

Superior Court of California, Contra Costa County

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MINUTE ORDER	
ORINDANS FOR SAFE EMERGENCY EVACUATION VS. CITY OF	N23-0579
ORINDA	HEARING DATE: 02/22/2024
PROCEEDINGS: SPECIAL SET HEARING RE: PETITION FOR WRIT OF MANDATE	
DEPARTMENT 12 JUDICIAL OFFICER: CHARLES S TREAT	CLERK: A. MONTGOMERY
<u>JOURNAL ENTRIES:</u>	
<p>- The Court received a timely opposition to the below tentative ruling:</p> <p style="padding-left: 40px;">Before the Court is a petition for writ of mandate filed by petitioner Orindans for Safe Emergency Evacuation ("OSEE") against the City of Orinda as respondent ("City" or "Respondent"). For the reasons set forth, the petition is granted in part.</p> <p>I. <u>Case Background</u></p> <p>Petitioner OSEE challenges respondent City’s certification of the Plan Orinda Final Environmental Impact Report/Responses to Comments on the Draft EIR ("FEIR") in connection with the approval of zoning modifications and general plan amendments (the "Project" or "Plan Orinda") approved on January 31, 2023. (Administrative Record ("AR") 1-116.) OSEE contends the City failed to comply with the California Environmental Quality Act, Public Resources Code §§ 21000 <i>et seq.</i> ("CEQA") in approving the FEIR and the Project for reasons detailed below. OSEE seeks a writ of mandate ordering the City to vacate its certification of the FEIR and approval of the Project, and other related relief.</p> <p>II. <u>Procedural Background and the OSEE Petition</u></p> <p>On September 15, 2022, the City issued a draft Plan Orinda Environmental Impact Report ("DEIR"). (AR 2, 141.) The DEIR describes the Project subject to the DEIR as "Plan Orinda" which is a "long range planning effort" with amendments to the City's General Plan and zoning changes consisting of three primary components: (1) a "2023-2031 Housing Element Update" ("Housing Element"), (2) a Downtown Precise Plan ("DPP"), and (3) a Safety Element Update ("Safety Element"), as well as related general plan and other amendments. (AR 175, 191, 192 [DEIR].)</p> <p>The zoning and general plan modifications are aimed at increasing the number of dwelling units allowed in the City for the City to meet its Regional Housing Needs Allocation ("RHNA") and comply with the Housing Element Law, Government Code §§ 66580 <i>et seq.</i> ("Housing Law"). (AR 191, 198 [DEIR].) The project area studied in the EIR "includes the entire city, with the DPP Plan Area delineated from, but contained within, the rest of the Housing Element Update Plan Area." (AR 192.) The Housing Element Sites outside the DPP are identified as HE-1 through HE-5. (AR 199 [DEIR].) Overall, the General Plan and zoning amendments would allow residential development in areas outside the DPP and residential development in the DPP that would potentially increase</p>	

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residential housing and density in the City by adding up to 2,383 new housing units to help the City meet the Housing Law requirements. (AR 415 [DEIR].) The City estimates the new housing could also add 6,672 new residents to the City overall, including an estimated 4,530 residents in the DPP. (AR 415-416, 203-205 [DEIR].)

The City received comments on the DEIR and conducted a virtual public meeting on the DEIR before the Downtown Planning & Housing Element Subcommittee on October 22, 2022. (AR 4.) The initial public comment period on the DEIR closed on October 31, 2022. (AR 2.) On November 9, 2022, the City released the first draft of its Evacuation Analysis for public comment. (AR 3182.) On January 13, 2023, the City issued the FEIR which includes the DEIR, written comments on the DEIR by certain agencies and the public, and the City's responses to the comments on the DEIR. (AR 4.) (For convenience, this tentative ruling will generally refer to the "EIR" unless the context warrants specific reference to the DEIR portion of the FEIR or the comments/responses portion of the FEIR.)

On January 18, 2023, a noticed hearing was conducted before the City Planning Commission at which additional public comments were presented on the Project and the EIR. (AR 4, 16975.) The Planning Commission recommended approval of the EIR and the Project to the Orinda City Council. (AR 4, 16975, 17028.) The City Council held a noticed public hearing on the certification of the FEIR and approval of the Project on January 31, 2023. (AR 4, 16972-17054.) After receiving written and oral public comments, the City Council approved the Project and certified the FEIR at the conclusion of the January 31, 2023 public meeting. (AR 2-79 [Res. No. 07-23].) The City issued a written notice of determination ("NOD") on February 1, 2023. (AR 1.) The NOD included a "Statement of Overriding Considerations" in which the City found the benefits of the Project outweighed any adverse, unmitigated environmental impacts described in the FEIR. (AR 5, 40-41 [Res. No. 7-23].)

OSEE timely filed its initial Verified Petition for Writ of Mandate challenging certification of the FEIR and approval of the Project on March 3, 2023. On June 16, 2023, OSEE a First Amended Verified Petition for Writ of Mandate ("Amended Petition"). The City filed an answer to the operative Amended Petition on November 6, 2023.

The Amended Petition asserts two causes of action. The first alleges a violation of CEQA for "Failure to Disclose and Analyze Significant Effects and Feasible Mitigation Measures," and the second a violation of CEQA based on "Inadequate Findings and Statement of Overriding Considerations." The parties have complied with stipulated briefing schedules approved by the Court and timely filed their respective briefs. The Court requested supplemental briefing and continued the original hearing date on the petition to address issues raised by the briefs as to which the Court sought clarification and additional explanation.

III. Standard of Review and Burden of Proof

In reviewing the City's decision to certify the FEIR, the Court determines whether the Respondent abused its discretion under CEQA either "by failing to proceed in the manner CEQA provides or by reaching factual conclusions unsupported by substantial evidence. ([Pub. Res. Code]

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§ 21168.5.)" (*Banning Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal.5th 918, 935 [internal quotation marks omitted].) Whether the FEIR omits essential information is "a procedural question subject to *de novo* review." (*Id.*) (*See also King & Gardiner Farms, LLC v. County of Kern* (2020) 45 Cal.App.5th 814, 837-38 [abuse of discretion by public agency's failure "to proceed in a manner required by CEQA is a procedural (i.e., legal) error."']). "Courts do not pass upon the correctness of an EIR's environmental conclusions but only upon its sufficiency as an informative document. [Citation omitted.]" (*City of Poway v. City of San Diego* (1984) 155 Cal.App.3d 1037, 1041.) "[T]o prove prejudicial error, the appellant must demonstrate 'the failure to include relevant information preclude[d] informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process.'" (*Save the Hill Group v. City of Livermore* (2022) 76 Cal.App.5th 1092, 1109.)

An agency fails to proceed in the manner required by CEQA when the agency fails to include in the certified EIR the information mandated by CEQA. (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435.) "Whether or not the alleged inadequacy is the complete omission of a required discussion or a patently inadequate one-paragraph discussion devoid of analysis, the reviewing court must decide whether the EIR serves its purpose as an informational document." (*Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 516.) "Technical perfection is not required; the courts have looked not for an exhaustive analysis but for adequacy, completeness and a good faith effort at full disclosure. [Citations omitted.]" (*Rio Vista Farm Bureau Center v. County of Solano* (1992) 5 Cal.App.4th 351, 368.)

The City's factual determinations are generally reviewed under the substantial evidence standard, pursuant to which the Court "may not set aside an agency's approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable." (*Sierra Club*, 6 Cal.5th at 512 [internal quotation marks omitted, quoting *Vineyard*, 40 Cal.4th at 35].) Whether the EIR includes an adequate discussion of the environmental or other impacts of a project "presents a mixed question of law and fact." (*Sierra Club*, 6 Cal.5th at 516.) "Thus, to the extent a mixed question requires a determination whether statutory criteria were satisfied, *de novo* review is appropriate; but to the extent factual questions predominate, a more deferential standard is warranted. [Citation omitted.]" (*Id.*) However, "whether a description of an environmental impact is insufficient because it lacks analysis or omits the magnitude of the impact is not a substantial evidence question." (*Sierra Club*, 6 Cal.5th at 514

"'Substantial evidence' is defined as 'enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached.'" (Cal. Code Regs. tit. 14, § 15384, subd. (a).) 'The agency is the finder of fact and we must indulge all reasonable inferences from the evidence that would support the agency's determinations and resolve all conflicts in the evidence in favor of the agency's decision.' [Citation omitted.]" (*City of Hayward v. Trustees of California State University* (2015) 242 Cal.App.4th 833, 839-840.)

An EIR is presumed to be adequate. (*Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899, 924.) The City's decision to certify the EIR is also presumed to comply

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with CEQA and "is presumed correct [citation omitted]." (*Id.* at 925.) "Persons challenging the EIR therefore bear the burden of proving it is legally inadequate, or that insufficient evidence supports one or more of its conclusions. [Citation omitted]." (*Id.* at 925.)

IV. General Standards Applicable to a Program EIR

The parties do not contest that the FEIR is a program EIR related to the approval of revisions to the General Plan and zoning addressed in the Housing Element and a modified Safety Plan, allowing future residential development in various locations in the City in order to meet the state-mandated housing requirements under the Housing Law. (AR 175, 191.) Specific future development projects will require their own environmental review and approval, which may entail a new EIR or a negative declaration, unless the future project is exempt from CEQA, as the EIR explains. (AR 181 ["[F]uture development proposals would be reviewed to determine whether their impacts have been addressed within this EIR, or if additional site-specific environmental review would be required. Subsequent environmental documents, when required, could 'tier' from the Plan Orinda EIR and focus their analysis on new significant impacts or an increase in the severity of impacts pursuant to CEQA Guidelines Sections 15152 and 15385."].)

A program EIR is generally used to examine a broad program at a relatively early stage of the planning process, before specific components of the program are ready for approval. (14 Cal. Code Regs. § 15168, subs. (a)-(c).) The level of specificity required in an EIR corresponds to the specificity of the underlying project. (See 14 Cal. Code Regs. § 15146, subd. (a).) A program EIR for a general, high-level planning document therefore is generally less specific or detailed than an EIR addressing a specific development. (*Id.*) Under CEQA's tiering process, a lead agency will often develop project-level EIRs or negative declarations that tier from the program EIR, focusing on details that the program EIR did not cover. (14 Cal. Code Regs. § 15152, subs. (a)-(d), (f), (g).)

A program EIR must address impacts of the project which may expand or change in the future where the "future expansion and general type of future use is reasonably foreseeable." (*Laurel Heights Improvement Assn. v. Regents of the University of California* (1988) 47 Cal.3d 376, 396, 397.) In *Center for Biological Diversity v. Department of Conservation, etc.* (2019) 36 Cal.App.5th 210, the Court of Appeal addressed principles relevant to its analysis of a program EIR which are also relevant in this case. "First, a program EIR may appropriately defer discussion of site-specific impacts and mitigation measures to later project EIR's where such 'impacts or mitigation measures are not determined by the first-tier approval decision but are specific to the later phases.' [Citation, internal quotation marks omitted.] Second, the sufficiency of a program EIR must be reviewed in light of what is reasonably feasible, given the nature and scope of the project. [Citations omitted.] Third, in considering a challenge to a program EIR, we focus on 'whether the EIR includes enough detail "to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project." [Citations.]' [Citations omitted.]" (*Id.* at 230-31.) (See also *Laurel Heights*, 47 Cal.3d at 405; *San Franciscans for Livable Neighborhoods v. City and County of San Francisco* (2018) 26 Cal.App.5th 596, 608-09 [stating designating an EIR as a program level alone " 'does not decrease the level of analysis"

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required].)

The California Supreme Court has held that "a sufficient discussion of significant impacts requires not merely a determination of whether an impact is significant, but some effort to explain the nature and magnitude of the impact. [Citations omitted.]" (*Sierra Club*, 6 Cal.5th at 519 [emphasis added].) (*See also Cleveland National Forest Foundation v. San Diego Assn. of Governments* (2017) 3 Cal.5th 497, 514-15.) Designating an adverse environmental impact as significant in the EIR "does not excuse the EIR's failure to reasonably describe the nature and magnitude of the adverse effect. [Citation omitted.]" (*Sierra Club*, 6 Cal.5th at 514 [citing *Berkeley Keep Jets Over the Bay Com. v. Board of Port Cmr.* (2001) 91 Cal.App.4th 1344, 1371.]

To comply with CEQA, agencies "generally are not required to analyze the impact of existing environmental conditions on a project's future users or residents. But when a proposed project risks exacerbating those environmental hazards or conditions that already exist, an agency must analyze the potential impact of such hazards on future residents or users. In those specific instances, it is the *project's* impact on the environment – not the *environment's* impact on the project – that compels an evaluation of how future residents or users could be affected by exacerbated conditions." (*California Building Industry Assn. v. Bay Area Air Quality Mgmt. Dist.* (2015) 62 Cal.4th 369, at 377-78 [emphasis added].) An EIR should consider significant environmental impacts caused or exacerbated by locating people and development in areas subject to wildfires, including impacts the project may have on the ability of residents to evacuate the area based on the evacuation plan adopted by the City. (*League to Save Lake Tahoe v. County of Placer* (2022) 75 Cal.App.5th 63, 136; 14 Cal. Code Regs. § 15126.2, subd. (a).) The Court in *Save Lake Tahoe* explained that when the Court reviews whether a project may interfere with an evacuation plan, it is "primarily concerned that the public and decision makers understand the impact the project will have on the new residents' ability to evacuate." (75 Cal.App.5th at 136).

The Court assesses the claimed procedural violations of the EIR and whether the EIR's information regarding wildfire impacts on evacuation was inadequate in light of these standards.

V. Issues Raised by Petitioner

Petitioner raises four general issues it asks the Court to review: (1) does the EIR meet the requirements of CEQA as a sufficient informational document in its discussion wildfire impacts on evacuation when (a) it does not address the wildfire impacts of the Project of "increased population in the DPP," or development in areas outside HE-5 facilitated by the Project will impact evacuation in the event of a wildfire (POB p. 11, l. 23 – p. 12, l. 28, p. 17, l. 26 – p. 18, l. 19), and the separate Evacuation Analysis addresses existing residential development but not the future projected residents and housing development contemplated in the Housing Element and DPP and has a flawed conclusion that the DPP is least constrained though two of the most constrained intersections (POB p. 13, l. 16 – p. 15, l. 4), (b) to the extent the City addressed the impacts of the additional potential residents based on the Housing Element including the DPP, it did so only with respect to emergency response and not evacuation (POB p. 15, ll. 5 – p. 16, l. 6), (c) the EIR does not identify how the "threshold of significance" stated in Impact WFR-1 is crossed (POB p. 18, ll. 20-

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28); (2) does the EIR fail to comply with CEQA because (a) mitigation measures directed to Impact WFR-1 are limited to HE-4 and HE-5 and fail to address "increased population in the DPP," and the EIR fails to include mitigation measures for the DPP, and (b) mitigation measures for Impact WFR-1 are impermissibly deferred (POB p. 20, l. 1 – p. 21, l. 19); (3) is the statement of overriding considerations flawed because the discussion of the wildfire impacts and mitigation for those impacts are insufficient under CEQA, so the decision-makers did not have adequate information on the "impacts" side of the equation to draw the conclusion that the benefits outweigh the impacts (POB p. 21, l. 20 – p. 22, l. 25); and (4) is the EIR inadequate as an informational document under CEQA as it does not contain adequate information regarding VMT (Vehicle Miles Travelled), because the EIR incorrectly assumes there will be no demolition of businesses, and three gas stations will be demolished (POB p. 23, l. 1 – p. 24, l. 7).

VI. Respondent's Contentions Regarding Petitioner's Failure to Exhaust Administrative Remedies

The City contends that some of the arguments raised by Petitioner in the POB were not raised in comments during administrative proceedings before the City approved the Project.

A. Governing Standards for Exhaustion

Public Resources Code § 21177 codifies the exhaustion of administrative remedies rules for CEQA. (*Defend Our Waterfront v. State Lands Com.* (2015) 240 Cal.App.4th 570, 581.) Under the statute, the petitioner must generally have "objected to the approval of the project orally or in writing" before the notice of determination, and "the alleged grounds for noncompliance" with CEQA must have been "presented to the public agency orally or in writing by any person during the public comment period provided by this division or before the close of the public hearing on the project before the issuance of the notice of determination." (Pub. Res. Code § 21177 subd. (a) and (b).)

Petitioner bears the burden of proving that it exhausted each issue for which it seeks judicial review by raising it at the administrative level. (*Citizens for Responsible Equitable Environmental Development v. City of San Diego* (2011) 196 Cal.App.4th 515, 527; *North Coast Rivers Alliance v. Marin Municipal Water Dist. Bd. of Directors* (2013) 216 Cal.App.4th 614, 624.) The Petitioner itself does not have to have raised the issue; if the Petitioner participated in the administrative proceedings, the Petitioner can raise grounds for noncompliance raised by other commenters during the public comment period or before the close of the public hearing. (*Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1199 ["The petitioner may allege as a ground of noncompliance any objection that was presented by any person or entity during the administrative proceedings. [Citation omitted.]."] "Although it is true the plaintiff need not have personally raised the issue [citation omitted], the exact issue raised in the lawsuit must have been presented to the administrative agency so that it will have had an opportunity to act and render the litigation unnecessary. [Citation omitted.]" (*Resource Defense Fund v. Local Agency Formation Com.* (1987) 191 Cal.App.3d 886, 894, disapproved on other grounds in *Voices of the Wetlands v. State Water Resources Control Bd.* (2011) 52 Cal.4th 499, 529.)

"To satisfy the exhaustion doctrine, an issue must be 'fairly presented' to the agency.

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[Citation omitted.] Evidence must be presented in a manner that gives the agency the opportunity to respond with countervailing evidence. [Citation omitted.]" (*Citizens for Responsible Equitable Environmental Development*, 196 Cal.App.4th at 527-28 [letters with only "general, unelaborated objections [are] insufficient to satisfy the exhaustion doctrine".])"' "The essence of the exhaustion doctrine is the public agency's opportunity to receive and respond to articulated factual issues and legal theories before its actions are subjected to judicial review." ' [Citation omitted.] 'The purposes of the doctrine are not satisfied if the objections are not sufficiently specific so as to allow the Agency the opportunity to evaluate and respond to them.' [Citation omitted.] Requiring anything less 'would enable litigants to narrow, obscure, or even omit their arguments before the final administrative authority because they could possibly obtain a more favorable decision from a trial court.' [Citation omitted.]" (*North Coast Rivers Alliance*, 216 Cal.App.4th at 623 [reiterating that "bland" or general references, or unelaborated comments do not meet the exhaustion requirement as they do not allow the agency to respond to the issue at the administrative level, holding certain specific issues raised were not exhausted by general comment letters did not exhaust the issue of whether a specific tank was inconsistent with county plan].)

B. Issues the City Contends Were Not Exhausted

1. Informational Deficiency as to Impacts on Evacuation

As to informational deficiencies in the EIR, to the extent the City contends that the EIR's failure to sufficiently evaluate the Project impacts on evacuation plans was not exhausted, the Court rejects that position. The record is replete with evidence that issue was exhausted. (See AR 854 [parked cars in DPP], 856, 3739 [evacuation benefit from less housing downtown], 3832 [not approve Housing Element and DPP pending further study on evacuation], 15893, 49305-49306 cited at POB p. 16, ll. 10-15 and Petitioner's Reply pp. 12-13.)

2. How Threshold of Significance Was Crossed

The City contends Petitioner has not exhausted administrative remedies as to the argument that the EIR failed to "articulate how the significance threshold for Impact WFR-1 was crossed." (Resp. Brief p. 28, ll. 5-8, citing POB p. 18.) The Court agrees that this issue was not raised or exhausted under the standards set forth above. (AR 3750-3752; 3774-3775, 3777; 3809-3810; 3811-3812; 857-860; 854-856; 870-884.) Petitioner has not cited to any written public comments or the oral objections reflected in the minutes and transcripts of the Planning Commission and City Council hearing that raise that objection, and Petitioner has not demonstrated this specific issue was fairly presented in the administrative proceedings in a manner that allowed the City to address and respond to this concern. (*Citizens for Responsible Equitable Environmental Development*, 196 Cal.App.4th at 527-28.) The Court is not persuaded that the evidence from the record cited by Petitioner in its reply met the standard for exhaustion by giving the City fair notice of the issue to provide the City an opportunity to address the issue through the administrative process. (See Reply p. 13, l. 20 – p. 14, l. 22.) Petitioner relies on "generalized objections" such as Waranoff's submission of the 14-page "Best Practices" guidelines with a general statement "Please take note of the attached paper and consider the points mentioned therein as comments by me." (AR 870-

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887.) Under the standards of CEQA and the case law, these general statements are not sufficient to identify any specific objection or concern regarding the EIR at issue and its compliance or lack of compliance with any of the 14 pages of statements in the attachment. (*Citizens for Responsible Equitable Environmental Development*, 196 Cal.App.4th at 527-28; *North Coast Rivers Alliance*, 216 Cal.App.4th at 623.) However, to the extent that the crossing of the "threshold of significance" is subsumed within Petitioner's broader claim that the EIR fails to adequately address the Project impacts on evacuation by describing the nature and magnitude of the Project's impacts in the wildfire hazards discussion, the Court considers the broader issue.

3. Evacuation Analysis

The City also contends Petitioner did not exhaust arguments regarding the failure to address emergency response and evacuation impacts in WFR-2 in the EIR (Resp. Brief p. 23, ll. 15-16), and the conclusion in the Evacuation Analysis that the downtown area is least constrained is "flawed" because two intersections in the downtown area, the onramps to SR 24, are some of the most constrained (Resp. Brief p. 24, ll. 16-19). The Court agrees that the comments did not specifically cite Impact WFR-2 or the specific finding regarding the two most constrained intersections and downtown as least constrained. (AR 3750-3752; 3774-3775, 3777; 3809-3810; 3811-3812; 857-860; 854-856; 870-884.) The Court, however, interprets Petitioner's arguments regarding WFR-2 not as a separate objection to the sufficiency of the EIR, but rather as support for Petitioner's primary argument that Impact WFR-1 does not specifically analyze wildfire and evacuation impacts on the DPP and that Mitigation Measure WFR-1 does not adequately mitigate the evacuation impacts of the Project. The Court interprets Petitioner's POB as citing WFR-2 to show that the impacts on evacuation specific to the DPP are not addressed in WFR-2 or any other relevant portion of the FEIR.

The transcript of the January 31, 2023 City Council hearing reflects there was an objection to the adequacy of the Evacuation Analysis because it addressed only existing conditions but "did not consider the future downtown residents." (AR 3811.) Another comment cited above expressed concern regarding existing traffic congestion issues downtown and that additional housing and cars downtown would exacerbate the problem. (AR 49305-49306.) Under the standards cited above, and considering the comments are made by lay people, the comments sufficiently apprised the City of the commenters' disputes with the conclusions in the Evacuation Analysis regarding downtown Orinda and the impact of the Project's proposed additional housing in the DPP on evacuation. In any event, the Court does not find the fact that the two most constrained intersections are located downtown means that the DPP is also the most constrained area or that adding housing in the DPP necessarily means evacuation from the DPP will be constrained, even if Petitioner has exhausted the issue and can raise the argument in support of the Petition. The Evacuation Analysis explains that evacuation constraints are impacted by the number of intersections evacuees must pass through, and people in the DPP pass through the fewest intersections to reach the evacuation route (SR-24). (AR 16884, 16889.)

4. Mitigation Issues

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The City contends that several of Petitioner's arguments concerning Mitigation Measure WFR-1 were not exhausted, including the inadequacy of Mitigation Measure WFR-1 because it only requires preparation of a Wildfire Hazard Assessment and Plan with shelter-in-place guidelines for Housing Element Sites 4 and 5 and not the DPP, and because that mitigation measure improperly defers preparation or adoption of those components of the proposed mitigation measures to address the evacuation impacts in HE-4 and HE-5 (Resp. Brief p. 29, ll. 13-15). The Court agrees with the City in part.

a. Exhaustion of Inadequacy of Mitigation Measure WFR-1 Based on Its Limitation to HE-4 and HE-5 Without Consideration or Explanation of Whether Mitigation Is Needed to Address the Project Impacts in the DPP

One public commenter asserted concerns regarding the planned residential development in the downtown and the "EIR's omission of an alternative to reduce the negative effects on emergency evacuation," while asking the City to "expand the emergency evacuation analysis to include the impacts of the buildout of Plan Orinda." (AR 3811-3812.) The commenter suggested that "[s]hifting a majority of the planned housing out of downtown to other sites, including the large vacant Caltrans site, would reduce the adverse impact identified in the EIR and the remaining new housing and retail downtown would meet the project objectives, especially when density bonus incentives are utilized." (AR 3812.) The statements construed in the context of comments from a lay person sufficiently raise the concern that the City failed to address mitigating the evacuation impacts of a buildout of the Project specifically with respect to the DPP.

Another comment asserted that downtown is a "major choke point," adding residents and cars to that area would "exacerbate the existing emergency evacuation problem," and that "major additions to housing or traffic must address the problem of emergency evacuation fully and at the very least include a sincere effort to find alternatives to exacerbating the problem rather than simply accepting the situation as the price of progress." (AR 49305-49306, cited at POB p. 16, ll. 10-16.) While the statements could be construed as requesting that the City address alternatives to more residential development downtown as opposed to other locations, the statements construed in the context of comments by a lay person sufficiently raise the concern that the City failed to address measures mitigating the evacuation impacts of the Project and a buildout of the DPP with residential housing in particular. (*Save Agoura Cornell Knoll v. City of Agoura Hills* (2020) 46 Cal.App.5th 665, 680 [the "court independently reviews the administrative record to determine whether the exhaustion of administrative remedies doctrine applies."]; *Save the Hill Group v. City of Livermore* (2022) 76 Cal.App.5th 1092, 1105 ["courts have acknowledged less specificity is required to preserve an issue for appeal in an administrative proceeding than in a court proceeding because parties are not generally represented by counsel before administrative bodies: '[T]o hold such parties to knowledge of the technical rules of evidence and to the penalty of waiver for failure to make a timely and specific objection would be unfair to them.'"] [Citations omitted.], concluding public comments inquiring regarding alternatives that might be explored to preserve the habitat in question sufficiently apprised the city "of the RFEIR's failure to adequately flesh out the feasibility of not going forward with the Project."].)

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b. Failure to Exhaust Issue that Mitigation Measure WFR-1 Improperly Defers Mitigation

The record cited by Petitioner does not show that the issue that Mitigation Measure WFR-1 improperly defers mitigation was raised before the City in the administrative process. The general comments cited above as to the inadequacy of Mitigation Measure WFR-1 to mitigate the adverse impacts of the Project on evacuation, and the need for further evacuation modeling or analysis, did not fairly apprise the City that Petitioner, or another objector, believed Mitigation Measure WFR-1 or nay of its components improperly deferred mitigation to the future. That issue has not been exhausted. (*Citizens for Responsible Equitable Environmental Development*, 196 Cal.App.4th at 527-28.) Petitioner's reliance on Waranoff's general referral to the 14-page "Best Practices" publication did not provide the City fair notice that the claimed inadequacy of Mitigation Measure WFR-1 was that it deferred mitigation in violation of CEQA by relying on the future creation of the Wildfire Hazard and Assessment Plan for HE-4 and HE-5. (AR 870-887; *Harrington v. City of Davis* (2017) 16 Cal.App.5th 420, 440-41.) (*Compare* Pet. Reply p. 14, l. 24 – p. 15, l. 7 [citing to one statement in the 14-page Bonta guidance not specifically cited or referred to by Waranoff or anyone else] to Pet. Reply p. 15, ll. 8-16.)

VII. Summary of Court's Conclusions Regarding Issues Subject to Review

The FEIR does not comply with CEQA's informational and disclosure requirements in its analysis of Wildfire Impacts WFR-1. The EIR's discussion of Wildfire Impacts WFR-1 is internally inconsistent in addressing the impact of the Project from a wildfire standpoint on City evacuation plans, fails to identify the County evacuation plan that is impaired, which is the conclusion stated in Impact WFR-1 and the related threshold, and fails to provide sufficient information to explain the City's conclusion regarding how the Project has a significant, unavoidable impact because it "risks exacerbating [the] existing environmental conditions" based on the City's stated methodology. (AR 506; *Sierra Club*, 6 Cal.5th at 514, 519; *Cleveland National Forest Foundation*, 3 Cal.5th at 514-15.) The FEIR also fails to comply with CEQA in that the City determined in Wildfire Impact WFR-1 that the Project as a whole significantly impairs evacuation, but the City included mitigation only as to HE-4 and HE-5, without an explanation of why mitigation is not required for the impacts of the Project as a whole rather than only those two sites, and without attempting to mitigate impacts of the Project on evacuation from the remainder of the Project areas. Because the EIR provides ambiguous information on the impacts on evacuation in WFR-1 and does not provide the public and decision-makers with sufficient information to understand the magnitude of the impacts of the Project on evacuation in the face of wildfire hazards, the City did not have sufficient information to balance the benefits of the Project against its adverse impacts, after mitigation, and the City's Statement of Overriding Considerations is therefore not supported. (*San Franciscans for Reasonable Growth v. City & County of San Francisco* (1984) 151 Cal.App.3d 61, 79-80.) As a result, the Court finds Petitioner has demonstrated the City failed to proceed in the manner required by CEQA in certifying the FEIR and issuing the Statement of Overriding Considerations.

The Court is not persuaded by Petitioner's arguments that there was an inadequate analysis of vehicle miles traveled (VMT) or that the City's conclusions regarding VMT are not

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supported by substantial evidence in the record.

VIII. Analysis of Claims Presented by Petitioner

The backdrop to the Court's discussion of the specific challenges to the FEIR raised by Petitioner is that the Project is an attempt by the City to timely fulfill certain mandates to address California's severe housing shortage imposed through the RHNA new housing allocation imposed on the City and other municipalities and jurisdictions by January 31, 2023. (AR 191, 198.) January 31, 2023 was the statutory deadline set under the Housing Law for the City and other municipalities and jurisdictions to update their Housing Elements in their general plans to accommodate the new housing allocated to them. (Govt. Code §§ 66580 *et seq.*) Petitioner does not dispute the City was obligated to add the new housing subject to Plan Orinda based on its RHNA and the Housing Law. (AR 197-206.) The new housing had to be added somewhere in the City, a city that the parties do not dispute is located in or near areas with high wildfire risks and that already has traffic congestion and evacuation constraints based on its topography and the limited number of main evacuation routes, primarily the highway SR-24. (AR 495-496, 498-499.)

Additionally, the challenges Petitioner makes to the sufficiency of the FEIR are very limited, primarily whether wildfire Impact WFR-1 has sufficient information on the Project's significant impact on evacuation and whether the EIR proposes proper mitigation for that significant impact. Petitioner in effect concedes that it is not challenging the City's decision to place more housing in the DPP, which provides for high-density housing not in the areas of the City designated as subject to severe wildfire risk, than in other locations. Petitioner has not contested the City's alternatives examined in the EIR as inadequate or its conclusions that the Project is superior to the other alternatives.

There is also no dispute that Petitioner understood that the Project would have a significant adverse impact on evacuation, and Petitioner does not dispute the City's conclusion in that regard. The transcript of the City Planning Commission hearing and minutes addressing the approval of the Project reflect that the objectors understood that the City concluded the Project as a whole, which would include the DPP, would have significant impacts on evacuation. (AR 3750-3752 [1/18/2023 Planning Comm. Min. [including Waranoff comment that the "EIR found that the congestion that would be added by the DPP is a significant and unavoidable impact which cannot be mitigated," Jacobson comment that "the EIR concluded that the significant increase in the downtown population proposed by Plan Orinda could substantially impair an adopted emergency response plan for emergency evacuation," and response to public comments explaining "the significant and unavoidable impact which the EIR calls out as associated with the Project is not specifically associated with development downtown, but for the project as a whole"].)

Petitioner cites authority that an EIR must analyze an environmental issue if there is a "fair argument" supported by substantial evidence in the record that there may be a significant impact. (POB p. 11, ll. 20-13; *Visalia Retail, LP v. City of Visalia* (2018) 20 Cal.App.5th 1, 13-14 [substantial evidence " ' includes fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact.' [Citation omitted.]" but "[s]peculation, argument, unsubstantiated opinion or narrative and evidence of economic impacts are not substantial evidence. [Citation omitted.]" "Complaints, fears, and suspicions about a project's potential environmental impact likewise do not

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constitute substantial evidence. [Citations.]" [Citation.]' [Citation omitted.]"). In this case, there is no dispute that the City did study the potential impact of the Project on wildfire risks in the EIR; Petitioner's claim is that the City's analysis was inadequate.

A. Issue 1: Challenges Regarding Informational Sufficiency of Impact WFR-1

Petitioner contends the discussion of Impact WFR-1 is deficient in the FEIR because it does not address the impact of the Project's proposed population and housing unit increases, particularly in the DPP, on evacuation plans. Petitioner cites several ways in which the FEIR fails to provide adequate information on wildfire impacts of the Project in Wildfire Impacts WFR-1, including its failure to identify the evacuation plans that would be significantly impaired by the Project, failure to address the DPP component of the Project, where most of the additional housing and residents will be located, on evacuation in the event of a wildfire, and the failure to explain the basis for the City's conclusion that the evacuation plans would be substantially impaired while asserting the Project is "consistent" with its evacuation plans.

1. Summary of City's Stated Threshold of Significance as to Impact WFR-1 and the EIR's Analysis of Evacuation in Wildfire Impacts WFR-1

The EIR states the "Threshold of Significance" of wildfire impacts of the Project as follows: "If located in or near state responsibility areas or lands classified as very high fire hazard severity zones, would the project substantially impair an adopted emergency response plan or emergency evacuation plan?" (AR 509 [emphasis added].) (*See also* AR 506 [stating significance threshold number 1 as that the Project will have "a significant adverse impact" if it would "substantially impair an adopted emergency response plan or emergency evacuation plans"].) It then summarizes Impact WFR-1 as follows: "Development facilitated by the Project would be in and near a WUI or Very High FHSZ. Compliance with applicable state and local regulations would reduce the extent to which the Project would impair emergency response and evacuation. Nonetheless, this impact would be significant and unavoidable." (AR 509 [emphasis added].)

Impact WFR-1 describes the location of the Housing Element sites and the DPP area in relation to major evacuation routes, concluding that the evacuation routes "would be accessed by preexisting roadways" and that the development of the Project "would not impair the use of emergency evacuation routes through the modification of existing roadways either through elimination, reduction in width, or blockage." (AR 509.) Only HE-5 is in a very high fire hazard zone, and that location is "directly adjacent to" the critical evacuation route SR-24, and HE-1 through HE-4 would generally rely on Moraga Way as an evacuation route. (AR 509.) As to the DPP with "higher-density housing," the City explains that "Orinda's main transportation routes are close to all DPP sites and would be relied on as evacuation routes during a wildfire evacuation." (AR 509.) The EIR also cites the proposed Safety Element as ensuring all evacuation routes are accessible throughout the City, noting the proposed Safety Element update cited in the methodologies for this impact "incorporates the Contra Costa County Hazard Mitigation Plan and the City of Orinda Annex." (AR 509.)

The ensuing paragraph in Impact WFR-1 addresses evacuation in the final sentence, stating

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"BART would coordinate with the County in emergency evacuation response by offering staging areas and assisting with evacuation on the rail network." (AR 510.) The City also cites the Safety Element policies S-1 to S-10 as supporting emergency response and "providing evacuation assistance for those with limited mobility or lack of access to a vehicle for evacuation." The City refers to the County's Emergency Operations Plan which the EIR states addresses emergency management to "ensure the safety of county residents and structures to the extent feasible," but does not explain whether that plan is an evacuation plan or specifically the evacuation plan the threshold of significance and Impact WFR-1 seems to conclude is impaired. The most specific summary of the impact of the Project on evacuation in WFR-1 is the following cited by the City:

An impact to emergency operations and evacuations could occur from construction of future projects if they were to result in temporary road closures, potentially reducing available emergency evacuation routes. Construction of new development could involve temporary lane closures or otherwise block traffic that could impede the ability of emergency vehicles to access the area. This would be limited to the construction site. **Development facilitated by the project could further inhibit safe evacuation by introducing more residents to the area that would require evacuation on narrow hillside roadways.**

(AR 510 [emphasis added, cited by City at Resp. Supp. Brief p. 9, ll. 8-15].)

The City's response in the FEIR to comments on the "significant" impairment of evacuation plan conclusion in the DEIR makes reference to time for evacuation from the development of the Housing Element sites quoted above and then refers to the City's Draft Evacuation Analysis issued in November 2022. (AR 889.) The City states in pertinent part:

Since the Draft EIR was circulated for public review, the City has prepared an evacuation analysis looking at evacuation constraints for existing and potential new development within the City. This analysis supports the Draft EIR's conclusion that the existing conditions are already constrained when it comes to evacuation and that new development anticipated by the Housing Element could exacerbate those impacts as discussed on Page 4.14-16 [of the DEIR]. The analysis, which was prepared to help the City update its Local Hazard Mitigation Plan, also contains a number of ideas for infrastructure improvements and emergency response strategies that could help reduce evacuation times as discussed as part of Mitigation Measure WFR-1 on Page 4.14-16 of the Draft EIR. As part of its Local Hazard Mitigation Plan update, the City will review these recommendations and adopt those that are effective, feasible, and within the City's jurisdiction.

(AR 889 [emphasis added].)

The City also cites comments by a City Council member in the portion of the transcript of the January 31, 2023 hearing that refer to evacuation impacts because of "existing constrained evacuation conditions in some scenarios" because "[a]dding more development could strain some of these evacuation conditions." (AR 3789 [emphasis added].) (*See also* AR 510, 511, 889.) In its

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response to public comments, the City states that the EIR "acknowledges in a qualitative way the potentially significant impact on evacuation routes and time resulting from development on the Housing Element sites (Draft EIR page 4.14-15)." (AR 889 [emphasis added].) The page cited from the DEIR states that existing evacuation routes would be relied on for the Housing Element sites and the DPP, and that the City was adopting the Safety Element "to ensure that emergency response and evacuation routes remain accessible throughout the city." (AR 509 [DEIR p. 4.14-15 (emphasis added)].) (See also AR 854-856 [responding to comment on DPP sites 14-17 without onsite parking required, potential impact of street parked vehicles on level of service of SR-24 onramps, emergency response and evacuation, with similar response that Transportation impacts addressed in EIR section 4.11 regarding emergency response access would be addressed in future project-specific reviews, that evacuation would use existing evacuation routes which are not being modified by the Project, that blocked roads during construction would be subject to Mitigation Measure WFR-1 [sic, should refer to Mitigation Measure WFR-2, and citing the Evacuation Analysis and EIR's conclusion evacuation impacts are significant and unavoidable].)

2. The City's Statements on Impairment of or Consistency with Evacuation Plans and Substantial Adverse Effect on Evacuation

The City contends the EIR identifies various emergency response and evacuation plans in this portion of the DEIR, citing in particular the Contra Costa County Emergency Operations Plan (AR 504). The City does not refer to that plan in the EIR discussion analyzing the significant and unavoidable impacts of the Project in Impact WFR-1. To the contrary, the City acknowledges that the DEIR does not identify any particular emergency response or evacuation plans that are impaired by the Project. (Resp. Brief p. 14, ll. 9-10.) Instead, the City repeatedly argues the DEIR "concluded the Project would be consistent with those [evacuation] plans." (Resp. Brief p. 14, ll. 7-9, p. 21, ll. 22-23, and p. 28, ll. 19-21.)

The City tries to clarify its position in its supplemental reply. The City contends the Project is consistent with "evacuation plans" or "adopted plans" but the Project "could exacerbate existing evacuation constraints." (Resp. Supp. Brief p. 8, l. 8 – p. 9, l. 6.) The City in effect contends that the Project does not impair "evacuation plans" (even though that is how the threshold of significance is framed) but will impair "evacuation." (AR 506 [thresholds of significance para. 1], 509 [threshold stated as whether adopted evacuation plans would be "substantially impaired," and Impact WFR-1, concluding compliance with regulations for evacuation would "reduce the extent to which the project would impair . . . evacuation" but the impact would still be "significant and unavoidable"].) The subtlety of this distinction is inadequately explained or addressed in impacts WFR-1, particularly in light of the conclusion as to impact WFR-1. The conclusion states: "With implementation of Mitigation Measure WFR-1, congestion induced from additional residents at these Housing Element Sites during an evacuation may be reduced. However, it is not possible to ensure that the project would not substantially impair an adopted emergency response plan or emergency evacuation plan, despite implementation of mitigation. Thus, this impact would remain significant and unavoidable." (AR 511 [emphasis added].)

The discussion in wildfire impacts WFR-1 in the EIR is at best ambiguous, and at worst

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inconsistent, in informing decision-makers and the public reading the EIR whether and how the Project significantly impairs adopted evacuation plans, based on the expressly stated threshold of significance when read in conjunction with contrary statements in Impact WFR-1 that the Project is "consistent" with those plans. There is an apparent possible inconsistency, from the point of a reader, in these two statements.

They are not necessarily inconsistent with each other, depending on what the City means when it says that the Project is "consistent" with existing evacuation plans. For example, does the City mean that the Project is "consistent" with them in the sense that it calls for no alteration or amendment of the plans, even though the result of the Project for evacuation (even under the evacuation plans) will be worse? If that is what the City means by "consistent," however, the EIR does not spell that out with clarity. The problem is that without an explanation of what the City does mean by this, a reader seeing the assertion that the Project is "consistent" with evacuation plans could take that to mean that the Project will not have an adverse effect on evacuation – even though the EIR says elsewhere that it will. The EIR should be clarified to explain what the City means by this "consistency" and to eliminate the possible misreading of "consistent" as meaning "not an adverse effect." The lack of identification of the specific evacuation plan or plans the Project would either substantially impair, or would be consistent with, makes this discussion even more uncertain. This discussion in the EIR does not provide an explanation or detail sufficient to allow those who did not participate in the preparation of the EIR to understand this aspect of the Project impact and must be clarified. (*Center for Biological Diversity*, 36 Cal.App.5th at 230-31.)

3. Whether the City Had to Address Wildfire Impacts on the DPP Rather than the Project as a Whole

Petitioner contends the EIR did not address the Project's proposed increase in population in the DPP on evacuation. To the extent Petitioner contends some separate analysis of the DPP portion of the Project on wildfire hazards and evacuation in WFR-1 was required, the Court agrees with the City that the EIR properly could consider the Project as a whole in assessing these impacts.

The City argues that focusing on DPP in particular, rather than on the Project as a whole, would constitute impermissible "piecemealing." CEQA prohibits "piecemealing," as "CEQA mandates 'that environmental considerations do not become submerged by chopping a large project into many little ones—each with a minimal potential impact on the environment—which cumulatively may have disastrous consequences.' [Citation, internal quotation marks omitted.] Thus, the Guidelines define 'project' broadly as 'the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment [Citation, internal quotation marks omitted.]" (*California Clean Energy Committee v. City of Woodland* (2014) 225 Cal.App.4th 173, 193-94 [finding appropriate the EIR's analysis of urban decay based on the whole of the project, as the EIR "had the hallmarks of a program EIR" and quoting *Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 283–84].)

The City's logic is not generically as sound as it thinks it is. The prohibition on piecemealing

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means that an agency cannot ignore the forest by focusing exclusively on the trees. But it does not follow that the agency can look only at the forest and not the trees (so to speak), if the individual components not studied are significantly different from each other in their environmental effects, and the differences between components could make a difference to the informed decision-making that CEQA seeks to enable.

Here, however, the scope of the issues to be decided affects whether there is informational value, for the agency's decision-making, in studying evacuation effects on DPP separately. Petitioners do not contest either the proposition that the overall Project must be adopted to comply with state mandates, or the proposed size of the Project in terms of total residential units to be added. Moreover, they expressly disavow any contention that the effects on evacuation and wildfire safety could be improved by shifting some of this total added capacity from the DPP to other locations within Orinda. These undisputed points, taken together, reinforce that there is little if any informational value to decision-makers in studying the evacuation issues in the DPP separately from the Project as a whole, or by comparing the evacuation issues in the DPP with evacuation issues in other parts of the Project.

4. Whether the EIR Adequately Explains the Significance of the Project's Impact on Evacuation or Evacuation Plans as a Program EIR

To the extent Petitioner argues that the EIR's wildfire impacts analysis and conclusions in WFR-1 only evaluated the wildfire impacts on evacuation from a portion of the Project (HE-5) and failed to adequately explain or consider impacts of the Project as a whole, including the DPP, on impacts on evacuation in the event of a wildfire, that is a distinct issue. This latter issue is what Petitioner asserts is the defect in this aspect of the EIR. (Petn. Suppl. Brief p. 7, ll. 22-25.) The latter issue does not run afoul of the piecemealing prohibition and is raised in the POB. Petitioner argues that "there is no way for the public to determine from the EIR how, where, or to what extent, development facilitated by the Project in any area outside of HE-5, and especially within the DPP, will adversely impact evacuation and response." (POB p. 18, ll. 1-4.) (See also POB p. 17, ll.3-7 [arguing *Save Lake Tahoe* required to estimate the additional residents to be added "as a result of the Project" and evaluate "the resulting impact on emergency response and evacuation by both current and future residents during a wildfire"], and p. 17, ll. 8-10 ["To the extent that Respondent argues that the EIR does in fact evaluate wildfire evacuation and emergency response impacts resulting from the Project, the analysis is deficient."].) The City contends the EIR sufficiently addressed evacuation issues in the wildfire impacts with respect to the Project as a whole, which includes the DPP, to meet CEQA's informational requirements. The Court addresses this issue.

Petitioner contends the EIR does not provide sufficient information regarding the "nature and magnitude" of the significant impacts of the Project on evacuation and that the EIR did not provide decisionmakers and the public "sufficient analysis to intelligently consider" the wildfire impacts of the Project which is what CEQA requires. (*Sierra Club*, 6 Cal.5th at 519; *San Franciscans for Livable Neighborhoods*, 26 Cal.App.5th at 609.)

The City explained its methodology for assessing wildfire impacts of the Project. The EIR

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states the impacts were evaluated (a) "using FHSZ mapping for Orinda, aerial imagery, and topographic mapping," (b) information on weather patterns affecting the "spread and magnitude" of wildfires, (c) the proposed Safety Element goals and policies, and (d) the general rule that CEQA does not require an analysis of the impact of the environment on a Project *unless* the Project will exacerbate existing environmental hazards, which the City also cites in the "methodologies" section of the Impact Analysis on wildfires. (*California Building Industry Assn.*, 62 Cal.4th at 377-78; *Newtown Preservation Society v. County of El Dorado* (2021) 65 Cal.App.5th 771, 788; AR 506.) Therefore, the City states, "impacts under the thresholds identified below would only be considered significant if the proposed project risks exacerbating those existing environmental conditions." (AR 506 [emphasis added].) There is no dispute the City concluded the Project impacts met the threshold of significance thus stated. (AR 509.)

a. Sierra Club Decision

Though the Court relies on the standards *Sierra Club v. County of Fresno* sets forth for meeting the informational requirements of CEQA, the case is distinguishable. The EIR provided estimated figures at buildout of the Project regarding various types of pollutants that would be generated by the project, as well as the figures the county considered to be the thresholds of significance for each pollutant, and the EIR concluded the project would exceed those thresholds, causing significant effects on air quality that could only be partially mitigated by a proposed mitigation measure. (*Sierra Club*, 6 Cal.5th at 517.) The EIR also included a general discussion of the adverse health effects of each type of pollutant, but the EIR did not connect the general adverse health effects of the pollutants to the levels of pollutants the project was expected to generate. (*Id.*) The Court held the EIR's discussion did not meet the informational requirements of CEQA, concluding "Because the EIR as written makes it impossible for the public to translate the bare numbers provided into adverse health impacts or to understand why such translation is not possible at this time (and what limited translation is, in fact, possible), we agree with the Court of Appeal that the EIR's discussion of air quality impacts in this case was inadequate." (*Id.* at 521 [explaining, "The task for real party in interest and the County is clear: The EIR must provide an adequate analysis to inform the public how its bare numbers translate to create potential adverse impacts or it must adequately explain what the agency does know and why, given existing scientific constraints, it cannot translate potential health impacts further."].)

Sierra Club is distinguishable in that the EIR is not providing bare numbers on the increased population and proposed residents location without any explanation at all of how the location of the Project is related to evacuation routes and how existing constrained evacuation conditions in the City as a whole may only be worsened by adding substantial new population as a result of the Project. The City does connect the location of Project residence sites to evacuation routes and access to those routes. (AR 509-510.) The Evacuation Plan explains that proximity to the evacuation routes and the number of intersections through which evacuees have to pass is what determines the level of constraint in evacuation. (AR 16884, 16889.) In this case, the EIR in a sense does the opposite: the EIR presents qualitative conclusions as to adverse effects without the quantitative data to back up the analysis. While the quantitative data may not be mandated in order for the EIR

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to provide adequate information as set forth below in the Court's analysis of the *Save Lake Tahoe* decision, the EIR still must provide sufficient factual details regarding the identification of adopted evacuation plans that are impaired, an explanation of why the Project will cause impacts that are significant under the threshold of significance while still being "consistent" with the unspecified evacuation plans, and a reasoned analysis explaining why the Project characteristics create significant, unavoidable impacts on evacuation in the event of a wildfire despite proposed mitigation.

b. *Save Lake Tahoe* Decision

In *Save Lake Tahoe*, the Court found sufficient from an informational standpoint an EIR which was supported by a quantitative evacuation analysis that calculated estimated evacuation times for residents with the new proposed project and in light of existing development. (*Save Lake Tahoe*, 75 Cal.App.5th at 137 ["The EIR recognized that the project would add people to the area, which would increase the amount of time to complete an evacuation. But it concluded the impact was not significant for a number of reasons."].) A specific plan amendment to allow new development in a parcel was at issue. Though no specific development plan was proposed, in conjunction with the certification of the EIR, the county also approved a development agreement with the owner/developer. (*Id.* at 80.) The Court also noted that the county had adopted an evacuation plan for the area which was identified in the EIR. (*Id.* at 133.)

The county's conclusions that the Project would not exacerbate risks from wildfires by impairing the implementation of or physically interfering with an evacuation plan, which was the threshold in that case (*id.* at 133), was based on a number of factors described in the EIR. Those factors, some of which are discussed in the EIR in this case, included (a) the availability of vehicle access and evacuation routes, (b) that the number of estimated vehicle trips at build out represented an "incremental" increase in traffic volumes but not enough to interfere with use of the highway evacuation route, (c) that the project would not modify or cutoff any existing evacuation routes, (d) that the CCRs would require a project-specific fire protection and emergency evacuation plan to be developed with designated emergency roads and at least two ingress and egress routes for each parcel, and (e) that the CCRs would also the homeowners association to construct an amenity that could be used as a shelter-in-place location. (*Id.* at 133-34.) In addition, the county relied on a traffic consultant study which, as in this case, was prepared separately from and after issuance of the draft EIR but was discussed in the final EIR. (*Id.* at 135.) The study provided estimated evacuation times from the proposed project based on full occupancy of the residences at 1.3 to 1.5 hours. (*Id.*)

The Court found the EIR sufficient to inform the public and decision-makers about the Project's wildfire impacts. "The EIR's analysis provides a reasonable explanation under modeled circumstances of how the project will affect its residents' ability to evacuate and emergency responders' ability to access the area and the site." (*Id.* at 140.) The final EIR also specifically explained to decision-makers and the public that merely adding people to an area increases evacuation time, but does not necessarily increase safety risks because emergency personnel take into account the time needed for evacuation when emergency personnel determine when to issue

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evacuation orders and what locations to order evacuated. (*Id.* at 135.) The Court rejected the criticism of the EIR as insufficient based on its failure to address "how much the project would increase evacuation times." (*Id.* at 138 [emphasis added].)

Petitioner argues that the City here should have done what the county did in *Save Lake Tahoe* by having a quantitative study prepared of the evacuation times from the Project locations, including the DPP. The EIR in that case was issued in the context of a project sufficiently specific to include a development plan with specific conditions on the community to be developed, not in the context of a program EIR addressing general plan and zoning amendments to allow potential future housing developments that may or may not materialize. Further, the Court did not state or hold that a quantitative analysis of evacuation times for the Project was essential to provide the information mandated by CEQA, but rather merely found the county properly exercised its discretion to choose that methodology (modeling in that case) for assessing the impact and that the modeling among other factors supported the sufficiency of the discussion of wildfire impacts and the county's conclusion the project impact was not significant.

On the other hand, while *Save Lake Tahoe* does not hold a quantitative analysis on evacuation times is mandated, it demonstrates that the EIR has to include a sufficient information to adequately explain whether the impact on the wildfire hazards are significant and how or why they are significant, which the agency did not only in its quantitative evacuation analysis but also in its qualitative explanation of the relationship of the Project to evacuation in the event of a wildfire. The EIR in this case does not have the explicit explanations regarding the evacuation impacts of the Project described in *Save Lake Tahoe*, including in responses to comments on the draft. In that case, the agency cited that the incremental increase in vehicle trips would not result in traffic volumes so significant they would physically interfere with the use of the evacuation route, and it explained that even if more people have to evacuate, safety wildfire risks may not be exacerbated because evacuation orders would account for the additional population and time needed to evacuate. The agency provided specific factual and analytical detail to explain its conclusion that the impact of the project in that case would be less than significant on evacuation, including a quantitative and qualitative analysis that supported that reasoning.

Even without the quantitative assessment of evacuation times from the project in that case, the analytical route of the agency in its assessment of wildfire impacts on evacuation was more explicit and less opaque than that contained in the EIR and City responses in the FEIR in this case. The EIR in WFR-1 does not have the kind of clear and specific analysis set forth in *Save Lake Tahoe*; it does not even include expressly the analysis the City makes more specifically and clearly in its briefs that adding any population to the City will cause significant impacts because of the geographic characteristics of the City and limited evacuation routes available. The EIR should either include a quantitative analysis that explains the City's reasoning that the Project has significant, unavoidable impacts on evacuation, or give a reasoned explanation of why more quantitative detail is either not available or not necessary. Instead, the City identifies the characteristics of the DPP and other Housing Element sites in relation to likely evacuation routes (AR 509), then refers generically to the Safety Element Update mitigating of some evacuation impact the impact and

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BART assisting with evacuation, but then concludes “future development under the proposed project may result in impacts,” with the sole specific analysis referring to evacuation on “narrow hillside roadways,” which is not required for the Project as a whole but only certain segments. The Court’s discussion below concerning the deficiencies in Mitigation Measure WFR-1 also highlight the missing analytical route between the Project and its significant impact in WFR-1. The EIR is missing the analytical route connecting facts regarding the proposed Project and the significant and unavoidable impacts on evacuation plans, unlike *Save Lake Tahoe*.

c. *Save North Petaluma River Decision*

In *Save North Petaluma River and Wetlands v. City of Petaluma* (2022) 86 Cal.App.5th 207, the Court found that the EIR satisfied CEQA's informational requirement regarding public safety concerns. The Court stated, “[T]he EIR identified the relevant provisions in the City's emergency response plan and took into account specific information about the Project site and the actual threat of flood or fire at the site. Drawing from such information, the EIR then considered whether the Project would '[i]mpair implementation of or physically interfere with an adopted emergency response plan or emergency evacuation plan' (Guidelines, appen. G, italics added) and concluded it would not. This was sufficient to demonstrate the analytic route from specific underlying evidence to the ultimate conclusion. [Citation omitted.]” (*Id.* at 230 [emphasis added].)

The threshold stated in this decision is the same threshold stated in *Save Lake Tahoe*. Notably, the City in this case did not refer to impairment of the “implementation” of an evacuation plan or “physical” interference with an evacuation plan. Unlike *Save North Petaluma River*, the City here failed to identify any specific or applicable evacuation plan in its Impact WFR-1 discussion, which is the foundation and starting point for the analysis of the threshold of significance and for the public and decision-makers to be able to draw the conclusion that an adopted evacuation plan is significantly impaired, the stated threshold of significance. The reference to the “County's Emergency Operations Plan” is stated in the context of “emergency management organization for emergency response” and does not explain if that plan includes an “evacuation plan” and if so, if that is the evacuation plan the Project either impairs (or is consistent with). (AR 510.)

Further, while the City explains at AR 509 where the Project components are physically located in relation to the primary evacuation routes from those locations (which is “specific information about the Project site”), the EIR does not include specific information and meaningful analysis about relationship of those facts to the significant, unavoidable impact of the Project as a whole on evacuation. The only specific analysis pertains to population evacuating on “narrow hillside roadways.” (AR 510.) That evacuation scenario applies only to a portion of the Project; yet, the City insists the Project as a whole has a significant impact on evacuation without explaining and analyzing either (a) how evacuation on narrow hillside roadways from one portion of the City or the Project could impact the rest of the City or the Project, or (b) the significant impacts of the Project on evacuation is limited to certain components.

d. *Berkeley Jets Decision*

In contrast, in *Berkeley Jets* cited by Petitioner, the Court found that the agency made no

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good faith effort to assess the increase in toxic air contaminants and their human health risks, and the EIR's analysis of human health risks from the contaminants failed to provide adequate information under CEQA. (*Berkeley Jets*, 91 Cal.App.4th at 1371.) The EIR stated there was no "standard for evaluating the significance of the risk associated" with the contaminants at issue that was "universally accepted." (*Id.* at 1368, 1371.) The EIR concluded the significance of the impact could only be "qualitatively discussed" and considered by decisionmakers but a "formal determination of the significance of the impact" was "unknown." (*Id.* at 1368.) The agency nevertheless concluded the human health risk was "significant" but that overriding considerations warranted project approval. (*Id.* at 1368-1370.) The Court held the EIR violated CEQA, certification of the EIR was a prejudicial abuse of discretion, and the agency had to "meaningfully attempt to quantify the amount of mobile-source emissions that would be emitted from normal operations conducted as part of the [project], and whether these emissions will result in any significant health risks." (*Id.* at 1371.)

The *Berkeley Jets* decision addressed a long-term expansion of the Oakland airport, but the specific issues the Court found deficient in the EIR are ones in which scientific assessment is customary and clearly possible. Though the Court rejected the "qualitative" analysis by the agency in that case, nothing in the decision indicates the qualitative discussion was supported by facts or evidence that made the qualitative analysis meaningful; to the contrary, the agency determined the significance of the human health effects of toxic contaminants under the circumstances were unknown and moved from that to a determination there was a significant impact.

e. Application to City's EIR and Conclusions as to Issue 1

The City's analysis of the impacts stated in WFR-1 at AR 509-510 are cited and quoted above. The City refers specifically to evacuation on "narrow hillside roadways." (AR 510.) The City in its Supplemental Brief directs the Court to its analysis of Project alternatives in the EIR to further bolster its position that the EIR explains that the Project as a whole will significantly impair evacuation in the event of a wildfire because the City in its entirety has evacuation constraints, and the Project is adding more residents who will need to evacuate in the event of a wildfire. (*See* AR 495-496 [setting susceptible to wildfires], AR 509 [describing location of new development in relation to access to evacuation routes], 541-542, 568-572, 594-596.) The City reiterates the wildfire impacts WFR-1, the project alternatives analysis in the EIR, and the Evacuation Analysis all explain that the evacuation constraints are less acute in the DPP because of its proximity to the SR-24 onramps and more problematic in other Housing Element locations that are further from the primary evacuation routes, closer to or within the high fire hazard zones, and require evacuees to proceed farther and through more intersections to reach the evacuation routes. The informational deficiency based on the ambiguities in the EIR's designation of the threshold of significance and conclusion the Project will significantly impair evacuation plans while stating the Project is "consistent" with the unidentified plans is not cured by those other portions of the EIR, nor does the impact WFR-1 analysis refer to or incorporate the later discussions on project alternatives alerting a reader that they must review those other sections to understand the wildfire impacts on evacuation in impact WFR-1.

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The City acknowledges the specific evacuation modeling assessments in terms of evacuation times in the Evacuation Analysis pertained to the City's current residents and not with the buildout of the Project. Instead, the Evacuation Analysis made a "qualitative" analysis regarding evacuation based on a buildout of the Project. (*Compare* AR 16888-16903 to AR 16884 cited by the City and AR 16921-16925.) (*See also* AR 15893 and 49305 cited at Reply p. 12.) The *Berkeley Jets* case rejected the sufficiency of a "qualitative" impact assessment under the circumstances of that case, but for impacts which seem particularly suited to technical, scientific assessment in order to adequately inform the public and decision-makers of the level of anticipated toxic contaminants from the project and their effect on human health.

The Court does not view the *Berkeley Jets* decision, or *Save Lake Tahoe*, as necessarily compelling a quantitative calculation of evacuation times from the Project in this case. The Court is aware the EIR here is a programmatic level EIR which does not address any actual proposed development or specific evacuation issues which may be subject to a multitude of variables and factors such as the number, configuration, location, setting, and design. Perhaps the City could conclude with reasoned analysis that those variables on the development that will actually occur in the various Project areas would make a quantitative evacuation timing analysis unhelpful or unreliable and therefore unnecessary. It is not clear to the Court that the "magnitude" of the Project's impacts on evacuation necessarily needs to be stated in quantitative terms under the circumstances given the nature of the Project being studied and approved if the City can express the nature and magnitude of the Project's significant impact by other means, including a meaningful qualitative explanation.

On the other hand, even if a qualitative discussion of the Project's evacuation impact is sufficient, for several reasons the City's EIR does not contain adequate information in this case to inform the public and decision-makers, including those who did not participate in its preparation, about the evacuation impacts of the Project. The Court has already highlighted the inconsistency or at least significant ambiguity in the City's stated threshold of significance, express statement of the significance of the impact in WFR-1, and the City's position that the Project does not impair any evacuation plans. Unlike the EIR's addressed in *Save Lake Tahoe* and *Save North Petaluma River*, despite the stated threshold of significance and significance finding which expressly and implicitly are made in reference to an adopted evacuation plan, the EIR does not identify what evacuation plan or plans apply that are subject to the threshold of significance and the significance finding and then explain clearly and unambiguously how the Project interacts with those plans.

In its briefing, the City explains why the Project as a whole will significantly affect evacuation because the Project has the potential to add significant population to a City that already has serious wildfire risks, in some areas especially vulnerable topography and narrow hillside roads, and limited evacuation routes that are already congested by existing population, an explanation that is not specifically expressed in the Impact WFR-1 of the EIR and at best obliquely stated in the response to comments on the DEIR. The threshold of significance issue and determination in WFR-1 is that the Project, which would in theory mean the Project as a whole, including all of its components, will significantly impact evacuation. That analytical route is missing from the EIR.

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The most specific statements about why the Project impacts are significant and why the Project exacerbates the risks from wildfires in WFR-1 refer only to temporary impacts from construction and residents evacuating on "narrow hillside roadways." (AR 519.) The City has also cited its CEQA finding that the "congestion induced from additional residents at these Housing Element Sites during an evacuation" may be reduced by the proposed mitigation measure, but "it is not possible to ensure that the project would not substantially impair an adopted emergency response plan or emergency evacuation plan," which also appears to apply only to HE-4 and HE-5 as the finding follows the description of Mitigation Measure WFR-1 which is expressly limited to those sites. (AR 32.) When those statements are coupled with the explicit limitation of Mitigation Measure WFR-1 to HE-4 and HE-5 in the EIR as drafted, discussed further below, they create, at a minimum an ambiguity, or worse, inadequate information about the Project impact on evacuation as a whole. They leave the reader with the impression the "significance" determination only may involve the two specified sites outside the DPP, though the City reiterates in its briefing that the significant impacts finding applies to the Project as a whole, including the DPP.

The City argues that its WFR-1 discussion studied the impacts of the Project as a whole and concluded the Project as a whole will have significant, unavoidable impacts, perhaps because merely adding significant residents to the constrained City will impact evacuation including the time needed to evacuate by all residents, most of whom may ultimately have to pass through intersections downtown to reach onramps to SR-24, an explanation also not explicitly stated in WFR-1. However, a reasonable interpretation of the discussion in WFR-1 coupled with the City's finding at AR 32 is that HE-4 and HE-5 only will have significant and unavoidable impacts on evacuation that can be partially mitigated by Mitigation Measure WFR-1, applicable solely to HE-4 and HE-5 by its terms. Impact WFR-1 does not explain whether the fact some portions of the population with the Project will have to evacuate on narrow hillside roadways will impact evacuation by the Project as a whole everywhere, or whether the Project has significant impacts on evacuation City-wide simply by adding so much population to the City. As a result, for all of these reasons, the EIR fails to provide a clear analysis and explanation, even on a qualitative basis, of how the Project as a whole will exacerbate the risks of wildfire hazards because it significantly impairs evacuation.

The City argues there is no substantial evidence in the record that adding population and housing in the DPP would have a worse impact on wildfire risks and evacuation plans than adding population or housing in any other portions of the City. (Resp. Brief p. 24, ll. 4-15; *Newtown Preservation Society v. County of El Dorado* (2021) 65 Cal.App.5th 771, 785 [holding that resident comments did not provide "substantial evidence raising a fair argument that despite setting forth the fire evacuation impact arising from the project's closure of Newtown Road bridge for a period of time during construction and the mitigation by planning for multiple evacuation routes, there remains a significant impact to the safety of area residents"].) The arguments regarding "fair argument" as to the impacts of the DPP portion of the Project seem beside the point, given that (a) the City itself concluded that there is a fair argument that the Project as a whole, which includes the DPP, might have a significant impact on evacuation plans, such that the City elected to include a study of that potential impact in the EIR (AR 506), and (b) the City contends it concluded based on

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its own significance standard that the Project as a whole, which includes the DPP, will exacerbate existing environmental conditions as to wildfire risks (AR 506, 509-510).

Respondent City also argues that substantial evidence supports the City's conclusion that the Project will have "significant and unavoidable impacts on emergency wildfire evacuation." (Resp. Brief p. 20, ll. 19-20.) Whether substantial evidence supports the City's conclusion regarding significant and unavoidable impacts is a different issue from whether the EIR satisfies the informational requirements of CEQA. As the Court explained in *Sierra Club*, "The determination whether a discussion [of potential significant environmental impacts] is sufficient is not solely a matter of discerning whether there is substantial evidence to support the agency's factual conclusions. [¶] The ultimate inquiry, as the case law and the CEQA guidelines make clear, is whether the EIR includes enough detail 'to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project.' [Citations omitted.]" (6 Cal.5th at 515.) "Whether an EIR has omitted essential information is a procedural question subject to de novo review. [Citations omitted.]" (*Banning Ranch*, 2 Cal.5th at 935.) "Noncompliance with substantive requirements of CEQA or *noncompliance with information disclosure provisions* "which precludes relevant information from being presented to the public agency ... may constitute prejudicial abuse of discretion within the meaning of Sections 21168 and 21168.5, regardless of whether a different outcome would have resulted if the public agency had complied with those provisions." (§ 21005, subd. (a).)" (*Sierra Club*, 6 Cal.5th at 515 [quoting *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 945-46 and stating failure to comply with CEQA in omitting necessary material to informed decision-making and public participation is prejudicial error (italics in original)].)

"CEQA contemplates consideration of environmental consequences at the 'earliest possible stage, even though more detailed environmental review may be necessary later.' [Citation, internal quotation marks omitted.]" (*Rio Vista Farm Bureau Center*, 5 Cal.App.4th at 370.) While future individual projects may require environmental review, it is not clear to the Court whether any future environmental review of an individual project would assess the overall impact of a buildout of the Project as a whole in that cumulative impacts analyzed in an individual project EIR under Guidelines § 15023.5(b) and Public Resources Code § 21083(b) may be limited to projects under construction, approved projects not yet constructed, projects under environmental review, and projects formally announced by a developer. (See *San Franciscans for Reasonable Growth v. City & County of San Francisco* (1984) 151 Cal.App.3d 61, 74.) (Reply p. 8, fn. 1.) Indeed, it seems likely a future project may rely on the current EIR as evidence the wildfire impacts on evacuation for the entire Project had already been considered, as the City contends, making the informational inadequacies and clarifications cited above important to address in this EIR. (See, e.g., Pub. Res. Code § 21083.3 and 14 Cal. Code Regs. § 15183 [environmental review of projects consistent with general and specific plans and zoning only required for impacts not analyzed in the prior planning or zoning EIRs].)

B. Issue 2: Challenges Regarding Mitigation Measure WFR-1

CEQA mandates that the City in the EIR mitigate all significant impacts found in the EIR to a

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level of less than significant. (*Sierra Club*, 6 Cal.5th at 525; Pub. Res. Code §§ 21002.1 subds. (a) and (b) [(a) The purpose of an environmental impact report is to identify the significant effects on the environment of a project, to identify alternatives to the project, and to indicate the manner in which those significant effects can be mitigated or avoided. [¶] (b) Each 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.] (emphasis added)]; 21100 subd. (b) [an EIR shall include "a detailed statement setting forth ... [¶] (1) All significant effects on the environment of the proposed project. [¶] (2) In a separate section: [¶] (A) Any significant effect on the environment that cannot be avoided if the project is implemented."].) As the California Supreme Court has explained, "if the County were to approve a project that did not include a feasible mitigation measure, such approval would amount to an abuse of discretion." (*Sierra Club*, 6 Cal.5th at 526.)

Petitioner contends the mitigation measures analyzed and adopted in the FEIR are flawed for several reasons. The Court will address only the general argument that Mitigation Measure WFR-1 is flawed because it addresses only HE-4 and HE-5 and not the wildfire evacuation impacts of all the proposed additional housing and residents in all Housing Element locations, including the DPP, based on Petitioner's failure to exhaust its administrative remedies as to other arguments made in its POB.

Mitigation Measure WFR-1 addresses multiple measures, including making housing in those locations protected against wildfire to the extent possible by meeting construction requirements if residents are required to "shelter in place." To the extent Petitioner contends that Mitigation Measure WFR-1 is improper based on its shelter-in-place provisions, that argument is undermined by the Court's analysis in *Save Lake Tahoe*. In *Save Lake Tahoe*, the Court rejected the project opponents' argument that the shelter-in-place portion of the proposed project was not a sufficient "substitute for an evacuation plan," stating it was not proposed as a substitute for evacuation but rather as "a contingency if the authorities order residents to shelter in place and not evacuate." (*Save Lake Tahoe*, 75 Cal.App.5th at 141-42.)

Mitigation Measure WFR-1 and the portion of the FEIR in which the City responded to comments on the inadequacy of the evacuation analysis both address only the wildfire risks and evacuation impacts as to HE-4 and HE-5 and mitigation measures for impacts on HE-4 and HE-5. (AR 510 [Mitigation Measure WFR-1 expressly limited to measures for approval of projects on Housing Element Sites HE-4 and HE-5] and 889.) However, the City contends that the Safety Element which was updated and approved as part of the Project also addresses mitigation of the impacts on evacuation in Impact WFR-1. In addition, in the Respondent's Supplemental Brief, the City acknowledges what it contends is an ambiguity in the EIR as to whether Mitigation Measure WFR-1 was intended to apply not just to HE-4 and HE-5 but to all Housing Element locations, including the DPP.

Petitioner cites Impact WFR-2, which addresses the impact of the Project on exposing property and residents to risks of property damage and personal injury from wildfires. Petitioner argues that the discussion of the Safety Element goals and policies that would mitigate risk of loss of property and injury to persons from wildfires does not address the wildfire impacts on

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evacuation plans found to be significant in Impact WFR-1 and that the Safety Element policies and goals are not incorporated into any mitigation measure in any event. (POB p. 13, ll. 3-15.) Impact WFR-2 is a separate analysis and does not address evacuation plan impacts nor was it intended to address that issue by its terms, as the City argues vigorously in its initial Respondent's Brief. (Resp. Brief p. 23, ll. 3-11 ["WFR-2 does not purport to address emergency response and evacuation impacts; those impacts are discussed in impact labeled 'WFR-1.'"].) Essentially, the City argues Impact WFR-2 and Mitigation Measure WFR-2 are separate and distinct from the evacuation plan impacts discussed in Impact WFR-1 and Mitigation Measure WFR-2 and are not relevant to the assessment of Impact WFR-1 and the sufficiency of mitigation measures addressing evacuation, which is supported by the text of the DEIR. (AR 513-514.) (See also AR 888-889 [stating the DEIR concludes that even with the statutes and regulations aimed at reducing "evacuation route impacts and other wildfire risks" the Project "could still result in significant impacts due to construction and operational traffic from new development potentially contributing to congestion during evacuations (see Draft EIR page 4.14-15 [AR 509]) and due to the fact that it is not possible to fully protect people and structures from the risks of wildfires (see Draft EIR Page 4.14-19 [AR 513])."] (Emphasis added).)

Mitigation Measure WFR-1 by its terms unambiguously applies only to HE-4 and HE-5. The City contends that Mitigation Measure WFR-1 was intended to apply to the Project as a whole and all Housing Element components. In fact, the discussion of Impacts WFR-2, which the City expressly disclaims applies to Impact WFR-1, provides some support for that intention.

Goals and policies in the updated Safety Element would mitigate the risk of loss of life, injury, and property loss from wildfires. Policies S-24 through S-38 would maintain MOFD fire protection standards, continue wildfire mitigation strategies such as fuel breaks in open spaces and fire access easements, require proposed development to have adequate access for fire and emergency services, and maintain evacuation routes in the event of an emergency.

With the exception of Housing Element Site HE-5, development facilitated by the project would not exacerbate existing environmental conditions; however, existing codes and regulations cannot fully prevent wildfires from damaging structures or occupants. Therefore, Mitigation Measure WFR-1 would be required to reduce the risk of wildfire during project construction for future development on all Housing Element and DPP sites. Mitigation Measure WFR-2, which includes project siting considerations, would apply to development on all Housing Element and DPP Sites."

(AR 512 [emphasis added].)

The foregoing discussion of wildfire impacts WFR-2 also suggests, as the City contends, the Safety Element update was intended by the City to be a mitigation measure applicable to WFR-1. The Safety Element Update potentially applicable to wildfire impacts generally is part of the methodology the City chose to assess the significance of the wildfire hazards impacts of the Project. (AR 506-509.)

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The Safety Element Update was not incorporated as a mitigation in Mitigation Measure WFR-1 as noted by Petitioner, but the Safety Element Update in this case is part of the same Project being reviewed in the FEIR and approved by the City. The City points out that the CEQA Guidelines specifically allow the City to adopt mitigation measures by incorporating them into a plan or policy. (14 Cal. Code Regs. § 15126.4 subd. (a)(2) ["Mitigation measures must be fully enforceable through permit conditions, agreements, or other legally-binding instruments. In the case of the adoption of a plan, policy, regulation, or other public project, mitigation measures can be incorporated into the plan, policy, regulation, or project design."].)

Public Resources Code § 21081 prohibits a public entity from proceeding with a project if a certified EIR identifies significant effects on the environment unless the agency finds that "[c]hanges or alterations have been required in, or incorporated into, the project which mitigate or avoid the significant effects on the environment" and overriding considerations warrant proceeding with the project even if all significant effects have not been fully mitigated. (Pub. Res. Code § 21081 subds. (a) and (b) [emphasis added].) Public Resources Code § 21081.6 states in pertinent part: "A public agency shall provide that measures to mitigate or avoid significant effects on the environment are fully enforceable through permit conditions, agreements, or other measures. Conditions of project approval may be set forth in referenced documents which address required mitigation measures or, in the case of the adoption of a plan, policy, regulation, or other public project, by incorporating the mitigation measures into the plan, policy, regulation, or project design." (Pub. Res. Code § 21081.6(b) [emphasis added].)

Based on these statutes and the Guidelines, the Safety Element Update was not required to be set forth as a separate mitigation measure since the Safety Element Update and its implementation are part of the Project and would be adopted components of the City general plan and legally binding as provided in the statutes. However, that fact does not excuse the City from including an analysis and explanation of how the lengthy series of stated goals and policies to be included in the Safety Element Update reduce the significant impacts found in impact WFR-1 on evacuation plans that the Project as a whole will have even with the adoption of the Safety Element Update.

The City in its brief cites various components of the Safety Element that address evacuation issues throughout the City which would include all areas that are part of the Project including the DPP. Those measures include maintaining the accessibility of evacuation routes across the City as a whole, revising and improving the evacuation analysis in the Safety Element in future updates, identifying and maintaining additional evacuation routes in coordination with Caltrans and first responders and identifying roads not in compliance with fire safety regulations and bringing them into compliance. (Resp. Brief p. 29, ll. 16-26 [citing AR 16803-16809 [Safety Element adopted].) However, the only general statement in the discussion of WFR-1 on the role of the Safety Element Update to mitigate impact WFR-1 is:

Goals and policies in the proposed updated Safety Element would assist in coordination and preparedness for emergency response. Policies S-1 through S-10, outlined in Section 4.14.2 *Regulatory Setting*, would ensure coordination among

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federal, state, and local plans and agencies, adequate public and interagency communication during hazard events, and providing evacuation assistance for those with limited mobility or lack of access to a vehicle for evacuation.

(AR 510 [emphasis added].)

The only reference to lessening the significant impact of the Project on evacuation is in relation to those who need evacuation assistance because of mobility issues or lack of a vehicle in WFR-1. The discussion does not identify which policies and goals from the long list set forth from the Safety Element Update at AR 506-509 address that aspect of evacuation assistance. Those with mobility issues and lack of a vehicle would also seem to be only a fraction of the City's population, including a fraction of the new residents expected to be added by the Project. If the City is relying on other policies and goals from the Safety Element Update to mitigate impact WFR-1, the EIR does not identify them and explain how they lessen the Project impact, even if a significant impact will remain from the Project that requires additional mitigation.

Further, the City apparently does not take the position that implementation of the Safety Element Update is sufficient to mitigate the significant impacts of the Project as a whole, or that as a result of the adoption of the Safety Element Update, the Project impacts found in WFR-1 will be limited to HE-4 and HE-5 and that is why Mitigation Measure WFR-1 only addresses by its terms HE-4 and HE-5. Rather, the City seems to acknowledge that Mitigation Measure WFR-1 was intended to apply to the Project as a whole, not just HE-4 and HE-5, because that mitigation is needed to mitigate at least in part the significant adverse wildfire impacts described WFR-1, which as the City vigorously argues applies to the Project in its entirety. Based on the discussion in connection with WFR-2 quoted above, the Court accepts the City's position that the City intended Mitigation Measure WFR-1 to apply to all Project locations, including all sites in the Housing Element and the DPP, as the City states in the EIR at AR 512. While that may have been the City's intent, that is not what the EIR states. This is a procedural failure under CEQA.

In summary, for the reasons stated, the City did not have to make the Safety Element Update a mitigation measure like Mitigation Measure WFR-1 and it has very generically identified the Safety Element Update as mitigation for impact WFR-1 in its discussion of impact WFR-1 which is sufficient. (Pub. Res. Code §§ 21081 and 21081.6 subd. (b); 14 Cal. Code Regs. § 15126.4 subd. (a)(2).) There are procedural violations of CEQA in the EIR, however, because (a) the explanation of how the Safety Element Update mitigates the impacts of WFR-1 is inadequate, lacking any identification of any specific goals or policies from the lengthy list included in the methodologies that will be mandated and binding and lacking any description of the City's analytical route for concluding those goals or policies will mitigate the Project impacts on evacuation found in WFR-1; and (b) the City acknowledges that Mitigation Measure WFR-1 to be adopted by the City to mitigate the impacts of the Project as a whole does not apply to the Project as a whole but only one segment (HE-4 and HE-5), despite the City's now stated intention that the measure be applicable to all components of the Housing Element. Further, assuming it was the City's intention that Mitigation Measure He-4 and HE-5 apply to all Housing Element components including the DPP, there is no explanation in the DEIR or the FEIR with the City's response to public comments as

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to how Mitigation Measure WFR-1 will mitigate the Project impacts in components of the Housing Element other than HE-4 and HE-5, another informational deficiency.

C. Issue 3: Challenges Regarding Statement of Overriding Considerations

Petitioner contends the City's Statement of Overriding Considerations is "flawed" because it is based on a defective analysis of the wildfire impacts and deficient analysis of mitigation measures. Specifically, Petitioner contends that as a result of the informational deficiencies as to the wildfire impacts and mitigation measures for wildfire impacts in the EIR, the statement of overriding considerations is not supported by substantial evidence. (POB p. 22, ll. 14-16.) Petitioner relies on one decision in which the failure to fully analyze the cumulative impacts of multiple projects skewed the agency's determination of the overriding benefits because it did not have a "true perspective on the consequences" of approving the projects in that case. (*San Franciscans for Reasonable Growth*, 151 Cal.App.3d at 79-80.) The case, however, is distinguishable from the circumstances presented here.

In that case, the city prepared separate EIRs to address the development of multiple high-rise commercial buildings in downtown San Francisco, but the EIRs failed to consider the multiple office building projects that were similarly under review or anticipated to be developed in evaluating the cumulative impacts, such that it excluded millions of square feet of anticipated high-rise office development without justification in assessing the cumulative impacts in each EIR. (*San Franciscans for Reasonable Growth*, 151 Cal.App.3d at 77-80.) The Court specifically found that the understatement of the cumulative impacts for each specific development project was so severe that the agency did not have the "opportunity to deal with the true severity and significance of its impacts ... on the whole spectrum of environmental concerns potentially affected by high-rise development." (*Id.* at 80 [emphasis added].)

The City assumed, and based its determinations in the statement of overriding considerations on the assumption, that the Project would have significant and unavoidable impacts on evacuation plans by significantly increasing the housing units and number of residents in Orinda given its topography and other issues described in the EIR that make Orinda vulnerable to wildfires, along with a number of other identified significant impacts deemed unavoidable. (AR 40.) The City's specific CEQA findings in connection with the Project approval and Statement of Overriding Considerations include a find that the "congestion induced from additional residents at these Housing Element Sites during an evacuation" may be reduced by the proposed mitigation measure, but "it is not possible to ensure that the project would not substantially impair an adopted emergency response plan or emergency evacuation plan." (AR 32.) In context, that finding refers only to HE-4 and HE-5 causing congestion impacting evacuation, though the City contends the City actually concluded it is the Project as a whole that has a significant and unavoidable impact on wildfire hazards and evacuation plans, a conclusion that is consistent with the express statement of the threshold of significance and determination of significance in WFR-1. (AR 506, 509.)

The problem here is not separate from the issues identified in the preceding sections, but rather is effectively derivative of those issues. To put the point algebraically, the analysis of a

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statement of overriding considerations is deciding whether X outweighs Y, where X is the benefits of the Project and Y is the environmental downside. If the EIR has not sufficiently identified Y, then necessarily it cannot have adequately explained the tradeoff between X and Y to be made.

Petitioner argues for defectiveness of the statement of overriding considerations in a way that is not merely derivative, contending that there is insufficient detailed discussion of how the Project's benefits are deemed to outweigh its environmental downside. This part of Petitioner's argument, however, is unconvincing, because the Court is hard-pressed to see just what kind of comparative analysis is supposed to be provided. The Project's benefits (e.g., providing more housing for California residents and complying with state housing mandates) are apples; the Project's environmental downsides (adverse effect on wildfire risk and evacuation) are oranges. There is no math or science that allows an EIR's analysis to quantify how one does or doesn't outweigh the other. That weighing of the plus-side apples against the minus-side oranges is a policy decision, the decision that the policy makers are to decide – not that an EIR can or should dictate to them.

In this respect, also, the Court is constrained to observe that the policy makers' hands may be more or less tied by the consideration (which petitioners do not contest) that the Project must be done because the state has mandated it. It is not for this Court, however, to make that determination. CEQA commands that the EIR must lay out all the environmental considerations of a Project, including available mitigation, in sufficient detail for the policy makers to take those considerations into account. What the policy makers do with that mandated analysis is for them to determine.

As a result of the ambiguities in the EIR addressed above as to what the City concluded and why with regard to WFR-1 and the limitations of Mitigation Measure WFR-1 which does not on its face mitigate impacts of the Project as a whole, one of the foundations for the Statement of Overriding Considerations is undermined. Because the foundation is undermined based on the lack of adequate information and description of the mitigation related to WFR-1, the Court agrees the decision-makers did not have a true perspective from which to assess the Project benefits and significant adverse effects in order to make the findings in the Statement of Overriding Considerations. (*San Franciscans for Reasonable Growth*, 151 Cal.App.3d at 79-80.)

D. Issue 4: Challenges Regarding Vehicle Miles Traveled (VMT) Analysis

Petitioner contends that the EIR underestimates the VMT generated by the Project in Impact AQ-1 and TRA-2, arguing that the City's response to a public comment on businesses in the DPP included in the FEIR states incorrectly that there would be no demolition or displacement of commercial businesses. (POB p. 23, ll. 2-14 [citing AR 887].) The City determined that VMT impacts are significant and unavoidable for purposes of the EIR, and that specific projects outside certain limited areas would require a project-specific VMT analysis, since the EIR is a program EIR which does not approve any specific development. (AR 458-462.)

There are three gas stations that the DEIR indicates may be demolished in the DEIR's Hazards and Hazardous Materials analysis which, if demolished, could produce potential hazardous

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waste exposures which the City determined would not need to be mitigated based on existing statutes and regulations that would render any impact less than significant. (AR 359, 373.) Petitioner contends in reference to those three sites that the EIR "contemplates significant demolition and/or displacement of existing businesses" based on the potential demolition of the three gas stations. (POB p. 23, ll. 14-24.) Petitioner has not directed the Court to evidence that potential demolition of the three gas stations out of approximately 90 DPP sites is "significant," nor does Petitioner cite any evidence in the record to connect the demolition of those gas stations to any material inaccuracy in the VMT calculation. (AR 359, 373.) Petitioner cites no evidence in the record of what, if any, impact the demolition of the three gas stations would have on Impact AQ-1 and TRA-2 and the VMT calculated in the FEIR. Petitioner cites no evidence to support its claim that the demolition of the three gas stations resulted in the EIR underestimating VMT generated by the Project, nor does Petitioner contest the EIR's conclusion that the impact on VMT of the Project would be significant and unavoidable. Petitioner does not challenge the model used by the City to analyze VMT in the EIR. (AR 455-456.) The model provides the basis for the City's conclusions regarding VMT and Impact AQ-1 and TRA-2.

Given that the FEIR concluded that VMT impacts would be significant and unavoidable (AR 458), it is not clear how the three gas stations being demolished, which was disclosed and considered in other sections of the DEIR (AR 359, 373), would support that there was a prejudicial nondisclosure constituting a procedural violation of CEQA, rather than what appears to be a minor misstatement in the City's response to a comment on the DEIR. (AR 887.) Further, Petitioner has not cited any evidence in the record that shows the City's determination that there would be no permanent loss of businesses downtown in the DPP is not supported, and that temporary demolition or displacement of businesses while new projects are built does not support the City's overall analysis, presentation, and conclusions of the VMT issues. (AR 887.) Argument does not qualify as substantial evidence. (14 Cal. Code Regs. § 15384 subd. (a); Pub. Res. Code § 21082.2 subd. (c).)

IX. Conclusion and Remedies

The Court concludes there are procedural violations of CEQA in the particulars set forth above. The appropriate remedy for the violations is an issue that requires additional comment and briefing by the parties based on this ruling. At the hearing, the parties should be prepared to address a supplemental briefing schedule on the remedy for the violations found by the Court in this tentative ruling.

Counsel Jason Flanders appears in person
Counsel Winter King appears in person
Counsel Osa Wolf appears in person
Court Reporter Tamara Willbat CSR#4609 reporting

The Court, having considered the pleadings and oral arguments of counsel, adopts

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the tentative ruling as the order of the Court.

Counsel are to meet and confer re a remedy to the issues and how to fix the problem.
If briefing is needed, counsel are to draft a relatively simple briefing schedule.

DATED: 2/22/2024

BY: _____

A. MONTGOMERY, DEPUTY CLERK