans to develop the Banning Ranch Property"). Thus, further development on NBR is clearly a "reasonably foreseeable" consequence of the City's approvals under the *Laurel Heights* test. *See, e.g.*, AR:7961, 8105 (City officials stating Project involved construction of NBR's road); *Laurel Heights*, 47 Cal.3d at 398 (agency officials' statements sufficient to demonstrate future development was "reasonably foreseeable"). The fact that the City approved Park facilities at the same time it approved the first phase of the NBR project is of no consequence.

Second, Respondents claim that the City's Park was "long-planned" and "[n]othing in the General Plan ties the development of the Park Project to the NBR proposal." RB:17. Respondents are wrong. Sunset Ridge *is* tied to the NBR project via the Access Agreement and the City's decision to construct, as part of its Park, key infrastructure for the NBR project. *See supra* Part I.B, *infra* Part I.D. Moreover, the City's General Plan clearly ties Bluff Road to the NBR development. *Infra* Part I.F.

Third, Respondents suggest that the NBR project cannot be a reasonably foreseeable consequence of the City's Park Project under *Laurel Heights* because the NBR project is a private project and the Park is a

public one. RB:17. But *Laurel Heights* does not address such an argument, which does not bear scrutiny in any event. In executing the Access Agreement, the City and NBR entered into a public-private endeavor, the whole of which must be analyzed under CEQA. *See Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 134-36 (City must review full consequences of public-private agreement prior to approval, even if further approvals will take place).

Furthermore, CEQA precedent clarifies that single projects (requiring environmental review) routinely involve individual components undertaken by separate entities. *See Bozung*, 13 Cal.3d at 283-85 (EIR for LAFCO annexation must analyze impacts of development project to be undertaken by developer and approved by city). In fact, several cases have held that projects were improperly segmented even though the "piecemealed" acts were to be completed by an entity different from the project proponent. *See, e.g., id.*; *Plan for Arcadia*, 42 Cal.App.3d at 720, 726 (parking lot and road widening undertaken by separate entities must be regarded as same project as developer's shopping center for CEQA review); *Riverwatch*, 170 Cal.App.4th at 1196, 1203 (recycled water delivery conducted by different entity must be reviewed as part of developer's "project"); *San Joaquin Raptor/Wildlife Rescue*, 27 Cal.App.4th at 731-32 (sewage treatment facility expansion to be

completed by outside entity improperly segmented from development project).

Fourth, Respondents argue that because the City has "little control" over whether the NBR project proceeds, that project cannot be linked to Sunset Ridge. RB:17. But the City has *already* exercised control over the NBR project: it approved the entryway and other crucial elements of that development as part of the Sunset Ridge approval. If the City is allowed to build those project elements as part of its Park, there will be significant "bureaucratic and financial momentum" to approve the remaining elements of the NBR development. *Laurel Heights* 47 Cal.3d at 395-96. This is precisely why *Laurel Heights* requires the City to examine the environmental consequences of the full NBR development prior to this initial approval. *Id.*

Finally, Respondents claim, without citation, that because "approval of the NBR project [would not] change the scope of the City's Park Project," the second prong of the *Laurel Heights* test is not met. RB:18. However, Respondents misapply the test. The relevant inquiry is not whether the initial Park uses will change after the NBR development is approved. Rather, the test is whether the initial components of the Project (the park access road, signal, etc.), when analyzed together with the later components (NBR's mixed use development), will result in potentially significant impacts that were not analyzed in the EIR for the initial

approval. Thus, the *Laurel Heights* court invalidated the EIR there not because the initial use of the 100,000 square feet would change after the later approval, but because the future plans would increase the total building usage to 354,000 square feet. 47 Cal.3d at 398. Here, there is no question that: (1) NBR's plan to develop its property would greatly increase the scope and nature of the Project; and (2) the project as a whole will result in impacts that are far greater than those analyzed in the City's present EIR, which evaluates only the Park. AR:123, 8068.

D. Respondents Cannot Distinguish *Tuolumne.*

The court's decision in *Tuolumne* directly addresses, and rejects, Respondents' primary defense at trial—that because Bluff Road is allegedly identified in City planning documents for construction "separate and independent" from the proposed NBR development, it may undergo separate environmental review. *Tuolumne*, 155 Cal.App.4th at 1227-31. The trial court cited this erroneous rationale as the sole basis for rejecting Appellant's segmentation claim. JA:51:524.

Respondents now back-pedal on this defense, declining to raise it affirmatively on appeal. Nevertheless, *Tuolumne* is instructive, for it holds that where a "strong connection" exists between two bordering projects that an agency is considering at the same time, those projects must be reviewed in a single EIR. *Tuolumne*, 155 Cal.App.4th at 1226; *see also Plan for Arcadia,* 42 Cal.App.3d at 720, 726 (related shopping center, road, and

parking lot are "single project" under CEQA). Respondents' attempt to distinguish the case is unconvincing.

The primary basis for the court's holding in *Tuolumne* was that the Lowe's project (first approval) was linked to the roadway expansion (second approval) by way of specific funding, legal commitments, and approval conditions. 155 Cal.App.4th at 1226-31. Here, the Access Agreement establishes similar financial and legal connections between Sunset Ridge and the proposed NBR development. *See* AOB:32-34.

Respondents claim that "[t]he City's approval of the Park Project does not include a condition requiring later approval of all or a part of the NBR proposal." RB:19. But Respondents ignore that the Access Agreement *legally obligates* the City to pay for and build elements of the NBR development as part of its Park. These elements include:

- A portion of the "primary roadway" through the NBR project (AR:1476, 2648, 2652, 7961, 8082-83, 8105);
- A signalized intersection on PCH "to provide motorists access to the Banning Ranch Development" (AR:1477, 1899, 2650-51; JA:48:442-43);
- The widening of PCH to accommodate NBR's four-lane entryway (AR:123, 186, 2651, 8052, 8078, 8082, 8449, 10069-70);
- Drainage improvements sized for the NBR project (AR:8442-46, 8953-56); and

- Compact pads of engineered fill on the NBR project site (AR:2650, 8045, 8083-84, 11280).

The City is also legally obligated to allow NBR to: (1) use the road for its development, (2) review and veto plans for the road, signal, and other improvements, and (3) close the Park access road as necessary for the NBR development. AR:2647-52. These binding commitments are directly analogous to the road condition in *Tuolumne*. 155 Cal.App.4th at 1226.

Respondents assert that *Tuolumne* is inapposite because the EIR for Sunset Ridge "identifies and analyzes all on- and off-site improvements for the Park Project." RB:19. Respondents miss the point. The Access Agreement goes far beyond requiring "offsite improvements" for the Park. It requires the City to construct, at its own expense, improvements *specifically designed* for the NBR project and not necessitated by the Park. *See, e.g.*, AR:1899, 2650-52, 7961, 8443-49.

For its part, the NBR developer is legally bound by the Access Agreement to specific financial commitments to the City, each of which will facilitate NBR's development:

- Dedication of NBR property in fee title for PCH widening (AR:2651, 8082);
- Dedication of an easement over NBR property and payment of the cost of dirt removal for Bluff Road improvements (AR:2647-52, 8082);

- Provision of NBR acreage for mitigation of the biological impacts from the Bluff Road improvements, plus up to an additional ten acres for mitigation of Park impacts (AR:2652); and
- Provision of NBR acreage for placement of 35,000 cubic yards of engineered fill from Park and road development (AR:2650, 8045, 8083-84, 11280).

Respondents attempt to downplay these commitments, stating that "NBR's owners granted an access agreement free of charge for a 'nonexclusive' easement to construct, operate, and maintain a park access road . . . ." RB:23. But there is no evidence that NBR—a for-profit company—is contributing valuable property and paying other costs for the City's Project for altruistic reasons. In fact, NBR's commitments under the Access Agreement align perfectly with NBR's development plans and give that project its first approvals.

Accordingly, because NBR and the City agreed to reciprocal legal commitments with respect to the Park and NBR projects, these developments have an even stronger connection than the Lowes and road projects in *Tuolumne*. However, rather than confront the evidence that the Access Agreement provides a direct connection between the two acts, Respondents merely state, without citation: "The agreement itself creates no such link." RB:20. Such a bald assertion cannot stand.

Respondents also quote the City's statement, made during the administrative process, that the Park approval will "not affect the City's future actions regarding the [NBR] property." RB:19. But this self-serving assertion is legally irrelevant. The City's intentions with regard to future action on NBR, whatever they may be, cannot change the fact that the City has legally bound itself, as part of the Park approvals, to construct the initial phase of the NBR development. *Laurel Heights*, 47 Cal.3d at 395-96 (relevant test is not whether agency had plans for future action).

Respondents similarly fail to distinguish *Tuolumne* on the three other factors considered by the court: time, physical location, and entity undertaking the action. Respondents first claim that there is no temporal connection between the two actions because there is no condition in the Park approvals mandating that the NBR project be completed before the Park opens. RB:19. Respondents are wrong. As in *Tuolumne*, the Park "cannot be completed and opened legally without the completion" of elements of the NBR project guaranteed by the Access Agreement. *Tuolumne*, 155 Cal.App.4th at 1231. Furthermore, it is undisputed that the City was conducting environmental review for the NBR project at the same time it was for the Park. *See, e.g.*, AR:1476, 8087. The fact that the NBR project needs further approvals before construction does not eliminate this temporal connection.

Respondents concede that the Park and NBR project have overlapping boundaries (RB:20), but claim this factor is not controlling. Again, Respondents are mistaken. *Tuolumne* actually emphasized the importance of reviewing two neighboring, contemporaneous actions in the same EIR: "When two acts are closely connected in time and location, the potential for related physical changes to the environment in that location is greater than otherwise. Thus, the need for a single review of the environmental impact of the two acts is greater." *Tuolumne*, 155 Cal.App.4th at 1227.

Finally, Respondents argue that the projects are not linked because "the Park Project is proposed and funded by the City, whereas NBR is proposed and funded by a private landowner." RB:20. However, Respondents ignore that the City is funding critical elements of the NBR project while NBR is funding critical elements of the Park. AR:2647-52. Thus, in executing the Access Agreement, the City and NBR entered into a public-private arrangement whereby each party agreed to legal commitments benefitting the other; under the contract, each side gained valuable consideration. The fact that City and NBR representatives carefully coordinated their environmental review further highlights their intertwined relationship. *E.g.*, AR:2433-34, 2470-72, 7964, 9718-32, 9746-48, 9961, 10006-08, 10108.

In any event, two actions need not have the same project proponent for the Court to find illegal segmentation. In *Plan for Arcadia*, a case relied upon by *Tuolumne* (155 Cal.App.4th at 1226), the court held that three related projects (a shopping center, road, and parking lot) must be reviewed in the same EIR, even though all three acts were undertaken by separate entities. *Plan for Arcadia*, 42 Cal.App.3d at 720-21, 726.

E. Respondents' Cited Cases Are Inapposite.

Respondents rely on *CBE* to support their claim that the City can review the Park and the NBR project independently. RB:20-21. However, *CBE* supports Appellant.

First, there was no evidence in *CBE*, as here, that the first project (refinery upgrade) involved construction of a portion of the second project (hydrogen pipeline) or that the two actions were legally linked in any way. Rather, because the court found the refinery and pipeline were independent from each other, it expressly distinguished those projects from the linked ones in *Tuolumne*. 184 Cal.App.4th at 99. Respondents emphasize that the refinery and pipeline projects were being undertaken by different entities (RB: 20-21), but the court's holding did not depend on that factor. Indeed, *CBE* noted that the third-party company in charge of the pipeline was also responsible for the hydrogen plant replacement, a different project element that was "fully described and analyzed in the EIR" as part of the refinery project. 184 Cal.App.4th at 97. Moreover, the court found significant that

Richmond was not the lead agency for the pipeline project, but only for the refinery upgrade. *Id.* at 97-98. Here, the City is the "lead agency" for *both* the Park and the NBR development. AR:8067. Also, unlike the situation in *CBE,* the two actions here are legally linked through the Access Agreement.

Second, Respondents rely on the fact that there was no segmentation in *CBE* because the refinery project was not dependent on the pipeline project. RB:20-21; *see CBE*, 184 Cal.App.4th at 98. But *Tuolumne* clarifies that such "dependence" is not required for a finding of segmentation if the two actions are otherwise linked, such as via the Access Agreement. 155 Cal.App.4th at 1228-30 ("[T]he possibility that two acts could be taken independently of each other is not as important as whether they actually will be implemented independently of each other."). In any event, the record here shows that the City would *not* have approved the Park unless it obtained NBR's agreement that it could use NBR property for access. AR:8105 (e-mails amongst City officials). Indeed, the City argues vigorously on appeal that there is no access to its Park *except* through the NBR property. RB:9. The record also reflects that the City obtained such access by agreeing to build essential components of the NBR project. *See, e.g*, AR:1899, 2650-52, 7961, 8443-49. Under such circumstances, CEQA requires that the City review the two acts in a single EIR. *See San Joaquin Raptor/Wildlife Rescue Center*, 27 Cal.App.4th at

731-32 (residential project must be analyzed together with expansion of sewer system where evidence demonstrated that former would not proceed without latter).

Third, even though the court in *CBE* found that the hydrogen pipeline was a separate project from the refinery upgrade, it nonetheless recognized that a full cumulative impacts analysis of that related project was required. 184 Cal.App.4th at 99. As explained below, the City here failed to include the NBR development in its cumulative impacts analysis for the Project, thereby depriving the public of any information regarding the combined impacts of the related projects.

Fourth, *CBE* found the EIR's project description was defective for failing to adequately discuss the full processing capabilities or ultimate potential uses of the refinery. *Id.* at 83-89. Similarly here, the EIR fails to disclose the potential of the access road and other Project infrastructure to be used ultimately for the NBR development. Thus, like in *CBE*, the EIR here is "inadequate as a matter of law." *Id.* at 83.

Respondents also cite *Christward Ministry* and *Berkeley Keep Jets*, but those cases are inapposite. In *Christward Ministry v. County of San Diego*, the county's EIR analyzed a single landfill expansion project. (1993) 13 Cal.App.4th 31, 37. The appellant argued that the EIR should have evaluated, as part of the same project, several other landfill projects planned in the area. *Id.* at 44-45. The court disagreed, noting there was no

evidence of any connection between the landfill projects. *Id.* In *Berkeley Keep Jets*, the court rejected a claim that an EIR for an airport expansion must include, as part of the project, runway projects included in planning documents, but long abandoned by the agency and in no way "linked" to the proposed project. 91 Cal.App.4th at 1357-58, 1362. Notably, the EIRs in both cases fully addressed the cumulative impacts of the proposed project together with the allegedly segmented projects. *Id.* at 1362-63; *Christward Ministry*, 13 Cal.App.4th at 42, 45-47.

By contrast, the City here expressly linked its Park to the larger NBR project, a linkage that was formalized in the Access Agreement. Furthermore, as explained *infra*, the EIR did not properly analyze the cumulative impacts of Sunset Ridge together with the NBR project.

F. Respondents' Interpretation of General Plan Provisions Regarding Banning Ranch Does Not Withstand Scrutiny.

At trial, Respondents argued that the EIR could review Bluff Road (the Park's access road) separately from the NBR project because the City's General Plan called for Bluff Road to be built "independent" of that development. JA:49:471-72. The trial court held that "substantial evidence" supported this view, and on that basis denied Appellant's segmentation claim. JA:50:524. In fact, the relevant General Plan policies, as well as the EIR for those policies, provide that the City will build Bluff Road only if NBR is developed. AR:6889.

Each of Respondents' explanations for why Bluff Road is unrelated to the NBR development is unconvincing. Seeking to distance itself from its own General Plan, the City initially asserts that it has no plans to annex the NBR property, and so the County—not the City—must approve the road. RB:5. But the City expressly included the NBR property in its Sphere of Influence and General Plan, indicating an intent to annex. AR:6779. The City is also serving as "lead agency" for the NBR project, which includes annexation of the entire property to the City. AR:8073-74. The fact that further approvals by another governmental entity are necessary[3] does not lessen the City's duty to comply with CEQA for its own approvals. *See Citizens for Responsible Government v. City of Albany* (1997) 56 Cal.App.4th 1199, 1216-19.

Respondents then switch gears and rely on the City's General Plan policies, claiming that the City must be accorded deference in interpreting its own document. RB:26. However, as Respondents acknowledge (RB:15), this Court reviews Appellant's segmentation claim as a matter of law, with no weight accorded to the agency. *See, e.g.*, *Tuolumne*, 155 Cal.App.4th at 1223-24. The *de novo* standard does not change merely because the City's General Plan is a piece of evidence for the Court to

[3] Here, LAFCO must approve the actual annexation of the NBR property into the City.

consider. *Id.* at 1228, fn. 8 (rejecting application of substantial evidence test to agency's claim that roadway expansion was independently planned and could undergo separate analysis). Respondents' cited cases, which do not involve segmentation claims and only discuss the standard of review applicable when an agency is interpreting its General Plan "in its adjudicatory capacity," are inapposite. RB:26.

In any event, no substantial evidence supports the City's contorted view of its General Plan. The Plan contains a clear framework for the two potential uses of Banning Ranch: preservation as open space (the priority use) and development as a "residential village" (the alternative use). AR:6883-84. The Plan establishes three sets of policies for these uses, including policies that apply to: (1) open space uses only (AR:6884), (2) development uses only (AR:6884, 6888-89), and (3) both the open space and development uses (AR:6890). The Plan provides for the construction of Bluff Road in the second category—only if Banning Ranch is developed. AR:6888-89.

Respondents claim these policies support the City's view that Bluff Road will be built regardless of the NBR project. RB:27. They reason that: (1) the City plans to build an active community park on the NBR site regardless whether the NBR project is approved, and (2) construction of this active community park constitutes "development." *Id.* But Respondents' position not only defies logic, it also contravenes the City's

General Plan, which defines the "open space" use of Banning Ranch as including "significant active community parklands." AR:6884 (Policy 6.3.1). The Plan clearly distinguishes this "open space" use from the alternate use of Banning Ranch, according to which "the site may be developed as a residential village," including a maximum of 1,375 residential units, 75,000 square feet of commercial space, and 75 hotel rooms, like the proposed NBR development. AR:6884 (Policy 6.4.1, describing allowable development uses for Banning Ranch), 6813 (describing allowable density/intensity for open space and development uses on Banning Ranch). Thus, Bluff Road is to be built only if the NBR site is developed under this alternate use; it will not be built if an active community park is constructed pursuant to the "open space" use. AR:6889; *see also* AR:6883-84, 6890 (no provision for Bluff Road in Plan policies that apply to open space use or Plan policies applying to either use). The fact that the "residential village" use may also include an active park (RB:27) is beside the point.

Respondents also rely on Circulation Element policies that call for adoption of various circulation maps. RB:28. But these general policies must be harmonized with the Plan's more specific policies for Banning Ranch. *See* AOB:29-30. Respondents fail to address the fact that the Plan's circulation policies must provide capacity for a worst-case scenario—full build-out of the City's General Plan—regardless whether

that scenario ever comes to pass. *See Concerned Citizens of Calaveras County v. Bd. Of Supervisors* (1985) 166 Cal.App.3d 90, 100-01). Thus, Respondents' citation to the General Plan EIR statement—"'Bluff Road' is needed 'to ensure that impacts resulting from buildout of the General Plan update are minimized'" (RB:28)—is unavailing. As that EIR specifically notes, "If an open space option is ultimately selected and implemented, no roadways would be anticipated upon Banning Ranch." AR:6531; *see also* AR:4468 (same).

In short, Respondents' interpretation of the City's General Plan is at odds with that document's plain language regarding Bluff Road. Respondents cannot use those Plan policies to excuse the City's refusal to analyze the full implications of its approval, through the Park Project, of the first section of the main thoroughfare through NBR.

II. Respondents Provide Scant Defense of the EIR's Inadequate Cumulative Impacts Analysis.

As Respondents note (RB:32), *Bakersfield* holds that a cumulative impacts analysis is "unduly narrow" if (1) it was "reasonable and practical" to include an omitted project, and (2) the exclusion "prevented the severity and significance of the cumulative impacts from being accurately reflected." 124 Cal.App.4th at 1215. This test is easily met here.

Because the City coordinated environmental review for the Park and the NBR project (*e.g.*, AR:2470-72, 7964, 9718-32, 9745-49, 9961, 10006-

08, 10108), even using the same environmental consultant (AR:2433-34, 2470-72), it was both reasonable and practical to include information regarding the NBR project. At the same time, the EIR's complete omission of NBR's impacts severely misrepresents the Project's cumulatively considerable effects, particularly with respect to traffic and biological resources. Contrary to Respondents' assertion, the Court reviews such omissions as a matter of law, not under the substantial evidence test. *See Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 712, 721 (omission of facts relevant to cumulative analysis constitutes a prejudicial abuse of discretion).

A. Respondents Concede that the EIR Omits NBR-Generated Trips from the Cumulative Traffic Analysis.

Respondents make two key concessions, effectively proving Appellant's challenge to the EIR's cumulative traffic analysis. First, the EIR employs a "list-of-projects" approach to analyzing these impacts. RB:32 ("[T]he analysis of cumulative traffic [in the EIR] includes existing traffic, plus additional traffic from other 'committed' projects, plus traffic from 'reasonably foreseeable projects in the Project vicinity.'"). Second, despite listing NBR as a "cumulative project" (AR:317), the EIR's analysis "does not include trips that would be generated by the NBR project." RB:33.

Because the EIR uses the "list" approach and because the EIR

properly identifies the NBR development as a reasonably foreseeable cumulative project, traffic from NBR should have been included in the analysis. Guidelines § 15130(b)(1)(A); *San Franciscans for Reasonable Growth v. City and County of San Francisco* (1984) 151 Cal.App.3d 61, 75, 79 ("*SFRG*") (impacts from projects under environmental review must be included in cumulative impact analysis, even if they "might never be built"). The City's failure to do so violated CEQA.

Respondents offer several after-the-fact excuses for this omission, each of which must be rejected. First, Respondents argue that the City had "discretion" to establish a "horizon year" that would exclude NBR because that development will not be completed until after the Park. RB:32-34 ("[A]gency has discretion to make reasonable, good faith assumptions concerning the scope of its cumulative-impact analysis."). But Respondents' cited case law does not support this expansive view of discretion. In *Ebbetts Pass Forest Watch v. Department of Forestry and Fire Protection* (2005) 123 Cal.App.4th 1331, 1350-51 and *City of Long Beach v. Los Angeles Unified School District* (2009) 176 Cal.App.4th 889, 911-12, the courts upheld the exclusion of geographically distant projects from cumulative analyses because the projects' cumulative effects would be imperceptible. Similarly, in *Greenbaum v. City of Los Angeles*, the court upheld the agency's use of a narrow timeframe because petitioners could point to no projects outside of that period causing additional cumulative

impacts. (1984) 153 Cal.App.3d 391, 411. Thus, while agencies have discretion to exclude projects from a cumulative impacts analysis, they may do so only if *such projects will have no cumulative impact.*

Here, the City cannot reasonably conclude the NBR project will have no cumulative impact merely because it will be completed after the Park. To the contrary, for the majority of the projects' lifetime, traffic from the Park and NBR will use the same road alignment and signalized intersection. AR:1899, 7961, 8082-83. Because no evidence supports the EIR's exclusion of NBR traffic based on construction timing, the City prejudicially abused its discretion. *SFRG*, 151 Cal.App.3d at 80 (failure to include projects undergoing environmental review "skewed the [agency's] perspective concerning the benefits of the particular projects" and "subvert[ed] [the agency's] ability to adopt appropriate and effective mitigation measures").

Second, Respondents assert that the EIR properly excluded NBR trips because "the park access road is not 'Bluff Road.'" RB:34-35. This argument is specious. In fact, it is undisputed that access to the Park relies on the exact same road alignment and signalized intersection as access to the NBR development. AR:1899, 2648, 7961, 8105. The City cannot invoke a hypothetical separation of the two "different" roadways simply because some upgrades to the alignment will be required. Similarly, while Respondents assert that the Access Agreement only allows access to the

Park (RB:36), the Agreement actually provides NBR and its contractors unrestricted "use, without charge" of the access road (AR:2648), even permitting them to close the road "to allow for efficient operations and uses on NBR Property." AR:2650.

In a similar vein, Respondents claim that because there will be environmental review for any future expansion of the access road, "there is no danger that the cumulative traffic impacts of the [park] . . . will somehow slip through the cracks." RB:35. But to delay the cumulative impact analysis would defeat its purpose. "One of the most important environmental lessons that has been learned is that environmental damage often occurs incrementally from a variety of small sources." *Bakersfield*, 124 Cal.App.4th at 1214 (citations and internal quotations omitted). Deferral of this analysis allows the initial incremental damage to occur before the combined effect can be studied.

Third, Respondents attempt to rely on the General Plan and its EIR to supply the omitted cumulative traffic analysis. RB:36-40. This argument, raised only in litigation, does not bear scrutiny. To begin, there is no evidence to suggest that the Project EIR ever *did* rely on the General Plan or its EIR. Certainly, none of Respondents' citations support their theory. *See* RB:38 (citing AR:123, 212-13, 234-38, 304-05, 566, 1474-76, 1918-19) (no citations showing Project EIR's cumulative traffic section even references General Plan or General Plan EIR). For this reason, *Las*

Virgenes Homeowners Federation, Inc. v. County of Los Angeles is inapposite. (1986) 177 Cal.App.3d 300, 307 (noting that the agency cited the EIR and properly relied on tiering).

The EIR's lack of citation to the General Plan or its EIR in the cumulative impacts analysis is not surprising, of course, because: (1) the City employed the "list-of-projects" approach (AR:314-23), and (2) the General Plan does not contain accurate information regarding NBR.[4] Regardless, the City cannot change course now to rely on the General Plan approach. *S.E.C. v. Chenery Corp.* (1943) 318 U.S. 80, 93-94 (An agency "must be measured by what [it] did, not by what it might have done.").

Fourth, Respondents claim, for the first time on appeal, that a cumulative traffic analysis was unnecessary because the public and decisionmakers had access to NBR traffic numbers in a "signal warrant analysis" completed for the Project. RB:36. This gambit must fail. CEQA requires the lead agency to present information in a clear, straightforward manner. The public is not required to "sift through obscure minutiae" to uncover essential information. *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 659.

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[4] While the number of units at NBR has not changed (RB:40), the composition of those units has shifted since the General Plan EIR was prepared. AR:317, 4578. The type of units has a direct impact on the number of trips generated. *See* AR:746.

Moreover, the presence of trip numbers alone does not remedy the underlying error. Trip generation is only the first step in a cumulative traffic impacts analysis. AR:313. The analysis must also simulate these trips through the affected intersections to determine how they, in combination with the Park and other cumulative projects, will affect levels of service. *Id.* The omission of this analysis defeats the EIR's informational purpose. *Kings County*, 221 Cal.App.3d at 712, 721.

Finally, Appellant properly exhausted this issue. AR:1889 (commenting that EIR should "address the traffic that would result if the Newport Banning Ranch Project is built"); AR:1914 (stating that EIR "must address the cumulative impacts of the park access road," including traffic from "growth on the Banning Ranch property"). As the courts have repeatedly held, all that is required is that the public comments "fairly apprise[]" the agency of the "substance" of the issue. *SORE*, 9 Cal.App.4th at 1750; *see also Mani Brothers Real Estate Group v. City of Los Angeles* (2007) 153 Cal.App.4th 1385, 1395 (holding that less specificity is required to preserve an issue for appeal in administrative proceedings than in judicial ones). In any event, because Respondents failed to raise exhaustion as to this issue in the trial court, they cannot do so now. *See Mokler v. County of Orange* (2007) 157 Cal.App.4th 121, 133.

B. The EIR's Analysis of Cumulative Biological Impacts Amounts to Bare Conclusions.

The EIR's one-page analysis of cumulative biological impacts makes no mention of NBR. Instead, it lists three other "larger projects in the City that would impact native [] habitat," and refers to the Orange County Central/Coastal subregion Natural Communities Conservation Plan ("NCCP") as supplying the necessary analysis. AR:427. When commentors questioned the EIR's omission of NBR from the project list, the City rotely asserted that the development was "assumed" because it was "within the boundaries of the NCCP." AR:1825. This response is unlawful. Guidelines § 15088(c) ("Conclusory statements unsupported by factual information will not suffice.").

In fact, there is no evidence that the NCCP included the requisite analysis of the Park's and NBR's cumulative impacts on biological resources. RB:42-43. While the NCCP is intended to provide for the long-term protection of the gnatcatcher, it defers environmental analysis for "Existing Use Areas" until the FWS receives permit applications for developments within those areas. AR: 415. Because both NBR and the Park are within an Existing Use Area, the FWS has yet to complete its analysis of gnatcatcher impacts for those projects. *Id.*, AR:965.[5]

[5] For this reason, FWS's statements regarding the piecemealing of the Park and NBR are also on point. RB:43.

Because the City cannot rely on the NCCP to supply the missing information, the EIR's analysis of cumulative biological impacts must be set aside.

III. Respondents Cannot Defend the EIR's Failure to Identify the Project's Growth-Inducing Impacts.

Respondents' defense of the EIR's analysis of growth-inducing impacts is similarly without merit. First, Respondents claim that the EIR completed this analysis and that it is supported by substantial evidence. RB:44. However, the EIR's so-called growth-inducing "analysis" focuses on park uses alone; it ignores the ability of the Project's infrastructure to induce growth. AR:532. The Court reviews such an omission as a matter of law, not under the substantial evidence test. *Citizens to Preserve the Ojai*, 176 Cal.App.3d at 428. Furthermore, because there is no substantial evidence to support the claim that the Project's infrastructure would not remove obstacles to the development of NBR, the EIR's conclusion regarding growth-inducing impacts is "totally inadequate," "[r]egardless of the weight accorded" to the agency. *City of Davis*, 521 F.2d at 674-75.

Second, Respondents claim that the EIR concluded that the Project "would not induce growth" on NBR because Bluff Road and the signal are independently included in the City's General Plan. RB:44-45. But this simply repeats Respondents' argument regarding segmentation. As demonstrated above, the General Plan provides that Bluff Road is to be

built through NBR only if the property is developed. AR:6889. Moreover, this argument does not address the fact that Project features are specifically sized for the planned NBR project.

Third, Respondents argue that no growth-inducing analysis is necessary because the General Plan EIR satisfies this requirement. RB:45. Respondents are wrong. As the Park EIR recognizes, a proper analysis of growth-inducing impacts must evaluate *the Project's* potential to "remove infrastructure constraints, provide access, or eliminate other constraints on development, and thereby encourage growth that has already been approved and anticipated through the General Plan process." AR:531. The EIR's stated approach is correct; it is the EIR's actual *analysis*—which entirely fails to identify or evaluate the potential of the Project's infrastructure improvements to facilitate the NBR development—that is faulty. AR:532; *see Clover Valley Foundation v. City of Rocklin* (2011) 197 Cal.App.4th 200, 227-28 (EIR correctly disclosed growth-inducing impacts, even where growth was already assumed in general plan).

Friends of the Eel River v. Sonoma County Water Agency, cited by Respondents (RB:45), is inapposite. The EIR in that case, prepared for a water project to serve eight municipalities, incorporated by reference a discussion of population growth included in the general plan EIRs for those areas. (2003) 108 Cal.App.4th 859, 877-78. Because the petitioner identified no defect in the analysis, the court upheld its incorporation into

the EIR. *Id.* By contrast, and as Respondents do not dispute, the EIR here attempts no such incorporation. AR:531-32. In fact, it does the opposite, stating that any inducement of planned growth should be independently analyzed in the EIR, but then cursorily concluding the Project will not induce such growth. *Id.* Respondents cannot now cite an analysis in the General Plan EIR to salvage the deficiencies in the Park EIR. *S. Cal. Edison Co. v. Pub. Util. Com.* (2000) 85 Cal.App.4th 1086, 1111 (Court may not "affirm an agency's action on a basis not embraced by the agency itself"); *see also supra* Part II.A (discussing inadequacy of General Plan EIR).

Finally, Respondents' attempt to distinguish *Antioch* is unavailing. RB:46-48. Respondents recognize *Antioch*'s holding that an EIR must analyze growth-inducing impacts where the "location and design of the road and appurtenant sewage and water distribution facilities will strongly influence the type of development possible." RB:47 (quoting *Antioch,* 187 Cal.App.3d at 1334). Respondents are wrong, however, to claim that the location and design of the Project's infrastructure improvements will not facilitate development on NBR. In fact, the record reflects that these improvements were specifically designed to serve the NBR project.

The City went to "a lot of pain to get [NBR's] road in at [NBR's] grades." AR:7961; *see also* AR:8105 (NBR and Park road share same alignment). Because this road is already designed and located exactly as

planned for the NBR project, it will be far easier for NBR to expand the road to serve as the "primary roadway" through their Project. AR:8082-83; *Antioch*, 187 Cal.App.3d at 1334. Respondents claim that the Project's "tiny" road could not "substantially induce growth" on the large NBR project, which "faces significant entitlement hurdles." RB:45-46. However, "substantial" inducement of growth is not the test. Rather, as the EIR recognizes (AR:531-32), any removal of impediments to growth, even indirect ones, must be analyzed under CEQA. Guidelines § 15126.2(d). Similarly, the fact that NBR "needs approvals from 11 different agencies" (RB:45) is legally irrelevant. *City of Davis*, 521 F.2d at 675-76 (even where ultimate outcome depends on uncertain actions of other parties, EIR must analyze growth-inducing impacts).

Respondents' claim that the Project's installation of a traffic signal will not induce growth is likewise unavailing. Respondents characterize as an "isolated statement" the assertion by Caltrans that the "main reason" for the signal is to serve the NBR project. RB:46. However, as Respondents recognize (RB:24), Caltrans is the responsible agency with current approval authority over the signal. AR:187, 194. As such, that agency's opinion on this subject constitutes substantial evidence. *See Stanislaus*, 33 Cal.App.4th at 155 (opinion of department charged with reviewing development application constitutes substantial evidence).

In any event, Respondents themselves have repeatedly admitted that the signal is not warranted by the Park alone. *See, e.g.*, AR:1477 ("The Draft EIR acknowledges that the proposed park alone would not generate enough traffic to warrant a signal."); RB:24; JA:48:442-43. These admissions, which confirm that the signal is oversized to accommodate additional growth, are dispositive of this issue. *Azusa Land Reclamation Co., Inc. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, 1216. Even assuming *arguendo* that, as Respondents argue (RB:46), the General Plan provides for such additional growth, the EIR here fails to identify the Project's facilitation of this growth as CEQA requires. *Clover Valley*, 197 Cal.App.4th at 226-27; AR:531.

The Park's oversized infrastructure does not stop with the traffic signal. It also includes: (1) widening of PCH to accommodate the planned four-lane entryway for NBR (AR:2651, 8449), and (2) oversizing of drainage improvements to handle flow from the NBR development. AR:8442-46. The Project also provides for the placement of "engineered" fill on the NBR site, which will further facilitate that development. AR:2650, 11280; AOB:45. Respondents do not dispute this evidence, but claim it is "hardly nefarious" that the City consulted with the landowner regarding its desired specifications, and that "such oversizing is common in development." RB:48. Even assuming these statements are true, they do

not excuse the City from analyzing the growth-inducing impacts of its Project. *Antioch*, 187 Cal.App.3d at 1336-37.

Respondents claim, erroneously, that the purpose of the Project's infrastructure is to serve *only* the Park, not NBR. RB:47. While there is ample evidence to the contrary (*e.g.*, AR:7961, 8442-49), the Project's "purpose" is not the determinative factor. *Stanislaus*, 33 Cal.App.4th at 158 (agency failed to evaluate growth-inducing impacts of residential golf course in agricultural area, even though purpose of project was not to induce growth). Rather, an EIR must analyze the impacts of "projects which may encourage and facilitate other activities that could significantly affect the environment." *See* Guidelines § 15126.2(d). The test is easily met here, as the Project's roadway and other infrastructure, which are specifically designed for the NBR project, will certainly "remove obstacles" to that proposed development.[6] *Id.* Respondents' argument to the contrary "taxes credulity," as NBR has agreed to contribute substantial financial resources to the City's Project and has vigorously defended it in this litigation. AR:2648-52; JA:433-57 (Real Parties' trial court brief).

Merz v. Board of Supervisors, cited by Respondents (RB:49), is inapposite. The roadway intersection there was a part of a residential/resort

[6] Respondents also try to distinguish *Antioch* on the grounds that it involved a negative declaration and not an EIR. RB:47. This difference is beside the point. *Antioch* is cited as a leading authority establishing an EIR's required analysis for growth-inducing impacts. *E.g., Napa Citizens for Honest Government v. Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 368.

complex, the growth-inducing impacts of which had already been examined in an EIR. (1983) 147 Cal.App.3d 933, 935-36, 940 (disapproved on other grounds). Since the later-approved intersection was not oversized to induce additional growth, the court held that the prior EIR's analysis need not be repeated. *Id.* at 940. The instant case presents the opposite situation: the roadway improvements necessary for NBR are being approved *in advance of* the NBR project; under CEQA, their impacts must be assessed now, in connection with the City's initial approval. *Antioch*, 187 Cal.App.3d at 1335-36.

IV. Respondents Fail to Explain How Impacts to Biological Resources Were Adequately Analyzed or Mitigated.

A. Respondents Cannot Defend the Finding that Impacts to Gnatcatcher Critical Habitat Are Insignificant.

It is undisputed that the Project site is home to the federally threatened gnatcatcher. AR:423. Defending the EIR's deficient analysis of the Project's impacts to this species, Respondents invoke the "substantial evidence" test. RB:51-52. They assert that, even though the Project will permanently alter nearly the entire 18.9-acre site, the EIR properly concluded, based on expert opinion that some of the habitat was "disturbed" or otherwise degraded, that there would be minimal impacts to the gnatcatcher. RB:51; AR:186, 424, 432.

This argument is flawed for three reasons. First, CEQA mandates a finding of significance for *any* impact that "restrict[s] the range of an

endangered, rare, or threatened species." Guidelines § 15065(a)(1). Accordingly, the California Supreme Court held in *Vineyard* that a "potential substantial impact on endangered, rare or threatened species is *per se* significant." 40 Cal.4th at 449.

Respondents claim that *Vineyard* upholds the "substantial evidence" test for the EIR's evaluation of impacts to listed species. RB:52. This is incorrect. *Vineyard* uses the substantial evidence test only as to plaintiff's recirculation claim—a claim not at issue here. 40 Cal.4th at 447 (citing *Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.* (1993) 6 Cal.4th 1112, 1129-30). In the relevant portion of the holding, the Court rejected the agency's conclusion that the project at issue would have a "small and insignificant" impact on a river designated as critical habitat for endangered salmon. *Id.* at 425, 448. Because of the "sensitivity and listed status" of the species, the Court found *any potential impact* to its critical habitat constituted "per se" evidence of a substantial adverse impact. *Id.* at 449. Thus, under *Vineyard*, even assuming some gnatcatcher habitat on the Park site is degraded, the City erred in concluding that the Project's potential impacts to this habitat are "small and insignificant." *Id.* at 447-49; AR:423.

Respondents also attempt to distinguish the recirculation claim in *Vineyard* on the grounds that the EIR in that case did not disclose the impact, whereas the City analyzed impacts to gnatcatchers "in detail."

RB:52. But the applicable test in *Vineyard* supports Appellant. *Id.* at 448 & n. 17 (citing high standard for recirculation requiring the project to have a significant impact not previously identified). In holding that the EIR had to be recirculated based on information related to a *potential* impact to critical habitat, the court thus found that any potential impact to critical habitat constitutes a significant impact on the species. *Id.* As in *Vineyard*, the EIR here fails to disclose as a significant impact the Project's potential to impact gnatcatcher critical habitat. AR:423, 1768 (City admits that the gnatcatcher uses all scrub habitat on Project site for foraging).

Second, even if the Supreme Court did not establish a *per se* rule, no credible evidence supports the EIR's conclusion that impacts to nearly four acres of habitat labeled as "disturbed encelia scrub" and "encelia scrub ornamental" were not significant. While the City claimed these habitat areas were "disturbed" and "not considered utilized by the gnatcatcher" (AR:423), independent biologists actually observed gnatcatchers using the areas. AR:1741-45.

Respondents do not dispute these observations (*see* AR:1768 (City concurring that gnatcatchers use all scrub habitats on site)), and no longer claim that the habitat area is not "utilized" by the gnatcatcher. RB:51-52. Instead, Respondents now suggest that the gnatcatcher's use of habitat is not relevant to a determination of critical habitat. *Id.* Thus, according to

Respondents, the City can destroy habitat currently used by gnatcatchers with no impact to the species. *Id.* This argument is simply spurious.

Under federal law, the habitat characteristics employed by FWS to identify areas that are essential to gnatcatchers are defined, in part, by the species' actual use. Specifically, these "primary constituent elements," or "PCEs," include "sage scrub habitats [and other habitats] . . . that provide space for . . . nesting, dispersal and foraging." 72 Fed. Reg. 72069. Thus, gnatcatchers' *use* of sage scrub and other habitats is directly relevant to a PCE determination. The EIR itself specifically acknowledges this factor by designating some small impacts to habitat as "significant" exclusively based on gnatcatcher use. AR:423. Under these circumstances, there was no basis for the EIR to reach the opposite conclusion as to other habitat areas used by the gnatcatcher. AR:424, 1741-45, 1768. Despite their allegedly degraded status, these habitat areas also exhibited PCEs because they contained scrub and were actually used by the gnatcatcher. AR:1741-44.

Respondents quip that, under Appellant's view of PCEs, even a chain-link fence would qualify as critical habitat. RB:51. This is false. The critical habitat rule specifically excludes man-made structures used by a species. 72 Fed. Reg. 72069. There is no similar exclusion for degraded scrub habitat. *Id.*

Third, Respondents argue that CEQA's definition of "baseline" salvages the EIR's failure to identify impacts to degraded habitat as significant. RB:53-54. They cite *Riverwatch v. County of San Diego* (1999) 76 Cal.App.4th 1428 and its progeny to argue that "CEQA requires analyzing the impacts of the project on the existing, physical conditions, even if those conditions have been altered." RB:53. But this argument, which falsely assumes that gnatcatchers do not use the degraded habitat, suggests that the EIR should treat the site's current conditions as if the development were already built. Nothing in *Riverwatch* implies such a result. 76 Cal.App.4th at 1452-53. As Appellant explained, even assuming *arguendo* that the baseline includes the City's illegal mowing, the EIR fails to evaluate the impacts of the Project's *permanent* conversion of the currently undeveloped habitat. AOB:52. Respondents do not respond to this point, and thus concede the issue. *Gresher v. Anderson* (2005) 127 Cal.App.4th 88, 103.

B. Respondents Fail to Excuse the EIR's Deficient Mitigation.

Even where the EIR properly acknowledges significant impacts to gnatcatcher habitat, the City's mitigation measures fail to meet CEQA's stringent standards. The EIR finds the loss of three areas of gnatcatcher habitat, totaling 0.68 acres, to be significant:

- 0.14 acres of southern coastal bluff scrub

- 0.06 acres of willow scrub
- 0.48 acres of disturbed mule fat scrub/goldenbush scrub ("mule fat scrub")

AR:423. The EIR identifies specific mitigation, however, only for the loss of southern coastal bluff and willow scrub, totaling 0.20 acres. AR:430-31. It includes no mitigation for the loss of mule fat scrub. *Id.*

Respondents offer several unconvincing excuses for the shortfall in mitigation. First, as a diversion, Respondents point to the EIR's mitigation for the loss of 0.27 acres of encelia scrub, a sensitive plant community. RB:55. Although the EIR found that removal of encelia scrub would not significantly impact the gnatcatcher (AR:423), Respondents now claim that "encelia scrub is part of the habitat that exhibits PCE's for the gnatcatcher." RB:55. This Court must reject the City's *post-hoc* attempt to "double dip" on mitigation. Mitigation for the loss of 0.27 acres of encelia scrub does *not* address the loss of 0.48 acres of disturbed mule fat scrub, the unmitigated gnatcatcher habitat area. AR:423.

Second, Respondents claim that mule fat scrub habitat "is not considered high quality, is disturbed, and is isolated from coastal sage scrub." RB:55. However, it is too late to reclassify the impact as less-than-significant. Because the EIR finds that the loss of mule fat scrub will be significant (AR:423), the City must either adopt specific mitigation measures or explain why such mitigation is infeasible. Guidelines

§ 15021(a)(2); *Los Angeles Unified School Dist. v. City of Angeles* (1997) 58 Cal.App.4th 1019, 1029.

The record, instead of supporting any claim of infeasibility, indicates that the City, at one time, considered specific mitigation for the loss of mule fat scrub to be both necessary and feasible. AR:9730. Respondents claim the Court need only consider "whether substantial evidence supports the City's adopted approach." RB:56. But the cited letter (AR:9730) provides relevant evidence that feasible mitigation measures were available to the City to fully mitigate impacts to the mule fat scrub. Because the City declined to adopt such mitigation, its actions are not supported by substantial evidence. *Los Angeles Unified*, 58 Cal.App.4th at 1029.

Third, Respondents claim that the EIR properly relies on future consultation with federal agencies to develop mitigation for the loss of the mule fat scrub and other critical habitat. RB:55. But CEQA does not countenance such deferral of mitigation. Deferral of mitigation is permitted only when the record demonstrates that: (1) the EIR adopts performance standards to guide the formulation of future mitigation measures; (2) the future mitigation will be both "feasible and efficacious"; and (3) a plausible explanation exists for why specific mitigation cannot be adopted at the time of certification. *CBE*, 184 Cal.App.4th at 95; *San Joaquin Raptor Rescue Center*, 149 Cal.App.4th at 669-71. Respondents' cited cases—*Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1275-75 and *California*

Native Plant Society v. City of Rancho Cordova (2009) 172 Cal.App.4th 603, 619-625—do not hold otherwise. RB:57.

While Respondents do not dispute this three-prong test, they offer no explanation for how the City complied with prongs two and three. Instead, they rely on the sole excuse that "other measures" identified in the EIR provide the requisite performance standards. RB:57. Even if meeting this one prong were sufficient, which it is not, Respondents' claim finds no record support. The identified mitigation measures are either temporary construction measures or are not applicable to all impacted gnatcatcher habitat, even under the City's restricted impact findings. AR:429-31. Respondents also refer to a portion of the EIR's consistency analysis, but that analysis notes only that the mitigation for the loss of mule fat scrub will be "determined by FWS." AR:262, 278. The discussion adopts no standards to guide this mitigation, or to ensure that any mitigation will actually be adopted. *Cf.* RB:56 ("federal agencies with permitting authority operate under statutes that may not align with CEQA"). The City's improper deferral of mitigation violates CEQA.

Finally, Respondents claim that "[b]elow Appellant conceded it had not exhausted its remedies on this issue." RB:56, fn. 13. It is not clear to which "issue" Respondents refer, as they cite only their trial court opposition brief. *Id.* (citing JA:48:439-41). Nevertheless, *Appellant made no such concession*. In its reply brief, Appellant detailed its compliance

with CEQA's exhaustion requirements, including as to the EIR's failure to mitigate for the loss of significant gnatcatcher habitat. JA:50:515, fn. 21 ("Petitioners' biologist raised this claim to the City below. AR:1746-47 ('Appropriate compensatory mitigation must be proposed for the impacts to all native scrub habitats' including mule fat scrub)."). Appellant also explained this compliance at the writ hearing. Reporter's Transcript at 88-89. The trial court made no finding on the exhaustion issue (JA:51:524), impliedly holding that the Conservancy had exhausted on all issues. *See Bakersfield*, 124 Cal.App.4th at 1199 ("Exhaustion of administrative remedies is a jurisdictional prerequisite to maintenance of a CEQA action.").

C. Respondents Cannot Defend the EIR's Failure to Address Inconsistencies with the Coastal Act and Coastal Land Use Plan.

CEQA requires that the City evaluate the Project's consistency with other applicable plans and laws, including in this case the California Coastal Act and the Coastal Land Use Plan ("CLUP"). Guidelines, App. G § X(b); AR:210-11. This consistency analysis serves two purposes. First, it ensures that the EIR analyzes and mitigates the Project's significant impacts to resources protected by the Coastal Act. Second, the analysis ensures that later actions taken by the Coastal Commission in reviewing a City's coastal development permit application do not result in fundamental changes to the project, causing a waste of public resources.

Apparently misunderstanding this process, Respondents argue that requirements applied "by another agency, acting under another statute, in another proceeding" are irrelevant to its CEQA analysis. RB:60. But CEQA specifically mandates the consistency analysis—that is, whether the Project complies with requirements to be applied by the Coastal Commission, acting under the Coastal Act and the CLUP. Guidelines, App. G § X(b); AR:210-11. Here, the City violated CEQA's requirement by failing to: (1) identify all resources protected under the Coastal Act, including gnatcatcher habitat and wetlands; (2) specify mitigation measures that comply with the Act; and (3) address the need for restoration activities resulting from prior habitat removal.

First, by failing to accurately apply the Coastal Act definitions for Environmentally Sensitive Habitat Areas ("ESHA"), the EIR did not recognize all resources on the Project site that are protected by the Act. With respect to gnatcatcher habitat, Respondents claim that because the EIR acknowledged that the Coastal Commission might designate such habitat as ESHA, the EIR analyzed the consistency "in that light." RB:58. But the EIR's analysis does not take into account the CLUP's definition of ESHA for the area, erroneously stating that "[t]he Project site does not contain natural communities that have been identified as rare" and severely underestimating the amount of potential gnatcatcher habitat on site. AR:262, 400, 1741-45, 8735; *compare* AR:262 (CLUP describing ESHA as

areas with either "rare" natural communities or "the potential presence of [] animal species designated as rare, threatened, or endangered"); *see also* § 30107.5.

When Appellant pointed out these errors prior to the Project's approval, the City refused to revise its analysis. Instead, the City claimed that no ESHA had yet been identified, and that "such a determination is made by the California Coastal Commission." AR:1817. This statement is non-responsive: the goal of a consistency analysis is to analyze whether the Project *will* conflict with the Coastal Commission's plans and policies. *Flanders Foundation v. City of Carmel-by-the-Sea* (2012) 202 Cal.App.4th 603, 615 ("When a comment raises a significant environmental issue, the lead agency must address the comment 'in detail' . . . . 'There must be good faith, reasoned analysis in response.'") (citations omitted).

The City attempts to excuse these errors by stating that it would be "speculat[ive]" to predict how the Coastal Commission would rule. RB:58 (citing Guidelines § 15145). But this analysis is not speculation—it is what CEQA requires. AR:210-11 (City's threshold of significance requiring determination whether Project would "[c]onflict with any applicable land use plan, policy, or regulation of an agency with jurisdiction over the Project").

In addition, Respondents assert a "dog-didn't-bark" argument, claiming that the absence of EIR comments from the Coastal Commission

constitutes evidence of that agency's approval. RB:59. But *Gentry v. City of Murrieta*, on which Respondents rely, is inapposite. 36 Cal.App.4th at 1380. In that case, petitioner objected to nearly every aspect of the challenged project, but was silent with respect to its scenic impacts. *Id.* Because petitioner had been so vocal, the court held the petitioner's silence on the scenic impacts was evidence that no fair argument had been presented on that issue. *Id.* By contrast here, the Coastal Commission made *no comments* on the EIR. Presumably, the Commission was well aware of its ability to comment during its own later proceedings on the Project's coastal development permit. *See* § 30600. Silence, in this case, is not acquiescence.

Respondents also cannot excuse the EIR's failure to properly analyze the potential for wetlands on the Project site. Because the Coastal Commission relies on a less restrictive definition of wetlands than the U.S. Army Corps of Engineers, areas that may not be considered wetlands under the federal definition can nevertheless qualify under the Coastal Act. Respondents insist that the EIR's wetland delineation actually used the Coastal Commission methodology (RB:60-61), but the biological technical report cited by Respondents contradicts this claim. While the report contains information on the Coastal Act definition (AR:1089-90), it states unequivocally that Corps' methodology "was used to identify the type and extent of wetland resources within the boundaries of the survey area."

AR:1086; *see also* AR:1093-95 (listing only U.S. Army Corps, Regional Water Quality Control Board, and Department of Fish and Game methodologies for jurisdictional delineation).

The EIR's omission is troubling, as the City fully understood, throughout the administrative process, that applying the Coastal Act definition to the Project site would likely result in a positive wetland determination. AR:11437 (statement of City's Principal Planner regarding wetland vegetation and seepage on Project site). Despite the City's attempt to cast the Coastal Commission's potential wetland determination in a political light (RB:61), evidence in the record demonstrates that the Project site contains areas replete with wetland characteristics. AR:1736-37, 1740 (documenting extensive wetland indicators on site).

Second, the EIR's proposed mitigation for the Project's impacts to ESHA—on-site or off-site restoration (AR:263)—violates the Coastal Act. While the City now claims it was not required to complete any analysis regarding this issue (RB:59), the argument is a non-starter. Under the City's own threshold, the EIR must analyze whether the Project, as proposed, might violate the Coastal Act. AR:210-11. The City's reliance on *Wilson & Wilson v. City Council* (2011) 191 Cal.App.4th 1559, 1581-85 and *Del Cerro Mobile Estates v. City of Placentia* (2011) 197 Cal.App.4th 173,186 is unavailing. Both of these cases address ripeness claims related to possible future actions in a non-CEQA context.

Respondents attempt to distinguish *Bolsa Chica Land Trust v. Superior Court* (1999) 71 Cal.App.4th 493, 506-07, but the effort falls flat. *Bolsa Chica* held that section 30240 of the Coastal Act prohibits any destruction of ESHA. *Id.* at 507 (Coastal Act "does not permit a process by which the habitat values of an ESHA can be [] recreated in another location"). While Respondents urge that ESHA restoration here might be accomplished on-site (RB:59-60), this characterization of Project mitigation cannot save the EIR's analysis. Under the Coastal Act, ESHA cannot be developed and then re-created elsewhere, regardless of whether the new habitat is created on-site or off-site. § 30240. Respondents' fundamental misunderstanding of the Coastal Act not only defeats their CEQA argument; it also may undermine the City's ability to obtain a coastal development permit for the Project.

Third, the EIR omits any discussion of whether the Project, as designed, would conflict with potential Coastal Commission action regarding prior removal of critical habitat. AR:9661-62e. Respondents assert that the Coastal Commission's 2009 notice to the owners of NBR, and copied to the City, has nothing to do with the Park. RB:60. This is false. The Commission's notice specifically warned that "major vegetation" had been removed from both NBR *and* Assessor's Parcel Number 424-041-10 (the City's Park site), potentially in violation of the Coastal Act. AR:9662a, 9661 (City noting that "[i]t appears that all three

areas are within or are close to the grading/disposal sites for our park project"); AR:1744-45 (maps illustrating location of removed habitat). The City has even acknowledged that the Commission will likely require mitigation for this habitat removal (AR:9661), including possible restoration on-site.

Accordingly, because the Project entails permanent conversion of land that will likely be slated for restoration activities, it is inconsistent with the Coastal Act's policies. The EIR's failure to mention either the Commission enforcement action or its possible repercussions (*cf.* AR:1768 (noting only the historic removal of habitat)) violated CEQA.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that the Court grant this appeal, reversing the judgment of the trial court.

DATED: May 9, 2012 SHUTE, MIHALY & WEINBERGER LLP

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CERTIFICATE OF WORD COUNT
(California Rules of Court 8.204(c))

The text of this Reply Brief consists of 13,964 words, not including tables of contents and authorities, signature block, and this certificate of word count as counted by Microsoft Word, the computer program used to prepare this brief.

AMY J. BRICKER

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PROOF OF SERVICE

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California Court of Appeal Fourth Appellate District Division Three
Case No.: G045622

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the City and County of San Francisco, State of California. My business address is 396 Hayes Street, San Francisco, California 94102.

On May 9, 2012, I served true copies of the following document(s) described as:

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Executed on May 9, 2012, at San Francisco, California.

Sean P. Mulligan

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