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 Respondents
Orange County Superior Court Case No. 30-2010-00365758
Honorable Gail A. Andler, Judge

APPELLANT'S OPENING BRIEF

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TO BE FILED IN THE COURT OF APPEAL **APP-008**

COURT OF APPEAL, Fourth APPELLATE DISTRICT, DIVISION Third	Court of Appeal Case Number: G045622
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APPELLANT/PETITIONER: Banning Ranch Conservancy RESPONDENT/REAL PARTY IN INTEREST: City of Newport Beach, et al.	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (Check one): ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

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1. This form is being submitted on behalf of the following party (*name*): Banning Ranch Conservancy

2. a. ☑ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

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(1)	
(2)	
(3)	
(4)	
(5)	

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The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: January 24, 2012

Amy J. Bricker
(TYPE OR PRINT NAME)

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PRELIMINARY STATEMENT

This appeal challenges the decision of the Orange County Superior Court upholding the City of Newport Beach's ("City") 2010 approvals for the Sunset Ridge Park ("Sunset Ridge," "Park" or "Project"). As Appellant Banning Ranch Conservancy ("BRC") demonstrates, those approvals violate the California Environmental Quality Act, Public Resources Code section 21000 et seq. ("CEQA").[1]

The 18.9-acre Project site crosses two biologically rich coastal properties: 13.7 acres of the Project is on land owned by the City and the remaining 5.2 acres is on land owned by the Real Parties in Interest (collectively, Newport Banning Ranch or "NBR"). AR:122.[2] The site contains habitat for over 40 species, including potential foraging habitat for 14 different special-status bird species. AR:401-12. The entire Project site is also designated as critical habitat for the federally threatened coastal California gnatcatcher. AR:414, 417.

The City's property lies at the corner of Pacific Coast Highway ("PCH," also known as "West Coast Highway") and Superior Avenue. AR:122-23. The neighboring NBR property, commonly known as "Banning Ranch," is an undeveloped, 401-acre property with rare, intact

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

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

coastal ecosystems that provide vital 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.

At the same time of its consideration of Sunset Ridge—a small park that includes active and passive recreational uses and facilities on the City's property—the City also received a proposal from NBR for a massive development project on Banning Ranch. AR:8067-87. The proposed NBR project includes construction of 1,375 residential units, 75,000 square feet of commercial space, and a hotel. AR:8068. In addition, the proposed NBR development includes a new road—Bluff Road—that extends from PCH through the NBR property and serves as the "primary roadway" for the development. AR:8082-83.

Approval of the full NBR development is still pending before the City. AR:1476. However, in approving Sunset Ridge, the action challenged here, the City approved infrastructure improvements that are specifically designed to serve the proposed NBR project. First, rather than providing direct access to Sunset Ridge from existing adjacent roadways, the City's Project approves construction of a circuitous access road that travels from PCH through the Banning Ranch property, before looping back to the Park site. AR:173, 186. It cannot be seriously disputed that the Park's access road constitutes a portion of Bluff Road that will serve the

NBR development. *See, e.g.*, AR:1476, 1562, 2648, 8082-83. As the City's engineer for the Project stated about NBR during the environmental review for Sunset Ridge: "We [the City] are going through a lot of pain to get *their road* in at *their grades*." AR:7961 (emphasis added).

Second, although the small Park is estimated to attract only 173 cars per day (AR:313), the City approved significant modifications to PCH as part of the Project. These include installation of a signalized intersection at PCH, and the widening of westbound PCH onto Banning Ranch, to accommodate a four-lane divided entryway to Bluff Road. AR:123, 186. Again, the record leaves no doubt that the "main reason" for these improvements is to serve the NBR development. AR:1899; *see also* AR:1477 (EIR acknowledging that Park alone would not generate enough traffic for a signal on PCH).

Finally, the Project includes other elements designed to serve the proposed NBR development, including drainage improvements sized for the NBR project and the export of approximately 34,000 cubic yards of "engineered fill" to the NBR property, which will be compacted for development purposes. AR:2650, 8442-46.

The City legally bound itself to completing these NBR project features by way of an Access Agreement between the City and NBR, which was approved as part of the Project. AR:2650-51. In exchange, the NBR developers dedicated to the City easements and rights of way to their

valuable property for the infrastructure and related mitigation. *Id.*

Given the timing and proximity of the NBR project and Sunset Ridge, it makes sense that the City would coordinate the two endeavors in this manner. However, under such circumstances, CEQA logically requires that the City also coordinate the environmental review for these actions. Therein lies the rub. In approving Sunset Ridge, including the infrastructure improvements that will serve the NBR development, the City certified an Environmental Impact Report ("EIR") that *entirely fails* to disclose or analyze the connection between the approved Project and the proposed NBR development. Instead, the EIR examines only the small Park project, claiming that the NBR project will undergo CEQA review at a later time. The City took this approach despite the fact that it received repeated comments from Appellant, numerous other members of the public, and the U.S. Fish and Wildlife Service ("USFWS") that the impacts of the two proposals should be reviewed together. AR:1469-72, 1476, 9605, 9637. The City could have easily conducted a joint review, as it was already coordinating with NBR on all aspects of the environmental review for the two actions, even using the same environmental consultant. *See, e.g.*, AR:2433-34, 2470-72, 9718-32, 9745-46, 10005, 10108.

By reviewing only the impacts from Sunset Ridge and ignoring the larger NBR project, the City violated several of CEQA's core requirements. First, the EIR failed to describe the whole of the project, as CEQA requires.

See Guidelines § 15378(a).[3] 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 actions must be analyzed together. *See Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 279, 282; *City of Carmel-By-the-Sea v. Bd. of Supervisors* (1986) 183 Cal.App.3d 229, 243-44 ("*Carmel*"). By impermissibly "piecemealing" its review of Sunset Ridge from the proposed NBR project, the EIR evaluates only a fraction of the environmental impacts that may ultimately result. 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) the impacts from the Project's potential to induce growth on the NBR property. § 21100(b)(5). The EIR fails on both counts, thus entirely evading CEQA's comprehensive scheme to ensure related projects are not viewed in isolation. To take but one example, although the primary purpose of the Project's signalized

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

intersection is to serve the proposed NBR development (AR:1477, 11361), the EIR entirely fails to analyze any traffic generated by that project.

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, the EIR arbitrarily claims that the Project will impact only a fraction of the area designated as critical habitat for the gnatcatcher and even further limits the mitigation for these impacts. At the same time, the EIR fails to adequately review the Project's consistency with the California Coastal Act, including that Act's protections for Environmentally Sensitive Habitat Areas, despite the fact that the Project must comply with the requirements of this Act. Similarly, the EIR fails to acknowledge the presence of wetlands on the site, or the jurisdiction of the California Coastal Commission ("Commission") over these resources.

In a two-page decision relying on the "substantial evidence" test, the trial court essentially "rubber stamped" the City's EIR. However, because the EIR omitted whole categories of environmental impacts, the substantial evidence test does not apply. The City's failure to include the required analysis in its EIR precluded informed decisionmaking and meaningful public participation, and thus constituted a prejudicial abuse of discretion.

See Citizens to Preserve the Ojai v. County of Ventura (1985) 176 Cal.App.3d 421, 428 ("*Ojai*"). Appellant thus requests that this Court reverse the trial court's judgment.

STATEMENT OF FACTS

I. The Environmental Setting and the Challenged Project

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. AR:414, 1740. In 2007, the USFWS designated the site as critical habitat for the federally threatened gnatcatcher. AR:414, 417.

Sunset Ridge Park is proposed for active and passive recreational uses and facilities, including several sports fields. AR:123. The Project also includes several major roadway improvements. First, the Project includes an access road (a portion of Bluff Road) that travels from PCH through Banning Ranch, 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 site includes a large parking lot and can accommodate a total of 97 cars. AR:123.

Located adjacent to the Park site, Banning Ranch is a rare, undeveloped 401-acre property, which the City's General Plan prioritizes

for conservation due to its biological significance. AR:1474, 8068, 8071. NBR has proposed a large, mixed-use development for the property, which is currently undergoing environmental review by the City. AR:1476, 8068, 8082 (including 1,375 residential units, 75,000 square feet of commercial space, and a hotel). Bluff Road and other infrastructure improvements approved for Sunset Ridge will serve the proposed NBR development project. AR:1476, 1562, 2648, 8082-83. Thus, the City coordinated with NBR on many aspects of the environmental review and approval of the Project. *See, e.g.*, AR:1476, 2433-34, 2470-72, 9718-32, 9745-46, 10005, 10108.

As part of the Sunset Ridge Project, the City approved an "Access Agreement Between the City and NBR Regarding Sunset Ridge Park" ("Access Agreement"). AR:2646-94, 2970. Under the Access Agreement, NBR will provide substantial "in kind" funding for the Project's extensive roadway improvements and mitigation. AR:2646-47. In exchange, the Access Agreement allows NBR unlimited use of Bluff Road for its proposed development, at no charge, and allows NBR to close Bluff Road if necessary for construction of its project. AR:2650-51. The Agreement also obligates the City to install a traffic signal at PCH, which would primarily serve NBR's development. AR:1899, 2650-51. Finally, the Agreement requires the City to provide "engineered fill" to be used by the NBR development. AR:2650.

II. The Administrative Proceedings

On May 8, 2009, the City filed a Notice of Preparation ("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 numerous inadequacies of the DEIR, satisfying CEQA's exhaustion requirements. *See, e.g.*, AR:1735-64, 1775-81, 1794-1812, 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 cumulative and growth-inducing impacts, as well as its impacts on biological resources. AR:1735-64, 1808-11, 2030, 2037, 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 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, 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. 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, 1486, 1776.

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. BRC and other members of the public provided oral and written comments on the FEIR, 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, 2873-74, 2886-88, 2893-94, 14700-03. Nevertheless, the City Council approved the Project at a public hearing on March 23, 2010. 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. The City filed Notices of Determination for the Project on March 24, 2010 and April 30, 2010. AR:1, 4.

III. The Litigation and Trial Court Decision

Appellant's petition, filed on April 22, 2010, challenges City approvals set forth in Resolutions Nos. 2010-29 and 2010-30. JA:1:1-24.[4] 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. On May 20, 2010, pursuant to the Parties' stipulation and a trial court order (JA:4:29-32), Appellant filed a supplemental petition to challenge the City's April 27, 2010 ratification of the Access Agreement. JA:5:33-48.

On August 3, 2010, the City challenged Appellant's choice of counsel and moved to disqualify Shute, Mihaly & Weinberger, LLP based on work the firm completed for the City of Newport Beach over five years prior. JA:A-2. The trial court granted the City's Motion and disqualified Appellant's counsel on September 9, 2010. *Id.* Appellant appealed the decision (JA:B-1) and filed a Petition for Writ of Mandate in this Court,

[4] Citations to the Joint Appendix ("JA") are: "JA:[tab]:[page(s)]."

seeking an immediate stay and reversal of the disqualification order. JA:A-1. This Court issued the requested stay on October 14, 2010, allowing Appellant's counsel to continue at trial. JA:A-5. Subsequently, on March 22, 2011, this Court released a published decision issuing a writ of mandate directing the trial court to vacate its disqualification order and holding that there was no on-going attorney-client relationship between Appellant's counsel and the City. *Banning Ranch Conservancy v. Superior Court* (2011) 193 Cal.App.4th 903. After granting the Writ, this Court dismissed the underlying appeal as moot. JA:A-7.

On September 1, 2010, the City filed with the trial court its certification of the administrative record on the merits of the Petition. JA:20:117-217.

After extensive briefing, the case proceeded to trial on March 14, 2011. The trial court ruled in favor of the City by way of a two-page Minute Order on May 5, 2011. JA:51:523-25. The trial court entered its final judgment on June 9, 2011, attaching the Minute Order. JA:53:531-35. Notice of entry of judgment was served on June 10, 2011. JA:54:536-40. Appellant timely filed its notice of appeal on August 5, 2011. JA:57:556-59; *see* California Rules of Court Rule 8.104(a)(2) (appeal proper within 60 days of service of notice of entry of judgment).

STANDARD OF REVIEW

This action challenges the adequacy of the Project's EIR. As the

California 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 University of California* (1988) 47 Cal.3d 376, 392 (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.* (quoting § 21001(a)). The EIR's central purpose is to identify the significant environmental effects of proposed projects and evaluate ways of avoiding or minimizing those effects. §§ 21002.1(a), 21061. CEQA also requires that the lead agency adopt feasible mitigation measures or alternatives that can substantially lessen the project's significant environmental impacts. § 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*, 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 (citations omitted).

This Court reviews the City's compliance with CEQA de novo. *County of Amador v. El Dorado City Water Agency* (1999) 76 Cal.App.4th 931, 946 ("[T]he appellate court's 'task . . . is the same as that of the trial court . . . .'" (citation omitted)). Thus, 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 unsupported by substantial evidence. § 21168.5; *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 427-28 ("*Vineyard*").

"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 also occurs if the EIR omits relevant information and thus precludes informed decisionmaking. *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 712. "[T]he ultimate decision of whether to approve a project . . . is a nullity if based upon an EIR that does not provide the decision-makers, and the public, with the information about the project" required by CEQA. *Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 829.

As the Supreme Court recently explained, "a reviewing court must adjust its scrutiny to the nature of the alleged defect, depending on whether the claim is predominantly one of improper procedure or a dispute over the

facts." *Vineyard*, 40 Cal.4th at 435. The court must "determine de novo whether the agency has employed the correct procedures, 'scrupulously enforc[ing] all legislatively mandated CEQA requirements.'" *Id*. (quoting *Citizens of Goleta Valley*, 52 Cal.3d at 564). Failure to follow these requirements constitutes an abuse of discretion as a matter of law. *County of Amador*, 76 Cal.App.4th at 946.

By contrast, courts use the more deferential "substantial evidence" standard only to review an agency's "substantive factual conclusions." *Vineyard*, 40 Cal.4th at 435. "[T]he existence of substantial evidence supporting the agency's ultimate decision on a disputed issue is not relevant when one is assessing a violation of the information disclosure provisions of CEQA." *Association of Irritated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1392.

Under prevailing law, then, this Court must determine, *as a legal matter*, "whether the EIR is sufficient as an informational document." *Kings County*, 221 Cal.App.3d at 711. Here, because the EIR fails to disclose fundamental information about the Project and its environmental impacts, the City has failed to proceed in the manner required by law and its approval of the Project must be overturned.

ARGUMENT

I. The EIR Failed to Analyze the Whole of the Project, a Fundamental CEQA Violation.

The City's most serious and far-reaching violation of CEQA is its failure to analyze the whole of the Project. CEQA defines the term "project" as "the whole of an action, which has a potential for resulting in either a direct physical change" or "a reasonably foreseeable indirect physical change in the environment." Guidelines § 15378(a); *see also* Guidelines § 15378(c) ("project" means the whole of the "activity which is being approved" and not "each separate government approval"). CEQA further instructs that "[w]here an individual project is a necessary precedent for action on a larger project . . . an EIR must address itself to the scope of the larger project." Guidelines § 15165. Thus, in conducting environmental review, CEQA requires an agency to take an expansive view of the project so as to "maximize protection of the environment." *Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora* (2007) 155 Cal.App.4th 1214, 1223 (citation omitted) ("*Tuolumne*").

Here, the City failed to comply with this central tenet of CEQA by narrowly defining its project as Sunset Ridge, even though it approved, as part of the project, critical infrastructure necessary for NBR's planned development. At trial, the City claimed that CEQA could not possibly require it to review its "small" park at the same time as the expansive NBR

development. *See* JA49:470-72. But this is precisely the point. CEQA's prohibition on segmenting projects is to ensure "that environmental considerations do not become submerged by chopping a large project into many little ones—each with a minimum potential impact on the environment—which cumulatively may have disastrous consequences." *Bozung*, 13 Cal.3d at 283-84. By including the entryway for a massive development project in its approval for a small public Park, the City has done exactly what CEQA proscribes.

A. Contrary to the Trial Court's Holding, the Court Must Review Appellant's Segmentation Claim as a Question of Law.

Initially, the trial court employed the wrong standard of review for Appellant's segmentation claim, holding that "substantial evidence supports the City's finding that the CEQA review could be limited to the Park itself." JA:51:524. Under well-established law, however, this Court must determine *as a matter of law* the scope of the "project" that the EIR should have evaluated. *See, e.g.*, *Tuolumne*, 155 Cal.App.4th at 1223-24. The Court must base its review on the undisputed facts in the record, with no weight accorded to the agency's claimed "evidence." *Id.*

The reason for such *de novo* review is that a truncated or misleading project description distorts every aspect of the environmental document. If an 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." *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 82-83 ("*CBE*") (citations omitted). Clearly, by omitting the larger NBR project, the EIR deprived the public of vital information regarding the true environmental impacts of the combined projects.

Further, without a complete project description, the EIR cannot, as a matter of law, adequately evaluate, much less adopt, alternatives or mitigation measures to lessen or avoid the project's impacts, as CEQA requires. § 21002; Guidelines § 15002(a)(3). The feasible alternatives and mitigation measures for a small park would be entirely different from those considered when viewing the larger project. For example, if the EIR analyzed the entire project, the City could have coordinated development plans in a manner that avoided impacts to sensitive biological resources, such as by relocating the access road and other project features. *See Tuolumne*, 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.

B. Under Black-Letter CEQA Law, the City Must Review the Entire Project Prior to Approving Critical Infrastructure Serving as a First Step Towards That Development.

The City claims that it may review the impacts of the entire NBR development separately from Sunset Ridge, as further approvals are needed to complete the NBR project. AR:1476, 1795-97, 1813, 2030-32; JA:49:464. However, this approach violates decades of CEQA precedent holding that an agency must review the full environmental consequences of a project prior to taking a necessary first step towards that project. *See, e.g.*, *Bozung*, 13 Cal.3d at 279, 282; *Carmel*, 183 Cal.App.3d at 243-44 (rezone that "was a necessary first step to approval of a specific development project" triggered environmental review for that yet-to-be-considered project); *Nelson v. County of Kern* (2010) 190 Cal.App.4th 252, 259-63 (EIR must examine future mining activities at same time as the initial mining reclamation plan). This is so regardless of whether further approvals are necessary, and even if the full development never actually occurs. *Bozung*, 13 Cal.3d at 279, 282-84.

In the landmark *Bozung* case , the Local Agency Formation Commission ("LAFCO") approved the annexation of 677 acres of land by the City of Camarillo, which was the first approval needed for the parcel's ultimate development for residential, recreational, and commercial purposes. 13 Cal.3d at 281. LAFCO argued that it need not analyze the

environmental impacts of the yet-to-be considered development because the City could decline to annex the property or could deny the development; LAFCO's approval was merely "permissive" and did not itself have environmental impacts. *Id.* at 278. The Supreme Court rejected this argument, finding that LAFCO's approval was a necessary first step in a chain of events that could lead to the ultimate development of the property. *Id.* at 279. Thus, the Court held, in order to satisfy CEQA's objectives of requiring review at the earliest feasible time in the planning process, LAFCO must review the environmental consequences of developing the entire property at the annexation approval stage, regardless of whether the actual development ultimately takes place. *Id.* at 279, 282-85.

Here, the City has approved far more than an amorphous planning change needed for the NBR development. In fact, undisputed record evidence demonstrates that the City has approved critical roadway and infrastructure improvements that are part of the initial phase of the NBR development. First, the City's approval includes an access road that will serve as a portion of the "primary roadway" for the proposed NBR development. AR:8082-83. As stated in the initial environmental review document for the NBR project:

> As a part of the [NBR] 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.

Id.; *see also* AR:1476, 1562.

At trial, the City argued that the access road "is not Bluff Road" because it is a two-lane gated road to be used for Park purposes only. JA:49:472, 476. The record flatly contradicts this proposition. Although NBR ultimately plans to expand Bluff Road to four lanes, under the Access Agreement, the City must "design and construct the Access Road Improvements from West Coast Highway to [Sunset Ridge] to match the proposed vertical and horizontal alignment of the east side of the proposed Bluff Road." AR:2648. Further, the Access Agreement requires that the City allow NBR to use the road for its development at no charge. *Id.*

Moreover, as the City's engineer for the Project stated in one candid e-mail, the City expected NBR to pay for all the traffic studies associated with the access road because "[w]e [the City] are going through a lot of pain to get *their road* in at *their grades*. Paying these incidental cost increases is above and beyond our tolerance level right now." AR:7961 (emphasis added); *see also Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1380 (factual testimony of agency staff based on

personal knowledge constitutes relevant evidence in CEQA case). Thus, there is no question that the City intended for the Park's access road to serve the NBR development.

Second, the City's approval includes significant modifications to PCH, including both the installation of a signalized intersection and the widening of westbound PCH onto NBR property to accommodate a four-lane divided entryway to Bluff Road. AR:123, 186, 1477, 8052, 8078, 8082. The record demonstrates that the "main reason" for the signal is to serve the NBR development. AR:1899 (e-mail from CalTrans official regarding the purpose of the traffic signal); *see also* AR:10069-70 (PCH widening needed for NBR project). Indeed, Respondents have conceded that the Park alone, which is anticipated to attract only 173 cars per day, would not generate enough traffic to warrant installing a traffic signal on PCH. AR:1477; JA:48:442. Installation of a new signalized intersection on this major thoroughfare is no small endeavor; as CalTrans warned, it would "seriously disrupt progressive traffic flow." AR:1479.

Third, the Sunset Ridge Project includes drainage improvements that are over-sized specifically to accommodate the proposed NBR project. AR:1337-38, 8443-44. At trial, Respondents offered no explanation for this.

Finally, the record demonstrates that the City's approval includes grading and fill areas that would serve NBR's development. AR:1826,

2650 (export material to be placed on NBR property as "engineered fill" for potential development by NBR), 8045 (EIR consultant noting concerns of "co-mingling" projects), 8083-84, 11280.

All of this undisputed evidence demonstrates that the Project's infrastructure improvements are a necessary and intended first step towards the NBR development. Thus, as in *Bozung*, the City must evaluate the environmental impacts of the full NBR development prior to approving this infrastructure, even if the City has yet to act on NBR's development application. *Bozung,* 13 Cal.3d at 279; *see also Carmel*, 183 Cal.App.3d at 243-44. Tellingly, the City could easily have conducted environmental review for the entire project, as the same EIR consultant was simultaneously preparing the environmental impact reports for the NBR development and Sunset Ridge. *See, e.g.*, AR:1476, 2433-34, 2470-72, 9745-46, 10005, 10108. The City's conscious decision to separate environmental review of the key first-phase elements of the NBR project from the full NBR development violates CEQA.

At trial, Respondents cited *Laurel Heights* as support for the City's deferred environmental review of the NBR project, but that case supports Appellant. In *Laurel Heights*, the Supreme Court held that an agency must analyze the effects of potential future development in its EIR if such development is: (1) "a reasonably foreseeable consequence of the initial project," and (2) "will likely change the scope or nature of the initial project

or its environmental effects." *Laurel Heights*, 47 Cal.3d at 396. The University of California San Francisco ("UCSF") had purchased a 354,000-square foot building, but prepared an EIR only for the initial occupation of 100,000 square feet by the School of Pharmacy. *Id.* at 393. UCSF argued that its future plans to occupy the remainder of the building, not available for ten years, were speculative. *Id.* at 394. Further, like Respondents here, UCSF claimed that, because these plans required further approvals that would be evaluated in their own right, the agency could evaluate the impacts of the potential expansion at a later time. *Id.*

The Supreme Court rejected this argument, finding that: (1) UCSF officials' statements regarding the likely future use of the additional area for offices and a biomedical research facility rendered the future expansion "reasonably foreseeable"; and (2) "an increase in the amount of space used from . . . 100,000 square feet to 354,000 square feet" made the future action "significant in that it will likely change the scope or nature of the proposed initial project and its environmental effects." *Id.* at 398. Under these circumstances, deferring environmental review to a later point, when "bureaucratic and financial momentum" would make it difficult to deny the expansion, violated CEQA. *Id.* at 395-96.

Here, the NBR development is far more defined than the future expansion in *Laurel Heights*, which had not been precisely planned and was several years away from being approved. *Id.* at 396-97. Real Parties have

already developed a detailed Master Site Plan for the NBR development. AR:8067-87. Because that Plan has been submitted for approval and is currently undergoing environmental review by the City (*id.*), there is no question that the proposed NBR project is "reasonably foreseeable" under *Laurel Heights*. *See* JA:48:448 (Real Parties stating at trial, "[t]he record is replete with evidence indicating the landowner has plans to develop the Banning Ranch Property"). Furthermore, there is no question that a massive residential, commercial, and resort development—including 1,375 residential units, 75,000 square feet of commercial space, and a hotel—will change the scope of the park project and its environmental effects. AR:8068.

At trial, Respondents argued that "[t]he proposed [NBR development] is not a foreseeable consequence of the City's Park Project." JA:49:472. Respondents are wrong. The record includes statements from City officials demonstrating that the City specifically designed the approved roadway improvements and other infrastructure to serve NBR's proposed development. *See, e.g.*, AR:1899, 7961, 8443-44; *Laurel Heights*, 47 Cal.3d at 396. The fact that the City is also approving sports fields is irrelevant. If the City's Park approval is left to stand, NBR will have overcome a crucial hurdle for its development plans: access to the project. *See, e.g.*, *City of Davis v. Coleman* (9th Cir. 1975) 521 F.2d 661, 676. If the entryway from PCH to this currently inaccessible, undeveloped

coastal property is constructed, there will likely be significant "bureaucratic and financial momentum" to approve the remainder of the NBR development proposal. *Laurel Heights*, 47 Cal.3d at 395-96.

In short, under *Laurel Heights*, the full NBR development is a reasonably foreseeable consequence of the City's action and therefore must be included in the project description and environmental review. *Id*. This is so regardless of any further approvals needed for the NBR project. *Id.* at 394. The City cannot circumvent CEQA's requirements by approving a smaller Park Project and ignoring the effects of the larger development that Project will serve.

C. The Trial Court's Decision Regarding the General Plan's Provision for Bluff Road Is Simply Wrong, and in Any Event Irrelevant.

After strenuously arguing at trial that its Park entrance road "is not Bluff Road as it is envisioned in the City's General Plan and the MPAH [County's Master Plan of Arterials and Highways]" (JA:49:476), the City switched gears and argued that the City had always planned for the approved road—Bluff Road—to be built, regardless of NBR's planned development. JA:49:471-72. Thus, the theory goes, Bluff Road is an "independent" City project that may be reviewed separately from the NBR project. *See* JA:49:472-74. The trial court found that "substantial evidence" supports this theory, and listed the General Plan's provision for Bluff Road as the sole basis for upholding the City's limited project

description. JA:50:524.

The trial court's conclusion is incorrect. As set forth below, the record clearly demonstrates that the City intended to build Bluff Road *only* in the event of development of the NBR property. Furthermore, applicable CEQA precedent dictates that, even assuming *arguendo* that the City had independent plans to build Bluff Road at a future time, it must still review the environmental consequences of linking Bluff Road to its Park approval *now*. Thus, Respondents' excuse for its truncated project description fails as a matter of law.

1. The General Plan Provides for Construction of Bluff Road Only in the Event that NBR Is Developed.

Respondents' interpretation of General Plan provisions relating to Bluff Road does not withstand scrutiny. Respondents' primary "evidence" that the Plan calls for Bluff Road's construction with or without the development of NBR is the depiction of Bluff Road on the City's circulation maps. JA:49:472. However, in determining whether a planned City action is consistent with the General Plan, it is the Plan's *policies* that are relevant, not isolated maps. *Garat v. City of Riverside* (1991) 2 Cal.App.4th 259, 299-300, *disapproved of on other grounds by Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 743, fn. 11. Tellingly, Respondents and the trial court wholly ignored General Plan policies expressly relating to Banning Ranch and Bluff Road, as well as other

critical and undisputed evidence in the record.

The City's General Plan provides a straightforward, logical framework for Banning Ranch. *See* AR:6878-90. As approved by the electorate, the Plan establishes as a first priority the preservation of NBR as open space. AR:6883-84. If such preservation is not possible, the Plan allows for certain development as an "alternative use." AR:6884.

Given the potential for alternate uses of the NBR site, the General Plan provides three separate sets of policies, whose application depends on the site's ultimate use. The first set of policies, set forth in General Plan Section 6.3, applies only in the event the site is preserved as open space, the preferred use. AR:6883-84. The second set of policies, set forth in Section 6.4, applies only in the event the site is developed, the alternative use. AR:6884-89. The third set of policies, set forth in Section 6.5, applies generally to the NBR site, whether it is preserved as open space *or* developed. AR:6890.

If Respondents' theory—that the General Plan provides for Bluff Road to be built whether the site is preserved as open space or developed—were correct, Section 6.5, which applies to any use of the NBR site, would have included a policy for this outcome. It did not. Instead, a policy in Section 6.4, which applies only if the site is developed, makes clear that Bluff Road is to be built only if the alternative development use is approved. AR:6889 (Policy 6.4.9 stating that road is to be built only "if the

[NBR] property is developed").

The environmental review for the City's General Plan further confirms that the City intended to build Bluff Road only if the NBR site is developed. AR:6531. In response to a comment from the City of Costa Mesa asking how the preservation of Banning Ranch as open space would impact the County's Master Plan of Arterials and Highways, the City responded: "If an open space option is ultimately selected and implemented, no roadways would be anticipated upon Banning Ranch." AR:6527, 6531; *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"). Thus, both the City's General Plan policies and the EIR evaluating those policies make clear that the City does not intend to build Bluff Road independent of development of NBR.

Attempting to dodge these key facts, Respondents argued at trial that there are other General Plan policies stating that the City should adopt the City's Master Plan of Streets and Highways and the County's Master Plan of Arterials and Highways. JA:2:473 (citing Circulation Element Policies 2.1.2 and 3.1.3). However, to interpret the Plan's general circulation policies as voiding its specific policies for Banning Ranch would be nonsensical. Rather, all the General Plan policies must be coordinated and harmonized, as can be easily accomplished here. Gov. Code § 65300.5; *see*

San Bernardino Valley Audubon Society, Inc. v. County of San Bernardino (1984) 155 Cal.App.3d 738, 757 (policies harmonized to protect resources). The purpose of the Circulation Element is to plan roadways under a worse-case scenario. *See Concerned Citizens of Calaveras County v. Bd. of Supervisors* (1985) 166 Cal.App.3d 90, 100-01 (purpose of circulation element is to provide "proposals" for meeting transportation needs in case maximum development allowed under the plan comes to fruition). However, this does not mean that the Plan requires, or even encourages, that all such roadways actually be built. *See Garat*, 2 Cal.App.4th at 299-300 (general plan maps may be interpreted differently "depending upon the planned uses to which the land may be put").

Here, the General Plan makes clear that Bluff Road will only be built "if the [NBR] property is developed." AR:6889 (Policy 6.4.9). For that reason, the City's environmental review for what constitutes the first phase of Bluff Road must analyze that infrastructure's implications for the larger NBR development.

2. The City's Approval of Bluff Road and the NBR Development Are Integrally Related and Therefore Must Be Reviewed Together.

Furthermore, even assuming *arguendo* that the General Plan did provide for Bluff Road to be constructed in the absence of the NBR development, which it clearly does not, such a fact could not salvage the City's truncated environmental review for its Project. The relevant inquiry

under CEQA is not whether the City *could* build Bluff Road independent of the NBR development, but whether it is actually doing so. *Tuolumne*, 155 Cal.App.4th at 1230-31. Critically, there is no evidence that the City has *any* such independent plans to construct Bluff Road. Rather, as Appellant demonstrated at trial, the City, via the Access Agreement, legally and financially linked the construction of its access road—the first phase of Bluff Road—with the development of NBR. *See* AR:2643-94. Thus, CEQA requires that the EIR review the consequences of both developments prior to the first approval. *Tuolumne*, 155 Cal.App.4th at 1230-31.

Tuolumne is directly on point. In that case, the court invalidated the environmental review for construction of a Lowe's home improvement center on the grounds that improperly excluded construction of adjacent roadway improvements, including realignment of a road and installation of a signalized intersection, as part of the project. *Id.* at 1218-20, 1231. Like Respondents here, the City of Sonora argued it had independent plans, as shown in its general plan circulation element, for the roadway improvements, and therefore should be able to conduct environmental review for those improvements separately. *Id.* at 1227-28. The Court of Appeal disagreed.

The court found that "there is a strong connection between the road realignment and the completion of the proposed home improvement center," and therefore the two endeavors "are part of a single CEQA

project." *Id.* at 1226. In reaching its decision, the court cited several linkages between the roadway and Lowe's. First, because the Lowe's center, which was approved before the realignment, was conditioned upon completion of the roadway improvements, 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). Second, Lowe's committed to funding the roadway improvements. *Tuolumne*, 155 Cal.App.4th at 1226. Finally, the court noted 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." *Id.* at 1227.

Here, there is an equally strong connection between the roadway improvements approved as part of Sunset Ridge and the proposed NBR development. First, the two developments are legally linked via the Access Agreement. Pursuant to the Agreement, the City must: (1) construct its access road in the same alignment as the proposed entrance road to NBR's development; (2) widen PCH and install a traffic signal—roadway elements that are primarily needed for the proposed NBR development; and (3) provide development-ready fill to be used for NBR development. AR:2648-51; 8052; 1899 (CalTrans official stating "the main reason behind [the signal] is to provide motorists access to the Banning Ranch Development"). Further, the City is legally obligated to allow NBR to use

the roadway for the NBR development, review and veto plans for the roadway improvements, and close the roadway as necessary to carry out NBR's development. AR:2650-52.

Second, the roadway improvements and NBR development are financially linked. NBR contributed critical funding to the roadway improvements by conveying, 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). In exchange, the City granted NBR and its builders free usage rights to the roadway improvements for the NBR development. AR:2648.

Third, like the road and Lowe's center in *Tuolumne*, the roadway improvements and NBR development are related in physical location. Indeed, the access road here is located entirely on NBR property, and the remaining roadway improvements are either on or adjacent to the NBR site.

Fourth, the projects are related in time. At the same time the City has approved a road and allowed NBR to use it for its development, it is reviewing an application by NBR for a massive development project that includes the same road as the "primary roadway" for the development. AR:8082-83.

Respondents argued at trial that *Tuolumne* does not apply here because "[t]he City's approval of the Park Project did not include a

condition requiring later approval of all or part of the proposed [NBR] residential and commercial development." JA:49:473. However, the City's approval goes beyond including such a condition for later approval: the City has approved *now*, as part of its Park project, critical infrastructure improvements that are indisputably part of the NBR development, and not necessitated by the Park alone.

Respondents also claimed that the two projects must be evaluated separately because the Park is a City project and the NBR development is a private one. JA:49:474-75. However, in approving the Access Agreement with a private party rather than, for example, condemning the land for public use, the Project became a *de facto* private one. Indeed, the record is replete with evidence that NBR stood in the shoes of the City regarding many aspects of the Project. For example, the City allowed NBR to review and request changes in every draft environmental document for the Project. *See, e.g.*, AR:2433-34, 2470-72, 7964, 9718-32, 9746-48, 9961, 10006-08, 10108. It is also notable that NBR vigorously defended the City's approval of the Park's roadway improvements in this litigation. *See* JA:48:433-57.

Finally, Respondents cited three additional cases at trial—*Christward Ministry v. City of San Diego* (1993) 13 Cal.App.4th 31; *Berkeley Keep Jets Over the Bay Com. v. Board of Port Comrs.* (2001) 91 Cal.App.4th 1344; and *CBE*, 184 Cal.App.4th 70—for the proposition that

the City could review Sunset Ridge apart from the proposed NBR project because the two endeavors do not depend on one another. JA:49:474-75. But these cases do not involve projects that are integrally connected, as here, and are therefore inapposite.

In sum, the City *could* have approved an access road for its Park that was completely unconnected to the NBR development. It did not. Instead, the City legally bound itself to constructing critical infrastructure improvements that constitute a first step towards the NBR development, and it accepted significant financial contributions from the NBR developers. Under *Tuolumne*, the Project's roadway improvements are thus integrally connected with the proposed NBR development and must be analyzed in the same EIR. 155 Cal.App.4th at 1231.

II. Despite NBR Boundaries and Project Features that Overlap with Sunset Ridge Park, the EIR Improperly Excludes the NBR Project from Its Cumulative Impact Analysis.

The trial court also plainly erred in finding that the EIR included a proper cumulative impacts analysis. If not considered as part of the Project itself, the NBR development is indisputably a project that must be considered in a cumulative impacts analysis. Yet, the EIR fails to conduct this requisite analysis.

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 Environment 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." § 21083(b)(2). 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.

The CEQA Guidelines specify that a lead agency must complete a cumulative impacts analysis in one of two ways. An agency may employ a "list-of-projects" approach, whereby the agency considers the impacts from individual past, present, and probable future projects in conjunction with the proposed project. Guidelines § 15130(b)(1)(A). Alternately, an agency may use a "summary-of-projections" approach by relying on analysis already completed in other environmental review. *Id.* § 15130(b)(1)(B).

The EIR here relies on a "list-of-projects" approach, and appropriately lists the NBR project as a cumulative project. AR:317; *see also Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo* ("*Bishop*") (1985) 172 Cal.App.3d 151, 168 (related projects currently

under environmental review "unequivocally qualify as probable future projects to be considered in a cumulative analysis"); AR:8067-87 (NBR project currently undergoing environmental review by the City). However, the EIR then fails to provide a proper analysis of the cumulative impacts of Sunset Ridge when viewed in conjunction with the NBR project. This omission is particularly pronounced in two crucial areas: traffic and biological resources.

Contrary to the trial court's conclusion, without this analysis, the City could not accurately determine whether the Project's impacts were "cumulatively considerable." JA:51:524. As a result, the public and decisionmakers were never apprised of the true impacts of the Project. *San Franciscans for Reasonable Growth v. City and County of San Francisco* ("*SFRG*") (1984) 151 Cal.App.3d 61, 79 (striking down cumulative impact analysis that omitted probable future project and thus failed to describe the true "significance and severity" of the agency's action).

A. The EIR's Cumulative Impact Analysis Improperly Omits NBR Traffic.

Although the NBR project and Sunset Ridge physically overlap and share an entrance road and signalized intersection (AR:2648), the EIR omits the vehicle trips generated by the NBR project from its cumulative traffic analysis. AR:319 (Exhibit 4.3-6 indicates no NBR traffic from Bluff Road at its intersection with PCH). Thus, in violation of CEQA's core

requirements, the EIR astonishingly never examines the combined traffic impacts of Sunset Ridge and the NBR project. *See SFRG*, 151 Cal.App.3d at 72-81. Rather, the EIR states that *only 42 cars*—those generated by Sunset Ridge—will move through the intersection at peak hours under cumulative conditions. AR:321. Respondents have offered several excuses for the omission of NBR from the cumulative traffic analysis, each of which must fail.

First, Respondents claimed that NBR traffic need not be considered because "construction for the [NBR] project would not begin before the Sunset Ridge Park opening year of 2012." AR:317; JA:49:476. However, the court emphatically rejected similar reasoning in *SFRG*. In that case, the lead agency refused to analyze cumulative transit impacts from projects currently undergoing environmental review, but not yet approved. 151 Cal.App.3d at 74. The court found this approach to be "unreasonably narrow" as it would result in a significant underestimation of cumulative impacts in violation of CEQA. *Id.* Similarly here, the City cannot justify excluding NBR traffic simply because the development would be completed after the Park.

Second, Respondents asserted for the first time at trial that the inclusion of a cumulative traffic analysis in the EIR for the City's General Plan excuses the City's failure to provide such analysis in the Sunset Ridge EIR. JA:49:477. In rote fashion, the trial court agreed. JA:51:524.

However, the Project EIR's cumulative traffic section never mentions the General Plan EIR's analysis (AR:313-318), and the City otherwise failed to alert the public that it was relying on such analysis to meet CEQA's requirements. *See, e.g.*, AR:27-28 (City's findings on cumulative traffic make no mention of General Plan EIR); *see also* Guidelines § 15130(d) (to rely on General Plan analysis, agency must make a "determin[ation] that the regional or areawide cumulative impacts of the proposed project have already been adequately addressed . . . in a certified EIR for that plan."). To the contrary, the EIR relied on the alternate "list-of-projects" approach and even listed NBR as a cumulative project. AR:317. Thus, the EIR should have assessed the cumulative impacts from NBR. It did not. AR:319-21. This Court should not countenance Respondents' post-hoc rationalization for this CEQA violation. *See 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").

The EIR's silence with respect to the General Plan EIR analysis is unsurprising, as the General Plan EIR does not even mention Sunset Ridge in its traffic analysis. AR:3981-4043. In fact, the General Plan EIR analyzes a different housing composition, and thus different traffic impacts, from the proposed NBR project currently under review. *Compare* AR:4578 (General Plan NBR description) *with* AR:317 (current NBR description). Thus, even if the EIR had included the requisite determination regarding

the General Plan EIR, the latter document does not provide accurate information as to the cumulative traffic impacts of the Project together with the NBR project.

Third, Respondents argued at trial that the EIR was not required to analyze NBR traffic because the NBR development "could not utilize [the access road] road, or otherwise contribute traffic to it." JA:49:476. But the Access Agreement between the City and NBR flatly contradicts this position. The Access Agreement provides that: (1) the access road must match the proposed alignment of the east side of the proposed Bluff Road, and (2) NBR has "the right to use, without charge, the Access Road Improvements for pedestrian and vehicle ingress and egress to the Easement Area and NBR Property from [PCH]." AR:2648; *see also supra* Part I. Further, vehicles entering Sunset Ridge and the proposed NBR project will use the same stretch of PCH and the same signalized intersection. AR:2648. Thus, there is no question that there would be cumulative traffic impacts from the two projects; the EIR's failure to evaluate these impacts is inexcusable. Guidelines § 15355(b); *Bakersfield Citizens*, 124 Cal.App.4th at 1218.

Respondents' argument is particularly disingenuous given that the City justifies the Project's need for a new traffic signal on PCH based on the traffic generated by the extension of Bluff Road beyond what is needed for Park access. Respondents acknowledge that, without such additional

traffic, the Park Project alone does not warrant installation of the signal. AR:1477; JA:48:442. Yet, the EIR never considers the cumulative traffic impacts at the signal that would result from such expansion of Bluff Road, including impacts from the proposed NBR development. Such omission is critical, as CalTrans warned the City that installation of the signal would "seriously disrupt progressive traffic flow." AR:1479; *see SFRG*, 151 Cal.App.3d at 78-80 (understatement of buildout rendered CEQA analysis inadequate).

B. The EIR Does Not Consider NBR's Cumulative Impact on Biological Resources.

Similarly, in considering cumulative impacts to biological resources, the EIR completely ignores the proposed future development of NBR. When Appellant's consultant objected to the omission in a comment on the DEIR, the City merely responded that "[t]he [NBR] property is assumed in the cumulative biological resource analysis." AR:1825. This assertion is at odds with the contents of the DEIR, which makes no mention of NBR yet specifically calls out other projects in the area. AR:427. Under CEQA, an "EIR must contain facts and analysis, not just the agency's bare conclusions." *Citizens of Goleta Valley*, 52 Cal.3d at 568 (citations omitted); Guidelines § 15088(c) (in responding to comments, "[c]onclusory statements unsupported by factual information will not suffice").

The EIR's failure to consider this issue is remarkable, as the

development of NBR is certain to create biological impacts similar to, and overlapping with, the Project. For instance, just as the Project will result in impacts to the threatened gnatcatcher and its habitat, 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. Some of these use areas are directly adjacent to and/or overlap with the Park site. AR:12234.

As the USFWS noted, the cumulative impacts to gnatcatcher habitat on the NBR and City properties must be analyzed and mitigated, along with other biological impacts, to avoid improperly "piecemealing" environmental review. AR:9605, 9637. Rather than heed this warning from the agency responsible for protecting the federally listed gnatcatcher, the EIR omits any analysis of the cumulative impacts from the two projects, and instead brushes off these serious concerns with a "trust-us" statement. AR:1825.

The very purpose of a cumulative impacts analysis is to ensure that individual project impacts are not "gauged in a vacuum." *Whitman v. Bd. of Supervisors* (1979) 88 Cal.App.3d 397, 408. The EIR patently fails to meet this requirement.

III. The EIR Fails to Adequately Analyze the Project's Significant Growth-Inducing Impacts.

In addition to requiring a complete project description and a full analysis of a project's cumulative impacts, CEQA includes a third

mechanism to ensure that an EIR analyzes impacts from related projects. Specifically, CEQA requires an EIR to provide a "detailed statement" of a project's growth-inducing impacts, which include aspects of the project that "may encourage and facilitate other activities that could significantly affect the environment." § 21100(b)(5); 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." Guidelines § 15126.2(d). 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, § XIII(a). The City must also identify adequate measures to mitigate the Project's growth-inducing impacts. *See* Guidelines § 15126.4(a)(1).

Despite the obvious connections between the Sunset Ridge infrastructure and the proposed NBR project, the EIR astonishingly concludes that the Project will have no growth-inducing impacts. AR:531-32. In a one-sentence holding, without citation to the record, the trial court found that "substantial evidence" supports this conclusion. JA:51:524. The trial court erred. As long-standing precedent dictates, because the EIR failed to identify the Project's ability to induce or facilitate growth on the NBR property, the City prejudicially abused its discretion under CEQA.

See Stanislaus Audubon Society, Inc. v. County of Stanislaus (1995) 33 Cal.App.4th 144, 158-59 (County prejudicially abused its discretion in finding that approval of golf course would not induce residential growth).

The seminal case on growth-inducing impacts is *City of Antioch v. City of Pittsburg* (1986) 187 Cal.App.3d 1325. In that case, 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 this infrastructure. *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; *see also City of Davis*, 521 F.2d at 676 (EIR must analyze impacts of development spurred by roadway improvements).

At trial, Respondents and NBR attempted to distinguish *Antioch* on the grounds that inducing growth is not the "sole purpose" of the Project's infrastructure improvements. JA:48:444. However, neither CEQA nor *Antioch* requires such a showing. Rather, an EIR must analyze direct or *indirect* growth-inducing impacts, such as the impacts of "projects which may encourage and facilitate other activities that could significantly affect the environment." Guidelines § 15126.2(d).

In fact, the Project's growth-inducing impacts here are much more

transparent than the vague and uncertain impacts in *Antioch*. 187 Cal.App.3d at 1335. As discussed *supra*, the Project's roadway improvements here are *specifically designed* to accommodate the proposed NBR project, which is currently undergoing environmental review by the City. *See, e.g.*, AR:1477, 1899, 2648, 2650-51, 8082-83. Further, the City agreed to engineer fill to facilitate the NBR development and specifically altered the Project's drainage improvements to handle the additional planned flow from the NBR project. AR:2650-51, 8442-46. It is the "over-sizing" of such infrastructure that makes the *Antioch* case directly analogous to the present circumstances. 187 Cal.App.3d at 1336-37.

Respondents and NBR also argued that the EIR need not analyze the Project's growth-inducing impacts because Bluff Road was already included in the City's General Plan, and the General Plan EIR had already examined the impacts from Bluff Road. JA:48:441-42. This argument fails for several reasons.

First, and most critically, even assuming *arguendo* that this General Plan argument were true, CEQA still requires the Sunset Ridge EIR to disclose the Project's role in "removing obstacles" for NBR's development. *See Clover Valley Foundation v. City of Rocklin* (2011) 197 Cal.App.4th 200, 227 (EIR correctly disclosed growth-inducing impacts of sewer line, even where growth was already assumed in general plan). It is undisputed that the Project's traffic signal, entrance road, and drainage improvements

will serve the NBR development. *See, e.g.*, AR:1562, 1899, 7961, 8442-46. As a result of the Park's approval, then, there would be fewer "obstacles" for the NBR project to overcome in acquiring its approvals. Even if the General Plan did include Bluff Road, inclusion of infrastructure in a planning document does not guarantee it will actually be built; due to the City's action here, a segment of Bluff Road is approved for construction. It was thus inexcusable for the EIR to conclude that the Project will not be growth-inducing. *Clover Valley,* 197 Cal.App.4th at 227.

Second, Respondents may not rely on the General Plan in any event. As established *supra*, the General Plan calls for the conservation of Banning Ranch as open space as a first priority, without the construction of a road through that property. AR:6883-84. The General Plan allows the construction of Bluff Road if, and only if, this open space option cannot be achieved and NBR is developed. AR:6527, 6531, 6889. Because Bluff Road is thus intimately linked to the NBR project, CEQA requires that the EIR disclose and analyze the current Project's role in facilitating that development. Guidelines § 15126.2(d). While the EIR recognizes this requirement, it fails to follow through with the necessary analysis. AR:531-32.

Third, this Court should reject Respondents' belated attempt to rely on any analysis in the General Plan EIR. The Project EIR's two-page growth-inducing discussion makes no mention of the General Plan EIR.

AR:531-32. Similarly, neither the EIR's response to comments nor the City's findings rely on the General Plan EIR. AR:20, 1474-75, 1918-19. *Friends of the Eel River v. Sonoma Cty. Water Agency*, cited by Respondents at trial (JA:48:442), is thus inapposite, as the agency there incorporated by reference the analysis in a general plan EIR. (2003) 108 Cal.App.4th 859, 877-78; *see also Clover Valley*, 197 Cal.App.4th at 226 (response to comments specifically referenced general plan EIR). A central tenet of CEQA is information disclosure; the statute does not allow the EIR to omit required analysis and then fabricate after-the-fact excuses for such omissions. *Laurel Heights*, 47 Cal.3d at 391, 394.

Moreover, as discussed *supra* (Part II), the General Plan EIR does not adequately evaluate the impacts of Sunset Ridge together with the proposed NBR project. Thus, the General Plan EIR cannot satisfy CEQA's requirement for a proper growth-inducing analysis in any event.

Under the court's holding in *Antioch*, then, the City must disclose and analyze the Project's potential to induce, or remove obstacles to, the proposed NBR development *before* approving infrastructure that will serve that development. 187 Cal.App.3d at 1335-36; *cf. Merz v. Board of Supervisors* (1983) 147 Cal.App.3d 933, 935-36, 940*, disapproved of on other grounds by Western State Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 570, fn. 2 (project EIR properly analyzed growth-inducing impacts of road that was not "oversized" to create impacts beyond those

analyzed). The City's failure to do so constitutes a prejudicial abuse of discretion. *See Napa Citizens for Honest Gov. v. Napa County* (2001) 91 Cal.App.4th 342, 368-70.

In sum, by truncating the Project's description and failing to conduct a proper analysis of cumulative and growth-inducing impacts, the City evaded all three of CEQA's "checks and balances" to ensure that the effects of related actions are considered together. Because the City has thus deprived the public and decisionmakers of critical information regarding the full environmental impacts of the Project, the City's action must be set aside. *Laurel Heights*, 47 Cal.3d at 403-05.

IV. The EIR Fails to Adequately Analyze and Mitigate the Project's Significant Impacts to Biological Resources.

The Project site is uniquely rich in biological resources, including federally designated critical habitat for the threatened gnatcatcher and significant wetland areas. AR:414, 417, 1740. As Appellant demonstrated at trial, the EIR's analysis of the Project's impacts to these important resources is wholly inadequate and violates CEQA's core requirements. The trial court's rote conclusion to the contrary finds no support in the law or the facts, and should be reversed. JA:51:524.

The EIR's treatment of biological resources is flawed in two key respects. First, in plain violation of CEQA, the EIR fails to identify and mitigate the Project's impacts to habitat areas that are essential to the

gnatcatcher, as designated by the USFWS. AR:420-27. Second, the EIR fails to adequately evaluate the Project's consistency with the California Coastal Act, including that Act's protections for wetlands and other Environmentally Sensitive Habitat Areas ("ESHA"), as required by CEQA. This requirement is particularly critical in the instant case, as: (1) the entire Project is located within the coastal zone and demonstrably affects valuable coastal resources; and (2) the City may not build the Project unless the Commission finds that the Project complies with the Act and issues a Coastal Development Permit ("CDP").

A. The EIR Fails to Identify or Mitigate the Project's Significant Impacts to Areas of Gnatcatcher Habitat that Have Been Federally Designated As Essential to the Species.

1. The EIR Fails to Find Impacts to Gnatcatcher Critical Habitat Significant, as Required by Law.

CEQA mandates a finding of significance for any impact that "restricts the range of an endangered, rare or threatened species." Guidelines § 15065(a)(1). In *Vineyard*, the Supreme Court applied this requirement, making clear that any impacts to federally designated critical habitat are *per se* significant. 40 Cal.4th at 425, 449 (EIR invalidated for failure to consider significant any reduction in water flow in designated critical habitat area for the Central Valley steelhead trout). The reasoning is manifest: the federal agency charged with the protection of a listed species has the requisite expertise to determine the habitat areas that, if impacted,

would "restrict the range" of the listed species, and that determination must be respected by state and local agencies under CEQA. Guidelines § 15065(a)(1); *see also* 16 U.S.C. § 1532(5)(A)(i) (defining critical habitat as the areas "on which are found those physical or biological features essential to the conservation of the species").

In 2007, the USFWS designated critical habitat for the threatened gnatcatcher, including the entire 18-acre Project site. AR:417; 72 Fed.Reg. 72069 (Dec. 19, 2007). Additionally, the agency identified certain scrub habitats within this critical habitat as particularly essential to the conservation of the species, as they contain "primary constituent elements" ("PCEs") that "provide space for individual and population growth, normal behavior, breeding, reproduction, nesting, dispersal and foraging." AR:1741; 72 Fed.Reg. 72069; 16 U.S.C. § 1532(5)(A)(i). There are over four acres of scrub habitat exhibiting PCEs on the Project site. AR:414, 424, 1741-45.

Construction of the Project, including the roadway, parking lot, ball fields, and other infrastructure improvements, involves grading and other disturbance of impacts to nearly the entire 18.9-acre Project site. AR:186, 424. Yet, the EIR claims that the Project will significantly impact only .68 acres of gnatcatcher habitat, a small fraction of both the on-site critical habitat and the four acres that exhibit PCEs. AR:423.

Respondents do not dispute that the Project will permanently alter

other areas of gnatcatcher critical habitat. JA:49:481. Rather, they contend that "substantial evidence" supports the City's conclusion that these areas are already "disturbed" by mowing and other human activities and therefore "not considered utilized by the gnatcatcher." AR:423. This argument must fail for several reasons. First, CEQA does not countenance such a unilateral downsizing of federally designated critical habitat. *Vineyard*, 40 Cal.4th at 425, 449. Because the USFWS designated various scrub habitats on the Project site as vital to the protection of the gnatcatcher, as a matter of law, the EIR must view the Project's grading and conversion of those habitats as *per se* significant, regardless of the City's view of the importance of that habitat. *Id.*

Second, no credible record evidence supports the City's determination that only .68 acres of scrub habitat on the site are "utilized" by the gnatcatcher. It is undisputed that gnatcatchers have been observed using the so-called "disturbed" scrub habitat areas in several recent surveys conducted by independent biologists. AR:424, 1741-45. Indeed, the City itself concedes that "gnatcatchers often use all scrub communities [on the site] during fall/winter," regardless of the purported mowing and other disturbances. 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). Thus, the City's bald claim that

the "disturbed" habitat is "not utilized" by the gnatcatcher is unsupported by the record. *See CBE*, 184 Cal.App.4th at 85 (invalidating EIR analysis relying on conclusions that "call for blind faith in vague, subjective characterizations").

Third, a notable portion of the so-called "disturbance" is caused by ongoing, illegal mowing that can be halted at any moment, returning the encelia scrub habitat to its full value within a growing season. AR:424, 1745-47. At trial, Respondents relied on *Riverwatch v. County of San Diego* (1999) 76 Cal.App.4th 1428 to claim that project impacts must be compared against existing conditions, even when they have been degraded through unlawful activity. JA:49:482. But *Riverwatch* and its progeny are inapposite. Even assuming *arguendo* that the baseline conditions include such ongoing illegal mowing, the EIR must still analyze the significant impacts from the Project's *permanent* conversion of gnatcatcher critical habitat, *e.g.*, by paving it for a road or grading for sports fields, as compared to its present undeveloped, albeit temporarily reduced, state. AR:414, 1745, 1756, 1767.

2. The EIR Fails to Properly Mitigate for Significant Impacts to Gnatcatcher Habitat.

The City's measures to mitigate impacts to gnatcatcher habitat are also legally insufficient in several respects. First, because the EIR claims that the Project will significantly impact only .68 acres of gnatcatcher

habitat, the City does not propose, much less adopt, mitigation for the Project's conversion of the remaining gnatcatcher critical habitat, including over four acres of coastal sage scrub that the gnatcatcher uses as dispersal and foraging habitat. AR:1768.

Second, for the .68 acres of gnatcatcher habitat that the City concedes the Project will significantly impact (AR:423), the City proposes mitigation for less than half. AR:423, 430-32. The EIR offers no explanation why mitigation is unnecessary or infeasible for the Project's remaining disclosed impacts to gnatcatcher habitat. In response to Appellant's argument in the trial court, Respondents relied on proposed mitigation for impacts to .27 acres of encelia scrub. JA:49:481. This is a red herring. The .27 acres of encelia scrub is not within the .68 acres of gnatcatcher habitat identified as impacted in the EIR. AR:423. Mitigation for this encelia scrub, a component of coastal bluff scrub that, when significantly impacted, requires mitigation in its own right, is simply irrelevant to the City's obligation to mitigate for the loss of the identified .68 acres of gnatcatcher habitat. AR:423. Indeed, 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 entire loss. AR:9730. The City's failure to adopt such mitigation, or provide substantial evidence that such mitigation is infeasible, violates CEQA. Guidelines § 15021(a)(2); *Los Angeles Unified Sch. Dist. v. City of Los Angeles* (1997) 58 Cal.App.4th

1019, 1029.

Third, the EIR defers identifying gnatcatcher mitigation to a later date when the City complies with the Federal Endangered Species Act ("FESA"). AR:429 (first section of Mitigation Measure ("MM") 4.6-3). The approach is unlawful. CEQA permits deferral of mitigation only when: (1) an EIR contains criteria or performance standards to govern future actions; (2) practical considerations preclude the development of earlier measures; and (3) the lead agency has assurances that the future mitigation will be both "feasible and efficacious." *CBE*, 184 Cal.App.4th at 95; *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 669-71 (county improperly deferred mitigation when it allowed 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). Here, the City cannot offer any assurances that future compliance with FESA is feasible given the Project's impacts to the gnatcatcher. Moreover, the EIR sets out no performance standards to control later formulation of FESA mitigation. Respondents' half-hearted attempt at trial to rely on various mitigation measures to serve as valid performance standards is unavailing. For example, the second half of MM 4.6-3, cited by Respondents (JA:49:483-84), contains only temporary, construction-related mitigation that cannot serve as a long-term performance standard. AR:429-30. Similarly, MMs 4.6-4 and 4.6-5, cited

by Respondents, facially apply only to impacts to specific locations of coastal sage scrub and riparian vegetation, and not to all gnatcatcher habitat areas. AR:430-32.

Further, the EIR fails to provide any basis to conclude that the City could not develop mitigation now to comply with FESA. 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. Thus, no practical impediments existed to developing gnatcatcher mitigation for inclusion in the EIR.

B. The EIR Fails to Adequately Analyze the Project's Consistency with the Coastal Act's Protections for Coastal Resources Present on the Project Site.

CEQA requires an EIR to analyze the Project's consistency with applicable land use plans, policies, and regulations. AR:210-11 (EIR's consistency threshold); Guidelines, App. G § X(b); § 30240. Here, because the Project is in the coastal zone, the City cannot build it unless the Commission determines the Project is consistent with the Coastal Act and the City's corresponding Coastal Land Use Plan ("CLUP"), and issues a CDP. AR:214; § 30600. Accordingly, if the Project is inconsistent with the Coastal Act or the CLUP, the EIR must consider such an inconsistency a significant impact under CEQA. AR:210-11, 214.

The purpose of this requirement is two-fold. First, the consistency analysis serves to inform the public and decisionmakers of the Project's impacts to protected coastal resources, including coastal scrub habitats and wetlands. The second purpose is a practical one. Since the Commission may require modifications to the Project or deny the Project altogether if it does not comply with the Coastal Act, it would be a waste of public resources to certify an EIR that does not address such legal conflicts. Undercutting these two purposes, the EIR here fails to adequately analyze and mitigate the Project's inconsistencies with the Coastal Act's protections for coastal resources.

The Coastal Act affords special protection to areas designated as "Environmentally Sensitive Habitat Areas" ("ESHA"). *Bolsa Chica Land Trust v. Superior Ct.* (1999) 71 Cal.App.4th 493, 506. ESHA are found where habitat is rare, or provides especially valuable ecosystem function, and is easily disturbed or degraded by human activities. § 30107.5. The CLUP describes the habitat attributes used to determine whether a site will meet this definition, including the presence of "rare" natural communities or listed species. AR:262.

As discussed below, the Coastal Commission is likely to identify ESHA on the Project site due to the presence of two resources: gnatcatcher habitat and wetlands. The Project site here contains significant areas of rare habitat, including coastal southern bluff scrub and willow scrub that, along

with other scrub habitats, are extensively used by the federally threatened gnatcatcher. AR:400, 8735, 1741-45. As Appellant's expert explained (AR: 1740), the site also contains wetlands, which are given protection as a unique resource and as ESHA. § 30233; *Bolsa Chica*, 71 Cal.App.4th at 515 ("Of all the [ESHA] mentioned specifically in the Coastal Act, wetlands and estuaries are afforded the most stringent protection."). The EIR's analysis of the Project's impacts on these resources is inadequate.

1. The EIR Fails to Adequately Analyze and Mitigate the Project's Impacts to Environmentally Sensitive Habitat Areas Vital to the Gnatcatcher.

As Appellant informed the City, the Commission broadly defines ESHA based on habitat and use by listed species. AR:1085; *see also* § 30107.5. The USFWS has designated the entire site as critical habitat for the gnatcatcher, and PCEs are present in over four acres. As documented in multiple surveys, these areas are used by the gnatcatcher. AR:1741-45. Thus, it is highly likely that the Commission will declare these areas as ESHA, and that the areas will therefore be subject to the Coastal Act's stringent protections. *See* JA:49:487; AR:2873-74 (Respondents acknowledge that the Coastal Commission could designate ESHA on the site). In addition, the Coastal Act specifically protects buffer areas adjacent to designated ESHA, further expanding the area where the Coastal Commission could limit impacts. § 30240(b).

Despite this extensive potential ESHA, the EIR's discussion of the

Project's consistency with the Coastal Act claims that only a very limited amount of habitat could be designated as ESHA. AR:262. In responding to comments regarding the EIR's deficient analysis of these impacts, the City simply responded that no ESHA have yet been identified by the Coastal Commission. *See, e.g.*, AR:1817. Such a response, which is devoid of factual support, does not meet CEQA's requirements. *Berkeley Keep Jets*, 91 Cal.App.4th at 1371.

The EIR compounds its error by attempting to mitigate the impacts to acknowledged ESHA in a manner that the Coastal Act specifically prohibits. AR:210-11. The EIR states 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. As the court in *Bolsa Chica* explained, the Coastal Act strictly proscribes such mitigation, as it "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 (citing § 30240). Instead, the Coastal Act "place[s] strict limits on the uses which may occur in an ESHA." *Id.* It was critical that the EIR disclose the Project's full impacts to ESHA because the prohibition on siting Project elements within ESHA or ESHA buffers would likely require the document to present entirely different alternatives.

Finally, the EIR failed to reveal several potential violations of the Coastal Act's protections for gnatcatchers that are already occurring on the Project site and that could alter the EIR's analysis of the Project. Prior to the EIR certification, the Commission sent a letter to both the City and NBR issuing a notice of potential Coastal Act violations for portions of the Project site, including City-owned property. AR:9661-62e. 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.

The Coastal Commission may also consider the City's ongoing mowing of encelia scrub a violation of the Coastal Act. Unless the City can produce evidence of a vested right or other permission to mow, the Coastal Commission will evaluate the habitat as if the unpermitted activity had not occurred (*LT-WR, L.L.C. v. California Coastal Com.* (2007) 151 Cal.App.4th 427, 796-97), increasing the likelihood that the Commission would designate the mowed area as ESHA. AR:1745-46 (noting the strong correlation between encelia and gnatcatcher use).

Remarkably, the EIR fails to mention the Commission's violation notice or discuss possible Coastal Commission action regarding the ongoing mowing. AR:1744-45. The City had a duty to disclose the

Project's potential inconsistencies with the Coastal Act's protections for habitat areas used by the gnatcatcher, and its failure to do so violated CEQA. AR:210-11; § 30240.

2. The EIR Fails to Identify Wetland Areas Protected under the Coastal Act.

The EIR's treatment of wetland areas also renders the consistency analysis inadequate. First, the EIR claims that "no wetlands defined by the California Coastal Act occur on the Project site." AR:416. This assertion is false, as the Commission, at the time of the EIR certification, had yet to complete its jurisdictional analysis and wetlands determination. *See, e.g.*, AR:1765, 1824, 1921.

Moreover, the assertion is misleading. The City's jurisdictional analysis relied on a methodology that results in the delineation of fewer wetland areas than the methodology used by the Coastal Commission. AR:1085-90 (describing the different Coastal Act definition, but stating that Army Corps methodology "was used to identify the type and extent of wetland resources within the boundaries of the survey area), 1740, 1765. Indeed, the statement of the City's Principal Planner that "[t]here is enough there for coastal staff to determine it a wetland," belies the EIR's claim that no coastal wetlands exist on the site. AR:11437 (statement made in response to an email about seepage and wetland vegetation discovered on site); *see also* AR:1736-40 (documenting extensive wetland indicators on

site). In order to determine if the Project is consistent with the Coastal Act's significant protection for wetlands, the EIR must determine whether wetlands, *as defined by the Coastal Act*, are present on the Project site. AR:278-79; *see also Bolsa Chica*, 71 Cal.App.4th at 515.

At trial, Respondents seized on the "evidence" that the Commission had not commented on the Project (JA:49:485), but this argument is a non-sequitur. The City was obliged both to investigate whether wetlands were present and to mitigate for any impacts. *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 311 ("agency should not be allowed to hide behind its own failure to gather relevant data"). Respondents have provided no authority, nor could they, for the argument that the EIR may ignore the wetlands definition used by one of the Project's permitting agencies and then claim that no wetlands exist meeting that definition.

The City's refusal to investigate and disclose the presence of wetlands subject to the jurisdiction of the Commission is analogous to the agencies' failure to disclose wetlands in *San Joaquin Raptor/Wildlife Rescue Center v. Cty. of Stanislaus* (1994) 27 Cal.App.4th 713, 727-29 (EIR violated CEQA by failing to seriously address whether wetlands occurred on the project site) and *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).

Because the EIR omitted this information, the City prejudicially abused its discretion under CEQA.

CONCLUSION

For these reasons, Appellant respectfully requests that the Court set aside the City's certification of the EIR and approval of the Project.

DATED: January 24, 2012 SHUTE, MIHALY & WEINBERGER LLP

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

The text of this Opening Brief consists of 13,922 words, not including tables of contents and authorities, signature block, the certificate of interested entities, 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

Banning Ranch Conservancy v. City of Newport Beach, et al.
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 January 25, 2012, I served true copies of the following document(s) described as:

APPELLANT'S OPENING BRIEF

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.

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

Executed on January 25, 2012, at San Francisco, California.

Sean P. Mulligan

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