Case No. G045622

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

BANNING RANCH CONCERVANCY

Petitioner and Appellant,

v.

CITY OF NEWPORT BEACH AND
CITY OF NEWPORT BEACH CITY COUNCIL

Respondents,

NEWPORT BEACH RANCH LLC, AERA ENERGY LLC,
CHEROKEE NEWPORT BEACH LLC

Real Parties in Interest and Respondents

RESPONDENTS' BRIEF

Appeal from the Superior Court of the State of California
For the County of Orange, The Honorable Gail A. Andler
Orange County Superior Court No. 30-2010-00365758

OFFICE OF THE CITY ATTORNEY
CITY OF NEWPORT BEACH
AARON HARP, SBN 190665
City Attorney
KYLE E. ROWEN, SBN 232351
Deputy City Attorney
3300 Newport Blvd.
Newport Beach, California 92658-8915
Telephone: (949) 644-3131
Facsimile: (949) 644-3139
Email: aharp@newportbeachca.gov
Email: krowen@newportbeachca.gov

REMY MOOSE MANLEY, LLP
WHITMAN F. MANLEY, SBN 130972
JENNIFER S. HOLMAN, SBN 194681
455 Capitol Mall, Suite 210
Sacramento, California 95814
Telephone: (916) 443-2745
Facsimile: (916) 443-9017
E-Mail: wmanley@rmmenvirolaw.com
E-Mail: jholman@rmmenvirolaw.com

Attorneys for Respondents

CITY OF NEWPORT BEACH ET AL.

TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, FOURTH **APPELLATE DISTRICT, DIVISION** THREE	Court of Appeal Case Number: G045622
ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):* Whitman F. Manely, SBN 130972 - Jennifer S. Holman, SBN 194681 REMY MOOSE MANLEY, LLP 455 CAPITOL MALL, SUITE 210 SACRAMENTO, CALIFORNIA 95814 TELEPHONE NO.: 916-443-2745 FAX NO. *(Optional):* 916-443-9017 E-MAIL ADDRESS *(Optional):* wmanley@rmmenvirolaw.com ATTORNEY FOR *(Name):* Respondents, City of Newport Beach et al.	Superior Court Case Number: 30-2010-00365758 ***FOR COURT USE ONLY***
APPELLANT/PETITIONER: Banning Ranch Concervancy 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*): City of Newport Beach et al.

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:

Full name of interested entity or person	**Nature of interest *(Explain):***
(1)	
(2)	
(3)	
(4)	
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☐ Continued on attachment 2.

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Date: April 5, 2012

Whitman F. Manley
(TYPE OR PRINT NAME)

▶ Whitman F. Manley
(SIGNATURE OF PARTY OR ATTORNEY)

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INTRODUCTION

This case involves the Newport Beach City Council's approval of the Sunset Ridge Park Project (Park Project). The Park Project will provide much-needed sports fields and other park facilities in an under-served area [AR:7136, 7139],[1] and will implement policies in the City's 2006 General Plan calling for a park at the site [AR:7134, 7173].

The City acquired the property from Caltrans in 2006. [AR:170-171, 174, 2201-2213, 10935-10936.] Caltrans conditioned the sale on the City's agreement to provide a scenic easement along Coast Highway. [AR:10940.] The deed states the property has no right of access to Coast Highway. [AR:2209.] Given the deed's restrictions, as well as steep topography and roadway speeds, direct access to the park site from Coast Highway and from Superior Avenue is infeasible. [AR:125, 536-537, 1814, 10941.] The City therefore sought alternative park access.

The site is adjacent to the Banning Ranch property. The owners of Banning Ranch agreed to donate an easement to the City to provide access from Coast Highway to the park site. [AR:2643-2694 (access agreement).]

Appellant opposes development on Banning Ranch. Indeed, that is its raison d'être. [JA:3.] Appellant now attacks the park, on the apparent belief that the park will somehow facilitate development of Banning Ranch.

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[1] / The administrative record is cited herein as "AR," the Joint Appendix as "JA," and Appellant's Opening Brief as "AOB"—all set off in brackets. The citation "[AR:170]" refers to the administrative record at page 170.

[*Ibid.*] Thus, the City's proposed public park is a pawn in Appellant's broader campaign to stymie private development on neighboring Banning Ranch.

The park is not the Newport Banning Ranch (NBR) proposal. The City is currently undertaking environmental review of that separate proposal. [AR:8067-8087.] Appellant will have ample opportunity to voice its concerns during the public review of the Environmental Impact Report (EIR) for that project. In the meantime, though, the public Park Project should not be held hostage to the private NBR proposal.

The trial court properly understood this, and denied the petition. [JA:53:531-535.] This Court should affirm.

STATEMENT OF FACTS AND PROCEDURE

A. Project Description.

The Park Project sits on 18.9-acres straddling the boundary of the City and Orange County. [AR:170.] Most of the park (about 13.7 acres) is on City-owned land. [AR:170.] On these 13.7 acres, the City proposes both active and passive recreational uses, including a tot lot, one baseball and two soccer fields, a playground and picnic area, walking paths, an overlook, a memorial garden, restroom facilities and a 75-space parking lot. [AR:15, 184-192.] The EIR describes the Project in detail. [AR:170-195.]

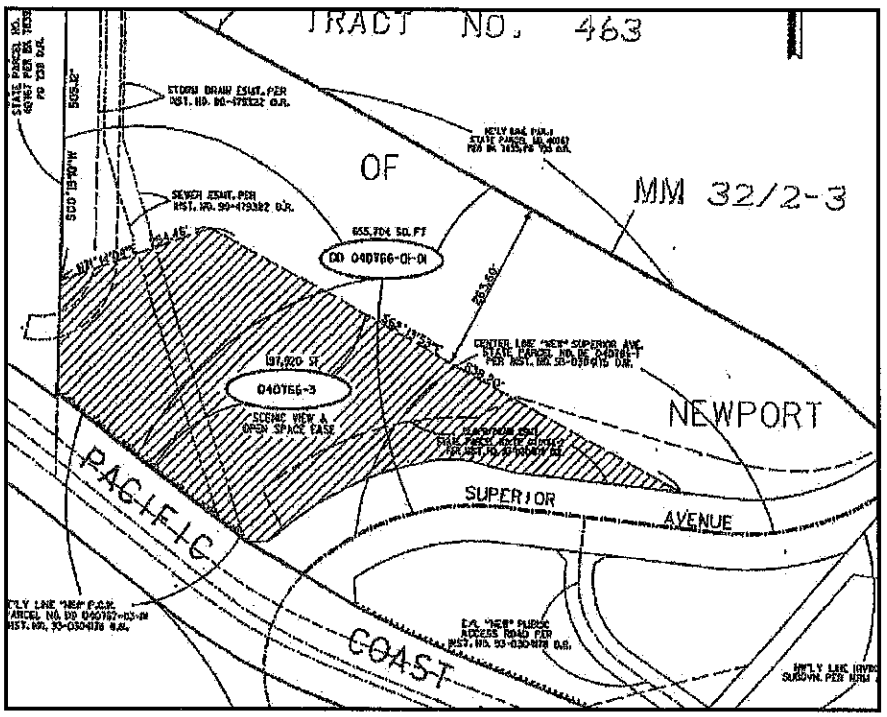
The remaining 5.2 acres are in Orange County on privately owned land, part of a much larger property known as Banning Ranch. [AR:170,

185.] On these 5.2 acres, the City would construct a gated, two-lane, undivided park-access road from Coast Highway to the park. [AR:15, 184-186.] Use of the private property requires an easement over a corner of Banning Ranch. [AR:15, 185.]

The distinctions between the City-owned land and the privately-owned land are important as they are subject to different land-use policies, as explained below.

B. History of City-Owned Property and Restrictions on Its Use.

The City acquired the 13.7-acre portion of the Sunset Ridge Park property from Caltrans in 2006. [AR:170-171, 174, 2201-2213, 10935.] The sale was subject to a 197,920-square-foot scenic easement located along the property line adjacent to Coast Highway and the requirement to use the property as a park consistent with Open Space-Active zoning. [AR:171, 10935-10936.] Within the scenic easement area, pavement, permanent structures, parking and motorized vehicles are unpermitted. [AR:10940.] The deed states the property has no right of access to Coast Highway [AR:2209], and the easement obstructs access directly from Coast Highway and from much of Superior Avenue. [AR:10941.] The deed illustrated the scenic easement area:



C. Planning for the Park Site.

1. City-Owned Property.

On July 25, 2006, the City Council certified an EIR and adopted its General Plan Update. [AR:6755-7378, 7408 -7416, 3516-6754, 7379 - 7407.] The General Plan contemplated the Sunset Ridge Park Project. [AR:6839, 7134.] The General Plan states the West Newport service area lacks active parks [AR:7136] and designates Sunset Ridge Park "as an active park to include ball fields, picnic areas, a playground, parking, and restrooms" to address this deficit. [AR:7136, 7173.]

The entire Project site is within the Coastal Zone. [AR:205.] The City has a certified Coastal Land Use Plan (CLUP), prepared under the Coastal Act. [AR:124.] The CLUP applies to the City-owned property,

designating it for "Parks and Recreation" uses. [AR:124, 200, 205-207.] Because the City lacks an approved Implementation Program for its CLUP, the City must obtain a permit from the Coastal Commission for the park. [AR:200, 206.]

2. Privately-Owned Property.

The remaining 5.2 acres are in unincorporated Orange County on the southeastern corner of a 401-acre property known as Banning Ranch. [AR:170] Banning Ranch has been a producing oil field since the 1940s. No active oil operations are located within the boundaries of the Park Project. [AR:174.]

The Banning Ranch property is governed by the County's General Plan, which designates the site R-4(O) and C1(O), authorizing residential and commercial uses as well as oil drilling and production. [AR:124, 180-181.] Because the City does not propose to annex the 5.2 acres, Orange County would be responsible for approving Project activities that occur on this property. [AR:194-195.]

Orange County Transportation Authority (OCTA) is responsible for overseeing the regional transportation system and local agency compliance with regional and statewide programs such as the Congestion Management Program. [AR:7087.] As part of this effort, OCTA has developed a Master Plan of Arterial Highways (MPAH), which depicts a primary, north-south roadway through the NBR property. [AR:203, 1476, 7087, 9074-9075.]

Although the NBR property is not within the City's boundaries, it is within the City's sphere of influence. [AR:6779.] Recognizing this, the City's General Plan includes a number of policies and goals targeted at the NBR property that apply *if* the City annexes the property. [AR:6789.] In the meantime, the County's General Plan governs. [AR:6789.]

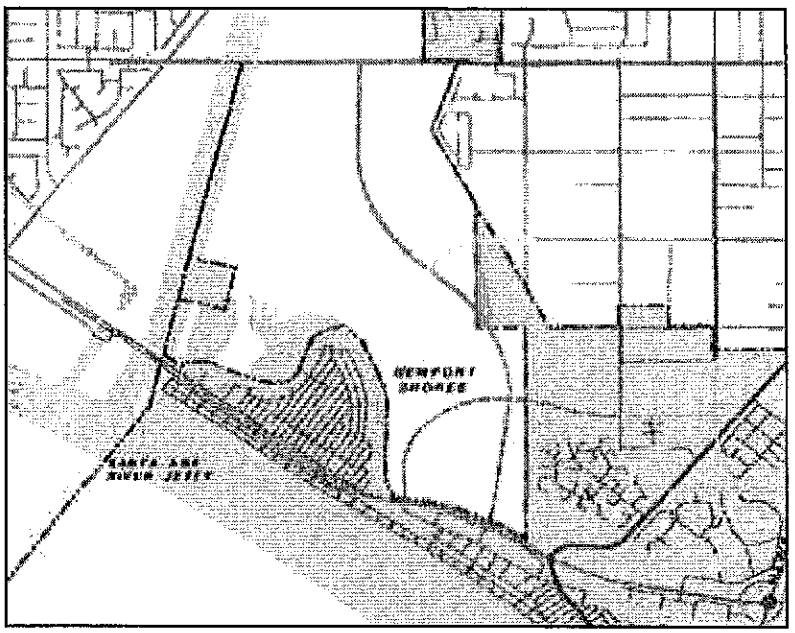
The City's General Plan includes Policy LU 3.4 identifying two permissible uses of the site: (1) acquisition for open space or (2) development of a mixed-use residential village. [AR:6806; see also AR:6813, 6878-6890.] Although Appellant suggests City voters approved only the former scenario [AOB:2], in fact the voters approved both. [AR:7417-7442, esp. 7425.][2] The General Plan contemplates some development under either scenario. For example, General Plan Goal LU 6.3 discusses the need for active community parks on the site. [AR:6883-6884; see also AR:6890 (Policy LU 6.5.2).] As the overview section explains: "Oil operations would be consolidated, wetlands restored, nature education and interpretative facilities provided, and an active park developed containing playfields and other facilities to serve residents of adjoining neighborhoods." [AR:6883.] Goal LU 6.4 discusses a private development scenario; Policy LU 6.4.1 explains that even under such a scenario, a community park is contemplated. [AR:6884.] The General Plan notes that

[2] / The ballot language asked simply whether the General Plan's land use element should be approved. [AR:7582, 7606.]

an active community park is needed at NBR to accommodate both the West Newport area and Citywide needs for active sports fields. [AR:7136.] General Plan Policy R1.9 lists the need for a community park at NBR, in addition to an active park at Sunset Ridge. [AR:7172-7173.] [3]

Under either scenario, the City's General Plan contemplates access through Banning Ranch. [AR:1474-1475.] Policy LU 6.4.9 states: "Facilitate development of an arterial highway linking Coast Highway with Newport Boulevard to relieve congestion at Superior Avenue, if the property is developed." [AR:6889.] Policy CE 2.1.2 states: "Construct the circulation system described on the map entitled Newport Beach Circulation Element-Master Plan of Streets and Highways shown in Figure CE1 and Figure CE2 (cross-section)." [AR:7096.] Figure CE1, the City's Master Plan of Streets and Highways, shows two "primary" roads through the NBR property [AR:7099]:

[3] / The City's CLUP does not apply to the privately-owned property as it is not in the City. [AR:124, 206, 1517.] This portion of the Project will also need a permit from the Coastal Commission. [AR:1517.]



Primary roads are four-lane divided roads. [AR:7101.] For the intersection of Bluff Road and the Coast Highway, the General Plan EIR envisioned two south-bound left-turn lanes, two south-bound right-turn lanes, two east-bound left-turn lanes, and one west-bound right-turn lane, all controlled by a stop light. [AR:4013 (Bluff Road in table with signal analysis), 4018 (table key), 4027 (description of turning lanes).] Policy CE 3.1.3 states there should be regional consistency in planning these major roads: "The City of Newport Beach Master Plan of Streets and Highways (shown on Figure CE1) shall be consistent with the Orange County [MPAH]." [AR:7103.] The MPAH likewise shows primary roads through NBR. [AR:9074, 9075.] The City's General Plan EIR states a primary road through NBR, referred to as "Bluff Road," is needed "to ensure that impacts resulting from buildout of the General Plan Update are

minimized." [AR:3567, 3568; see also AR:4011-4012, 4019.]

D. Park Access

The City considered obtaining access to the project site directly from Superior Avenue and Coast Highway. The City's Traffic Engineer stated such access would involve steep slopes, provide poor sight lines, and inadequate space for deceleration. [AR:125, 536-537, 1814.] It also substantially reduced the area available for active park uses. [AR:125, 536-537.] Finally, such access would violate the scenic easement established as part of the original grant of property to the City from Caltrans. [AR:10941.]

Because the City could not provide direct access, the City negotiated an access agreement with NBR's owners, allowing the City to construct and use an access road on the NBR property so long as the access did not interfere with the private owner's access to and use of its own property. [AR:2646.] The NBR owner's granted an access agreement for a "nonexclusive" easement to construct, operate, and maintain a park access road, so long as the proposed designs for the improvements are available for review and approval, within reason, by the property owner prior to construction. [AR:2647-2652.] The proposed access road proceeds several hundred feet north from the Coast Highway, into the NBR property, before looping back into the City's park property. [AR:2972.] Appellant describes this route as "circuitous" [AOB:2], but as the EIR makes clear

this route is designed to avoid steep slopes and sensitive habitat [see, e.g., AR:269, 295, 400, 425, 2972].

In exchange for the easement, the City agreed (1) to use the "Bluff Road" alignment, which makes sense given the City has identified a "Bluff Road" through the NBR property in its General Plan [AR:1474-1475, 6889, 7102], (2) to plan for and pay for water quality, drainage, and erosion control improvements needed to mitigate impacts associated with the Access Road improvements [AR:2649], (3) to construct a signal at Coast Highway and the park access road if approved by Caltrans [AR:2650], (4) to construct a security fence between the access road and the existing oil field on the NBR property [AR:2651], and (5) to construct a turn lane from Coast Highway, on property donated for this purpose. [AR:2651, 2666, 2688-2694.] For the turn lane, the City will widen a portion of the northern side of Coast Highway from Superior Avenue to a point west of the access road, consistent with the standards in the Circulation Element of the City's General Plan and the OCTA's MPAH to provide safe access. [AR:15, 187.] Because Coast Highway is a State Highway, California Department of Transportation (Caltrans) must approve these changes. [AR:15, 187.] The City acknowledged the access road might have to be closed temporarily if necessary for operation and use of the NBR property. [AR:2650.]

E. Compliance with the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.).

On May 8, 2009, the City circulated a Notice of Preparation (NOP) for the Park Project. [AR:620-656.] The City then prepared a Draft EIR, which it circulated for 90 days for public review and comment. [AR:7.] The City received comments on the Draft EIR [AR:1469-1471], prepared responses, and published a Final EIR on March 12. [AR:7.]

On March 23, the City Council held a hearing on the Park Project. [AR:8, 2498, 2765-2923.] The Council certified the EIR, adopted findings, approved a Mitigation Monitoring and Reporting Program, and approved the Conceptual Site Plan. [AR:7-111, 2884-2885, 2920.] The Council then approved the access agreement. [AR:2494, 2643-2656, 2885-2905, 2915-2922, 2954-2955, 2970.]

Appellant sued. [JA:1:1-24.]

F. The NBR Proposal

NBR has submitted an application to develop the 401-acre property with up to 1,375 residential dwelling units, 75,000 square feet of commercial uses, and 75 overnight resort accommodations. [AR:8068.] On March 16, 2009, the City issued a NOP for the proposal. [AR:8067-8087.] The NBR NOP notes the adjacent proposed Sunset Ridge Park [AR:8073], and the proposal to access the park from the NBR property. [AR:8083.]

STANDARD OF REVIEW

In this case, the Court's task is to determine whether the respondent agency prejudicially abused its discretion by failing to proceed in the manner required by law, or by reaching a conclusion that is not supported by substantial evidence. (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 392 (*Laurel Heights*); Pub. Resources Code, §§ 21168, 21168.5.) The court presumes that the agency complied with the law. (*Al Larson Boat Shop, Inc. v. Board of Harbor Comm.* (1993) 18 Cal.App.4th 729, 740 (*Al Larson*).) An EIR is presumed adequate (Pub. Resources Code, § 21167.3) and "the party challenging the EIR has the burden of showing otherwise." (*Santa Clarita Organization for Planning the Environment v. County of Los Angeles* (2007) 157 Cal.App.4th 149, 158.)

In determining whether an agency abused its discretion, the "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 Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435 (*Vineyard*).) If the dispute is predominately one of facts, the Court must uphold the agency's actions that are supported by substantial evidence. (*Ibid.*) "Challenges to the scope of the analysis, the methodology for studying an impact, and the reliability or accuracy of the data present factual issues, so such challenges

must be rejected if substantial evidence supports the agency's decision as to those matters and the EIR is not clearly inadequate or unsupported." (*Federation of Hillside & Canyon Assns. v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1259.) "In reviewing for substantial evidence, the reviewing court 'may not set aside an agency's approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable.'" (*Ebbetts Pass Forest Watch v. California Dept. of Forestry & Fire Protection* (2008) 43 Cal.4th 936, 944-945.) The court does not "'pass upon the correctness' of the EIR's environmental conclusions, but only its sufficiency as an informative document." (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564.) A court must uphold the EIR "'if there is any substantial evidence in the record to support the agency's decision that the EIR is adequate and complies with CEQA." (*El Morro Community Assn. v. California Dept. of Parks and Recreation* (2004) 122 Cal.App.4th 1341, 1349 (*El Morro*).) The court looks "not for perfection but for adequacy, completeness, and a good faith effort at full disclosure." (*Sequoyah Hills Homeowners Assn. v. City of Oakland* (1993) 23 Cal.App.4th 704, 712.)

As noted above, the Supreme Court's decision in *Vineyard* distinguishes between the "procedural" and "factual" issues that arise in CEQA cases. A reviewing court should not find that the omission of information amounts to a failure to proceed "in a manner required by law,"

unless the petitioner can point to a clear legal duty that the respondent agency has violated. (Pub. Resources Code, § 21168.5 ["[a]buse of discretion is established if the agency has not proceeded in a manner *required by law*"] [italics added]; CEQA Guidelines, § 15204 ["lead agencies need only respond to significant environmental issues and do not need to provide all information requested by reviewers, so long as a good faith effort at full disclosure is made in the EIR."].) "The relevant inquiry here is not whether the record establishes compliance" but whether the record shows that the agency "failed to comply" with its regulatory program. (*Gilroy Citizens for Responsible Planning v. City of Gilroy* (2006) 140 Cal.App.4th 911, 919.)

ARGUMENT

A. The EIR Properly Focused on the Park Project; There Was No Piecemealing.

In what it characterizes as its strongest argument [AOB:16], Appellant argues the City violated CEQA by not treating the City's Park Project and the NBR proposal as part of the same "project" for CEQA purposes and analyzing them together in a single EIR. [AOB:16-35.] Appellant boldly asserts that "Black-Letter CEQA Law" supports its position.

In fact, no statute or decision supports Appellant's position. The City did not err in treating a private development proposal in the County as a separate development proposal from the publicly proposed Sunset Ridge

Park. The privately-sponsored NBR proposal involves development of up to 1,375 residential dwelling units, 75,000 square feet of commercial uses, and 75 overnight resort accommodations on the 401-acre NBR property. [AR:8068.] The publicly-sponsored Sunset Ridge Park Project, by contrast, involves constructing a public park on less than 20 acres. [AR:170.] While the City's Park Project would involve the use of a corner of the NBR property for access, and while the two projects may ultimately share the alignment for a short segment of a single roadway, they share no other commonalities. CEQA does not require the City to treat them as the same "project."

1. Standard of Review for the Piecemealing Claim.

As Appellant notes, the Fifth Appellate District has held that "piecemealing" allegations involve purely legal issues. (*Tuolumne County Citizens for Responsible Growth v. City of Sonora* (2007) 155 Cal.App.4th 1214 (*Tuolumne*).) In this case, the trial court suggested the "substantial evidence" test applies. [JA:52:524.] This appears to be a question of first impression for the Fourth District. Under either test, however, the Court should uphold the City's approach.

2. The Test for Piecemealing Claims.

Under CEQA, "[t]he lead agency must consider the whole of an action, not simply its constituent parts, when determining whether it will have a significant environmental effect." (CEQA Guidelines, § 15003,

subd. (h).) This rule is designed to prevent an agency from "chopping a large project into many little ones—each with a minimal potential impact on the environment—[but] which cumulatively may have disastrous consequences" (*Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 283-284), a violation of CEQA often referred to as "piece-mealing."

The Supreme Court's decision in *Laurel Heights* provides a test to determine whether an EIR must include, as part of a project, a potential future phase or expansion of the initial proposal: the EIR must consider the future proposal if "(1) it is a reasonably foreseeable consequence of that initial project and (2) the future expansion or action will be significant in that it will likely change the scope or nature of the initial project or its environmental effects. Absent these two circumstances, the future expansion need not be considered in the EIR for the proposed project." (*Laurel Heights*, *supra*, 47 Cal.3d at p. 396.) The Court held the university had violated CEQA because the EIR prepared for the relocation of a medical facility analyzed only the initial occupancy of a portion of the new building, even though the record showed the university planned to occupy the entire building; under such circumstances, the EIR should have analyzed the impacts of full occupancy. (*Id.* at pp. 397-399.)

3. The Park Project and NBR Are Not Part of a Single, Larger Undertaking.

Applying the *Laurel Heights* test, Appellant argues the entire NBR

proposal is a "reasonably foreseeable consequence of the City's action and therefore must be included in the project description and environmental review." [AOB:26.]

Appellant is wrong. Unlike the university in *Laurel Heights*, the City has no plans to expand the Park Project, much less to expand further onto the NBR property. The City's Sunset Ridge Park project has been identified as a goal of the City since at least 2006. [AR:6839, 7134, 7136, 7173.] Nothing in the General Plan ties the development of the Park Project to the NBR proposal, which is not even located in the City. Moreover, NBR is proposed by a private entity, which is free to propose, change, or withdrawal the proposal at any time. The private proposal is subject to the review of the City, but the City is not the primary driver for that project and has little control over whether the proponent proceeds or abandons it. As such, the NBR proposal is not a foreseeable future phase of the City's Park Project.

True, park access will be provided through the NBR property on a short, gated two-lane access road. [AR:184, 185.] This road segment is the linchpin for Appellant's entire argument; it is what Appellant refers to as "critical infrastructure necessary for" the NBR project. [AOB:16.] On this basis, Appellant claims the City's long-planned, publicly-funded Park Project is so intimately tied to the neighboring landowner's proposal to construct 1,375 residential dwelling units, commercial uses, and resort

accommodations on the 401-acre NBR property [AR:8068], that the two proposals are essentially the same undertaking and must as a matter of law be analyzed as the same project in a single EIR. [AOB:17.]

Appellant is wrong. As noted above, under the Supreme Court's *Laurel Heights* decision, an EIR must include an analysis of future expansion or other project-related activity only if: "(1) it is a reasonably foreseeable consequence of that initial project and (2) the future expansion or action will be significant in that it will likely change the scope or nature of the initial project or its environmental effects." (47 Cal.3d at p. 396.) Neither is true here. The NBR proposal is not a foreseeable consequence of the City's Park Project, nor would approval of the NBR project change the scope of the City's Park Project. Thus, under *Laurel Heights*, the City acted properly in considering separately the proposed park.

Appellant claims *Tuolumne, supra,* 155 Cal.App.4th 1214 is "directly on point." [AOB:31.] The case is easily distinguished. *Tuolumne* focused on whether the impacts of off-site road improvements had to be analyzed with a proposal to construct a Lowe's retail store. The city had treated the store and off-site road improvements as two separate projects. The problem with this approach is that the city's permit approving the store *required* Lowe's to construct the off-site road improvements. (*Id.* at pp. 1227-1231.) As the court observed, the independence of store and road "was brought to an end when the road realignment was added as a

condition to the approval of the home improvement center project." (*Id.* at p. 1231.)

Here, there is no such link. The EIR for the Sunset Ridge Park Project identifies and analyzes all on- and off-site improvements for the Park Project, including the access road. [E.g., AR:187, 203, 417-418.] The City's approval of the Park Project does not include a condition requiring later approval of all or part of the NBR proposal. As the City explained: "The Sunset Ridge Park Project would not affect the City's future actions regarding the [NBR] property." [AR:1476.]

None of the factors dispositive in *Tuolumne* are present here. First, in *Tuolumne*, the Court found that the project and the offsite improvements were related in time because the roadway improvements "must be completed before business operations" at the Lowe's store may begin. (155 Cal.App.4th at p. 1277.) Here, no condition of the Park Project that mandates that the NBR project be completed at all, much less before the park opens. Nothing in the EIR, the access agreement, or the City's findings tied the approval of the Park Project with the approval of the entire NBR proposal. [AR:2646-2656.] In sum, there is no temporal connection between the Park Project and the NBR proposal. (See *Christward Ministry v. County of San Diego* (1993) 13 Cal.App.4th 31, 46-47 [agency did not piece-meal review of landfill expansion where other waste management projects were proposed at the same time].)

The *Tuolumne* Court also noted that when the same entity "undertakes both matters, it increases the likelihood that they are related—that is, are part of a larger whole." (155 Cal.App.4th at p. 1227.) Here, the Park Project is proposed and funded by the City, whereas NBR is proposed and funded by a private landowner. Thus, the two projects would be undertaken by different parties, one public and the other private. [4]

Appellant argues that the legal and financial link created by the access agreement is sufficient to make the projects part of a single undertaking. The agreement itself creates no such link. Indeed, the Court in *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 96-101, rejected a piecemealing claim in similar circumstances. There, the Court refused to find that a refinery upgrade and hydrogen pipeline were the same project for CEQA purposes, even though they were located on the same site and the pipeline was designed to transport excess hydrogen generated by refinery operations. The Court reached this conclusion because the refinery and pipeline were proposed by

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[4] / *Tuolumne* also noted geographic proximity as a factor, but neither *Tuolumne* nor any other decision suggests that this factor is controlling. Indeed, courts have rejected "piecemealing" claims notwithstanding geographic proximity, where, as here, the project under review is not functionally dependent on a potential future project. (See *Berkeley Keep Jets Over the Bay Com. v. Board of Port Comrs.* (2001) 91 Cal.App.4th 1344, 1361-1362 (*Berkeley Jets*) [EIR for airport development plan did not need to include long-range plan for potential runway expansions]; *Christward Ministry*, *supra*, 13 Cal.App.4th at pp. 46-47 [waste management projects proposed in same area as landfill expansion; agency did not segment review].)

different entities, performed different functions, and did not functionally depend on one another. (Compare *Nelson v. County of Kern* (2010) 190 Cal.App.4th 252 [where project consisted of both mining operations and reclamation, county impermissibly "piece-mealed" its review by considering only reclamation because mining and reclamation were two phases of the same "project"].)

Appellant argues that *Bozung*, *supra*, 13 Cal.3d 263, compels the conclusion that the privately-proposed, 401-acre residential development project and the neighboring public-park project are really one in the same. *Bozung* actually supports the opposite conclusion. In that case, a developer sought to annex farmland into a City in order to further its ultimate development. The local agency formation commission (LAFCO) took the position that its annexation decisions were not subject to CEQA because it did not "approve" a project per se. LAFCO therefore undertook *no* environmental review of the proposed annexation. The court disagreed with LAFCO's conclusion that it was not subject to CEQA, noting that the LAFCO approval was the first step in the plan to develop the annexed property, and as such LAFCO had to consider the impacts of the ultimate development. (*Id.* at pp. 279-285.) Here, as explained above, the City's EIR analyzed the impacts of the entire Sunset Ridge Park, including its access road. [E.g., AR:187, 203, 417-418.] The City did not analyze the impacts of the NBR project in its Park Project EIR, but then the City took

no action to approve or advance the NBR project when it approved the Park Project. [AR:1476.]

In arguing to the contrary, Appellant repeatedly mischaracterizes the record. Appellant states, for example, that that "undisputed record evidence demonstrates that the City has approved critical roadway infrastructure improvements that are part of the initial phase of the [NBR] development." [AOB:20.] The record is undisputed only in the sense that the record speaks for itself. In fact, the City has not approved *any* element of the NBR project. The City has approved an access road to the park [AR:15], but the park access road is not Bluff Road as it is envisioned in the City's General Plan and the MPAH, nor as the road is proposed as part of the NBR project. The City's General Plan, identifies Bluff Road as a four-lane, divided road extending from the Coast Highway to 19th Street. [AR:7101, 7099.] The NBR NOP states the project would include a "north-south Primary Arterial" "highway"—a four-lane, divided roadway designed to accommodate "30,000 to 45,000 Average Daily Trips." [AR:8074, 8078.]

In contrast, the park access road traverses a corner of the NBR property. The road is sized only to meet the needs of the park; it consists of a gated, two-lane, undivided road traveling from Coast Highway, extending north for about 850 feet to the City's park site. [AR:184-190, 7099, 7101, 8078, 9074-9075.] Such a road cannot *reasonably* be characterized as "critical roadway infrastructure improvements" to serve the NBR project.

[AOB:20.]

Appellant makes much of the fact that the City designed the access road in consultation with the NBR property owners. [AOB:21-22.] Given the fact that the easement for the road was donated, and will traverse private property, it is hardly surprising that the easement grantor had input into its design and construction. The access agreement provides the easement would be provided without charge so long as the access did not preclude owner's access to and economic use of the property. [AR:2646.] NBR's owners granted an access agreement free of charge for a "nonexclusive" easement to construct, operate, and maintain a park access road, so long as the proposed designs for the road are available for review and approval within reason by the property owner prior to construction. [AR:2652.] Among other things, the City agreed to use the "Bluff Road" alignment, which makes sense because the City identified a "Bluff Road" through the property in its General Plan. [AR:1474-1475, 6889, 7102.] The City also agreed to plan, design and pay for water quality, drainage, and erosion control improvements required as part of the access road [AR:2649] in accordance with specifications provided by the grantor [AR:1338]. Again, this is hardly surprising, as the grantor would want to assure that the road did not impair its property. Such terms do not, however, change the basic character of the access road. It was, and remains, a short, dead-end, two-lane, undivided, gated road. The notion that such a road opens the

floodgates to a four-lane, divided arterial highway designed to accommodate 30,000 to 45,000 Average Daily Trips [AR:15, 184-186, 8074, 8078] is absurd.

Appellant notes the City agreed to construct a signal at Coast Highway and the park access road *if approved by Caltrans*. [AR:2650-2651.] NBR's owners agreed to donate additional property in fee to facilitate a turn lane from Coast Highway at no cost with the proviso that the City would have to pay for the improvements for that turn lane. [AR:2651, 2666, 2688-2694.] As the City explained, a signal is proposed as part of the Park Project to facilitate safe and convenient access to the park from Coast Highway. [See, e.g., AR:1593.] Although the park itself does not meet signal warrant standards, without a signal turning into the park will be constrained. [AR:326-327, 1477, 1593.] As the EIR acknowledges, whether a signal is installed will ultimately be determined by Caltrans, which has jurisdiction over the highway. [AR:187, 324, 1477, 1899, 1902, 2895.] Such a situation, in which another agency has approval authority over a project feature, is commonplace. (*El Morro*, *supra*, 122 Cal.App.4th at p. 1362 [Caltrans jurisdiction over signal on State highway].)

Finally, Appellant argues the Park Project includes grading and fill operations aimed at preparing the NBR property for development. [AOB:22-23.] That claim is false. The Park Project includes grading and

fill in order to level and stabilize the site and control run-off. [AR:457, 460-461, 1826.] Because more soil will be excavated than used on site, roughly 34,000 cubic yards of soil will be exported. [AR:123, 192-193.] The EIR and access agreement identified two previously disturbed sites on the NBR property to accommodate this fill, enabling the City to reduce air pollutant emissions and traffic impacts from hauling the soil to more distant locations. The EIR analyzed the impacts of exporting the soil to these sites. [AR:323, 360-361, 384, 394, 399 (stockpile locations consist of non-native grassland), 419 (surveys of stockpile sites).] This contrasts with the estimated 2.8 *million* cubic yards of excavation and grading required for the NBR proposal. [AR:8083-8084.] The export of soil from the Park site to NBR does not make the projects one and the same.

4. Bluff Road and a Private Development at NBR Are Not "Integrally Related."

Bluff Road is planned as a four-lane, divided highway. [AR:7099, 7101-7102.] The Park Project, by contrast, includes a dead-end, gated, undivided, two-lane access road along a small segment of the planned alignment of Bluff Road. [AR:184-186,189-190.] Nevertheless, Appellant argues (1) the access road is actually Bluff Road, (2) Bluff Road will be constructed only if development proceeds at NBR, and therefore (3) the City's small Project is one in the same as the large private development at NBR. [AOB:27-30.] Appellant's argument—that the access road renders

the Park Project integrally related to the NBR proposal—turns on Appellant's interpretation of the City's general plan.

Appellant ignores the deference to which the City is entitled in interpreting its own General Plan: "[T]he body which adopted the general plan policies in its legislative capacity has unique competence to interpret those policies when applying them in its adjudicatory capacity." (*Save Our Peninsula Com. v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 142; see also *Western States Petroleum Assoc. v. Superior Court* (1995) 9 Cal.4th 559, 572 (*WSPA*) ["[t]he legislative branch is entitled to deference from the courts because of the constitutional separation of powers"], citing Cal. Const., art. III, § 3.) This standard of review is "highly deferential." (*Friends of Lagoon Valley v. City of Vacaville* (2007) 154 Cal.App.4th 807, 816.) "Because policies in a general plan reflect a range of competing interests, the governmental agency must be allowed to weigh and balance the plan's policies when applying them, and it has broad discretion to construe its polices in light of the plan's purposes. [Citations.] A reviewing court's role 'is simply to decide whether the city officials considered the applicable policies and the extent to which the proposed project conforms with those policies.' [Citations.]" (*San Franciscans Upholding the Downtown Plan v. City and County of San Francisco* (2002) 102 Cal.App.4th 656, 677-678.)

Appellants argue that the "primary 'evidence'" for the City's

position that Bluff Road is planned independently of NBR is an isolated map, but that policies are relevant, and maps are not. [AOB:27.] [5] The City's interpretation of its General Plan was not based solely on a single, isolated map, but rather on a holistic view of many policies. For instance, Policy LU 3.4 identifies two possible uses of the site: (1) acquisition for open space or (2) development of a residential village. [AR:6806; see also AR:6813, 6878-6890.] The General Plan contemplates some development under either scenario. For example, Goal LU 6.3 1 discusses the need for active community parks on the site. [AR:6883 ("Oil operations would be consolidated, wetlands restored, nature education and interpretative facilities provided, and an active park developed containing playfields and other facilities to serve residents of adjoining neighborhoods."),6884; see also AR:6890 (Policy LU 6.5.2).] Goal LU 6.4 discusses a private development scenario; Policy LU 6.4.1 explains that even under such a scenario, a community park is contemplated. [AR:6884.] The General Plan notes that an active community park is needed at NBR to accommodate both the West Newport area and Citywide needs for active sports fields. [AR:7136.] Policy R1.9 lists the need for a community park at NBR, in

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[5] / Appellant cites *Garat v. City of Riverside* (1991) 2 Cal.App.4th 259, 299-300 for the proposition that policies trump maps. *Garat* does not say that. Rather, in *Garat,* the Court upheld the city's interpretation of its General Plan, notwithstanding tensions between maps and policies. (*Ibid.*) In that context, the case hardly supports the notion that the maps adopted by the City as part of its General Plan are meaningless.

addition to an active park at Sunset Ridge. [AR:7172-7173.]

Under either scenario, the City's General Plan contemplates access to and through the NBR site. [AR:1474-1475.] Policy LU 6.4.9 states: "Facilitate development of an arterial highway linking West Coast Highway with Newport Boulevard to relieve congestion at Superior Avenue, if the property is developed." [AR:6889.] Policy CE 2.1.2 states: "Construct the circulation system described on the map entitled Newport Beach Circulation Element-Master Plan of Streets and Highways shown in Figure CE1 and Figure CE2 (cross-section)." [AR:7096.] Figure CE1—the City's Master Plan of Streets and Highways—shows two planned primary roads through the NBR property, one on the Bluff Road alignment. [AR:7099.] Figure CE2 shows that primary roads are four-lane divided roads. [AR:7101.] Circulation Element Policy CE 3.1.3 states there should be regional consistency in planning these major roads: "The City of Newport Beach Master Plan of Streets and Highways (shown on Figure CE1) shall be consistent with the Orange County [MPAH]." [AR:7103.] The MPAH likewise shows primary alignments through NBR. [AR:9074, 9075.] The City's General Plan EIR states "Bluff Road," is needed "to ensure that impacts resulting from buildout of the General Plan Update are minimized." [AR:3567, 3568; see also AR:4011-4012, 4019.][6] The City's

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[6] / Appellant takes a different view of the policies, citing in its favor an isolated statement made in the General Plan EIR by the EIR consultant.

interpretation of its own General Plan was not an abuse of discretion and must be upheld.

B. Substantial Evidence Supports the EIR's Analysis of Cumulative Impacts.

Appellant argues the Sunset Ridge Park EIR does not contain an adequate analysis of the cumulative impacts of the Park Project, in combination with the impacts of the proposed NBR project. [AOB:35-42.] Appellant cites no other "reasonably foreseeable" project aside from the proposed NBR development. Appellant also limits its argument to traffic and biological resources. [*Ibid.*] For these reasons, the only issue on appeal consists of the manner in which the cumulative-impact analysis addresses the proposed NBR project as it relates to traffic and biological resources. Appellant concedes that the cumulative-impact analysis is otherwise valid. (*Save Sunset Strip Coalition v. City of West Hollywood* (2001) 87 Cal.App.4th 1172, 1181 fn. 3 [issues not presented in opening brief are waived]; *Adelson v. Hertz Rent-A-Car* (1982) 133 Cal.App.3d 221, 225 [appellant cannot raise issues not presented to trial court]; Pub. Resources Code, § 21167.2 [unchallenged EIR is presumed valid].)

Under CEQA, an EIR must consider whether the "possible impacts of a project are individually limited but cumulatively considerable." (Pub.

[AOB:29, citing AR:6527, 6531.] Such statements are no more binding than "isolated maps" surely. No case law holds otherwise. In any event, the statement conflicts with other statements in the EIR that Bluff Road is needed to accommodate buildout of the General Plan.

Resources Code, § 21083, subd. (b)(3); see CEQA Guidelines, § 15130 [guideline addressing cumulative impacts analysis].) "Cumulative impacts" are "two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts." (CEQA Guidelines, § 15355.) The purpose of this analysis is to consider whether the incremental impacts of a series of related projects, though seemingly modest in isolation, are cumulatively significant. (*Los Angeles Unified School Dist. v. City of Los Angeles* (1997) 58 Cal.App.4th 1019, 1025 (*LAUSD v. Los Angeles*); *Las Virgenes Homeowners Federation, Inc. v. County of Los Angeles* (1986) 177 Cal.App.3d 300, 306 (*Las Virgenes*).)

After establishing the relevant geographic scope of the analysis, the lead agency identifies "past, present, and probable future projects producing related or cumulative impacts" through: (1) a "list" of such projects; or (2) through the use of "a summary of projections" contained in planning documents such as an adopted general plan, or in a prior adopted or certified environmental document, that describes or evaluates regional or area-wide conditions contributing to the cumulative impact. (CEQA Guidelines, § 15130, subds. (b)(1), (b)(3).) The agency determines (1) whether the overall impacts of related projects would be cumulatively significant; and (2) whether the project itself would cause a "cumulatively considerable" incremental contribution to any such cumulatively significant impacts. (CEQA Guidelines, §§ 15130, subds. (a), (b), 15355; *Communities*

for a Better Environment v. California Resources Agency (2002) 103 Cal.App.4th 98, 120.)

Aside from this general guidance, CEQA provides agencies discretion to determine the appropriate approach for analyzing a project's cumulative impacts, and to determine whether to classify impacts as "significant" depending on the circumstances and nature of the affected area. (CEQA Guidelines, §§ 15064, subd. (b), 15130, (b)(3); *Mira Mar Mobile Community v. City of Oceanside* (2004) 119 Cal.App.4th 477, 493 (*Mira Mar*); see *Ebbetts Pass Forest Watch v. Department of Forestry and Fire Protection* (2004) 123 Cal.App.4th 1331, 1350-1351 (*Ebbetts Pass*) ["[t]he selection of the assessment area is left to the [agency's] expertise, and absent a showing of arbitrary action, we must assume the [agency] exercised its discretion appropriately"]; *City of Long Beach v. Los Angeles Unified School Dist.* (2009) 176 Cal.App.4th 889, 906 (*Long Beach*) [good-faith effort to disclose cumulative impacts is sufficient].)

In this case, Appellant concedes (as it must) the EIR includes an analysis of cumulative impacts. [AR:307, 314-317, 322-323 (cumulative traffic impacts), 694-700, 707-709, 734-760 (traffic study in appendix to EIR, including data sheets on other projects), 427-428 (cumulative biological resources), 962-964 (biological technical report included as appendix to EIR, describing site in context of regional biological resources).] Appellant's argument is instead that the City violated CEQA

by devoting insufficient attention to the NBR proposal in its cumulative-impact analysis.

"When faced with a challenge that the cumulative impacts analysis is unduly narrow, the court must determine whether it was reasonable and practical to include the omitted projects, and whether their exclusion prevented the severity and significance of the cumulative impacts from being accurately reflected. [Citation.]" (*Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1215.) In this case, the record shows the City acted within its discretion in how it approached the NBR proposal.

1. The EIR Adequately Analyzed Cumulative Traffic Impacts.

Access to the park site will be provided off the Coast Highway. The access road will traverse a corner of the NBR property. [AR:185-187; see also AR:189-190 (figures showing improvements to access point at Pacific Coast Highway, and location of access road leading to park).]

The City released the Draft EIR in October 2009. [AR:112.] The analysis of cumulative traffic includes existing traffic, plus additional traffic from other, "committed" projects, plus traffic from "reasonably foreseeable projects in the Project vicinity." [AR:314.] Because the City expects the park to open in 2012, the analysis focuses on anticipated traffic as of the horizon year 2013, four years after the City published the Draft

EIR. [AR:305, 307.] The EIR assumes that, as of 2013, the NBR proposal would not generate any trips. That is because, even if approved, the NBR proposal would not be operational until long after that date. [AR:1611, 1726 (NBR site remediation work will not commence until 2014).] Thus, the number of trips using the access road consists of vehicles travelling to and from the park; the total does not include trips that would be generated by the NBR project and use "Bluff Road" to gain access to the Coast Highway. [7]

Appellant argues the City erred by not including NBR trips in the cumulative-impact analysis because the park site and NBR are located next to one another and would share the same access point with the Coast Highway. [AOB:37-38.] The Court need not consider this argument. Appellant and its anti-park allies submitted extensive comments on the EIR. [AR:1775-1781, 1794-1812.] Appellant's comments on the EIR's traffic analysis say nothing about the need to include NBR trips in the cumulative-impact analysis for traffic. [AR:1803.] Rather, Appellant and others submitted comments stating the City must analyze the park and NBR

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[7] / The EIR estimates the park project will generate 42 vehicle trips during the weekday p.m. peak hour. [AR:313.] That is the same number of trips shown entering or exiting the park site at the "Bluff Road at West Coast Highway" intersection in the figure depicting "Year 2013 With Project Peak Hour Traffic Volumes" for the weekday p.m. peak hour. [AR:321.] That makes sense because in the year 2013 the road will provide access to the park and nowhere else. [AR:189-190.] Off-peak traffic on weekends would be slightly higher: one car every 36 seconds or so. [AR:1917.]

as two parts of the same project. [AR:1566-1567, 1604, 1625, 1724, 1795-1798, 1998, 2025, 2030.] Appellant therefore failed to exhaust its administrative remedies with respect to this issue. (Pub. Resources Code, § 21177, subd. (a); *Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 535-536 [to exhaust administrative remedies, exact issue must first be presented to agency]; *Porterville Citizens for Responsible Hillside Development v. City of Porterville* (2007) 157 Cal.App.4th 885, 909 [petitioner has burden of proof regarding exhaustion requirement].)

Even if the Court reaches the merits, Appellant is wrong. This argument amounts to the claim that the City had to focus on a horizon year later than 2013—one that would encompass traffic generated by projects that would foreseeably come on line only well after that date, if and when the City approves that proposal (specifically, Banning Ranch). Case law makes clear, however, that the agency has discretion to make reasonable, good-faith assumptions concerning the scope of its cumulative-impact analysis. (*Ebbetts Pass*, *supra*, 123 Cal.App.4th at pp. 1350-1351; *Long Beach*, *supra*, 176 Cal.App.4th at p. 911; see also *Greenebaum v. City of Los Angeles* (1984) 153 Cal.App.3d 391, 411 [rejecting claim that time frame of cumulative-impact analysis was too narrow].)

Here, the City had ample reason to exclude the NBR proposal from its analysis of cumulative traffic impacts. The park access road is not "Bluff Road" as envisioned in the City's General Plan and the MPAH. The

General Plan identifies Bluff Road as a four-lane, divided road running the entire distance from the Coast Highway northward to 19th Street. [AR:7099, 7101-7102 (Figure 1a showing configuration of Bluff Road at Coast Highway).] The park access road, by contrast, consists of a narrow, two-lane, undivided road that tracks only the southernmost 850-foot segment of the ultimate alignment of Bluff Road. [AR:15, 184-186.] Thus, constructing the access road provides access to Sunset Ridge Park and nothing else. [AR:189-190.] Access to NBR or elsewhere would not exist unless the road were widened and extended all the way to 19th Street to the north. [AR:1562.] The cumulative traffic impacts to which Appellant refers would not occur as a result of constructing the park access road. Rather, that traffic would occur only if the City approves NBR and Bluff Road as called for by the Circulation Element. There is thus no danger that the cumulative traffic impacts of Sunset Ridge Park, in conjunction with NBR, will somehow slip through the cracks. Simply put, the concern that animates the need to analyze cumulative impacts does not exist in this case. (Compare *Bakersfield Citizens*, *supra*, 124 Cal.App.4th at pp. 1215-1217 [where evidence showed two contemporaneous shopping center proposals would compete with one another, use same roadways, and result in air pollutant emissions in same air basin, agency had obligation to consider cumulative impacts of both proposals].)

Appellant argues the terms of the access agreement show the NBR proposal could, in fact, contribute traffic to the park access road. [AOB:40.] Appellant is wrong. The access agreement [AR:2646-2694] states the NBR owners retain the right to use the access road. [AR:2648.] But the agreement covers only the construction and use of the access road to the park. [AR:2647-2648, 2659.] Thus, the agreement simply provides the owners with the ability to use the access road to gain access to their own, undeveloped land.

Moreover, the record shows the City and public *did* understand the cumulative traffic impacts of approving both Sunset Ridge Park and NBR. That information appears in the EIR's signal warrant analysis in the EIR. [AR:325 (Table 4.3-9 showing trips at buildout with and without NBR).] That the EIR did not repeat this information in the discussion of cumulative traffic is immaterial. (See *Al Larson*, *supra*, 18 Cal.App.4th at pp. 748-750 [cumulative analysis upheld absent showing that agency or public was misled].)

Further information on cumulative traffic appears, appropriately, in the City's General Plan and its related EIR. The General Plan EIR includes an analysis of Bluff Road. [AR:3568 (Table 3-4), 4027 (Table 4.13-10).] The General Plan EIR analyzes this improvement under cumulative General Plan buildout conditions. [AR:4009 (Table 4.13-6), 4013 (Table 4.13-7).] "Buildout" includes development of NBR as a mixed-use village.

[AR:4003-4004 (traffic analysis assumes build-out of General Plan), 3565 (describing NBR as mixed-use village), 4578 (trip generation for NBR), 4595 (table summarizing trip generation rates assumed at build-out of General Plan).] The General Plan EIR identifies Bluff Road as a needed improvement to accommodate build-out traffic, regardless of whether NBR is developed. [AR:4019 (Table 4.13-8), 4670 (Bluff Road required even if NBR is acquired as open space).] The analysis identifies no impacts related to General Plan buildout at Bluff Road; rather, it concludes the identified improvements, including Bluff Road, are needed to mitigate the impacts of the General Plan buildout: "The improvements listed below in Table 3-4 would be implemented under the proposed General Plan Update to ensure that impacts resulting from buildout of the General Plan Update are minimized." [AR:3567.] Thus, the City already concluded that constructing Bluff Road is necessary to address cumulative traffic from General Plan buildout. [AR:3567-3568.] In sum, even if the City was obliged to consider the cumulative traffic impacts of constructing the full length of Bluff Road (and not merely the short segment leading to the park site), the City did so in 2006 as part of its General Plan Update.

Las Virgenes, *supra*, is on point. In that case, petitioners argued the EIR for an industrial and residential project did not consider the cumulative impacts of other development proposed nearby. The Court rejected this argument based on the EIR's citation to the county's General Plan and area

plan, stating: "The County, in adopting its general plan and the [area plan], necessarily addressed the cumulative impacts of buildout to the maximum possible densities allowed by those plans. . . . It was not necessary for the project EIR to recover this ground." (177 Cal.App.3d at p. 307.) The same is true here.

Appellant argues the City cannot rely on the General Plan EIR's analysis because the Sunset Ridge Park EIR does not reference it. [AOB:38-39.] This is false. The Sunset Ridge Park EIR cites both the General Plan and its EIR. The Sunset Ridge Park Project EIR includes an analysis of the project's consistency with the Circulation Element of the City's General Plan; the analysis concludes the park is consistent with this element. [AR:234-238; see also AR:123, 212-213, 304-305 (traffic analysis referencing General Plan consistency discussion), 1474-1476, 1918-1919 (noting park project's consistency with General Plan land-use designations and road improvements).] The Sunset Ridge Park EIR specifically references both the General Plan and its related EIR. [AR:566.][8]

The cases cited by Appellant are distinguishable on this ground. In *San Franciscans for Reasonable Growth v. City and County of San*

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[8] / The City specifically referenced and relied on its General Plan and EIR. In referring to these analyses, the City is not engaging in post-hoc rationalizations; rather, the City is instead relying on its record of proceedings. For this reason, *Southern Cal. Edison Co. v. Public Utilities Com.* (2000) 85 Cal.App.4th 1086 is inapposite.

Francisco (1984) 151 Cal.App.3d 61, the EIRs for a several downtown office tower projects identified the cumulative transit impacts of only those projects that were either under construction or approved; the EIRs did not consider the transit impacts of roughly 10 million square feet of other proposed office towers undergoing contemporaneous environmental review but not yet approved. The Court held the cumulative-impact analyses were too narrow because nowhere had the city considered the combined transit impacts off all the office towers that had been proposed. (*Id.* at p. 74.) Similarly, in *Bakersfield Citizens*, *supra*, the city prepared separate EIRs for two different regional shopping centers located roughly 3.6 miles apart within the same market area. Both proposed shopping centers required General Plan amendments. (124 Cal.App.4th at pp. 1216-1217.) The two shopping centers shared arterial roadways, and were aimed at overlapping market areas. (*Id.* at p. 1216.) Even though the environmental review processes overlapped, and the city approved the projects on the same day, neither EIR mentioned the other proposal. Nor did either EIR assess the potential for cumulative "urban decay," traffic, air quality or other impacts caused by the two shopping centers operating in tandem. (*Id.* at pp. 1216-1219.)

Here, by contrast, the City understood the cumulative impacts of approving the Sunset Ridge Park, Bluff Road, and NBR. As noted above,

all that information was readily available in the City's 2006 General Plan and EIR. (*Las Virgenes, supra*, 177 Cal.App.3d at p. 307.)

Appellant argues the City cannot point to the General Plan and its accompanying EIR because the Banning Ranch development described in the General Plan does not match the NBR proposal. [AOB:39-40.] Not true. [AR:3565 (General Plan EIR describing NBR as mixed-use village and open space), 4578 (trip generation estimates for NBR based on 1,375 dwelling units, 75,000 square feet of retail, and 75-room hotel), 317, 710 (Park traffic study states General Plan authorizes up to 1,375 dwelling units, 75,000 square feet of retail, and 75-room hotel).]

Similarly, Appellant argues the General Plan and its EIR do not specifically mention Sunset Ridge Park. [AOB:39.] They do. [AR:7134, 7139 (General Plan figures of proposed park facilities identifying location of Sunset Ridge Park), 7136 (describing park deficit in area of City and need for park at this location), 7172-7173 (Policy R 1.9—developing active use park at this location a "priority").] Moreover, the General Plan EIR's traffic study assumed buildout under the plan, and thus subsumed development of a park at this site. [AR:4632-4633 (trip generation rates include allowance for additional parks).]

Appellant argues the City relied on anticipated traffic from NBR to justify seeking permission from Caltrans to install a signal at the intersection of the Coast Highway and the park access road. [AOB:40-41.]

This argument distorts the record. The EIR for the Park Project concludes a signal will provide safer access to the park. [AR:187, 712, 1477, 1480-1481, 1549.] Appellant cites a letter from Caltrans expressing concern about whether a signal would disrupt traffic on the Coast Highway. [AOB:41, citing AR:1479.] The EIR acknowledges, however, that Caltrans has jurisdiction over the highway, and therefore will have the final say regarding whether a signal is installed. [AR:187, 324, 1477, 2895.] That that the City and Caltrans have differing views on the matter does not mean the EIR is inadequate. (*California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 639 (*CNPS*).) In any event, the City's General Plan EIR contemplates and evaluates the installation of a traffic signal at Bluff Road and Coast Highway [AR:4013, 4018, 4027; see also AR:1931], and the signal warrant analysis shows a signal will ultimately be needed regardless of whether the City approves development on Banning Ranch or acquires the site as open space. [AR:710-712; see AR:4656 (General Plan intersection analysis).]

2. The EIR Provided an Adequately Analysis of Cumulative Biological Impacts.

Appellant argues the analysis of cumulative biological impacts "completely ignores the proposed future development" of Banning Ranch. [AOB:41.] This statement is incorrect. The Park EIR explains that a number of projects were evaluated in the cumulative scenario, including the

proposed City Hall and Park Development project, the development of Newport Coast, and Newport Ridge, as well as the Orange County Central Coast/Coastal Subregion NCCP. [AR:427.] A commenter asked why the NBR proposal was not included in the list of cumulative projects. [AR:1808 (comment P40-61).] The Final EIR explained that it was, in fact, included: "The [NBR] property is assumed in the cumulative biological resources analysis; both properties are within the boundaries of the NCCP." [AR:1825.] Appellant quotes only the first half of this response, and ignores the reference to the NCCP.

The response was adequate. The reference to the "NCCP" is to the "Natural Communities Conservation Plan/Habitat Conservation Plan for the Central/Coastal Subregion." The NCCP, approved in 1996, is a comprehensive plan for the long-term protection of the coastal California gnatcatcher and other special-status species that rely on coastal sage-scrub habitat. [AR:414-415, 962-964, 1012-1013.] As such, it is designed to ensure the long-term viability of wildlife. (Fish & Game Code, § 2801; see *Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1274 (*Defend the Bay*) [description of NCCP].) Both the Sunset Ridge Park site and Banning Ranch are within an "Existing Use Area" covered by the NCCP. [AR:965, 1825.] The EIR states the quality of habitat on the Sunset Ridge Park site is, within the context of the NCCP, not cumulatively significant. [AR:427-428.] The EIR also identifies, and the City adopted,

comprehensive mitigation to address the project's contribution to this cumulative impact; among other things, the adopted measures require the City to protect and restore coastal sage scrub habitat at a 2:1 ratio. [AR:37-39, 429-431.] Thus, the City had ample reason to conclude the Park Project's contribution to cumulative biological impacts would not be cumulatively considerable. (*Mira Mar*, *supra*, 119 Cal.App.4th at pp. 494-496 [upholding compensatory mitigation at specified ratio]; *Defend the Bay*, *supra*, 119 Cal.App.4th at p. 1277 [upholding mitigation requiring creation of habitat].)

Appellant cites to passages in the record indicating that gnatcatchers are present on the NBR property. [AR:12211, 12228.] But the City's EIR acknowledged this fact. [AR:417.] Appellant also cites to statements indicating that FWS wanted the City and NBR to submit a single application for "take" authorization under the Federal Endangered Species Act. [AR:9605, 9637.] FWS' preferred approach to federal permitting does not mean the City's EIR was invalid. (*CNPS*, *supra*, 172 Cal.App.4th at p. 639.) In any event, as explained above, the City *did* consider NBR in its analysis of the park's cumulative biological impacts. Although the Draft EIR could have been clearer on this point, perfection is not required. (*El Morro*, *supra*, 122 Cal.App.4th at p. 1349.)

C. Substantial Evidence Supports the EIR's Analysis of Growth-Inducing Impacts.

Under CEQA, an EIR should analyze whether a proposed project will "[i]nduce substantial population growth in an area, either directly (for example, by proposing new homes and businesses) or indirectly (for example, though extension of roads or other infrastructure)[.]" (CEQA Guidelines, Appendix G, § XII(a); cf. CEQA Guidelines, § 15126.2, subd. (d) [EIR should "discuss the ways in which the proposed project could foster economic or population growth, or the construction of additional housing, either directly or indirectly, in the surrounding environment."].) [9]

Appellant argues the EIR did not address the Park Project's potential to induce growth. [AOB:42-48.] The argument ignores the EIR's discussion of potential growth-inducing impacts. The EIR concluded that because the project was designed to meet a preexisting park deficit, and was previously planned in the General Plan, it would not induce growth. [AR:531-532.] Commenters stated the access road might induce growth. In response, the EIR explained the roadway for the park is on an

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[9] / Citing Public Resources Code section 21100, subdivision (b)(5), Appellant argues that the analysis of growth-inducing impacts under CEQA must be a "detailed statement." [AOB:43.] The term "detailed statement" refers to the entirety of the analysis in the EIR and not specifically to growth-inducing impacts. (Pub. Resources Code, § 21100, subd. (b); see also *Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 369 ["Nothing in the Guidelines, or in the cases, requires more than a general analysis of projected growth."].)

alignment that has already been planned in both the City's General Plan and the Orange County MPAH. [AR:1474-1475, 1562, 1830, 1918-1919.] The planned roadway—"Bluff Road"—is needed irrespective of the Park Project or the NBR proposal. [AR:1474-1475.] Moreover, the impacts of constructing Bluff Road were evaluated in the General Plan EIR [see, e.g., AR:3568, 4009, 4013, 4019, 4027, 4126], and that EIR also evaluated growth-inducing impacts. [See, e.g., AR:4126-4127.] The General Plan EIR states:

> Implementation of the proposed General Plan Update would include development that would ultimately require extension of roadways, sewer, water, gas, and electrical lines, which would be developed to serve the project area. .... However, because development associated with the proposed General Plan Update could result in extension of public facilities into areas not currently served by such facilities, such as Banning Ranch and would facilitate subsequent development in the area, the project would be considered growth inducing.

[AR:4126.] (See *Friends of the Eel River v. Sonoma County Water Agency* (2003)108 Cal.App.4th 859, 877 [water supply project did not need to analyze growth, where analyzed in general plan EIR].)

Moreover, as explained above, the park access road (1) will occupy only a tiny segment of Bluff Road alignment, (2) is sized for the park alone, and (3) will be gated with limited hours of access. [AR:15, 183-186, 7099, 7101.) The record is clear that the NBR proposal faces significant hurdles [AR:8085-8086 (list of needed approvals from 11 different agencies)], and

the mere construction of the park access road—which is not sized to serve NBR in any event—would not substantially induce growth there.

Appellant again cites to the proposal to install a signal at Coast Highway, and points to an isolated statement by a Caltrans official that the main reason behind the signal is to provide access to the "Banning Ranch Development." [AR:1899.] No other evidence in the record supports this contention; rather, the record supports the contrary. [See, e.g., AR:1477 (signal warranted under General Plan assumptions, without regard to development of NBR), 326-327, 1593 (signal would improve park access).] Installing a signal is specifically contemplated and analyzed in the General Plan EIR for the intersection of Coast Highway and Bluff Road. [AR:4013 (Bluff Road in table with signal analysis), 4018 (table key), 4027 (detailed description of turning lanes).] The City was entitled to rely on its own substantial evidence. Moreover, the isolated statement of a Caltrans staffer does not rise to the level of substantial evidence. (CEQA Guidelines, § 15385 ["expert opinion supported by facts" constitutes substantial evidence]; *Citizens Committee to Save Our Village v. City of Claremont* (1995) 37 Cal.App.4th 1157, 1170 [expert opinion, devoid of foundation or fact, is not substantial evidence].)

City of Antioch v. City Council of the City of Pittsburgh (1986) 187 Cal.App.3d 1325, cited by Appellant, is readily distinguishable. There, the project consisted of constructing a 6,400-foot roadway and an adjacent

sewer system. The agency's analysis focused exclusively on the impacts of constructing the road and sewer system, and ignored the development they presaged. According to the court, "the location of the [ ] property, as well as the desire of the [city] to facilitate its development, render it virtually certain that additional development will result." (*Id.* at p. 1335.) The Court held the agency had to analyze the growth that would be induced by constructing this infrastructure, stating: "[O]ur decision . . . arises out of the realization that the sole reason to construct the road and sewer project is to provide a catalyst for further development in the immediate area." (*Id.* at p. 1337.)

City of Antioch involved a negative declaration, rather than an EIR. In any event, in this case, the purpose of the access road is to provide access to the park, no more. The Court in *City of Antioch* noted that the "location and design of the road and appurtenant sewage and water distribution facilities will strongly influence the type of development possible." (*Id.* at p. 1334.) That is true here as well—the design of the facilities will influence the development possible. Here, the access road is designed and sized for the park alone (i.e., gated, two-lane, undivided road from Coast Highway to the park site), and is not sized to facilitate further development, such as at buildout of the General Plan (i.e., four-lane, divided road, from Coast Highway to 19th Street). [AR:15, 184-186, AR:7099, 7101, 4013, 4018, 4027.] Appellant claims "infrastructure

improvements" were "*specifically designed* to accommodate the proposed NBR project" [AOB:45], but Appellant cites scant evidence to support that claim.

The record shows the City consulted with the NBR property owners as to the specific design of the easement and facilities that the City would construct on NBR's property in connection with the access road. [AR:1337-1338, 1899, 2648-2662, 8082-8083, 8442-8446.] Such consultation was hardly nefarious given that the City needed access over the NBR property, and the owners were willing to provide it. [10]

Appellant cites to *Clover Valley Foundation v. City of Rocklin* (2011) 197 Cal.App.4th 200, 227, to support the claim the Park Project EIR should have identified significant growth-inducing impacts related to the access road. [AOB:45.] In that case, the developer installed a sewer system designed to accommodate the project's 558 homes, plus another 524 homes located nearby. The EIR noted this change would remove an

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[10] / Appellant argues that the stormwater drains were oversized to meet the needs of the proposed Banning Ranch project. [AOB:45, citing to AR:2650-2651, 8442-8446.] The record shows the City did consult with the Banning Ranch property owners regarding the infrastructure proposed on the Banning Ranch property. Even if the stormwater drains were oversized, such oversizing is common in development (see Gov. Code, § 66485 [authorizing agencies to require developers to oversize underground infrastructure]) so that future growth, if ever approved, does not require replacing buried infrastructure. Such an accommodation would hardly be a significant inducement to growth to future development at Banning Ranch given the substantial regulatory impediments to development of the property. [AR:8085-8086.]

impediment to growth in the area. The Court concluded this statement was adequate, stating, "[n]o further analysis was required, as the growth had already been expressly contemplated in the City's general plan and the general plan EIR." (*Id.* at p. 225.) *Merz v. Board of Supervisors* (1983) 147 Cal.App.3d 933 (disapproved on other grounds in *WSPA, supra,* 9 Cal.4th 559) is closer to the present case. In *Merz*, the petitioner argued the county could not adopt a negative declaration analyzing the impacts of constructing intersection improvements because theoretical maximum capacity of the intersection exceeded what was necessary to serve approved development. (147 Cal.App.3d at pp. 939-940.) The Court rejected this argument, concluding the evidence indicated the purpose of the intersection was to provide capacity for approved projects, and not to induce growth by providing excess capacity. (*Ibid.*)

The same is true here. Here, the City prepared an EIR (as opposed to a negative declaration), and the record shows the access road does *not* provide excess capacity. The park is designed to meet an existing shortfall, and the access road will not remove a substantial impediment to development of NBR. Because substantial evidence supports these conclusions [AR:1474-1475, 1562, 1830, 1918-1919], they should be upheld.

D. Substantial Evidence Supports the EIR's Analysis of Biological Resource Impacts.

1. The City Was Not Legally Compelled to Find that All Habitat Impacts Were Significant.

Appellant argues that because the Park Project falls within an area mapped as critical habitat for the gnatcatcher, the City had to find all habitat impacts to be significant. [AOB:49-50.] Appellant mischaracterizes the critical habitat designation. As the critical habitat rule states, mapping critical habitat involves large-scale, grid-based mapping; such maps do not delineate the precise boundaries of actual habitat critical to the conservation of the species. (72 Federal Register (FR) 72010, 72014.) [11] The rule provides "Primary Constituent Elements" (PCEs) to identify the physical and biological features essential to the species' conservation. (72 FR 72012.) PCEs are designed to allow landowners and managers to "more clearly identify habitat containing features essential to the species." (72 FR 72014.) PCEs focus on habitat characteristics critical for conserving the species. (72 FR 72069.) PCEs do not define habitat as critical simply because the species may, on occasion, visit it. (72 FR 72069.) As the rule explains, impacts to habitat within the mapped area do not significantly impact (in the rule's words, "adversely modify") critical habitat where they do not "appreciably" reduce the ability for PCEs to serve

[11] / See Respondents' request for judicial notice filed concurrently.

their intended conservation role. (72 FR 72042.) Thus, the identification of PCEs within a site, and the significance of impacts to mapped habitat, requires expert judgment depending on the character of the site and the nature of the impact. As explained at trial [JA:49:480-484], the City's determinations on these factual questions were supported by substantial evidence. Appellant argues for a "per se" rule that does not exist. (CEQA Guidelines, § 15065, subds. (a)(1) [mandatory finding of significance applies where project would *substantially* reduce the number or restrict the range of protected species, (b) [mandatory finding not required where mitigation is adopted].)

Appellant argues if acreage is "occupied" habitat then its loss must be significant. [AOB:50.] That gnatcatcher is observed visiting a site does not mean the habitat is essential to conserve the species (16 U.S.C., § 1532 (5)(A)(i)), or that its loss is a significant impact. Appellant's biologist purportedly observed a gnatcatcher "occupying" a chain-link fence. [AR:1743.] "Occupancy" does not mean the fence is critical habitat. Here, the disputed acres consist of "disturbed encelia scrub" and "encelia scrub ornamental." [AR:424-425.] As the EIR's expert consultant explained, this "habitat" is disturbed, overgrown with non-native, invasive and ornamental species, near traffic and other disturbances, and fragmented. [AR:398-399, 414, 423, 424, 1534, 1767-1768, 1770.] The expert opined the habitat does not exhibit PCEs, and its loss is not significant. [AR:398-

399, 414, 423, 424, 1534, 1767-1768, 1770.] [12] Appellant's own biologist conceded the area has no actual habitat value, but merely potential value. [AR:1745-1746.] Appellant argues the City had to conclude otherwise simply because species were observed using the habitat, but that is not the standard. There is no rule providing that simply because species were observed at a particular location, the site is critical habitat or otherwise significant to the species. The question is simply one of fact.

Vineyard, supra, 40 Cal.4th at p. 449, cited by Appellant [AOB:49-50], actually supports this conclusion. In *Vineyard*, a project proposed to pump groundwater near the Cosumnes River, which was designated as critical habitat for certain endangered fish. The pumping would dewater the river and thereby harm listed fish. The EIR did not analyze this impact. The Court held the EIR had to be recirculated to address this impact. (*Id.* at pp. 448-449.) Appellant argues the court held "any impacts to federal designated critical habitat are per se significant." [AOB:49.] In fact, the Court held the agency's finding—that the pumping would not harm the fish—*was not supported by substantial evidence*. (40 Cal.4th at p. 448.) In this case, the City analyzed in detail the Park Project's impact on gnatcatcher habitat; Appellant simply disagrees

[12]/ Appellant claims FWS "designated various scrub habitats on the project site as vital to the protection of the gnatcatcher." [AOB:51.] False. The record contains no evidence FWS made such a determination for this site. FWS' rule belies this claim. (72 FR 72014.)

Appellant states the City's expert conceded that the habitat was essential. [AOB:51.] The expert actually said: "Coastal California gnatcatchers also use chaparral, grassland, and riparian habitats that are in proximity to sage scrub. … Availability of these non-sage scrub areas is essential during certain times of the year." [AR:1064.] This statement was a general description of gnatcatchers, and did not focus on the Project site. The expert never said the habitat at issue was essential; rather, the expert said it was disturbed and fragmented. Appellant also cites an expert report on the neighboring property [AOB:51, citing AR:12217], but does not explain the report's relevance to the Park site.

Appellant argues because the habitat is degraded due to illegal mowing (an allegation the City strongly disputes), the EIR should assume it is not. [AOB:52.] In any event, CEQA requires analyzing the impacts of the project on existing, physical conditions, even if those conditions have been altered. (CEQA Guidelines, § 15125, subd. (a); *Sunnyvale West Neighborhood Association v. City of Sunnyvale City Council* (2010) 190 Cal.App.4th 1351,1373-1374.) That is true even if the alterations were illegal. (*Riverwatch v. County of San Diego* (1999) 76 Cal.App.4th 1428, 1442-1453; *Fat v. County of Sacramento* (2002) 97 Cal.App.4th 1270, 1280-1281.) Appellant argues this rule applies only if the change in the setting is permanent, not where the "violation" is ongoing. Wrong. The remedy for illegal activity is an enforcement action, not the fabrication of a

hypothetical CEQA baseline. (*Riverwatch*, *supra*, 76 Cal.App.4th at pp. 1442-1453.) That is true even if the alleged violation is "ongoing." (*Fat*, *supra*, 97 Cal.App.4th at pp. 1280-1281 [ongoing operation of unpermitted airport].)

2. Substantial Evidence Supports the City's Conclusion that Impacts to Gnatcatcher Habitat Were Mitigated.

Appellant argues that the EIR's mitigation for gnatcatcher is deficient. [AOB:52-55.] Appellant is wrong.

The EIR considers the Park Project's impacts on biological resources. [AR:394-432, 953-1122.] The consultants performed focused gnatcatcher surveys using FWS protocols. [AR:417, 1063-1076.] The biologists concluded some, limited habitat has high value; other areas, while occasionally visited, are degraded, vegetated by non-native species, disturbed or fragmented, and have low value. [AR:423.] The EIR concludes the loss of high-value habitat is a significant impact; the loss of the low-value habitat is not. [AR:423-424.] Although listed species may occasionally visit degraded scrub habitat, its loss is not significant because it is disturbed and fragmented, and provides insufficient food, cover and shelter. [AR:423-424, 1767.]

For the high-quality habitat, the EIR identifies specific mitigation: compensation for the loss of 0.41 acres of coastal sage scrub at a 2:1 ratio and 0.06 acres of willow scrub at a 1:1 ratio. [AR:430-432; see AR:424

(Table 4.6-4 and narrative above table), 430-432, 1767 (0.41 acres consists of 0.14 acres of southern coastal scrub and 0.27 acres of encelia scrub).] This mitigation is appropriate. (*Mira Mar*, *supra*, 119 Cal.App.4th at pp. 494-496 [upholding mitigation of sensitive habitat at identified ratios].)

Appellant argues that the City could not rely on the mitigation of 0.27 acres of encelia scrub because, "according to the EIR, gnatcatchers do not 'utilize' the encelia scrub." [JA:50:515; AOB 53.] Appellant misreads the EIR. The EIR states that encelia scrub on the site is not valuable habitat because it is fragmented and degraded; the EIR never states that encelia scrub is *never* good habitat. [AR:414.] In fact, when not degraded or fragmented, encelia scrub is part of the habitat that exhibits PCE's for the gnatcatcher. [*Ibid.*; see 72 FR 72032.] Here, the mitigation habitat must be sited in open space and contiguous with other habitat, and thus not fragmented. [AR:430.] As the EIR explains, the disturbed mule fat scrub/goldenbush scrub in the western portion of the Project site was visited by the gnatcatcher, although the habitat is not considered high quality, is disturbed, and is isolated from coastal sage scrub to the northwest. [AR:262, 278, 423.] The EIR explains this degraded habitat would also be mitigated at a ratio to be determined by USFWS. [AR:262, 278, 430-431.] This would be in addition to the other measures in the EIR

to mitigate for loss of gnatcatcher habitat.[13]

Appellant cites a draft letter to the U.S. Army Corps of Engineers (Corps) proposing a different mitigation package than set out in the EIR. [AOB:53, citing AR:9730.] The issue, however, is not whether other conclusions might have been reached regarding impacts or mitigation measures, but whether substantial evidence supports the City's adopted approach. Indeed, as the courts have noted, federal agencies with permitting authority operate under statutes that may not align with CEQA, and may require different or additional mitigation. (*CNPS*, *supra*, 172 Cal.App.4th at pp. 625-626.) Mitigation Measure 4.6.3 acknowledges this fact, stating the City will perform a section 7 consultation or obtain a section 10 permit under the Endangered Species Act. [AR:429.] That does not mean the City's adopted mitigation is inadequate. (*Laurel Heights*, *supra*, 47 Cal.3d at pp. 407-408.)[14]

Appellant argues Mitigation Measure 4.6-3 represents impermissible deferral, citing *San Joaquin Raptor Rescue Center v. County of Merced* (2007)149 Cal.App.4th 645, 669-670. In that case, the agency merely committed to future development of a vague mitigation plan in consultation

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[13] / Below Appellant conceded it had not exhausted its remedies on this issue. [JA:48:439-441.] Therefore, the court need not consider it. (Pub. Resources Code, § 21177, subd. (a); *Sierra Club*, *supra*, 163 Cal.App.4th at p. 536.)

[14] / Because the City concluded the adopted measures would address the impact, and substantial evidence supports that conclusion, *LAUSD v. Los Angeles*, *supra*, 58 Cal.App.4th at p. 1029 is inapposite.

with federal agencies that would "protect the integrity" of vernal pools, should future studies show the pools contained endangered species. In this case, by contrast, Mitigation Measure 4.6.3 acknowledges overlapping permitting authority of other agencies, *and* commits the City to carry out specific actions to minimize impacts. [AR:429-430.] The EIR cites other measures that would provide further mitigation for habitat relied upon by the gnatcatcher. [AR:429-431.] That is not deferral. (*Defend the Bay*, *supra,* 119 Cal.App.4th at pp. 1275-1276 [mitigation required surveys, consultations, and specific actions]; *CNPS*, *supra*, 172 Cal.App.4th at pp. 619-625 [off-site mitigation for impacts to vernal pools at specified ratio]; *Mira Mar*, *supra*, 119 Cal.App.4th at pp. 494-496 [restoration of habitat at identified ratios]; see *Laurel Heights*, *supra*, 47 Cal.3d at p. 416 [under substantial evidence test, adequacy of mitigation must be reviewed in light of whole record].)

3. The EIR's Analysis of Impacts to ESHA and Wetlands Is Supported by Substantial Evidence and Is Adequate.

Citing to select portions of the record, and quoting them out of context, Appellant argues the EIR failed to properly assess impacts to "Environmentally Sensitive Habitat Areas" (ESHAs) and wetlands. [AOB:55-62.] Appellant is wrong.

First, "ESHA" is an area that contains habitat of particular value due to its "special nature or role in an ecosystem." (Pub. Resources Code, §

30107.5.) Development in ESHA is restricted, and development in surrounding areas must be designed so it does not substantially degrade ESHA. (Pub. Resources Code, § 30240; *Bolsa Chica Land Trust v. Superior Court* (1999) 71 Cal.App.4th 493, 506-507 (*Bolsa Chica*).)

Appellant argues the Park EIR is inadequate because the Commission is "likely" [AOB:57]—nay, "highly likely" [AOB:58]—to conclude four or more acres are ESHA. In fact, the EIR evaluates at length the Project's consistency with the Coastal Act and the City's approved CLUP [AR:214-281], including a discussion focusing on policies designed to protect ESHA. [AR:262-265, 8736-8741.] The EIR states the CLUP does not identify ESHA on the site. [AR:262, 1817.] The EIR acknowledges the Coastal Commission may determine ESHA is present on the site [AR:262], and analyzes the Project's consistency with the CLUP in that light. [AR:262-265.] Appellant cites information submitted by its biologist [AR:1741-1745] but dismisses the City's evidence and ignores its response. [AR:1767-1769.] Whether the site contains ESHA is ultimately a factual issue that must be upheld if supported (as it is here) by substantial evidence.

Appellant's argument amounts to a prediction that the Coastal Commission will disagree with the City. CEQA does not require speculation. (CEQA Guidelines, § 15145.) The City considered the relevant facts and standards, and determined based on substantial evidence that the project was consistent with the Coastal Act. [AR:262-265, 8736-

8741.] Nothing more was required.

Indeed, the record shows the City solicited the Coastal Commission's views. CEQA directs the lead agency to consult with "responsible agencies." (CEQA Guidelines, § 15086, subd. (a)(1).) CEQA also directs responsible agencies to respond regarding resources within their purview. (CEQA Guidelines, § 15096, subd. (b), (d).) Here, the City consulted with the Coastal Commission. [AR:7, 10366-10367, 10383-10385.] The Commission had no comment. [AR:1469.] "This lack of comment … was in itself evidence." (*Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1380.)

Appellant argues the EIR's consistency analysis is inadequate because, should the Commission conclude that ESHA is present, the City's adopted mitigation would violate the Coastal Act. [AOB:58, citing *Bolsa Chica*, *supra*, 71 Cal.App.4th at p. 507.] The Court need not consider claims premised on hypotheses about future events. (*Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559, 1581-1585; *Del Cerro Mobile Estates v. City of Placentia* (2011) 197 Cal.App.4th 173, 186.) In any event, *Bolsa Chica* is distinguishable. There, the Commission identified habitat as ESHA, but concluded the habitat could be recreated elsewhere. The Court ruled the Coastal Act does not allow remote recreation of ESHA. (71 Cal.App.4th at p. 507.) Here, by contrast, the City's adopted mitigation allows for off- *or* on-site restoration [AR:430.]

CEQA allows this approach. (*CNPS*, *supra*, 172 Cal.App.4th at pp. 624-625; *Defend the Bay*, *supra*, 119 Cal.App.4th at p. 1275-1276; *Mira Mar*, *supra*, 119 Cal.App.4th at pp. 495-496.) *If* the Commission determines ESHA is present and will be affected, then whether on-site restoration will be permitted by another agency, acting under another statute, in another proceeding, is irrelevant. (*El Morro*, *supra*, 122 Cal.App.4th at p. 1362 [other agency's jurisdiction over aspects of project not relevant to adequacy of EIR].)

Appellant makes a convoluted argument based on a notice of potential violation that was sent to a neighboring landowner about actions on that property. [AOB:59, citing AR:9661-9662e.] The notice says nothing about ESHA, the EIR's analysis of ESHA, or the Park Project. At most, the notice speaks to actions that the Commission may or may not take in regards to the historic removal of habitat, all of which the EIR acknowledged. [AR:1768.]

Second, with respect to wetlands, the City's consultant performed a jurisdictional delineation to determine whether Waters of the United States are present. [AR:967, 1077-1122.] The consultant concluded, and the Corps agreed, that no Waters of the United States are on-site. [AR:1102.] Appellant argues the City relied exclusively on this Federal methodology. Appellant is wrong. The delineation also used Coastal Commission methodology to identify resources within its jurisdiction under State law.

[AR:1089-1090, 1100.] The consultant concluded the site does not contain wetlands within the jurisdiction of the Coastal Commission. [AR:1101.]

Appellant argues the City "seized" on "evidence" that the Commission did not comment on the Project EIR as evidence no wetlands are present. [AOB:61.] This argument is absurd. As noted above, the City did the requisite analysis and consulted with the Coastal Commission, which had no comment on this (or any other) issue. The EIR acknowledged the Commission would make the final determination regarding its jurisdiction under the Coastal Act. [AR:1765, 1921.]

Appellant cites an internal email in which City staff stated "there is enough there for coastal staff to determine it is a wetland." [AR:11437.] The quote is distorted. The e-mail also states: ". . . I think coastal staff won't call it a wetland given the characteristics of that area, but you never know. There is enough there for coastal staff to determine it a wetland and they likely will try if they previously called a very similar area a wetland. Our record won't call it a wetland and if they push it, it will be that prior precedent or politics driving them …!" [*Ibid.*] The e-mail thus makes it clear that, in staff's view, (1) the feature is not a wetland under the Coastal Act, (2) Commission staff might disagree, and (3) if so, the Commission's decision would likely be driven by politics. That the City internally discussed the possibility that Commission staff would disagree does not mean the City's position was wrong, or (more to the point) unsupported by

substantial evidence. In sum, there was no failure to investigate and disclose the presence of wetlands, and the cases cited by Appellant—*San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 727; *Mira Monte Homeowners Ass'n v. County of Ventura* (1985) 165 Cal. App. 3d 357; *Berkeley Jets*, *supra*, 91 Cal.App.4th 1344—are inapposite.

CONCLUSION

The City requests that the Court deny the petition.

Dated: April 5, 2012

Respectfully submitted,

REMY MOOSE AND MANLEY, LLP

By: Whitman F. Manley

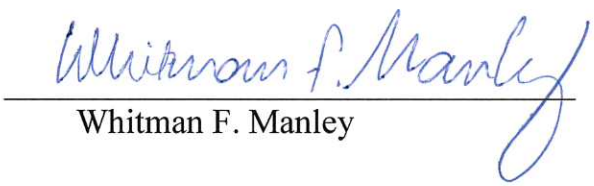
Whitman F. Manley
Attorneys for Respondents CITY OF NEWPORT BEACH and CITY OF NEWPORT BEACH CITY COUNCIL

CERTIFICATE OF WORD COUNT

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

Pursuant to Rule 8.204(c) of the California Rules of Court, I hereby certify that RESPONDENT'S BRIEF contains 14,000 words, according to the word counting function of the word processing software used to prepare this brief.

Executed on April 5, 2012 at Sacramento, California.



Whitman F. Manley

Banning Ranch Conservancy v. City of Newport Beach et al.
4th DCA Case No. G045622
(Orange County Superior Court Case No.: 30-2010-003665758)

PROOF OF SERVICE

I am a citizen of the United States, employed in the City and County of Sacramento. My business address is 455 Capitol Mall, Suite 210, Sacramento, California 95814. I am over the age of 18 years and not a party to the above-entitled action.

I am familiar with Remy Moose Manley, LLP's practice whereby the mail is sealed, given the appropriate postage and placed in a designated mail collection area. Each day's mail is collected and deposited in a U.S. mailbox after the close of each day's business.

On April 5, 2012, I served the following:

RESPONDENTS' BRIEF

☑ On the parties in this action by causing a true copy thereof to be placed in a sealed envelope with postage thereon fully prepaid in the designated area for outgoing mail addressed as follows; or

☐ On the parties in this action by causing a true copy thereof to be delivered via Federal Express to the following person(s) or their representative at the address(es) listed below; or

☐ On the parties in this action by causing a true copy thereof to be hand-delivered to the following person(s) or representative at the address(es) listed below; or

☑ On the parties in this action by causing a true copy thereof to be electronically delivered via the internet to the following person(s) or representative at the electronic mail address(es) listed below:

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury that the foregoing is true and correct and that this Proof of Service was executed this 5th day of April 2012, at Sacramento, California.

_____
Valorie Wood

Banning Ranch Conservancy v. City of Newport Beach et al.
4th DCA Case No. G045622

PROOF OF SERVICE
SERVICE LIST

Rachel G. Hooper
Amy J. Bricker
SHUTE, MIHALY & WEINBERGER LLP
396 Hayes Street
San Francisco, CA 94102
Phone: (415) 552-7272 (Amy ext. 236)
Fax: (415) 552-5816
Email: Hooper@smwlaw.com
Bricker@smwlaw.com

Attorneys for Appellant
BANNING RANCH
CONSERVANCY

Electronically Delivered Via the Internet and U.S. MAIL

Susan K. Hori
Keli N. Osaki
MANATT PHELPS & PHILLIPS
695 Town Center Drive, 14th Floor
Costa Mesa, CA 92626
Phone: (714) 371-2500
Fax: (714) 371-2550
Phone: (714) 371-2528 (direct line Susan)
Fax: (714) 371-2571 (direct fax Susan)
Email: shori@manatt.com
kosaki@manatt.com

Attorneys for Respondents
NEWPORT BANNING RANCH, LLC; AERA ENERGY, LLC; CHEROKEE NEWPORT BEACH, LLC

Electronically Delivered Via the Internet and U.S. MAIL

CALIFORNIA SUPREME COURT
350 McAllister Street
San Francisco, CA 94102
(4 copies)

VIA U.S. Mail

ORANGE COUNTY SUPERIOR COURT
Complex Civil Division
751 W. Santa Ana Blvd.
Santa Ana, CA
P.O. BOX 22028
Santa Ana, CA 92702-2028
(1 copy)

VIA U.S. Mail

Appellate Coordinator
OFFICE OF THE ATTORNEY GENERAL
Consumer Law Section
300 S. Spring Street
Los Angeles, CA 90013-1230
VIA U.S. Mail

OFFICE OF THE ATTORNEY GENERAL
455 Golden Gate, Suite 11000
San Francisco, CA 94102-7004

VIA U.S. Mail