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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SANTA CRUZ

CALIFORNIA NATIVE PLANT SOCIETY, a California non-profit corporation, and FRIENDS OF ARANA GULCH, an unincorporated association,

Petitioners,

vs.

CITY OF SANTA CRUZ, CITY COUNCIL OF THE CITY OF SANTA CRUZ, and DOES 1 THROUGH 15,

Respondents.

Case No. CV 154966

PETITIONER'S REPLY BRIEF

Hearing Date: 6/14/07
Time: 8:30am
Dept: 9

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The Respondents' Opposition Brief makes inconsistent and circular arguments, and relies on many authorities that have no bearing on this case. Moreover, Respondents fail to address many of the salient points and arguments raised in Petitioner's Opening Brief, including, but not limited to, the criticisms of the project by the California Coastal Commission, the California Department of Fish & Game, the City Parks and Recreation Commission, and Grey Hayes, who was cited as an authority on tarplant in the Master Plan.

A. Standard of Review

The Respondents assert that the Petitioners are erroneous when they state that this matter is reviewed pursuant to CCP § 1094.5. Instead, Respondents argue, this matter should be reviewed is pursuant to CCP § 1085 because this matter involves a legislative act. Respondents' Brief, p. 8-9. This is a *non sequitur*. Petitioner based its standard of review on the fact that the City held public hearings on the Master Plan. Nonetheless, the Courts have held that the standard of review, whether under CCP § 1094.5 or 1085, is essentially the same. *Laurel Heights Improvement Association of San Francisco v. Regents of the University of California*(1988) 47 Cal.3d 376, 392. Moreover, the Petition for Writ of Mandate pleads both CCP §§ 1085 and 1094.5. *See* Petition for Writ of Mandamus, p. 6, par. 23 and 25.

The Respondents argue that the standard of review in this case is the "substantial evidence" prong of review rather than "a failure to proceed in a manner required by law." The Respondents ignore state precedent and instead rely on federal authorities under the National Environmental Policy Act ("NEPA"). Respondents' Brief, p. 9. While Petition agrees that NEPA cases can be persuasive authority for interpreting CEQA when no state authorities exist,

NEPA cases do not trump state cases that have interpreted CEQA. Indeed, the California Supreme Court, which indisputably has the last word in interpreting CEQA, has stated that statements of overriding considerations and findings in support of infeasibility are questions of law.

> At issue ... are the Trustees' findings that mitigation is infeasible and that mitigation is not their responsibility. These findings depend on a disputed question of law--a type of question we review de novo. De novo review of legal questions is consistent with the abuse of discretion standard. In the context of review for abuse of discretion, an agency's "use of an erroneous legal standard constitutes a failure to proceed in a manner required by law." [Citations].

City of Marina v. Board of Trustees of California State University (2006) 39 Cal. 4th 341, 355-356. There can be no argument that the City's failure to adopt a feasible alternative and its erroneous application of the infeasibility in its Statement of Overriding Considerations is a question of law.

Assuming, for the sake of argument, that the standard employment was the substantial evidence standard, the Respondents also fail miserably. The Respondents argue that Petitioners fail to recognize the "intra-agency division of labor within CEQA." Respondents' Brief, p. 18. The Respondents essentially argue that staff prepares an EIR, and that the City Council adopts the findings. Accordingly, the City Council's findings trump the EIR's determination of feasibility. This argument, if true, would make EIR processes a mere charade.

After the Draft EIR was released, the public had an opportunity to submit written comments on the EIR. A lead agency must, in the EIR, describe each of the significant environmental issues raised in the comments as well as state why the particular comments were rejected. *People v. County of Kern* (1974) 39 Cal.App.3d 830, 841; Public Resources Code

Section 21091 (d)(2)(A).

In the case at bar, Petitioners' counsel and others submitted written comments. Particular responses to Petitioner's comments were contrary to the findings of the City Council. In response to Petitioners' comments on the EIR that there must be a reasonable range of alternatives (2 AR 773-774), the Final EIR states that

> The four alternatives evaluated in Chapter 5 of the DEIR are considered to be a reasonable range of alternatives. While each alternative does not necessarily achieve all of the identified project objectives, the City's decision makers can **easily** select any of the alternatives rather than the proposed project, and each alternative would still provide the City with a Master Plan for Arana Gulch.

[2 AR 778 (emphasis added)]. The Responses go on to state that "except for the No project, each alternative meets 'most' of the project objectives." [2 AR 778]. However, in the end, the City Council stated that all the alternatives were infeasible. [1 AR 205-208]. The Council should not be permitted to make statements contrary to the very written responses made to Petitioners' counsel during the EIR public comment process.

The findings of the Council must be supported by substantial evidence in the record. If the EIR and the evidence in the administrative record directly contradict the findings of the City Council, it cannot be said that the City Council's findings are supported by substantial evidence in the record.

> [T]he findings must support the decision and the evidence must support the findings. (*Topanga Assn. for a Scenic Community v. County of Los Angeles* [(1974)] 11 Cal.3d [506,] 514.) Here, the findings are inadequate because they are not supported by any evidence.
>
> A conclusory statement in findings, unsupported by any evidence in the record suggesting the [Environmental Review Board] was not created, is per se insufficient. [Citations].

Healing v. California Coastal Commission (1994) 22 Cal.App.4th 1158, 1167. *Topanga*

Association for a Scenic Community v. County of Los Angeles, supra, 11 Cal.3d at 514-517; *Preservation Action Council v. City of San Jose* (2006) 141 Cal.App.4th 1336, 1356.

Moreover, the Respondents' argument concerning the intra-agency division of labor is specious in light of how the Council also approves its findings. To pretend that the Council actually sat in a room and drafted the findings itself ignores the fact that City staff also drafts the findings for the Council's consideration. The Staff Report to the Council actually states that

> [t]he Statement of Overriding Considerations is included in Attachment 2, Exhibit A. If the City Council chooses to adopt the Statement of Overriding Considerations and approve the Arana Gulch Master Plan, **the Council will be concluding, as staff does**, that the benefits listed below would render acceptable the significant and unavoidable effect on the Santa Cruz tarplant habitat.

[1 AR 229 (emphasis added)]. Therefore, City staff drafts the EIR and the findings. No integrity is left if City staff can draft an EIR, and then say something entirely different for purposes of the Council's findings. The EIR cannot simply be discarded as if it were perfunctory. "If the [agency] concludes there are no feasible alternatives, it must explain in meaningful detail ***in the EIR*** the basis for that conclusion." (*Laurel Heights Improvement Assn. v. Regents of University of California, supra*, 47 Cal.3d at p. 405.)" *Preservation Action Council v. City of San Jose, supra*, 141 Cal. App. 4th at 1351 (emphasis added). In the case at bar, the EIR determined that the alternatives were feasible.

With respect to the remaining arguments concerning the wetlands delineation and application of the Coastal Act's prohibition of development in Environmentally Sensitive Habitat Areas ("ESHA"), the standard of review concerns the Respondents' failure to proceed in a manner required by law. Both issues deal with procedural irregularities and concern questions of law. In determining whether an agency correctly interpreted and applied CEQA, the reviewing

court makes a de novo determination based upon independent review of the law and the record. *Laurel Heights Improvement Ass'n v. Regents of the University of California* (1988) 47 Cal.3d 376, 394-396; *see also, Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 117-118.

B. The Respondents Failed to Approve a Feasible Alternative

1. The Respondents Ignore the Arguments Concerning the Statement of Overriding Considerations

One of the most important arguments in this case is largely ignored by the Respondents. Respondents simply provide a two page recitation of the general law pertaining to Alternatives and Statements of Overriding Considerations. Respondents' Brief, p. 24-25. The Respondents assert that because the Council was making a legislative decision, it could find the benefits of the project outweighed the environmental harm. Moreover, the Respondents' Brief concludes, as does the Statement of Overriding Considerations, is that mitigation measures "lessen the overall impact on tarplant habitat. (AR 1:0208.):" Respondents' Brief, p. 24-25. However, the EIR concluded that the impact was significant and unavoidable. [1 AR 4, 139; 2 AR 615]. And, the EIR concluded that Alternatives 3 and 4 were feasible alternatives that would avoid the significant and unavoidable biological impacts. [2 AR 1115 (*see* "Biological Resources" in table)].

The Respondents' brief ignores CEQA's clear directive. Public Resources Code § 21002.1(b) states that "[e]ach public agency **shall** mitigate or avoid the significant effects on the environment of projects that it carries out or approves whenever it is feasible to do so." Public

Resources Code § 21002.1(b) (emphasis added). Under CEQA, "feasible" is defined as "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social and technological factors." Public Resources Code § 21061.1; CEQA Guidelines, § 15364.

The California Supreme Court has stated that the alternatives and mitigation sections are "the core" of an EIR. *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564; *Los Angeles Unified School Dist. v. City of Los Angeles* (1997) 58 Cal.App.4th 1019, 1029; *Preservation Action Council v. City of San Jose* (2006) 141 Cal.App.4th 1336, 1350. As stated in the Opening Brief, the Supreme Court has also recently held that CEQA requires agencies to adopt feasible alternatives when there are unavoidable impacts of a proposed project.

> A statement of overriding considerations is required, and offers a proper basis for approving a project despite the existence of unmitigated environmental effects, **only when the measures necessary to mitigate or avoid those effects have properly been found to be infeasible**. (Pub. Resources Code, § 21081, subd. (b).) ... . **CEQA does not authorize an agency to proceed with a project that will have significant, unmitigated effects on the environment, based simply on a weighing of those effects against the project's benefits, unless the measures necessary to mitigate those effects are truly infeasible.** Such a rule, even were it not wholly inconsistent with the relevant statute (id., § 21081, subd. (b)), would tend to displace the fundamental obligation of "[e]ach public agency [to] mitigate or avoid the significant effects on the environment of projects that it carries out or approves whenever it is feasible to do so" (id., § 21002.1, subd. (b)).

City of Marina' v. Board of Trustees of California State University (2006) 39 Cal. 4th 341, 368-369 [emphasis added]; see also *County of San Diego v. Grossmont-Cuyamaca Community College Dist.* (2006) 141 Cal.App.4th 86, 98, 108, fn.18; *Uphold Our Heritage v. Town of Woodside* (2007) 147 Cal.App. 4th 587 (*review denied*). The Respondents circumvented CEQA's mandate to adopt feasible alternatives that would avoid a significant environmental impact to Santa Cruz tarplant, a listed federal and state species under endangered species laws. [2 AR

922].

Moreover, the reasons for alleged "infeasibility" set forth by the City Council in the Statement of Overriding Considerations has nothing to do with "[s]pecific economic, legal, social, technological, or other considerations [that] make infeasible the ... alternatives." Public Resources Code § 21081(a)(3). The City Council found that the alternatives were simply infeasible for not "fully" meeting the project objectives. *See* Opening Brief, p. 18-19. The findings, however, are directly contradicted by the Response to Public Comments in the Final EIR. As stated *supra*, the City states that "the City's decision makers can **easily** select any of the alternatives rather than the proposed project, and each alternative would still provide the City with a Master Plan for Arana Gulch." [2 AR 778 (emphasis added)]. "[E]xcept for the No project, each alternative meets 'most' of the project objectives." [2 AR 778]. The EIR's response to comments follows CEQA's mandate to examine alternatives even if they do not fully meet the objectives of the Project.

> A potential alternative should not be excluded from consideration merely because it "would impede to some degree the attainment of the project objectives, or would be more costly." (Guidelines, § 15126.6, subd. (b).) "The range of potential alternatives to the proposed project shall include those that could feasibly accomplish ***most** of the basic objectives* of the project and could avoid or substantially lessen one or more of the significant effects.

Preservation Action Council v. City of San Jose, supra, 141 Cal.App.4th at 1354 (emphasis in original). The City Council's findings ignore this mandate.

Uphold Our Heritage v. Town of Woodside (2007) 147 Cal.App. 4th 587 (review denied), which involved the proposed demolition of an historical home owned by computer magnate Steve Jobs, held that "[t]he willingness of the applicant to accept a feasible alternative, however,

is no more relevant than the financial ability of the applicant to complete the alternative. To define feasible as appellants suggest would render CEQA meaningless." *Id.* at 602. That is exactly what the Respondents have done here. They have created an artificial construct and in the end rejected alternatives simply because they did not like them, not because they were truly infeasible. Moreover, the EIR concluded they were feasible.

Because there are admittedly feasible alternatives, the City must adopt an alternative that avoids significant environmental impacts. Alternatives 3 and 4 were deemed feasible and would avoid the significant, unavoidable impacts. [2 AR 1115]. Indeed, the Respondents recognize that it has "options" in developing a Master Plan and it is not wedded to any particular concept for the property. [3 AR 1579].

2. Respondents Argument Concerning "Potential Feasibility" is a Ruse

The Respondents argue that Alternatives only have to be "potentially feasible" and that the City Council can later determine that they are infeasible. The Respondents rely on *Preservation Action Council v. City of San Jose, supra.* Respondents' brief, p. 19. However, the Respondents fail to acknowledge that case actually supports Petitioners.

> "It is the [agency]'s responsibility to provide an adequate discussion of alternatives. (Guidelines, § 15126, subd. (d).) That responsibility is not dependent in the first instance on a showing by the public that there are feasible alternatives. If the [agency] concludes there are no feasible alternatives, it must explain in meaningful detail ***in the EIR*** the basis for that conclusion." (*Laurel Heights Improvement Assn. v. Regents of University of California, supra*, 47 Cal.3d at p. 405.)

Preservation Action Council v. City of San Jose, supra, 141 Cal. App. 4th at 1351 (emphasis

added). As stated *supra*, the EIR in this case concludes that the alternatives are feasible. Under *Preservation Action Council*, infeasibility, if any, must be stated in the EIR.

Respondents argue that CEQA Guideline Section 15126.6 allows the City to put forth only "potentially" feasible alternatives and then the Council can decide later that they are not feasible by a simple wave of a wand. This is not what the CEQA Guidelines say. CEQA Guideline § 15126.6 states that the an agency does not have to consider infeasible alternatives, and in this context then goes on to say only "potentially feasible alternatives" are required. 14 CCR § 15126.6(a). It is clear that the Supreme Court requires Respondents to adopt feasible alternatives to avoid significant environmental impacts. *City of Marina' v. Board of Trustees of California State University* (2006) 39 Cal. 4th 341, 368-369. Moreover, the Respondents state that the City Council has wide discretion. Under such circumstances, there are no economic, legal or technological barriers to approval of an alternative that avoids significant environmental impacts. Public Resources Code § 21081(a)(3).

The Respondents also cite *Sequoyah Hills Homeowners Assn. v. City of Oakland* (1993) 23 Cal.App.4th 704, 715, and *Sierra Club v. County of Napa* (2004) 121 Cal.App.4th 1490, 1507-1508, for the proposition that the Council can reject alternatives as "infeasible" if they do not meet all the project objectives. These cases are taken out-of-context. *Sequoyah Hills* concerned a matter where there was a lower density alternative to the development was considered **legally and economically infeasible** because the Government Code did not allow the City to decrease the number of units under the circumstances, and there was evidence that reducing the density would make the project economically infeasible. The court in *Sierra Club* found that there was evidence of economic infeasibility for the project if the size was reduced.

Sierra Club at 1506-1507. In the case at bar, Respondents repeatedly state that the City Council has wide discretion in adopting the Master Plan.

3. Respondents Continue to Employ Circular Reasoning in Defending the City's Actions

Like the Respondents' statements in the Administrative Record, the Respondents' Brief employs circular reasoning. On the one hand it states that the City Council's actions are legislative in character and therefore the City is free to set forth any objectives and has the freedom to adopt any plan it deems appropriate. Respondents' Brief, p. 6. The Respondents state that "[t]he Master Plan's purpose is to 'establish a vision and goals that will shape the future of Arana Gulch as a unique open space within the City of Santa Cruz.' (AR 3:1236.) The City correctly relied on this overall purpose in developing the Project objectives contained in the EIR." Respondents' Brief, 13: 11-14. Respondents also state that "Petitioners fail to recognize that when, as here, a particular project features 'specific and narrow' objectives, a lead agency is 'justified in limiting its review of alternative[s] ... to those ... which could feasibly accomplish the project's purpose.'" Respondents's Brief, p. 13, ln. 5-11, *citing Save San Francisco Bay Assn. v. San Francisco Bay Conservation and Development Commission* (1992) 10 Cal.App.4th 908, 929.

After explaining in their Brief that the City Council can narrowly define the Project objectives, the Respondents then state that they do not have to consider off-site alternatives for the bike path because "Petitioners' argument ignore the fact that the proposed 'project" is not a bike path, but a Master Plan for the Arana Gulch property." Respondents' Brief, p. 21. The Respondents also argue that it was not required to set forth alternatives that included an ADA

compliant trail.[1]

The Respondents argue that a "review of the objectives ..., however, reveals that while provision of a trail system is an objective of the Master Plan, the exact location of the trail has not been pre-selected in the objectives." Respondents' Brief, 14: 24-26. However, all the alternatives were dismissed as infeasible because they did not include an ADA-compliant trail.

The Respondents merely construct alternatives that render the Project selected *a fait accompli* without any real choice of alternatives that would reduce environmental impacts. For instance, the Council finds that every alternative is infeasible because they do not include an ADA trail. [1 AR 205-208.] This creates a false choice between an ADA trail and avoiding significant impacts to tarplant. The Respondents' argument is akin to a rental car agency telling a customer that he or she can choose any car on the lot for the same rate, but only one of the cars has a steering wheel. Respondents could have made any of the other trails that are proposed in the Master Plan, ADA compliant.

4. There Are No Legislative Mandates That Prevent the City From Adopting An Alternative

The Respondents argue that *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 693, 735-737, is inapplicable because unlike that case where a private developer's economic decisions were driving the project objectives, the Respondents here are "implementing

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[1] The Respondents cite to four cases that states that the Respondents were not required to consider alternatives to individual facets of a project. Respondents' Brief, p. 22. However, these cases do not stand for the proposition that the Respondents may simply design a project with specific objectives and fail to include those objectives in the alternatives that the EIR thereby rendering them straw alternatives. If an ADA-compliant trail is an essential component of the Project, then the alternatives examined must include such a trail.

existing legislative policies and goals to determine the objectives for the Project." Respondents' Brief, pp.15, 22, 24. Respondents also argue that "The Project carries out past legislative policy determinations" from the City's General Plan, the Santa Cruz Greenbelt Master Plan, and the Arana Gulch Interim Master Plan. Respondents' Brief, p. 1 - 2. However, this is incorrect.

First, the General Plan does not dictate that there be specific uses on Arana Gulch. The Respondents admit that the range of alternatives presented in the EIR "easily meet" the general plan standards. Respondents' Brief, p. 15-16. Moreover, many of the provisions of the General Plan that Respondents cite are general policy statements that apply throughout the City and none of the citations mandate a particular use on Arana Gulch. *See* Respondents' Brief, p. 2, fn. 2. Even the more specific General Plan provisions concerning Arana Gulch do not require the construction of an east-west bicycle route through Arana Gulch or ADA trail. It simply states "[p]rovide for pedestrian and bicycle linkages to other segments of the Arana Gulch corridor via the harbor and other public access points." 13 AR 8666. This vague statement does not mandate a bicycle connection through tarplant between Broadway and Brommer. Moreover, Parks and Recreation Element Policy 4.2.2, concerning ADA-compliant trails simply pertains to trails on a city-wide basis. [13 AR 8593-8594.] Indeed, in response to a comment on the EIR by Petitioners' counsel asking if an ADA-compliant trail was required by law (2 AR 775), the Response to Comments stated that "There is not a 'requirement' or specific law that the trail be ADA accessible within Arana Gulch. This was a decision by the City decision makers to include such a trail in the preparation of the Master Plan for Arana Gulch. The existing grant funding has requirements to make the trail accessible." [2 AR 779]. While the Petitioners believe an ADA-accessible path is a noble component of the project, other trails that are being constructed

as part of the Master Plan outside tarplant habitat can be made ADA compliant.

Second, the Greenbelt Master Plan simply sets forth "conceptual plans" and "recommended uses" for all greenbelt properties in the City. [5 AR 2996-2998.] Indeed it refers to the Broadway-Brommer connection as a "possibility." [5 AR 2997.] Furthermore, despite Respondents' contention to the contrary, the Greenbelt Master Plan was never "adopted" by the City Council. It was simply a planning and feasibility study that only was "accepted" by the City Council. [5 AR 2959-2960.]

Finally, the Master Plan that is the subject of this action was to "supercede" the Interim Management Plan and land use decisions were not part of the Interim Management Plan. [1 AR 133; 3 AR 1237; 4 AR 2117].

The Respondents follow the City Council's conclusions and tick off the reasons why each of the Alternatives "would not contribute to the achievement of Project objectives" because none of the alternatives include the ADA-compliant trail, and Alternatives 3 and 4 do not include nature viewing areas and interpretive displays. Respondents' Brief, p. 16-18. However, as stated in the Opening Brief on pages 18 through 20, these arguments are fallacious.

The Respondents also argue that if the City would be obliged to manage the tarplant at Arana Gulch under the Interim Management Plan. Respondents' Brief, 20: 6-8. This is false. The citations to the record provided for this passage (2 AR 604 and 1114) do not make any such statement and the Interim Management Plan is superceded by the Management Plan. So the interim plan, as its name implies, is no longer relevant under the Management Plan. Moreover, as discussed in the Opening Brief, pages 10 - 11, tarplant management was a mitigation for significant environmental effects the management was deemed unnecessary for some alternatives

due to the lack of significant impacts; the EIR stated that the Council could include a management plan for any of the alternatives.

5. The Respondents Must Consider Alternative Alignments for the East-West Bicycle Route

Where Petitioners do agree is with the Respondents' recitation of the legal requirement that "in evaluating the scope of alternatives to be analyzed in an EIR, each case must be evaluated on its own facts, which in turn must be reviewed in light of CEQA statutory purposes." Respondents' Brief, 12: 3-5, *citing Del Mar Terrace Conservancy, Inc. v. City Council of the City of San Diego* (1992) 10 Cal.App.4th 712, 739; see also, *Preservation Action Council v. City of San Jose* (2006) 141 Cal. App. 4th 1336, 1350-1351 [emphasis added]; see also, *Goleta, supra, at 566; Save San Francisco Bay Association v. San Francisco Bay Conservation and Development Commission* (1992) 10 Cal.App.4th 908, 919. As stated in Petitioners' Opening Brief, in this case, because (1) the California Coastal Commission and City advisory bodies clamor for offsite alternatives analysis, (2) the east-west bike path is meant to be a regional transportation facility, (3) the Master Plan approval already includes development of the bike path offsite on Port District property, (4) the Project is a public facility to be built on public property, (5) a previous City Council directed staff to investigate offsite alternatives, and (6) offsite alternatives would avoid significant unavoidable impacts to tarplant habitat, the discussion of offsite alternatives would foster informed decisionmaking and public participation and would avoid significant environmental impacts. Opening Brief, p. 13-15. Respondents ignore these arguments in Petitioners' Opening Brief.

Finally, Respondents argue that the City Council already considered alternatives as part

of the Broadway-Brommer EIR. Respondents' Brief, p. 23. However, as Respondents admit, the City Council never used the EIR for any decision concerning the Broadway-Brommer connection. Accordingly, the Respondents cannot dispense with the need for consideration of alternatives as part of this action simply because an EIR exists for a project that was never approved. The City Council did not consider any of these alternatives in their deliberations on the Master Plan. It simply dismissed the alternatives in the EIR for the Master Plan as infeasible.

C. Respondents Acknowledge their Failure to Delineate Coastal Act Defined Wetlands Which Would be Impacted, But In Effect Contend that the Master Plan Approval at the City Level Can be Mere "Shadow-Play" and the Delineation Can be Postponed Until the Coastal Commission Acts on the Local Coastal Plan Amendment.

The concluding sentence to Respondents introductory summary regarding the wetlands delineation (Argument B, p. 26) states as follows:

> "... development of the trail alignment will require a coastal permit from the Coastal Commission, and this process will ensure that delineation is done to satisfy the Commission's protocol prior to final alignment."

This case involves ***City*** approval of a Master Plan and Resolutions for amendments to the Local Coastal Implementation Plan Amendments, and zoning changes. [1 AR 122-131; 172-226]. The City is the lead agency and the primary decisionmaker as to the foregoing Approvals. Yet the City seeks to abdicate its role and responsibility and have this Court treat the City's decisions (and the broad public participation in the hearings leading to those decisions) as mere "shadow play" for the main act which the City apparently envisions as the review of its decisions by the Coastal Commission. The City takes this position in order to find some argument to respond to their admitted failure to inform the public of the extent of resources which would require protection had delineation of the wetlands been accomplished using the proper and more

protective Coastal Commission criteria. This deprived the City decisionmakers and the public of the ability to know what areas need to be "designed around" and precluded finding creative alternatives based on full disclosure of the wetland areas. **It also avoids facing the possibility that the combination of wetlands and tarplant habitat would preclude use of the Arana Gulch site for the commuter bike path. Instead, the City's head-in-the-sand approach facilitates what CEQA prohibits, namely an attempt to imbue the project with overwhelming "bureaucratic and financial *momentum*"**" *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal. 4th 412, 441, emphasis added.

Not only do Respondents argue that the City hearings are of little import compared to the Coastal Commission process, but they also belittle the consequences, stating that:

> "Any necessary trail realignment is expected to be minor enough that new significant impacts will not result. (AR 2:0589)" (Respondents' Brief 26:1-15)

The above-quoted language is a direct quote from the Addendum and no justification is given for the City's "expectation." Rather, the Addendum simply makes the bald statement that "the final design of the trail, which has not yet occurred, can ensure that such wetlands are avoided." (AR 2: 0589). There is no way to give such assurance without knowing the location of the wetlands as determined based on the proper standard. That is the case for at least the following reasons:

> (1) The Arana Gulch site is severely constrained and the southern portion of Arana Gulch where the bike path will be constructed has been previously designated by City consultants as a tarplant preservation area. [1 AR 351; 5 AR 3186]; hence the bike path which bisects this area is hemmed in by tarplant habitat and any increase in wetland area has the potential to require finding an off-Arana alternative.
>
> (2) Respondents themselves have acknowledged that "[b]ecause the Commission criteria and the Corps criteria differ, it is possible that the "wetlands" acreage found pursuant to

the Commission criteria may be greater than the acreage found pursuant to the Corps criteria. [2 AR 613].[2]

(3) The City's Local Coastal Program requires not only avoidance of wetlands, but a setback of "at least 100 feet from a wetland." LCP Section 4.2.2.

(4) The Coastal Commission, whose standards for delineation are the proper ones, informed the City that it is "imperative" that the Coastal Commission standard be used for the EIR and that standard has been described by a Court of Appeal as "broad." *Bolsa Chica Land Trust v. Superior Court (1999)* 71 Cal.App.4th 493.

1. Respondents Have Not Demonstrated Compliance with the Requirement for Clearly Identifying and Describing the Relevant Specifics of the Resources Involved.

Respondents have effectively acknowledged that a wetlands delineation using Coastal Commission standards is required for the EIR. That is because when the Coastal Commission comment on the Draft EIR informed the City that such a delineation was "imperative" (AR 2:614), in response the Master Plan EIR imposed such a requirement by adding the following text:

> Any jurisdictional wetland delineation shall also use the California Coastal

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[2]The Coastal Commission definition includes areas without hydrophytic vegetation as wetlands and this is the essential (and very significant from a practical standpoint) difference with Army COE criteria. Under the Coastal Act, wetlands are defined as land within the coastal zone which may be covered periodically or permanently with shallow water and include saltwater marshes, freshwater marshes, open or closed brackish water marshes, swamps, mudflats, and fens. (Public Resources Code §30121) Further precision in the Coastal Commission definition of wetlands is provided under the California Code of Regulations. Under these provisions wetlands are defined as:

> "...land where the water table is at near, or above the land surface long enough to promote the formation of hydric soils or to support the growth of hydrophytes, and shall also include types of wetlands where vegetation is lacking and soil is poorly developed or absent as a result of frequent drastic fluctuations of surface water levels, wave action, water flow, turbidity or high concentration of salts or other substances in the substrate. Such wetlands can be recognized by the presence of surface water or saturated substrate at some during each year and their location within, or adjacent to vegetated wetland or deepwater habitats." (14 CCR §13577)

> Commission criteria (i.e., one positive indicator) since the project site is within the jurisdiction of the California Coastal Commission. Because the Commission criteria and the Corps criteria differ, it is possible that the "wetlands" acreage found pursuant to the Commission criteria may be greater than the acreage found pursuant to the Corps criteria. [2 AR 613]

Respondents nevertheless do attempt to argue that even though such "imperative" wetlands delineation was not performed, "[t]he Draft EIR included enough information to allow meaningful analysis."[3]

To justify this contention, Respondents point to AR 2: 1003 and claim that this portion of the Draft EIR contains "extensive information" on the types of habitat found on the Arana Gulch site (Respondents' Brief 26:24-27:1); however, only two paragraphs on page 1003 (DEIR p. 4.2-37) address "Wetlands." The first of those two paragraphs initially acknowledges that only a 1996 "**preliminary**" delineation of wetlands on the coastal terrace portion of the site has been done and that was done pursuant to Army Corps of Engineers ("ACOE") methodology. Then such paragraph contains the statement found in Respondents' Brief at 27:24-26 that a biologist "conducted a reconnaissance visit to the site in December 2004 to identify additional potential jurisdictional wetlands." However, Respondents' Brief omits the critical qualifying phrase

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[3]Petitioners have also made the point that this failure to identify the relevant specifics of the resources involved also results in deferral of impact analysis and mitigation without a realistic performance standard. Respondents contend that Mitigation Measure BIO-2(a) establishes a realistic performance standard by requiring that the trail be designed to avoid the jurisdictional wetland. This assumes that the trail can be designed in its approximate proposed location and still both avoid the wetland and the tarplant habitat. This cannot be known until the wetland delineation is completed using Coastal Commission criteria. The City's approach puts enormous pressure on any biologist who performs such delineation after the basic route has been chosen and this is contrary to CEQA which is intended to put all this information on the table before **the project has gained overwhelming "bureaucratic and financial *momentum*""** *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal. 4th 412, 441, emphasis added.

which ends the sentence on page 1003, namely "although she did not conduct a formal delineation." Furthermore, by referencing the 1996 delineation, the first sentence of the second paragraph on page 1003 makes it clear that in using the term "jurisdictional wetlands," this portion of the Draft EIR is referring to ACOE jurisdictional wetlands, not wetlands meeting the Coastal Commission standard.

Respondents Brief acknowledges that the "Draft EIR relies on these two sources ["preliminary" delineation in 1996 and reconnaissance visit in 2004] to analyze impacts to seasonal wetlands on the Arana Gulch site" (AR 2: 27:26-28:1). This is an inadequate basis[4] for the required "resource identification and impact analysis" and in any event is based on "initial visits"[5] by Project biologists (using the ACOE standard rather than the "imperative" Coastal Commission standard. In fact, the Coastal Commission's comment on this aspect of the Draft EIR expressly restates the salient portions of the first paragraph of the "Wetlands" portion of Draft EIR page 4.2-37 and concludes by stating that it is "imperative" that the wetland delineation be based on the Coastal Commission's criteria.

Respondents also cite three cases to support their argument that there is enough information to allow meaningful analysis, all of which are easily distinguishable as set forth following. The first of these cases is *Association of Irritated Residents (AIR) v. County of Madera*, 107 Cal. App. 4th 1383, 1394 (Cal. Ct. App. 2003). In that case, the Appellants

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[4]Footnote 14 in Respondents' Brief attempts to paraphrase the second paragraph of the discussion of wetlands on page 1003 of the Draft EIR. At minimum it creates confusion regarding the nine patches of vegetation in the east-central portion by lumping it together with "the larger seasonal wetland in the southeast portion of the area." The latter does not appear to be limited by the "nine patches of vegetation" identified in the east-central portion.

[5]Respondents' Brief 28:8

contended that the field study did not follow survey guidelines for sensitive species that were issued by Fish and Game to determine the presence of state listed species. The Court of Appeal stated that "[i]mplicit in this argument is the foundational assumption that CEQA compels compliance with the survey guidelines as a matter of law. The Court of Appeal rejected this argument because the survey guidelines are not codified in the Public Resources Code, the Fish and Game Code or the California Code of Regulations. Here, the Coastal Commission standards for wetlands are codified in the California Public Resources Code 30121 and 14 California Code of Regulations §13577. Appellants in the *AIR* case also did not establish that the survey guidelines were meant to be applied in cases where a reconnaissance level study did not detect either quality natural habitat or any sign of the species. Here the reconnaissance level study did detect wetlands. In addition, the Court of Appeal found it notable that Fish and Game did not reference the survey guidelines when the agency responded to County's request for comment about the specific project. Here, the Coastal Commission not only commented, but expressly stated that it is "imperative that the wetland delineation be based on the [Coastal] Commission's criteria." Hence, the *AIR* case is completely distinguishable.

The two other cases cited by Respondents in this regard, do not involve a failure to identify impacted resources. One involved alleged failure to provide a sufficiently detailed project description. *Dry Creek Citizens Coalition v. County of Tulare* (1999) 70 Cal.App.4th 20, 28. As Respondents' Brief acknowledges, the applicable CEQA Guideline (14 CCR 15124(c)) requires only a "general description" of a project. On the other hand, CEQA Guideline (14 CCR 15126.2) entitled "Consideration and Discussion of Significant Environmental Impacts" requires much more than the City did here. Subsection 15126.2(a) requires that significant effects shall

be "clearly identified and described," including "***relevant specifics*** of the resources involved." (Emphasis added.)

The other case involved a Mitigated Negative Declaration rather than an EIR as here. *Ocean View Estates Homeowner's Association v. Montecito Water District* (2004) 116 Cal.App.4th 396, 400-401. The Court of Appeal reversed the Trial Court and ordered the Mitigated Negative Declaration set aside. The language quoted by Respondents is clearly *dicta* dealing with hypothetical mitigation measures and contains no citation supporting it. Furthermore, the actual meaning of the paragraph in which it is contained supports Petitioners. The Court rejected the Mitigated Negative Declaration because "the MND fails even to recognize the problem; nothing in the MND requires any measures to mitigate contamination or dam failure." As the Court of Appeal described it two paragraphs earlier, "[b]ut the MND does not discuss ***or even identify*** the impacts." (Emphasis added.) Thus, this case makes clear the critical legal requirement that resources impacted be identified.

2. Recirculation of the EIR was Required Because the Delineation of Wetlands Based on Coastal Commission Criteria Would Provide Significant New Information Potentially Resulting in a New Significant Environmental Impact or a Substantial Increase in the Severity of an Environmental Impact.

Respondents revised Mitigation Measure BIO-2(a) by issuing an Addendum to the Master Plan EIR on July 10, 2006, one day before granting approval of the Master Plan. [2 AR 589-590] Respondents argue that the Addendum with its revised Mitigation Measure requiring wetland delineation under the Coastal Commission criteria at some unspecified time in the future "actually *strengthened* the measure" because it ensures that no adverse impacts to wetlands would occur (Respondents' Brief 31:24-25). However, the measure still provides that a trail will

be constructed and says nothing to prevent increased impact on the tarplant habitat in order to avoid the wetlands. Nor does the measure state that if no trail can be constructed along the selected route without impact to wetlands or tarplant habitat, then the trail will be moved to an alternative route which will not have those impacts.

Under these circumstances, Recirculation of the EIR was required by CEQA Guideline 15088.5 (Recirculation of an EIR Prior to Certification)because

> (1) A new significant environmental impact would result from the project or from a new mitigation measure proposed to be implemented.
>
> (2) A substantial increase in the severity of an environmental impact would result unless mitigation measures are adopted that reduce the impact to a level of insignificance. Public Resources Code Section 21092.1, Public Resources Code; *Laurel Heights Improvement Association v. Regents of the University of California* (1993) 6 Cal. 4th 1112.

Furthermore, as described above, even with the Addendum, the Master Plan EIR still calls for a wetland delineation to be done at some point after the Master Plan is approved. The public and the City Council had no way to assess the true impacts of the project without knowing the true extent of wetlands on the Arana Gulch property. Thus, the failure to include resource identification and detailed impact analysis concerning the presence of wetlands on the Arana Gulch property means that the decisionmakers and the public were deprived of meaningful information upon which to judge the project.

D. Citing Only their Version of "Common Sense" Respondents Erroneously Contend that the Standard for "Significant Disruption of Habitat Value[]" is that Impacts Must be Great Enough to Affect the Viability of the Habitat." Furthermore, Respondents Do Not Refute the Coastal Commission Staff's Stated Understanding that the Primary Objective of the Project is to Create a Direct Connection Between Broadway and Brommer for the Benefit of Bicycle Commuter Use, Thereby Disqualifying the Project as "Resource Dependent."

The City Attorney opined that in order to comply with the Coastal Act, the Master Plan bike connection trail must be both resource dependent and not result in significant disruption of ESHA, citing *Bolsa Chica Land Trust v. Superior Court* (1999) 71 Cal.App.4th 493. [AR 5428-5430]

1. Describing the CEQA Finding as "Legally Conservative" Does Not Change the Fact that the Master Plan's Finding that There is a Significant and Unavoidable Environmental Effect on the ESHA Qualifies as Failure to Avoid "Any Significant Disruption of Habitat Values."

The Santa Cruz tarplant is a special status species in the State of California and its habitat is considered ESHA (as are the wetlands and riparian habitat). [AR 780] **Indeed, the Master Plan EIR admits that there will be significant and unavoidable impacts to ESHA**. [AR 208, 437, 615] Respondents contend that this was merely a "legally conservative" conclusion and should not be read to mean that there will be a significant disruption of habitat values[6]. Respondents want to be able to take inconsistent positions. It would sure make litigation easier. However, it should not be allowed. Petitioners' submit that a "**significant** environmental effect" on tarplant habitat is also a "**significant** disruption of habitat values." By concluding that there will be significant and unavoidable impacts to ESHA, Respondents are effectively acknowledging that such impacts would violate the Coastal Act at Section 30240 which precludes significant disruption of ESHA habitat values.. Indeed, the Coastal Commission staff requested that the

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[6]Respondents spend considerable time trying to convince that the tarplant is only extant in small numbers. This is actually an argument for the importance of "full mitigation." In any event, it is the ***habitat*** which needs preservation, not just the plants. As CDFG stated in its letter to the City, **"[t]his population represents one of only two potentially recoverable populations that are in public and/or conservation ownership; in addition, this population has been demonstrated to be genetically unique. We believe that splitting the population in two by a bike path is not appropriate**, may limit the recoverablity of the population, and may not be mitigable." See AR1: 437.

Master Plan EIR demonstrate how the Master Plan is consistent with the Coastal Act (particularly Section 30240) and the City's and County's Local Coastal Program.

Respondents claim "common sense" implies that the term "significant disruption of habitat values"in Public Resources Code Section 30240 must mean impacts great enough to affect the viability of the habitat. First of all, as described by CDFG, splitting the habitat as proposed would appear to meet this test. However, Respondents' invention of such a test is without legal basis and should not be considered.

Respondents also attempt to "footnote away" the rather devastating letter sent to the City by the California Department of Fish and Game (CDFG). See Respondents' Brief fn. 17. Petitioners request that the Court reread the portions of Petitioners' Opening Brief (p.29) addressing this letter, and the letter itself which is found at 1 AR 435-438. The CDFG requirement for "full mitigation" is not being achieved by the route proposed. Respondent's footnote 17 contends that CDFG misreads the requirements of the California Endangered Species Act (which CDFG enforces) and "full mitigation" is not required because Fish and Game Code Section 1913(c) does not so require. Section 1913(c) is not the applicable Section where (as here) a project is the subject of a planning approval process. It applies to prevent a property owner from simply removing a resource before applying for a permit.

2. The Primary Objective of the Bikeway Connection is to Create a Direct Connection Between Broadway and Brommer for the Benefit of Bicycle Commuter Use and this Does Not Qualify as "Resource Dependent" as Required Under the Coastal Act.

Public Resource Code Section 30240, subdivision (a), provides that "only uses dependent on those resources shall be allowed within [ESHA]." While Respondents assert that a bike

connection between Broadway and Brommer is a "resource dependent use," it is not. As the Coastal Commission's letter dated May 13, 2003 states:

> City staff has suggested that the D2 alternative (very similar to the one approved in the Master Plan) could include interpretive signs and displays and the addition of these amenities would qualify the bike path as a resource dependent use. It is Commission Staff's understanding, however, that the primary objective and current design of the project, as currently proposed, is to create a direct connection between Broadway and Brommer for the benefit of bicycle commuter use. [1 AR 423]

Respondents do not refute the Coastal Commission staff's stated understanding that the primary objective of the project is to create a direct connection between Broadway and Brommer for the benefit of bicycle commuter use. This disqualifies the project as "resource dependent."

Respondents primary responses are as follows: (1) several paved recreational trails have been permitted within ESHAs by the Coastal Commission; and (2) access to special biotic habitat for wheelchair users and recreational bicyclists renders the trail "resource dependent." As to the both, all of the examples are distinguishable because their primary purpose is truly educational and recreational enjoyment of coastal resources. Here the primary purpose remains creation of a commuter bicycle route. Educational and recreational purposes (including wheelchair access to special biotic habitats) could be accomplished easily without the expense of a bicycle bridge across the Harbor connecting Broadway and Brommer.

WITTWER & PARKIN, LLP

Dated: May 23, 2007

By: William P. Parkin
Attorneys for Petitioners
CALIFORNIA NATIVE PLANT SOCIETY and FRIENDS OF ARANA GULCH

PROOF OF SERVICE BY MAIL

I certify and declare as follows:

I am over the age of 18, and not a party to this action. My business address is Wittwer & Parkin, LLP, 147 South River Street, Suite 221, Santa Cruz, CA 95060, which is located in Santa Cruz County where the mailing described below took place.

I am familiar with the business practice at my place of business for the collection and processing of correspondence for mailing with the United States Postal Service. Correspondence so collected and processed is deposited with the United States Postal Service that same day in the ordinary course of business.

On May 23, 2007, the following document(s):

1. **Petitioner's Reply Brief**

was placed for deposit in the United States Postal Service in a sealed envelope, with postage fully paid to:

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I certify and declare under penalty of perjury that the forgoing is true and correct.

Dated: May 23, 2007

Miriam C. Gordon