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THE SUPERIOR COURT OF CALIFORNIA

COUNTY OF MONTEREY

MONTEREY COURTHOUSE

HIGHWAY 68 COALITION;

Petitioner,

vs.

COUNTY OF MONTEREY; MONTEREY COUNTY BOARD OF SUPERVISORS,

Respondents,

DOMAIN CORPORATION, FERRINI OAKS, LLC, ISLANDIA 29 A DELAWARE LIMITED PARTNERSHIP and DOES 1-50 inclusive,

Real Parties in Interest.

Case No.: 130660

SUPPLEMENTAL BRIEF RE PARK MITIGATION BY PETITIONER LANDWATCH MONTERY COUNTY

Action Filed: January 15, 2015
Trial Date: None Set

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INTRODUCTION

LandWatch responds to the Court's May 3, 2017 Minute Order in detail below. In summary, the EIR concludes that on-site park dedication is required, and that in-lieu fees will not suffice, as mitigation for a significant impact to Toro Regional Park. The conclusion is based on facts and analysis provided by the County Parks Director and set out in the EIR itself. The Board of Supervisors rejected this conclusion based on nothing more than a conclusory finding that directly contradicts the EIR. The unresolved contradiction renders the EIR informationally inadequate and the findings unsupported by substantial evidence, both of which violate CEQA. Public Resources Code section 21168.9 requires that a writ must issue to remedy CEQA violations. On this record, the Court cannot determine how the County will exercise its discretion to resolve the contradiction. Thus, a writ should mandate that the County set aside both the EIR and the project approvals until the County takes steps to comply with CEQA.

ARGUMENT

I. The record provides only conclusory statements for rejecting the EIR's analysis.

A. Based on facts, analysis, and a recommendation from the Director of Parks, the EIR concludes that on-site land dedication is required to avoid a significant impact under CEQA and that in-lieu fees will not suffice.

After reviewing the administrative draft EIR in November 2010, the County Director of Parks disagreed with its proposed conclusion that parks impacts could be mitigated merely through payment of impact fees. AR 6037. The Director explained that "[w]hen subdivision development occurs immediately adjacent to existing parkland, there is a natural tendency for neighbors to enter into said parkland for recreation purposes as they would a more urban, neighborhood park, and especially if there is no available, on-site parkland serving the subdivision itself." *Id.* Accordingly, the Director concluded that there would be a potentially significant impact from the Ferrini subdivision and that this impact could not be mitigated without dedication of park land within the subdivision. AR 6038. The significant impact from overuse of the adjacent regional park identified by the Director is precisely the impact at issue in *City of Hayward v. Bd. of Trustees of the California State Univ.* (2015) 242 Cal. App. 4th 833, 858-859. In that case, as here, the agency failed to comply with CEQA because it did not

provide substantial evidence to support its findings that the project resident's increased use of the neighboring regional parks would be less than significant.[1]

In May, 2012, the EIR consultant acknowledged to the Director that the EIR would propose on-site dedication of park land. AR 8832. The Director responded by reiterating that in-lieu fees would be unacceptable given potential impacts to Toro Park. AR 8831. In July, 2012 the Director noted that the developer's proposed on-site park locations were well-distributed to serve subdivision residents, explaining once again that Toro Park should not be used to meet the Ferrini residents' active recreational needs. AR 8830 (e-mail), 8833-8834 (maps of proposed on-site parks). Planning staff concurred with the Director's recommended mitigation measure and stated that "Mark [Kelton, the developer] can argue the point of the in-lieu fee to the BOS [Board of Supervisors] if so desired." AR 8835.

Thus, the draft EIR incorporated the Director's analysis and proposed mitigation of parks impacts. AR 575-577. The EIR recites the salient terms of the subdivision ordinance provisions for park dedication, including the requirement that the Board act on the basis of the Director's recommendation. AR 575-576. Noting "the potential increase in the use of the park by the neighboring residents," the EIR explained that the Director had concluded that "at minimum, the proposed project shall require on-site park dedication" of approximately 2 acres and that "the payment of in-lieu fees is not an option for the proposed project." AR 576. The EIR explained that, "[a]ccording to the proposed Vesting Tentative Map, no dedication of parkland is proposed, which would be considered a **significant impact.**" AR 576, emphasis in original. The EIR proposed Mitigation Measure 3.10-3, mirroring the Director's recommendation for on-site parks, in order to "reduce this impact to a less than significant level."[2] AR 577. Notably, although the County received and considered the developer's draft EIR comments requested mitigation via in-

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[1] Contrary to Real Party's oral argument, the holding in *City of Hayward*, *supra*, 242 Cal. App. 4th at 843 that the need for additional *fire services* is not an environmental impact does not support the notion that increased use of existing parks is not an environmental impacts.

[2] The EIR also separately analyzed several *different* potential impacts to the Toro Regional Park, including potential entrance fee evasion, potential changes to the cross-country course, and the "take" of a portion of Toro Park to use for a proposed access road. AR 577-583. These impacts were ultimately minimized or avoided by the adoption of a different access road through Alternatives 3 and 5. AR 17; *see* AR 2650, 2662, 2666, 2697.

lieu fees and proposing that Ferrini residents use Toro Park instead of on-site parks, it made no change to the proposed mitigation in the final EIR. AR 3765, 3773.

B. The record contains no reasoning for abandoning the EIR's proposed mitigation other than the conclusory staff report and resolution.

Despite the analysis and recommendation by the Director and the EIR, the County abandoned the land dedication requirement in Mitigation Measure 3.10-3. AR 17. The conditions of approval merely require payment of an in-lieu fee. AR 99. As this Court notes in its Minute Order, the explanations for this about-face are the conclusory statements in the Planning Commission staff report (AR 4167) and its Resolution No. 14-0444 (AR 4355).

The Planning Commission staff report states that the project's zoning for open space/grazing and its scenic and conservation easements do "not count toward dedication of park and recreational facilities; therefore the project would be subject to in-lieu fees." AR 4167. The conclusion does not follow the premise, because the project could be subject to land dedication instead. And, as the EIR explained, the 600 acres of open space easements "could be modified to accommodate the required dedication of parkland," which came to 2 acres. AR 576.

The staff report states that "the nature of this subdivision is to be subordinate to the topography, existing grazing activities, and natural environment that currently exist on the land" and recommended without further explanation that "passive open space and scenic/conservation easements are the more appropriate choice than dedication of, and development of, recreational facilities." The staff report does not mention that the EIR arrived at precisely the opposite conclusion and does not address the Director's concern that failure to provide on-site lots would significantly impact the adjacent Toro Regional Park. Nor does the staff report mention that the developer had identified, and the Director endorsed, three park locations that were *not* in open space – two entirely surrounded by proposed lots and one immediately adjacent to two lots – locations which would not, therefore, compromise the "subordination" of the project to the existing features of the land. AR 8830, 8833-8834.

The Planning Commission consistency finding is even less informative; and it does not cite the staff report's "subordination" rationale for abandoning on-site parks. Instead, it merely

concludes that "payment of fees in-lieu of land dedication is deemed to be greater regional recreational benefit to the County as a whole, because the payment of fees could be used to upgrade the recreational facilities within Monterey County" and that the in-lieu fee payment "is equal of more effective mitigation in this case." AR 4355. As the Director and EIR explained, regional and local parks are supposed to serve different needs and are funded from different sources; and in-lieu fees for local parks would not benefit the adjacent Toro Regional Park that would be subject to overuse by the Ferrini residents. AR 575, 6038, 8830-8831. This consistency finding simply does not address the facts, analysis, and conclusion in the EIR.

The County's reasoning for its decision to require payment of fees rather than dedication of land does not appear in any other place in the record. The decision itself appears in the Board's two resolutions, but without any reasoning for the abandonment of the previously proposed mitigation. The CEQA findings in Resolution No. 14-370 simply report a conclusion: "potentially significant impacts on park facilities have been mitigated to a less than significant level through payment of in-lieu fees, and Alternative 5 which would not use Toro Park for access. (MM 3.10-3, Condition 122.)"[3] AR 10. The project consistency findings in Resolution No. 14-371 only reports that the project is consistent with Monterey County Code section 19.12.010.E.1, under which a project must dedicate land if the General Plan designates a park location on the project's site. AR 33.

However, the Section 19.12.010.E.1 *ban* on in-lieu fees where the General Plan designates a park site does not operate necessarily to *permit* in-lieu fees where the general Plan does not designate a park site. Where land dedication is not required under Section 19.12.010.E.1, *the choice between in-lieu fees or land dedication must instead be made based on the Parks Director recommendation process set out in MCC section 19.12.010.J, as explained and reported in the EIR*. AR 576. Thus, the finding ignores the operative portions of the ordinance, the Director's recommendation, and the EIR. And notably, the Board also failed to follow the process mandated by the County's subdivision ordinance to refer its proposed

[3] The finding refers to multiple significant impacts. As discussed in footnote 2 above, these impacts were separately assessed in the EIR as distinct impacts (AR 577-583) and were ultimately mitigated by providing a different access road (AR 17).

modification of the Parks Director's recommendation back to the Director "for a report and further recommendation." MCC, § 19.12.010.J.2.

II. The County violated CEQA's informational requirements because the adopted mitigation was not identified, and evidence to support findings of its sufficiency was not presented, *in the EIR*.

Mitigation measures must be identified and discussed in the EIR. 14 CCR, §§ 15120(c) 15126.4. An agency must make findings that mitigation measures are sufficient to avoid or mitigate significant effects and do so based on substantial evidence. 14 CCR, § 15091(a)(1), (b). That evidence must be in the EIR itself. In *Laurel Heights Improvement Assn. v. Regents of Univ. of California* ("*Laurel Heights I*") (1988) 47 Cal. 3d 376, 408-412, in evaluating the adequacy of evidence supporting the mitigation findings, the California Supreme Court specifically disavowed reliance on information that was not part of the EIR process. *Id.* at 412 n. 16. And, in discussing the adequacy of the alternatives analysis (*id.* at 403-405), the other method of alleviating environmental effects under CEQA that the EIR must discuss (*id*. at 401), the Court again rejected the argument that an agency may rely on information outside the EIR to fulfil its obligation to provide the information that CEQA requires an EIR to contain. *Id*. at 404-405. Citing case law concerning mitigation findings, the Court explained that, in order to fulfill CEQA's informational purpose, the required discussion must contain facts and analysis, not mere conclusions, and must be *in the EIR*:

> The Regents miss the critical point that the public must be equally informed. Without meaningful analysis of alternatives in the EIR, neither the courts nor the public can fulfill their proper roles in the CEQA process. We do not impugn the integrity of the Regents, but neither can we countenance a result that would require blind trust by the public, especially in light of CEQA's fundamental goal that the public be fully informed as to the environmental consequences of action by their public officials. "To facilitate CEQA's informational role, the EIR must contain facts and analysis, not just the agency's bare conclusions or opinions." [citations] An EIR must include detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project.

Id. at 404-405. The Court explained that the "EIR is the heart of CEQA," which is intended "to demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action." *Id.* at 392. Thus, the EIR "is a document of accountability" that "protects not only the environment but informed self-government." *Id.* at 392. For these reasons, an agency may not rely on information that is not included in the EIR:

> Those alternatives and the reasons they were rejected, however, must be discussed in the EIR in sufficient detail to enable meaningful participation and criticism by the public. "*'[W]hatever is required to be considered in an EIR must be in that formal report; what any official might have known from other writings or oral presentations cannot supply what is lacking in the report'*" [citations].

Id. at 405, emphasis added. The California Supreme Court later reaffirmed that the information an EIR is required to provide must appear in the EIR itself: "To the extent the County, in certifying the FEIR as complete, relied on information not actually incorporated or described and referenced in the FEIR, it failed to proceed in the manner provided in CEQA." *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 442.

The Sixth District in *Save our Peninsula Comm. v. Monterey Cty. Bd. of Supervisors* (2001) 87 Cal. App. 4th 99, 128-131 held that the agency must identify mitigation and present evidence of its sufficiency in the EIR itself, not in staff reports. Information presented after the EIR was complete "does not make up for the lack of analysis in the EIR." *Id.* at 130. The County must exercise its discretion as to its choice of mitigation "on the basis of information collected and presented *in the EIR* and subjected to the test of public scrutiny." *Id.* at 131, emphasis added. The Court emphasized that CEQA mandates the opportunity for public participation through an adequate EIR, which ensures the opportunity to challenge data and conclusions and obtain a response from the County. *Id.* at 118 ("The ultimate decision of whether to approve a project, be that decision right or wrong, is a nullity if based upon an EIR that does not provide the decisionmakers, and the public, with the information about the project that is required by CEQA," internal quotations omitted), 131.

Other cases are clear that the evidence that mitigation would be effective must be presented in the EIR. In *Gray v. Cty. of Madera* (2008) 167 Cal. App. 4th 1099, 1115-1116, the

County amended the mitigation initially proposed in the EIR to provide for a new water system. The Court held that there was no evidence that the new mitigation would "be able to remedy the environmental problem" identified in the EIR (*id.* at 1119), because "[t]his mitigation option also was never discussed in the DEIR or FEIR, and thus there was no analysis of this mitigation option." *Id.* at 1116. In *Communities for a Better Env't v. City of Richmond* (2010) 184 Cal. App. 4th 70, 92-96 the court held the CEQA process deficient because the EIR failed to demonstrate mitigation efficacy. CBE holds that "the development of mitigation measures, as envisioned by CEQA [must be] an open process that also involves other interested agencies and the public." *Id.* at 93. Thus, mitigation measures must be "timely set forth" so that "environmental decisions [are] made in an accountable arena." *Id.* at 96.

In sum, mitigation must be identified, and the evidence of its efficacy must be provided, in the EIR, not later.[4] Here, not only did the EIR fail to propose in-lieu fees as mitigation or provide substantial evidence of its efficacy, it specifically *rejected* in-lieu fee mitigation as *ineffective*. The County cannot claim that the EIR was informationally adequate in light of its decision to adopt mitigation rejected by the EIR.

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[4] *California Native Plant Society v. City of Santa Cruz* ("*CNPS*") (2009) 177 Cal. App. 4th 957, cited by Real Party, does not permit an agency to rely on post-EIR reports to identify and provide substantial evidence of the *efficacy* of mitigation. That case holds only that the required evidence of *infeasibility* of mitigation proposed in the EIR to support a finding under P.R.C. § 21081(a)(3) need not be provided in the EIR. *Id.* at 1000. This is consistent with case law explaining that infeasibility is not an *environmental* determination and that CEQA does not require this particular evidence be in the EIR. *See, e.g., Flanders Found. v. City of Carmel-by-the-Sea* (2012) 202 Cal. App. 4th 603, 618; *Sierra Club v. Cty. of Napa* (2004) 121 Cal. App. 4th 1490, 1504-1506.

Nor does *Western Placer Citizens for an Agr. & Rural Env't v. Cty. of Placer* (2006) 144 Cal.App.4th 890, 904-905 permit an about-face as to significance of impacts and mitigation efficacy. *Western Placer* held only that recirculation was not required for one *additional* mitigation measure, a change in phasing that demonstrably *improved* the environmental outcome to address a previously identified impact, where there was no challenge to the sufficiency of the EIR's analysis and no argument that the new condition *conflicted* with the EIR's analysis.

Nor does *South County Citizens for Smart Growth v. County of Nevada* (2013) 221 Cal.App.4th 316, 329-332 countenance last minute changes to mitigation outside the EIR process. In *South County*, after the agency selected a new alternative, *the public commented and the agency revised the FEIR to respond to comments*. *Id.* at 325.

III. The conclusory explanations offered after, and in contradiction to, the EIR are not based on substantial evidence because the County did not bridge the gap between evidence and decision.

As noted, CEQA requires an express finding, supported by substantial evidence, that mitigation or alternatives will avoid or substantially lessen significant impacts. Public Resources Code ("P.R.C."), § 21081(a)(1); 14 CCR, § 15091(b). CEQA incorporates the requirement of T*opanga Ass'n. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515 that findings "bridge the analytic gap between the raw evidence and ultimate decision". *Laurel Heights I, supra*, 47 Cal.3d at 404; *Vineyard, supra*, 40 Cal.4th at 445.

A lack of substantial evidence may be shown by a failure to ground findings with facts and reliance on conclusory statements. *Laurel Heights I, supra*, 47 Cal.3d at 403-405 ("EIR must contain facts and analysis, not just the agency's bare conclusions or opinions"). No deference is due to conclusory findings: "[a] clearly inadequate or unsupported study is entitled to no judicial deference." *Id.* at 410 n. 12. And no deference is due when a mitigation finding "defies common sense." *Gray, supra*, 167 Cal.App.4th at 1117-1118. Notably, a lack of substantial evidence is demonstrated where the record contains contradictory or fundamentally unclear claims. *Vineyard, supra*, 40 Cal.4th at 439 ("Factual inconsistencies and lack of clarity in the FEIR leave the reader—and the decision makers—without substantial evidence . . .").

Here, there is no substantial evidence for a finding that the significant impacts identified in the EIR could be mitigated by in-lieu fees. First, as this Court has observed, the statements in the Planning Commission staff report and the Planning Commission resolution that in-lieu fees would be sufficient mitigation are conclusory. Second, the finding directly contradicts the facts, analysis, and conclusion provided by the Director and set out in the EIR that in-lieu fees are *not* sufficient. AR 576-577; *see* AR 6038. The staff report does not explain or resolve its direct contradiction of the EIR's conclusion that on-site parks must be provided to prevent a significant impact from overuse of the adjacent Toro Regional Park. This constitutes precisely the "[f]actual inconsistencies and lack of clarity" that preclude substantial evidence. *Vineyard, supra*, 40 Cal.4th at 439. Asking the Court to uphold the Board's findings on the basis of

conclusory statements that contradict the facts, analysis, and conclusion in the EIR, and which are based on the expertise of the Parks Director, would defy common sense.

Real Party has suggested that that Board of Supervisors was free to reject the EIR's conclusions as mere staff opinion. But this violates CEQA's requirements that the certified EIR reflect *the decision makers'* independent judgment and that an EIR be a "document of accountability."[5] 14 CCR, §§ 15084(e), 15090(a)(3); *Laurel Heights I, supra,* 47 Cal.3d at 392. Furthermore, case law is clear that decision makers may not reject the analysis and conclusions in an EIR as mere staff opinion without providing an analytically coherent rationale for their findings. In *California Clean Energy Comm. v. City of Woodland* (2014) 225 Cal. App. 4th 173, 205–06 the Court held that the agency had not complied with CEQA's requirement to disclose the analytic path from evidence to action because it failed to provide an adequate explanation for abandoning the EIR's conclusion as to which alternative was environmentally inferior.[6] Here, the Board's unsupported rejection of the EIR's conclusion is the same violation of CEQA.

IV. The Court should order the County to decertify the EIR, void the project approval, and take corrective action if it intends to re-approve the project.

"In most cases, when a court finds that an agency has violated CEQA in approving a project, it issues a writ of mandate requiring the agency to set aside its CEQA determination, to set aside the project approvals, and to take specific corrective action before it considers reapproving the project." Kostka and Zischke, Practice Under the California Environmental

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[5] It also ignores the County ordinance's requirement to refer modification of the Director's recommendation back to the Director for a report and further recommendation. MCC, § 19.12.010.J.2.

[6] Contrary to Real Party's claim, *CNPS, supra,* 177 Cal. App. 4th 957 does not stand for the proposition that decision makers are free to disagree with the facts, analysis, and conclusions in the EIR. There, the Court held there was no CEQA violation when the decision maker's found that the "potentially feasible" alternatives discussed in the EIR were in fact infeasible for policy reasons, which were not, and need not be, considered in the EIR. *Id.* at 998-102. Unlike here, the issue in *CNPS* was infeasibility, not inefficacy, of mitigation and CEQA is clear that infeasibility need not be discussed in the EIR at all. *Id.* at 999-1000; see footnote 4 *supra*. And unlike here, the decision makers did not reject or contradict the facts, analysis, or conclusions of the EIR; they simply brought other considerations (policy considerations) to bear on the question of feasibility. *Id.* at 1001.

Quality Act (2nd Ed., 2017 Update), § 23.124; *see, e.g., City of Redlands v. County of San Bernadino* (2002) 96 Cal.App.4th 398, 414-415; *Save Our Peninsula, supra*, 87 Cal. App. 4th 99, 143; *California Clean Energy, supra*, 170 Cal. Rptr. 3d at 522–523. The Court should do so here.

A. A remedy cannot be predicated on a specific assumption about adequate mitigation.

Faced with diametrically opposed conclusions in the EIR and findings, the Court should not fashion a remedy that assumes that impact fees are sufficient *or* that on-site parks are required, *or* that they remain feasible. The remedy must be agnostic. First, the County cannot cure its failure to make adequate findings by offering new facts, analyses, conclusions, or findings in this litigation. *Santiago County Water District v. County of Orange* (1981) 118 Cal.App.3d 818, 831. Second, this Court should not speculate how new facts, analyses, and conclusions offered by the County would have affected the County's decision, because that takes the Court beyond its role and the "realm of its competence." *Envtl. Prot. Info. Ctr. v. California Dep't of Forestry & Fire Prot.* (2008) 44 Cal. 4th 459, 488. Third, a remedy must not control the agency's exercise of discretion. P.R.C. §21168.9(c); *Federation of Hillside & Canyon Associations v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1266. Finally, as a practical matter, mitigation may now require substantial revision to the approved project because it now situates residential lots on all of the previously identified park locations. *Compare* AR 8833-8834 (maps of proposed on-site parks) *to* AR 107-108 (approved map). And the current layout commits essentially all of the developable land to residential lots. AR 5342, 5355-5358, 5416-5419, 20255-20257.

B. Public Resources Code section 21168.9 requires a writ because the County violated CEQA; interlocutory remand is neither permitted under CEQA nor proper here.

Where an agency fails to comply with CEQA, a court must issue a writ ordering at least one of the remedies in Public Resources Code section 21168.9(a) pursuant to the Legislature's mandatory "shall." *POET, LLC v. California Air Res. Bd.* (2013) 218 Cal. App. 4th 681, 756-757. These include voiding the EIR and approvals in whole or in part, suspending project activities that could adversely affect the physical environment, and/or mandating specific

corrective action to ensure CEQA compliance. Here, a writ with one or more of these remedies is required because the EIR was informationally inadequate and the County failed to ground its findings in substantial evidence as required by CEQA.

The Court may not simply send the matter back to the County on an interlocutory remand to correct its findings without issuing a writ. In *Resource Defense Fund v. LAFCO of Santa Cruz County* (1987) 191 Cal.App.3d 886, 899-900 the Court found interlocutory remand to issue findings regarding rejection of alternatives was improper because it precludes challenge to sufficiency of findings. In *Sierra Club v. Contra Costa County* (1992) 10 Cal.App.4th 1212, 1221 the Court rejected prejudgment remand as inconsistent with P.R.C. § 21168.9 and because it precludes a meaningful challenge of the findings. While the Court in *Voices of the Wetlands v. State Water Resources Control Board* (2011) 52 Cal.4th 499, 525-529, 539 reversed the portions of these two cases that broadly held that *CCP section 1094.5* prohibited interlocutory remand altogether, that case upheld interlocutory remand only in limited circumstances, *in a non-CEQA case.*

Because *Voices* is not a CEQA case, it addresses only remedies under CCP section 1094(e), *not* the remedial scheme required under P.R.C. section 21168.9. Section 21168.9 is "the specific application of the general rule contained in [CCP] section 1094.5," by which the Legislature provided a *CEQA-specific* system of remedies. *San Bernardino Valley Audubon Soc. v. Metro. Water Dist. of S. California* (2001) 89 Cal. App. 4th 1097, 1103. As such, the Legislature's *requirement* for some writ of mandate in section 21168.9, as set out in *POET, LLC, supra*, 218 Cal. App. 4th at 756-757, must be honored. *See also LandValue 77, LLC v. Board of Trustees of California State University* (2011) 193 Cal.App.4th 675, 680-681 (error not to comply with mandatory language in Section 21168.9 to issue writ as CEQA remedy). And for precisely this reason, the concurrence in *Voices* explained that that decision does *not* apply "to the procedures to be followed when an agency's action is found to have violated CEQA," that is, to CEQA's "own detailed and balanced remedial scheme." *Voices, supra*, 52 Cal.4th at 540. There is simply no authority for interlocutory remand in a CEQA case.

Furthermore, *Voices* found interlocutory remand acceptable only in the "rare exception[]" in which a finding "*lacks* evidence" and remand was only intended to permit the agency to "fill the evidentiary gap." *Id.* at 532, 535, emphasis in original. Here, unlike in *Voices*, the problem is not merely a lack of evidence to support a finding, but 1) the need to resolve a contradiction in the record, 2) the need to correct an informationally adequate EIR, 3) the potential need to change the finding, the mitigation, and the conditions of approval, 4) the potential need to revise the approved project to make mitigation feasible, and/or 5) the potential need to make an additional finding that mitigation is infeasible. This goes well beyond the rare and limited exception in which interlocutory remand is acceptable merely to add evidence to support an existing finding. *Id.* at 532, 535.

C. A writ should order the County to void its finding as unsupported by substantial evidence, to void the EIR as informationally inadequate, and to void the approvals as unsupported by adequate findings or an adequate EIR.

Section 21168.9(a)(1) provides that the Court may mandate that the County void its CEQA determination, its findings, or its decision to approve the project in whole or in part. First, the County must be mandated to void its conclusory finding of adequate mitigation (AR 10), which is contradicted by the EIR (AR 576), because it is clearly unsupported by substantial evidence (AR 4167, 4355). This requires that the County void Resolution No. 14-370 that certifies the EIR and contains the contradiction. Depending how the County ultimately determines resolve the contradiction, it may or may not revise the EIR. However, the certification resolution must be voided because it contains the unsupported findings and because the remedy must remain agnostic as to the eventual mitigation choice, i.e., the remedy must allow for the possibility that the County will alter the EIR's analysis and conclusion.[7]

[7] *Federation of Hillside & Canyon Associations, supra,* 83 Cal. App. 4th at1266, holding that an agency need only correct its findings, is distinguishable because there, unlike here, the agency had not made findings that *contradicted* the EIR's facts, analysis, and conclusion as to necessary mitigation. Where an EIR omits information necessary to informed decision making and accountable self-government, voiding the EIR is a proper remedy. *Sunnyvale W. Neighborhood Assn. v. City of Sunnyvale City Council* (2010) 190 Cal. App. 4th 1351, 1360,

Second, the County must be mandated to void Resolution No. 14-371 approving the project because it is also based on inadequate findings (AR 33) and because it is now uncertain what findings will be made and what parks condition will be imposed in the project approval (AR 99). Furthermore, in *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1221 the Court held that, because an agency must have a legally adequate EIR before approving a project, the Court must void project approvals when it finds that the EIR is inadequate. *See also, LandValue 77, LLC, supra,* 193 Cal. App. 4th 675, 681–683 (agency must set aside approvals because EIR found invalid).

D. A writ should order the County to suspend project activities.

Section 21168.9(a)(2) provides that the Court may mandate suspension of project activities that could have adverse impacts and that would "prejudice the consideration and implementation of particular mitigation measures" until the agency has complied with CEQA. Suspension of physical construction is a proper remedy when construction commitments may compromise mitigation measures. *POET, supra,* 217 Cal.App.4th at 761; *San Joaquin Raptor/Wildlife Rescue Ctr. v. Cty. of Stanislaus* (1994) 27 Cal. App. 4th 713, 741. Here, the Court should order suspension of project activities precisely because constructing the project without provision for on-site parks would prejudice the on-site park mitigation identified as essential in the EIR and because it may not be feasible to incorporate suitable park locations if the developer pursues the current lot layout.

E. A writ should identify corrective action.

Section 21168.9(a)(3) provides that the Court may mandate specific action to comply with CEQA. Here, the Court should mandate that the County correct its failure to make adequate findings and/or to provide an informationally adequate EIR, depending on what determination the County eventually makes as to parks mitigation. Again, the Court cannot control the County's discretion or prejudge this outcome based on litigation representations.

1392-1393, 119 Cal. Rptr. 3d 481, 513 (2010), disapproved of on other grounds by *Neighbors for Smart Rail v. Exposition Metro Line Const. Auth.* (2013) 57 Cal. 4th 439.

F. A limited writ is not warranted.

The remedies in Section 21168.9(a)(1) and (2) permit the court to void approvals "in part" and/or to suspend "any or all" project activities. A partial remedy is not warranted here because the Court cannot make the findings required by Section 21168.9(b) for a partial remedy. *See San Bernardino Valley Audubon Soc. v. Metro. Water Dist. of S. California* (2001) 89 Cal. App. 4th 1097, 1105-1106.

First, a partial remedy to address just the parks mitigation issue is not warranted because LandWatch has shown a number of other CEQA violations, e.g., issues related to water supply, visual, greenhouse gas, and traffic impacts, so the Court cannot find the remainder of the project in compliance as required by Section § 21168.9(b)(3). S*ee Anderson First Coal. v. City of Anderson,* 130 Cal. App. 4th 1173, 1181, *citing San Joaquin Raptor/Wildlife Rescue Ctr., supra,* 27 Cal. App. 4th at 741. Furthermore, where the actions an agency must take to remedy multiple CEQA deficiencies, e.g., lot relocations, may interact, a limited writ is not warranted. *Pres. Wild Santee v. City of Santee* (2010) 210 Cal. App. 4th 260, 290.

Second, this Court cannot find that parks mitigation is a severable project activity, as required by Section 21168.9(b)(1). As argued, a remedy must allow for mitigation via on-site parks. Unlike the gas station found severable from the rest of the retail project in *Anderson First,* on-site parks are not a stand-alone portion of the project; they are a mitigation measure that would be required for, and distributed throughout, the project as a whole. *Anderson First Coal., supra,* 130 Cal.App.4th at 1178-1181. It is not appropriate to direct an agency to void an approval in part where that approval cannot be separated into distinct parts. *POET, supra,* 218 Cal.App.4th at 760.

Third, this court cannot find that severance of parks mitigation from the rest of the project would not prejudice compliance with CEQA as required by Section 21168.9(b)(2). Because parks *are* mitigation, it is not possible to permit the rest of the project to proceed without the parks provision without pre-judging compliance with CEQA's mitigation provisions.[8]

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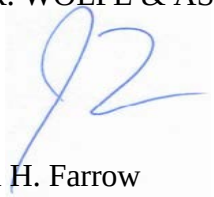
[8] Case law conflicts as to whether there is a partial remedy with respect to EIR certification; but, as a practical matter, the issue is irrelevant. While *Pres. Wild Santee v. City of Santee*

Finally, equitable considerations that may permit continuation of the status quo operation of a project do *not* support permitting construction where it has not yet commenced. *Burbank-Glendale-Pasadena Airport Auth. ("Airport") v. Hensler* (1991) 233 Cal. App. 3d 577, 596; *see POET, supra*, 218 Cal.App.4th at 761-762 (continuation of regulations permitted because more protective and because they do not require construction); *Laurel Heights I, supra*, 47 Cal.3d at 424 (continuation of existing medical research operations with no impacts permitted, but not facility expansion where impacts uncertain). Here, equitable considerations "militate against" a limited writ that would permit construction before CEQA compliance, because the CEQA violations have compromised the "integrity of the decisionmaking process required by CEQA," which is intended to protect "not only the environment but informed self-government" through public review. *Airport, supra*, 233 Cal. App. 3d at 596.

CONCLUSION

For all of the foregoing reasons, LandWatch asks this Court to issue a writ of mandate setting aside the certification of the EIR and the project approvals.

Dated: May 23, 2016 M. R. WOLFE & ASSOCIATES, P.C.



John H. Farrow
Attorneys for LandWatch Monterey County

(2012) 210 Cal. App. 4th 260, 268, 286–290 endorsed, but did not apply, the *concept* of a "limited writ" in which project activities are suspended pending revision of a portion of an EIR, as a practical matter an agency cannot act on a "partial certification" of an EIR because it is "either complete or not." *LandValue 77, LLC, supra*, 193 Cal. App. 4th at 682. The typical remedy is to direct the agency to set aside the EIR and then identify what sections are deficient rather than to direct it to set aside only a portion of the EIR. *Id.*

PROOF OF SERVICE

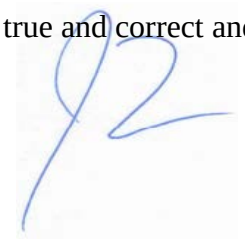
I hereby declare that I am employed in the City San Francisco, County of San Francisco, California. I am over the age of eighteen years and not a party to this action. My business address is 455 Sutter Street, Suite 405, San Francisco, CA 94102. I am familiar with this firm's practice for the collection and processing of mail sent via U.S. Mail, which provides that mail be deposited with the U.S. Postal Service on the same day in the ordinary court of business. On May 24, 2017, I served

- **SUPPLEMENTAL BRIEF RE PARK MITIGATION BY PETITIONER LANDWATCH MONTERY COUNTY**
- **APPENDIX TO SUPPLEMENTAL BRIEF RE PARKS MITIGATION BY PETTIONER LANDWATCH MONTEREYCOUNTY – EXCERPTS OF ADMINISTRATIVE RECORD**

in this action via the U.S. Mail by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid addressed to:

James G Moose Remy, Moose, Manley, LLP 555 Capitol Mall, Ste. 800 Sacramento, CA 95814 jmoose@rmmenvirolaw.com Anthony Lombardo ANTHONY LOMBARDO & ASSOC., INC. 144 Gabilan Street Salinas, CA 93901 tony@alombardolaw.com *Attorneys for Real Parties*	Richard Rosenthal Law Offices of Richard Rosenthal, A Professional Corporation 27880 Dorris Drive, Ste. 110 Carmel Valley, CA 93923 Rrosenthal62@sbcglobal.net Alexander T. Henson Law Offices of Alexander Henson 13766 Center Street, Ste. 27 Carmel Valley, CA 93924 zancan@aol.com *Attorneys for Highway 68 Coalition*
Michael J. Whilden Deputy County Counsel Office of the County Counsel 168 W. Alisal Street, Third Floor Salinas, CA 93901 whildenm@co.monterey.ca.us *Attorneys for Respondent County of Monterey*	

for collection and deposit with the U.S. mail on this date according to ordinary business practices. I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed at San Mateo, California on May 24, 2017.



John Farrow