RACHEL B. HOOPER (State Bar No. 98569)
AMY J. BRICKER (State Bar No. 227073)
SHUTE, MIHALY & WEINBERGER LLP
396 Hayes Street
San Francisco, CA 94102
Telephone: (415) 552-7272
Facsimile: (415) 552-5816
Hooper@smwlaw.com
Bricker@smwlaw.com

Attorneys for Petitioner Banning Ranch Conservancy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE, CIVIL COMPLEX CENTER

Banning Ranch Conservancy, Petitioner, v. City of Newport Beach, City of Newport Beach City Council, and DOES 1-10, Respondents. Newport Banning Ranch, LLC; Aera Energy, LLC; Cherokee Newport Beach, LLC; and DOES 11-50, Real Parties in Interest.	Case No. 30-2010-00365758 CCP §§ 1085 (1094.5); California Environmental Quality Act "CEQA" ASSIGNED FOR ALL PURPOSES TO JUDGE GAIL A. ANDLER DEPARTMENT CX102 **OPENING BRIEF OF PETITIONER BANNING RANCH CONSERVANCY** Date: March 14, 2011 Time: 9:00 a.m.

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PRELIMINARY STATEMENT

Petitioner Banning Ranch Conservancy ("BRC") brings this action to challenge: (1) the City of Newport Beach's ("City's") approval of Sunset Ridge Park and related Access Agreement (collectively, "Project"), and (2) its certification of an environmental impact report ("EIR") for the Project. Because the Project is a public park, the City is both the "applicant" and the approval agency. As Petitioner demonstrates, the City's approvals violate the California Environmental Quality Act, Public Resources Code section 21000 et seq. ("CEQA").[1]

The Project site is 18.9 acres. Approximately 13.7 acres of the site is owned by the City, while approximately 5.2 acres lie on the neighboring Banning Ranch property, which is owned by Real Parties in Interest (collectively, Newport Banning Ranch or "NBR"). AR 122.[2] Located within one quarter mile of the Pacific Coast, the Project site contains wetlands and extensive environmentally sensitive habitat, such as coastal sage scrub and willow scrub. The site is designated as critical habitat for the federally threatened coastal California gnatcatcher. AR 414, 417. Portions of the site experienced decades of use in oil production, and still contain abandoned wells and contaminated soils. AR 466-67.

Sunset Ridge Park, proposed for active and passive recreational uses and facilities, is located on the City's property, at the corner of West Coast Highway (also known as Pacific Coast Highway or "PCH") and Superior Avenue. AR 123. Although the small park is estimated to attract only 173 cars per day (AR 313), the Project includes several major roadway improvements. First, rather than providing direct access to the park from the adjacent PCH or Superior Avenue, the Project includes a circuitous access road ("Bluff Road") that travels from PCH through the Banning Ranch property, before looping back to the park site. AR 173, 186. Second, the Project includes significant modifications to PCH, including the installation of a signalized intersection and the widening of westbound PCH onto the Banning Ranch property to accommodate a four-lane divided entryway to Bluff Road. AR 123, 186. Finally, the Project includes a 75-space parking lot on the City's property. AR 123. Project development will also require massive grading, including the export of approximately 34,000 cubic yards of fill to the Banning Ranch property. *Id.*

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[1] Except as otherwise noted, all further statutory references are to the Public Resources Code.

[2] Citations to the Administrative Record appear herein as: "AR [page number, excluding leading zeros]."

Banning Ranch is an undeveloped, 400-acre property with rare, intact coastal ecosystems that provide habitat for numerous species. AR 8068, 8071. Due to its biological significance, in 2006 the voters approved an amendment to the City's General Plan calling for the preservation of Banning Ranch as open space. AR 1474. As Petitioner warned throughout the administrative proceedings, however, the present Project will facilitate the intensive urban development of Banning Ranch. In fact, Bluff Road and the PCH widening/signalization—features of Sunset Ridge Park—are included in the first phase of the large mixed use development already proposed by NBR. AR 8068, 8082. Moreover, under an Access Agreement between the City and NBR, NBR will provide substantial "in kind" funding for the Project's extensive roadway improvements. AR 2646-47. In exchange, the Access Agreement allows NBR unlimited use of Bluff Road for their proposed development, at no charge; the Agreement also obligates the City to install a traffic signal at PCH, which would primarily serve NBR's development. AR 2650-51.

The City circulated a Notice of Preparation ("NOP") for the proposed NBR development on March 16, 2009. AR 8067-87. In addition to Bluff Road and the PCH improvements, the proposed NBR project includes construction of up to 1,375 residential units, 75,000 square feet of commercial space, and a hotel. AR 8068. The City's environmental review of the NBR project has proceeded concurrently with the Sunset Ridge Park Project, but will be completed at a later date. AR 1476. The City has been using the same EIR consultant for the two projects. AR 2433-34, 2470-72.

While BRC enthusiastically supports public parks, the City's approval of the present Project was in flagrant violation of CEQA, and thus cannot stand. The EIR's most serious deficiency is its failure, at the outset, to describe the whole of the Project, as CEQA requires. *See* Guidelines § 15378(a).[3] Here, it is clear that the Project's roadway improvements will serve as the crucial "first step" toward development of the proposed NBR project. Thus, longstanding CEQA precedent holds that the two projects must be analyzed together. *See Bozung v. Local Agency Formation Comm.* (1975) 13 Cal.3d 263, 279, 282; *City of Carmel-By-the-Sea v. Bd. of Supervisors of Monterey County* (1986) 183 Cal.App.3d 229, 243-44. By impermissibly "piecemealing" its review of Sunset Ridge Park from the proposed NBR project, the EIR evaluates only a fraction of the environmental impacts that may ultimately result from the whole of the

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

project. Because this deficiency permeates the EIR, the City "did not proceed 'in a manner required by law.'" *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 199-200 (citation omitted).

Further, even if the intertwined developments could be treated as separate projects, the City had a duty to analyze and mitigate: (1) the Project's cumulative impacts, when viewed together with the proposed NBR project (Guidelines § 15355); and (2) impacts from the Project's potential to induce growth on the NBR property. § 21100(b)(5). The EIR fails on both counts. To take but one example, although the primary purpose of the Project's signalized PCH intersection is to serve the proposed NBR development (AR 1477, 11361), the EIR entirely fails to analyze any traffic generated by that project. Compounding these deficiencies, the EIR dismisses, without substantial evidence, any alternative that would eliminate Bluff Road from the Sunset Ridge Park Project. Thus, the EIR fails to evaluate a reasonable range of alternatives to the Project, as required by CEQA. *See* § 21100(b)(4); Guidelines § 15126.6(a).

Equally troubling, the EIR fails to adequately examine or mitigate the Project's impacts on the extraordinarily sensitive biological resources on the site. Time and again, the EIR improperly limits the scope of its analyses, relies on faulty assumptions, or simply omits important information altogether. For example, rather than analyze the Project's impacts on the entire area designated as "critical habitat" for the threatened California gnatcatcher, the EIR arbitrarily confines its review to the species' breeding sites. The City gives no sound rationale for excluding the gnatcatcher's foraging and dispersal habitat, which is also included within the U.S. Fish and Wildlife Service ("USFWS") designation. At the same time, the EIR fails to acknowledge the presence of wetlands on the site, or the jurisdiction of the Regional Water Quality Control Board ("RWQCB") and the California Coastal Commission ("Commission") over these resources.

The EIR's discussion of impacts due to hazardous materials is similarly evasive. While the document acknowledges that contaminants from decades of oil production pervade portions of the Project site, the City stops short of performing any meaningful investigation. Until the final stages of environmental review, the City failed even to disclose, much less analyze, the fact that one potentially hazardous stock pile lies directly adjacent to Carden Hall School. The City's persistent underestimation of impacts, together with its failure to identify proper mitigation measures, contravenes CEQA's core mandates. Because the EIR's omissions precluded informed decisionmaking and meaningful public participation, they constitute a prejudicial abuse of discretion. *See Citizens to Preserve the Ojai v. County of Ventura* (1985) 176 Cal.App.3d 421, 428

("*Ojai*"). Accordingly, Petitioner urges the Court to vacate the approvals of the Project until the City complies with CEQA and the Guidelines.

STATEMENT OF FACTS

I. THE CHALLENGED PROJECT.

Petitioner's action challenges City approvals set forth in Resolutions Nos. 2010-29 and 2010-30. These Resolutions adopt the Conceptual Site Plan for Sunset Ridge Park, certify the EIR and make related findings, approve a Mitigation Monitoring and Reporting Program, and adopt a Statement of Overriding Considerations. AR 8-9, 106-07. This action also challenges the City's approval of the Access Agreement between the City and NBR regarding Sunset Ridge Park. AR 2970.

II. THE ADMINISTRATIVE PROCEEDINGS.

On May 8, 2009, the City filed with the State Clearinghouse an NOP of the Draft EIR ("DEIR") for the Project. AR 7, 620-56. BRC submitted comments on the NOP, urging the City to evaluate an alternative park configuration that did not involve road construction through Banning Ranch. AR 680.

On October 27, 2009, the City circulated the DEIR for the Project. AR 7. BRC's representatives and consultants submitted extensive written comments regarding the inadequacies of the DEIR. *See, e.g.*, AR 1735-64, 1775-81, 1928-29, 2030-31, 12374-84. In particular, BRC emphasized that the DEIR's failure to evaluate the environmental impacts of the Project together with the proposed NBR development constituted impermissible "piecemealing" under CEQA. AR 2030-31. BRC also warned that the DEIR failed to adequately analyze or mitigate the Project's significant impacts on biological resources and hazardous materials, or its growth-inducing and cumulative impacts. AR 1735-64, 1808, 1929, 2030, 12374-84. For example, BRC's biological and planning consultants submitted comments demonstrating that the DEIR grossly underestimated the Project's impacts to wetlands, environmentally sensitive habitat areas, and the threatened California gnatcatcher. AR 1735-64, 1804-08. Finally, BRC objected that the DEIR improperly rejected alternatives that could have reduced the Project's significant environmental impacts by eliminating or relocating the proposed roadway improvements. *See, e.g.*, AR 1776-80, 1928-29.

In total, the City received over 100 comments on the DEIR from government agencies and members of the public concerned about the Project's significant impacts, particularly those stemming from the Project's roadway improvements. AR 2775. For example, echoing the sentiments of numerous

commenters, a USFWS official advised the City that failure to review the Project's biological impacts along with impacts from the proposed NBR project would result in improper piecemealing. AR 9605, 9637. A RWQCB official noted that the DEIR erred in its description of a wetland and other resources subject to that agency's jurisdiction. AR 1496-98, 9637. Further, the California Department of Transportation ("CalTrans") and numerous others commented on their concerns regarding traffic impacts from the Project's planned addition of a signalized intersection on PCH. *See, e.g.*, AR 1479, 1776. Others commented that the presence of contaminated soils and potential impacts to an adjacent school had not been adequately investigated or disclosed. AR 1512, 1958.

The City prepared its response to comments on the DEIR and issued the Final EIR ("FEIR") for the Project on March 12, 2010. AR 7. On March 23, 2010, the City Council held a public hearing at which it approved the Project. AR 2915-2920. Due to its failure to properly circulate the Access Agreement prior to the March 23 hearing, the City Council held a second public hearing on the Access Agreement on April 27, 2010; at that time, the Council ratified its earlier approval of the Access Agreement. AR 2970. BRC provided oral and written comments on the FEIR prior to these approvals, noting that the document did not adequately address the inadequacies in the DEIR that had been identified during the review process. *See, e.g.*, AR 2802-10, 2819-22, 2838-40, 2845-46, 2886-88, 2893-94, 14700-03. The City filed Notices of Determination for the Project on March 24, 2010 and April 30, 2010. AR 1, 4.

III. THE PRESENT ACTION.

On April 22, 2010, Petitioner timely filed a Petition for Writ of Mandate to challenge the City's actions on March 23, 2010 to approve the Project. On May 20, 2010, pursuant to the Parties' stipulation and this Court's order, Petitioner filed a Supplemental Petition for Writ of Mandate to challenge the City's ratification of the Access Agreement on April 27, 2010.

The City lodged the Administrative Record with the Court on September 2, 2010.

STANDARD OF REVIEW

This action challenges the legal adequacy of the EIR for the Project. As the Supreme Court has explained, the EIR is "the heart of CEQA"—an "environmental 'alarm bell' whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return." *Laurel Heights Improvement Assn. v. Regents of Univ. of Calif.* (1988) 47 Cal.3d 376, 392

("*Laurel Heights I*") (citations omitted). The EIR is the "primary means" of ensuring that public agencies "take all action necessary to protect, rehabilitate, and enhance the environmental quality of the state." *Id.*

An EIR must not only identify the adverse environmental impacts of a proposed project, but also evaluate ways of avoiding or minimizing those effects. §§ 21002, 21002.1(a), 21061. Indeed, CEQA requires that the lead agency actually *adopt* any identified mitigation measures or alternatives that would substantially lessen a project's significant environmental impacts, unless those measures or alternatives are infeasible. § 21002; Guidelines § 15002(a)(3).

Under CEQA, an EIR must reflect a good faith effort at full disclosure (*see* Guidelines § 15151), including "detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project." *Laurel Heights I,* 47 Cal.3d at 405. To accomplish CEQA's informational purpose, an "EIR must contain facts and analysis, not just the agency's bare conclusions." *Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 568 ("*Goleta II*") (citations omitted); *see also Communities for a Better Env't v. City of Richmond* (2010) 184 Cal.App.4th 70, 85 (EIR must provide objective analysis, not just "call for blind faith in vague subjective characterizations"). As one court explained, "CEQA places the burden of environmental investigation on government rather than the public." *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 311.

In reviewing the adequacy of the EIR for the Project here, this Court must determine whether the City prejudicially abused its discretion by either: (1) failing to proceed in the manner required by law, or (2) reaching a decision that is not supported by substantial evidence. § 21168.5; *Laurel Heights I*, 47 Cal.3d at 392. "Certification of an EIR which is legally deficient because it fails to adequately address an issue constitutes a prejudicial abuse of discretion . . . ." *Ojai,* 176 Cal.App.3d at 428. A prejudicial abuse of discretion occurs, as a matter of law, if an EIR omits relevant information and thus precludes informed decisionmaking. *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 712.

ARGUMENT

I. THE CITY VIOLATED CEQA BY IMPERMISSIBLY SEGMENTING THE PROJECT AND THUS "PIECEMEALING" ENVIRONMENTAL REVIEW.

The City's most fundamental violation of CEQA is that the EIR failed to analyze the Project in its entirety. The CEQA Guidelines define "project" as "the whole of an action" that may result in a direct or reasonably foreseeable indirect change in the environment, and require the lead agency to fully analyze each

"project" in a *single* environmental review document. Guidelines § 15378(a); *see also* Guidelines §§ 15165, 15168. The proper scope of an EIR's project description is a question of law, subject to de novo review by the Court. *Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora* (2007) 155 Cal.App.4th 1214, 1223-24 ("*Tuolumne County*").

"'Project' is given a broad interpretation in order to maximize protection of the environment." *McQueen v. Bd. of Directors* (1988) 202 Cal.App.3d 1136, 1143 (disapproved on other grounds). As the Supreme Court has explained, this rule ensures "that environmental considerations do not become submerged by chopping a large project into many little ones—each with a potential impact on the environment—which cumulatively may have disastrous consequences." *Bozung*, 13 Cal.3d at 283-84. CEQA thus forbids the City from "segmenting" or "piecemealing" project components to hide or minimize environmental impacts that must be reviewed in a single EIR.

Yet, "piecemealing" is precisely what the City did in analyzing the Project. It is undisputed that the construction of Bluff Road and PCH improvements, included as part of the Sunset Ridge Park approval, are also vital components of the proposed NBR development project. As the NOP for the NBR project states:

> As a part of the [Newport Banning Ranch] Project, Bluff Road would be constructed from a southern terminus at West Coast Highway to a northern terminus at 19th Street. . . . Bluff Road would serve as the primary roadway through the Project site . . . . The implementation of Bluff Road may be phased. Access into the City of Newport Beach's proposed Sunset Ridge Park is proposed from Bluff Road within the Project site. An interim connection from Bluff Road through the Project site connecting to Sunset Ridge Park may be constructed as a part of the Sunset Ridge project.

AR 8082-83; *see also* AR 1476 ("[B]oth the proposed Sunset Ridge Park Project and the proposed Newport Banning Ranch Project assume the generally same roadway alignment from West Coast Highway.") Thus, there is no question that the construction of Bluff Road constitutes the first phase of, or first step towards, development of the larger NBR project. In fact, the Access Agreement approved as part of the Project legally links Sunset Ridge Park to the proposed NBR development by committing NBR to dedicate land and easements on the NBR property. AR 2646-47. Nevertheless, despite numerous public comments urging the City to analyze the entire NBR project at the time it approved the first portion of Bluff Road, the City simply responded that it would complete environmental review of the remainder of the NBR project at a later time. *See, e.g.*, AR 1476, 1795-97, 1813, 2030-32.

Long-standing CEQA law makes clear that environmental review of the entire project—here, Sunset

Ridge Park and the proposed NBR project—must be completed *before* the approval of the first step toward that development. Over thirty years ago, the California Supreme Court considered a Local Agency Formation Commission ("LAFCO") approval of an annexation of 677 acres of land by the City of Camarillo. *Bozung*, 13 Cal.3d at 281. This annexation constituted the first step towards the parcel's ultimate development for residential, recreational, and commercial purposes. *Id*. LAFCO argued that it did not need to analyze the impacts of the development because any such review would be conducted by the City at a later date, if it chose to proceed with further development approvals. *Id*. at 278.

The Court rejected this argument, emphatically holding that environmental review must be conducted before the first discretionary approval of a project, even if later approvals are to take place. *Id.* at 282-84. Courts of Appeal have faithfully followed this rule for decades. *See, e.g.*, *City of Carmel-By-the-Sea*, 183 Cal.App.3d at 233-35, 244 (City must analyze full environmental consequences of rezone because it "was a necessary first step to approval of a specific development project" that may be submitted to City); *Koster v. County of San Joaquin* (1996) 47 Cal.App.4th 29, 31, 34, 39-40 (County EIR must analyze General Plan amendment that was the "first step" toward developing new towns); *Nelson v. County of Kern* (Cal. App. 5, Nov. 19, 2010, No. F059293) 2010 WL 4678706 at *7-11 (EIR must analyze impacts from proposed mining activities at the same time as mining reclamation plan). Thus, the City's assurances that the environmental impacts of the NBR project will be reviewed in a subsequent EIR are entirely insufficient.

The only other rationale offered by the City for its segmented project description is that:

> the City of Newport Beach General Plan Circulation Element Master Plan of Streets and Highways and the Orange County Master Plan of Arterial Highways (MPAH) assume a Primary Road through the Newport Banning Ranch property from West Coast Highway to 19th Street regardless of whether the property is retained as Open Space or developed as a Residential Village.

AR 1476. Thus, the theory goes, the City roadway improvements are "independent" of the NBR project and may be reviewed separately from it.

This argument must fail for several reasons. First, the City's assertion that Bluff Road will be constructed regardless of the NBR development is wholly unsupported by the record. In fact, the City's General Plan, and the environmental analysis underlying that Plan, make clear that Bluff Road would be considered *only* in conjunction with development of Banning Ranch. As stated in General Plan Policy LU 6.4.9, the City's policy is to "[f]acilitate development of an arterial highway" through Banning Ranch "*if the*

property is developed." AR 6889 (emphasis added); *see also* AR 6806 (General Plan Policy LU 3.4 providing for protection of Banning Ranch as open space). Further, when asked by the City of Costa Mesa how the MPAH would be impacted if the Banning Ranch property were preserved as open space, the City responded: "If an open space option is ultimately selected and implemented, *no roadways would be anticipated upon Banning Ranch*." AR 6527, 6531 (emphasis added); *see also* AR 4468 (General Plan EIR traffic analysis noting, "[i]f the open space preservation [of Banning Ranch] occurs, roadway segments through the property (Bluff Road and 15th Street) *will not be constructed* . . . .") (emphasis added). Thus, it is clear that the General Plan provides no authority for the City to build Bluff Road independently from the development of Banning Ranch.[4]

Second, even if the City had independent plans for Bluff Road, its appearance in the General Plan does not constitute road approval. The City must still conduct a CEQA analysis for the required discretionary approval of a roadway. *See Envtl. Planning and Info. Council v. County of El Dorado* (1982) 131 Cal.App.3d 350, 357-58 (EIR must analyze a project's effect on the existing environment, not the project's relationship to an existing general plan). Because Bluff Road is currently being proposed for Sunset Ridge Park *and* the NBR project, its presence in the General Plan only begs the question of whether CEQA review for both projects must be conducted in the same EIR.

Finally, any alleged independence of the City's need for Bluff Road was shattered when the City linked the roadway improvements to the proposed NBR project via the Access Agreement. *See* AR 2643-94. The present case is analogous to *Tuolumne County*, in which the Court of Appeal found that the construction of a Lowe's home improvement center had to be analyzed in the same EIR as adjacent City roadway improvements. 155 Cal.App.4th at 1231. The City of Sonora, like the City here, argued that the roadway improvements were an independent project because "the realignment is shown in the 1984 general plan circulation element and in City's redevelopment plan as a regional road improvement." *Id.* at 1227-28.

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[4] For this reason, the City's approval of Bluff Road in advance of a full vetting of the proposed NBR project is inconsistent with the General Plan's goals and policies calling for the preservation of Banning Ranch as open space, in violation of State Planning and Zoning Law. *See, e.g.*, AR 6806, 6883-84 (Policies LU 3.4, 6.3.1-2, Goal LU 6.3); *Neighborhood Action Group v. County of Calaveras* (1984) 156 Cal.App.3d 1176, 1182-86; *Friends of "B" Street v. City of Hayward* (1980) 106 Cal.App.3d 988, 998 (decisions of the City affecting land use and development, including but not limited to approvals of public works projects, must be consistent with the general plan).

The court rejected this argument, holding that while "it was theoretically possible" that the two projects could have been completed independently of each other, the record made clear that they were, in fact, related projects. *Id*. at 1230-31. First, Lowe's committed to funding the roadway improvements. *Id*. at 1226. Second, the Lowe's center, which was approved before the road, was conditioned upon completion of the roadway improvements, and thus the projects were legally linked. *Id*.; *see also Plan for Arcadia, Inc. v. Arcadia City Council* (1974) 42 Cal.App.3d 712, 720, 726 (shopping center and related roadway improvements are "single project" under CEQA). Finally, the Court took into consideration the fact that "the road realignment and the proposed home improvement center are related in (1) time, (2) physical location and (3) the entity undertaking the action." *Tuolumne County*, 155 Cal.App.4th at 1227.

All of the *Tuolumne County* factors are present here. First, the NBR developer contributed critical funding to the roadway improvements. The City could have used its power of eminent domain and paid fair market value for the land needed to build the roadway improvements. Instead, it entered into an Access Agreement with the NBR property owners, whereby NBR conveyed, at no cost to the City, easements and fee title to portions of NBR's valuable private property for construction and mitigation of the improvements. AR 2647-48, 2651-52; *see also* AR 2650 (NBR agrees to pay costs of dirt removal for road improvements). The City claims its Project remains isolated from the NBR project because the NBR property owners are "willing to grant an access easement to the City for said [roadway] use." AR 1476. However, the NBR property owners are not "willing" to provide this financial contribution for nothing. Rather, like Lowe's, they are "willing" to commit substantial funding for the roadway improvements only because such improvements will serve their proposed development. In fact, in exchange for its financial contribution, NBR and its builders were granted free usage rights to the roadway improvements. AR 2648.

Second, Sunset Ridge Park and the proposed NBR development are legally linked. It is clear that Bluff Road would not only be a condition of the NBR project; it is actually an integral part of it, serving as "the primary roadway through the Project site." AR 8082. At the same time, the City conditioned Sunset Ridge Park on the needs of the NBR developers, agreeing: (1) to close the access road to the park for any construction necessary for the "efficient" use of the NBR property, including installation of infrastructure to serve development of the site (AR 2650), and (2) to widen PCH and install a traffic signal, elements that were primarily needed for the proposed NBR development. AR 2650-51; 8052; 1899 (CalTrans official

stating "the main reason behind [the signal] is to provide motorists access to the Banning Ranch Development"). Because each project was conditioned on the other, the legal linkage between them is even stronger than the linkage present in *Tuolumne County*. Finally, as in *Tuolumne County*, the roadway improvements and the NBR project are adjacent to one another and will be approved sequentially by the same lead agency, even using the same EIR consultant. AR 1476, 2433-34, 2470-72.

For all these reasons, under *Tuolumne County*, the Project's roadway improvements are integrally connected with the proposed NBR development and must be analyzed in the same EIR. 155 Cal.App.4th at 1231. The City cannot escape this established rule simply by approving a park at the same time as the roadway improvements.

The City's failure to review the environmental impacts of Sunset Ridge Park together with the NBR development is not a trivial omission, but implicates core CEQA policies. As explained by the court in *Tuolumne County,* separating the projects "runs the risk that some environmental impacts produced by the way the two matters combine or interact might not be analyzed in the separate environmental reviews." 155 Cal.App.4th at 1230. Moreover, "if the two matters are analyzed in sequence . . . the opportunity to implement effective mitigation measures as part of the first matter may be lost." *Id.* Because the EIR's use of a truncated project description here undercut the City's ability to adequately analyze and mitigate the environmental impacts of the whole of the Project, the City failed to proceed in a manner required by law. *County of Inyo*, 71 Cal.App.3d at 199-200.

II. THE EIR FAILS TO ADEQUATELY ANALYZE THE PROJECT'S SIGNIFICANT CUMULATIVE IMPACTS.

Even if Sunset Ridge Park and the NBR project could be viewed as two separate projects, the EIR must still analyze and mitigate the two projects' cumulative impacts. CEQA defines cumulative impacts as "two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts." Guidelines § 15355; *see also Communities for a Better Env't v. Calif. Res. Agency* (2002) 103 Cal.App.4th 98, 120. An effect is "cumulatively considerable" when the "incremental effects of an individual project are significant when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects." Guidelines § 15065(a)(3). A proper cumulative impact analysis is "absolutely critical," *Bakersfield Citizens for Local*

Control v. City of Bakersfield (2004) 124 Cal.App.4th 1184, 1217, as it is a mechanism for controlling "the piecemeal approval of several projects that, taken together, could overwhelm the natural environment." *Las Virgenes Homeowners Fed'n, Inc. v. County of Los Angeles* (1986) 177 Cal.App.3d 300, 306.

Here, there is no question that the proposed NBR project is a "probable future project" that must be analyzed for cumulative impacts. *San Franciscans for Reasonable Growth v. City and County of San Francisco* (1984) 151 Cal.App.3d 61, 73-74, 81 ("*SFRG*") (EIR must analyze cumulative impacts from projects under environmental review but not yet approved). Yet, throughout its impact analyses, the EIR fails to adequately consider the Project's impacts in conjunction with the proposed NBR project. *See, e.g.*, AR 214 (land use), AR 392 (operational noise), AR 446 (cultural and paleontological resources).

For example, the EIR fails to adequately analyze and mitigate cumulative impacts on traffic. Although the EIR lists NBR as a cumulative project (AR 317), the full number of trips generated by the NBR project is *not* included in the actual cumulative project traffic analysis. AR 319 (Exhibit 4.3-6 indicates no NBR traffic from Bluff Road at its intersection with PCH). The City's apparent justification for this omission is that NBR construction would not begin until after the opening of Sunset Ridge Park. AR 317. However, this Court should not countenance such an end run around CEQA's requirements. *See SFRG*, 151 Cal.App.3d at 75 (EIR must address impacts from proposed projects even though they may *never* be built); *Citizens Assn. for Sensible Dev. of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151, 168 ("even projects anticipated beyond the near future should be analyzed for their cumulative effect").

Moreover, in determining whether a signal at the intersection of Bluff Road and the West Coast Highway is warranted, the EIR uses General Plan buildout forecast volumes which assume that Bluff Road will eventually connect to 19th Street. AR 325. Even without NBR's residential development, these buildout forecast volumes indicate that 5,225 cars will travel through the new intersection per day. *Id.* Yet, the EIR never considers the *impact* this volume of cars will have on traffic at the new intersection—even though CalTrans warned the City that installation of a signal would "seriously disrupt progressive traffic flow." AR 1479. Instead, the EIR considers only the small number of trips generated by the Project. AR 321. This sleight of hand violates CEQA. If the buildout volumes are used to justify the necessity of the signal, the effect of the buildout volumes on traffic should also be considered. *See SFRG,* 151 Cal.App.3d at 78-80 (understatement of buildout rendered CEQA analysis inadequate).

The EIR's assurance that CalTrans, as a responsible agency, will analyze and mitigate traffic impacts in conjunction with its approval of the signal is disingenuous at best. *See* AR 324, 1477. What the EIR fails to disclose is that CalTrans will lose approval authority if the City assumes jurisdiction of the intersection as it plans to do under a state law (AB 344) that authorizes the switch. *See, e.g.*, AR 1989-96, 12896, 14709. Such a misrepresentation of a responsible agency's role thwarts CEQA's informational purposes, thereby "preclude[ing] informed decisionmaking and informed public participation." *Kings County Farm Bureau,* 221 Cal.App.3d at 721; *see also* Guidelines § 15124(d)(1)(C) (EIR must contain accurate information about environmental review requirements of state agencies). In any event, such deferral of analysis and mitigation is improper under CEQA, as the EIR fails either to analyze CalTrans' requirements for the signal or to commit the City to any specific standards for mitigation. *See San Joaquin Raptor Rescue Ctr. v. County of Merced* (2007) 149 Cal.App.4th 645, 670.

Similarly, in considering cumulative impacts to biological resources, the EIR completely ignores the proposed future development of NBR.[5] This omission is remarkable, as the development of NBR is certain to create similar biological impacts to the Project. For instance, just as the Project will result in impacts to the threatened gnatcatcher and its habitat, so the development of NBR will cause direct impacts to 19 identified gnatcatcher use areas, as well as the loss of over 18 acres of habitat. AR 12211, 12228. As stated by a USFWS official, these cumulative impacts to gnatcatcher habitat must be analyzed and mitigated, along with other biological impacts, to avoid improperly "piecemealing" environmental review. AR 9605, 9637. Indeed, they highlight the importance of a cumulative impacts analysis, as such impacts, when viewed together, would likely result in new or different mitigation than that proposed for the Project alone.

Given that the NBR development will cause related impacts to traffic and biological resources, as well as in other areas such as land use, noise, and hazardous materials, the EIR's cumulative impact analyses must include it. *See Bakersfield Citizens for Local Control*, 124 Cal.App.4th at 1214, 1221 (invalidating EIR for failure to treat proposed retail shopping center approximately 3.6 miles away as a "relevant project" for cumulative impact analysis). The EIR's omission of analyses for these cumulative impacts is especially

[5] While the City states in response to comments that "[t]he Newport Banning Ranch property is assumed in the cumulative biological resources analysis" (AR 1825), biological resource impacts from its development are not discussed at all in the EIR.

egregious since data and information regarding the proposed NBR project's impacts were readily accessible to the City, and were in some instances purposely jettisoned from the EIR. *See, e.g.*, AR 2433-34, 2470-72 (same EIR consultant used for the Project and NBR); AR 10082, 10297 (information on NBR's hazardous waste impacts deleted from Project EIR); AR 12211-38 (technical report for NBR's impacts to gnatcatchers completed February 2009).

Finally, the EIR attempts to avoid CEQA's requirements regarding cumulative impacts by repeatedly asserting that, because Project-specific impacts are less than significant, or less than significant with mitigation, the Project would not contribute any significant cumulative impacts. *See, e.g.*, AR 214 (land use), AR 303 (aesthetics), AR 471 (hazardous materials). Thus, the EIR's cumulative impact analysis improperly collapses into its Project-level analysis; no additional analysis is provided. But the Court of Appeal in *Kings County Farm Bureau* specifically rejected this approach. 221 Cal.App.3d at 721 ("the analysis used in the EIR . . . avoids analyzing the severity of the problem and allows the approval of projects which, when taken in isolation appear insignificant, but when viewed together appear startling."). Accordingly, the City abused its discretion in certifying an EIR that fails to analyze and mitigate the Project's cumulative impacts in conjunction with the proposed NBR project.

III. THE EIR FAILS TO ADEQUATELY ANALYZE THE PROJECT'S SIGNIFICANT GROWTH-INDUCING IMPACTS.

The EIR further evades the obvious connection between the Project and the proposed NBR development by failing to provide a "detailed statement" of the Project's growth-inducing impacts, as required by CEQA. § 21100(b)(5). Growth-inducing impacts include aspects of a project that "may encourage and facilitate other activities that could significantly affect the environment." Guidelines § 15126.2(d). Thus, the EIR must examine "the ways in which the proposed project could foster economic or population growth, or the construction of additional housing, either directly or indirectly." *Id.* Likewise, CEQA requires analysis of the project's ability to "remove obstacles to population growth." *Id.* The Guidelines expressly recognize that growth-inducing impacts can occur "through extension of roads or other infrastructure." Guidelines App. G, § XII(a).

While the EIR alludes to these requirements, it makes no attempt to analyze the growth-inducing impacts that will result from the Project's expansion of infrastructure. AR 531-32. As the City

acknowledges, Project components include the widening and signalization of PCH, construction of a new road through the NBR property, and related drainage improvements. AR 185-87, 191-92. Yet, the EIR does not disclose either the amount or form of development that is likely to be induced by such infrastructure expansion, let alone analyze the environmental impacts associated with such development. *See* AR 531-32. Instead, the document cursorily concludes that the Project "is not considered growth inducing." AR 532.

Such omissions are plainly unacceptable under CEQA. In *City of Antioch v. City of Pittsburg* (1986) 187 Cal.App.3d 1325, the Court of Appeal set aside the approval of a road and sewer project on the grounds that the agency never analyzed the environmental impacts from future development facilitated by the project. *Id.* at 1329, 1338. The court reached this holding even though no specific development or connections to the project had yet been proposed. *Id*. at 1335. As the court explained, "[t]he location and design of the road and appurtenant sewage and water distribution facilities will strongly influence the type of development possible." *Id.* at 1334.

In the present case, the Project's growth-inducing impacts are much more transparent than in *City of Antioch*. The Project's infrastructure improvements are *specifically designed* to accommodate the proposed NBR project, the details of which are currently undergoing environmental review by the City. Indeed, as discussed *supra*, both the widening of the PCH and the construction of Bluff Road, approved as part of the Project, are actually components of the proposed NBR project. Further, as stated by a Caltrans official, "the main reason behind [the Project's signal] is to provide motorists access to the Banning Ranch Development." AR 1899; *see also* AR 1477 (City acknowledging that "the proposed park alone would not generate enough traffic to warrant a signal"). Fully aware of the linkage between the roadway improvements and the NBR project, the City coordinated with NBR on many aspects of them and even altered its drainage connection plans to accommodate NBR's development. AR 8442-46.

Thus, under the court's holding in *City of Antioch*, the City must analyze the impacts from the proposed NBR project *before* approving the infrastructure improvements that presage it. 187 Cal.App.3d at 1335-36; *see also City of Davis v. Coleman* (9th Cir. 1975) 521 F.2d 661, 676 (EIR must analyze impacts of development spurred by roadway improvements). Similarly, the City must identify adequate measures to mitigate the Project's growth-inducing impacts. *See* Guidelines § 15126.4(a)(1). The City's failure to conduct this analysis constitutes a prejudicial abuse of discretion. *See Napa Citizens for Honest Gov. v.*

Napa County (2001) 91 Cal.App.4th 342, 370.

IV. THE EIR'S ALTERNATIVES ANALYSIS VIOLATES CEQA BY IMPROPERLY DISMISSING ALTERNATIVES THAT WOULD HAVE SUBSTANTIALLY LESSENED THE PROJECT'S SIGNIFICANT ENVIRONMENTAL IMPACTS.

CEQA requires the EIR to analyze a reasonable range of alternatives that would avoid or substantially lessen the Project's significant environmental impacts while feasibly attaining most of the Project's basic objectives. *See* § 21100(b)(4); Guidelines § 15126.6(a). This analysis lies at "[t]he core of an EIR." *Goleta II*, 52 Cal.3d at 564. If an EIR fails to consider a reasonable range of alternatives, or to support its analysis with substantial evidence, the EIR is legally inadequate. *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal. App. 4th 713,735-38. Further, if a feasible alternative exists that will meet the project's objectives while reducing or avoiding its significant environmental impacts, the project may not be approved. § 21002.

Here, the EIR's alternative analysis is fatally flawed because it (1) fails to provide substantial evidence that the "environmentally superior" off-site alternative provided in the EIR is infeasible, and (2) improperly dismisses several other feasible alternatives that would have lessened the Project's significant environmental impacts by eliminating Bluff Road.

A. The EIR Fails to Provide Substantial Evidence to Support Its Conclusion that the Environmentally Superior Alternative Is Infeasible.

The EIR evaluates three alternatives, in addition to the "no project" alternative (Alternative A). These include an alternative site (Alternative B), a passive park (Alternative C), and a grading/design alternative (Alternative D). AR 537-557. Only one of these three alternatives—Alternative B—did not include construction of the Project's roadway improvements. AR 541-45. Alternative B involves construction of an active park, with facilities similar to the Project, at an alternate site located on the northeastern end of the NBR property. AR 543. Because the alternate location is accessible by existing roads and is already designated in the General Plan to allow for active park uses, it is identified as an "environmentally superior" alternative to the Project. AR 557. The EIR concludes that with Alternative B, "[a]ll significant impacts associated with the proposed Project could be mitigated to a less than significant level," and "the basic objective of providing parkland in West Newport" could be achieved. *Id*.

If, as here, an agency ultimately decides not to adopt an environmentally superior alternative, the EIR must provide substantial evidence that this alternative is infeasible. *Pres. Action Council v. City of San*

Jose (2006) 141 Cal.App.4th 1336, 1356-57 ("*PAC*"). The City's EIR fails to meet this requirement. The EIR proffered two reasons for the alleged infeasibility of Alternative B. First, it claimed, without reference to any facts or analysis, that purchase of the NBR property was "speculative." AR 557. However, in the absence of detailed information comparing the costs of purchasing the off-site property against constructing the Project as proposed (with its expensive roadway improvements), the EIR lacks sufficient basis for an infeasibility finding. *PAC*, 141 Cal.App.4th at 1355-57 (feasibility analysis of a reduced-sized alternative to a Lowe's held inadequate for failure to provide meaningful comparative data). Dismissing Alternative B with no feasibility analysis is especially troubling here, given that: (1) the City has the power of eminent domain for a City park; and (2) the property owners of the alternative site (NBR) had already demonstrated a "willing[ness]" to dedicate property to accommodate Sunset Ridge Park on other parts of the NBR property. *See* AR 1476; *Goleta II,* 52 Cal.3d at 574 (power of eminent domain renders alternative sites "more feasible"); *Save Round Valley Alliance v. County of Inyo* (2007) 157 Cal.App.4th 1437, 1459-63 (EIR must include detailed analysis of financial feasibility of land exchange where land owner noted it "would have entertained" the idea).

Second, the EIR assumed, without any analysis or investigation, that Alternative B would result in the violation of a deed restriction whereby CalTrans required the City property to be developed as a park. AR 557. But this "bare conclusion[]" violates CEQA. *PAC*, 141 Cal.App.4th at 1353 (citation omitted). In fact, there was no basis for the City to conclude that it could not have retained the City property as a passive park, without the roadway improvements, while using the alternative site as an active park. *Id.* at 1356. Such a solution, which the public specifically requested (AR 1929), would have allowed all of the Project's environmental impacts to be mitigated to a less than significant level, *and* met the City's policy objectives consistent with the deed restriction.

The EIR's failure to analyze the feasibility of this approach, or otherwise to provide a meaningful consideration of Alternative B, violates CEQA. *PAC*, 141 Cal.App.4th at 1356-57. Tellingly, the City has no explanation for its failure to provide specific details on the feasibility of Alternative B, other than to say its rejection of the off-site option "is a matter of policy." AR 1831. But such reasoning is obviously circular. The EIR must provide substantial evidence for the City's ultimate policy choices regarding alternatives, not summarily dismiss potentially feasible alternatives in the name of "policy."

B. By Improperly Excluding Any On-Site Alternative Without Bluff Road, the EIR Fails to Evaluate a Reasonable Range of Alternatives to the Project.

Given the EIR's summary rejection of off-site Alternative B for "policy" reasons, Petitioner and others asked the City to evaluate on-site alternatives that did not involve the construction of Bluff Road. Such alternatives included either: (1) eliminating the on-site parking lot (and thus the need for Bluff Road), or (2) relocating the access road from the NBR property to a location on the City's property that would entail less severe environmental impacts. *See, e.g.*, AR 1617, 1724, 1969. Because the City dismissed Alternative B out of hand, inclusion of such an alternative was necessary to provide decisionmakers with a reasonable range of options. *Watsonville Pilots Assn. v. City of Watsonville* (2010) 183 Cal.App.4th 1059, 1089-90.

The range of alternatives evaluated in the EIR is subject to a "rule of reason," and must be guided by case-specific factual circumstances. Guidelines § 15126.6(a); *PAC*, 141 Cal.App.4th at 1350. As the *Watsonville* court recently explained, "[s]ince the purpose of an alternatives analysis is to allow the decisionmaker to determine whether there is an environmentally superior alternative that will meet most of the project's objectives, the key to the selection of the range of alternatives is to identify alternatives that meet most of the project's objectives but have a reduced level of environmental impacts." 183 Cal.App.4th at 1089. Here, there is no question that an alternative that eliminated Bluff Road would be environmentally superior to the Project. AR 557. Further, the suggested alternatives would meet the Project objectives, as neither the access road nor the parking lot is listed among them. AR 536.

The City states its rationale for rejecting such on-site alternatives in a conclusory fashion. In response to requests for a "no on-site parking" alternative, the EIR acknowledges that not all City parks contain parking lots (AR 1726), but then summarily concludes that on-site parking is required for an active park to "operate and function effectively." AR 1619. Notably, the EIR provides *no data* to support its determination that Sunset Ridge Park cannot "function effectively" without on-site parking facilities, much less comparative data analyzing other City or regional parks that have no parking. Similarly, the EIR provides no analysis as to why a passive park (Alternative C) would need a parking lot. AR 545.

The EIR's response to requests that the City consider using an existing City-owned parking lot across the street from the proposed park site is equally perfunctory. *See, e.g.*, AR 1617, 1619. Rather than address the critical point that the existing lot is currently underutilized, the EIR merely intones that the lot was

"developed in order to provide beach access parking" due to the loss caused by widening PCH. AR 1619. Here again, the EIR provides no analysis as to whether the City lot could feasibly be used by beach *and* park goers, and no comparative analysis of other City or regional parks that have similar off-site parking options.[6]

As public outcry over the Project focused on the serious impacts from its proposed roadway improvements, it was incumbent on the City to analyze a viable alternative that removed these features. Because the EIR rejected an on-site "no Bluff Road" option with no analysis whatsoever, its determination is not supported by substantial evidence and must be set aside. *See Center for Biological Diversity v. County of San Bernardino* (2010) 185 Cal.App.4th 866, 884-85 (decision to exclude alternative from EIR not supported by substantial evidence due to lack of specific comparative data on feasibility).

V. THE EIR FAILS TO ADEQUATELY ANALYZE AND MITIGATE SIGNIFICANT IMPACTS TO BIOLOGICAL RESOURCES.

The EIR fails both to disclose critical information about the Project's impacts on biological resources, and to effectively mitigate those impacts. In particular, as Petitioner and others warned, the document does not: (1) adequately describe or mitigate impacts to the threatened coastal California gnatcatcher and its critical habitat, or (2) disclose the likely presence of wetlands and environmentally sensitive habitat areas ("ESHAs") on the site. It also fails to properly analyze the Project's consistency with the Coastal Act and other policies relating to the wetland and EHSA resources.

A. Impacts to the Gnatcatcher and Its Critical Habitat.

The EIR improperly limits the scope of its analysis of impacts to the federally threatened gnatcatcher by narrowly focusing on nesting habitat, and ignoring other critical habitat designated by the USFWS for the species. *See* Fed. Reg. 72:72069. The Federal Endangered Species Act ("FESA") defines critical habitat as the areas "on which are found those physical or biological features essential to the conservation of the species." 16 U.S.C. § 1532(5)(A)(i) (2006). The USFWS describes these essential physical or biological features, which are known as "primary constituent elements" ("PCEs"), at the time of critical habitat

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[6] Similarly, the EIR lacks substantial evidence to support its determination not to evaluate alternative access road configurations. In particular, it fails to provide (1) requested information about the feasibility of obtaining a waiver from CalTrans' easement's prohibition of pavement on a portion of the site (AR 1776), and (2) meaningful comparative data on the traffic engineering safety requirements for entry into various locations on the City property versus the NBR property. AR 1726-27.

designation. 50 C.F.R. § 424.12(b) (2009). Importantly, the USFWS has found that gnatcatcher PCEs include not only nesting habitat, but also dispersal and foraging habitat.[7]

The EIR concludes that "[t]he Project is expected to impact a total of 0.68 acre . . . of habitat determined to be used by [the gnatcatcher] during the breeding season." AR 1767-68. This analysis ignores over 4 acres of additional scrub habitat, areas where gnatcatchers were observed in several recent surveys conducted by independent biologists. AR 424, 1741-45. The City purports to justify its exclusion of this dispersal and foraging habitat by claiming that it "would not be considered utilized by the gnatcatcher due to the periodic mowing and traffic/pedestrian edge effects in this area." AR 423.

The City's rationale for excluding this habitat is unsupportable. First, the City cannot unilaterally remove the USFWS's designation of these areas as critical habitat. *See* Guidelines § 15065(a)(1) (mandating a finding of significance where a project has the potential to "substantially reduce the habitat of a fish or wildlife species" or substantially impact listed species). The California Supreme Court has expressly recognized that *any* impact to critical habitat is potentially significant. *See Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 425, 449. Second, the record contains no evidence to support the City's assertion that gnatcatchers do not "utilize" the additional 4 acres of designated habitat. To the contrary, the City itself concedes that "gnatcatchers often use all scrub communities [on the site] during fall/winter," regardless of the purported mowing and edge effects. AR 1768. Tellingly, the City's own biological consultant specifically referred to such scrub areas as "essential." AR 1064; *see also* AR 12217 (NBR's biological consultant explains that gnatcatchers rely on this habitat during non-breeding season). Because the City has thus failed to substantiate its claim that impacts to gnatcatcher habitat would be insignificant, its EIR is inadequate under CEQA. *See City of Richmond*, 184 Cal.App.4th at 85 (criticizing conclusions that "call for blind faith in vague, subjective characterizations").

The City's measures to mitigate impacts to gnatcatcher habitat are also insufficient. First, because the EIR fails to acknowledge impacts to 4.11 acres of coastal sage scrub that the gnatcatcher uses as

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[7] PCEs for the gnatcatcher include "southern coastal bluff scrub . . . that provide[s] space for individual and population growth, normal behavior, breeding, reproduction, nesting, dispersal and foraging" as well as "non-sage scrub habitats . . . in proximity to sage scrub habitats . . . that provide space for dispersal, foraging, and nesting." Fed. Reg. 72: 72069.

dispersal and foraging habitat (AR 1768), no mitigation for these areas is even proposed. Second, of the 0.68 acres of habitat that the City concedes will be impacted (AR 423), the City will mitigate for the loss of only 0.14 acre of southern coastal bluff scrub vegetation and 0.06 acres of riparian habitat. AR 423, 430-32. The City offers no explanation why mitigation is unnecessary for the Project's impacts on the remaining 0.48 acres of disturbed mulefat/goldenbrush scrub. The EIR identifies this vegetation as occupied habitat for the gnatcatcher (AR 423), and in an earlier letter from the City's consultant to the U.S. Army Corps of Engineers, the City indicated its intent to mitigate for the loss. AR 9730. If the City now regards mitigation for this vegetation as infeasible, the EIR must provide evidence to support this claim. *See Los Angeles Unified Sch. Dist. v. City of Los Angeles* (1997) 58 Cal.App.4th 1019, 1029.

The EIR also provides a measure (MM 4.6-3) that calls for the City to mitigate impacts to gnatcatcher habitat in the future, when the City complies with the FESA. AR 429. But this deferred mitigation is in flat violation of CEQA, as it fails to commit the City to any specific measure and lacks criteria or performance standards that might govern such future mitigation.[8] *See San Joaquin Raptor Rescue Ctr.,* 149 Cal.App.4th at 669-70 (county improperly deferred mitigation when it allowed a land management plan for special status vernal pool species to be developed with the California Department of Fish and Game ("CDFG") and USFWS after certification of EIR). In any event, CEQA permits deferral of mitigation only when practical considerations preclude the agency from developing measures earlier. *Id.* at 671. Here, the EIR does not claim that such circumstances exist. In fact, the City had already decided to initiate Section 7 consultation with USFWS via a joint Biological Assessment with NBR (for both the Sunset Ridge Project and the proposed NBR project) *prior* to certification of the present EIR—a fact the EIR neglects to mention. AR 9718-32. Further, in the Access Agreement, NBR commits to providing land acreage to mitigate the biological impacts from the Project. AR 2647. Thus, no practical impediments existed to developing gnatcatcher mitigation for inclusion in the EIR. Moreover, the EIR's omission of relevant information concerning the ongoing Section 7 consultation for the Project constitutes a prejudicial abuse of discretion. *Berkeley Keep Jets Over the Bay Com. v. Bd. of Port Comrs.* (2001) 91 Cal.App.4th 1344, 1370-71.

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[8] Although MM 4.6-3 does contain some specific construction-related mitigation regarding gnatcatcher habitat, such mitigation will only be temporary. AR 429-30.

B. Impacts to Wetlands and ESHA.

The EIR also improperly excludes critical information about wetlands and ESHAs on the Project site. With regard to wetlands, the EIR misrepresents the jurisdiction of the relevant state agencies. First, the EIR claims that "no wetlands defined by the California Coastal Act occur on the Project site." AR 416.[9] This assertion is false, as the Commission has yet to complete its jurisdictional analysis and wetlands determination. *See, e.g.*, AR 1765, 1824, 1921. It is also at odds with the statement of the City's Principal Planner, in an email about seepage and wetland vegetation discovered on site, that "there is enough there for coastal staff to determine it a wetland." AR 11437.

Second, the EIR erroneously claims that "no resources under the jurisdiction of the RWQCB occur on the site." AR 416. In fact, the RWQCB has indicated to the City that it would take jurisdiction over some areas on the Project site. AR 1496-98, 9637. The EIR's failure to disclose such critical information regarding wetlands and the jurisdiction of the Commission and RWQCB violates CEQA. *See San Joaquin Raptor/Wildlife,* 27 Cal.App.4th at 727-29 (EIR violated CEQA by failing to seriously address whether wetlands occurred on the project site); *Mira Monte Homeowners Assn. v. County of Ventura* (1985) 165 Cal.App.3d 357, 364-65 (setting aside County's approval for failure to analyze impacts to one-quarter acre of wetland); *Berkeley Keep Jets*, 91 Cal.App.4th at 1367 (comments from sister agencies "may not be simply ignored. *There must be good faith, reasoned analysis in response.*") (citations omitted) (court's emphasis).

The EIR's discussion of the Project's impacts on ESHAs is also inadequate. These sensitive areas are afforded special protection under the Coastal Act. *Bolsa Chica Land Trust v. Superior Ct.* (1999) 71 Cal.App.4th 493, 506. The Commission is responsible for determining the boundaries of ESHAs, based on Environmental Study Areas ("ESA") defined by local governments. AR 262. While the Commission has yet to define ESHAs for the Project site here (AR 262), CEQA still requires that the City discuss possible impacts to these areas and analyze the Project's consistency with relevant provisions of the Coastal Act and the City's Coastal Land Use Plan ("CLUP"). *See* Guidelines, Appendix G, § IX(b) (requiring a mandatory finding of significance when a project conflicts with any applicable land use plan, policy or regulation).

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[9] Without any explanation for the internal discrepancy, the EIR also states in the Project Description that "the site contains wetland habitat that *is* under the jurisdiction of the CDFG and California Coastal Commission." AR 174 (emphasis added).

The EIR's discussion of these issues falls short, for several reasons. First, the EIR fails to clarify whether an ESA is located on or near the Project site. Compare AR 247 ("The project site is one of 28 areas identified . . . as an [ESA].") *with* AR 262 ("The Project Site is not within an identified ESA."). Next, in considering the Project's consistency with the CLUP, the EIR erroneously states that "[t]he Project site does not contain natural communities that have been identified as rare by the CDFG" (a characterization that would meet the definition of an ESHA). AR 262. In fact, CDFG has designated both the southern coastal bluff scrub and the willow scrub as rare (AR 8735), and the EIR elsewhere indicates that these types of vegetation are present on the site. AR 400. Finally, while the EIR notes that an ESHA is "located immediately west of the Project site" (AR 279), it does not disclose the size, shape and precise location of that ESHA, even though both the Coastal Act and the CLUP limit uses in ESHA buffer areas. *See, e.g.*, AR 264, 279. Such repeated evasions and misrepresentations contravene CEQA's fundamental informational requirements. *Kings County Farm Bureau*, 221 Cal.App.3d at 721.

Further, the EIR's failure to properly analyze the presence of ESHAs on the site mars its consistency analysis. If an ESHA is found on the City-owned portion of the site, which is covered by the CLUP, the EIR must disclose whether the Project complies with the CLUP's policies to protect ESHAs. AR 8737-40; Guidelines, Appendix G, § IX(b). Similarly, the document must analyze impacts to any ESHA for consistency with the Coastal Act's stringent ESHA protections. *See* Guidelines, Appendix G, § IX(b)*;* § 30240. Despite these requirements, the City, when asked to perform this analysis, merely responded that no ESHAs or ESAs have yet been identified. *See, e.g.*, AR 1817. CEQA does not permit such intransigence: an EIR must analyze all *potentially* significant impacts. *See* § 21068 (defining a significant environmental impact as "a substantial, or *potentially substantial*, adverse change in the environment" (emphasis added)); *Vineyard Area Citizens*, 40 Cal.4th at 448, fn. 17; *see also Sundstrom,* 202 Cal.App.3d at 311 (an "agency should not be allowed to hide behind its own failure to gather relevant data").

Nor may the City avoid the required impact analysis by adopting illusory mitigation. Here, the EIR claims that "[i]mpacts to the habitat areas that have the potential to be considered ESHA by the California Coastal Commission would be mitigated through habitat restoration on site and/or in the immediate vicinity of the Project Site to maintain and enhance overall habitat values." AR 263. This mitigation is inadequate for two reasons. First, as the court in *Bolsa Chica* explained, the Coastal Act prohibits this type of

mitigation: "the language of section 30240 [of the Coastal Act] does not permit a process by which the habitat values of an ESHA can be isolated and then recreated in another location." 71 Cal.App.4th at 507. Instead, the Coastal Act "place[s] strict limits on the uses which may occur in an ESHA." *Id.*

Second, CEQA does not permit the City to defer mitigation for impacts on areas protected by the Coastal Act simply because the Commission may exercise its jurisdiction in the future. *San Joaquin Raptor Rescue Ctr.*, 149 Cal.App.4th at 670. Here, the City's deferral of mitigation is especially troubling because the City knew, even before EIR certification, that the Commission had issued a notice to NBR of potential Coastal Act violations for portions of the Project site. AR 9661-9662a. Indeed, in a particularly candid e-mail, the City's Principal Planner stated that he would be "shocked" if the Commission did not require corrective action "within or . . . close to the grading/disposal sites for [the] park project"; he further implied that the City would like the Commission to "hold off" on its corrective action until a later date. AR 9661. Remarkably, the EIR includes neither the Commission's violation notice nor City staff's discussion of it. The City's attempt to sweep the Commission's notice under the rug gives the lie to the City's stance that mitigation for ESHAs may be postponed, and that the Project may be found consistent with the Coastal Act. For all these reasons, the City abused its discretion. *See Berkeley Keep Jets,* 91 Cal.App.4th at 1366-67.

In sum, the City's steadfast refusal to disclose the extent of the Project's impacts on gnatcatcher habitat, wetlands, and ESHAs; its failure to acknowledge the likely jurisdiction of state agencies over these areas; and its persistent deferral of necessary mitigation violated CEQA's most basic requirements.

VI. THE EIR FAILS TO ADEQUATELY ANALYZE THE PROJECT'S SIGNIFICANT IMPACTS RELATED TO HAZARDOUS MATERIALS ON THE SITE.

CEQA requires analysis and mitigation of a project's human health and environmental impacts due to hazardous materials. *See* Guidelines, App. G, § VII. While the City acknowledges that portions of the Project site are riddled with contaminates from decades of oil production (AR 466), the EIR provides a paltry analysis of the impacts of construction and grading in this potentially volatile setting.

The EIR provides faulty analysis in two respects. First, in violation of *Save Our Peninsula Committee v. Monterey County* (2001) 87 Cal.App.4th 99, 122, the EIR merely summarizes past NBR studies of the entire Banning Ranch and then rotely concludes that there will be no significant impacts after mitigation. AR 472. The City's failure to conduct its own investigation is particularly disturbing here, as a

previous Phase I ESA on NBR property identified chemical-impacted soils and hydrocarbons in the Project area and recommended additional site investigations to address ongoing uncertainty. AR 10546, 10560. Further, while the EIR acknowledges that that one area of the Project site contains four abandoned oil wells, the EIR provides no evidence for its assertion that these sites have been remediated. AR 469. Rather, the document cites to an email chain that makes no reference to soil cleanup. AR 12378. Such "[c]onclusory statements unsupported by factual information will not suffice." Guidelines § 15088(c).

Second, in determining whether the Project would result in hazardous materials exposure within one-quarter of a mile of an existing school, one of the EIR's identified thresholds of significance, the EIR erroneously concludes that "[t]here are no schools located within one-quarter mile of the Project site." AR 468; *see also* Guidelines App. G § VII(c). Later, in response to comments, the City acknowledged that the northern stock pile is *directly adjacent* to Carden Hall School, but still did not find a significant impact. AR 1815, 472. The use of clearly erroneous information to support a determination of no significant impact, particularly when the City is aware of accurate information, both violates CEQA and raises questions about the City's good faith. *See* § 21082.2(c).

Despite this deficient CEQA analysis, the City claims that the Project's hazardous materials impacts will nonetheless be "less than significant" with mitigation. AR 472. It bases this conclusion on two mitigation measures (4.9-3 and 4.9-4) that essentially promise to clean up and dispose of hazardous materials if and when they are found. AR 2058-59. This tactic violates CEQA. As explained by the court in *Berkeley Keep Jets,* "[t]he EIR's approach of simply labeling the effect 'significant' without accompanying analysis of the project's impact . . . is inadequate" and "exactly backward." 91 Cal.App.4th at 1371. Similarly here, by providing mitigation that will "fix it later" without sufficiently exploring the Project's impacts now, the City violates CEQA.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court set aside the City's approval of the Project and certification of the EIR, until the City complies with CEQA and the CEQA Guidelines.

DATED: December 6, 2010

SHUTE, MIHALY & WEINBERGER LLP

By: _____
AMY J. BRICKER
Attorneys for Petitioner Banning Ranch Conservancy

PROOF OF SERVICE

Banning Ranch Conservancy v. City of Newport Beach, et al.
Orange County Superior Court
Case No. 30-2010-00365758

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 December 6, 2010, I served true copies of the following document(s) described as:

OPENING BRIEF OF PETITIONER BANNING RANCH CONSERVANCY

on the parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Shute, Mihaly & Weinberger LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

BY E-MAIL OR ELECTRONIC TRANSMISSION: Based an agreement of the parties to accept service by e-mail or electronic transmission, I caused the document(s) to be sent from e-mail address thurston@smwlaw.com to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

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

Executed on December 6, 2010, at San Francisco, California.

Natalia Thurston

SERVICE LIST

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Whitman F. Manley (State Bar No. 130972)
Jennifer S. Holman (State Bar No. 194681)
Remy, Thomas, Moose and Manley, LLP
455 Capitol Mall, Suite 210
Sacramento, California 95814
Telephone: (916) 443-2745
Facsimile: (916) 443-9017
email: wmanley@rtmmlaw.com
email: jholman@rtmmlaw.com

Attorneys for Respondents City of Newport Beach and Newport Beach City Council

David R. Hunt (State Bar No. 110675)
City Attorney
Kyle E. Rowen (State Bar No. 232351)
Deputy City Attorney
Michael Torres (State Bar No. 238973)
Deputy City Attorney
Office of the City Attorney
City of Newport Beach
3300 Newport Blvd.
Newport Beach, CA 92658-8915
Telephone: (949) 644-3131
Facsimile: (949) 723-3519
email: dhunt@newportbeachca.gov
email: krowen@newportbeachca.gov
email: mtorres@newportbeachca.gov

Attorneys for Respondents City of Newport Beach and Newport Beach City Council

Susan K. Hori (State Bar No. 91429)
Keli N. Osaki (State Bar No. 179920)
Manatt Phelps & Phillips
695 Town Center Drive, 14th Floor
Costa Mesa, CA 92626
Telephone: (714) 371-2528
Facsimile: (714)371-2571
email: shori@manatt.com
email: kosaki@manatt.com

Attorneys for Real Parties in Interest
Aera Energy, LLC
Newport Banning Ranch, LLC
Cherokee Newport Beach, LLC