1st App. Dist. CIVIL No. A134559

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT

CITY OF PETALUMA, ET AL.,
Petitioners and Appellants,

v.

COUNTY OF SONOMA, ET AL.,
Respondents and Appellees

THE DUTRA GROUP, ET AL.,
Real Parties in Interest and Respondents.

APPELLANTS' REPLY BRIEF

Appeal from the Superior Court for Sonoma County,
Case No. SCV 248948
Honorable Rene Auguste Chouteau (Phone no. (707) 521-6725)

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Appellants respectfully submit the following reply to the opposition briefs.

A. Under The General Plan, In Order To Rezone An Entire Parcel From Commercial to Industrial Uses, The Entire Parcel Must Not Be Subject To Flood – Not Just The Footprint Of Anticipated Buildings.

The County rezoned the entirety of two parcels from Commercial to Limited Industrial – Parcels APN019-320-022 and APN019-320-023. Parcel APN019-320-022 is coextensive with Area B of the Asphalt Plant Project. (AR482, AR200.) Areas C and D of the Project encompass Parcel APN019-320-023. (*Id*.) The rezoning of the two parcels was not limited to the anticipated facility footprint of the Asphalt Plant and associated structures. All of Parcels APN019-320-022 and APN019-320-023 were rezoned from Commercial to Limited Industrial.

Respondents acknowledge that the General Plan precludes zoning lands as Limited Industrial where those lands are in areas subject to flood. General Plan Policy 2.4, the "Industrial Use Policy", states "Amendments to add this [industrial use] designation must meet all of the following: … (5) ***Lands shall not be in areas subject to flood***…." (LU-43 (emphasis added) (Declaration of Michael Lozeau, Exhibit 7 (filed July 20, 2012).)

Respondents' argument would replace the word "lands" in Policy 2.4 with the term "project site" or "project footprint" and ignore that rezoning the parcels to Limited Industrial was not limited to the Project structures and building footprint but instead extends throughout the two parcels. (Respondents' Brief in Opposition

("Opp."), pp. 11-14.)[1] The County does not dispute that significant portions of those two parcels are areas subject to flood. A large part of APN019-320-023 is currently wetlands delineated by the Army Corps of Engineers. Even more of that parcel is slated to be wetlands (Area D of the Project) designed to increase flooding of that portion of the parcel. Yet the County designated APN019-320-023, including that wetland portion, as Limited Industrial. The other portion of APN019-320-023 labeled as Area C where the asphalt plant and storage piles are to be located currently includes a large wetland area delineated by the Corps that covers about a third of the area. (AR260; AR216 (photos of Area C's seasonal wetlands).) Only as part of the Project will grading occur in the future to eliminate most of the wetlands in Area C and only then "bringing Area C above flood level prior to construction and stockpiling of aggregate." (AR254.) But as of the date of rezoning of APN019-320-023, most of the parcel including both Areas C and D, consisted of wetland areas within the 100-year Flood Plain, zoned as Flood Plain, and subject to flood. As for Parcel APN019-320-022, or Area B as labeled by the Project, that area also is located within the 100-year Flood Plain and zoned as Flood Plain.

As the EIR states, most of Parcels APN019-320-022 and APN019-320-023 will be inundated in a 100-year flood:

> ***[A]reas of the site below [7 feet msl] would be expected to be inundated by flood waters of the Petaluma River during a 100 year***

[1]Citations to Respondents' brief shall use the format Opp.:page, e.g., Opp.:11-14.

> ***flood. Areas of the site that would not be expected to flood are the small hill in Area B and the western margin of Areas C and D***.

(AR458 (emphasis added). *See also* AR459 ("Flood Map"); AR473 ("the project site is expected to be inundated in the 100-year flood event").)

Respondents attempt to sidestep the General Plan's plain language and the undisputed presence of areas on Parcels APN019-320-022 and APN019-320-023 subject to flood by arguing as if the General Plan only precluded designating a parcel as Limited Industrial if the ***footprint of a future facility*** on ***part of the parcels*** itself was not within the 100-year flood plain. (Opp.:12.) That truncated read of Policy 2.4 ignores the General Plan's plain language.

A review of each of the record citations offered by Respondents confirms that Parcels APN019-320-022 and APN019-320-023 include lands in areas subject to flood. At AR3396, County staff says that, after all the project grading has occurred, the "new plant" will not be subject to flood. (AR3396; Opp.:12.) Nor does staff's statement say that the current undeveloped footprint of the future "new plant" does not contain areas subject to flood. Staff, instead, confirms that even those areas currently are subject to flood by explaining that "the majority of the area to be developed is already above 7 feet msl[,]" not the entire area and construction areas "will be raised" so "the new plant will not be subject to flood hazards." (AR3396. *See also* AR5973 ("***most*** of the property is going to be above, above the seven year, foot mean flood elevation").)

Staff emphasizes that the conveyor belt will be constructed on piers in order to keep it from flooding:

> There are some portions of the area that still is within the F2 [flood zone]. But these will be on piers, the conveyor, and the conveyor belt has to be above, one foot above the final flood elevation, the one hundred year flood elevation. So, the structure itself will just have small amounts of area footings that are in the flood area. But that will be it.

(AR6140.) How confirming the presence of flood areas amounts to evidence that areas within Parcels APN019-320-022 and APN019-320-023 are not subject to flood is not explained by Respondents.[2]

Respondents prove Appellants' point when they attempt to argue that ***increasing flooding*** on a large portion of APN019-320-023 at the same time as rezoning that parcel Limited Industrial is somehow consistent with the General Plan's express prohibition on rezoning parcels as Limited Industrial that contain areas subject to flood. (Opp.:12-13.) Whether or not increasing flooding on

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[2]Respondents' record cites further confirm that Parcels APN019-320-022 and APN019-320-023 currently are subject to flood and, in the case of APN019-320-023, will continue to be for the life of the Project. (*See* AR1966 ("the majority of the developed project site and the parcel adjacent to the barge offloading facility are located within the FEMA 100-year flood hazard zone and the County F2 (floodplain) zoning district. However, Area C ***would be raised*** above the base flood elevation of 7 feet msl. As such, the proposed ***facilities*** would not be expected to be flooded during the 100-year event.") (emphasis added); AR4542 ("***Area C would be raised*** above the base flood elevation of 7 feet msl. As such, the ***proposed facilities*** would not be expected to be flooded during the 100-year event. Furthermore, the wetlands associated with both the Current and Revised Projects would retain additional floodwaters after restoration by increasing the flood storage volume below elevation 7 feet msl….") (emphasis added); AR2007 (same); AR 2010 ("The ***area proposed for development of the asphalt plant (northerly half of Area C***) is currently elevated… above the 100 year flood elevation…") (emphasis added); AR31 (same).)

APN019-320-023 serves any general goal of reducing flooding elsewhere, the parcel cannot do so if zoned for Limited Industrial uses and be consistent with the General Plan. By doing so, the County entirely undermines the goal of the General Plan to keep industrial uses out of flood areas by facilitating potential future industrial uses at that site.

The General Plan is unequivocal: Limited Industrial zoning of parcels cannot include "lands… in areas subject to flood…." The fact that the future developed portions of Parcels APN019-320-022 and APN019-320-023 will be filled and raised above the 100-year flood level, does not rebut the fact that a majority of Parcel APN019-320-023 slated for wetlands is and will remain subject to flood. Likewise, just because the future development and filling may raise the Project's buildings and facilities above flood levels does not rebut that significant areas of Parcel APN019-320-022 and the Area C portion of APN019-320-023 were subject to flood (and continue to be) at the time the County rezoned them as Limited Industrial.

Although "great deference" to a county's interpretation of its policies is appropriate and the Court may not reweigh conflicting evidence, those review standards do not come into play where, as here, the General Plan provision at issue is "fundamental, mandatory, and clear[,]" there is no conflicting interpretation of the General Plan's Policy 2.4, Criteria #5 language, and Respondents cannot point to any evidence that contradicts the facts in the administrative record that Parcels APN019-320-022 and APN019-320-023 are subject to flooding.

In reviewing a project's consistency with a General Plan, "the nature of the policy and the nature of the inconsistency are critical factors to consider." (*Families Unafraid to Uphold Rural etc. County v. Board of Supervisors* (1998) 62 Cal.App.4th 1332, 1341.) "[G]eneral consistencies with plan policies cannot overcome 'specific, mandatory and fundamental inconsistencies' with plan policies." (*Clover Valley Foundation v. City of Rocklin* (2011) 197 Cal.App.4th 200, 239.) "Consistency requires more than incantation, and a county cannot articulate a policy in its general plan and then approve a conflicting project." (*Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 789.) Where a general plan specifies without exception that a certain land use designation shall be restricted to certain areas, or, as here, prohibited from certain areas, that specific, mandatory provision must be implemented. (*Families Unafraid*, 197 Cal.App.4th at 1341-42.) As the Court of Appeal explains the decision in *Families Unafraid*:

> The general plan there specified without exception that the designation "low density residential" would be restricted to certain areas. The agency, however, approved a project proposing to develop "low density residential" in another area, thereby approving a project that directly conflicted with a mandatory policy set forth in the plan. It followed that the agency's implied finding of consistency was not supported by substantial evidence.

(*Sierra Club v. County of Napa* (2004) 121 Cal.App.4th 1490, 1511.) The same is true with the County's General Plan and its specific prohibition on designating Limited Industrial zoning for lands in areas subject to flood. (*See also Endangered Habitats*, 131 Cal.App.4th at 783-84 (where General Plan specified a specific

model to determine traffic impacts in certain areas, county precluded from using another model in those areas).

A specific and mandatory requirement trumps the rule articulated in *Sequoyah Hills Homeowners Association v. City of Oakland* (1993) 23 Cal.App.4th 704, 717-19, that a project need only be compatible with the objectives, policies, programs and general land uses in the general plan. (Opp.:9. *See Ross v. California Coastal Com.* (2011) 199 Cal.App.4th 900, 928.) The three general plan policies at issue in *Sequoyah Hills* "were amorphous" and involved "conflicting evidence of consistency." (*Families Unafraid* , 62 Cal.App.4th at 1341.) Like the general plan provision at issue in *Families Unafraid*, Sonoma County's General Plan provision prohibiting zoning a parcel as Limited Industrial in areas subject to flood is "mandatory and anything but amorphous" and is fundamental to the General Plan's industrial use planning. (*See* LU-43 ("Amendments to add this designation [Limited Industrial] ***must meet all of the following***. . . .") (emphasis added).) Here, there is no evidence disputing the presence of areas on Parcels APN019-320-022 and APN019-320-023 that are subject to flood. The County plainly acted inconsistently with the General Plan by zoning those parcels for industrial uses despite the proscription that the "***[l]ands shall not be in areas subject to flood***…." (LU-43.)[3]

[3]Neither General Plan Policy LU-7a nor LU-7c apply to changing a parcel's zoning to Limited Industrial with areas subject to flood and are inapplicable.

B. The County Violated General Plan Policy LU-19c by Assuming the Asphalt Plant Would Be River-Dependent Without Substantial Evidence That Either the Neighbor's Dock or Land Underlying That Assumption Would Ever Be Available to the Project.

Even assuming that Dutra can buy aggregate from Shamrock and truck it to the asphalt plant for three years, buying aggregate and trucking it to the site is not a river dependent use. (*See* Opening:23-26.) Because the only evidence in the record indicates that there is no agreement or willingness by Shamrock either to sell Dutra any aggregate, cede its dock to Dutra for its aggregate materials, or sell its land for Dutra to build a conveyor, there is no evidence that the Project as conceptualized will ever be built and river-dependent.

As a result, the County cannot show that the Project is consistent with General Plan Policy LU-19c's prohibition on applying the Limited Industrial Zoning category within the "Petaluma and Environs Planning Area" to any uses not existing as of 1986 except those that are ***river dependent***. (Opening:23; LU-79.)

Respondents do not dispute the absence of evidence that the asphalt plant is river dependent for the first three-years of the Project, during which time aggregate may be trucked to the Facility from another vendor. First, there is no evidence that Shamrock intends to sell aggregate to the asphalt plant. The only evidence in the record says no, Shamrock won't sell aggregate to Dutra. "We

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Appellants' Opening Brief ("Opening"), p. 22 [cites to the Opening shall use the format Opening:page, *i.e.* Opening:22]. *See* Opp.:14-15.)

[Shamrock] cannot allow our property to be associated with the Dutra proposal to allow their project barges to unload at our facility." (AR29071; (CTA:740, ¶60 ("[T]here is no agreement between Shamrock and Dutra to sell 500,000 tons of sand and aggregate to Dutra").) The EIR even concludes that unloading and trucking asphalt aggregate through Shamrock is infeasible. (AR617 ("the [Shamrock] facility is designed to maximize the storage capacity for concrete aggregates and that there is no excess capacity available for non-conforming aggregate (e.g. asphalt aggregate)").) And even if Shamrock were to agree to sell Dutra all of its aggregate for the first three-years, Dutra's trucking of aggregate from another facility is not a river dependent use. (*See* Opening:24; AR4631 ("[S]taff believes that the trucking option is not consistent with the General Plan because it would not result in a river-dependent use, as required by General Plan Policy LU-19c").)

Second, there is no evidence in the record that Shamrock will either sell its property to construct a conveyor in order to cede its dock to Dutra. Again, the opposite is true – a consistent disavowal by Shamrock of any such intention. (AR4622-23; AR29071; CTA:740, ¶60.) Even now, on appeal, Shamrock consistently maintains that they have no interest in the project. (Shamrock Br., p.1.)

Planning Department staff conceded that "I don't have the contract between the two companies in front of me. I don't have that, but I'm just saying that there is an agreement that they will be working together." (AR6139.) This is pure

speculation and, indeed, the "agreement" alluded to by staff does not exist either in reality or the record. At least one Supervisor called out staff on the misrepresentation, stating that "the problem that I have with that, is that that's what's put forth in terms of Conditions of Approval. But we don't have any paperwork in our hands saying that… there, in fact, is any agreement." (AR6139.)

Respondents' other cites also do not provide any evidence that the Project can be built or even operate as approved and ignore the contrary evidence that buying aggregate from Shamrock is infeasible. (AR5698-99; AR5973-74; AR5982.) The only record evidence says the Landing Way conveyor will not be built because Shamrock is not a willing seller of either land or aggregate and the EIR finds a similar alternative to buy aggregate from Shamrock for the Project was infeasible.

Respondents argue that evidence that Shamrock will not participate in the Project at all was addressed by making the Project's use of Shamrock's land and dock a mandatory condition. (Opp.:19.) Respondents reason that if the condition is not met, the Project will not happen, so no harm done. (*Id*.) First, this assertion, as well as the trial court's similar assertion that, "if river-based shipments are not implemented by Dutra, the Project will not go forward[,]" are false because the Board already completed its zoning decision. (CTA:1141.) Although, according to the evidence, the conceptual conveyor from Shamrock will never be built, the industrial zoning is done and will continue even if the asphalt plant is never built, is never operated, or is dismantled after three-years. That is, the rezoning will

have been effected despite the absence of any river-dependent use, contrary to General Plan Policy LU-19c.

No reasonable person could find that, where the General Plan conditions allowing Limited Industrial zoning upon there being a river-dependent use, that requirement is met by simply envisioning some conceivable river-dependent use, over the stated objection of a third-party whose participation is necessary for the vision to come true. There is no substantial evidence in the record that river-dependent industrial uses can or will ever occur on Parcels APN019-320-022 and APN019-320-023.

C. The County's EIR Applies an Erroneous Baseline and Omits Key Impacts.

1. Respondents fail to cite evidence or explain how a closed asphalt plant can continue to emit air pollution.

The condition that existed at the time of the Asphalt Project's Notice of Preparation was that a temporary asphalt plant was operating a mile away from the proposed Project site and was required to be shut-down by no later than June 2008. (AR579 ("approximately one mile north"); Opening:28.) In fact, that distant asphalt plant was closed in September 2007, five months prior to the release of the draft EIR.[4] Where at the time of the NOP, the agency and applicant are aware that a facility they want to credit as part of the project's baseline cannot operate beyond a certain date, then their baseline cannot assume it will operate

[4]Respondents' assertion that the temporary asphalt plant was operating at the time the DEIR was released is incorrect. (Opp.:27. *See* AR128; AR10662-63.)

beyond that date. To allow the baseline to include pollution from that facility beyond its mandatory closure date is to ignore reality and common sense.

Citizens for East Shore Parks v. State Lands Commission (2011) 202 Cal.App.4th 549 does not sanction the County ignoring the temporary asphalt plant's mandated closure and cessation of its pollution emissions as of that date. In *Citizens*, the Petitioners argued that because the State Lands Commission had an option to deny approving a new lease for Chevron's marine terminal, the baseline should assume that the terminal was not operating. (202 Cal.App.4th at 560.) The Court rejected that argument, finding that the baseline for the lease renewal could acknowledge the reality that the marine terminal was still operating. Unlike the Dutra Project's baseline, *Citizens* involved the same facility – Chevron's marine terminal. (*Id*. at 554.) The case did not involve an entirely separate facility a mile away. Second, unlike the temporary asphalt plant that was mandated to close by June 2008 and in fact closed in September 2007, Chevron's terminal did not have to close and continued operating through the date of the lease renewal. (*Id*. at 554-55.) The Court's approval of State Lands' baseline rested squarely on the recognition that "the baseline … reflected 'what was actually happening' at the site of the proposed project that is, an operating marine terminal." (*Id*. at 560, citing *CBE v. SCAQMD* (2010) 48 Cal.4th 310, 322 ("*CBE*").)

The County's baseline for the asphalt project runs afoul of *Citizens* and *CBE*'s reality-check. By not recognizing the reality that the temporary asphalt

plant would be closed and not emitting air pollution as of June 2008 (and indeed was closed by September 2007) and instead assuming that those non-existent emissions would continue indefinitely until the new plant, at another location, was up and running (currently five-years of fictitious air emissions and counting), the County's baseline did not reflect what was actually happening at the Project site. *See also Woodward Park Homeowners Assn. v. City of Fresno* (2007) 150 Cal.App.4th 683, 707; *Sunnyvale West Neighborhood Assn. v. City of Sunnyvale* (2010) 190 Cal.App.4th 1351, 1376-77.)[5]

2. Respondents fail to cite evidence or explain how localized, non-existent air pollution can travel a mile and be emitted again at the Project location.

The temporary asphalt plant was approximately a mile away from the proposed Project and, hence, was not in the ***vicinity*** of the Project. (AR579; AR453) The CEQA Guidelines limit a Project's baseline to those physical environmental conditions "in the vicinity of the project." (Guideline §15125(a). *See Citizens*, 202 Cal.App.4th at 560 (baseline required to "reflect[] 'what was actually happening' ***at the site*** of the proposed project…") (emphasis added).) None of the PM10 and ROG emissions that occurred at the temporary asphalt plant a mile away up to September 2007 were ever present at the Project site.

[5]Respondents do not appear to dispute that, but for making believe that the temporary asphalt plant would emit pollution after it closed and crediting those emissions to the Project, the Project's emissions of PM10, ROGs and GHGs would exceed BAAQMD's significance thresholds. (*See* AR12516.)

Treating those distant emissions as if they were occurring at the Project site defies reality.

Respondents do not refute that the closed temporary plant is approximately a mile away from the Project site, simply resorting to vague descriptions of its location as "across the freeway" or "in the same area." (AR579; *See* Opp.:4, 27.) Respondents also do not refute the clear evidence that PM10 and ROGs have localized air pollution impacts that do not extend to locations a mile distant. (Opening:33-35.) Instead, Respondents simply rely on the EIR's conclusions applying the incorrect baseline attributing pollution (that ceased in 2007) a mile away to the Project site. (Opp.:27-29.)[6]

Since Dutra is constructing a new facility on undeveloped wetlands (AR201-9), this is a new project, not a modification of an existing project. The "real condition on the ground" is a zero baseline. Subtracting emissions from a plant that was a mile away and did not exist at the time of the EIR does not reflect "real conditions on the ground" (48 Cal.4th at 321), is not realistic, is based on a false hypothesis, and, as a result, is inconsistent with law. (*See Sunnyvale West*, 190 Cal.App.4th at 1376-77; *CBE*, 48 Cal.4th at 322.)

[6]Contrary to Respondents' argument, Petitioners squarely objected to the Project's baseline based on the different locations of the two facilities. (*See* CT:1033-34.)

3. The EIR neither describes nor analyzes potential significant impacts of the Revised Project II.

The Revised Project II ("RPII") is so different from the project described in the EIR that the EIR's project description is misleading and RPII amounts to a new project, the impacts of which have not been considered in the EIR.

"The defined project and not some different project must be the EIR's bona fide subject." (*County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 199.) Although "[t]he CEQA reporting process is not designed to freeze the ultimate proposal in the precise mold of the initial project" and revisions to the original proposal may be appropriate, where those revisions amount to a new project the impacts of which were unaddressed in the EIR, the EIR is deficient as a matter of law. (*See id*.) In *County of Inyo*, the originally narrow water project became much wider, involving activities in different locations from the originally described project. (*Id*. at 199-200.) By describing a narrower project in the EIR and thus avoiding analyzing the impacts of the final approved project, the water agency "did not proceed in the manner required by law." (*Id*. at 200.)

That is what occurred here. It is clear from the record that the Revised Project was expanded to include new components on land outside of the Project area. (AR234-37. *Compare* AR4606-08.) By changing the scope of the Project to encompass lands and issues that were never addressed in the EIR, the County proceeded contrary to law by failing to consider the actual project in the EIR.

This case is similar to the project question addressed in *Save Our Neighborhood v. Lishman* (2006) 140 Cal.App.4th 1288. Although that case involved a change to a motel project after the final certification of a negative declaration and thus considered the applicability of PRC §21166 rather than §21092.1, it identifies as a threshold question whether a subsequent project is a new project or a modification of the previous reviewed project. The Court reviewed the new project question as a question of law. (*Id*. at 1297.)[7] The two hotel projects were "planned for the same land and involving similar mixes of uses." (140 Cal.App.4th at 1300-01.) The differences articulated by the Court boiled down to the second project's hotel reducing the number of rooms by four and eliminating retail uses and adding a convention space. (*Id*.) The Court also noted that the projects had different proponents. (*Id*. at 1300.) A roadway, on-site wetlands and stream realignment were shared by both projects, the later version simply adding details about these components. (*Id*. at 1301.)

RPII is similarly different from the project described in the EIR. RPII now proposes to construct a significant component on an adjacent, third-party's property. (AR4607.) RPII now requires the participation of a new third-party – Shamrock and Corto Meno. (*Id*.; AR103, 113.) And, the addition of new

[7] One case, *Mani Brothers Real Estate Group v. City of Los Angeles* (2007) 153 Cal.App.4th 1385, disagrees with *Lishman* in the context of PRC §21166 and post-certified EIR changes to a project. Because Dutra's project was reconfigured prior to the EIR's certification, the presumptions of regularity under Section 21166 have no bearing here.

trucking operations and a new conveyor on an entirely new parcel, including a wetlands mitigation area, raises new issues of potentially substantial environmental impacts identified by Petitioners' experts and never addressed in the EIR. For these reasons, the last minute RPII is a new project and the EIR's failure to describe that project or consider the potentially significant impacts described by Petitioners' experts is inconsistent with law.

4. Alternatively, the County must recirculate the EIR because the record does not contain substantial evidence that the Revised Project does not have a new potentially substantial impact.

Alternatively, assuming that the Revised Project is new information, that new information is significant because the changes will have one or more potentially substantial new impacts requiring recirculation pursuant to 14 CCR §15088.5 and *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412.

The Revised Project's impacts are new impacts from entirely new features not described in the EIR – the addition of trucking from Landing Way, trucking of recycled materials from around the region, and the construction and operation of a conveyor belt through what is now Shamrock's property and wetland area.[8] "Significant new information" includes when "(1) A new significant environmental impact would result from the project or from a new mitigation measure proposed to be implemented." Guideline §15088.5(a)(1).) As the

[8]Alternatively, Respondents were required to recirculate under Guidelines section 15088.5(a)(4) because the DEIR was "fundamentally and basically inadequate" for the review of the Project that was actually approved.

Supreme Court has explained, "a significant environmental impact is defined as 'a substantial, or ***potentially substantial***, adverse change in the environment.'" (40 Cal.4th at 448 n.19 (emphasis added).) Hence, any change to the Project that has a potentially substantial adverse change in the environment is significant new information triggering recirculation of the EIR. (*Id*. at 448. *See Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 130-35 (post-EIR identification of off-site location for groundwater pumping mitigation triggers recirculation and documentation provided before agency meeting "does not make up for the lack of analysis in the EIR").)

None of Respondents' cited cases involve a wholly new location for a significant portion of the previously described project with new potentially substantial environmental impacts. *See Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 533 (project's final version a subset of the project originally described and "[t]he action approved need not be a blanket approval of the ***entire project*** initially described in the EIR"); *Chaparral Greens v. City of Chula Vista* (1996) 50 Cal.App.4th 1134, 1148 (no change to the project); *Western Placer Citizens for an Agricultural & Rural Environment v. County of Placer* (2006) 144 Cal.App.4th 890, 894-95 (reduction in size of project and no change to location); *Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4th 1112, 1139-40 (no change, only clarification of traffic for the project).) The unrebutted expert evidence in the record meets the

recirculation standard for each of the three impacts from the Revised Project discussed in the opening brief – new traffic impacts, new air pollution impacts and new noise impacts to wetland area wildlife.

a. Revised Project II will have a potentially substantial, adverse change on traffic levels requiring recirculation.

Respondents' assert that the traffic impacts of the Landing Way proposal were already addressed in the EIR and only "[a] substantial increase in the severity of an environmental impact would result…," which is mitigated by a new traffic light at Landing Way and South Petaluma Boulevard. (Opp.:35 (citing Guideline §15088.5(a)(2).)

Increased truck traffic transporting materials from Landing Way, in addition to traffic from trucks bringing in recycled aggregate from other locations, was not part of the project reviewed in the EIR. The project analyzed in the EIR would have no Level of Service ("LOS") impacts at Landing Way and Petaluma Boulevard South. AR592 (LOS A and B at that intersection). Only after the Project was revised twice did RPII result in a new substantial change adverse to the environment, plunging that intersection to LOS F. (AR4630; AR4789.) Because the original project had no LOS traffic impacts, RPII's significant impact is not an increase in the original project's impact under Guideline §15088.5(a)(2) – it is a ***new impact*** subject to Guideline §15088.5(a)(1). Importantly, Section 15088.5(a)(1) does not include the mitigation measure exception contained in §15088.5(a)(2). Any new significant impact, *i.e.*, any 'substantial, or ***potentially***

substantial, adverse change in the environment" must be recirculated, whether or not any mitigation is proposed or adopted. (Guideline §15088.5(a)(1); *Vineyard*, 40 Cal.4th at 448 n.19.)

Respondents try to downplay the importance of the critical mistake in the traffic analysis by claiming that the mistake only related to trucking of recycled material "from other places in Sonoma and Marin, similar to the originally proposed project, but not Landing Way." (Opp:36; Opening:43-44.) Even if that is true, by seriously underestimating the level of truck trips of recycled material for RPII, the non-EIR analysis of truck traffic impacts is not supported by substantial evidence. (Opening:9) Mr. Brohard's expert comment is substantial evidence that the new information of the changes in the Project to use Landing Way combined with trucking in recycled aggregate will have a ***potentially substantial***, adverse change in the environment" and must be recirculated, regardless of any mitigation. (Guideline §15088.5(a)(1); *Vineyard*, 40 Cal.4th at 448 n.19.)

b. Revised Project II will have a potentially substantial, adverse change on air quality requiring recirculation.

Respondents acknowledge that Dr. Pless submitted expert comments on a possible impact to the environment from additional emissions of PM10 from RPII. (Opp.:38; AR29061-62.) Dr. Pless's expert air comments are substantial evidence of a "***potentially substantial***, adverse change in the environment" from the change to the Project. (40 Cal.4th at 448 n.19 (emphasis added).) Respondents do not

cite to any evidence in the record responding to Dr. Pless or amounting to substantial evidence that there is ***no potential*** substantial adverse change from increases in PM10 from RPII. Indeed, County staff acknowledges increases in PM10 emissions, though by Dutra's calculation, the emission levels fall just shy of BAAQMD's threshold of significance of 80 lbs/day. (AR4795 (63 lbs/day).) Staff's analysis does not eliminate the potential substantial change adverse to the environment described by Dr. Pless. As a result, RPII is significant new information requiring recirculation.

c. Revised Project II will have a potentially substantial, adverse change on wetlands requiring recirculation.

Guideline §15088.5(a)(1) also is triggered by RPII's impact on the wetlands area that will be damaged by the proposed conveyor belt from Landing Way. The evidence referenced by Respondents is not substantial evidence that the placement of a conveyor belt through the wetland area would not have ***potentially*** substantive adverse change on the wetland. (AR4617-18; AR4815.) Biologist Faber provided expert evidence based on her personal observation that, despite the wetland habitat's relatively low quality, the wetland area nevertheless provides important habitat values such as feeding and resting refugia especially during storms and extreme high tides that is not mitigated by a distant mitigation bank. (AR29043-44.) These are new impacts unaddressed in the EIR– because the project analyzed in the EIR did not involve the wetlands at all. As a result, the record does not contain substantial evidence that there is no potential of substantial

adverse changes to the wetlands by installing concrete footings and a conveyer belt right through the wetlands. (*Vineyard*, 40 Cal.4th at 448.)

d. Revised Project II will have a potentially substantial, adverse change to noise levels in the wetland requiring recirculation.

Respondents are wrong to claim that noise levels from the conveyor operation in the Shamrock wetland was addressed by evidence in the record. (Opp.:41-43.) Contrary to Respondents' assertion, the EIR does not provide any noise level data for the conveyors. (AR563.) Respondents cite a report by Dutra's noise consultant as evidence that the conveyor will not have high noise levels in the wetland area. (AR4803-05.) However, the reported 49-dB noise level is at an off-site residential receptor several hundred feet away, not the wetland area. (AR4804. *See* AR551 (all seven receptors are off-site, a number on the opposite side of the project from the Shamrock wetland and several behind a proposed sound wall). *See also* AR2002-04; AR2011 ("the Conveyor Option would not exceed the General Plan Noise Standards ***at any of the residential receivers***") (emphasis added).) The conveyor will be a few feet from the wetlands. (AR23958; *See, e.g.,* AR246.) No noise levels of the conveyor are predicted or considered for the wetland area. No effort to consider the effect of actual predicted noise levels on wildlife in the wetland area is discussed in the EIR or the record.[9]

[9]The statement from Dutra's consultant that "The conveyor is a relatively minor noise contributor as compared to the other noise sources," citing to oral comments

In contrast to that evidentiary void, Biologist James Castle submitted expert comments that RPII would have new noise and vibration impacts on birds and wildlife using the wetland area, including several endangered species and sensitive bird species. (Opening:47-48.) Biologist Castle further stated that the off-site mitigation bank does not mitigate the noise impact. (*Id*.) At a minimum, this undisputed evidence establishes a potential substantial, adverse change to this wetland environment. (*Vineyard*, 40 Cal.4th at 448.)

5. The Superior Court erred in holding that CEQA does not require analysis of worker health effects.

Respondents tepidly argue that the clear language of PRC §21083(b)(3) is only a "general reference." (Opp.:45.) There is nothing "general" about it – §21083(b)(3) provides that a project has significant impacts if it "will cause substantial adverse ***effects on human beings***, either directly or indirectly." (emphasis added). Respondents do not attempt to address PRC §21000(b)-(d), which unequivocally states CEQA's intent to provide "critical thresholds for the health and safety of the people of the state," and "to provide a high-quality environment that at all times is healthful and pleasing to the senses and intellect of man." Nor do Respondents rebut the Court of Appeal's holdings. (*Bakersfield Citizens v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1219-20; *Berkeley*

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by County staff, is of no evidentiary value given the absence of any estimate of the conveyors noise level in close proximity to the wetland area. (AR3874.)

Keep Jets etc. v. Bd. of Port Cmrs. (2001) 91 Cal.App.4th 1344, 1369; Opening:49.)

Instead, Respondents attempt to analogize a project's potential health impacts to workers to a project's social impacts such as increasing the need for fire protection (*City of Hayward v. Trustees of California State University* (2012) 207 Cal.App.4th 446, 459-60), aesthetic impacts in a crowded urban setting (*Bowman v. City of Berkeley* (2004) 122 Cal.App.4th 572, 592, or modest overcrowding of classrooms (*Goleta Union School Dist. v. Regents of University of California* (1995) 37 Cal.App.4th 1025, 1031-32). None of those social impact cases involve anything like the Project's potential health impacts to workers at the Project or justify exempting worker health from CEQA.

Respondents claim that generalized references in the EIR's hazards section to Worker Health and Safety regulations is sufficient to inform the public of potential health impacts to workers at the Project. (Opp.:45.) No such discussion is located there. (AR440-51.) The referenced pages focus on historical uses, soil contamination levels, and the general hazardous waste and worker health and safety regulatory setting. (*Id.*) The subsequent impact analysis focuses on use and storage of hazardous materials, risks of exposures to possible soil contaminants from site grading only, and storage and transport of hazardous materials. (AR447-51). As Dr. Pless commented, the EIR does not assess the health risks from PM10 and silica generated during the life of the Project on its workers. (AR12526.) The

EIR consultant's post-EIR response does not cure the EIR's absence of any consideration of this impact. (*See* AR1955.)

D. The County Violated the Brown Act by Barring the Public From Directly Addressing the Board at the Final Hearing.

Respondents' claim that Petitioners did not raise Gov. Code §54954.3 of the Ralph M. Brown Act ("Brown Act") is incorrect. On December 14, 2010, Petitioners wrote the County on the eve of the final hearing objecting to the County's refusal to allow public testimony on the Project agenda item in violation of Section 54954.3. (AR29518-20.) The County's February 2, 2011 response addresses the Section 54954.3 issue raised by Petitioners. (AR31824-25) Likewise, Petitioners also raised their objection to the County's refusal to allow public testimony at the final County hearing and before the Superior Court. (AR6132-34; CT954-55.) Although Petitioners have refined their arguments and have informed the Court that the precise legal theory arising from Government Code §54954.3 was not articulated to the trial court, the County's violation of Government Code §54954.3 was indeed raised.

Respondents point out that Government Code §54954.3 is not one of the provisions listed in Section 54960.1(a), which specifies certain Brown Act provisions that can be enforced directly under the Act. (Opp.:53.) In those circumstances, an interested member of the public is free to petition for a traditional writ of mandate, CCP §1085, to enforce violations of the Brown Act. Petitioners specifically alleged CCP §1085 in their claim to enforce Section

54954.3. (CT:246, 248.) Because Petitioners have no plain, speedy, and adequate remedy pursuant to Government Code §54960.1(a), they are entitled to seek relief pursuant to a traditional writ of mandate. (*See Doe v. Albany Unified School Dist.* (2010) 190 Cal.App.4th 668, 682 ("The fact that a particular statute may not create an explicit private right of action does not mean it cannot be the basis of a petition for writ of mandate to compel compliance").)

Pursuant to its broad, equitable powers, the Court may vacate the action underlying the County's violation of the Brown Act. "In its nature mandamus is a proceeding in which equitable principles are applicable." (*Dare v. Board of Medical Examiners* (1943) 21 Cal.2d 790, 795.) "An equity court has broad powers to fashion a remedy." (*Oceanside Cmty. Assn. v. Oceanside Land Co.* (1983) 147 Cal.App.3d 166, 177. *See Advanced Micro Devices v. Intel Corp.* (1994) 9 Cal.4th 362.)

The County did violate §54954.3. Respondents do not convincingly address the simple fact that the Board of Supervisors was not sitting as a committee on October 12, 2010. (Opp.:57-58.) Respondents claim that applying §54954.3(a)'s plain language would lead to the absurd result of allowing members of the public to address the Board twice if the Board agendizes an item twice. (Opp.:58.) That is hardly absurd – instead it is consonant with the intent of the Brown Act to open agency meetings to the public and allow them to meaningfully participate. (Gov. Code §54950. *See* Brief of Amicus Curiae John McGinnis.)

Lastly, Petitioners were prejudiced by the Supervisors' refusal to let the public testify at the final hearing on the Project. The morning of the hearing, the County released documents previously unavailable to Petitioners claiming to be the Project's "Final EIR." (Opening:12; AR6132-33; AR5413-5560.) The vote was a close one – 3-2 – and it was not a foregone conclusion that public comment would not have affected the outcome. Indeed, at a previous hearing, the Board had taken a straw vote to deny the Project. (AR5867-70.)[10]

The cases cited by Respondents do not hold otherwise. None of those cases involved an agency's refusal to let the public speak on a noticed agenda item for a Project that had aroused significant interest by the public. (*See Cohan v. City of Thousand Oaks* (1994) 30 Cal.App.4th 547, 556 (no prejudice from city's failure to provide notice for hearing on whether to hold a subsequent appeal when subsequent appeal on merits was duly noticed); *Galbiso v. Orosi Public Utility Dist.* (2010) 182 Cal.App.4th 652, 669-71 (no prejudice from "secret meetings" that were not even alleged in complaint). *Compare Sounhein v. City of San Dimas* (1992) 11 Cal.App.4th 1255, 1260 ("the failure of the city to provide the requisite notice and hearing procedures cannot be deemed harmless or nonprejudicial").) And *Chaffee v. San Francisco Library Com.* (2004) 115 Cal.App.4th 461 is inapposite, involving a one-day continuance of a single, agendized meeting. (115

[10] Hence, this situation is readily distinguishable from *North Pacifica LLC v. California Coastal Com.* (2008) 166 Cal.App.4th 1416 which involved notice for an item the adoption of which was "automatic."

Cal.App.4th at 469 (holding that Legislature "mandated… public comment on each agenda item as it is taken up by the body" and noting that the Brown Act "mandates that action on continued agenda items must occur within five calendar days").) The County's meetings where it agendized the Dutra Project were two separate meetings, separately agendized, held more than five days apart.

IV. CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court overturn the Superior Court's ruling and order the Superior Court to grant the petition for writ of mandate.

Respectfully submitted,

Dated: September 25, 2012

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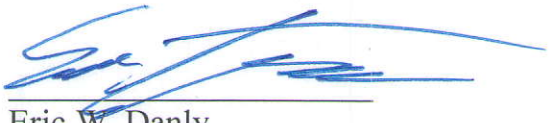

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Date: September 25, 2012

Respectfully submitted,

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PROOF OF SERVICE

I, Toyer Grear, declare as follows:

I am a resident of the State of California, and employed in Oakland, California. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 410 12th Street, Suite 250, Oakland, CA 94607. On September 25, 2012, I served a copy of the foregoing document(s) entitled:

APPELLANTS' REPLY BRIEF

☒ **BY ELECTRONIC MAIL AND US FIRST CLASS MAIL (PURSUANT TO CASE MANAGMENT ORDER AND STIPULATION)**. By sending the documents as an electronic mail attachment in PDF format to the e-mail addresses below, and by placing the document(s) listed above in a sealed postage pre-paid envelope, and causing the envelope to be delivered to a US Mail receptacle for collection

on the following interested parties in the above referenced case addressed as follows:

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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, and that this declaration was executed September 25, 2012 at Oakland, California.

Toyer Grear