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8
9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **COUNTY OF CONTRA COSTA**

12 ORINDANS FOR SAFE EMERGENCY
EVACUATION,

13 Petitioner,

14 v.

15 CITY OF ORINDA,

16 Respondent.
17

Case No. N23-0579

Respondent's Opposition Brief

**(California Environmental Quality Act,
Pub. Resources Code § 21100 et seq.; Code
of Civil Procedure §§ 1094.5 and 1085)**

Action Filed: March 3, 2023

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1 **Introduction**

2 In 2023, the City of Orinda adopted a new Housing Element to plan for development of more
3 than 1,300 new residential units over the next eight years. Administrative Record (“AR”) 83-116. The
4 City did not undertake this effort voluntarily or lightly: it was *mandated* to do so by state law, and
5 failure to timely adopt the new Housing Element could have meant loss of state funding for
6 infrastructure projects and loss of City authority to regulate land use. Gov. Code § 65585. The City did
7 not shy away from investigating the potential environmental impacts of this new housing. To the
8 contrary, the City prepared an environmental impact report (“EIR”)—the most exhaustive level of
9 review under the California Environmental Quality Act (“CEQA”)¹—acknowledging that the new
10 housing would have several significant and unavoidable impacts, including increased wildfire
11 evacuation risk and increased “vehicle miles traveled” or “VMT”. AR 511, 889. The City approved the
12 Housing Element, together with updates to its Safety Element and a new “Downtown Precise Plan”
13 (together, “Plan Orinda” or “Project”), finding that various social and economic benefits of the Project—
14 including the benefit of complying with state law—outweighed these impacts.

15 Despite this thorough analysis and the mandatory nature of the process, the City was sued for
16 approving the Housing Element by “Orindans for Safe Emergency Evacuation” (“OSEE” or
17 “Petitioner”). This group does not dispute the City’s conclusion that the Project’s wildfire and VMT
18 impacts would be significant. Instead, it criticizes the analysis contained in the EIR, asserting it could
19 have been clearer, involved more studies, or separately analyzed distinct portions of the Project, such as
20 development in the downtown area.

21 As discussed below, OSEE’s arguments are meritless. Many were not presented to the City
22 during the administrative phase, and therefore are not properly before the Court. *Citizens for Open*
23 *Government v. City of Lodi* (2006) 144 Cal.App.4th 865, 874-75. Moreover, the record clearly shows
24 that the EIR disclosed the potential impacts of *all* development, including development downtown.
25 OSEE has presented no evidence to support its claim that adding residences downtown is more
26

27 ¹ CEQA is codified at Public Resources Code section 21000 et seq. All statutory references are to the
28 Public Resources Code unless otherwise noted. The CEQA Guidelines, Cal. Code Regs., tit. 14, section
15000 et seq., are referred to herein as “Guidelines.”

1 impactful to evacuation than adding them elsewhere. Indeed, substantial evidence in the record shows
2 that opposite is true. And the record also shows the City’s finding of significant and unavoidable
3 impacts was conservative: Even though the EIR concluded that the Project would not interfere with any
4 emergency response or evacuation plan, it nonetheless found that the Project would have significant
5 impacts because adding any new development to the City’s already constrained evacuation routes could
6 impact emergency response and evacuation. This analysis not only satisfied the letter of the law but also
7 the spirit, as it fully disclosed potential Project impacts.

8 The main case cited by OSEE in support of its argument actually supports the City. In *League to*
9 *Save Lake Tahoe v. County of Placer* (2022) 75 Cal.App.5th 63, the lead agency conducted wildfire
10 evacuation analysis very similar to that provided in the City’s EIR and concluded impacts would be *less*
11 *than significant*. The court upheld this determination, rejecting petitioners’ claims that the analysis failed
12 to disclose “how much the project would increase evacuation times” and did not “address uncontrollable
13 factors such as a fast-moving wildfire.” *Id.* at 138. Instead, the court held it was wholly within the
14 County’s “discretion to determine its methodologies for analyzing the impact,” and the analysis need not
15 be “so exhaustively detailed as to include every conceivable study or permutation of the data.” *Id.* at
16 139-40 (citations omitted). While the additional analysis requested by petitioners might be helpful, it
17 was not necessary. *Id.* The same is true here.

18 Finally, OSEE attempts to portray the City as unconcerned about wildfire and safe
19 evacuation. Nothing could be further from the truth. The City has consistently “sounded the alarm”
20 about fire risk and works on fire and evacuation issues every day. As part of the Housing Element
21 process, the City openly acknowledged that planning for more housing, as required by state law,
22 involved significant and unavoidable impacts related to wildfire evacuation. The seriousness of the
23 situation was repeatedly made clear to the public and was well understood by decisionmakers. The
24 City’s Safety Element update, which contains numerous policies requiring the City to further improve
25 evacuation and emergency response times and prevent wildfire impacts and injury, was reviewed by the
26 California Department of Forestry and Fire Protection (“CalFire”), which had no comments or concerns.
27 AR 3182. OSEE’s litigation is, at bottom, a last-ditch effort by a handful of individuals – now acting as
28 OSEE – to use CEQA and the courts to try to overturn the results of a long public process designed to

1 comply with state housing laws and provide additional housing opportunities in Orinda. This Court
2 should reject this effort and deny OSEE’s petition.

3 **Statement of Facts**

4 **I. Orinda prepares a new Housing Element, as required by state law, that would facilitate
5 development of 1,359 additional residential units.**

6 In 2022, the City of Orinda was given a daunting task by the State: prepare a new Housing
7 Element that would accommodate at least 1,359 additional residential units—increasing the City’s
8 population by nearly twenty percent—over the next eight years. AR 83, 16505-06, 16757. The State
9 imposed this housing mandate on Orinda (and all of the other 539 local jurisdictions in California) in
10 response to a severe housing shortage, establishing complex requirements that are administered by the
11 Department of Housing and Community Development (“HCD”). Gov. Code §§ 65580 et seq. (housing
12 element law); Gov. Code § 65589.5(a)(2)(A) (“California has a housing supply and affordability crisis
13 of historic proportions.”). In particular, the City had to identify sites that could realistically
14 accommodate this growth, identify potential constraints to development, and commit to zoning changes
15 and other measures that would address those constraints. Gov. Code § 65583. All of this work had to be
16 completed on a tight timeframe, with HCD reviewing the City’s final Housing Element for compliance
17 with state law. Gov. Code §§ 65585, 65588. Moreover, the consequences for failing to adopt a
18 compliant Housing Element on-time were serious: the City could face fines, lose funding for
19 infrastructure projects, and lose land use regulatory authority (i.e., “the builder’s remedy”). Govt. Code
20 § 65585.

21 While all cities and counties periodically face this state mandate to plan for additional residential
22 development, it is an especially challenging task for Orinda as almost the entire City is exposed to
23 significant wildfire hazards. AR 16788 (“A combination of factors, including weather, topography, and
24 vegetation put Orinda, including both the Very High [Fire Hazard Severity Zones] and the [wildland-
25 urban interface areas], at a high risk of wildfire hazards.”); 15785 (portions of Orinda designated “very
26 high fire hazard severity zone”; almost all of Orinda designated “Wildland Urban Interface-Fire Area”);
27 *see also* AR 377, 495, 497, 498-99, 15783, 15787-88, 16786, 16793. In addition, the City is already
28 largely built-out, leaving few options for additional residential growth. AR 15753.

1 Well aware of these challenges, the City attempted to accommodate the state-mandated growth
2 while protecting current and future residents against the inevitable risks that wildfires pose. To that end,
3 the City focused much of the anticipated growth in the already developed downtown area, which is
4 furthest from the “mountainous, highly combustible areas in the East Bay Hills,” and thus is least likely
5 to be threatened by fire. AR 495; *see also* AR 16641-50 (listing housing sites); 16693 (“Sites in and
6 around downtown Village and Theatre Districts are generally the best suited for urban development and
7 higher-density residential uses” due to “good access, gentle topography,” and “no natural or human-
8 made hazards.”); 3787 (noting City originally considered other Housing Element sites but did not pursue
9 them due in part to increased wildfire risk there). It is also the area closest to evacuation routes, such as
10 BART and Highway 24 (“SR-24”), in case evacuation is needed. AR 495; 496 (Downtown Precise Plan
11 (“DPP”) sites are located on “flat, mostly developed terrain surrounded by major urban roads and not
12 conducive to the spread of wildfire”); 16884 (DPP sites “not likely to face substantial evacuation
13 constraints primarily because they are located close to SR-24 entrances”).

14 In taking this approach, the City followed the recommendations of the Governor’s Office of
15 Planning and Research, which has stated that “avoiding low-density, leapfrog development and
16 increasing development density in infill areas decreases risk of wildfire.” AR 495, 502 (low-density,
17 leapfrog development may create higher wildfire risks than high-density, infill development), 49807-08;
18 *accord* AR 871, 882-83 (Attorney General recommending “increasing housing density” to reduce
19 wildfire risk, as well as “[p]lacement of development close to existing or planned ingress/egress and
20 designated evacuation routes to efficiently evacuate the project population and the existing community
21 population”); *see also id.* (recommending “[a]voidance and minimization of low-density exurban
22 development patterns or leapfrog-type developments (i.e., those with undeveloped wildland between
23 developed areas”); *see also* AR 16884.

24 In addition to addressing wildfire risk, the City also sought to achieve other goals in crafting the
25 Housing Element, including meeting other state requirements. For example, state law required the City
26 to “affirmatively further fair housing” by planning for new housing in multiple locations rather than
27 concentrating affordable housing in one place. Gov. Code § 65583(c); *see also* AR 16696-97.

1 In the spring of 2022, the City released its draft Housing Element for public review. AR 84. This
2 draft proposed that the City accommodate the required units by putting more than 400 units in the
3 downtown area and more than 400 units on other sites (including three church sites, a school site, and
4 the CalTrans property along SR-24), among other strategies. AR 9600, 9605-06. The potential housing
5 element sites in the downtown area were referred to as the “DPP” sites. AR 9599-604. The sites located
6 farther away from downtown were referred to as the “Opportunity Sites.” AR 9605-09.

7 The City submitted the draft Housing Element to the Department of Housing and Community
8 Development (“HCD”) for its initial review in May 2022. AR 84, 9459.

9 **II. Orinda updates its Safety Element and prepares an analysis of evacuation routes and**
10 **constraints, as required by state law.**

11 While working on the Housing Element, the City was also updating the Safety Element of its
12 General Plan, as required by state law. Gov. Code § 65302(g). Pursuant to recent legislation (Stats.
13 2019, ch. 681 (AB 747)), this Safety Element update was required to “identify evacuation routes and
14 their capacity, safety, and viability and evacuation locations under a range of emergency scenarios.”
15 Gov. Code § 65302.15. The City prepared this analysis (“Evacuation Analysis” or “Analysis”) and
16 circulated it for public review in November 2022. AR 85. The Analysis showed that, depending on
17 where a fire originates, the southern portions of the City are most constrained with respect to evacuation,
18 and the downtown areas are among the least constrained. AR 16922-24. While much of the Analysis
19 focused on existing conditions and constraints, it also provided a qualitative assessment of the Project’s
20 impacts, concluding “the increased traffic congestion pressure expected from development at these
21 locations” would not significantly change the expected congestions at key intersections. AR 16884. The
22 Analysis then recommended ways to improve evacuation throughout the City. AR 16910-13.

23 The City included numerous policies in the Safety Element to address existing and future
24 wildfire risks. For example, Policies S-1 and S-2 require the City to implement the Contra Costa County
25 Local Hazard Mitigation Plan and incorporate it into the Safety Element “to ensure that emergency
26 response and evacuation routes are accessible throughout the city.” AR 16803. Policy S-10 requires the
27 City to “[d]evelop and implement an evacuation assistance program” for at-risk populations. AR 16804.
28 Policy S-11 requires the City to coordinate with emergency responders and Caltrans to identify and

1 maintain additional potential evacuation routes. AR 16804. Policy S-12 provides for potentially
2 expanding contra-flow lanes and red flag parking restrictions. *Id.* Policy S-13 requires continued
3 cooperation with schools, senior care centers, and similar facilities to improve evacuation planning. *Id.*
4 Policy S-14 requires the City to continue to revise and improve the evacuation analysis in future Safety
5 Element updates. *Id.* Policy S-15 requires the City to continue to coordinate with the fire district to
6 conduct emergency services training. *Id.* Policy S-32 requires the city to encourage new development
7 outside for very high fire hazard severity zones; any development within these zones must prepare
8 project-specific fire protection plans. AR 16808. Policy S-34 requires coordination with the fire district
9 to ensure that new development is located where fire and emergency services have sufficient capacity
10 (or require that additional capacity be provided as part of the proposed development). *Id.* Policy S-40
11 requires the City to identify public and private roadways in fire hazard severity zones and the wildland-
12 urban interface that are not in compliance with current fire safety regulations and work towards
13 retrofitting these roads. AR 16809-10.

14 In addition to these policies, the Safety Element also included implementation measures
15 addressing wildfire risk and safety. “Implementation Action 4” provides that the City “shall evaluate,
16 and as feasible enact, recommendations in the City of Orinda 2022 Evacuation Analysis and other
17 pertinent analyses to improve safe evacuations in Orinda.” AR 16813. The City Manager’s Office is
18 responsible for this task, which is scheduled for 2024. *Id.*

19 The Safety Element was reviewed by CalFire. AR 3182. CalFire did not request any changes and
20 confirmed on December 8, 2022 that no further action from CalFire was required. *Id.*

21 **III. Orinda prepares a programmatic EIR for the Project, with extensive analysis of potential**
22 **wildfire and other impacts.**

23 In September 2022, the City published its draft environmental impact report (“DEIR”) for the
24 Project. AR 84. This programmatic DEIR described the Project at length and analyzed its potential
25 environmental impacts. *See generally* AR 124-612.

26 The DEIR devoted over twenty pages to wildfire impacts alone. AR 494-515. This analysis
27 disclosed that Orinda is already highly susceptible to wildfires, given the “mountainous, highly
28 combustible areas in the East Bay Hills” and residential development in the “wildland-urban interface”

1 or “WUI.” AR 495. It listed the federal, state, and local plans and regulations in place to protect against
2 the worst impacts of wildfires. AR 500-506. It also noted that “avoiding low-density, leapfrog
3 development and increasing development density in infill areas decreases risk of wildfire,” citing the
4 Governor’s Office of Planning and Research. *See, e.g.*, AR 495, 512.

5 Following CEQA’s guidelines for analyzing impacts, the DEIR stated that the Project would
6 have a significant adverse impact if, among other things, it substantially impaired an adopted emergency
7 response plan or emergency evacuation plan. AR 506. The DEIR identified several emergency plans
8 relevant to the City, and concluded that the Project would be consistent with those plans, including the
9 County’s Emergency Operations Plan. AR 510. The DEIR did not identify any emergency response or
10 evacuation plans that would be impaired as a result of the Project.

11 Nonetheless, in an abundance of caution, the DEIR concluded the Project could have potentially
12 significant impacts related to evacuation because future development could “introduc[e] more residents
13 to the area that would require evacuation on narrow hillside roadways.” AR 510. The DEIR’s analysis
14 focused specifically on evacuation of residents in hilly areas because those are the residents that are
15 typically closest to flammable vegetation, furthest from safety, and will take the longest to evacuate.
16 *See, e.g.*, AR 496 (hilly areas at greater risk); *see also* AR 16908, 16925 (describing factors for
17 determining which areas of the City are most constrained, including the number of “constrained arterial
18 intersections” a person would have to pass through to evacuate, and showing the most constrained
19 areas). To help reduce this potential impact, the DEIR identified mitigation for certain at-risk areas (i.e.,
20 Housing Element Sites 4 and 5, which are not downtown) requiring future developers to prepare wildfire
21 hazard assessments and plans. AR 510. While such plans could reduce the congestion caused by new
22 residents during evacuation, the DEIR concluded that it was not possible to ensure that evacuation
23 impacts would be less than significant, and thus they remained significant and unavoidable. AR 511.

24 In addition to disclosing potential evacuation impacts, the DEIR also analyzed whether
25 development located in WUI or Very High Fire Hazard Severity Zones (“VHFHSZ”) would expose
26 occupants or structures to wildfire risk. AR 511. Here, the DEIR noted that two of the Housing Element
27 sites (again, Sites 4 and 5) could be at greater risk due to their sloped topography, while the DPP sites
28

1 and Housing Element Sites 1-3 would generally be at less risk due to their flatter topography and the fact
2 that they are already substantially developed. AR 511-13.

3 The DEIR then cited existing regulations, codes and policies, including policies in the City’s
4 Safety Element, designed to protect residents and structures from wildfires. AR 511-13. The DEIR
5 concluded that development consistent with these existing laws would not exacerbate wildfire risk in the
6 DPP or on Housing Element Sites 1-4. Housing Element Site 5 could exacerbate this risk because it was
7 considered to be “leap-frog” development. AR 512. Nonetheless, because “existing codes and
8 regulations cannot fully prevent wildfires from damaging structures or occupants,” the DEIR concluded
9 this impact was potentially significant as well. AR 513. To address it, the DEIR identified two more
10 mitigation measures, WFR-2 and WFR-3, designed to better prevent new development from igniting or
11 exacerbating wildfires. AR 513-14 (imposing restrictions/requirements on project construction;
12 requiring fire-resistant vegetation as part of project landscape plans; requiring geotechnical review to
13 ensure structural stability in the event of a fire).

14 Although these mitigation measures would reduce the potential for new construction to ignite a
15 wildfire and would make structures more fire resistant and less vulnerable to loss in the event of a
16 wildfire, the DEIR nonetheless concluded that this impact would remain significant and unavoidable for
17 the same reason as the evacuation impact: “it is not possible to prevent a significant risk of wildfires or
18 fully protect people and structures from the risks of wildfires.” AR 514.

19 **IV. The City received no comments identifying any perceived flaw in the DEIR’s wildfire**
20 **impacts analysis during the public comment period on the DEIR.**

21 The City received written comments on the DEIR from six organizations/individuals during the
22 46-day public comment period. AR 820. Three of these comments were from responsible agencies
23 (EBMUD, CDFW, CalTrans). *Id.* The only comments submitted by a known OSEE member (Michelle
24 Jacobson) during that comment period did not address the DEIR’s wildfire impacts analysis *at all*. AR
25 858-60. Rather, these comments expressed concerns about locating multifamily housing in the
26 downtown area for other reasons (e.g., consistency with the City’s “semi-rural character”). AR 858.
27
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1 The City did not receive any DEIR comments from CalFire, Moraga Orinda Fire District
2 (“MOFD”), or any other entity with responsibility for fire, evacuation, or emergency response.² In fact,
3 only two comment letters submitted during this comment period even referenced wildfire. One was an
4 email attaching a memorandum published by Attorney General Bonta on “best practices for analyzing
5 and mitigating wildfire impacts of development projects under the California Environmental Quality
6 Act.” AR 870-84. This comment did not identify any perceived errors with the DEIR’s wildfire impacts
7 analysis. Nonetheless, the City responded to the comment in the Final EIR (“FEIR”) with an extensive
8 discussion of how the DEIR had incorporated many of the recommendations, even though the DEIR was
9 circulated before the memorandum was published. AR 888.

10 This response also clarified and amplified the DEIR’s original wildfire impacts analysis. It
11 explained that the DEIR provided a qualitative assessment of the Project’s potentially significant
12 impacts on evacuation. AR 889. While numerous state and local regulations and activities are in place to
13 help reduce evacuation impacts and other wildfire risks, the DEIR concluded the Project could still
14 result in significant impacts “due to construction and operational traffic from new development
15 potentially contributing to congestion during evacuations.” *Id.* The response also noted that the
16 evacuation analysis prepared to comply with state Safety Element law confirmed this conclusion, and
17 that “new development anticipated by the Housing Element could exacerbate those impacts.” *Id.*

18 The second wildfire comment submitted during the public comment period for the DEIR asserted
19 that the proposed densities downtown would affect the “LoS [level of service] on this freeway on-ramp
20 and wildfire escape route.” AR 854. This comment provided no evidence that adding residences
21 downtown would be more impactful than adding them elsewhere, given that residents throughout the
22 City use the freeway on-ramps to evacuate. AR 16898 (evacuees on Camino Pablo are heading towards
23 the SR-24 onramps); 16899-901 (showing constrained intersections in three fire scenarios). Nonetheless,
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26
27 ² MOFD Fire Chief Winnacker did comment on a draft of the Evacuation Analysis, as Petitioner notes in
28 its Petition. First Amended Petition for Writ of Mandate ¶ 85. Petitioner does not cite to these comments
in its Opening Brief, and they are irrelevant to its claims. Nonetheless, the City responded to these
comments and others during the administrative proceedings. AR 45585-629, 45633.

1 the City responded to this comment and acknowledged that potential impacts from adding more
2 residents to an already constrained system would have significant and unavoidable impacts. AR 856.

3 Between the issuance of the FEIR and the City’s approval of the Project, several additional
4 comments were received related to the EIR’s wildfire impacts analysis. These comments asserted,
5 without evidence, that increasing density downtown had greater evacuation impacts than increasing
6 density at Housing Element Site 5, the CalTrans property along SR-24. *See* AR 3340 (“Moving some
7 new housing out of downtown will facilitate emergency evacuation.”); 3397 (same commenter: “best
8 way to mitigate the wildfire evacuation risk is to increase density at the CalTrans site and reduce the
9 density proposed in the DPP”); 3445 (same commenter: density downtown should be reduced to reduce
10 impact on evacuation); 3335 (asking whether more housing should be allowed on the CalTrans parcel
11 and less downtown “to reduce the traffic jam that will occur in the event of an emergency evacuation,
12 and for other reasons such as parking and traffic”); 49305-06 (addition of residents and their cars
13 downtown “would only exacerbate the existing emergency evacuation problem”).

14 Others disagreed. One resident expressed concern that “a very vocal minority” was using
15 baseless evacuation concerns to oppose “any type of development or improvement in the downtown. . . .
16 [E]vacuation of the downtown will be easier due to its access to Highway 24, and the downtown being
17 more ‘firesafe’ by code than the forested hillsides surrounding the town.” AR 3475. Others opposed
18 increasing the density of low-income housing on the CalTrans property, because it is located away from
19 the rest of the city and public transit. *See e.g.*, AR 3320 (“The location of the 200 housing units relegates
20 residents to a corner isolated from every other neighborhood in Orinda.”); 3358 (“This site is not a
21 feasible site. It is cut off from the rest of the city and has no businesses, public transportation, or public
22 services nearby. It is also in a fire hazard zone.”); 3359 (“that parcel is cordoned off from the rest of the
23 city and wholly inaccessible via public transit. . . . Even if this housing were built, it would be
24 condemning low-income residents to be totally isolated from Orinda.”).

25 The City responded to these and other concerns at the City Council meeting on January 31, 2023.
26 Staff noted that the EIR wildfire analysis “acknowledges that there are existing constraints regarding
27 evacuation in the city,” and, “[g]iven uncertainties inherent in wildfire situations and to be conservative,
28 the EIR concluded that wildfire impacts could be significant and unavoidable.” AR 15905; *see also* AR

1 3789. Staff also noted that, although the Evacuation Analysis was specifically designed to facilitate the
2 Safety Element update, it supported the EIR’s conclusion about existing constraints. AR 15905.

3 The EIR concludes that Orinda has existing constrained evacuation conditions in some
4 scenarios. This situation exists now and will continue to exist in the future with
5 implementation of the Housing Element, the Downtown Precise Plan and the Safety
6 Element Update. *Adding more development could strain some of these evacuation
7 conditions.* But there’s new policies in the Safety Element Update that would mitigate
8 those impacts to some extent. But given the uncertainties inherent in wildfire situations
9 and to be conservative, the EIR concluded that wildfire impacts would be significant and
10 unavoidable. [AR 3789 (emphasis added).]

11 In response to a request for more modeling of wildfire impacts, one councilmember noted the
12 difficulties inherent in modeling something with so many variables:

13 [T]hese analyses are very probabilistic, these are modeling exercises. . . . Engineering,
14 which is my own professional background, is based on doing enormous amounts of
15 probabilistic modeling, which none of it actually 100% accurately represents anything. . .
16 . I spent a great deal of time when we went through the evacuation plan and quite
17 honestly, I don’t think it could be proven that the evacuation plan, in real life, none of
18 what’s in the assumptions may happen in real life. So I think it has to be taken for what it
19 is, which is an attempt to capture maybe worst case scenario. [AR 3814-15.]

20 **V. The City certifies the EIR, adopts a Statement of Overriding Considerations, and approves
21 the Project.**

22 The City Council certified the EIR for the Project and approved Plan Orinda on January 31,
23 2023. AR 2-116. Because the EIR had identified significant and unavoidable impacts, the City adopted a
24 “Statement of Overriding Considerations” as part of that approval. § 21081; Guidelines § 15093; AR 40-
25 41. This statement identified reasons why, in the City’s judgment, specific benefits of the Project
26 outweighed the significant and unavoidable effects. Project benefits included: facilitation of new
27 residential development, including affordable housing development; compliance with state housing law
28 and avoidance of penalties for failure to comply with state law, including potential loss of local land use
control; location of new housing near transit, jobs, services, and community benefits; enhancement of
public facilities and infrastructure; protection of the community against potential hazards. AR 40-41.

**VI. OSEE files suit challenging the City’s approval of Plan Orinda, and HCD certifies the
City’s Housing Element as compliant with state law.**

OSEE filed its lawsuit challenging Plan Orinda on March 3, 2023, and filed a first amended
petition for writ of mandate on June 16, 2023.

1 HCD determined that the Housing Element complies with state housing law on March 30, 2023.
2 AR 17056-59. In doing so, HCD did not consider Housing Element Site 5 (the CalTrans site) “as part of
3 demonstrating adequate sites to accommodate the Regional Housing Need Allocation (RHNA).” AR
4 17056. HCD determined, however, that the DPP sites, Housing Sites 1-4, and associated rezoning
5 provided adequate sites to accommodate the City’s RHNA even without the CalTrans site. AR 17057.

6 **Standard of Review**

7 In reviewing agency actions under CEQA, a court’s inquiry “shall extend only to whether there
8 was a prejudicial abuse of discretion. Abuse of discretion is established if the agency has not proceeded
9 in a manner required by law or if the determination or decision is not supported by substantial
10 evidence.” § 21168.5. While courts “determine de novo whether the agency has employed the correct
11 procedures,” they “accord greater deference to the agency’s substantive factual conclusions.” *Ebbetts*
12 *Pass Forest Watch v. Cal. Dept. of Forestry & Fire Protection* (2008) 43 Cal.4th 936, 944; *see also Cal.*
13 *Native Plant Society v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 985 (“CNPS”) (courts ““must
14 indulge all reasonable inferences from the evidence that would support the agency’s determinations and
15 resolve all conflicts in the evidence in favor of the agency’s decision”) (citation omitted).

16 Although OSEE attempts to couch its claims as arguments that the City failed to proceed in a
17 manner required by law, they are, in fact, challenges to the City’s factual conclusions, the scope of the
18 EIR’s analysis, the studies used to evaluate certain impacts, the adequacy of mitigation, and the City’s
19 findings that Project benefits outweigh its environmental impacts. Such claims are subject to the
20 substantial evidence standard of review. *Bakersfield Citizens for Local Control v. City of Bakersfield*
21 (2004) 124 Cal.App.4th 1184, 1198; *Oakland Heritage Alliance v. City of Oakland* (2011) 195
22 Cal.App.4th 884, 898.

23 Under the substantial evidence standard, a court must uphold an agency’s determination where
24 substantial evidence supports it, even if there is also substantial evidence supporting a contrary
25 conclusion. *See, e.g., Assn. of Irrigated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383,
26 1391. Substantial evidence is “enough relevant information and reasonable inferences from this
27 information that a fair argument can be made to support a conclusion, even though other conclusions
28 might also be reached.” Guidelines § 15384(a). ““The court does not pass upon the correctness of the

1 EIR’s environmental conclusions, but only upon its sufficiency as an informative document.” *Laurel*
2 *Heights Improvement Assn. v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 392 (citation omitted).

3 Parties challenging an EIR in court must have first identified the alleged flaws in comments to
4 the lead agency during the administrative proceedings. *Citizens for Open Gov. v. City of Lodi* (2006) 144
5 Cal.App.4th 865, 874-75; § 21177. Such comments must be specific and raise the exact issue raised in
6 court; general or unelaborated objections fail to satisfy the exhaustion requirement. *See, e.g., Sierra*
7 *Club v. City of Orange* (2008) 163 Cal.App.4th 523, 535, 538-39; *Citizens for Responsible Equitable*
8 *Environmental Development v. City of San Diego* (2011) 196 Cal.App.4th 515, 527-28. In addition, a
9 party “challenging an EIR for insufficient evidence must lay out the evidence favorable to the other side
10 and show why it is lacking. Failure to do so is fatal. A reviewing court will not independently review the
11 record to make up for appellant’s failure to carry his burden.” *Tiburon Open Space Com. v. County of*
12 *Marin* (2022) 78 Cal.App.5th 700, 728 (citation omitted).

13 Lastly, the City’s EIR “is presumed adequate,” and OSEE “has the burden of proving
14 otherwise.” *State of California v. Super. Ct.* (1990) 222 Cal.App.3d 1416, 1419 (citing § 21167.3);
15 *McAllister v. Cal. Coastal Com.* (2008) 169 Cal.App.4th 912, 921. Courts do not “require technical
16 perfection or scientific certainty” (*League to Save Lake Tahoe*, 75 Cal.App.5th at 95 (citation omitted))
17 but rather “a good faith effort at full disclosure” (Guidelines § 15151).

18 **Argument**

19 **I. Substantial evidence supports the EIR’s conclusion that Plan Orinda would have** 20 **significant and unavoidable impacts on emergency wildfire evacuation.**

21 OSEE’s principal argument is that the Plan Orinda EIR was insufficient because it did not
22 analyze how anticipated development *in the downtown area* would impact wildfire evacuation and
23 emergency response. Petitioner’s Opening Brief (“OB”) 12. OSEE argues the EIR focused only on the
24 impacts of development outside of downtown, and therefore violated CEQA. OB 13. But the EIR
25 considered the impacts of all potential development, including development downtown, and found that
26 development would have significant and unavoidable wildfire impacts (a conclusion OSEE does not
27 dispute). Nothing more was required.
28

1 **A. The EIR analyzed potential wildfire impacts caused by full build-out of the Project,**
2 **not just development outside of downtown.**

3 In support of its argument, OSEE points to the DEIR’s discussion of evacuation and emergency
4 response impacts (labeled WFR-1 in the DEIR). OB 12. Among other things, this section notes that the
5 Project could “inhibit safe evacuation by introducing more residents to the area that would require
6 evacuation on narrow hillside roadways.” AR 510. Taking this sentence in isolation, OSEE asserts that it
7 means the DEIR considered only the impacts of adding new residences outside of the DPP, since those
8 are the areas that evacuate on narrow hillside roadways. OB 12. However, the rest of the record makes
9 clear that the same impacts would be caused by adding any new residents anywhere. AR 3789 (“The
10 EIR concludes that Orinda has existing constrained evacuation conditions in some scenarios. This
11 situation exists now and will continue to exist in the future with implementation of the Housing
12 Element, the Downtown Precise Plan and the Safety Element Update. Adding more development could
13 strain some of these evacuation conditions.”); 889 (“new development anticipated by the Housing
14 Element could exacerbate [evacuation] impacts”). Thus, OSEE is simply incorrect when it claims the
15 EIR only analyzed the wildfire impacts associated with development outside of the downtown area.³

16 In fact, the EIR’s analysis of these impacts is quite straightforward, despite OSEE’s attempts to
17 complicate it. First, the EIR disclosed that the entire City of Orinda is subject to wildfires, due to
18 topography, climate, and vegetation. AR 495-99, 888. Next, it disclosed that existing evacuation
19 conditions are constrained in Orinda. AR 889 (“existing conditions are already constrained when it
20 comes to evacuation and [] new development anticipated by the Housing Element could exacerbate
21 those impacts”); 509 (referring to Figure 2 in the proposed Safety Element to demonstrate evacuation
22 routes); 16764 (showing existing evacuation routes). The EIR goes on to list the state and local plans
23 and regulations designed to facilitate safe emergency response and evacuation, AR 500-06, and finds
24 that the development anticipated by Plan Orinda would be *consistent* with these plans, AR 510. The EIR

25 _____
26 ³ OSEE’s failure to cite this evidence favorable to the City is “fatal” to its claim. *Tiburon Open Space*
27 *Com.*, 78 Cal.App.5th at 728 (party “challenging an EIR for insufficient evidence must lay out the
28 evidence favorable to the other side and show why it is lacking. Failure to do so is fatal.”) (citation
omitted); *Delta Stewardship Council Cases* (2020) 48 Cal.App.5th 1014, 1072 (“When, as here, an
opening brief fails to recite and discuss the record that supports the challenged agency decision, the
appellant is deemed to have forfeited the substantial evidence argument.”).

1 further notes that, as part of Plan Orinda’s Safety Element update, the City will undertake additional
2 measures to improve emergency evacuation and response. AR 506-09. Nonetheless, because
3 implementation of Plan Orinda would add new development to an already constrained system, these
4 impacts would be significant and unavoidable. AR 511, 889.

5 This analysis fully complies with the letter and spirit of CEQA. Far from hiding the ball on
6 potential impacts, the EIR acknowledged that adding new residences will impact evacuation times. In
7 doing so, the EIR fulfilled its basic purpose to “[i]nform governmental decision makers and the public
8 about the potential, significant environmental effects of proposed activities.” Guidelines § 15002; *see*
9 *also* § 21061. The public fully understood this disclosure, as evidenced by several members of the
10 public—including an OSEE member—urging the City to reject the Housing Element because of this
11 significant impact. AR 3809-10, 3811-12. The City nonetheless decided that the benefits of Plan Orinda
12 outweighed these potential impacts, and adopted a “statement of overriding considerations.” AR 40-41.
13 CEQA requires nothing more. § 21081.⁴

14 **B. The City was not required to analyze the impacts of potential downtown**
15 **development separate from the whole of the Project.**

16 Not satisfied with the EIR’s analysis, OSEE asserts that the City was also required to analyze the
17 impacts of a portion of the Project (i.e., development downtown) separate from the whole. OB 11-12.
18 OSEE cites no law in support of this assertion. Indeed, such partial analysis is typically prohibited as
19 “piecemealing” under CEQA. *See Topanga Beach Renters Assn. v. Dept. of Gen. Servs.* (1976) 58
20 Cal.App.3d 188, 195-96 (lead agency may not “chop[] up proposed projects into bite-size pieces which,
21 individually considered, might be found to have no significant effect on the environment”).
22
23

24 ⁴ Indeed, the City could have found these impacts less-than-significant, given the uncontested finding
25 that the Project is consistent with existing emergency response and evacuation plans. AR 506, 509
26 (threshold of significance chosen by City was whether the Project would “[s]ubstantially impair an
27 adopted emergency response plan or emergency evacuation plan”); AR 510 (Project would be *consistent*
28 with relevant plans, including the County’s Emergency Operations Plan); *League to Save Lake Tahoe v.*
County of Placer (2022) 75 Cal.App.5th 63, 134-37 (upholding County’s conclusion that impact on
emergency evacuation plans would be less than significant where project would be consistent with
County’s evacuation plan).

1 **C. The EIR’s discussion of whether the Project would expose occupants or structures**
2 **to damage from wildfires is separate from its discussion of emergency response and**
3 **evacuation impacts.**

4 OSEE is similarly off-base in its discussion of the EIR’s impact analysis labeled “WRF-2,”
5 which analyzes whether the Project would expose occupants or structures to damage from wildfires. OB
6 13; AR 511-13. OSEE excerpts one sentence from that analysis—which states that goals and policies in
7 the Safety Element would mitigate the risk of loss and injury from wildfires—and asserts the EIR fails
8 to identify which evacuation routes will be maintained. OB 13. OSEE also asserts that this section
9 “fail[s] to analyze or discuss the nature and magnitude of the wildfire emergency response and
10 evacuation impacts of the Project due to new development in the DPP.” OB 13. But WRF-2 does not
11 purport to address emergency response and evacuation impacts; those impacts are discussed in the
12 impact labeled “WRF-1.” Rather, it addresses potential harm caused to occupants or structures by
13 wildfire itself. AR 511-13; *Newtown Preservation Society v. County of El Dorado* (2021) 65
14 Cal.App.5th 771, 788 (question under CEQA is whether project will have a significant effect on the
15 environment, not on resident safety and emergency evacuation). The EIR cannot be faulted for failing to
16 address emergency response and evacuation impacts in this separate analysis. Moreover, this argument
17 was not raised in the administrative proceedings and is therefore waived. § 21177.

18 **D. OSEE’s criticisms of the Evacuation Analysis have no evidentiary basis.**

19 OSEE next attacks the Evacuation Analysis for failing to address impacts caused by
20 development anticipated under Plan Orinda, stating that “the Evacuation Analysis simply ignores the
21 thousands of additional residents and commercial development that will be located within the DPP and
22 HE.” OB 14. Not true. The Analysis considered these impacts qualitatively and concluded that “the
23 increased traffic congestion pressure expected from development at these locations” would not
24 significantly change the expected congestion at key intersections in the City. AR 16884, 11286 (goal of
25 analysis to assess evacuation for current residents and buildout of Housing Element and DPP). It also
26 ranked the Housing Element sites from most constrained to least constrained, finding that the Miramonte
27 High School property (Housing Element Site 4) would be most constrained (AR 16884) and the DPP
28 sites would be least (*id.*). It concluded that the DPP sites “are not likely to face substantial evacuation
 constraints primarily because they are located close to SR-24 entrances.” *Id.* The Analysis also directly

1 contradicts OSEE’s unsupported argument that adding development downtown would be more
2 impactful than adding it elsewhere in the City. AR 16884, 16922-24 (showing areas with the most and
3 least constrained evacuation routes); 16889.

4 Indeed, OSEE points to *no* evidence suggesting that adding new residents downtown would be
5 more impactful to emergency response⁵ or evacuation than adding them elsewhere. The group submitted
6 *no* technical or expert analysis during the administrative phase supporting this conclusion. Nor did
7 anyone else. Rather, OSEE cites only general assertions by lay people, which do not constitute
8 substantial evidence much less establish an abuse of discretion. *Newtown Preservation Society*, 65
9 Cal.App.5th at 781 (“In the absence of a specific factual foundation in the record, dire predictions by
10 nonexperts regarding the consequences of a project do not constitute substantial evidence.”) (citation
11 and quotation marks omitted); *Clews Land & Livestock, LLC v. City of San Diego* (2017) 19
12 Cal.App.5th 161, 195 (“commenters’ predictions of significant impacts alone are insufficient absent
13 specific facts in the record supporting a fair argument”); *Assn. of Irrigated Residents*, 107 Cal.App.4th at
14 1391 (court must uphold an agency’s determination where substantial evidence supports it, even if there
15 is also substantial evidence supporting a contrary conclusion).

16 Lacking any evidence of its own, OSEE claims the Evacuation Analysis’s conclusion that the
17 downtown area is one of the least constrained areas is “flawed” because the downtown area also
18 contains the two most constrained *intersections*—the onramps to SR-24. OB 14. Once again, no one
19 raised this argument during the administrative phase, and thus it has been waived. § 21177.

20 The argument also misunderstands the Analysis. No matter where development occurs in Orinda,
21 most residents will need to pass through the two downtown on-ramps to SR-24 to evacuate to safety. AR
22 16896 (“in all three [fire] scenarios, the fastest route for most Orinda residents from their home to safety
23 is towards SR-24 westbound towards the Caldecott Tunnel, particularly to the westbound on-ramps from
24 Camino Pablo”). That is why those downtown intersections will experience the heaviest traffic volumes

27 ⁵ While OSEE refers to “emergency response” impacts in addition to evacuation impacts, it cites
28 absolutely no record evidence—not even public speculation or general assertions—that emergency
response times will be more impacted by downtown development than development elsewhere.

1 during an evacuation and are the most constrained. AR 16898 (evacuees on Camino Pablo are heading
2 towards the SR-24 onramps); AR 16899-901 (constrained intersections in three fire scenarios).

3 But *proximity* to a constrained intersection has no bearing on how long it will take an area to
4 evacuate; rather, evacuation constraint largely depends on *how many* intersections are between the
5 evacuee and safety. AR 16889 (constraint index scores based on “how far Orinda residents must travel
6 through Orinda to reach the nearest safe destination” and “how many congested intersections each
7 household must travel through to reach the nearest safe destination”). Those evacuating from the
8 downtown area will need to pass through only one or two intersections before entering SR-24 (and
9 heading to safety). AR 16922-24, 16038. In other areas of the City, evacuees will need to pass through
10 many more constrained intersections—including the SR-24 onramps—to get to safety. AR 16922-24.
11 Thus, there is no conflict between saying that the SR-24 onramps are the most constrained *intersections*
12 during an evacuation and, at the same time, that downtown is the least constrained *area*, i.e., will have
13 the easiest time evacuating, because of its proximity to those onramps (and BART).

14 **E. *League to Save Lake Tahoe* upheld similar analysis.**

15 OSEE also cites *League to Save Lake Tahoe*. OB 16-17. Far from supporting OSEE’s argument,
16 this case rejects it entirely. There, the petitioners challenged Placer County’s analysis of wildfire
17 evacuation impacts in an EIR for a large development project. 75 Cal.App.5th at 78-80. The County
18 concluded the project would not interfere with the County’s emergency response plans for a host of
19 reasons (e.g., the project would not cut off or modify existing evacuation routes; the project would
20 develop a fire protection plan that included a shelter-in-place location, among other elements; the
21 additional traffic volumes added by the project would be insufficient to interfere with the use of the
22 highway under the existing evacuation plan). *Id.* at 133-34. As a result, the County concluded the
23 project’s impacts would be *less than significant*. *Id.* at 135.

24 Comments on the draft EIR expressed concern about the potential increase in emergency
25 response times and evacuation times caused by the project. *Id.* at 134. In the Final EIR, the County
26 described a study that had analyzed those impacts. *Id.* at 135. Contrary to OSEE’s description of this
27 study (OB 16-17), it did *not* analyze the increased evacuation time for existing residents caused by
28 adding the project’s new residents to the roads. Rather, it simply estimated the amount of time it would

1 take the *project's occupants* to evacuate (with and without other proposed projects in the area). *Id.* at
2 135. The final EIR stated: “the proposed project, or any project that adds people to an area, would
3 increase the amount of time to complete an evacuation.” *Id.* At 135. Nonetheless, it concluded that the
4 impact would be *less than significant* because emergency personnel would take this extra time into
5 account in issuing evacuation orders. *Id.*

6 Petitioners challenged this analysis, specifically arguing that the EIR failed to disclose “how
7 much the project would increase evacuation times,” and that the study did not “address uncontrollable
8 factors such as a fast-moving wildfire.” *Id.* at 138. The court rejected those arguments. In doing so, the
9 court recognized that “[i]t is difficult to predict how an actual evacuation will unfold and determine how
10 a project may impact it.” *Id.* at 140. Further, CEQA does not require analysis to be “so exhaustively
11 detailed as to include every conceivable study or permutation of the data.” *Id.* at 139 (citation omitted).
12 While the additional analysis requested by petitioners could be helpful, the court held, it was not
13 necessary. *Id.* at 139-40. And it was wholly within the County’s “discretion to determine its
14 methodologies for analyzing the impact.” *Id.* at 140. For all these reasons, the court held that the
15 County’s analysis was supported by substantial evidence and therefore satisfied CEQA. *Id.* at 143.

16 The analysis in the City’s EIR for Plan Orinda has many of the same elements as Placer
17 County’s (e.g., consistency with local evacuation plans, requirements for future projects to prepare
18 wildfire safety and evacuation plans (including shelter-in-place locations), evacuation analysis). The
19 main difference is that the City took the conservative step of disclosing that the Project’s wildfire
20 impacts would be *significant and unavoidable* due to the addition of new residences. AR 511, 889, 3789.
21 Given that the court in *League to Save Lake Tahoe* upheld the County’s finding of less-than-significant
22 impacts when presented with very similar information and analysis, the City’s more conservative finding
23 that these impacts are significant and unavoidable should also be upheld.

24 *League to Save Lake Tahoe* also undermines OSEE’s complaints that the City should have done
25 additional or different studies of evacuation impacts. OB 17-18; 75 Cal.App.5th at 138 (“Numerous
26 scenarios could be modeled and discussed; some would show a significant impact and others would
27 not.”); *see also Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 515 (courts “do not require
28 technical perfection or scientific certainty” in CEQA cases).

1 Moreover, CEQA expressly permits the type of qualitative analysis the EIR employed here. *See*
2 Guidelines § 15064.7 (thresholds of significance include “identifiable . . . *qualitative* . . . level of a
3 particular environmental effect”) (emphasis added). This is especially true when a project is a high-level
4 planning document, and thus the EIR is programmatic, not project-specific. *See In re Programmatic*
5 *Environmental Impact Report Coordinated Proceedings* (2008) 43 Cal.4th 1143, 1169-76 (upholding
6 programmatic EIR’s analysis of impacts in general terms, without quantification of impacts from
7 second-tier projects). A first-tier EIR for a large-scale planning project, such as Plan Orinda, may
8 provide a general analysis of potential significant environmental effects. *Id.* at 1174-75; *Town of*
9 *Atherton v. Cal. High-Speed Rail Authority* (2014) 228 Cal.App.4th 314, 346; *San Franciscans for*
10 *Livable Neighborhoods v. City and County of San Francisco* (2018) 26 Cal.App.5th 596, 606, 607-08
11 (identifying EIR for a housing element as a programmatic EIR requiring a more overarching analysis of
12 impacts and mitigation measures). More detailed analysis can be deferred to a second-tier analysis of the
13 site-specific projects. *Id.*; Guidelines §§ 15168, 15152; *Vfineyard Area Citizens for Responsible Growth,*
14 *Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 431 (tiering is properly used to defer analysis
15 when impacts are specific to later phases); *Atherton*, 228 Cal.App.4th at 344 (tiering allows the agency
16 to tailor analysis to the decision ripe for review rather than speculate about future decisions); § 21093(a).
17 Indeed, the Legislature has directed agencies to tier “whenever feasible, as determined by the lead
18 agency.” § 21093(b). For this reason as well the EIR’s analysis was more than adequate.

19 **F. *Sierra Club v. County of Fresno* is irrelevant because the EIR provided information**
20 **about the potential safety consequences of the Project.**

21 OSEE next argues that the EIR’s wildfire evacuation analysis is deficient because it does not tie
22 the increased population in the DPP to specific evacuation or emergency response impacts, citing *Sierra*
23 *Club v. County of Fresno*. OB 17. But that case had nothing to do with evacuation impacts. There the
24 Court found that an EIR violated CEQA because it contained only technical information about air
25 quality impacts and failed to make a reasonable effort to tie those impacts to likely health consequences.
26 6 Cal.5th at 510, 517-21. In this case, the EIR *does* tie the increase in population to added evacuation
27 constraints and discloses the potential safety impacts related to those constraints. AR 511, 889, 3789. It
28 does not specifically parse out the impacts of increasing the population *in the DPP*, but nothing in *Sierra*

1 *Club* (or any other case cited by OSEE) suggests that a lead agency must analyze impacts associated
2 with a portion of the project separate from the whole of the project. As noted above, such a “segmented”
3 approach to analysis typically *violates* CEQA. *See* Argument Section I.B, *supra*.

4 **II. OSEE failed to exhaust its administrative remedies with respect to its meritless**
5 **“significance threshold” claim.**

6 OSEE claims that the City violated CEQA by failing “to articulate how the significance
7 threshold for Impact WFR-1 was crossed.” OB 18. OSEE cites to no evidence in the record that this
8 issue was raised during the administrative process, and the City is aware of none. As a result, it is not
9 properly before the Court. § 21177.

10 Even if it were, it would be meritless. As discussed above, the EIR explained the Project was
11 *consistent* with existing plans, including the County’s Emergency Operations Plan. AR 510.
12 Nonetheless, the EIR looked beyond this consistency to acknowledge the obvious: that adding more
13 residents to an already constrained evacuation system could have significant impacts. AR 511, 889; *see*
14 *also League to Save Lake Tahoe*, 75 Cal.App.5th at 136-37 (“Developing new homes and stores in a
15 very high fire hazard area risks exacerbating the hazard by putting more people and property in harm’s
16 way and increasing the chance of a wildfire starting. ¶ The EIR recognized that the project would add
17 people to the area, which would increase the amount of time to complete an evacuation.”).

18 OSEE argues that this analysis was inadequate because the EIR did not identify any relevant
19 emergency response plan or cite specific policies the Project would conflict with. OB 18-19 (citing *Save*
20 *North Petaluma River & Wetlands v. City of Petaluma* (2022) 86 Cal.App.5th 207). But the City *did*
21 identify an emergency response plan (i.e., the County’s Emergency Operations Plan) and disclosed that
22 the Project would be *consistent* with its goals and objectives. AR 510. Nothing more was done in *Save*
23 *North Petaluma River & Wetlands*. 86 Cal.App.5th at 226.

24 Nor was the EIR required to provide more detail about precisely how significant the impact is.
25 *See* OB 19. This is not a case where the lead agency simply declared certain impacts “unknown,”
26 without any analysis, and proceeded to find them significant and unavoidable. *Cf. Berkeley Keep Jets*
27 *Over the Bay Com. v. Bd. of Port Comrs.* (2001) 91 Cal.App.4th 1344, 1367, 1371. Here, the EIR
28 provided extensive discussion of wildfire risk and evacuation impacts, ultimately concluding they were

1 significant and unavoidable. And *Cleveland National Forest Foundation v. San Diego Association of*
2 *Governments*, cited by OSEE, actually supports the City: There, the Supreme Court found that the EIR
3 had adequately discussed the project’s greenhouse gas impacts, even though “there were perhaps clearer
4 or more graphic ways” it could have done so. (2017) 3 Cal.5th 497, 516. Here, too, the Plan Orinda EIR
5 presented the information about potential wildfire impacts “in a manner calculated to adequately inform
6 the public and decision makers, who may not be previously familiar with the details of the project.” *Id.*

7 **III. OSEE’s complaints about Mitigation Measure WFR-1 were not raised during the**
8 **administrative process and ignore numerous evacuation improvement policies and**
9 **commitments properly included in the Safety Element.**

10 OSEE’s next complaint is that the EIR included only one mitigation measure to address the
11 Project’s evacuation impacts. OB 20. This measure requires any future developers of Housing Element
12 Sites 4 and 5—two sites that are relatively large and undeveloped—to prepare a Wildfire Hazard
13 Assessment and Plan ensuring that the developments have “shelter-in-place” design guidelines. AR 510-
14 11. OSEE argues that this measure, which applies only to Housing Element Sites 4 and 5, does not
15 address evacuation impacts caused by development in the downtown areas, and is deferred. Once again,
16 OSEE did not raise these concerns during the administrative phase, and cannot raise them now. § 21177.

17 Moreover, mitigation measure WFR-1 is not the only measure designed to reduce evacuation
18 impacts, as OSEE asserts. OB 20. Numerous policies designed to improve evacuation safety throughout
19 the City were included in the Safety Element itself. AR 16803-09 (requiring City to, inter alia,
20 implement the Contra Costa County Local Hazard Mitigation Plan and incorporate it into the Safety
21 element “to ensure that emergency response and evacuation routes are accessible throughout the city”;
22 coordinate with emergency responders and Caltrans to identify and maintain additional potential
23 evacuation routes; continue to revise and improve the evacuation analysis in future Safety Element
24 updates; identify public and private roadways in fire hazard severity zones and the wildland-urban
25 interface that are not in compliance with current fire safety regulations and work towards retrofitting
26 these roads). Because the Project here involves updating the City’s General Plan, CEQA expressly
27 authorizes the City to include mitigation in the General Plan as well. Guidelines § 15126.4(a)(2).

28 Nor did the City ignore the recommendations in the Evacuation Analysis, as OSEE asserts. OB
20-21. “Implementation Action 4” specifically provides that the City “shall evaluate, and as feasible

1 enact, recommendations in the City of Orinda 2022 Evacuation Analysis and other pertinent analyses to
2 improve safe evacuations in Orinda.” AR 16813. The responsible department or agency is the City
3 Manager’s Office, and the time-frame is “by 2024.” *Id.*

4 To the extent OSEE claims mitigation measure WFR-1 is improperly deferred (OB 21), that
5 argument also fails. Mitigation can be deferred when the agency “commits itself to mitigation and lists
6 the alternatives to be considered, analyzed and possibly incorporated in the mitigation plan.” *Defend the*
7 *Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1275; *see also* Guidelines §15126.4 (a)(1)(B). Such
8 deferral is appropriate at the early stages of land use planning processes, ““where practical
9 considerations prohibit devising such measures”” *Sacramento Old City Assn. v. City Council* (1991) 229
10 Cal.App.3d 1011, 1028-29 (citation omitted). Here, there is no current proposal to develop either of the
11 sites subject to this mitigation measure. Without any idea of what the development would entail or how
12 it would be designed, the City cannot develop a site-specific Wildfire Hazard Assessment and Plan. *Id.*

13 Numerous cases have similarly allowed EIRs to commit agencies to developing future plans. *See*
14 *e.g., North Coast Rivers Alliance v. Marin Municipal Water Dist. Bd. of Directors* (2013) 216
15 Cal.App.4th 614, 630-631 (allowing mitigation through landscaping plans that would be developed later
16 at the project’s construction phase); *Center for Biological Diversity v. Dept. of Fish & Wildlife* (2015)
17 234 Cal.App.4th 214, 240-42 (a program EIR allowing mitigation through aquatic biodiversity
18 management plans and hatchery management plans to be developed at later-identified sites);
19 *Endangered Habitat League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 794 (allowing
20 mitigation through several plans, including a fuel modification plan approved by a local fire authority).

21 **IV. Substantial evidence—including the fact that state law requires the City to plan for**
22 **increased residential development despite existing evacuation constraints—supports the**
23 **City’s statement of overriding considerations.**

24 Under CEQA, a lead agency’s statement of overriding considerations must be upheld unless the
25 court finds it is not supported by substantial evidence in the EIR or the record. *Cherry Valley Pass Acres*
26 *& Neighbors v. City of Beaumont* (2010) 190 Cal.App.4th 316, 357. Unlike other aspects of the CEQA
27 review process, whether a project’s benefits outweigh the environmental harm is entirely up to the
28 agency to determine. *Id.* (“A lead agency’s decision to approve a project despite its significant
environmental impacts is a discretionary policy decision, entrusted to it by CEQA, and will be upheld as

1 long as it is based on findings of overriding considerations that are supported by substantial evidence.”).
2 Courts cannot second-guess that determination unless it is unsubstantiated by the record. *Toward*
3 *Responsibility in Planning v. City Council* (1988) 200 Cal.App.3d 674, 684-85; Kostka & Zischke,
4 *Practice Under the Environmental Quality Act* (Cont.Ed.Bar 2022) § 17.34 (“Reviewing courts defer to
5 the policy judgments reflected in a statement of overriding considerations.”).

6 Here, OSEE asserts that the City’s statement of overriding considerations was invalid because
7 the City was unaware of the full effects of the Project. OB 21-22. This assertion is wholly unfounded.
8 The City was well aware of the potential evacuation impacts and repeatedly acknowledged them in the
9 DEIR, FEIR, and staff presentations. *See, e.g.*, AR 511, 889, 3789, 15905; *see also* AR 3809, 3811-12
10 (public comments indicating residents also understood potential impacts would be significant). The City
11 adopted CEQA findings—which OSEE does not challenge—acknowledging these impacts at the same
12 time as it adopted its statement of overriding considerations. AR 7-39. The City’s decision to approve
13 the Project, for all the reasons stated in the override findings, was well informed.

14 As a result, this case is more akin to *San Diego Citizenry Group v. County of San Diego* than *San*
15 *Franciscans for Reasonable Growth v. City and County of San Francisco*. OB 22. In *San Diego*
16 *Citizenry*, the court found that the EIR “relied on conservative assumptions, found significant
17 environmental impacts and adequately apprised the decision maker of the severity of those impacts”
18 before making override findings. (2013) 219 Cal.App.4th 1, 25. The same is true here. *See* Argument
19 Section I, *supra*; *cf. San Franciscans for Reasonable Growth*, (1984) 151 Cal.App.3d 61, 79-80
20 (override findings inadequate where analysis severely understated cumulative impact).

21 OSEE’s claim that the override findings required a statement of “*how* the Project’s costs and
22 benefits are weighed in the balance” (OB 22, emphasis added) is unsupported by any citation to law. It is
23 also unclear what more could have been said beyond identifying specific policy and economic
24 considerations (including compliance with state housing law, development of more affordable housing,
25 and increasing accessibility to employment (AR 40-41)) that outweighed the identified environmental
26 impacts. Having cited these considerations, the City adequately supported its override findings. § 21081.

1 **V. Substantial evidence also supports the EIR’s VMT analysis.**

2 OSEE’s final argument is that the EIR should have assessed the additional “vehicle miles
3 traveled” or “VMT” caused by residents having to drive farther for services if the Project replaces
4 downtown businesses with residences. OB 23-24. OSEE claims the EIR acknowledges this loss of
5 businesses in the hazardous materials analysis. OB 23. OSEE is wrong.

6 First, the EIR’s extensive VMT analysis utilized a model prepared by the regional transportation
7 authority. AR 454-455. The City was entitled to use that model and OSEE has provided no evidence that
8 the loss of some businesses downtown⁶ would result in different modeling results. *Newtown*
9 *Preservation Society*, 65 Cal.App.5th at 789 (lay person opinion about technical issue not substantial
10 evidence). Second, the EIR concluded that there will no permanent loss of businesses downtown, even if
11 there may be temporary construction impacts during redevelopment. AR 887. Numerous DPP policies
12 designed to preserve and support businesses downtown support this conclusion. *See, e.g.*, AR 15995
13 (recommending that, to implement DPP, staff amend code to codify “minimum retail requirements”);
14 16062-64 (stating DPP vision for downtown as supporting businesses and diversifying land uses to
15 include housing as well as commercial). Third, the EIR concluded that VMT impacts would be
16 significant and unavoidable, a conclusion OSEE does not dispute. AR 458. OSEE’s complaints about
17 the EIR’s VMT analysis must be rejected.

18 **Conclusion**


19 For all of these reasons, the Court should deny OSEE’s petition for writ of mandate.
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27 ⁶ The hazardous materials analysis cited by OSEE refers to potential demolition of only three DPP sites,
28 all of which are currently gas stations. AR 359, 373. Nothing in this analysis suggests demolition will
result in permanent loss of businesses in the City.

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DATED: December 6, 2023

SHUTE, MIHALY & WEINBERGER LLP



By:

WINTER KING

Attorneys for Respondent City of Orinda

1712207.7

1 **PROOF OF SERVICE**

2 ***Orindans for Safe Emergency Evacuation vs. City of Orinda***
3 **Case No. N23-0579**
4 **Contra Costa County Superior Court**

5 At the time of service, I was over 18 years of age and **not a party to this action**. I am
6 employed in the County of San Francisco, State of California. My business address is 396
7 Hayes Street, San Francisco, CA 94102.

8 On December 6, 2023, I served true copies of the following document(s) described as:

9 **RESPONDENT’S OPPOSITION BRIEF**

10 on the parties in this action as follows:

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23 **BY E-MAIL OR ELECTRONIC TRANSMISSION:** I caused a copy of the
24 document(s) to be sent from e-mail address jmiao@smwlaw.com to the persons at the e-mail
25 addresses listed in the Service List. I did not receive, within a reasonable time after the
26 transmission, any electronic message or other indication that the transmission was unsuccessful.

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

Executed on December 6, 2023, at San Francisco, California.



Jennifer K Miao