SUPERIOR COURT OF CALIFORNIA

COUNTY OF MARIN

FRIENDS OF MUIR WOODS PARK; WATERSHED ALLIANCE OF MARIN, Petitioners/Plaintiffs, v. COUNTY OF MARIN; BOARD OF SUPERVISORS OF THE COUNTY OF MARIN; and DOES I through X, Respondents/Defendants, DANIEL WEISSMAN, an individual, and a California Corporation; and DOES XI through XX, Real Parties in Interest.	Case No. CIV 2003248 ORDER AFTER HEARING **HON. ANDREW E.SWEET**

Petitioners' Petition for Writ of Mandate is granted in part. The Court finds the Initial Study does not satisfy the informational requirements of CEQA Guidelines, Section 15063, with respect to three areas: (1) the description of the Project as it pertains to the location of surplus fill, to the extent left on-site; (2) the current condition of soil stability around the fire road; and (3) the location of drainages on the property in relation to stream or wetland conservation areas, any mechanisms to be employed to divert water from these areas as discussed by the consultant at the Board of Supervisors hearing, and associated environmental impacts, if any, from the drainages and diversion of water from those areas. The Petition is denied as to all other issues raised by Petitioners.

The Court issues a limited writ directing the County to set aside its resolutions adopting the mitigated negative declaration and approving the Project, and to take further action as necessary to comply with CEQA and the Guidelines, specifically Section 15063. The Court does not direct the

County to prepare an EIR as Petitioners have not identified substantial evidence supporting a fair argument that the Project may have a significant effect on the environment based on the Administrative Record lodged and certified in this matter on August 4, 2021. Instead, the County must satisfy the instructional requirements of CEQA Guidelines in section 15063, described above, including weather to issue a Mitigated Negative Declaration or order and Environmental Impact Report.

To provide guidance to the parties, the Court expects any further judicial review will be limited to the Administrative Record lodged and certified in this matter on August 4, 2021, plus the addition of any new information limited to the three areas that are the subject to this limited writ - (1) the description of the Project as it pertains to the location of surplus fill, to the extent left on-site; (2) the current condition of soil stability around the fire road; and (3) the location of drainages on the property in relation to stream or wetland conservation areas, any mechanisms to be employed to divert water from these areas as discussed by the consultant at the Board of Supervisors hearing, and associated environmental impacts, if any, from the drainages and diversion of water from those areas.

The Court expects that any further judicial review will not include additional information or evidence beyond that already in the Administrative Record lodged and certified in this matter on August 4, 2021, concerning environmental impacts that are not subject to the three issues identified in this limited writ.

The Court retains jurisdiction over these proceedings until it determines that the County has complied with CEQA.

Factual Background

Real Party in Interest Daniel Weissman ("Weissman") owns the property at 455 Panoramic Highway in Mill Valley, an 8.29 acre parcel with APN 046-161-11. (AR 54, 1561.) Weissman also owns an adjoining 1.86 parcel at 357 Panoramic Highway. (AR 1561.) Weissman's personal residence is located on the larger parcel, and includes a 2,745 square foot single family residence, a 1400 square foot four car garage, and a 480 square foot detached accessory building. A paved, gated

driveway provides access to his home from Panoramic Highway. A gate to a fire road within the lower portions of the site is also located along Panoramic Highway. (AR 54, 63, 914.)

In 2014, Weissman brought approximately 1200 cubic yards of soil onto the property to elevate the fire road without authorization from regulatory agencies. A notice of violation was posted on the site and Weissman was notified to stop all grading work. (AR 54, 731.) The Department of Public Works decided that given Weissman's statements that he intended to submit an application to subdivide the property, it would wait for him to do so rather than processing a permit for the work at that time and the grading work he performed would be reviewed in connection with his application. (AR 701.)

In 2016, Weissman applied to the Homestead Valley Sanitary District for sewage hookups for up to 16 units and was given a "will serve" letter. (AR 4524.) In February 2017, Weissman applied to subdivide the 8.29 acre lot into 13 single-family lots and to develop the 1.86 acre lot for one new single family residence. (AR 914, 1561-1562, 3690.) The application included a master plan for the property that would have included both market rate and affordable housing. (AR 3690.)

After receiving comments regarding his 2017 application, in February 2018, Weissman submitted a revised application to the County. The revised application excluded the smaller 1.86 acre parcel and proposed a tentative map to divide the larger 8.29 parcel into three separate single family residential lots of approximately .89, 2.22 and 5.18 acres, respectively, with proposed building envelopes on each lot (the "Project"). (AR 7, 1786-1803). The Project includes the improvement of the existing driveway to provide access to the two new lots, the development of new on-site sewage disposal systems and a stormwater management system, and grading of portions of the property. (AR 63-64.)

The County engaged a consultant, Sicular Environmental Consulting & Natural Lands Management ("Sicular"), to assist in processing Weissman's application. An Initial Study ("Initial Study" or "IS") was prepared for the Project. (AR 53-221.) The Initial Study concluded that the only environmental issue areas for which the Project could have a significant impact are air quality (Section 3), biological resources (Section 4), and noise (Section 13). (AR 71.) The Initial Study further concluded that the Project will have a less-than-significant impact on these areas with the

implementation of specific mitigation measures. (AR 83-120, 179-185.) The measures included reduced emissions from construction vehicles, wildlife surveys, tree surveys, a vegetation management plan, cleaning equipment, and restrictions on construction times. (AR 32-37, 88, 109-117, 184.)

In evaluating potential impacts, the Initial Study found that the development of the two newly created residential lots was a reasonably foreseeable consequence of approval and thus were part of the Project. (AR 54.) The Initial Study assumes that if the Project is approved, the existing residence would remain in newly created Lot 1 and new residences would be built on new Lots 2 and 3. (AR 61.) The proposed map designates building envelopes on each of the three lots and the Initial Study provides for estimated square footage of the building envelope area and maximum allowable building floor area for each lot. (*Ibid.*) The Initial Study states that "[i]f the Project is approved, no construction could occur outside of these building envelopes without a new application and approval to alter the Tentative Parcel Map. Therefore, this Initial Study assumes that future residential development following Project approval, if such approval is forthcoming, would be within the mapped building envelopes." (AR 61.) The Initial Study further states that development of one single family dwelling and one ADU on each lot would be principally permitted, and that the single-family residences would require design review. (*Ibid.*)

Based on the Initial Study, the County determined that a mitigated negative declaration ("MND"), prepared by Sicular, was appropriate. (AR 5-6, 219.) The IS and proposed MND were distributed to agencies and other parties to commence a 45-day period for public review and comment on the MND. (AR 40, 68.) Following the 45-day public review period, a Response to Comments was prepared by Sicular. (AR 27, 468-700.)

On July 27, 2020, the Planning Commission held a public hearing where Weissman and several members of the public spoke. (AR 20-21, 1582-1695.) Weissman stated that the Project had been reduced due to the comments he received regarding his previous proposed 13-lot subdivision. (AR 1607-1608.) He also stated that he had no present intention to further subdivide the property given the time and expense involved. (AR 1612-1613.) The Planning Commission voted to adopt

the MND and approve the tentative map with a modification requiring the lot line between Lot 1 and Lot 3 to be adjusted so an existing leach field would be entirely on Lot 1. (AR 7-21.)

On August 5, 2020, Petitioners filed an appeal with the Board of Supervisors. (AR 22, 840-882.) Sicular prepared a memorandum responding to certain points raised by the appeal. (AR 883-897.) Approximately a week before the Board of Supervisors hearing, a neighbor submitted a letter prepared by Lotic Environmental Services (the "Lotic Letter"). (AR 4097-4109.) The County engaged Sutro Science, LLC ("Sutro") to evaluate the points raised in the Lotic Letter. Sutro concluded that the letter did not contain any substantial new evidence to support a fair argument of a significant impact and that the evidence in the record supported the findings presented in the Initial Study. (AR 3679-3682.) Planning Commission staff presented a report recommending that the Board of Supervisors deny the appeal. The report incorporated responses to the public comments received since the Planning Commission hearing. (AR 817-1560.)

At the Board of Supervisors hearing on October 6, 2020, Weissman and several members of the public spoke about the Project. (AR 23, 1696-1781.) Weissman again stated he had no present intention to further develop the property. (AR 1776-1777.) The Board of Supervisors denied the appeal and approved the Project with the condition that buildings be constructed entirety within the respective building envelopes. (AR 22-41.) The Board found among other things that the Project is consistent with the density established by the Tamalpais Area Community Plan ("TACP") (AR 23-24) and that the IS and MND were legally adequate and that Petitioners did not provide any substantial evidence that would constitute a fair argument of a potentially significant environmental impact resulting from the Project. As a result, the Board of Supervisors found that no EIR was required. (AR 40.) The Board of Supervisors also approved site improvements to accommodate the two new lots, specifically, the installation of two new on-site sewage disposal systems to serve the two lots, the development of a storm water management system to address run off, and the improvement of the existing driveway to extend access to the two lots. (AR 33.) The Board imposed certain conditions on the approval, including mitigation measures for special status wildlife and habitat, bats, trees, plant species, and noise and other construction disturbances. (AR 34-37.)

Petitioners filed a petition for writ of mandate on November 4, 2020, asserting claims for violation of the California Environmental Quality Act ("CEQA") and the California Subdivision Map Act ("SMA").

Judicial Notice

The Court takes judicial notice, sua sponte, of the Marin Countrywide Plan and Tamalpais Area Community Plan. (Evid. Code §452; *Scott v. JPMorgan Chase Bank, NA* (2013) 214 Cal.App.4th 743, 752 ["the court may take judicial notice on its own volition"].)

Discussion

I. Count One: CEQA

A. Standard of Review

1. Scope of Project

Several courts have held that the determination of the scope of a project, i.e., what actions constitute the "whole of the action" under CEQA Guidelines Section 15378, is a question of law subject to de novo review without deference to the agency's determination. (*Los Angeles Depart. of Water & Power v. County of Inyo* (2021) 67 Cal.App.5th 1018; *Poet, LLC v. State Air Resources Board* (2017) 12 Cal.App.5th 52, 100; *Nelson v. County of Kern* (2010) 190 Cal.App.4th 252, 272; *Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora* (2007) 155 Cal.App.4th 1214, 1224.) At least one court has applied an abuse of discretion standard. (*See Save Round Valley Alliance v. County of Inyo* (2007) 157 Cal.App.4th 1437, 1448.)

2. Compliance with Informational Requirements for Initial Study/MND

A court reviews an entity's compliance with the informational requirements for an initial study under Section 15063 of the Guidelines under an abuse of discretion standard. (*See San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School Dist.* (2006) 139 Cal.App.4th 1356, 1375; *Aptos Council v. County of Santa Cruz* (2017) 10 Cal.App.5th 266, 288.)

"The failure to comply with the law subverts the purposes of CEQA if it omits material necessary to informed decisionmaking and informed public participation. CEQA places the burden of environmental investigation on government rather than the public. Where an agency fails to provide

an accurate project description, or fails to gather information and undertake an adequate environmental analysis in its initial study, a negative declaration is inappropriate." (*Lighthouse Field Beach Rescue v. City of Santa Cruz* (2005) 131 Cal.App.4th 1170, 1202 [citations and internal quotations omitted].)

"When the informational requirements of CEQA are not complied with, an agency has failed to proceed in 'a manner required by law' and has therefore abused its discretion." (*Id.* at p. 1200 [citation and internal quotation omitted].) However, there is no presumption that the error is prejudicial. (Cal. Pub. Res. Code § 21005(b).) "Insubstantial or merely technical omissions are not ground for relief." (*Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 463.) "'A prejudicial abuse of discretion occurs if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process.'" (*Id.* [citation omitted].)

A defective initial study does not necessarily require the court to find prejudice or require the preparation of an EIR. (*Lighthouse*, 131 Cal.App.4th at p. 1202; *Silverira v. Las Gallinas Valley Sanitary Dist.* (1997) 54 Cal.App.4th 980, 992 ["An inadequate initial study does not automatically make an EIR necessary"].) The absence of evidence in the record on a particular issue does not automatically invalidate a negative declaration, as it is not evidence that there will be a significant impact. (*Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1379.) Once the informational requirements are ultimately met, the entity can still determine at that time that a negative declaration or mitigated negative declaration is appropriate. (*Lighthouse*, 131 Cal.App.4th at p. 1202.)

3. Significant Impact Findings

If an agency approves a project for which it has certified a negative declaration or a mitigated negative declaration, and the decision is challenged for CEQA compliance, the court will find an abuse of discretion if there is substantial evidence to support a fair argument that the project may have a substantial environmental impact. (*Save Agoura Cornell Knoll v. City of Agoura Hills* (2020) 46 Cal.App.5th 665, 675–676.)

"Substantial evidence" is "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions

might also be reached." (Guidelines, § 15384(a).) "Substantial evidence supporting a fair argument must be of 'ponderable legal significance ... reasonable in nature, credible, and of solid value.'" (*Jensen v. City of Santa Rosa* (2018) 23 Cal.App.5th 877, 896 [citation omitted].)

"Relevant personal observations of area residents on nontechnical subjects may qualify as substantial evidence for a fair argument. So may expert opinion if supported by facts, even if not based on specific observations as to the site under review. Where such expert opinions clash, an EIR should be done." (*Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 928 [citations omitted].) "On the other hand, mere argument, speculation, and unsubstantiated opinion, even expert opinion, is not substantial evidence for a fair argument. 'The existence of public controversy over the environmental effects of a project shall not require preparation of an environmental impact report if there is no substantial evidence in light of the whole record before the lead agency that the project may have a significant effect on the environment.'" (*Id.* at pp. 928-929 [citations omitted].)

The petitioner bears the burden of showing, by citation to the record, that substantial evidence exists supporting a fair argument of significant environmental impact. (*Newtown Preservation Society v. County of El Dorado* (2021) 65 Cal.App.5th 771, 781-82; *Leonoff v. Monterey County Board of Supervisors* (1990) 222 Cal.App.3d 1337, 1348.) "'Unless the administrative record contains this evidence, and [plaintiffs] cite[ ] to it, no 'fair argument' that an EIR is necessary can be made.'" *Parker Shattuck Neighbors v. Berkeley City Council* (2013) 222 Cal.App.4th 768, 778 [citation omitted].)

The fair argument standard is a "low threshold" test for requiring the preparation of an EIR. (*Newtown*, 65 Cal.App.5th at p. 781.) Whether a fair argument exists is a question of law, and the courts owe no deference to the entity's determination. Review is de novo, with a preference for resolving doubts in favor of environmental review. (*Ibid.*) Although review is de novo, courts give the entity the benefit of the doubt on legitimate, disputed credibility issues. Further, the entity has discretion to determine whether evidence offered by the citizens claiming a fair argument exists meets the definition of "substantial evidence". (*Ibid.*)

Citing *Citizens for a Megaplex-Free Alameda v. City of Alameda* (2007) 149 Cal.App.4th 91, 112-113, Weissman argues that Petitioners have the burden of setting forth all material evidence in

the record, not merely its own evidence, and that failure to do so is deemed a concession that the evidence supports the findings. The *Citizens for a Megaplex-Free* case did not address this issue in the context of an initial study/MND but rather a subsequent CEQA document. Weissman does not cite to any case applying the same standard in the context of a challenge to an initial study/MND. The Court does not find the standard set forth in *Citizens for a Megaplex-Free Alemeda* to be applicable here. Petitioners only bear the burden of demonstrating by citation to the record the existence of substantial evidence supporting a fair argument of significant environmental impact.

B. Statement of Issues

Weissman argues that Petitioners have forfeited their CEQA challenge because they failed to file a statement of issues as required by Public Resource Code Section 21167.8(f), which provides that "[n]ot later than 30 days from the date that notice of certification of the record of proceedings was filed and served in accordance with Section 21167.6, the petitioner or plaintiff shall file and serve on all other parties a statement of issues which the petitioner or plaintiff intends to raise in any brief or at any hearing or trial . . . ." The notice of lodging and certification of the AR was filed on August 4, 2021, making Petitioners' statement due no later than September 3, 2021. Petitioners never filed a statement in accordance with this statute.

Petitioners do not dispute that they did not file a statement of issues, but argue that they gave Weissman ample notice of their allegations because their Petition, which was served on Weissman on December 30, 2020, frames the issues and no new issues are addressed in their Opening Brief. As a result, Petitioners argue, there is no prejudice to Weissman from their failure to file a statement of issues.

The parties do not cite to any authority as to the appropriate consequences or remedy, if any, that apply to a failure to serve a statement of issues required by Section 21167.8(f). The Court notes that in *Board of Supervisors v. Superior Court* (1994) 23 Cal.App.4th 830, 849 the court found that a petitioner's failure to serve its petition in accordance with a different section, Section 21167.6(a), did not warrant dismissal of the petition where there was no showing that the respondent was prejudiced. While this decision involves a different code section within the same Chapter 6 ("Limitations"), the Court will apply the same analysis here. Weissman does not argue he was prejudiced in any way by

Petitioners' failure to file a statement of issues or that the issues discussed by Petitioners in their brief are different in any way from the issues set out in their Petition. The Court therefore does not dismiss Petitioners' CEQA challenge on this basis.

C. Scope of the Project/Cumulative Impacts

Petitioners argue that the IS/MND is inadequate because it addresses the impact of 2 homes only rather than the combined impacts of 12 total potential homes on the property. These 12 potential homes include Weissman's existing home, the two additional homes approved in the subdivision map, a fourth main home that would result from a lot split of Lot 3, and the eight potential ADUs and JADUs that a builder can develop "by right" in Marin County without further environmental review. Petitioners argue that this right derives from Government Code Sections 65852.2 and 65852.22, which require public entities to ministerially approve a permit application for building two ADUs in addition to the primary home. Petitioners argue that the development of these ADUs is foreseeable due to Weissman's previous applications to develop significantly more homes on the property.

The scope of environmental review conducted for an initial study must include the entire project. (*Nelson*, 190 Cal.App.4th at p. 267.) CEQA defines a "project" as an "activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment . . . that involves the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies." (Pub. Res. Code § 21065.) The CEQA Guidelines further provide that a "project" means "*the whole of an action*, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment . . . ." (CEQA Guidelines, § 15378 (a) [emphasis added].) "This big picture approach to the definition of a project (i.e., including 'the whole of an action') prevents a proponent or a public agency from avoiding CEQA requirements by dividing a project into smaller components which, when considered separately, may not have a significant environmental effect." (*Nelson*, 190 Cal.App.4th at p. 271.) CEQA also requires that an EIR contain an evaluation of the cumulative impacts caused by other past, present and reasonably

foreseeable probable future projects. (CEQA Guidelines, §§ 15130(a) and 15355; Pub. Resources Code, § 21083(b)(2).)

In addressing reasonably foreseeable conduct, an environmental review need not discuss future action "that is merely contemplated or a gleam in a planner's eye." (*Laurel Heights Improvement Ass'n v. Regents of University of California (1988)* 47 Cal.3d 376, 398.) "[M]ere awareness of proposed expansion plans or other proposed development does not necessarily require the inclusion of those proposed projects in the EIR. Rather, these proposed projects must become 'probable future projects.' [Citation.]" (*Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1127; *see Friends of the Sierra Railroad v. Tuolumne Park & Recreation Dist.* (2007) 147 Cal.App.4th 643, 657 [even though prediction of *some* future development was not speculative, EIR was not required when there were "no specific plans on the table"]; *Aptos Council,* 10 Cal. App. 5th at pp. 293-294) [county did not err in approving negative declaration for hotel regulating ordinance by failing to consider impacts from future hotel developments, where such developments were too speculative]; *Pala Band of Mission Indians v. County of San Diego* (1998) 68 Cal.App.4th 556, 575 [EIR not required to evaluate impacts of potential landfill sites where sites were only tentatively reserved and record did not show it was reasonably foreseeable that any of the sites would actually be developed]; *Rominger v. County of Colusa* (2014) 229 Cal.App.4th 690, 711-712, disapproved on other grounds in *Union Medical Marijuana Patients, Inc. v. City of San Diego* (2019) 7 Cal.5th 1171 [county did not fail to analyze the "whole" of a subdivision project where there was no evidence the unanalyzed uses were a reasonably foreseeable consequence of the subdivision].) "'[W]here future development is unspecified and uncertain, no purpose can be served by requiring an EIR to engage in sheer speculation as to future environmental consequences.'" (*City of Maywood v. Los Angeles* (2012) 208 Cal.App.4th 362, 397-398 [citations omitted].)

"[A]n EIR must include an analysis of the environmental effects of future expansion or other action if: (1) it is a reasonably foreseeable consequence of the initial project; and (2) the future expansion or action will be significant in that it will likely change the scope or nature of the initial project or its environmental effects. Absent these two circumstances, the future expansion need not be considered in the EIR for the proposed project." (*Laurel Heights*, 47 Cal.3d at p. 396.)

In *Save Round Valley Alliance v. County of Inyo* (2007) 157 Cal.App.4th 1437, the court held that an EIR was not deficient for failing to discuss the possibility that future owners would build ADUs on subdivided lots, even though the county had adopted an ordinance allowing for their construction. The court rejected a similar argument made by Petitioners here, and reasoned that construction of the ADUs was too uncertain and speculative:

> The Inyo County ordinance provides the Planning Commission with discretionary decision-making authority regarding any application for a second dwelling unit. (Inyo County Code, § 18.78.340D.) SRVA contends, however, that such discretionary authority has been superseded by conflicting provisions of Government Code section 65852.2, which provide that applications for second dwelling units must be considered ministerially without discretionary review. (See Gov. Code, § 65852.2, subds. (a)(3), (b)(1).) We need not decide this issue, however, because regardless of whether the Planning Commission retains discretionary authority concerning second dwelling unit applications, the possibility that future lot owners will or will not build a second unit is extremely uncertain, and any impact of such second units is highly speculative.
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> Whether a conditional use permit to build a second unit will ever be sought depends initially upon the desires of future lot owners, who are unknown. Although a conditional use permit can be sought for a second unit, there is no factual basis for believing that a future lot owner is likely to do so. Any conclusions about their intentions to build second units would therefore be pure speculation. There is simply nothing in the record (other than SRVA's speculative comment) to remotely suggest that any future lot owner would ever desire to build a second unit.

(*Id.*) While other factors existed in *Save Round Valley* that are not applicable here (i.e., CC&R limitations), the same rationale applies. Weissman notes that his family purchased the property in 2009 and the property is already developed with his own residence, but no ADUs have been developed on the property during this time. Petitioners point to no evidence in the record that Weissman or any potential future owner have any plan to build ADUs on any of the units. Any such plans or intentions are purely speculative. Just because a lot owner *can* build an ADU, and the process may be essentially ministerial under state law, does not mean that it is reasonably foreseeable that he *will*.

Similarly, Petitioners fail to cite to any evidence in the record that it is reasonably foreseeable that a lot split of Lot 3 would occur (creating the opportunity for 3 of the 12 potential units Petitioners contend can be built).[1] Petitioners only mention this in passing, noting that Weissman previously applied for a larger project and that the County acknowledged that Weissman could split Lot 3. Weissman stated at the hearings before both the Planning Commission and the Board of Supervisors that he had no current plan to further subdivide the property. Weissman also points out that the Project conditions further restrict development because the approved tentative map requires any development on the parcels to be within the designated building envelopes.

Petitioners do not point to any contrary evidence of Weissman's intent. The mere fact that Weissman previously sought a greater subdivision is not evidence of any current intent to do so. Further, the mere fact that the County acknowledged one lot *could* be further subdivided does not mean it is reasonably foreseeable that it will be. Petitioners note in their Reply that the County also refused to impose a deed restriction on further division of Lot 3. This does not change the analysis or make additional development on that lot any more reasonably foreseeable.

The cases cited by Petitioners are distinguishable in that unlike here, there was some evidence in the record that the future development was likely or reasonably foreseeable as opposed to merely possible. (*See Aptos Council,* 10 Cal. App. 5th at p. 293 [noting that cases finding that future development should be considered in environmental review "share a commonality: the potential impacts were all *reasonably foreseeable*"] [emphasis in original].) For example, in *Laurel Heights, supra*, 47 Cal.3d at p. 396, the court noted that there "is no doubt . . . that in this case there will be future use" where the draft EIR acknowledged the facility would be used and even estimated the number of faculty, staff and students who would occupy it. In *Arviv Enters., Inc. v. South Area Planning Comm'n* (2002) 101 Cal.App.4th 1333, 1346, the developer admitted at the Planning Commission hearing that he envisioned a much larger project (21 homes) than the two or three homes being reviewed. In *City of Antioch v. City Council* (1986) 187 Cal.App.3d 1325, the court held that the county should have considered future development when reviewing impacts from construction of a roadway and appurtenant sewage and water distribution facilities, because even though they were

[1] The parties do not address in any detail the extent to which a further subdivision of Lot 3 would involve additional CEQA review.

not attached to any existing development at that time, they could not be considered in isolation because "the sole reason to construct the road and sewer project is to provide a catalyst for further development in the immediate area." (*Id.* at p. 1337.)

D. Description of the Project

1. Excess fill

Petitioners argue that the IS/MND does not sufficiently describe the Project because it does not address the placement of excess fill on the property if the fill is not removed off-site during and/or after construction. Specifically, Petitioners point out that the IS/MND states that approximately 140 cubic yards of excess fill from the Project resulting from new grading will be "stockpiled on-site or hauled off-site and disposed" (AR 64) but does not state where the fill will be stockpiled if left on-site.[2] Petitioners argue that this omission is significant because the site drains to streams that are tributary to Redwood Creek, which in its lower reaches supports Coho salmon, an endangered species, and steelhead trout, a threatened species, and the average slope of the project site is 36.76 percent. (AR 55, 67.)

The CEQA Guidelines, Section 15063(d)(1), provides that an initial study contain, in "brief form", a description of the Project. (Guidelines, § 15063(d)(1); *see Lighthouse*, 131 Cal.App.4th at p. 1192; *El Dorado County Taxpayers for Quality Growth v. County of El Dorado* (2004) 122 Cal.App.4th 1591, 1598.) An initial study does not need to contain the same in-depth discussion or analysis as an EIR. (Guidelines, § 15063(a)(3) ["an initial study is neither intended nor required to include the level of detail included in an EIR"].)

The requirement that a project be described only in "brief form" indicates that an initial study does not need to address every detail that may be involved in a project. Here, there appears to be no dispute that the IS/MND does not address the specific location for the placement of excess fill, if left on-site. The question is whether the failure to disclose this information in the IS/MND is prejudicial. As noted above, an entity abuses its discretion when it fails to comply with the informational requirements of CEQA. However, the abuse of discretion must be shown to be prejudicial; the

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[2] In response to public comments, staff explained that the IS/MND "assumed" the excess fill would be transported off-site and that this transport was contemplated and included in its determination that there would be no significant impact on traffic or emissions. (AR 622-623.)

absence of information alone does not require the preparation of an EIR. (Pub. Resources Code § 21005; *Lighthouse*, 131 Cal.App.4th at p. 1200; *Aptos*, 10 Cal.App.5th at p. 296; *Schenck v. County of Sonoma* (2011) 198 Cal.App.4th 949, 959.)

While the IS/MND does not specify where the 140 cubic yards of excess fill will be placed if left on-site, it does require certain practices or measures to be implemented with respect to stockpiled fill, both during and after construction, to minimize or eliminate any potential impacts regardless of where the fill is placed. (AR 150-153, 158.) As a result, the failure to identify the specific location may not be prejudicial. Petitioners do not address these measures in their briefs or explain how they are inadequate or insufficient to mitigate any potential impacts from stockpiled fill left onsite. Petitioners state in their Opening Brief that "[s]oil erosion anywhere on the site will introduce sediment into these tributaries of Redwood Creek, and over time, ultimately into Redwood Creek itself, degrading its salmonid habitat. AR 4449" (POB, p. 12:9-11), but the cited page from the AR does not support this statement.

The IS/MND states that there are two streams, tributaries to Redwood Creek, that flow along the western and eastern edges of the Project site and meet just south of the property boundary. The average slope of the property is 36.76%. (AR 55.) The IS/MND also acknowledges that Redwood Creek provides habitat for Coho salmon and steelhead. (AR 67, 105) Given these important characteristics of the Project site, the description of the Project is lacking in that the specific plans for excess fill from the Project's grading activities are not addressed. The Response to Comments notes that the 140 cubic yards is an approximate square pile 30 feet on a side and 4 feet, 4 inches high, and would fit in 15 standard 10 cubic yard dump truck loads. (AR 622-623.) This is not an insignificant amount. If the fill is expected to be removed off-site or placed in an area where potential erosion into the streams is not an issue, the issue of surplus fill may be summarily addressed. However, an environmental review should address this issue in more detail given the County's recognition that the streams downslope are tributaries to Redwood Creek.

2. Conditions resulting from 2014 grading of the fire road

Petitioners also contend that the IS/MND fails to include an adequate description of the Project because it does not adequately discuss the conditions resulting from Weissman's 2014

grading of the fire road. Petitioners contend that in connection with the 2014 illegal grading, "contemporaneous heavy rainfall transported much of this unconsolidated fill downslope, and very probably into the adjacent streams, and thence into Redwood Creek. AR 64, 131, 1824." (OB, pp. 13:1-2.) The cited pages of the record do not support this contention. Page 64 is a page from the IS which merely notes that the IS considers the impacts, if any, of the 2014 grading. Pages 131-132 address landslides, including an old landslide which overlaps with the fire road, but does not address whether grading fill went downslope into the streams. Page 1824 is a page from the 2015 GeoTech report that discusses downslope migration of groundwater generally and the existence of landslide areas at the site. None of these pages supports Petitioners' statement that soil from the 2014 grading made its way downslope into the streams or Redwood Creek. This statement is speculative at best.

In contrast, the IS/MND states a site visit was conducted on March 14, 2019 which showed the erosion control features installed by Weissman to be present and in good repair, and appeared to be effective in minimizing erosion and sedimentation associated with the grading. The IS/MND further states that "vegetative cover along with the erosion control features required by the County, San Francisco Regional Water Quality Control Board, and CDFW has addressed any ongoing erosion and sedimentation associated with the Fire Road and there is no residual or ongoing impact relating to sedimentation or the degradation of water quality." (AR 153.) The Responses to Comments also address this issue, noting that these two agencies found the site to be stabilized with satisfactory erosion control measures in place. (AR 479.) While, based on the timing of the grading work, there may have been some erosion and downslope movement of sediment in the immediate area surrounding the work, photos showed that downslope areas were well-vegetated and not disturbed, and likely protected the tributary stream and downstream resources from being affected. (AR 480.) Further, "the resource agencies with technical jurisdiction over stream and wetland features determined that no fill or grading occurred within the bed or bank of ephemeral or intermittent streams or wetlands, or otherwise affected surface waters subject to their jurisdiction." (AR 485.) The response concludes that "[a]ll of the evidence, including County staff's contemporaneous communications and photographs, and the fact that no rain fell during the period when most of the grading work was completed, supports the impact conclusion presented in the Initial Study that no

significant erosion or sedimentation of Redwood Creek or other downgradient receiving surface waters occurred as a result of the Fire Road grading." (AR 486.) Petitioners point to no contradicting evidence as any impact from the 2014 grading of the fire road.

In any event, the CEQA Guidelines and case law applying those guidelines provide that an environmental study must only describe the physical environmental conditions "as they exist at the time the notice of preparation is published . . . ." (Guidelines §15125(a)(1); *see Banning Ranch Conservancy v. City of Newport Beach* (2012) 211 Cal.App.4th 1209, 1233 ["'environmental impacts should be examined in light of the environment as it exists when a project is approved,' and any illegal activities affecting the baseline environmental condition are best addressed by enforcement agencies"] [citation omitted].) Therefore, earlier impacts from the 2014 activity which no longer existed at the time the IS/MND was prepared do not need to be addressed in the IS/MND.

E. Description of the Existing Environment

Petitioners argue that the IS/MND fails to accurately describe the environmental setting as required by Section 15063(d)(2) of the Guidelines. The "environmental setting" description requirement for an initial study does not require the depth of analysis that is required for a description of the "environmental conditions in the vicinity of the project" requirement of an EIR. (*Lighthouse*, 131 Cal.App.4th at p. 1192.) Section 155063, which sets forth the requirements of an initial study, expressly states that the initial study is to contain "in brief form" an identification of the environmental setting. (Guidelines, § 15063(d)(2).)[3]

"An initial study is the preliminary environmental analysis (see Guidelines, § 15365) and its purposes include '[p]rovid[ing] the lead agency with information to use as the basis for deciding whether to prepare an EIR or negative declaration,' '[e]nabl[ing] an applicant or lead agency to modify a project, mitigating adverse impacts before an EIR is prepared, thereby enabling the project to qualify for a negative declaration,' and '[p]rovid[ing] documentation of the factual basis for the finding in a negative declaration that a project will not have a significant effect on the environment.'

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[3] Petitioners cite *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713 for the proposition that a description must include the exact location and extent of riparian habitat. *San Joaquin Raptor* addressed the adequacy of an EIR, not an initial study, finding the FEIR's description of the environmental setting was inadequate because, among other things, it did "not reflect even minimal investigation into the exact location and extent of riparian habitats either adjacent to or within the site." (*Id.* at p. 728.)

(Guidelines, § 15063, subd. (c)(1), (c)(2), (c)(5)).” (*Lighthouse*, 131 Cal.App.4th at p. 1180.) The *Lighthouse* court described the depth of analysis required in an initial study as compared to an EIR:

> Under the CEQA Guidelines, an initial study must “contain in *brief* form: [¶] (1) A description of the project including the location of the project; [¶] (2) An identification of the environmental setting; [¶] (3) An identification of environmental effects by use of a checklist, matrix, or other method, provided that entries on a checklist or other form are *briefly* explained to indicate that there is some evidence to support the entries.... [¶] (4) A discussion of ways to mitigate the significant effects identified, if any; [¶] (5) An examination of whether the project would be consistent with existing zoning, plans, and other applicable land use controls; [¶] . . . . The Guidelines’ sample environmental checklist form is indicative of the general level of brevity that is acceptable. (See Guidelines, Appendix G.)
>
> The Guidelines define the term “environment,” consistent with statute, to mean “the physical conditions which exist within the area which will be affected by a proposed project including land, air, water, minerals, flora, fauna, ambient noise, and objects of historic or aesthetic significance.” (Guidelines, § 15360, see § 21060.5.) The Guidelines do not specially define “environmental setting” with regard to an initial study but do state in regard to EIR preparation: “An EIR must include a description of the physical environmental conditions in the vicinity of the project, as they exist at the time the notice of preparation is published, or if no notice of preparation is published, at the time environmental analysis is commenced, from both a local and regional perspective. This environmental setting will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant.” (Guidelines, § 15125, subd. (a), italics added.)
>
> An EIR’s description of the environmental setting must be sufficient to allow “an understanding of the significant effects of the proposed projects and its alternatives” but “no longer.” (Guidelines, § 15125, subd. (a).) That description should place “[s]pecial emphasis” “on environmental resources that are rare or unique to that region and would be affected by the project” and “must permit the significant effects of the project to be considered in the full environmental context.” (Guidelines, § 15125, subd. (c).)
>
> However, the Guidelines merely require an initial study, in contrast to an EIR, to briefly identify the environmental setting. (Guidelines, § 15063, subd. (d)(2); cf. Guidelines, § 15125, subd. (a).) An initial study is only a “preliminary analysis” (Guidelines, § 15365) and the regulatory requirements regarding its contents are not as demanding as those

> imposed upon an EIR. (See Guidelines, § 15063, subd. (d), cf. Guidelines, § 15120 et seq.) "[A]n initial study is neither intended nor required to include the level of detail included in an EIR." (Guidelines, § 15063, subd.(a)(3).)

(*Id.* at pp.1192-1193 [emphasis in original].)

While Section 15063 only requires a "brief" discussion, a public entity "'should not be allowed to hide behind its own failure to gather relevant data.'" (*Id.* at p. 1199 [citation omitted].) "'The negative declaration is inappropriate where the agency has failed either to provide an accurate project description or to gather information and undertake an adequate environmental analysis. An accurate and complete project description is necessary for an intelligent evaluation of the potential environmental impacts of the agency's action. Only through an accurate view of the project may affected outsiders and public decision-makers balance the proposal's benefit against its environmental cost, consider mitigation measures, assess the advantage of terminating the proposal ... and weigh other alternatives in the balance.'" (*Center for Sierra Nevada Conservation v. County of El Dorado* (2012) 202 Cal.App.4th 1156, 1171 [citations and internal quotations omitted].)

1. Soil structure, slope instability, soil runoff and hydrology

Petitioners argue the IS/MND does not adequately describe the environmental setting because the 2015 GeoTech Report, which was prepared in connection with Weissman's earlier application for the larger development of 13 lots, noted that there was some evidence of landslides on certain portions of the site (AR 1824) and that there was some yielding and instability which would require support of roadway cuts and other measures (AR 1826). Specifically, the report noted that the cuts for existing roads on the property, which included the fire road, "typically expose weak colluvial soils and deeply weathered and highly fractured bedrock which have experienced various degrees of sloughing and sliding" and the fill banks on the downward slope of the dirt roads consist of "varying thickness of relatively poor compacted fills" that are "subject to yielding and instability." The report concluded that where these roads extend across proposed lots or the risk of instability is not acceptable, it would be necessary to support the cuts with retaining walls or other measures. (*Ibid.*)

Petitioners argue that "[s]uch instability could result in downslope soil stability on neighboring properties and watercourses, including potential for landslides, erosion, soil movement,

e.g., subsidence. AR 78, 130-133." (OB, p. 14:15-16.) The citations to these pages in the AR do not support this statement. AR 78 discusses aesthetic impacts (or the lack thereof), and AR 130-133 are pages from the Initial Study which recite the GeoTech Report findings but then conclude there are no significant impacts because the portions of the site where construction would occur did not have these issues. (AR 131.)

With respect to soil conditions at the fire road itself, the IS/MND acknowledges the 2015 report's identification of the old landslide but focuses on the more recent condition of the property that at existed at the time the IS/MND was prepared approximately four years after the 2015 report. The IS/MND states that "[w]hile the fill for the Fire Road was placed on the debris of a former landslide, the grading of the Fire Road appears not to have increased the potential for future landsliding. Conversely, it is likely that grading the road bed for the Fire Road created a stable terrace on the slope that, in addition to channelizing and routing of storm flows through the culvert under the road, stabilizing the fill soils, and revegetating the slope, reduced the potential for further landsliding in this area. Therefore, impacts to slope stability on the Project site from the unpermitted grading of the Fire Road are less than significant." (AR 131-132.)

While the description of the current state of the property around the roads appears on its face to address slope instability concerns, the IS/MND does not describe the more recent investigation or studies that were conducted to reach these conclusions or support the description of the current state of the property in the IS/MND. The consultant which prepared the 2015 GeoTechnical Report prepared a supplemental report in 2018 for the current Project and did not note any differences or changes in the condition of the property from its 2015 analysis. (AR 2192-2194.) While the Guidelines require only a brief description of the existing conditions, a minimal description of the current conditions (e.g., creation of a stable terrace) without reference to any supporting study or investigation is insufficient particularly given the earlier study which is potentially inconsistent with this description. Further development of the fire road is not itself part of the Project, but the fire road extends across the lots (e.g. AR 95) and its continued use is a reasonably foreseeable use of the Project. As a result, the IS/MND does not satisfy Section 15063 with respect to its description of soil stability around the fire road.

Petitioners also argue that the IS/MND relies on disputed estimates of rainfall to further justify its finding that there will be no soil instability or landslide issues. Specifically, Petitioners challenge the statement in the IS/MND that "[t]he Project site receives mean annual precipitation of 34 inches of rain, mostly during the winter months." (AR 150.) Petitioners cite to the Lotic Letter in which the author opines that the site would have an average rainfall closer to 40.2 inches, which is approximately 15% higher than the estimate in the IS/MND. (AR 4098.)

While Petitioners contend that there is conflicting evidence in the record as to the accurate amount of rainfall at the Project site, they do not identify the qualifications or experience of the author of the Lotic Letter and fail explain how the author's discussion of rainfall numbers translates into an inaccurate description of the existing environment. Petitioners also fail to show how any use of erroneous rainfall numbers is prejudicial. As noted in the letter from Sutro which reviewed the Lotic Letter, "Lotic does not describe how the 30-year normal annual rainfall of 40.2 inches presented is relevant to the analysis of impacts presented in the Initial Study." (AR 3680.) Sutro further states that revising the rainfall information "would not alter the impact analysis or conclusions presented in the environmental document. The stormwater management system design and the assessment of impacts relating to hydrology, drainage patters, and water quality is based on specific representative design storms, not mean annual rainfall depths." (*Ibid.*; AR 1142-1144) Petitioners do not cite to any contrary evidence in the record.

2. Biological resources

a. Redwood Creek

Petitioners argue that the IS/MND fails to sufficiently describe the existing environmental condition of the streambed and riparian corridor that is a tributary to Redwood Creek, which is designated critical habitat for Coho salmon and steelhead. Petitioners state that the IS/MND does not contain any surveys for or National Marine fisheries Service data on these species or habitats which are documented to occur in Redwood Creek.

A biological assessment prepared for the earlier version of the project in 2015 addressed areas of biological interest and sensitive plant communities and habitats, evidence of special habitat species, and/or habitats that could support such species. (AR 1808-1813.) This report noted that

Coho salmon and steelhead spawn in Redwood Creek downstream of the site and that silt and other material could wash into the drainage and cover or fill in gravel beds used by Coho and steelhead for spawning. (AR 1811.) The IS/MND discusses the Redwood Creek watershed and the species that spawn there, including Coho salmon and steelhead. (AR 105-106.) The IS/MND therefore adequately describes the existing environment of the streambed and tributary to Redwood Creek, including existing habitats and species.

b. Characterization of the stream, wetland and wildlife corridors

Petitioners also contend that the IS/MND misclassifies and mischaracterizes a stream on the property as an "ephemeral" or "intermittent" "drainage" instead of a perennial blue line streambed with related riparian habitat. (E.g. AR 150.) Petitioners argue that evidence in the record shows the stream is perennial rather than ephemeral. The pages cited by Petitioners do not provide evidentiary support their statement. Pages 242 and 248 are from a letter from one of the Petitioners and include an unsupported statement about "1600 linear feet of mostly blue line perennial and intermittent creeks" and a picture of a 1910 assessors map with blue arrows, with no discussion of the current status of the map or evidentiary support for the arrows.[4] Pages 4007-4008 and 4130 cited by Petitioners are from letters from another petitioner and also do not provide adequate explanation or evidentiary support for Petitioners' position. Petitioners also cite to page 4099, which is a page from the Lotic Letter, but that page does not include the language cited by Petitioners. The Court is not required to scour the record itself to find supporting evidence for Petitioners' arguments. (*Harshad & Nasir Corp. v. Global Sign Systems, Inc.* (2017) 14 Cal.App.5th 523, 527 n. 3; *Inyo Citizens for Better Planning v. Inyo County Board of Supervisors* (2009) 180 Cal.App.4th 1, 14.)

In any event, even if the pages cited by Petitioners did indicate that there is a perennial stream, Petitioners do not explain why this alleged mischaracterization is significant or prejudicial. They do not identify any additional or different analysis that would be necessary to accurately evaluate environmental impacts if the IS/MND characterized the stream as permanent or perennial, or suggest how or why environmental impacts would be different. The Sutro Report which addressed

[4] The Lotic Letter, relied on by Petitioners, notes that this map only "presumably" indicates the stream "was a perennial or intermittent channel." (AR 4099.)

the Lotic Letter indicates that "impact conclusions would not be altered by reclassification of channels from ephemeral to intermittent, as the assessment methodology incorporates the conservative approach of assessing impacts to all on-site and downstream drainage features." (AR 3681.) Petitioners cite to no evidence to challenge or contradict this assessment.

c. Wetlands

Petitioners also argue that the IS/MND fails to adequately describe and delineate the location of wetlands. The IS/MND identifies two wetland features on the Property. One occurs along the western drainage and is entirely within the 100-foot SCA where there will be no development. (AR 111.) The second is located along the northern edge of the fire road and is approximately 180 square feet, and the proposed development is set back at least 100 feet from the wetland. (*Ibid.*) Petitioners do not explain how this description is insufficient or fails to accurately describe the wetlands.

d. Terrestrial and avian wildlife corridors

Petitioners contend that the IS/MND fails to adequately describe the terrestrial and avian wildlife corridors that run through the Project. As noted above in footnote 3, the *San Joaquin* case relied on by Petitioners does not require the exacting detail Petitioners contend is required in an initial study. Here, the IS/MND describes the species found or expected to be found at the project and the means by which this determination was reached. (AR 92-94.) The IS/MND states that documents and/or databases from several sources were reviewed for special-status species with potential to occur within the Project site identified 23 special status plans and 21 special status animal species. The consultant found that certain components necessary to support 22 of the special-status plant species did not occur within the Project site so those species were not expected to occur there, and the one species for which there was potential habitat was not found in a 2015 survey conducted during its breeding period or in a 2019 follow up survey. (AR 95-99.) The IS/MND also discusses a number of special-status animal species that have the potential to occur in the general vicinity of the Project site (AR 99-104), as well as downstream aquatic resources and the SCA and BMPs that would be implemented to protect them. (AR 105-110.) With respect to impacts on wildlife corridors, the IS/MND notes that future development would be concentrated on the northern portion of the site and that native plant communities and significant stands of native vegetation are not present within

the proposed building envelopes. Vegetated habitats beyond the proposed building envelopes would remain undisturbed and wildlife near the Project site is likely habituated to human activity. (AR 112.) This discussion of the existing biological resource conditions is sufficient.

Petitioners cite to a memo written by a neighbor who states she has expertise in riparian wildlife and habitat, watersheds and creeks and opines that the consultant should have visited the site during different seasons where there would be more evidence of impacts to wildlife corridors and that additional surveys should have been conducted. (AR 4366-4367.) However, "an agency is not required to conduct all possible tests or exhaust all research methodologies to evaluate impacts. Simply because an additional test may be helpful does not mean an agency must complete the test to comply with CEQA. (*Save the Agora Cornell Knoll*, 46 Cal.App.5th at p. 694.) The IS/MND notes the multiple sources consulted or reviewed in determining the species present or expected to be present on the property.

Petitioners also point to unattributed "reliable sightings" of certain species (AR 254), a comment from a neighbor that she has eight Dusky Footed Wood Rat nests on her own property and has heard Northern Spotted Owls outside her kitchen (AR 4076-4077) and a comment from another neighbor that she has observed several species, including the Dusky Footed Wood Rat and the Northern Spotted Owl, on the "project area" over the course of 20 years (AR 4366-4377.) However, the fact that such species have been spotted somewhere within the entire parcel, including outside the proposed building areas, does not make the description of the existing environment in the IS/MND insufficient. The IS/NMD acknowledged the potential for habitat for the Northern Spotted Owl and other special-status species at the site but did not find any habitat within the proposed building envelopes of the new lots. (AR 100-105, 107, 108.) The Project requires mitigation measures to the extent any of these species are present. (AR 27-28.) Therefore, the limited evidence identified by Petitioners does not support a finding that the biological species discussion in the IS/MND is inadequate.

F. Geological, Hydrological and Biological Resources and Human Safety

Petitioners argue that the IS/MND fails to analyze impacts on biological species or wetlands from storm water movement or increased erosion and runoff from grading, surface water diversions,

construction and additional impermeable surfaces. The IS/MND does address potential erosion and runoff and concludes that, with mitigation measures, there will be no significant impact. (AR 91-120, 127-137, 149-164, 211-217.) The page from the LSA report that Petitioners cite as evidence that the Project could cause an impact (AR 1811) merely raises the possibility that silt or other material which wash into the drainage "could" cover or fill in gravel bed used by Coho salmon and steelhead for spawning. Petitioners ignore the more detailed analysis in the IS/MND regarding erosion and runoff and do not address the measures identified in the IS/MND that would mitigate or eliminate potential impacts to the environment. Similarly, the language Petitioners cite from the Lotic Letter (AR 4106) makes a general statement about stability and health of streams as being crucial to mitigating stormwater impacts from urban development. Petitioners do not cite to any evidence in this report that the Project itself would result in significant impacts. Similarly, the language quoted from the National Park Service letter (AR 3710-3711) is not evidence of significant impacts of the Project, nor does it address the sufficiency of the practices and mitigation measures that are incorporated into the Project.

Petitioners also contend that, contrary to the IS/MND's statement that drainage systems are set back at least 100 feet from wetlands, the Project has on-site drainage that will run through the stream conservation area ("SCA") and/or wetland conservation areas ("WCAs"). (AR 4397.) The Court agrees with Petitioners that there is some conflicting information in the record regarding the location of the drainages on the property and, specifically, whether they run through any WCA or SCA. The IS/MND states that any development, as well as onsite septic and drainage systems, will be outside any WCA or SCA. (AR 111.) At the hearing before the Board of Supervisors, however, evidence was presented showing drainages within these areas. The consultant from Sicular was asked about the development of stormwater drainage facilities within the defined WCA. He responded that they were proposing to route some of the outflow from the proposed stormwater drainage system to the existing road ditch and culvert, which then drains downslope into the natural tributary to Redwood Creek. He stated that the proposed stormwater drainage system would not increase runoff so there would not be any additional erosion or sedimentation. (AR 1760-1761.)

Weissman's Opposition does not address the inconsistency between the statements in the IS/MND and the acknowledgement of the consultant at the hearing that there is some drainage within the WCA. While the consultant explained that the drainage system would be built to divert water to the existing culvert, Weissman does not point to anything in the record which demonstrates this is an actual requirement or feature of the Project. The IS/MND should clarify the information regarding the location of drainages at the property in relation to any SCA or WCA and discuss, if applicable, any mechanisms to divert water away from these areas and related environmental impacts, if any.

Petitioners' remaining arguments in this section of their brief are limited and contain very little meaningful discussion. The Court only addresses issues actually briefed. (*See Hoiden v. City of San Diego* (2019) 43 Cal.App.5th 404, 418-419.)

Petitioners argue that that the IS/MND fails to analyze the impacts of construction to terrestrial and avian wildlife and the potential noise, traffic and nighttime glare impacts of new residences. As noted above, the IS/MND addresses impacts to wildlife, and Petitioners do not cite to any evidence in the record supporting their argument that this analysis is deficient. The IS/MND notes that there is already a high level of human use already in the area. Petitioners do not dispute this. Petitioners believe that at some point there could be up to 12 residences so the impacts should be determined in that context. However, as discussed above, the current Project does not contemplate 12 residences so the IS/MND was not required to evaluate these impacts based on the much more extensive development Petitioners envision. The Department of Fish and Wildlife comment letter cited by Petitioners (AR 3901, 3902) noted potential impacts on special-status plants. As noted by Weissman, the County incorporated mitigation measures recommended by the Department into the final conditions of approval. (AR 548-551.)

Petitioners also complain that the IS/MND does not adequately address fire risk. The IS/MND does address fire risk (e.g. AR 172, 208-210.) Petitioners do not explain how this discussion or analysis is insufficient, other than making the same erroneous argument that the IS/MND was required to evaluate risk based on the development of 12 homes.

G. Cumulative Impacts

Petitioners argue that the IS/MND fails to consider the cumulative impacts of past, present and foreseeable future projects combined with the incremental impacts of those potentially caused by the project. (Pub. Res. Code §§ 21083(b); CEQA Guidelines §§ 15064(h)(1), 15063(a)(3).) Specifically, Petitioners argue that the IS/MND violated this requirement because it dismissed the impact of Weissman's previous illegal grading on the property and the unstable soil conditions it caused. (AR 112-113.) This argument has been addressed above. The IS/MND adequately considered the impact of the grading when evaluating the impacts of the Project. Petitioners also argue that the IS/MND dismissed other recent or proposed residential projects without providing all relevant data. The IS/MND adequately discusses the impacts of these projects as well. (AR 43-47, 212-214.)

H. Consistency with Local Plans

Petitioners contend the IS/MND violates CEQA Guideline Section 15125(d) because it does not address the Project's conflict with the General Plan's watershed protections. The IS/MND adequately addresses protection of the watershed as discussed above. Petitioners also contend that the IS/MND fails to determine consistency with the TACP, but consistency with the Countywide Plan and the TACP is addressed in the IS/MND. (AR 165-177.) The Board of Supervisors' Resolution also discusses consistency with these plans. (AR 23-24.)

II. Count Two: Subdivision Map Act

Petitioners argue that the County failed to properly determine the Project's consistency with the Marin County Countrywide Plan, specifically CWP Policy CD-5.E, as well as the Project's consistency with local plans.

A. The County's Findings Regarding Consistency with the General and Local Plans

The Board of Supervisors' Resolution No. 2020-110 noted that the property has been zoned as RMP-0.5 (residential, multiple-planned, one unit per two acres) since 1975, pursuant to which the allowable density of the 8.29 acre property would be four units. The Board concluded that because the Project is a subdivision that results in only three units, it is consistent with this governing zoning district. (AR 23.) The Board also found the Project was consistent with the Countrywide Plan Land

Use designation, per the Tamalpais Area Land Use Policy Map, Muir Woods, which designates the property as PR or Planned Residential, one unit per 1 to 10 acres. Under this designation, the allowable density range would result in a maximum potential density of eight units on the property. (*Ibid.*)

Because the property is located in an area that lacks public sewer, the Board also considered Countrywide Plan Policy CD-5.e (Limit Density for Areas without Water or Sewer Connection) which, applying the lowest end of the CWP density range for the property as directed under CD-5.e, would result in a density of one unit. (AR 23-24.) However, the Board found that because the Tamalpais Area Community Plan ("TACP") provides a more specific provision addressing density for this specific piece of property, that provision governs because the CWP (Policy CD-3.4-3) provides that "[w]here there are differences in the level of specificity between a policy in the Community Plan and a policy in the Countrywide Plan, the document with the more specific provision shall prevail." LU31.1 of the TACP addresses the property specifically by APN and states that "Given septic tank regulations a maximum of five units is possible." (AR 24.) The Board therefore concluded that the Project was consistent with applicable density requirements because it was consistent with the more specific provision in the TACP. (AR 24, 27.)

B. Standard of Review

Government Code Section 66473.5 provides that "[n]o local agency shall approve a tentative map, or a parcel map for which a tentative map was not required, unless the legislative body finds that the proposed subdivision, together with the provisions for its design and improvement, is consistent with the general plan . . . or any specific plan . . . A proposed subdivision shall be consistent with a general plan or a specific plan only if the local agency has officially adopted such a plan and the proposed subdivision or land use is compatible with the objectives, policies, general land uses, and programs specified in such a plan."

"A project is consistent with the general plan '"if, considering all its aspects, it will further the objectives and policies of the general plan and not obstruct their attainment."' [Citation.] A given project need not be in perfect conformity with each and every general plan policy. [Citation.] To be

consistent, a subdivision development must be 'compatible with' the objectives, policies, general land uses and programs specified in the general plan." (*Ibid.*)

"[T]he nature of the policy and the nature of the inconsistency are critical factors to consider." (*FUTURE, supra,* 62 Cal.App.4th at p. 1341, 74 Cal.Rptr.2d 1.) Inconsistencies with vague, general policies that "encourage" actions may not be fatal. (See *Sequoyah Hills Homeowners Assn. v. City of Oakland* (1993) 23 Cal.App.4th 704, 719, 29 Cal.Rptr.2d 182.) An approval must be set aside, however, where there is an inconsistency with a mandatory policy. (*Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 783 (*Endangered Habitat*); *see also San Franciscans Upholding the Downtown Plan v. City & County of San Francisco* (2002) 102 Cal.App.4th 656, 678 [finding of consistency requires that project be in agreement or harmony with the terms of the applicable plan, "not in rigid conformity with every detail thereof"]; *Naraghi Lakes Neighborhood Pres. Assn. v. City of Modesto* (2016) 1 Cal.App.5th 9, 19.)

Courts give great deference to a public entity's determination as to whether a project is consistent with the general plan. As the court stated in *East Sacramento Partnerships, supra*:

> "A city's determination that a project is consistent with the city's general plan 'carries a strong presumption of regularity. [Citation.] This determination can be overturned only if the [city] abused its discretion—that is, did not proceed legally, or if the determination is not supported by findings, or if the findings are not supported by substantial evidence. [Citation.] As for this substantial evidence prong, it has been said that a determination of general plan consistency will be reversed only if, based on the evidence before the local governing body, " ... a reasonable person could not have reached the same conclusion" [Citation.].' [Citation.]" (*Clover Valley Foundation v. City of Rocklin* (2011) 197 Cal.App.4th 200, 238, 128 Cal.Rptr.3d 733 (*Clover Valley*); see also *Naraghi Lakes Neighborhood Preservation Assn. v. City of Modesto* (2016) 1 Cal.App.5th 9, 18–19, 204 Cal.Rptr.3d 67)

> "When we review an agency's decision for consistency with its own general plan, we accord great deference to the agency's determination. This is because the body which adopted the general plan policies in its legislative capacity has unique competence to interpret those policies when applying them in its adjudicatory capacity. [Citation.] Because policies in a general plan reflect a range of competing interests, the governmental agency must be allowed to weigh and balance the plan's policies when applying them, and it has broad discretion to construe its policies in light of the plan's purposes. [Citations.] A reviewing court's

> role 'is simply to decide whether the city officials considered the applicable policies and the extent to which the proposed project conforms with those policies.' [Citation.]" (*Save our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 142, 104 Cal.Rptr.2d 326 (*Save our Peninsula*).)
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> (*East Sacramento Partnerships*, 5 Cal.App.5th at p. 305.)

The deferential standard applies both to challenges under CEQA and the Subdivision Map Act. (*See Covina Residents for Responsible Dev. of City of Covina* (2018) 21 Cal.App.5th 712, 732 [applying standard to SMA challenge]; *Woodward Park Homeowners Assn, Inc. v. City of Fresno* (2007) 150 Cal.App.4th 863, 706 [same].)

C. Countrywide Policy CD-5.e

Petitioners do not dispute that the Project is consistent with the RMP-0.5 zoning designation for the property or the PR designation in the Countrywide Plan Land Use Designation. Instead, Petitioners contend that the Project is inconsistent with CWP Policy CD-5.e, which they contend limits development in the area to one unit per 10 acres.

Petitioners do not request that the Court take judicial notice of Policy CD-5.e and do not attach a copy to their papers. While Petitioners had the burden of providing this information to the Court, the Court will take judicial notice, sua sponte, of the Marin Countrywide Plan, including Map 6.1.1 (Tamalpais Area Land Use Policy Map, Muir Woods Park). The Court also takes judicial notice of the Tamalpais Area Community Plan.

CWP Policy CD-5.e is found under "Goal CD-5" for effective growth management, i.e., to "[m]anage growth so that transportation, water, sewer, wastewater facilities, fire protection, and other infrastructure components remain adequate." Goal CD-5 has two policies: CD-5.1 (assign financial responsibility for growth) and CD-5.2 (correlate development and infrastructure). (CWP, p. 3.4-22.) The CWP states that the results will be achieved through a number of "implementing programs", one of which is CD-5.e. CD-5.e provides: "Limit Density for Areas Without Water or Sewer Connections. Calculate the density at the lowest end of the Country Wide Plan density range for new development proposed in area without public water or sewer service . . . .."

Petitioners argue that CD-5.e is a density policy which limits the property to one unit (one unit per ten acres), and therefore the Project is inconsistent with the Countrywide Plan in violation of

Section 66474(a). Weissman contends that the Project is consistent with the Countrywide Plan because that plan states that more specific provisions control and the TACP has a more specific provision regarding density, namely, LU31.1. The three units contemplated by the Project are below the five units allowable under LU31.1.

The Court finds that the County's interpretation and application of the various provisions and policies relating to zoning and density was not an abuse of discretion. "Because policies in a general plan reflect a range of competing interests, the governmental agency must be allowed to weigh and balance the plan's policies when applying them, and it has broad discretion to construe its policies in light of the plan's purposes . . . a finding of consistency requires only that the proposed project be *compatible* with the objectives, policies, general land uses, and programs specified in the applicable plan." (*San Franciscans Upholding the Downtown Plan*, 102 Cal.App.4th at p. 678 [citations and internal quotations omitted] [emphasis in original.) This court's role "is simply to decide whether the city officials considered the applicable policies and the extent to which the proposed project conforms with those policies." (*Ibid.* [citation and internal quotations omitted].) The Court finds that the County considered the applicable policies and the extent to which the Project conforms with those policies.

Even if CD-5.e of the CWP can be interpreted as a density policy as Petitioners argue, LU31.1 of the TACP more specifically addresses density at this particular property (by APN). Because the CWP provides that TACP provisions prevail when they are more specific, the County did not abuse its discretion in concluding that the Project is not inconsistent with the CWP.

Petitioners cite to *Sierra Club v. Board of Supervisors of Kern County* (1981) 126 Cal.App.3d 698, 708 as support for their argument that an agency must reconcile all general plan policies because each of the elements is equally important. The *Sierra Club* court did so hold in the context of a county's adoption or amendment of a general plan; the court held in this context, there can be no precedence clause giving one element of a plan priority or precedence over another. However, Petitioners do not cite any authority applying this rule to a county's application of an existing general plan to its approval of a subdivision or project, which is what Petitioners argue here. The *Citizens of Goleta Valley* and *Ballard* decisions upon which Petitioners rely do not support their argument that

the rule articulated in *Sierra Club* applies in this context. In this particular context, i.e. where a public entity is acting more in an adjudicatory rather than legislative capacity, the cases hold only that the entity must ensure a project is consistent with the general plan under the guidelines set forth above. (*See East Sacramento Partnerships* (2016) 5 Cal.App.5th at p. 304-305; *Covina*, 21 Cal.App.5th at p. 732.) As discussed above, the record does not support a finding that the County abused its discretion in determining the Project was consistent with the CWP.

D. Other Plans and Policies

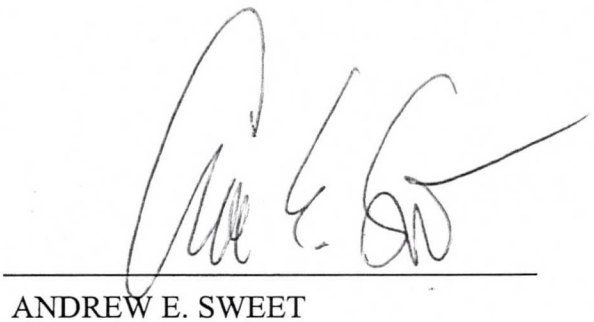
Petitioners argue that the County also failed to comply with Government Code Section 66474 and the County Subdivision Ordinance, MCMC § 22.44.060(a). Petitioners' first arguments in this section (pp. 28-29) are dependent upon and refer the Court back to their discussion about alleged CEQA violations. The Court does not re-visit that discussion here.

Petitioners also argue that the County failed to consider and apply TACP Policy LU 2.1 which provides that "All undeveloped properties in the Planning Area should be evaluated in terms of their environmental constraints and rezoned to a density which is compatible with identified restraints." Petitioners contend the County did not discuss "environmental constraints" such as steep slopes, proximity to a National Monument, location of headwaters for Redwood Creek, and impacts to Coho salmon and steelhead critical habitat.

Petitioners do not cite to any point in the record where this issue was raised before the Planning Commission or Board of Supervisors. The Court's review of the record reflects that compliance with LU 2.1 was raised only generally in public comments, none of which elaborated on specifically how the County failed to properly evaluate environmental constraints. It appears Petitioners therefore failed to exhaust their administrative remedies with respect to this argument. (*See Evans v. City of San Jose* (2005) 128 Cal.App.4th 1123, 1138; *California Correctional Peace Officers Assn. v. State Personnel Board* (1995) 10 Cal.4th 1133, 1151.) Even if Petitioners did raise this argument before the County, the record reflects that the County considered environmental constraints such as steep slopes and impacts to Coho salmon and steelhead (discussed above) and concluded that the Project was consistent with LU 2.1. (AR 29.)

Petitioners also argue that there is no consistency with TACP Policy LU 10.2a, which provides that "Development on lands adjacent to wetlands and bay waters shall be required to provide habitat buffer zones adequate to protect the habitat value of wetlands and bay waters," and TACP Policy LU14.1d, which provides that "Planning staff should work with the State Parks, National Park Service and representatives from the Muir Woods Park neighborhood to identify parcels in the area which may be appropriate for acquisition for open space." The Court's review of the record indicates that Petitioners may have failed to exhaust their administrative remedies as to their LU10.2 argument as well. In any event, the record reflects that the County considered and adopted buffer zones as measures or features of the Project and concluded that the Project was consistent with LU10.2. (AR 29.) With respect to LU14.1d, this is a general policy with respect to open space and use of the word "should" rather than "shall" indicates it is not a mandatory requirement that the County pursue open space in connection with every approval of a project that is submitted for review and approval.

DATED: January 10, 2022



ANDREW E. SWEET
Judge of the Superior Court

MARIN COUNTY SUPERIOR COURT
3501 Civic Center Drive
P.O. Box 4988
San Rafael, CA 94913-4988

FRIENDS OF MUIR WOODS PARK, ET AL. vs. **COUNTY OF MARIN, ET AL.**	CASE NO. CIV 2003248 **PROOF OF SERVICE BY FIRST CLASS MAIL** ***Code of Civil Procedure Sections 1013a and 2015.5***

I am an employee of the Marin County Superior Court. I am over the age of 18 years and not a party to this action. My business address is 3501 Civic Center Drive, Hall of Justice, San Rafael, California.

On 1-11-2022 I served the following document(s): **ORDER AFTER HEARING** in said action to all interested parties, by placing the envelope for collection and mailing on the date shown thereon, so as to cause it to be mailed on that date following standard court practices. I am readily familiar with the court's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

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

Executed at San Rafael, California

JAMES M. KIM
Court Executive Officer

By: S. HENDRYX
DEPUTY