SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL

MINUTE ORDER

DATE: 10/07/2021 TIME: 02:29:00 PM DEPT: C-68

JUDICIAL OFFICER PRESIDING: Richard S. Whitney
CLERK: Richard Cersosimo
REPORTER/ERM: Not Reported
BAILIFF/COURT ATTENDANT:

CASE NO: **37-2019-00038820-CU-TT-CTL** CASE INIT.DATE: 07/25/2019
CASE TITLE: **Petition of Sierra Club [E-FILE]**
CASE CATEGORY: Civil - Unlimited CASE TYPE: Toxic Tort/Environmental

APPEARANCES

STATEMENT OF DECISION:

The Court, having taken the above-entitled matter under submission on 9/21/2021, and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

"A superior court sitting as a court of review in a CEQA proceeding is not required to issue a "statement of decision" as that term is used in Code of Civil Procedure sections 632 and 634. (See 2 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act (Cont.Ed.Bar 2d ed. 2011) § 23.116, p. 1262.) Conversely, a superior court that chooses to issue a written document explaining its decision to grant or deny a writ of mandate in a CEQA proceeding is not prohibited from labeling the document "statement of decision." Regardless of the label used, the rights, obligations and procedures set forth in Code of Civil Procedure sections 632 and 634 and California Rules of Court, rule 3.1590 do not apply to any such document issued by the court in a CEQA writ proceeding." (Consolidated Irrigation Dist. v. City of Selma (2012) 204 Cal.App.4th 187, 196 fn. 5, as modified on denial of reh'g (Mar. 9, 2012).)

(1) PETITIONERS' PETITION FOR WRIT OF MANDATE and PEOPLE'S PETITION FOR WRIT OF MANDATE IN INTERVENTION is GRANTED.

Petitioners ENDANGERED HABITATS LEAGUE, CALIFORNIA NATIVE PLANT SOCIETY, CENTER FOR BIOLOGICAL DIVERSITY, PRESERVE WILD SANTEE, CALIFORNIA CHAPARRAL INSTITUTE, and SIERRA CLUB's (collectively "Petitioners") Requests for Judicial Notice are granted (Exhibits A, B and C). Intervenor People of the State of California ex rel. Rob Bonta, Attorney General's ("AG") Requests for Judicial Notice are granted. Real Parties in Interest, Jackson Pendo Development Company, et al.'s ("GDCI") Requests for Judicial Notice are granted. The "JOINT OBJECTION BY THE PEOPLE AND PETITIONERS TO REAL PARTIES IN INTEREST'S NOTICE OF "OTHER RELEVANT EVIDENCE" PURSUANT TO GOVERNMENT CODE SECTION 12612 AND SUPPORTING

DECLARATION OF ELIZABETH JACKSON" is granted. The AG did not intervene via Government Code section 12612, but 12606. Further, the evidence is extra-record evidence that post-dates Respondents and Defendants COUNTY OF SAN DIEGO and BOARD OF SUPERVISORS OF COUNTY OF SAN DIEGO's ("County") decision to approve the Project, defined below, which renders it irrelevant for purposes of this California Environmental Quality Act ("CEQA") action. (See *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559.)

Background

GDCI's Project is located within the Proctor Valley, approximately one-quarter mile east of Chula Vista and immediately south of the unincorporated community of Jamul. (Administrative Record ["AR"] 1.) "The project is a planned community consisting of 1,119 dwelling units; 10,000 square feet of neighborhood commercial; 2.3 acre joint use Fire Station/Sheriff storefront; 9.7 acre elementary school site; 24 acres of public/private parks; 776 acres of open space and a preserve on 1,284 acres" (the "Project"). (AR 1.) The County's approval of the Project includes a General Plan Amendment ("GPA") of the County's General Plan. (AR 1.) The County approved the Final Environmental Impact Report ("EIR") as to the Project. (AR 1.) Petitioners and the AG challenge the EIR under CEQA as being unsupported by substantial evidence and the approvals as being an abuse of discretion based on a failure to proceed in the manner required by law. Petitioners and the AG also allege the Project is inconsistent with the General Plan.

Standard of Review Under CEQA and Relevant Law

The issue before this Court is whether the County abused its discretion. "Abuse of discretion is shown if (1) the agency has not proceeded in a manner required by law, or (2) the determination is not supported by substantial evidence." (*County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 945 [Citation omitted].)

Under CEQA, courts review quasi-legislative agency decisions for an abuse of discretion. (§ 21168.5.) At both the trial and appellate level, the court examines the administrative record anew. (*Vineyard, supra,* 40 Cal.4th at p. 427, 53 Cal.Rptr.3d 821, 150 P.3d 709.)

An "agency may abuse its discretion under CEQA either by failing to proceed in the manner CEQA provides or by reaching factual conclusions unsupported by substantial evidence." (*Vineyard, supra,* 40 Cal.4th at p. 435, 53 Cal.Rptr.3d 821, 150 P.3d 709, citing § 21168.5.) "Judicial review of these two types of error differs significantly" however. (*Vineyard,* at p. 435, 53 Cal.Rptr.3d 821, 150 P.3d 709.) For that reason, "a reviewing court must adjust its scrutiny to the nature of the alleged defect, depending on whether the claim is predominantly one of improper procedure or a dispute over the facts." (*Ibid.*)

1. Procedural Claims

Courts must "scrupulously enforce all legislatively mandated CEQA requirements." (*Goleta II, supra,* 52 Cal.3d at p. 564, 276 Cal.Rptr. 410, 801 P.2d 1161.) To do so, "we determine de novo whether the agency has employed the correct procedures" in taking the challenged action. (*Vineyard, supra,* 40 Cal.4th at p. 435, 53 Cal.Rptr.3d 821, 150 P.3d 709.)

2. Substantive Claims

Compared with review for procedural error, "we accord greater deference to the agency's substantive factual conclusions." (*Vineyard, supra,* 40 Cal.4th at p. 435, 53 Cal.Rptr.3d 821, 150 P.3d 709.) We apply "the highly deferential substantial evidence standard of review in Public Resources Code section 21168.5" to such determinations. (*Western States, supra,* 9 Cal.4th at p. 572, 38 Cal.Rptr.2d 139, 888 P.2d 1268.) "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." (*Save Our Peninsula, supra,* 87 Cal.App.4th at p. 117, 104 Cal.Rptr.2d 326.) That deferential review standard flows from the fact that "the agency has the discretion to resolve factual issues and to make policy decisions." (*Id.* at p. 120, 104 Cal.Rptr.2d 326.)

The CEQA Guidelines define substantial evidence 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." (Guidelines, § 15384, subd. (a).)

(*California Native Plant Soc. v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 984-85.)

"[W]hether 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. A conclusory discussion of an environmental impact that an EIR deems significant can be determined by a court to be inadequate as an informational document without reference to substantial evidence." (*Sierra Club v. County of Fresno* ("*Friant Ranch*") (2018) 6 Cal.5th 502, 514.) "The ultimate inquiry, as 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.'" (*Id*. at 516 [Citation omitted].)

"[T]he petitioner bears the burden of demonstrating that the record does not contain sufficient evidence justifying a contested project approval." (*Latinos Unidos de Napa v. City of Napa* (2013) 221 Cal.App.4th 192, 206.) "To do so, an appellant must set forth in its brief all the material evidence on the point, not merely its own evidence. [Citation.] A failure to do so is deemed a concession that the evidence supports the findings." (*Id*. [Citation omitted].)

GDCI asserts Petitioners failed to raise a number of issues, such that the exhaustion of administrative remedies doctrine precludes the claims.

"Exhaustion of administrative remedies is a jurisdictional prerequisite to maintenance of a CEQA action. ... The petitioner is required to have 'objected to the approval of the project orally or in writing during the public comment period provided by this division or prior to the close of the public hearing on the project before the issuance of the notice of determination.' ([Pub. Resources Code,] § 21177, subd. (b).) The petitioner may allege as a ground of noncompliance any objection that was presented by any person or entity during the administrative proceedings." (*Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1199, 22 Cal.Rptr.3d 203.)

" 'The petitioner bears the burden of demonstrating that the issues raised in the judicial proceeding were

first raised at the administrative level.

...

"It is, however, "not necessary to identify the precise statute at issue, so long as the agency is apprised of the relevant facts and issues." (*McPherson v. City of Manhattan Beach* (2000) 78 Cal.App.4th 1252, 1264, 93 Cal.Rptr.2d 725.)

(*Center for Biological Diversity v. County of San Bernardino* (2010) 185 Cal.App.4th 866, 889–890.)

Mitigation Measures as to Green House Gases ("GHG")

The EIR recognizes the Project will emit at least 484,770 metric tons of climate pollution over 30 years. (AR 31823.) The EIR acknowledges this is a significant impact that should be mitigated. The EIR contends the impacts will be mitigated to less than significant by implementing, *inter alia*, M-GHG-1 through M-GHG-4. (AR 31819.) Both the AG and Petitioners challenge M-GHG-1 and M-GHG-2 as being inadequate. Both M-GHG-1 and M-GHG-2 attempt to address GHGs that will be created from construction and operation of the Project over 30-years. (AR 318-324.)

First, the EIR relies on an estimated 30-year life for the Project to estimate the amount of GHG that must be mitigated. (AR 42057.) The 30-year life span is taken from the South Coast Air Quality Management District's set of GHG thresholds of significance for industrial projects. (AR 121687-88.) However, the District stated that as to "Residential/Commercial Sector Projects" "Not Recommended at this Time" to use the 30-year life span for offsets, as is used by the EIR in this case. (AR 121688.) GDCI asserts the District was not asked to make a recommendation as to Residential/Commercial Sector Projects. This does not support that the evidence the EIR relies upon to use a 30-year life span is substantial. GDCI does not point to any evidence in the record that the EIR relied on specific standards for Residential/Commercial Sector Projects, which is at issue in this action. A 30-year life span for a residential project goes against common sense. As GDCI asserts, the homes will be more advanced, such that they could last longer than other homes which last longer than 30 years. However, comments in the EIR state "30-year project life also is widely used in CEQA documents by expert consultants and lead agencies," "Executive Order (EO) S-3-05 established 2050 as the target year for an 80 percent reduction in statewide GHG emissions below 1990 levels," and that the incremental implementation of the development will result in a later start time for the Project and the "modeling analysis likely overestimates the Proposed Project's GHG emissions because the modeling does not take into account reasonably foreseeable regulatory, programs and other governmental strategies and technological factors that likely would result in further reductions in GHG emissions levels throughout California that are needed to achieve the 2030 and 2050 targets." (AR 33525-26.)

Even if the 30-year life span were accepted as being supported by substantial evidence, the mitigation measures M-GHG-1 and M-GHG-2 are insufficient under *Golden Door Properties, LLC v. County of San Diego* (2020) 50 Cal.App.5th 467. "An EIR shall describe feasible measures which could minimize significant adverse impacts, including where relevant, inefficient and unnecessary consumption of energy." (California Code of Regulations ("CEQA Guidelines") section § 15126.4(a)(1).) "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." (CEQA Guidelines

section § 15126.4(a)(2).) "Under section 38562, subdivision (d)(1) and (2), cap-and-trade offset credits may be issued only if the emission reduction achieved is "real, permanent, quantifiable, verifiable, enforceable, and additional to any GHG emission reduction otherwise required by law or regulation, and any other GHG emission reduction that otherwise would occur." (*Golden Door, supra,* 50 Cal.App.5th at 506.)

" 'Real' means ... that GHG reductions ... result from a demonstrable action or set of actions, and are quantified using appropriate, accurate, and conservative methodologies that account for all GHG emissions sources, GHG sinks, and GHG reservoirs within the offset project boundary and account for uncertainty and the potential for activity-shifting leakage and market-shifting leakage." (Cal. Code Regs., tit. 17, § 95802.) " 'Permanent' means ... that GHG reductions ... are not reversible, or when GHG reductions ... may be reversible, that mechanisms are in place to replace any reversed GHG emission reductions ... to ensure that all credited reductions endure for at least 100 years." (*Ibid.*) " 'Quantifiable' means ... the ability to accurately measure and calculate GHG reductions ... relative to a project baseline in a reliable and replicable manner for all GHG emission sources ...." (*Ibid.*) " 'Verifiable' means that an Offset Project Data Report assertion is well documented and transparent such that it lends itself to an objective review by an accredited verification body." (*Ibid.*) " 'Additional' means ... greenhouse gas emission reductions or removals that exceed any greenhouse gas reduction or removals otherwise required by law, regulation or legally binding mandate, and that exceed any greenhouse gas reductions or removals that would otherwise occur in a conservative business-as-usual scenario." (Cal. Code Regs., tit. 17, § 95802.)

(*Id.* at 506-507.)

Similar to the County's Climate Action Plan (CAP) found to be inadequate under CEQA in *Golden Door*, M-GHG-1 and M-GHG-2 are for the purchase and retirement of carbon offsets that may be issued by "(i) the Climate Action Reserve, the American Carbon Registry, and Verra (previously, Verified Carbon Standard); or (ii) any registry approved by the California Air Resources Board (CARB) to act as a registry under the state's cap-and-trade program." In *Golden Door* the similarly labelled M-GHG-1 provided "the Director may approve offsets issued by any 'reputable registry or entity that issues carbon offsets consistent with ... section 38562[, subdivision] (d)(1).'" (*Golden Door, supra,* 50 Cal.App.5th at 514.) In both *Golden Door* and here, "M-GHG-1 says nothing about the protocols that the identified registries must implement." (*Id*. at 511.) "Unlike M-GHG-1, under cap-and-trade, it is not enough that the registry be CARB-approved. Equally important, the protocol itself must be CARB-approved." (*Id*.) "The CARB Protocols are the heart of cap-and-trade offsets-but the word "protocol" is not even mentioned in M-GHG-1.... M-GHG-1 is not equivalent to cap-and-trade offset programs because M-GHG-1 does not require the protocol itself to be consistent with CARB requirements under title 17, section 95972, subdivision (a)(1)-(9) of the California Code of Regulations." (*Id*. at 512.) The same is true in this case – the word "protocol" is not even mentioned in M-GHG-1 nor does the EIR require the protocol of the registry be consistent with CARB requirements. (AR 318-320.) The EIR parrots the words of California Health & Safety Code section 38562, subdivision (d)(l), stating "the purchased carbon offsets used to reduce GHG emissions from construction and vegetation removal shall achieve real, permanent, quantifiable, verifiable, and enforceable reductions." (AR 319.) More than mere lip service is required – there must be "objective criteria for making such findings." (*Id*. at 521–522.)

GDCI points to the fact the EIR cites to the program manuals for registries in the appendices. However, one of the registries, American Carbon Registry, provides "projects must commit to maintain, monitor,

and verify Project Activity for a Minimum Project Term of 40 years...because no length of time, short of perpetual, is truly permanent...," but Permanent, as to GHG reductions, is defined as reductions that "endure for at least 100 years." (AR 75786; Cal. Code Regs., tit. 17, § 95802; see also *Golden Door, supra,* 50 Cal.App.5th at 522 [for example, CARB's forestry protocol requires sequestering carbon "for at least 100 years"].) As discussed above, GDCI's citation to extra-record evidence of actual purchases of offsets is not relevant. (See *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559.) Even if it were considered, the evidence indicates GDCI purchased offsets from American Carbon Registry, which would not meet the permanence requirement under *Golden Door*.

Further, in both the EIR and the County CAP considered in *Golden Door*, M-GHG-1 is silent as to the additionality requirement in Health & Safety Code section 38562, subdivision (d)(2), which provides "the reduction is in addition to any greenhouse gas emission reduction otherwise required by law or regulation, and any other greenhouse gas emission reduction that otherwise would occur." (Health & Saf. Code, § 38562(d)(2); *Golden Door, supra,* 50 Cal.App.5th at 514.) M-GHG-1 and M-GHG-2 ignore the requirement that the reductions would not have otherwise occurred – that it would not result from a business-as-usual scenario. (*Golden Door, supra,* 50 Cal.App.5th at 521.) The EIR's requirement that the offsets achieve reductions that are "not otherwise required," consistent with Guidelines section 15126.4(c)(3) does not equate to requiring compliance with the additionality requirement in Health & Safety Code section 38562, subdivision (d)(2). Also, responses to comments in the EIR as to the acknowledgement of the additionality definition does not equate to a requirement within M-GHG-1 and M-GHG-2 that the offsets purchased meet the additionality requirement in Health & Safety Code section 38562, subdivision (d)(2). Finally, reliance on registry protocols is of no avail. As an example, one of the registries relies on the "project proponent" to sign an "Attestation of Legal Additionality form that confirms the mitigation project activity was not required by any law, statute, rule, regulation or other legally binding mandate by any national, regional, state, local or other governmental or regulatory agency having jurisdiction over the project." (AR 75925.) This is essentially the fox guarding the hen house, plus it does not address whether or not the reduction resulted from a business-as-usual scenario.

Petitioners also criticize the EIR's reliance upon forecasted reductions in relation to the purchase of carbon offsets. GDCI cites to the Newhall Ranch project, discussed with approval in *Golden Door*, which utilized estimated reductions and carbon offsets for past reductions. GDCI does not explain how this Project has safeguards to ensure the reduction would occur equivalent to those in the Newhall Ranch EIR. GDCI also relies upon the Climate Forward program, but the Climate Forward Program Manual recognizes it "does not guarantee the use of FMUs [Forecasted Mitigation Units] or CRTs will be accepted as a means to meet CEQA GHG mitigation obligations where required by an approving agency(ies)." (AR 75898.) The Court agrees the Climate Forward Program's reliance on a one-time verification of the mitigation project is troublesome. (AR 75916.) The lack of ongoing verification illustrates the protocols do not ensure that the forecasted reductions are real, additional, permanent, confirmable, and enforceable. "'[O]nce the project reaches the point where activity will have a significant adverse effect on the environment, the mitigation measures must be in place.'" (*King & Gardiner Farms, LLC v. County of Kern* (2020) 45 Cal.App.5th 814, 860 [Citation omitted].) While GDCI must provide proof of purchase of carbon offsets prior to permit issuance, a proper mitigation measure must be in place at that time. (AR 31819, 31822.) Without rigorous protocols to ensure the forecasted reductions are real, additional, permanent, confirmable, and enforceable, it cannot be concluded the mitigation measures were permissibly implemented at proper times.

Finally, the EIR suffers from enforcement issues as to M-GHG-1 and M-GHG-2. In *Golden Door*, the court stated:

The only M-GHG-1 limit on mitigating with international offsets is the Director's unilateral decision that offsets are not feasibly available within (1) the unincorporated county; (2) the County; (3) California; and (4) the United States. The fundamental problem, unaddressed by M-GHG-1, is that the County has no enforcement authority in another state, much less in a foreign country. M-GHG-1 does not require a finding that an out-of-state offset site has laws at least as strict as California's with respect to ensuring the validity of offsets.

At oral argument, the County asserted that the "registries" would be the County's enforcement mechanism to ensure the validity of offsets originating in foreign countries. This argument fails, however, because it is premised on the assumption that the registry's protocol is Assem. Bill No. 32 compliant-and as explained *ante*, M-GHG-1 does not require use of an Assem. Bill No. 32 compliant protocol.

(*Golden Door, supra,* 50 Cal.App.5th at 512–513.) Similarly, here, the EIR relies upon the registries for enforcement, which is problematic because of their protocols. M-GHG-1 provides "the Director of the PDS shall require the Project applicant or its designee to provide an attestation or similar documentation from the selected registry(ies) that a sufficient quantity of carbon offsets meeting the standards set forth in this measure have been purchased and retired, thereby demonstrating that the necessary emission reductions are realized." (AR 319.) This enforcement mechanism pales in comparison to CARB, which discourages noncompliance "by deterring and punishing fraudulent activities." (AR 75598.) CARB has the enforcement authority to hold a party liable and to take appropriate action, including imposing penalties, if any of the regulations for CARB offset credits are violated. (17 C.C.R. §§ 95802(a), 96013, 96014.) GDCI does not cite to any evidence in the record that the registries have the same enforcement authority under their protocols.

One of the registries states it "will rely first and foremost on legal requirements within the jurisdiction(s) where the project is implemented." (AR 75909.) As *Golden Door* recognized, such reliance can be a problem in another state or foreign country where the County does not have any enforcement authority. There is nothing in M-GHG-1 or M-GHG-2 that requires the Director of the PDS to follow specific protocols when "offsets are unavailable and/or fail to meet the feasibility factors defined in CEQA Guidelines Section 15364 in a higher priority geographic category before allowing the Project applicant or its designee to use offsets from the next lower priority category" to ensure the offsets are ultimately enforced properly. Rather, the Director of the PDS merely needs to issue a written determination that considers information such as "availability of in-State emission reduction opportunities," "geographic attributes of carbon offsets," "temporal attributes of carbon offsets," "pricing attributes of carbon offsets," and "[a]ny other information deemed relevant to the evaluation...." (AR 320, 323-24.) This could allow for the Director to permit purchase of offsets almost entirely from international offsets. As a registry recognizes, "[d]epending on the location of the mitigation project, there may be insufficient compliance and/or enforcement of national, regional, state, local, or other regulations." (AR 75906.) As in *Golden Door*, "M-GHG-1 does not require a finding that an out-of-state offset site has laws at least as strict as California's with respect to ensuring the validity of offsets." (*Golden Door, supra,* 50 Cal.App.5th at 513.)

The EIR is inadequate as to M-GHG-1 and M-GHG-2.

Wildfire Ignition Risk

The AG and Petitioners assert the EIR fails to properly acknowledge the increased risk of wildfire ignition from the additional people who will be in the area as a result of the Project. The EIR states "the Project Area, in its current condition, is considered to be vulnerable to wildfire ignition and spread during extreme fire weather." (AR 32172.) The EIR goes on to states that the "introduction of up to 1,119 new homes would not increase the potential likelihood of arson, off-road vehicle-related fires, or shooting-related fires." (AR 32173.) The body of the EIR does not acknowledge an increase in risk of wildfire ignition as a result of more humans being in the area from the Project. However, a County expert acknowledges "southern California's increasing population will make it more likely that ignitions will occur, which could potentially cause large areas of chaparral to type-convert into grasslands." (AR 104506.) Further, it is known humans are the primary cause of wildfires, especially in Southern California. (AR 89718-23.) The EIR does not address this issue, but notes "[p]ost-construction ignition sources would include vehicles, although roadside FMZs would be provided, reducing the potential for a vehicle-related fire escaping into the Otay Ranch RMP/MSCP Preserve fuels." (AR 32173.) This does not acknowledge or analyze the impact of adding more than 1,100 new homes to the area as to humans being an ignition cause of wildfires. This is combined with the fact the EIR does not clearly, in the body of the EIR, acknowledge the area's designation as a Very High Fire Hazard Severity Zone. (AR 32172-77.) The EIR does not includes enough detail to enable those who did not participate in its preparation to understand and to consider meaningfully the issue of wildfire ignition raised by the Project.

The above issue is accompanied by an improper compressing of the analysis. Instead of independently acknowledging all the significant impacts of the Project as to wildfire risks and subsequently discussing mitigating measures to address such impacts, the mitigation measures are characterized in the EIR as being part of the project. (*Lotus v. Department of Transportation* (2014) 223 Cal.App.4th 645, 656.) "By compressing the analysis of impacts and mitigation measures into a single issue, the EIR disregards the requirements of CEQA." (*Id.*) Here, the EIR considers the impacts of wildfire to be less than significant because the Project's "landscaped and irrigated areas and FMZs, as well as the paved roadways and ignition-resistant structures, would result in reduced fire intensity and spread rates around the Project Area, creating defensible space for firefighters." (AR 32173.) "Additionally, provisions for a fire station in the area would reduce the response time to wildfire ignitions and increase the likelihood of successful initial attacks that limit the spread of wildfires." (AR 32173.) The EIR also states "[u]nauthorized activities such as off-road vehicles and shooting may still occur, but there will be more 'monitors' (i.e., future residents) in the area to discourage and report such activities, resulting in an anticipated decreased occurrence." (AR 32173.) "'CEQA EIR requirements are not satisfied by saying an environmental impact is something less than some previously unknown amount.'" (*Ukiah Citizens for Safety First v. City of Ukiah* (2016) 248 Cal.App.4th 256, 264 [Citation omitted].) The adoption of the Fire Protection Plan (FFP) and compliance with applicable fire codes do not obviate the need for the EIR to analyze significant impacts that would exist prior to the implementation of any mitigation measures. The EIR fails to comply with *Lotus*.

Multiple Species Conservation Program

The Multiple Species Conservation Program ("MSCP") "is a multi-jurisdictional habitat conservation

planning program that involves USFWS, CDFW, the County of San Diego, the City of San Diego, the City of Chula Vista, and other local jurisdictions and special districts...." (AR 31246.) "A total of 85 plant and animal species are 'covered' by the MSCP Plan." (AR 31246.) "Quino checkerspot butterfly *(Euphydryas editha qumo)* is not a covered species under the MSCP." (AR 31191.) "A species that is not an MSCP covered species is not allowed take through the MSCP." (AR 31191.) Normally, "take authorization" can be allowed when incidental to land development and other lawful land uses which are authorized by the County. (AR 31191.) GDCI points to evidence in the record that a previous owner of property that is part of the Project area proposed preserving PV1-3 and other areas of Otay Ranch in exchange for allowing development of other open spaces within Otay Ranch; however, the parties disagree as to whether an agreement was reached. The MSCP and County Subarea Plan designates PV1-3 as "No Take Authorized" areas (AR 115049), or "Otay Ranch Areas Where No 'Take Permits' Will Be Issued," while allowing take in other areas that were previously designated as open space. (AR 82930, 94838-43, 115049, 115051.) The County General Plan calls for implementation of the "MSCP Plans for North and East County in order to further preserve wildlife habitat and corridors, wetlands, watersheds, groundwater recharge areas and other open space that provide carbon sequestration benefits and to restrict the use of water for cleaning outdoor surfaces and vehicles." (AR 129683.) The County's EIR cannot ignore mitigation measures in a General Plan, as such failure violates CEQA. (*Sierra Club v. County of San Diego* (2014) 231 Cal.App.4th 1152, 1167.)

"The EIR shall discuss any inconsistencies between the proposed project and applicable general plans, specific plans and regional plans. Such regional plans include, but are not limited to, ...habitat conservation plans...." (CEQA Guidelines § 15125(d).) Petitioners raised the issue as to the Project's consistency with the MSCP, citing *Banning Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal.5th 918. (AR 94708.) GDCI points to the Implementing Agreement between the Wildlife Agencies ("IA") where it states "as outlined in the letter attached to the South County Segment from the Baldwin Company Dated November 10, 1995, will be included if the agreements are reached." (AR 115255.) GDCI does not deny that the IA still includes a map showing PV1-3 as "Otay Ranch Areas Where No 'Take Permits' Will Be Issued." (AR 115285.) This appears to be why the California Department of Fish and Wildlife (CDFW) concluded "[t]he Implementing Agreement and Subarea Plan are consistent on this point. The Implementing Agreement includes a map as Exhibit F defining the area encompassed by the Subarea Plan." (AR 33276.)

Petitioners do not assert PV1-3 is undevelopable, but that the Project is inconsistent with the MSCP and the EIR does not address this issue. The Court agrees. The Project conflicts with the face of the MSCP. While GDCI or the County is free to seek an amendment of the MSCP, the face of the MSCP reflects PV1-3 is subject to no take. The United States Fish and Wildlife Service (USFWS) did not disagree, but explicitly stated "because no take has been authorized in PV 1, 2, 3 we are evaluating approaches for authorizing take in those parcels including the options considered in the County's draft Condition of Approval for the Village 14 project." (AR 33270.)

CEQA does not "permit lead agencies to perform truncated and siloed environmental review, leaving it to other responsible agencies to address related concerns seriatim." (*Banning Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal.5th 918, 941.) Petitioners assert the EIR fails to meaningfully address the issue. GDCI relies on the purported consistency with the MSCP and on the Biological Mitigation Ordinance (BMO) to support that the County did not violate CEQA. As discussed above, the Project is inconsistent with the MSCP as it currently designates PV1-3 as no take. Even though the Project may be

consistent with the BMO, the EIR does not recognize nor analyze the consistency between the MSCP and the Project. Rather, the County concluded "the Proposed Project, including development of PV1-3, is consistent with the MSCP, Subarea Plan and Implenting [sic] Agreement" after reviewing findings as to the BMO. (AR 75554.) GDCI does not contest that the EIR failed to consider any Project alternative that would comply with the MSCP and preserve PV1-3.

In *Banning Ranch*, an EIR for a project in the coastal zone subject to the California Coastal Act was found inadequate. (*Banning Ranch, supra,* 2 Cal.5th at 941.) The EIR considered comments that the project would disturb environmentally sensitive habitat areas (ESHAs), that could not be developed under the Coastal Act, but it did not study the impact, instead deferring that task to the Coastal Commission. (*Id*. at 930-932.) Here, PV1-3 are currently in an analogous state – they cannot be developed given their designation as no take. As in *Banning Ranch*, the EIR improperly avoids the issue because the analysis assumes the Project is not inconsistent with the MSCP. (AR 40428-541, 32897-900.) Consequently, the EIR fails as an informational document. (*Id*. at 942.)

The Quino Checkerspot Butterfly ("Quino")

The EIR must provide an accurate and complete description of the "baseline" existing environmental conditions against which a project's impacts are evaluated. (*Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 447-48; CEQA Guidelines § 15125.) The USFWS lists the Quino as endangered. (62 FR 2313-01.) Petitioners assert that the EIR's conclusion that Quino do not occupy area within the Project is erroneous. The Project is partially located on "Quino Occurrence Complexes" designated as "Unit 8" by the USFWS. (AR 97955, 98619, 98483-85; 74 FR 28776-01.) "The physical and biological features found in Unit 8 may require special management considerations or protection to minimize impacts from loss and fragmentation of habitat and landscape connectivity due to development...." (74 FR 28776-01.) USFWS defines Quino occupancy based on "population-scale occupancy" as "all areas used by adults during the persistence time of a population (years to decades)." (AR 97955.) Thus, "focused distribution studies over multiple years are required [in order] to quantify Quino checkerspot butterfly population distributions." (AR 97955.)

The EIR states Quino were not "detected during protocol surveys and, therefore, the Project Area is not currently considered occupied" by Quino. (AR 31258.) This conclusion was based on survey results in 2015 and 2016, when it was found the "species has been observed within and adjacent to the Project Area." (AR 82940.) "[T]he 2017 spring season, presumably fueled by above-normal rainfall following multiple years of drought, created the most favorable conditions for Quino since 2012. As a result, very high numbers of Quino were observed, particularly in nearby areas. Unfortunately, in 2017, protocol surveys were not performed on Village 14, qualified USFWS biologists were not allowed to survey the property during the peak of the flight season, and an excellent opportunity to obtain better information on the status of Quino on the property was lost." (AR 82940.) Notwithstanding, "in 2017 Service staff documented multiple Quino individuals adjacent to and interspersed within the Project Area," but the EIR "dismisses these sightings as incidental." (AR 82942.) Additionally, "qualified personnel from CDFW observed [Quino] on and around the site in 2018." (AR 76070-71.) Further, the County acknowledged observation during "low rainfall years...may not be considered adequate evidence to conclude a particular site is unoccupied, even if guidelines are followed." (AR 85305.) Nevertheless, the County encouraged "surveys be conducted regardless of rainfall levels because negative adult data can be

useful long‐term to support conclusions of population absence." (AR 85305.) Finally, in spring of 2019, a non-drought year, qualified personnel documented Quino "widely throughout the Proctor Valley area, including locations immediately adjacent to the project site." (AR 76072.)

GDCI acknowledges 2016 was a below-average year for rainfall, but defends the EIR's conclusion because the "CDFW's 'limited' survey effort did not conform to any established protocols for surveys of this species." (AR 32944.) "Occurrence complexes are mapped in the Recovery Plan using a 0.6 mile (1 kilometer) movement radius from each butterfly observation, and may be based on the observation of a single individual (Figures 1 and 2)." (AR 98326.) The above 1 kilometer radius measurement is part of the "*only* accepted procedure for delineating [Quino] 'occupied habitat.'" (76074.) The observations where mapped based on GPS coordinates with accuracy within about 3 meters. (AR 94849-50.) Given there are more years of observation of Quino in the area than years of no observation and one of the years of no observation, 2016, was a below-average year for rainfall, the data supporting that Quino occupy at least some areas within the Project is more supported than the conclusion the Project area is not occupied by Quino. Moreover, multiple Quino experts and the CDFW determined that the area is occupied. (AR 82942, 83480-84, 97952-54.) In the context of the available data, the EIR's conclusion is erroneous. Without an accurate conclusion as to occupancy by Quino, the EIR fails "to give the public and decision makers the most accurate and understandable picture practically possible of the project's likely near-term and long-term impacts." (CEQA Guidelines section § 15125(a).) This failure also affected the EIR's consideration of mitigation measures. (See GDCI's reliance on AR 29165.)

Cumulative Impacts

It is undisputed the EIR must disclose cumulative impacts. "'Cumulative impacts' refer to two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts." (CEQA Guidelines section § 15355.) "The cumulative impact from several projects is the change in the environment which results from the incremental impact of the project when added to other closely related past, present, and reasonably foreseeable probable future projects. Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time." (CEQA Guidelines section § 15355(b).) "[I]t is vitally important that an EIR avoid minimizing the cumulative impacts. Rather, it must reflect a conscientious effort to provide public agencies and the general public with adequate and relevant detailed information about them. (CEQA, § 21061.)" (*San Franciscans for Reasonable Growth v. City and County of San Francisco* (1984) 151 Cal.App.3d 61, 79.) "The CEQA Guidelines specify that location may be important when the location of other projects determines whether they contribute to an impact. For example, projects located outside a watershed would ordinarily not contribute to cumulative water quality impacts within the watershed." (Kostka, *supra,* § 13:42, p. 651; Guidelines, § 15130, subd. (b)(2).)" (*City of Long Beach v. Los Angeles Unified School Dist.* (2009) 176 Cal.App.4th 889, 907.) However, "the geographic context or scope to be analyzed 'cannot be so narrowly defined that it necessarily eliminates a portion of the affected environmental setting.'" (*Id*. at 907.) Petitioners assert the EIR fails to consider the following pending projects in its analysis: Lilac Hills Ranch, Newland Sierra, Harmony Grove, Warner Ranch, Otay 250, and Valiano.

GDCI defends the EIR's exclusion of the six above projects based on geographic location, the assertion some of the projects have not sufficiently crystalized, and the projects were not closely related to this

Project. Analysis of an entire air basis may be necessary and "[t[he primary determination is whether it was reasonable and practical to include the projects and whether, without their inclusion, the severity and significance of the cumulative impacts were reflected adequately." (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 722-23.) The six potential projects include the need for General Plan amendments to account for changes in densities. (AR 85509-11.) GDCI does not specifically explain how the potential projects would not impact air quality and GHG considerations, even considering their geographical distance from the Project. Given the enormous potential increase in homes, nearly 10,000, from the potential projects, the Court cannot conclude all of the six projects were properly excluded from the cumulative impact analysis, especially as to wildfire risk, air quality and GHG, unless the projects were not sufficiently crystallized such that it would have been unreasonable and impractical to evaluate their cumulative impacts. (*City of Maywood v. Los Angeles Unified School Dist.* (2012) 208 Cal.App.4th 362, 397.)

GDCI cites to evidence some of the projects face challenges, such as referendums and rescinding of some approvals. (See GDCI's RJN Exhibits 3-10.) However, GDCI does not point to evidence that the challenges prevented the projects from ultimately going forward at in time in the future and such was known at the time the EIR was being prepared. Further, not all of the projects have faced issues. GDCI merely points to the fact public review did not commence until March, April, and June of 2017 as to some of them. GDCI does not cite evidence that indicates the projects were "merely contemplated or a gleam in a planner's eye." (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 398.) Given the deferential treatment EIRs often receive, the Court cannot conclude projects that have commenced public review of draft EIRs are too speculative. The Court cannot conclude all of the six projects are not closely related to the Project – they are residential developments which could have similar impacts on wildfire risk, air quality and GHG. (See AR 85509-11.) The failure to consider the cumulative impacts from at least some of the potential projects was potentially significant. (AR 85522-38, 84687-92, 98681, 90648, 84615-17.) This failure violated CEQA.

Standard of Review as to Inconsistencies with the General Plan

"A project is inconsistent if it conflicts with a general plan policy that is fundamental, mandatory, and clear." (*Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 782.) "[J]udicial review of consistency findings is highly deferential to the local agency." (*Naraghi Lakes Neighborhood Preservation Assn. v. City of Modesto* (2016) 1 Cal.App.5th 9, 18.) "'Reviewing courts must defer to a procedurally proper consistency finding unless no reasonable person could have reached the same conclusion.'" (*Covina Residents for Responsible Development v. City of Covina* (2018) 21 Cal.App.5th 712, 732 [Citation omitted]; *California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 637.) "[T]he essential question is 'whether the project is compatible with, and does not frustrate, the general plan's goals and policies.'" (*Naraghi Lakes, supra,* 1 Cal.App.5th at 18 [Citation omitted].)

Affordable Housing Component Requirement Within the General Plan

The General Plan states at H-1.9: "Affordable Housing through General Plan Amendments. Require developers to provide an affordable housing component when requesting a General Plan amendment

for a large-scale residential project when this is legally permissible." (AR 130098.) GDCI does not seriously dispute that the Project does not include an affordable housing component, but asserts it includes "attainable housing components." However, there is a statutory definition for affordable housing cost, which GDCI does not and cannot contend the Project meets. (Health & Saf. Code, § 50052.5.) Rather, GDCI points to the fact the County has not yet adopted an affordable housing ordinance, focusing on the "when this is legally permissible" portion of H-1.9.

GDCI's argument that the law disfavors ad hoc imposition of affordable housing conditions, citing *San Remo Hotel L.P. v. City And County of San Francisco* (2002) 27 Cal.4th 643, is of no avail because inclusionary housing ordinances do not violate the constitution where "the ordinance does not require a developer to give up a property interest for which the government would have been required to pay just compensation under the takings clause outside of the permit process." (*California Building Industry Assn. v. City of San Jose* (2015) 61 Cal.4th 435, 461.) GDCI cannot point to any requirement GDCI was required to give up a property interest without just taking under an ordinance, as no ordinance exists. GDCI's reliance on the lack of an adopted affordable housing ordinance is also unavailing. The County may not rely upon its failure to follow through in implementing an ordinance to ensure projects conform with the General Plan to justify its failure to conform with the General Plan. As GDCI points out, the County has delayed adopting an ordinance since at least 2012. (GDCI's RJN Exhibits 14-15; AR 135444.).

GDCI does not point to any authority stating an ordinance must be adopted before an agency is required to conform to the General Plan. "[A]n agency's interpretation of a regulation or statute does not control if an alternative reading is compelled by the plain language of the provision." (*Southern California Edison Co. v. Public Utilities Com'n* (2000) 85 Cal.App.4th 1086, 1088.) H-1.9 unambiguously requires an affordable housing component. Contrary to GDCI's suggestion, the General Plan does not bend to the requirements of ordinances, it is the other way around – ordinances must not be inconsistent with the General Plan. (*Lesher Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 541.) While the Court is sympathetic that the process to develop affordable housing criteria may not be easy, the evidence and law does not indicate the County is precluded from imposing affordable housing criteria nor that the County is permitted to ignore clear policies and goals in the General Plan based on the difficulty in implementing them. Finally, GDCI's suggestion that H-1.9 only applies to amendments that increase density is without support – nothing in H-1.9 nor other policies or goals within the General Plan support that H-1.9 only applies to amendments that increase density. The limitation on applicability of H-1.9 is its application to "large-scale residential project[s]," not density changes. The Project is inconsistent with H-1.9 of the General Plan.

The petition is granted as to the above discussed issues. As to the other issues raised by the AG and Petitioners, the Court finds GDCI's arguments sufficiently persuasive. The County is ordered to vacate its approvals of the Project.

(2) PETITIONERS' *UNOPPOSED* MOTION TO STRIKE DOCUMENTS IN ADMINISTRATIVE RECORD is GRANTED

Failure to file an opposition to the motion indicates the other parties' acquiescence that the motion is

meritorious. (California Rules of Court, Rule 8.54(c).) Public Resources Code section 21167.6(e) sets forth the types of records to be included in a record of proceedings. (Pub. Resources Code, § 21167.6(e).) "[T]he Legislature intended courts to generally consider only the administrative record in determining whether a quasi-legislative administrative decision was supported by substantial evidence." (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 571.) "[E]xtra-record evidence is generally not admissible in traditional mandamus actions challenging quasi-legislative administrative decisions on the ground that the agency 'has not proceeded in a manner required by law' within the meaning of Pub. Resources Code, § 21168.5." (*Id.* at 561.) The potential exceptions acknowledged in *Western States* do not apply here. (*Id.* at 575, n. 5.) Petitioners explain how the documents included after the fact were considered by GDCI's consultant, but were not presented to the agency decision-makers and did not become part of the record. GDCI does not dispute this. The documents do not fall into a category under Public Resources Code section 21167.6(e). The motion is granted.

Judge Richard S. Whitney