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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF CONTRA COSTA

ORINDANS FOR SAFE EMERGENCY EVACUATION,

Petitioner,

vs.

CITY OF ORINDA,

Respondent.

Case No.: N23-0579

PETITIONER'S REPLY BRIEF IN SUPPORT OF VERIFIED PETITION FOR WRIT OF MANDATE

(California Environmental Quality Act, Pub. Resources Code § 21100 et seq.; Code of Civil Procedure §§ 1094.5 and 1085)

TABLE OF CONTENTS

I. INTRODUCTION 1

II. LEGAL BACKGROUND 1

A. Standard of Review 1

B. Exhaustion 1

III. ARGUMENT 2

A. The EIR Failed to Analyze Effects of the Full Project Buildout. 2

i. The City's record citations fail to show the EIR disclosed and analyzed the Project's effects to evacuation safety and viability 2

ii. Discussion of construction standards did not describe evacuation effects. 4

iii. The Evacuation Analysis was not circulated with the EIR and still failed to consider evacuation impacts caused by Project buildout. 4

iv. The analysis conducted by Placer County in League to Save Lake Tahoe is distinct from Respondent's Evacuation Analysis. 5

v. The EIR cannot defer qualitative analysis of evacuation and emergency response impacts to future Projects 7

B. The EIR Fails to Describe how the Impact WFR-1 Significance Threshold was Exceeded. 8

C. Mitigation Measure WFR-1 is Flawed. 9

D. The Project's Statement of Overriding Considerations is Flawed 10

E. The EIR Underestimates VMT Impacts 11

F. Respondent was on Notice of its CEQA Process Failures at Issue Here. 11

i. Petitioner exhausted its claim that the EIR fails to evaluate the emergency evacuation and response effects caused by Project buildout. 12

ii. Petitioner exhausted its "significance threshold" claim 13

iii. Petitioner exhausted its claim that Mitigation Measure WFR-1 is Flawed. 14

IV. CONCLUSION 15

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

STATE CASES

Banning Ranch Conservancy v. City of Newport Beach
(2017) 2 Cal.5th 918 1

California Native Plant Society v. City of Rancho Cordova
(2009) 172 Cal. App.4th 603 .... 2, 12

Center for Biological Diversity v. Dept. of Fish & Wildlife
(2015) 234 Cal.App.4th 214 10

City of Long Beach v. City of Los Angeles
(2018) 19 Cal. App.5th 465 .... 2, 12

Cleveland Nat'l Forest Found. v. San Diego Ass'n of Gov'ts
(2017) 17 Cal.App.5th 413 .... passim

Cleveland Nat'l Forest Found. v. San Diego Ass'n of Gov'ts
(2017) 3 Cal.5th 497 3

Defend the Bay v. City of Irvine
(2004) 119 Cal.App.4th 1261 9

Endangered Habitats League, Inc. v. County of Orange
(2005) 131 Cal.App.4th 777 10

In re Bay-Delta etc.
(2008) 43 Cal.4th 1143 7

Laurel Heights Improvement Assn. v. Regents of University of California
(1988) 47 Cal.3d 376 11

League to Save Lake Tahoe v. County of Placer
(2022) 75 Cal.App.5th 63 6

Los Angeles Unified School Dist. v. City of Los Angeles
(1997) 58 Cal.App.4th 1019 7

North Coast Rivers Alliance v. Marin Municipal Water Dist. Bd. of Directors
(2013) 216 Cal.App.4th 614 10

Sacramento Old City Assn. v. City Council
(1991) 229 Cal.App.3d 1011 9

San Diego Citizenry Group v. County of San Diego
(2013) 219 Cal.App.4th 1 .... 10, 11

San Franciscans for Reasonable Growth v. City & County of San Francisco (1984) 151 Cal.App.3d 61 8

Santa Clarita Org. for Planning v. County of L.A. (2003) 106 Cal.App.4th 715 8

Save North Petaluma River & Wetlands v. City of Petaluma (2022) 86 Cal.App.5th 207 8

Save the Hill Group v. City of Livermore (2022) 76 Cal. App.5th 1092 ..... 2, 12

Sierra Club v. Cty. of Fresno (2018) 6 Cal.5th 502 ..... 1, 3, 4, 5

Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova (2007) 40 Cal.4th 412 ..... 3, 8, 11

STATE STATUTES

Pub. Resources Code, § 21061 9

Pub. Resources Code, § 21081.6(b) 9

Pub. Resources Code, § 21100 9

Pub. Resources Code, § 21100(b)(3) 9

STATE REGULATIONS

Cal. Code Regs., tit. 14, § 15126.4(a)(1) 9

Cal. Code Regs., tit. 14, § 15126.4(a)(2) 9

Cal. Code Regs., tit. 14, § 15146 7

Cal. Code Regs., tit. 14, § 15152(b) 7

I. INTRODUCTION

At the outset, it is important to clarify what this case is *not* about. Petitioner Orindans for Safe Emergency Evacuation ("OSEE" or "Petitioner") does not oppose additional development in downtown Orinda, or elsewhere. Recognizing the difficult situation facing the City of Orinda (the "City" or "Respondent") in light of State-mandated housing requirements, combined with the unique wildfire risks posed by Orinda's geography, Petitioner urges this Court to *not* let the City's obligations under the California Environmental Act be ignored. Wildfire evacuation safety and emergency response are nothing short of life-threatening issues, demanding the strictest adherence to the letter of the law. Regrettably, the City's EIR falls far short, failing to describe or analyze the effects of full buildout of the Project. Consequently, the EIR fails to serve as the "environmental alarm bell" CEQA requires to inform the public and decisionmakers, while also failing to consider feasible mitigation measures and alternatives that could reduce the Project's serious effects. For these reasons, and to protect public safety, the Project approval and EIR must be set aside.

II. LEGAL BACKGROUND

A. Standard of Review

When faced with challenges to the sufficiency of an EIR's discussion of environmental impacts, including situations where an EIR omits essential information, courts employ de novo review. (*See*, *Banning Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal.5th 918, 935; *Sierra Club v. Cty. of Fresno* (2018) 6 Cal.5th 502, 512-16 ["Whether a description of an environmental impact is insufficient because it lacks analysis or omits the magnitude of the impact is not a substantial evidence question."]) With the exception of perhaps Petitioner's arguments regarding vehicle miles traveled (VMT) (*See* Petitioner's Opening Brief "OB" at 28-29), Petitioner's challenges are not factual or evidentiary. Petitioner's challenges based on a complete lack of analysis of specific impacts and/or the sufficiency of the analysis conducted, are reviewed de novo.

B. Exhaustion

The administrative exhaustion "requirement is satisfied if 'the alleged grounds for noncompliance with [CEQA] were presented … by *any* person during the public comment period … or prior to the close of the public hearing on the project before the issuance of the notice of

determination.'" (*City of Long Beach v. City of Los Angeles* (2018) 19 Cal. App.5th 465, 474 [emphasis added].) While something more than "generalized environmental comments at public hearings" is required, "less specificity is required to preserve an issue for appeal in an administrative proceeding than in a judicial proceeding." (*California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal. App.4th 603, 616.) "CEQA does not require public interest groups … to do more than fairly apprise the agency of their complaints" (*Save the Hill Group v. City of Livermore* (2022) 76 Cal. App.5th 1092, 1104) so the agency has an opportunity to evaluate and respond (*Cleveland Nat'l Forest Found. v. San Diego Assn. of Gov'ts* (2017) 17 Cal.App.5th 413, 446).

III. ARGUMENT

A. The EIR Failed to Analyze Effects of the Full Project Buildout.

Respondent argues that the EIR's analysis of evacuation impacts complied with CEQA as follows: Orinda has existing constrained evacuation conditions and, therefore, any additional development facilitated by the Project will necessarily result in significant and unavoidable impacts. Respondent argues that it was not required to actually describe, and further analyze, the changes to evacuation safety and emergency response caused by the Project, including the addition of thousands of residents to downtown Orinda. Instead, the EIR simply concluded that those impacts are significant because the situation is already so dire. (Op. Br. at 21-22.) CEQA requires more.

i. *The City's record citations fail to show the EIR disclosed and analyzed the Project's effects to evacuation safety and viability.*

Respondent's record cites simply restate the same conclusory analysis, without any further investigation, description, or discussion of the nature, location, degree, and/or magnitude of the Project impacts – including in downtown areas – on emergency response and evacuation. (*See* Op. Br. at 21-22). Most do not cite the EIR at all, and therefore fail to cure the EIR's defects.

Respondent cites statements of Darcy Kremin, Rincon Consultants, Inc. (the firm that prepared the EIR), made the day Plan Orinda was adopted, which comments are not found in either the DEIR or FEIR. (AR 3783, 3787-3789.) Ms. Kremin states that conditions are constrained now, and, therefore, future development "could" inhibit evacuation and emergency response. Respondent also cites AR 888-889, which describes Orinda's *existing* constrained conditions, and states in

conclusory terms that the Project development will result in significant impacts. These documents fail to demonstrate CEQA compliance. (*See* OB at 21-22; *Sierra Club*, *supra*, 6 Cal.5th at 519 [a "sufficient discussion of significant impacts requires not merely a determination of whether an impact is significant, but some effort to explain the nature and magnitude of the impact."]; *Cleveland Nat'l Forest Found. v. San Diego Ass'n of Gov'ts* (2017) 3 Cal.5th 497, 514 ["[A]n EIR's designation of a particular adverse environmental effect as 'significant' does not excuse the EIR's failure to reasonably describe the nature and magnitude of the adverse effect."]; *see also*, *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 442 [information scattered in the record "is not a substitute for good faith reasoned analysis…To the extent the County…relied on information not actually incorporated or described and referenced in the FEIR, it failed to proceed in the manner provided in CEQA."] [cites, quotes omitted].).

As noted above and described in greater detail in Petitioner's Opening Brief (OB at 17-18), the EIR's analysis of Impact WFR-1 is limited to those impacts on narrow hillside roadways, which is characteristic of the terrain on Housing Element (HE) site number five (HE-5), but nowhere else in the Project area. In response, Respondent mischaracterizes Petitioner's argument as seeking a "piecemeal" analysis of the Project. (Op. Br. at 22.) In reality, Petitioner seeks that the EIR analyze impacts of the whole Project, including the DPP, while the EIR only discusses HE-5.

Again, *Sierra Club, supra,* 6 Cal.5th 502, is instructive. There, a Fresno County EIR actually quantified pollution emissions resulting from the project, and generally described the broad health impacts of those pollutants. The EIR, however, failed to describe how the known quantity of pollutants created by the project would impact public health, but found the health impacts to be significant and unavoidable, "the reader can infer from the provided information that the Project will make air quality and human health worse." (*Id.* at 517-518.) Rejecting this approach, the Court found the EIR failed to "explain the nature and magnitude of the impact." (*Id.* at 519.) Orinda's EIR suffers the same fatal flaw. The EIR quantifies the expected population increase that will be facilitated by the Project, including specifically by the DPP and HE update, but does not investigate, evaluate, or describe, in any detail whatsoever, how that known population increase will worsen emergency evacuation and response. This could and should have occurred: for example, the EIR *does* determine

the adverse impacts to car traffic from the Project increasing Orinda's population (AR 455, 460); yet, the EIR fails to undertake the same analysis for evacuation impacts, never describing where nor how much worse it will be. This rendered development of targeted mitigations or alternatives impossible.

Respondent distinguishes *Sierra Club* by citing again to AR 511, 889, and 3789, arguing that the EIR "*does* tie the increase in population to added evacuation constraints and discloses the potential safety impacts related to those constraints." (Op. Br. at 27.) As noted above, however, those record documents do not add the missing analysis of describing the foreseeable effects of the approved levels of future development. As in *Sierra Club*, the City's EIR violates CEQA by omitting any analysis of the nature, location, and magnitude of impacts to emergency evacuation and response.

ii. *Discussion of construction standards did not describe evacuation effects*.

In arguing that the EIR analyzes the full build-out of the project, Respondent notes the EIR found "development anticipated by Plan Orinda would be *consistent* with" local plans and regulations. (Op. Br. at 21 [citing AR500-06, 510, which states: "[t]he County's Emergency Operations Plan establishes the emergency management organization for emergency response…."]) The EIR finds future development facilitated by the Project would be "*constructed* in accordance with federal, state, regional, and local requirements…[and that] Compliance with these standard regulations would be consistent with the Emergency Operations Plan's goals." (*Id* [modifications and emphasis added].)

Whether new construction complies with local, county, or state regulations is unrelated to whether the EIR meaningfully described the Project's wildfire evacuation and emergency response impacts. While EIRs sometimes do find impacts less than significant if a project is consistent with an adopted plan, that is not the case here, where the EIR expressly concluded that the Project *would* substantially impair an adopted emergency response plan or emergency evacuation plan, and that the impacts would, therefore be significant and unavoidable. (AR 509.) The EIR failed CEQA, however, completely failed to describe precisely *how* any such plan would be impaired. (AR 509-510.)

iii. *The Evacuation Analysis was not circulated with the EIR and still failed to consider evacuation impacts caused by Project buildout*.

Respondent argues that Petitioner misunderstands the methodology of the Evacuation Analysis to the extent that "evacuation constraint largely depends on *how many* intersections are

between the evacuee and safety[,]" rather than simply "proximity to a constrained intersection." (Op. Br. at 25.) This misapprehends Petitioner's argument. Tellingly, the City ignores a key factor in the Evacuation Analysis' methodology – namely the number of households evacuating: "staff estimated traffic volume counts at each intersection in Orinda's possible evacuation roadway network based on the number of households traveling towards each safety gateway…The methodology aggregates cumulative vehicle counts for arterial intersections along the possible evacuation network and compares them to their assigned capacities of 912 vehicles per hour to estimate" loss of service. (AR 16898.) An essential factor, therefore, is the total number of households that must evacuate. Yet, the Evacuation Analysis fails to consider either: (1) the additional loss of service at the downtown intersections leading to SR-24 resulting from adding thousands of new residents to the DPP areas; or (2) the cascading impacts of those newly added residents to Orinda's current residents living outside of the DPP areas, but who must also pass through those intersections to reach safety.

Petitioner does not argue, as the City claims, that adding development downtown will necessarily "be more impactful than adding it elsewhere in the City" (Op. Br. at 23-24), though it seems reasonable to assume that it would given the Evacuation Analysis' finding that the downtown intersections to SR-24 are the most constrained. (AR 16902). Regardless, these questions should have been answered by the EIR, but were not. No effort is made in the record, including in the Evacuation Analysis, to determine precisely whether, how, and to what extent adding over 4,500 new individuals to the downtown areas alone will impact evacuation and emergency response. That the Evacuation Analysis "qualitatively" evaluated these impacts by simply labeling them as worse (Op. Br. at 23), is not enough to comply with CEQA. (See Section III.d, infra; and *Sierra Club, surpa*, 6 Cal.5th at 519.) This constitutes a failure to proceed in a manner required by law, subject to de novo review (section II.a, supra); Petitioner is not required to present evidence showing precisely what the unanalyzed impact would have caused. Such was the City's mandatory duty in the first instance.

iv. *The analysis conducted by Placer County in League to Save Lake Tahoe is distinct from Respondent's Evacuation Analysis.*

The evacuation analysis conducted by respondent in *League to Save Lake Tahoe v. County of Placer* (2022) 75 Cal.App.5th 63 is, contrary to Respondents assertions (Op. Br. at 25-26), wholly

distinct from the Evacuation Analysis conducted by the City. In that case, Placer County's analysis estimated and disclosed the time for future residents of the proposed development to evacuate. (*League to Save Lake Tahoe*, 75 Cal.App.5th at 135; *See also* OB at 16-17.) The evacuation analysis in *League to Save Lake Tahoe* "modeled how long it would take for the…development to evacuate…*assuming that all of the project's residences would be occupied and evacuated*." (*Id.* [emphasis in original].) That modeling indicated that evacuating all future residents would take 1.5 hours. (*Id.* at 137.) The City concedes, or at least does not refute, that the Evacuation Analysis prepared by the Respondent does *not* quantify the time for the Project areas, including the DPP areas, to evacuate, *after* accounting for the added population resulting from the Project.

Respondent claims that Petitioner mischaracterizes *League to Save Lake Tahoe*, claiming that there, Placer County did not evaluate the "increased evacuation time for existing residents caused by adding the project's new residents to the roads." (Op. Br. at 25.) This is not true. The evacuation analysis conducted by Placer County specifically compared future traffic volumes resulting from the proposed development with current traffic conditions and determined that "the project would represent an incremental increase over existing traffic volumes," and that "it would take 1.3 hours to evacuate the project site at full capacity and 1.5 hours cumulatively with other projects." (*League to Save Lake Tahoe,* at 133-34, 137.) The Evacuation Analysis prepared by Respondent lacks this sort of comparative investigation of the extent of the impact of new development facilitated by the Project.

Respondent further points to the *League to Save Lake Tahoe* court's rejection of that petitioner's argument that Placer County should have conducted analysis of "every conceivable study or permutation of the data" related to petitioner's request that Placer County conduct modeling of different wildfire scenarios, including an analysis of the "rate at which fires would advance, considering such variables as wind speeds, direction…topography, time of day, and fuel loadings…." (Op. Br. at 26 [citing *League to Save Lake Tahoe* at 139-40].) OSEE's opening brief does not request a similar analysis of every possible wildfire and traffic condition, nor does it criticize the Evacuation Analysis on that basis. Instead, Petitioner only asks that the City actually analyze, disclose, and attempt to mitigate, the community-wide impacts to evacuation and emergency response times resulting from additional development and population in the Project areas, including DPP areas.

Respondent claims that it took the "conservative" approach of finding that the Project's impacts would be significant and unavoidable. (Op. Br. at 26.) Respondent's decision is better described as analytically expedient. The Evacuation Analysis is simply a baseline description of existing evacuation conditions within Orinda without any discussion as to nature and magnitude of the Project's impacts, as required. (*See* section III.a, *supra*.; and OB at 12, 17-18.) The EIR simply labels the Project's effects as significant and unavoidable without the required analysis of the nature and magnitude of the Project's impacts.

v. *The EIR cannot defer qualitative analysis of evacuation and emergency response impacts to future Projects.*

Respondent argues that, given the pragmatic nature of the EIR, the admittedly general and qualitative analysis conducted by the City is permissible (Op. Br. at 27.) The City is mistaken. The level of detail required for programmatic EIRs is commensurate with the level of detail of the proposed project. (*See* 14 CCR §§ 15146, 15152(b); and *In re Bay-Delta etc.* (2008) 43 Cal.4th 1143, 1176.) CEQA's preference for streamlining the administrative process (noted by Respondent) does not permit an action agency to defer evaluation of a reasonably foreseeable significant impacts to later, project-specific, EIRs in order to avoid analyzing those impacts in the first instance. (14 CCR § 15152(b).) Review of an impact is required when there is "sufficient reliable data to permit preparation of a meaningful and accurate report on the impact." (*Los Angeles Unified School Dist. v. City of Los Angeles* (1997) 58 Cal.App.4th 1019, 1028.) Respondent cites nowhere in the EIR contending such reliable data was unavailable to assess evacuation and emergency response.

On the contrary, the EIR describes the total number of new units (and residents) facilitated by the Project, as well as the specific locations of that future development. (AR 196, 201-205, 207.) Facilitating this development is the express purpose of the Project. The baseline analysis conducted by Evacuation Analysis shows that the City has the means to evaluate evacuation impacts at specific population levels at specific portions of the City. The City simply needed to account for buildout of the Project. By comparison, the EIR's analysis of transportation impacts of the Project, including changes to vehicle miles traveled, compared pre-Project VMT with estimated VMT after Project

build-out. (AR 455, 460.) The City violated CEQA by failing to conduct a comparable analysis of impacts to evacuation safety and emergency response.

The City implies that a quantitative analysis of how and to what extent the Project will impact evacuation and emergency response may be deferred to later project-specific planning documents. (Op. Br. at 27.) CEQA's informational and disclosure requirements, however, are not met with bald claims that information related to otherwise foreseeable impacts will be provided at a later time. (*Vineyard, supra,* 40 Cal.4th at 431 ["CEQA's demand for meaningful information is not satisfied by simply stating information will be provided in the future."] [internal quotations omitted]; *Santa Clarita Org. for Planning v. County of L.A.* (2003) 106 Cal.App.4th 715, 723 [same].) Future individual development projects cannot evaluate, quantitatively or otherwise, the potential evacuation and emergency response impacts resulting from development facilitated by the *entire* Project.[1] The Project's evacuation and emergency response impacts, including buildout of the DPP and HE, are foreseeable and must be evaluated.

B. <u>The EIR Fails to Describe how the Impact WFR-1 Significance Threshold was Exceeded.</u>

The significance threshold set by the EIR for WFR-1 Impact turned on whether the Project would "substantially impair an adopted emergency response plan or emergency evacuation plan." (AR000509.) Nowhere does the EIR identify what plan would be impaired, how, or to what extent. This, again, is in stark contrast to the facts of *Save North Petaluma River & Wetlands v. City of Petaluma* (2022) 86 Cal.App.5th 207, where respondent there identified the specific provisions in the City's emergency response plan that would be impaired due to the proposed project. (*Id.* at 230; OB at 19.)

Whether the City needed to have stated "precisely how significant the impact" of the Project will be, the level of analysis conducted is inadequate because the EIR entirely failed to discuss the nature and magnitude of the Projects impacts, which were otherwise reasonably foreseeable. (*See*

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[1] Future project's cumulative impacts analyses will not fill this gap. Only projects already approved, constructed, undergoing environmental review, or formally announced by a developer, would be included. (*San Franciscans for Reasonable Growth v. City & County of San Francisco* (1984) 151 Cal.App.3d 61, 74.) Each future development will not analyze full project buildout.

section III.a, *supra*). Without this information, the public and decision-makers were unable to determine exactly how significant the Project effects would be.

C. Mitigation Measure WFR-1 is Flawed.

Respondent argues that, in addition to mitigation measure WFR-1, policies outlined in the Safety Element are also designed to mitigate the evacuation and emergency response impacts from WFR-1. (Op. Br. 29-30.) CEQA, however, requires that *the EIR* propose and describe measures to mitigate each significant effect it identifies. (Pub. Resources Code, §§ 21100, 21061, 21100(b)(3); 14 CCR § 15126.4(a)(1).) Nowhere does the Project EIR include the Safety Element policies as mitigation measures, nor discuss or evaluate how they would mitigate the impact, as required.

The City argues that the failure to discuss these measures within the EIR itself is permitted "[b]ecause the Project here involves updating the City's General Plan, CEQA expressly authorizes the City to include mitigation in the General Plan as well. Guidelines § 15126.4(a)(2)." (Op. Br. at 29.) Guidelines section 15126.4(a)(2) does not absolve the City of its obligation to include the discussion of all mitigation measures within the EIR. Instead, section 15126.4(a)(2) governs the extent to which a project proponent may incorporate mitigation measures for future projects or approvals into a larger planning document. (14 CCR §15126.4(a)(2); Pub. Resources Code §21081.6(b).)

Respondent further argues that it may properly defer determination as to the precise details of mitigation measure WFR-1 to later project approvals. (Op. Br. at 30). Deferral of mitigation measures is only permissible when the action agency has described those future mitigation measures, identified performance criteria to evaluate the effectiveness of those measures, and committed itself to satisfying those criteria. (*Sacramento Old City Assn. v. City Council* (1991) 229 Cal.App.3d 1011, 1029; *Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1275-76.) The broad statement in mitigation measure WFR-1 that "[a] Wildfire Hazard Assessment and Plan shall be developed for the project site" (AR000510-511) does not establish any performance criteria for the mitigation or commit the agency to satisfying such criteria. Finally, cases cited by Respondent supporting deferred mitigation measures are distinguishable where future mitigation in those cases contained performance criteria. (*See North Coast Rivers Alliance v. Marin Municipal Water Dist. Bd. of Directors* (2013) 216

Cal.App.4th 614, 630-31 [deferred landscaping plan required to identify location and types of planting and contain specific performance metrics such as plant survival]; *Center for Biological Diversity v. Dept. of Fish & Wildlife* (2015) 234 Cal.App.4th 214, 240-44 [deferred mitigation required surveys of mountain lakes and mitigation of impacts to insignificance prior to trout stocking operations]; and *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 794 [deferred mitigation prescribed specific habitat replacement ratio].)

D. The Project's Statement of Overriding Considerations is Flawed

Despite Respondent's arguments to the contrary (Op. Br. at 31), the City could not have been fully informed as to the full effects of the Project because the EIR failed to adequately describe and evaluate the Projects impacts. (*See* sections III.a-d, *supra*). To be sure, the City was aware generally that the Project will adversely impact evacuation and emergency response, but it was not placed on notice of the magnitude of those impacts because the EIR is devoid of any such analysis. (*Id.*) Again, the portions of the administrative record cited by Respondent (Op. Br. at 31) simply repeat the same conclusion that given the baseline constrained conditions, additional development will result in significant and unavoidable impacts to evacuation and emergency response. The simple fact that the City was aware that the Project will have significant and unavoidable impacts is, in isolation, insufficient to support a Statement of Overriding Considerations. (*See San Franciscans for Reasonable Growth, supra,* 151 Cal.App.3d at 78-80 [finding statement of overriding considerations unsupported despite knowledge that the project would result in significant and unmitigated impacts.].)

San Diego Citizenry Group v. County of San Diego (2013) 219 Cal.App.4th 1, cited by Respondent (Op. Br. at 31) is distinguishable. There, and unlike the present case, San Diego County's EIR attempted to estimate and/or quantify the reasonably foreseeable environmental impacts of the Project (that is, assuming full project build-out). (*San Diego Citizenry Group, supra,* at 21-25.) Specifically, the EIR there attempted to quantify how many new boutique wineries would be added as a result of the project (*id.* at 21), projected additional traffic constraints and developed trip generation data under "project 'build-out' conditions in the future" (*id.* at 22), and quantified the relative water use of boutique wineries that would be permitted under the project in relation to other potential agricultural uses (*id.* at 7, 9, 22-23). The Project Orinda EIR, however, fails to adequately

evaluate or discuss potential impacts following build-out of the Project, and most notably the reasonably foreseeable impacts of future development within the DPP areas or elsewhere. Without this, the City could not determine that the Project's purported benefits outweighed its adverse effects.

E. The EIR Underestimates VMT Impacts

Petitioner does not challenge the City's use of the specific VMT model prepared by the regional transportation authority, as Respondent claims. (Op. Br. at 32.) Petitioner only challenges the conclusions drawn by the model, and notes that the analysis likely underestimates the full effect on VMT of the Project. (OB at 23-24.)

The EIR does not, as Respondent claims (Op. Br. at 32), conclude that the service business identified by Petitioner in its Opening Brief, specifically gas stations, would not be permanently lost following demolition. Instead, and as noted in Petitioner's brief, the EIR's analysis only *assumed* that this would be the case, despite portions of the record indicating that these service businesses would be demolished. (OB at 23-24.) While the EIR notes that the Project would preserve the total commercial square footage in downtown Orinda, it does not conclude that any business subject to demolition will be replaced and/or rebuilt. (AR 454-455, 458-461.) In fact, the EIR notes that the three sites containing gas stations subject to demolition – as noted in Petitioner's Opening Brief (OB at 23-24) – are now approved for residential use, proving they will not be rebuilt. (AR 357-359, 374.)

Because the EIR ignores demolition contemplated by the Project when estimating VMT impacts, the EIR's analysis of those impacts is necessarily an underestimate. The EIR fails to adequately disclose or analyze VMT generated by the Project and corresponding effects to travel and greenhouse gas emissions / air quality. The EIR's conclusions regarding VMT effects caused by the Project is not supported by substantial evidence, and therefore violates CEQA. (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 392; *Vineyard*, *supra*, 40 Cal.4th at 435.)

F. Respondent was on Notice of its CEQA Process Failures at Issue Here.

Public critique of the City's approach to wildfire evacuation and emergency response was open and notorious. To exhaust an issue for litigation, litigants need only comment one time (on any issue) in opposition to the project, and any person (not limited to the litigant) must raise the applicable

critique to the agency. (*City of Long Beach, supra,* 19 Cal. App. 5th at 474). Layperson comments are not required to exhaust issues with pinpoint legal or technical precision. (*California Native Plant Society, supra,* 172 Cal. App.4th at 616; *Save the Hill Group, supra,* 76 Cal. App.5th at 1104.) Petitioners need only raise issues with sufficient specificity so that the agency can evaluate and respond. (*Cleveland National Forest Foundation, supra,* 17 Cal.App.5th at 446.) Respondent incorrectly argues that Petitioner failed to exhaust several of its claims.[2]

i. *Petitioner exhausted its claim that the EIR fails to evaluate the emergency evacuation and response effects caused by Project buildout.*

Comments submitted throughout the administrative process put the City on notice that it had failed to appropriately account for and analyze the evacuation and emergency response impacts caused by the Project substantially increasing Orinda's population. Again, an issue is exhausted if the agency can fairly evaluate it. Testament to this, the FEIR, *when responding to comments*, referred for the first time to the City's Evacuation Analysis, which was released *after* the DEIR was circulated for public comment. (AR856.) The Evacuation Analysis *began* to supplement the DEIR's inadequate impact assessment, by calculating existing evacuation times in the City. But this too was insufficient. Thus, OSEE member Michele Jacobson asked Respondent to "confirm that the Evacuation Analysis … did NOT calculate the added traffic to be expected from the development proposed in the Downtown Precise Plan" and stated that, "[i]n re-reading the report, it appear[ed] that the number of cars assumed to be on the roads in an emergency are based on the number of existing parcels in the study area and do not make an assumption about the future parcels planned in the DPP or Housing Element Update." (AR015893.) In response, Respondent confirmed that Jacobson's "understanding [wa]s correct that the analysis does not measure how much more affected other zones or neighborhoods would be in terms of exact drive times with buildout of the Downtown Precise Plan compared to estimated drive-times at current population levels." (*Id.*) Ms. Jacobsen raised these concerns again in comments to the City. (AR049305 [noting that "Planning Director Buckley recently stated, '…the analysis does not measure how much more affected other zones or neighborhoods

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[2] Respondent concedes VMT and Statement of Overriding Considerations claims were exhausted.

would be in terms of exact drive times with build-out of the Downtown Precise Plan compared to estimated drivetimes at current population levels,'" and noting that "downtown is already a major choke point for evacuation from both north and south sides of the community, the addition of a significant number of residents and their cars to the downtown would only exacerbate the existing emergency evacuation problem."]) Ms. Jacobson also commented at the January 31, 2023, public hearing on the adoption of the Project that the City should "direct staff to expand the emergency evacuation analysis to include the impacts of the buildout of Plan Orinda." (AR003833.) These comments put the City on notice that it had failed to describe and analyze the actual evacuation impacts caused by the Project. (*See*, *Cleveland National Fores*t, *surpa*, 17 Cal.App.5th at 446.)

Another commenter complained that "at 85 du/acre with no or limited on-site parking, the crush of parked vehicles for a high-rise building here, will effect LoS on this freeway on-ramp and wildfire escape route," and noted that "the DPP numbers in the EIR and the DPP numbers in the latest Housing Element Document, don't seem to match. That's unfortunate." (AR854.) Another comment made during a January 10, 2023, public hearing asked if Respondent had "considered whether evacuation would benefit if there was less housing downtown…." (AR3739.) Another urged City to "reject the Housing Element and…DPP and study them to further maximize the City's ability to evacuate." (AR3832.) Again, there can be no serious question that Respondent was on notice about the need to evaluate the threat increased population may have on wildfire evacuation. (*Cleveland National Forest Foundation,* 17 Cal.App.5th at 446.)

ii. *Petitioner exhausted its "significance threshold" claim.*

Respondent argues that Petitioner "failed to exhaust its administrative remedies with respect to its [] 'significance threshold' claim," (Opp. Brief at 28). In short, the significance threshold established in the EIR asks, "would the project substantially impair an adopted emergency response plan or emergency evacuation plan?" (AR509-511.) Petitioner challenges the EIR for not specifically describing *how* the increased population from the Project would "substantially impair" an adopted emergency response plan or emergency evacuation plan. (OB at 18-19.) As above, this issue was sufficiently raised during the administrative process. Ms. Jacobson's central critique (that the City failed to analyze the buildout effects of the Project) applies here, and is tantamount to contending that

the City failed to describe precisely *how* the Project would result in significant and unavoidable effects to evacuation and emergency response.

Further, frequent commenter Nick Waranoff submitted comments that attached the California Attorney General's recently issued wildfire CEQA guidance, and directed the City to "consider the points mentioned therein as comments made by me." (AR 870-887.) While not expressly stated, it was clearly implied that Mr. Waranoff was informing the City that the EIR was not consistent with the guidance. That guidance directs agencies (like Respondent) to "develop thresholds of significance for evacuation times … [that] reflect [the] informed expert analysis of safe and reasonable evacuation times given the existing and proposed development." (AR 881.) These "thresholds of significance," the guidance states, should consider "the extent of exposure for existing and new residents based on various fire scenarios" in order "to quantify increased wildfire risks resulting from a project adding more people to wildfire prone areas." (AR 879.) And the guidance further suggests agencies analyze "any significant environmental effects the project might cause or risk exacerbating by bringing development and people into the area affected." (AR 876.) By requesting that the City consider the guidance's directives as his own comments, Mr. Waranoff suggested in his comment that the DEIR was not consistent with the guidance and therefore not in compliance with CEQA either. This sufficiently put Respondent on notice of the need to account for increased population when establishing and assessing compliance with the significance threshold, and on the need to thoroughly evaluate the Project's impacts on specific evacuation routes. (*Cleveland National Forest Foundation,* 17 Cal.App.5th at 446.) The fact that the FEIR, in its response to this comment, spoke to guidance document section by section, and (incorrectly) contended that the EIR was consistent, clearly evidences that the City was on notice and had opportunity to fairly consider these issues.

iii. *Petitioner exhausted its claim that Mitigation Measure WFR-1 is Flawed.*

The same Attorney General CEQA guidance attached to the comment submitted by Nick Waranoff provided sufficient notice to Respondent regarding Petitioner's complaints about the EIR's only mandated mitigation measure, including the claim that the mitigation mandated is unlawfully deferred and that it does not address evacuation impacts caused by development in the downtown areas. (Opp. Brief at 29.) The guidance states that, "[f]or projects located in high wildfire risk areas

that present an increased risk of ignition and/or evacuation impacts, evacuation modeling and planning should be considered and developed *at the time of project review and approval*—when there is greater flexibility to modify a project's design, density, siting, and configuration to address wildfire considerations—*rather than deferred to a later stage of the development process*." (AR 880. [emphasis added].) And it goes on to assert that "agencies will be best-positioned to ensure proposed development projects facilitate emergency access and ease constraints on evacuation with this information in hand prior to project approval." (*Id.*)

Though Respondent notes that Moraga Orinda Fire District ("MOFD") did not comment on the DEIR's wildfire impact analysis (Op. Br. at 16), MOFD Fire Chief Dave Winnacker commented on the Evacuation Analysis itself and criticized various of its modeling assumptions and recommendations to mitigate evacuation impacts. (AR 10781.)

Mr. Waranoff also submitted a comment on mitigation measure WFR-1 noting other possible Project ways to mitigate evacuation and emergency response impacts *within the DPP*. (See AR 48632-33 [discussing mitigation measure WFR-1, and stating "the City could reduce density downtown below the density proposed in the DPP, and thereby further mitigate" evacuation risks.]) These were sufficient to put Respondent on notice of the need not to defer evacuation modeling and planning. (*Cleveland National Forest Foundation,* 17 Cal.App.5th at 446.) Respondent's administrative exhaustion argument therefore fails.

IV. CONCLUSION

For the reasons stated herein, the Project EIR fails to meet the requirements of CEQA, and failing to apprise the public and decision-makers of serious threats to wildfire evacuation and emergency response; depriving the opportunity to consider discrete mitigation measures, alternatives, and a complete consideration for any Statement of Overriding Considerations. Petitioner, therefore, respectfully requests that the Court vacates Respondent's Project approval, set aside the EIR, and vacate and enjoin all approvals made in furtherance of the Project, unless and until brought into compliance with CEQA.

Respectfully submitted,

DATED: January 4, 2024

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