

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

FILED
SUPERIOR COURT
COUNTY OF LAKE
JAN 04 2022

by VP Krista D. LeVier
VP Blanca Blum
Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LAKE

CENTER FOR BIOLOGICAL DIVERSITY,)	Case No. CV421152
)	
Petitioner,)	
)	RULING AND ORDER ON PETITIONS
PEOPLE OF THE STATE OF CALIFORNIA,)	FOR WRIT OF MANDATE
EX. REL, ATTORNEY GENERAL ROB)	
BONTA,)	
)	
Petitioner-Intervenor,)	
)	
v.)	
)	
COUNTY OF LAKE, BOARD OF)	
SUPERVISORS OF THE COUNTY OF)	
LAKE; and DOES 1 through 20,)	
)	
Respondents.)	
)	
_____ LOTUSLAND INVESTMENT HOLDINGS,)	
INC.; and DOES 21 through 40,)	
)	
Real Parties in Interest.)	
_____)	

///

Ruling

I. Introduction.

The Court's obligation in this case is to answer the following questions:

1. Was there substantial evidence to support the County's decision?

2. Did the County fail to proceed in the manner required by law?

(Pub. Res. Code §§ 21168, 21168.5.)

In answering the first question, the Court "must indulge all reasonable inferences from the evidence that would support the agency's determinations and resolve all conflicts in the evidence in favor of the agency's decision." (*Save Our Peninsula Committee v. Monterey County Board of Supervisors* (2001) 87 Cal.App.4th 99, 117.) "A court may not set aside an agency's approval of an EIR [Environmental Impact Report] on the ground that an opposite conclusion would have been equally or more reasonable." (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 393.)

In answering the second question, the Court must determine if the County substantially complied with the procedural requirements of the California Environmental Quality Act (CEQA). (Practice Under the California Environmental Quality Act (2d ed. Cal CEB) § 23.35) While a court may find noncompliance with CEQA requirements to be a prejudicial abuse of discretion, there is no presumption that such an error is prejudicial. (Pub. Res. Code § 21005(b).) In determining whether a failure to comply with CEQA is prejudicial, a court does not determine whether a different outcome would have resulted. (Pub. Res. Code § 21005(a).)

///
///

1 **II. Wildfire Risk.**

2 **A. Compression of Mitigation Measures Into the Project.**

3 When an EIR incorporates mitigation measures into the project description, then
4 concludes that the project has no significant impact, the failure to separately identify
5 significant impacts and analyze the mitigation measures violates CEQA. (*Lotus v.*
6 *Department of Transportation* (2014) 223 Cal.App.4th 645.) This is because by doing so,
7 an EIR 'precludes both identification of potential environmental consequences arising
8 from the project and also thoughtful analysis of the sufficiency of measures to mitigate
9 those consequences.' (*Id.* at p. 658.)

10 *Lotus v. Department of Transportation, supra*, involved a highway construction
11 project through an old growth redwood forest. A portion of the construction was planned
12 to occur within the structural root zone of a number of trees. The EIR described
13 measures that "have been incorporated into the project to avoid and minimize impacts as
14 well as to mitigate expected impacts." (*Id.* at p. 650.) Those measures included
15 restorative planting and replanting, invasive plant removal, and use of an arborist and
16 specialized equipment. In the EIR, the agency concluded that "[n]o significant
17 environmental effects are expected as a result of this project with the implementation of
18 the stated special construction techniques." (*Id.* at p. 651.)

19 In concluding that the EIR violated CEQA by compressing the analysis of impacts
20 and mitigation measures into a single issue, the Court of Appeal explained:

21 The EIR fails to indicate which or even how many protected redwoods will be
22 impacted beyond the tolerances specified in the handbook and, by failing to
23 indicate any significant impacts, fails to make the necessary evaluation and
24 findings concerning the mitigation measures that are proposed. Absent a
determination regarding the significance of the impacts to the root systems of the
old growth redwood trees, it is impossible to determine whether mitigation

1 measures are required or to evaluate whether other more effective measures than
2 those proposed should be considered. Should Caltrans determine that a specific
3 tree or group of trees will be significantly impacted by proposed roadwork, that
4 finding would trigger the need to consider a range of specifically targeted
mitigation measures, including analysis of whether the project itself could be
modified to lessen the impact.

5 (*Id.* at p. 656.)

6 In that case, the measures contained within the project were designed to mitigate
7 the impacts to the health of the trees caused by the construction. The measures at issue
8 were "plainly mitigation measures and not part of the project itself." (*Id.* at p. 656, fn. 8.)

9 The failure to classify those measures as mitigation measures prevented those reviewing
10 the EIR from determining the significance of the impact the construction would have on
11 the health of the trees. (*Id.* at pp. 656-658.)

12 In the instant case, Petitioners¹ argue certain design elements included in the
13 Wildfire Prevention Plan (WPP), including those relating to relating to vegetation
14 management and firebreaks, were misclassified as part of the Project rather than
15 mitigation measures. Although certain actions such as vegetation management and
16 maintenance of the firebreaks will continue well after the Project is built, those
17 components of the WPP are properly classified as part of the Project itself. This is
18 because those measures, unlike the measures in *Lotus v. Department of Transportation*,
19 *supra*, are not designed to rectify the impacts to the environment caused by the Project.
20 None of the challenged design elements are meant to repair, rehabilitate or restore the
21 impacted environment. Instead, they are part of the design of the Project meant to avoid

22
23 ¹ Petitioners includes Intervenor/Petitioner unless otherwise stated.

1 impacts to the environment in the first place. Accordingly, the Court concludes all of the
2 components of the WPP, including vegetation management and maintenance of the
3 firebreaks, are not mitigation measures improperly misclassified as Project components.
4 Instead, they are part of the Project itself.

5 **B. Adequacy of Analysis of Wildfire Risk.**

6 Petitioners find fault with the EIR's analysis of the wildfire risk and the
7 methodology used to analyze that risk. Although the analysis could have been more
8 thorough and better methodologies could have been used, "challenges to the scope of an
9 EIR's analysis, the methodology used, or the reliability or accuracy of the data underlying
10 an analysis, must be rejected unless the agency's reasons for proceeding as it did are
11 clearly inadequate or unsupported." (*Chico Advocates for a Responsible Economy v. City*
12 *of Chico* (2019) 40 Cal.App.5th 839, 851.) The EIR's analysis of the Project's impacts on
13 wildfire risk was extensive and specific to both the Project and its location. Without
14 rehashing the evidence contained in the record, the Court concludes substantial evidence
15 supports the County's findings regarding the Project's impact on wildfire risks, with one
16 exception which will be discussed in the following section.

17 **C. Impacts on Emergency Evacuation Routes.**

18 In its briefing, Real Party differentiated project evacuation routes from
19 community or area-wide evacuation routes. The Court agrees that analysis of the
20 Project's evacuation routes are a "reverse CEQA" issue and need not be addressed in
21 the EIR. The Project's impacts to community evacuation routes, however, must be
22 analyzed in the EIR.

1 In *California Building Industry Assoc. v. Bay Area Air Quality Management Dist.*
2 (2015) 62 Cal.4th 369, at issue was an agency's thresholds of significance for certain air
3 pollutants which required project proponents to evaluate how existing air pollution would
4 affect individuals within the proposed project. The Supreme Court concluded, "CEQA
5 generally does not require an analysis of how existing environmental conditions will
6 impact a projects future users or residents." (*Id.* at p. 386.) CEQA does, however, require
7 an analysis of a "project's potentially significant *exacerbating* effects on existing
8 environmental hazards -- effects that arise because the project brings 'development and
9 people into the area affected.'" (*Id.* at p. 388; italics in original.) The Supreme Court
10 explained an "EIR should evaluate any potentially significant impacts of locating
11 development in other areas susceptible to hazardous conditions (e.g., floodplains,
12 coastlines, wildfire risk areas)." (*Ibid.*)

13 *Newton Preservation Society v. County of El Dorado* (2021) 65 Cal.App.5th 771,
14 involved a bridge construction project where project opponents, many of whom were
15 residents, alleged the project would have a significant impact on evacuation. The Court of
16 Appeal held the evidence presented in that case did not "support a fair argument that the
17 project may have a significant impact on the environment or may exacerbate existing
18 environmental hazards." (*Id.* at p. 792.) The court determined the comments offered in
19 opposition to the project "lacked factual foundation and failed to contradict the
20 conclusions by agencies with expertise in wildfire evacuations with *specific* facts calling
21 into question the underlying assumptions of their opinions as it pertained to the project's
22 potential environmental impacts." (*Id.* at p. 791, italics in original.)

23
24

1 Real Party is correct that analysis of community evacuation is not required unless
2 the project might exacerbate existing environmental hazards. (Real Party in Interest
3 Lotusland Investment Holding, Inc.'s Supplemental Brief Re: Evacuation filed November
4 19, 2021, (Real Party's Supplemental Brief), p. 7:7-9.) Here, unlike the case in *Newton*,
5 *supra*, there is evidence that the Project might exacerbate existing environmental
6 hazards. As pointed out by Petitioners Center for Biological Diversity (CBD) and
7 California Native Plant Society (CNPS), a significant number of wildfire related deaths in
8 California occur during attempts to evacuate. (Petitioners' Opening Brief filed June 15,
9 2021, pp. 19:26-20:4.) The hazards of a wildfire are certainly exacerbated if community
10 residents are unable to evacuate safely due to congested evacuation routes. It is
11 estimated that the Project will bring 4,070 residents to the area. (AR 6612.) This is a
12 significant population increase when considering the Project is located in Lake County
13 Census Tracts 12 and 13 which had an estimated combined population of 10,163 in
14 2017. (AR 6608.) If a wildfire occurs, the Project's residents will need to evacuate. These
15 people will likely compete with residents in the surrounding area for safe evacuation
16 routes. The additional people competing for the same limited routes can cause
17 congestion and delay in evacuation, resulting in increased wildfire related deaths. This is
18 undoubtedly a situation where the Project, by bringing a significant number of people into
19 the area, may significantly exacerbate existing environmental hazards; specifically,
20 wildfires and their associated risks. Therefore, this is an issue that is required to be
21 addressed under CEQA.

22 The County concluded the impacts to existing emergency evacuation plans would
23 be less than significant. (AR 6746.) The evidence supporting this conclusion are

24

RULING AND ORDER ON PETITIONS FOR WRIT OF MANDATE

1 comprised primarily of opinions from traffic engineers and fire and law enforcement
2 personnel. (Real Party's Supplemental Brief, p. 8:2-8; AR 42594-42595; 53739-53740.)
3 Those opinions were not based on any identifiable facts.

4 There are two problems with this evidence. First, this evidence primarily addresses
5 the issue of whether the Project's residents could safely leave the Project in the event of
6 a wildfire. This evidence does not focus on the issue that is required to be addressed by
7 CEQA; whether evacuation of the residents in the nearby area would be affected by the
8 evacuation of the Project's residents during a wildfire.

9 Second, this evidence cannot be considered substantial evidence. Substantial
10 evidence includes "expert opinion supported by facts." (14 CCR §15384(b).)
11 Unsubstantiated opinion does not constitute substantial evidence. (14 CCR §15384(a).)
12 The conclusion reached by the County as it relates to emergency evacuation plans is
13 based on unsubstantiated expert opinions. This evidence is legally insufficient to qualify
14 as substantial evidence under CEQA.

15 Because the County's findings regarding community emergency evacuation routes
16 are not supported by substantial evidence, the EIR does not comply with CEQA.

17 **iii. Carbon Credit Program².**

18 Petitioners argue the carbon credit program is ineffective as a mitigation measure
19 because it does not include sufficient safeguards to ensure offsets are real, permanent,
20 verifiable and enforceable. (*Golden Door Properties, LLC v. County of San Diego* (2020)
21 50 Cal.App.5th 467, 506-507.)

22
23 ² The carbon credit program was discussed by the parties under the broader topic of climate impacts and GHG
24 mitigation measures. Also discussed was the transportation demand management plan (TDM). The Court concludes

1 Here, the carbon credit program was added through an errata to the Final EIR
2 after the public comment period had closed. The County explained:

3 Also we added a mitigation requiring the purchase of greenhouse gas carbon
4 credits to offset the project's remaining greenhouse gas emissions that are above
5 and beyond the stated thresholds in the EIR. However, the EIR's conclusion of a
6 significant, unavoidable greenhouse gas impact would not change, given the
7 limited supply of carbon offsets and the uncertainty regarding the availability of
8 offset credits throughout the life of the project.

7 (AR42599.)

8 Given the timing of the addition of this measure to the EIR and the comments
9 made by the County, unlike the mitigation measure in *Golden Door Properties, LLC, v.*
10 *County of San Diego, supra*, the carbon credit program here was not a mitigation
11 measure that the County relied upon in making any findings contained in the EIR. In fact,
12 the County described the modifications to the mitigation measures contained in the
13 Errata, which included the addition of the carbon credit program, to be minor and
14 insignificant. (AR 7193.) To the extent this measure did not comply with CEQA, the Court
15 determines it does not constitute prejudicial error because inclusion of the measure did
16 not "deprive[] the public and decision makers of substantial relevant information about
17 the Project's likely adverse impacts." (*Neighbors for Smart Rail v. Exposition Metro Line*
18 *Constr. Auth.* (2013) 57 Cal.4th 439, 463.)

18 **IV. Water Supply.**

19 Petitioners CBD and CNPS take issue with on an off-site groundwater well located
20 within the Collayami Valley Groundwater Basin. Groundwater from on-site wells and
21 surface water sources are expected to supply all of the projects water demands.
22

23 the TDM substantially complies with CEQA. (cf. *City of Hayward v. Trustees of California State University* (2015)
24 242 Cal.App.4th 833, 851-855.)

RULING AND ORDER ON PETITIONS FOR WRIT OF MANDATE

1 (AR6554-6556.) The off-site well would provide non-potable water if required. (AR 6689.)
2 The County determined because of the characteristics of the basin, the potential impacts
3 of drawing water from the well could not be determined. (AR 6558.) The County
4 therefore imposed mitigation measure 3.9-3 which requires the applicant to provide to the
5 County an analysis that defines a safe yield as specified in the measure. It also requires
6 the applicant to submit annual monitoring reports and provide quarterly data for the first
7 five years of use. (AR 6575.) It further mandates the development of a groundwater
8 management plan should the reports show an impact to groundwater levels. (*Id.*) The
9 County found any potential impact would be mitigated to less than substantial when
10 considering this measure. The County's findings regarding the well are supported by
11 substantial evidence. This mitigation measure complies with CEQA.

12 **V. Special Status Plants.**

13 Two appendices attached to the EIR³ provide an in depth analysis and disclosure
14 of special status plants. The County's findings relating to the special status plants are
15 supported by substantial evidence. Which specific plants will be impacted cannot be
16 determined because the exact location of the buildings on the site has not been
17 determined. Mitigation measure MM 3.4-3 is designed to accommodate the uncertainty of
18 the impacts on the plants. It requires pre-construction botanical surveys be conducted by
19 a qualified biologist. If avoidance of a special-status plant is not feasible, compensatory
20 planting or transplanting shall occur. Those plants would be subject to monitoring to
21 ensure success of the plants⁴. (AR 6387-6388.) This mitigation measure complies with

22 _____
23 * The appendices are labeled as BRA1 (AR2489-2926) and BRA2 (AR2927-3403).

24 _____
These requirements also apply to initial vegetation clearing along proposed roadways. (AR 6387.)

1 CEQA. (cf. *Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Ca .App.4th
2 899, 943.)

3 **VI. Project Alternatives.**

4 "The wisdom of approving [a] project, a delicate task which requires a balancing of
5 interests, is necessarily left to the sound discretion of the local officials and their
6 constituents who are responsible for such decisions. The law . . . simply requires that
7 those decisions be informed, and therefore balanced." (*Citizens of Goleta Valley v. Board*
8 *of Supervisors* (1990) 52 Cal.3d 553, 576.) "[F]easibility' under CEQA encompasses
9 'desirability' to the extent that desirability is based on a reasonable balancing of the
10 relevant economic, environmental, social, and technological factors." (*City of Del Mar v.*
11 *City of San Diego* (1982) 133 Cal.App.3d 401, 417.)

12 Petitioners contend the County's finding of infeasibility of Alternative C was not
13 supported by substantial evidence. With respect to Alternative C, the County concluded,
14 "[G]iven that the Reduced Intensity Alternative would result in significantly fewer
15 economic benefits, the County finds that the Reduced Intensity Alternative does not
16 warrant approval in lieu of the Proposed Project." Economic benefits are key goals of the
17 project. The stated project objectives included economic growth, expanding high-end
18 hospitality and construction employment opportunities, and increasing revenues for the
19 County. (AR 6769.) Alternative C would restrict the overall luxury market resort and
20 residential community appeal; reduce revenues and workforce; and reduce marketability
21 to investors, buyers and consumers in the high-end luxury resort market. (AR 53789-

22
23
24

1 53791.) The evidence supports the conclusion that Alternative C would result in fewer
2 economic benefits to the County.⁵

3 Intervenor suggests the County should have considered alternative locations
4 closer to a transit stop because GHG emissions would have been reduced in such a
5 location.⁶ The Project consists of high-end residential, resort, and recreational facilities. It
6 is speculative to conclude consumers of the project will travel from out of the area by
7 public transit.

8 "It is [the petitioner]'s burden to demonstrate inadequacy of the EIR. [A petitioner]
9 must therefore show the agency failed to satisfy its burden of identifying and analyzing
10 one or more potentially feasible alternatives. [A petitioner] may not simply claim the
11 agency failed to present an adequate range of alternatives and then sit back and force
12 the agency to prove it wrong." *Mount Shasta Bioregional Ecology Center v. County of*
13 *Siskiyou* (2012) 210 Cal.App.4th 184, 199.) Here, Intervenor "make[s] no attempt to
14 show how such an alternative would have met most of the goals of the Project, would
15 have been potentially feasible under the circumstances, or would have reduced overall
16 environmental impacts of the Project." (*Ibid.*)

17 The County properly considered and rejected potential alternatives.

18 VII. Recirculation of the EIR.

19 Recirculation of an EIR is not required when the changes merely clarify, amplify
20

21 ⁵ Intervenor's position is that Alternative C was found infeasible based on the applicant's expectation of reduced
22 revenues. (Intervenor People of the State of California's Opening Brief filed June 15, 2021 (People's Opening Brief),
p. 35:4-6.) This interpretation is not supported by the language of the EIR as a whole. It is the economic benefits to the
County, not the applicant, that was the driving force behind the County rejecting Alternative C.

23 ⁶ People's Opening Brief, pp. 32:22-33:1.
24

1 or make insignificant modifications to an EIR. (*Laurel Heights Improvement Association v.*
2 *Regents of University of California (Laurel Heights II)* (1993) 6 Cal.4th 1112, 1130.) The
3 County found the Errata contained minor edits and clarifications which did not constitute
4 significant new information that deprived the public of a meaningful opportunity to
5 comment upon a substantial impact resulting from the Project or a mitigation measure.
6 (AR 7193.) This determination is required to be upheld if supported by substantial
7 evidence. (*Laurel Heights II, supra*, at p. 1135.) Reasonable doubts are to be resolved in
8 favor of the agency's decision. (*Ibid.*)

9 The EIR's analysis of the Project's impacts on wildfire risk was extensive. The
10 County's finding that the EIR did not include any information that showed a substantial
11 increase in the severity of the wildfire related impacts is supported by substantial
12 evidence.

13 The Errata did add an additional mitigation measure regarding the purchase of
14 OHG carbon credits. Recirculation is required only if a new mitigation measure is not
15 adopted. (*South County Citizens for Smart Growth v. County of Nevada* (2013) 221
16 Cal.App.4th 316, 330.) The mitigation measure in the Errata was adopted.

17 Based on the County's findings that the Errata contained only clarifications,
18 amplifications and insignificant modifications to the EIR, recirculation of the EIR was not
19 required.

20 **VIII. Other Issues Raised by Petitioners Not Specifically Discussed.**

21 Due to time constraints, the Court has not discussed each and every issue raised
22 by Petitioners. The Court focused on those issues which it considered to be of primary
23 importance in helping the parties to understand the reasons for the Court's ruling. As to
24

1 all other issues raised by Petitioners not specifically discussed herein, the Court has
2 determined all findings made by the County were supported by substantial evidence and
3 the County otherwise substantially complied with the requirements of CEQA.

4 **IX. Timeliness of Intervenor's Claims.**

5 A subsequent pleading may relate back to the original pleading for statute of
6 limitation purposes if it (1) rests on the same general facts as the original; (2) involves the
7 same injury; and (3) refers to the same instrumentality. (*Norgart v. Upjohn Co.* (1999) 21
8 Cal.4th 383, 408.)

9 The timeliness of Intervenor's petition is moot as to all claims denied by the Court.
10 As discussed above, the Court has concluded the EIR was deficient because the
11 County's findings regarding community emergency evacuation routes are not supported
12 by substantial evidence. This issue was addressed by causes of action in the Petitions
13 filed by CBD and CNPS. Therefore, the claim related to this issue was timely filed
14 pursuant to the relation-back doctrine.

15 **X. Conclusion.**

16 Because the County's findings regarding community emergency evacuation routes
17 are not supported by substantial evidence, the EIR does not comply with CEQA. Had the
18 findings regarding emergency evacuation routes been supported by substantial evidence,
19 the Court would have concluded the EIR complied with CEQA and therefore denied each
20 of the Petitions.

21 **Order**

22 The Court orders as follows:

- 23 1. Respondent's and Real Party in Interest's Joint Motion to Augment the

1 Administrative Record filed August 17, 2021, is granted. Exhibits A and B attached to the
2 Declaration of Charmaine G. Yu in Support of Respondent's and Real Party in Interest's
3 Joint Motion to Augment the Administrative Record are hereby added to the
4 administrative record in this action.⁷

5 2. The People's Request for Judicial Notice in Support of Opening Brief filed June
6 15, 2021, is granted. The Court takes judicial notice of Exhibits 1 and 2 attached to the
7 Declaration of Andrew R. Contreiras.


8 3. The Objection to the Declaration of Van Busic Regarding E-Mail
9 Communication in the Record filed October 15, 2021, is sustained.

10 4. A judgment will issue granting a peremptory writ of mandate ordering
11 Respondent County of Lake to set aside its (a) certification of the final EIR, (b) findings
12 relating to impacts to an adopted emergency evacuation plan, and (c) approval of the
13 Project.

14 5. Intervenor/Petitioner People of the State of California is directed to prepare a
15 form of judgment and peremptory writ of mandate.

16 6. The issues of costs and attorney fees are reserved.

17 Date: January 4, 2022

18 
19 J. David Markham
20 Judge of the Superior Court

21
22
23 ⁷ Prior to the trial in this matter, a number of motions were filed by the parties. The Court ruled on those motions prior
24 to commencement of the trial. At the request of counsel, orders relating to those motions are contained herein.

Center for Biological Diversity vs. County of Lake et al CV421152

PROOF OF SERVICE

I am a Deputy Clerk of the Superior Court of California, County of Lake. I am over the age of 18 and not a party to the action to which this document is attached.

January 4, 2022- On this date, I mailed a true copy of the attached document to the person(s) whose name(s) are set forth below by placing said copy in a sealed envelope addressed to each of said person(s), at the address set forth below, which envelope was then sealed and postage fully prepaid, and deposited in the mail at Lakeport, California to be delivered by United States mail.

Peter Broderick-Center for Biological Diversity
1212 Broadway, Ste 800
Oakland, CA 94612

Nicole Johnson & Anita Grant – by courthouse mailbox

Arthur F Coon – Miller Starr Regalia
1331 N California Blvd, 5th Fl
Walnut Creek, CA 94596

Andrew Contreiras/Attorney General of Calif
PO Box 85206
San Diego, CA 92101

Jonathan R. Bass/COBLENTZ PATCH DUFFY & BASS
One Montgomery St, STE 3000
San Francisco, CA 94104-5500

Rebecca Davis- Lozeau/Drury LLP
1939 Harrison St, Ste 150
Oakland, CA 94612

Krista D. LeVier, Court Clerk

Dated: January 4, 2022

By: YB
Yolanda Blum
Deputy Court Clerk