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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN BERNARDINO, SAN BERNARDINO DISTRICT

GREENSPOT RESIDENTS ASSOCIATION and SAN BERNARDINO VALLEY AUDUBON SOCIETY,

Petitioners,

v.

CITY OF HIGHLAND; CITY OF HIGHLAND CITY COUNCIL; and DOES 1 through 20, inclusive,

Respondent.

LCD GREENSPOT, LLC; ORANGE COUNTY FLOOD CONTROL DISTRICT; COUNTY OF ORANGE; ORANGE COUNTY BOARD OF SUPERVISORS; and DOES 21 through 40, inclusive,

Real Parties in Interest.

Case No. CIVDS 1615280
Related Case No: CIVDS 1615347

PETITIONERS' REPLY BRIEF

Assigned for All Purposes to:
Hon. Donald Alvarez, Dept. S23

Code Civ. Proc. § 1094.5 (alternatively, § 1085), Cal. Public Resources Code §§ 21000, et seq. (California Environmental Quality Act)

Action Filed: September 15, 2016
Hearing Date: April 6, 2018

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Introduction

The City of Highland approved a 1,657-acre, 3,632-unit housing development, the Harmony project, on the remote, eastern outskirts of the City. It has no serious transit service and includes almost no job opportunities and limited retail amenities. It is entirely car-dependent. The state-mandated regional transportation plan for the Southern California region had a very different vision for development of this site. The regional plan recognized that putting new homes in undeveloped areas far from urban and other job-rich centers will advance global warming and impede California's efforts for a sustainable climate. In today's legislative environment, 20th-century sprawl housing like Harmony is no longer the norm. Instead, regional plans aim to reduce greenhouse gas ("GHG") emissions by coordinating land use and transportation planning and by focusing new development in infill and other so-called "opportunity" areas. The resulting GHG reductions will help achieve the goals of Assembly Bill 32 and the post-2020 statewide goals embodied in Executive Orders S-3-05 and B-30-15. But these plans only work if they are followed and if the public is informed of their workings.

The Harmony development is starkly out of synch with modern land use and transportation planning. The environmental review for the Harmony development, required under the California Environmental Quality Act ("CEQA"), completely fails to explain Harmony's inconsistencies with regional planning and state law. It lacks substantial evidence to show that the Project is consistent with the GHG reduction targets in the Regional Transportation Plan/Sustainable Communities Strategy ("RTP/SCS"). The Harmony development's size will exceed this plan's housing forecast for the project area, while also providing as little as 10% of the plan's employment forecast for the same area. As a result, the 12,000 future Harmony residents who will need to drive daily to jobs in the City's center or beyond will add hundreds of thousands of vehicle miles per year and the resulting GHG emissions in excess of the RTP/SCS's targets.

The City of Highland nonetheless found that Harmony would achieve the overall GHG reduction needed to meet the AB 32 targets, and that Harmony is thus consistent with AB 32. Yet, the California Supreme Court recently held that the *overall* GHG reduction target needed to

achieve AB 32's goals has no discernable relationship to the reduction needed from *new land use* development, and that this evidentiary "gap" must be filled before new land use development may rely on AB 32's overall GHG reduction standard. Attempting to fill this gap, the City relied on two local air district documents which, the City claims, "implicitly assert" that the required GHG reduction for new land use development is known and quantifiable. An unstated implication, however, does not meet the standard of evidence the Supreme Court has expressly required here.

The City's alternative approach to AB 32 consistency, through Harmony's alleged compliance with regulatory programs implementing AB 32, falls flat. The City fails to connect all of the regulatory programs it relies on to AB 32's goals, and asserts compliance with regulatory programs with which it would be impossible for the City to "comply." Furthermore, because the EIR hinges its conclusions on alleged consistency with the RTP/SCS, the EIR erred in concluding the Project would be consistent with *any* of these GHG reduction targets.

Besides the EIR's thoroughgoing failure to properly analyze Harmony's GHG impacts, the EIR also failed to disclose or analyze its significant flooding impacts. The Harmony project site lies partly within a "high risk" flood hazard zone designated by the Federal Emergency Management Agency. The City's findings approving the development determined that this impact could be avoided by raising the elevation of the affected area by 20 feet, thereby bringing the development out of the floodplain. This would require a huge amount of fill and would likely change hydrology, potentially causing flooding downstream in Redlands, Mentone, Colton, and San Bernardino. Yet the EIR never disclosed the amount of fill needed or its potential hydrological impacts. The City now takes the contrary position that *none* of the Harmony development lies within the floodplain, so no change in elevation is needed. This position direction conflicts with the City's own findings; furthermore, there is no evidence in the record to support this claim. The City cannot change its position after certifying the EIR and adopting findings. Engaging in a smoke-and-mirrors game about the basis of the City's approval ignores the very flood risk that the City has imposed on its residents and neighboring communities.

Finally, the EIR failed to include any analysis of a reasonably foreseeable consequence of the Harmony development: a bridge crossing Mill Creek at the southeastern corner of the project site, connecting to the highway and providing a direct link to the City of Redlands. Although the City and project developer engaged in frequent discussions—which are documented in the record—about the role of the bridge in the Harmony development and its significant environmental consequences, the EIR ultimately did not analyze the bridge as part of the Project. CEQA prohibits "piecemealing" of projects—the "chopping up" of a single project into multiple, smaller projects to mask the greater environmental impacts of the overall development. The bridge is not only reasonably foreseeable, it is guaranteed: the record includes statements by the City that bridge design will begin "immediately" after approval of the Harmony development. Moreover, the Mill Creek Bridge would serve no purpose other than access to and from the Harmony development. The City's own General Plan describes the bridge only as serving the residential development of the Harmony site, and the City has never given any reason for the bridge's construction *other* than this development.

For these reasons, this Court should grant the petition for writ of mandate and order the City to rescind its approvals pending issuance and certification of an EIR that complies with CEQA.

Argument

I. The City Illegally Piecemealed the Analysis of the Mill Creek Bridge, a Reasonably Foreseeable Consequence of the Harmony Development, from the Harmony EIR.

Petitioners explain, in Part II of their Opening Brief, that the EIR incorrectly treated the Mill Creek Bridge as a separate project, outside the scope of the current environmental review. In fact, CEQA required the EIR to analyze the bridge rather than artificially split it off. The City's and Real Parties' (together, "Respondents") response to this piecemealing argument rests on two incorrect assumptions. First, the test for piecemealing asks whether the purportedly piecemealed action is a "reasonably foreseeable consequence" of the primary project, but Respondents insist that Petitioners show the bridge is legally compelled by the Harmony development, or required as a mitigation measure to reduce its impacts. Although the

piecemealing case law sometimes considers whether a segmented action is legally compelled by a project, such compulsion is not required to show that an action has been improperly divided from a larger project. For instance, a reasonably foreseeable action that is "practically presume[d]" by a development is a part of that project for CEQA purposes. *Banning Ranch Conservancy v. City of Newport Beach* (2012) 211 Cal.App.4th 1209, 1223.

Second, Respondents suggest that if the lead agency contemplated taking the action prior to the application for the larger project, then the two must be separate and subject to piecemeal environmental review. Here, however, the City's General Plan contemplated the bridge at the southeast corner of the Harmony site as far back as 2006, and *only* in connection with eventual development of the site. Thus, the General Plan actually shows that the bridge would be built only to serve the development.

A. The Bridge Is Part of the Harmony Development Even If the Development Does Not Legally Compel the Bridge Construction.

The Harmony development is the only reason for the Mill Creek Bridge; the City's General Plan ties the bridge to development of the Project site. Declaration of Brian Fish in Support of Real Parties' Opposition to Greenspot's Petition ("Fish Decl."), Exh. 1, p. 2-41. Furthermore, the bridge construction is imminent—the City has stated that planning will begin immediately after approval of the Harmony development. Administrative Record ("AR") 44435. Thus the bridge is a reasonably foreseeable consequence of the Harmony development, and its potentially significant impacts had to be fully analyzed along with those of the development.

Respondents argue that the bridge is not part of the development because the development does not "need or require" the bridge.[1] Opp. Br. at 17:9; *see id.* at 15:24–16:6. But

[1] Respondents do not appear to disagree that a piecemealing challenge is subject to de novo review. *See Tuolumne County Citizens for Responsible Growth, Inc. v. County of Sonora* (2007) 155 Cal.App.4th 1214, 1224 (when an EIR fails to analyze the "whole of an action" under CEQA, the EIR is inadequate as a matter of law). Respondents nonetheless attempt to apply the substantial evidence standard, arguing that "[s]ubstantial evidence supports the City's determination that the Project can proceed without the Mill Creek Bridge." Opp. Br. at 21:6-7. The law is clear: the issue of the project description's sufficiency is reviewed as a question of law, and courts do not defer to the lead agency. *Tuolumne*, 155 Cal.App.4th at 1224, *Assn. for a Cleaner Environment v. Yosemite Community College Dist.* (2004) 116 Cal.App.4th 629, 637.
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an action may be a "reasonably foreseeable consequence" of a proposed project even if the project does not need or require the segmented action. *See Banning Ranch*, 211 Cal.App.4th at 1223 (discussing various scenarios where piecemealing can occur). In *Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora* (2007) 155 Cal.App.4th 1214, 1226, the court of appeal found that conditions of a store's approval requiring certain roadwork were evidence of a "strong connection" between the store and the roadwork. *Id.* It did not establish such conditions as an exclusive test, nor is there any such suggestion in prior case law. In *Laurel Heights*, for example, the Court applied the "reasonably foreseeable consequence" test to hold that an EIR should have analyzed the impacts of an agency's eventual move into the second half of a building, after it occupied the first half. *Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 396-99. The Court did not ask whether the agency's occupation of the first half required or demanded it to eventually occupy the second half. Rather, the agency, "by the time it prepared the EIR, had either made decisions or formulated reasonably definite proposals as to future uses of the building." *Id.* at 397. The City has done the same here—it has indicated it will begin the bridge planning immediately after Harmony's approval. AR 44435.

Respondents rely heavily on the mistaken view that the *East Sacramento Partnerships* case held that an allegedly piecemealed action must be "need[ed]" by the proposed project. Opp. Br. at 15:8-10; *see East Sacramento Partnerships for a Livable City v. City of Sacramento* (2016) 5 Cal.App.5th 281, 293-94. But in that case, again, necessity of the tunnel for the project was not a determinative factor: rather, the agency had already determined that the tunnel, a project alternative proposed by opponents of the project, was infeasible, and therefore the court did not even need to decide whether the tunnel was a "consequence" of the project. 5 Cal.App.5th at 294 ("[C]onstruction of the Alhambra vehicular tunnel is not reasonably foreseeable. Rather, it is currently deemed infeasible, due to its considerable expense, the need

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Contrary to Respondents' implication (Opp. Br. at 18:10-13), Petitioners do not claim that the bridge is a mitigation measure that the City failed to adopt; the law on such a failure is irrelevant here.

for Union Pacific approvals, and the difficulties and impacts of construction."). Thus, the additional work "was not part of the Project and did not need to be included in the Project description." *Id.* at 292. Unlike the Mill Creek Bridge, which the City acknowledges will be built, with planning to begin immediately after Harmony approval, the tunnel in *East Sacramento Partnerships* would never have been built.

Respondents do not deny that the Project's conditions of approval require a street extension that will be the landing of the Mill Creek Bridge (Opp. Br. at 22:1-12), or that the conditions were clear that this extension would connect to the bridge (*id.*), before the City revised them to suit its legal position. Instead, Respondents claim that the City removed the reference to the bridge from the condition of approval because the bridge is not needed for the Harmony development. *Id.* at 19:5-8. The specifications for the road (e.g., location, length, roadbed and shoulder width, and surfacing), however, remain identical. AR 46712, 45906; *see also* AR 614. The road's purpose is clear: to provide a connection to the future bridge. Editing the language of the conditions of approval does not change that.

Tuolumne explains that the relevant question here is not whether the bridge *must* be built as a result of the Harmony development, but whether it *will* be built as a result of the development. 155 Cal.App.4th at 1230 ("[T]he possibility that two acts *could* be taken independently of each other is not as important as whether they actually *will* be implemented independently of each other.") (emphasis added). The bridge not only is destined to be built, but construction will begin immediately after approval of the Harmony development. AR 44435. For this reason and those discussed below, it was a part of the Project under review, and the EIR should have considered its environmental impacts.[2]

[2] Respondents are incorrect that Petitioners ignored the multiple jurisdictions that would need to approve the bridge. *See* Opp. Br. at 22:24-26. Petitioners' Opening Brief ("OB") cited case law holding that projects, or pieces of projects, routinely involve actions undertaken by separate entities, and that CEQA nonetheless requires such projects to be considered as a whole. OB at 19:5-18.

B. The City's General Plan Shows that Access to and from the Harmony Development Is the Only Purpose of the Bridge, and Respondents Give No Other Reason for the Bridge.

Respondents dismiss the argument that the Harmony development is the bridge's only purpose. Opp. Br. at 21:11-17. Respondents do not, however, offer any alternative justification for the bridge, let alone point to any evidence in the record supporting another reason. Instead, Respondents do no more than show that the City's General Plan contemplated a bridge at this location before the Harmony development was proposed. *Id.* at 20:6-7.

The General Plan's discussion of the bridge makes clear that the bridge is part of the Project and should have been included in the EIR. It does nothing to help Respondents fill in their never-specified alternative purpose for the bridge. The Plan's only substantive discussion of the bridge centers on its serving the eventual residential development of the Project site, which the General Plan refers to as the "Seven Oaks" property. Fish Decl., Exh. 1, p. 2-41. The General Plan states that the development site "has limited access, with Greenspot Road providing the sole connection to the west part of Highland and with future access to Bryant Street to the east via an extension of Greenspot Road." *Id.* This "extension of Greenspot Road" necessarily implies a bridge crossing Mill Creek, as Bryant Street is across the creek from Greenspot Road and the development. That the General Plan might not have contemplated the specific Harmony proposal at the Seven Oaks site is irrelevant—the record shows that the purpose of the bridge has always been to serve development of the Project site and Respondents have not suggested any other purpose for the bridge.

Plan for Arcadia does not do the work Respondents say it does. Opp. Br. at 20:3-7. There, the court held that the widening of a particular road segment was a part of a nearby development project because the city "determined a need existed for the road widening before the developer even submit[ted] the shopping center project." *Id.* at 19:18-19 (citing *Plan for Arcadia, Inc. v. City Council of Arcadia* (1974) 42 Cal.App.3d 712, 724). Whereas in *Plan for Arcadia* the need for the road would have existed even without the shopping center project, here the bridge has always and only been associated with development of the Project site. The question is not whether a need for the bridge predated the Harmony development. Rather, it is

whether any reason for the bridge has ever existed other than development of the Project site. *Compare with Banning Ranch*, 211 Cal.App.4th at 1217 (general plan stated that it already "assumes a roadway extension north through the Newport Banning Ranch property . . . with or without development of that property").

II. The City Lacked Substantial Evidence to Find that the Project is Consistent with AB 32 and Executive Orders B-30-15 and S-3-05.

CEQA requires an EIR to determine whether a project would generate GHGs, either directly or indirectly, that may have a significant impact on the environment. In *Center for Biological Diversity v. California Department of Fish & Wildlife* ("*Newhall Ranch*"), the Supreme Court held that an EIR may do so by analyzing how much the project would reduce GHG emissions below the amount it would emit if built and operated in the regulatory environment preceding adoption of Assembly Bill ("AB") 32—the business as usual ("BAU") scenario. (2015) 62 Cal.4th 204, 223. The EIR must then determine whether the reduction below BAU is sufficient to be consistent with the statewide emissions reduction target in AB 32. *Id.*

Here, Petitioners argue that the EIR applied the wrong yardstick to the Project's reduction. It claims to have identified the amount of reduction required for consistency with AB 32, but Petitioners claim that the evidence does not support this measure. It is misleading for Respondents to claim that "Petitioners do not argue that the City utilized an improper threshold of significance" (Opp. Br. at 25:4), and it is simply incorrect that "the parties agree that the City complied with CEQA in evaluating consistency with AB 32 for purposes of analyzing the significance threshold" (*id.* at 29:13-16). The EIR lacks substantial evidence that the City's standard reduction below BAU (28.5%, or alternatively, 26.2%) would reduce the Project's GHG emissions sufficiently to achieve AB 32's GHG reduction goals. Without such evidence, the EIR has not shown that the Project complies with the statewide threshold, and cannot support the conclusion that the Project has a less than significant GHG impact.[3]

[3] Respondents claim that Petitioners failed to cast the record evidence in the light most favorable to the agency (Opp. Br. at 24:21-27), yet they never identify which evidence Petitioners allegedly glossed over or omitted. Petitioners have not omitted any record evidence from their
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The following discussion first explains why the EIR did not comply with the primary holding of *Newhall Ranch*: it does not provide support for its assumption that the GHG reduction target for land use projects is the same for new development like Harmony and for upgrades to existing development. The City makes the same error as the California Department of Fish and Wildlife ("DFW") in *Newhall Ranch*, by taking a statewide reduction target that does not distinguish between existing and new land uses, and claiming that the target can measure whether Harmony complies with AB 32.

Second, it describes the flaws in the City's separate approach of attempting to show that the Project complies with various federal, state, regional, and local emissions reduction regulations, and thus with AB 32. Of the regulations the EIR describes, some are irrelevant to consistency with AB 32, while others are not actually regulations with which the Project can "comply." Third, Petitioners explain that the EIR lacks substantial evidence to determine that the Project would reduce GHGs consistent with Executive Orders B-30-15 and S-3-05.

Additionally, Petitioners challenge the City's claim that the Project is consistent with the GHG reduction goals of the Southern California Association of Governments ("SCAG") 2012 Regional Transportation Plan/Sustainable Communities Strategy ("RTP/SCS"). The City relies on the Project's alleged consistency with the RTP/SCS in order to claim compliance with the statewide GHG reduction goals, yet the EIR lacks substantial evidence showing the Project is consistent with the RTP/SCS. Likewise, the EIR lacks evidence of the Project's compliance with the RTP/SCS overall, a separately requirement under state law. The EIR's flawed analysis doomed both analyes.

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briefs that would rebut their GHG claims; furthermore, Petitioners are not required to explain, let alone challenge, every aspect of the EIR.

A. The EIR Lacks Substantial Evidence that the Project Is Consistent with AB 32.

1. The City Could Not Determine that the Project's GHG Reductions Below BAU Are Consistent with the Reduction Needed from New Development.

The California Air Resources Board ("Air Board") determined that achieving 1990 emission levels by 2020, consistent with AB 32, would require a 28.5% reduction statewide in current GHG emissions below the levels the state would emit without AB 32's implementing regulations—the hypothetical BAU scenario. AR 16751. Subsequently, the Bay Area Air Quality Management District ("Bay Area District") set out to develop a Bay Area–specific GHG reduction metric for AB 32 compliance. AR 16771; *see also* AR 16805, 36043-44. As part of these efforts, it determined that the Air Board's Scoping Plan assumed a 26.2% reduction just for land-use driven emissions statewide. *Id.* The Harmony EIR concludes that the Project's GHG emissions would be less than significant because they amount to a reduction of approximately 28.66% below the BAU scenario. AR 16798-99. Because the City asserts that any new land use project must only make a 26.2% reduction from BAU in order to advance the statewide reduction, the Project supposedly does *more* than necessary to achieve consistency. AR 16771, 16805.

Newhall Ranch requires substantial evidence to support such metrics. Here, Respondents have used reduction standards for land use projects in general, with no distinction between newly built projects and alterations to existing developments. Respondents claim that the administrative record in this case, in contrast to the record in *Newhall Ranch*, contains substantial evidence to justify reliance on its standards. Yet this "substantial evidence" is barely evidence at all: it is the City's *opinion* that excerpts from a 2010 Bay Area District document, and a similar San Luis Obispo Air Pollution Control District ("SLO District") document from 2012, "imply" by their silence that new development does not need to achieve greater GHG reductions than upgrades to existing development. This is "speculation [and] unsubstantiated opinion," not the substantial evidence CEQA requires. Pub. Resources Code § 21082.2(c); *Newhall Ranch*, 62 Cal.4th at 228.

Newhall Ranch held that the AB 32 Scoping Plan did not establish the necessary emissions reduction standard for individual development projects. The Plan "nowhere related that *statewide* level of reduction effort to the percentage of reduction that would or should be required from *individual projects*." 62 Cal.4th at 225-26. Rejecting DFW's reliance on the Scoping Plan's standard, the Court described the substantial evidence DFW *should* have marshalled:

> expert opinion stating generally that the Scoping Plan contemplates the same emission reductions from new buildings as from existing ones, or more particularly that the Scoping Plan's statewide standard of a 29 percent reduction from business as usual applies without modification to a new residential or mixed-use development project.

Id. at 226. The Court held,

> [t]he analytical gap left by the EIR's failure to establish, through substantial evidence and reasoned explanation, a quantitative equivalence between the Scoping Plan's statewide comparison and the EIR's own project-level comparison deprived the EIR of its "sufficiency as an informative document."

Id. at 227 (quoting *Laurel Heights*, 47 Cal.3d at 392). "[W]hen the agency chooses to rely completely on a single quantitative method to justify a no-significance finding, CEQA demands the agency research and document the quantitative parameters essential to that method." *Newhall Ranch*, 62 Cal.4th at 228. DFW also attempted to rely on the 26.2% land use–specific reduction standard as an alternative to the economy-wide 28.5% standard, but the Court was not swayed. The 26.2% standard still failed to show that the "reduction from [BAU] at the *project* level corresponds to the *statewide* reductions called for in the Scoping Plan." *Id.* at 226 (emphasis added).

The City does the same thing here, and does not fill the analytical gap left open in *Newhall Ranch* as to either its 28.5% or 26.2% reduction standards. To justify reliance on the statewide 28.5% reduction standard, Respondents claim that the Scoping Plan's required reduction is actually lower now: specifically, they claim that the First Update to the Climate Change Scoping Plan shows that AB 32 requires a roughly 15.3% reduction from BAU. Opp. Br. at 31:11-19. But merely stating a statewide reduction standard for all sectors of the economy does not fill the "analytical gap" in *Newhall Ranch*. It fails to differentiate the individual

reduction standards required from new versus existing development. Furthermore, the EIR explicitly states that it "continu[es] to use the higher 28.5 percent reduction," not the First Update's standard. AR 16771. Whether the Air Board's update to the Scoping Plan established a new, lower statewide standard is thus beside the point.[4] The EIR lacked substantial evidence to rely on the 28.5%-below-BAU reduction target.

To justify the 26.2% land use–specific reduction standard that *Newhall Ranch* also rejected, the City attempts to establish that the required reductions for new and existing land use development are the same. Yet, the City fails to provide what *Newhall Ranch* expressly required: "expert opinion stating generally that" the reduction required statewide (here, 26.2% percent) applies to "new residential or mixed-use development project." *Newhall Ranch*, 62 Cal.4th at 226. Instead of offering such evidence, the City points to excerpted portions of the 2010 Bay Area District and 2012 SLO Air District documents and notes that they do not distinguish between new and existing land use projects. This, a City climate change consultant claims, is an "implicit assertion" (AR 36044) that the required reduction from new and existing land use development is the same. The consultant even goes a step further, attributing to the air districts the concrete "*position* that reductions from existing and future land uses would be the same to meet AB 32 goals." AR 36048. No such position is expressed in either document. *See* AR 36050-64 (excerpt from Bay Area District document); AR 36066-83 (excerpt from SLO Air District document).[5] This is a wild overextension and mischaracterization of the air districts' analyses. It is not evidence supporting the EIR's approach.

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[4] Respondents also note, in defense of the 28.5% standard, that the AB 32 Scoping Plan "does not state that new development must exceed the statewide target to offset emissions from existing land use development." Opp. Br. at 33:4-6 (quoting AR 36045). But this was the Court's reason for rejecting reliance on the 28.5% standard for assessing a new land use project's consistency with AB 32. *Newhall Ranch*, 62 Cal.4th at 225-26. Respondents have merely restated the evidentiary gap the Supreme Court identified.

[5] Although Respondents appear to argue otherwise, the statewide cap and trade program would not have an equalizing effect on the required reductions from new versus existing land use developments. *See* Opp. Br. at 33:17-21. The emissions sources the City asserts are covered by the cap and trade program are "associated with land use development projects" in *general* (AR 36047) and are not more prevalent with new development. Thus the program would not bring

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Relying on the air districts' silence only repeats the error in *Newhall Ranch*. The Supreme Court rejected reliance on the Scoping Plan's statewide reduction standard *because* it failed to state whether the statewide reduction standard was applicable to local land use projects. *Newhall Ranch*, 62 Cal.4th at 225-26. The local air district documents are not substantial evidence of such equivalency and thus do not support the City's determination that the Project would be consistent with AB 32, and that it would therefore have a less than significant GHG impact.

2. The City Cannot Show, as an Independent Basis for Approving the Project, that the Project Would Be Consistent with AB 32 by Complying with Various State, Regional, and Local Regulations.

Newhall Ranch suggests that, if a lead agency cannot demonstrate AB 32 consistency through numerical analysis, it might instead "assess consistency with [AB] 32's goal in whole or in part by looking to compliance with regulatory programs designed to reduce greenhouse gas emissions from particular activities." 62 Cal.4th at 229. Taking this route, the City determined that the Project would be consistent with AB 32 by purportedly complying with various federal, state, regional, and local regulatory programs. The EIR, however, lacks substantial evidence to support this determination.

The EIR simply concludes that any applicable regulations designed to reduce GHG emissions will ensure that the Project will advance AB 32's goal because the Project "must comply" with them. AR 16778-79, 16783-85, 16790, 16792, 16793-94. Respondents concede that this amounts to a conclusory analysis that Harmony will comply with the law (Opp. Br. at 36:9-10) but wrongly claims that CEQA allows such analysis. *Id.*at 36:9-12 (citing *Tracy First v. City of Tracy* (2009) 177 Cal.App.4th 912, 933-34). *Newhall Ranch* expressly stated that

> to the extent a project's design features comply with or exceed the regulations *outlined in the Scoping Plan* and *adopted by the Air Board or other state agencies*, a lead agency could appropriately rely on their use as showing compliance with "performance based standards" adopted to fulfill "a statewide . . . plan for the reduction or mitigation of greenhouse gas emissions."

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the higher reduction standard likely necessary from new development (*Newhall Ranch*, 62 Cal.4th at 226) closer in line with the standard for existing development.

62 Cal.4th at 229 (quoting Guidelines, § 15064.4(a)(2), (b)(3) (emphasis added)). It is not enough for the City to assert it will comply with a specific GHG reduction regulation—the City must also demonstrate that each regulation has some fundamental nexus with AB 32. *Newhall Ranch*, 62 Cal.4th at 229 (EIR must "assess consistency with [*AB*] *32's* goal . . . by looking to compliance with regulatory programs") (emphasis added); *cf. Tracy First*, 177 Cal.App.4th at 933-34 (project construction's compliance with Building Code Energy Efficiency Standards justified finding that energy impacts were reduced to a less than significant level).

The City's analysis relies on several regulations with no nexus with AB 32's goals. For example, the City concludes that compliance with the United States Environmental Protection Agency's and National Highway Traffic Safety Administration's respective transportation fuel emissions regulations would advance compliance with AB 32. AR 16778-79. But these federal regulations have nothing to do with California law and were not designed to achieve AB 32's goals. Furthermore, the EIR itself explains that these federal regulations might reduce GHG emissions from construction vehicles by as little as 6%, as the EIR itself explains (AR 16745-46)—far below the average 28.5% reduction that each category of emissions discussed in the EIR would need to achieve to comply with AB 32 (AR 16772, 16776). Yet the EIR states, without evidence, that compliance with these regulations "support[s] []the conclusion" that the Project is consistent with AB 32. AR 16779; *see also* Opp. Br. at 36:18.

In several instances, the Project is not even capable of "compliance" with the cited regulations—for example, the mobile source regulations cited include AB 1493 (the "Pavley Standard"), requiring the Air Board to adopt regulations to reduce GHG emissions from passenger vehicles; Executive Order S-01-07, requiring a 10 percent or greater reduction by 2020 in the average fuel carbon intensity for transportation fuels; and the statewide cap-and-trade program implementing AB 32. AR 16793-94. Because none of these actually regulates the construction or operation of a land-use project, the EIR could not conclude the Project would "comply" with them to ensure consistency with AB 32.

The EIR's analysis of the Project's compliance with AB 32 regulatory programs also includes the necessary determination that the Project is consistent with the RTP/SCS. AR

16794; *Newhall Ranch*, 62 Cal.4th at 229-30 ("the Scoping Plan . . . relies instead on *local governments* . . . [to] evaluat[e] a land use project's impact on greenhouse gas emissions"); *see also* Opp. Br. at 37:2-3 (RTP/SCS is a "key document[] for purposes of achieving AB 32 compliance at the local and regional level"). Yet, for the multiple reasons explained below, the Project is inconsistent with the RTP/SCS. Thus, the EIR lacked evidence that the Project is consistent with AB 32 through compliance with regulatory programs designed to achieve AB 32's goals.

B. The EIR Lacks Substantial Evidence that the Project Is Consistent with the Regional Transportation Plan/Sustainable Communities Strategy.

In SB 375, the California legislature found that the transportation sector contributed 40% of the state's GHG emissions and that automobiles and light trucks alone are responsible for 30%. *Cleveland National Forest Foundation v. San Diego Association of Governments* (2017) 3 Cal.5th 497, 505-06 ("*CNFF*"). The Legislature also found the state could not meet its emission reduction goals without improved land use and transportation policy. *Id.* at 506. SB 375 directed CARB to develop region-by-region emission reduction targets for automobiles for 2020 and for 2035. *Id.* In order to achieve these targets, regional transportation planning agencies, including SCAG, must each develop a Sustainable Communities Strategy, consistent with the CARB regional targets, as part of their Regional Transportation Plan. Gov. Code § 65080(b)(2). The strategy must address regional distribution of land uses, population, and housing needs. *CNFF*, 3 Cal.5th at 506. It must "set forth a forecasted development pattern for the region, which, when integrated with the transportation network," will reduce automobile GHG emissions to achieve the emission reduction targets approved by the Air Board. § 65080(b)(2)(B). The SCAG region's RTP/SCS sets a standard of reducing per-capita passenger-vehicle CO2 emissions by 9% below 2005 levels by 2020, and by 16% below those levels by 2035. AR 36119.

The EIR assesses consistency with the RTP/SCS for three purposes. First, to assess the Project's GHG emissions, the City adopted as a significance threshold whether the Project would "conflict with an applicable plan . . . adopted for the purpose of reducing the emissions of

greenhouse gases." AR 16805.[6] Second, the CEQA Guidelines require an EIR to "discuss any inconsistencies between the proposed project and . . . regional transportation plans." Guidelines, § 15125(d); *see also* AR 17213-23. Third, the EIR *also* relies on the Project's alleged consistency with the RTP/SCS to conclude that the Project would be consistent with AB 32's GHG reduction goals and Executive Orders S-3-05 and B-30-15. AR 35962 ("The Harmony Specific Plan is also consistent with the Southern California Association of Governments' RTP/SCS . . . thus, the Harmony Specific Plan is consistent with . . . the state's GHG reduction goals."). The EIR lacks substantial evidence to conclude that the Project is consistent with the RTP/SCS, invalidating its conclusions in all of these areas.

The Project is fundamentally at odds with the RTP/SCS goal of "focus[sing] new growth and development in existing urbanized areas and opportunity areas" such as high quality transportation corridors, "where transit and infrastructure are already in place." AR 36122-23. Yet, based on a comparison of the Project to the RTP/SCS's goals and policies, and in particular to the household and employment forecasts for the Project site, the EIR determined that the Project is consistent with the plan's goals and would not impede achievement of the plan's GHG reduction targets. In response to Petitioners' argument that the Project fundamentally conflicts with the RTP/SCS, Respondents state that the RTP/SCS "does not restrict other types of developments" than infill and other projects in "opportunity areas." Opp. Br. at 41:15-17. Whether this is true or not, the City does not have discretion to declare just any project consistent with the RTP/SCS; it must consider, in good faith, whether a project actually addresses the plan's purposes. CEQA required the City to conduct an objective analysis of the Project's consistency with the RTP/SCS and inform the public of any conflicts, even if those conflicts were significant and unavoidable. Because of significant, irreconcilable conflicts with the RTP/SCS, the EIR lacked substantial evidence to conclude either the Project's GHG impacts are less than significant or that the Project is consistent with the RTP/SCS overall.

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[6] CEQA requires lead agencies to determine the extent to which a project complies with regulations adopted to implement a statewide, regional, or local plan to reduce or mitigate GHG emissions. Guidelines, § 15064.4(b)(3).

1. Substantial Evidence Does Not Support the Conclusion that the Project Would Not Impede the Achievement of the RTP/SCS's GHG Reduction Goals.

The RTP/SCS divides the region by "transportation analysis zones" ("TAZ"), and assigns each a housing and employment capacity. *See* Opp. Br. at 40:1-10. Growth within this capacity will lead to GHG emissions consistent with the RTP/SCS. *Id.* Growth in excess of capacity will cause excessive, inconsistent emissions. *Id.* The EIR determines the Project's consistency with the RTP/SCS's GHG reduction goals by evaluating whether the Project's housing and employment figures are within SCAG's 2035 housing and employment forecast for TAZ corresponding to the Project site. Respondents claim that, through the TAZ forecasts, the "RTP/SCS already contemplates the growth, and therefore the GHG emissions, associated with the Project on the Project site." Opp. Br. at 41:6-8; *id.* at 41:10-12 ("[T]he TAZ analysis is property specific such that the RTP/SCS planning and modeling already accounts for the Project's distance from transit and employment."). Yet, the housing and employment forecasts for these TAZ actually show that the Project would impede achievement of the RTP/SCS's GHG reduction goals. The Project results in *more* housing, and dramatically *less* employment, than the forecasts provide, and therefore more vehicle miles traveled ("VMT") between people's homes and jobs, and more GHG emissions. Thus, the City lacked substantial evidence to conclude that the Project would not impede the RTP/SCS's emission reduction goals.

The EIR includes SCAG's forecast for housing and employment in the three TAZ corresponding to the Project site. AR 16805-06 (EIR's comparison of Project with TAZ housing and employment forecasts, shown in Table 5.7-M). It states that "SCAG's growth forecasting data assumes that this TAZ area will grow by 3,500 residential units and 1,248 jobs by the year 2035" (AR 16806), and asserts that because the Project would not exceed either forecast in 2035, the RTP/SCS already accounts for the Project's GHG emissions. *Id.*; *see* Opp. Br. 40:1-11; AR 358-59 (City's finding of Project's consistency with forecasts). This conclusion is flawed in two ways.

First, to properly determine whether the RTP/SCS's modeling of GHG emission reductions accounted for the Project's proposed housing units, the EIR should have compared

the number of Harmony's proposed units to the remaining capacity of 3,500 units in the relevant TAZ. *See* AR 16805-06. Yet the EIR concludes that "the Project would not conflict with growth contemplated in the [RTP/]SCS" because "3,950 households . . . is higher than the 3,467 to 3,632 residential units projected for the Project." *Id. Total* projected housing units in 2035 are 3,950. But remaining capacity is 3,500 units and therefore *less* than the Projects' 3,632 total units. The IER compared the Project to the wrong figure—to the future total buildout rather than growth capacity. This is plainly the wrong comparison. The Project's huge size would exceed the growth contemplated by the RTP/SCS. It is facially inconsistent with the RTP/SCS and neither the EIR nor the City could validly find otherwise. *See id.* (EIR's conclusion), AR 358 (City's findings).

Second, the RTP/SCS's TAZ for the Project site forecast employment capacity at 1,248 jobs in 2035 (AR 16806), but the Project would support only 124 to 451 jobs (*id.*). This means that the Project would provide just *one-tenth to one-third* of the RTP/SCS's employment forecast while surpassing its housing forecast for the Project site. As explained by Respondents, "the TAZ analysis . . . accounts for the Project's distance from transit and employment." Opp. Br. at 41:10-12. Here, however, the RTP/SCS's household and employment forecasts for the property assume that development of the area would include jobs near housing.

Harmony includes almost exclusively housing, and is thus necessarily more distant from employment than the RTP/SCS assumed. The Harmony development's "distance from transit and employment" is thus inconsistent with the RTP/SCS because the development would exceed housing capacity in 2035 while providing only a small fraction of the employment forecast for the Project site. The EIR could not conclude that the RTP/SCS's "planning and modeling" already accounted for the high-population, low-employment Harmony development. The RTP/SCS committed to reducing per-capita passenger-vehicle CO2 emissions by 9% below 2005 levels by 2020, and by 16% below 2005 levels by 2035, but its commitments did not assume Harmony would be developed in the manner the City approved. AR 36119.

The flaws in the EIR's analysis demonstrate why the Project does not meet the fundamental RTP/SCS goal of "focus[sing] new growth and development in existing urbanized

areas" where transit and infrastructure are "already in place." AR 36122-23. Rather than reducing GHG emissions associated with transportation in concert with the RTP/SCS's vision, the Project will increase VMT and associated GHGs. AR 16806.

In sum, because the City's chosen comparison reveals that Harmony will have more people, yet dramatically fewer jobs than the RTP/SCS forecast, the City lacked substantial evidence to conclude that the Project would not impede that plan's emission reduction goals.

2. The City Lacked Substantial Evidence to Conclude that the Project Is Consistent with the RTP/SCS Overall, as Required by CEQA Guidelines.

In addition to considering specifically whether a project advances or impedes an RTP/SCS's emissions reduction goals, an EIR must analyze a project's overall consistency with the RTP/SCS. Guidelines, § 15125(d). The Harmony EIR does compare the Project with the RTP/SCS's goals and principles (AR 17216-19), but its conclusion that the Project would actually achieve these goals and principles is meritless. The Project will build 3,632 residences on 1,657 acres well beyond the City's urban core. AR 16513, 16772. Single family and multifamily residences would take up roughly half of the site (658 acres) while a miniscule 5.7 acres of the site is planned for "neighborhood commercial" development providing "retail goods and services." AR 16513. The Project would be developed far from, and with limited connections to, the City's core. It is isolated from existing population and service centers. AR 16509-10. The site's current connections to the City's developed center are limited to Greenspot Road, a two-land road with no curb, sidewalks, or other roadway improvements, and Newport Avenue. AR 17217. The only public transit the Project proposes are two bus stops. *Id.* Given these limited connections to the rest of the region and lack of meaningful public transit, the Project would encourage reliance on single-passenger vehicles. *See id.* All of this is directly contrary to the type of development that the RTP/SCS encourages. Despite all of this, the EIR concludes the Project is consistent with the RTP/SCS. AR 17223.

This conclusion is unsupportable. For example, the Project is plainly inconsistent with RTP/SCS goals G2 and G8, which respectively call for "[m]aximiz[ing] mobility and accessibility for all people and goods" and for "[e]ncourag[ing] land use and growth patterns

that facilitate transit and non-motorized transportation." AR 17217-19. Goal G6 calls for jurisdictions to "[p]rotect the environment and health of our residents by improving air quality and encouraging active transportation." AR 17218. As explained in Petitioners' Opening Brief, creating a "pedestrian friendly environment" using sidewalks (AR 17218) is not the same as promoting "active transportation," which is SCAG defines to mean people's ability to walk, bicycle, use mass transit, or a combination of the three as *transportation* with the effect of reducing VMT. OB at 35. Respondents fail to respond to any of these arguments, and instead state generically that the EIR "lists every RTP/SCS goal and . . . includes a corresponding analysis of consistency and applicability to the Project." Opp. Br. at 40:16-17. But the Project's location and design, and the fact that it will provide up to 90% less employment than the RTP/SCS forecasted for the site, will ensure that the majority of residents will continue to use automobiles for virtually all of their transportation needs. The touted list cannot make the Project consistent with the RTP/SCS. The EIR cannot merely make a show of analysis. It must, as Harmony has not, support that consideration with logic and evidence.

Respondents assert that Appendix G.2 to the EIR demonstrates the Project's consistency with the RTP/SCS. It contains a list of optional mitigation measures recommended by SCAG to reduce individual projects' environmental impacts. AR 4898-4965; Opp. Br. at 40:23-28. But incorporating certain measures into the Project to reduce its myriad significant environmental impacts cannot mask the reality that it is fundamentally inconsistent with the RTP/SCS goals. *See* AR 17216, 17223 (EIR's discussion of the Project's "consistency with the [RTP/SCS] *policies*" and conclusion that the "Project would be consistent with all applicable SCAG *policies*") (emphasis added).

In sum, the EIR does not contain substantial evidence for the conclusion that the Project would achieve the objective of the RTP/SCS to focus new growth and development within existing urbanized areas and high quality transit corridors where transit and infrastructure are already in place. AR 36122-23.

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C. The EIR Lacks Substantial Evidence that the Project Is Consistent with the Executive Orders' Post-2020 Emission Reduction Goals.

In addition to AB 32's emissions reduction target, Executive Order S-3-05 (2005) set a goal of reducing GHG emissions to 80% below 1990 levels by 2050. AR 16749. Executive Order B-30-15 (2015) set an additional, interim goal of reducing GHG emissions to 40% below 1990 levels by 2030. *Id.* In *Cleveland National Forest Foundation*, the Supreme Court held that the state's long-term GHG reduction goals set forth in Executive Orders S-3-05 and B-30-15 "express[] the pace and magnitude of reduction efforts that the scientific community believes necessary to stabilize the climate." 3 Cal.5th at 515. Respondents agree that *CNFF* holds that "an EIR should include a comparison of the project-relevant emissions and the goals of the Executive Orders." Opp. Br. at 43:8-9 (citing 3 Cal.5th at 516). Yet here, the EIR determined, without evidence, that the Project "will not impede the achievement" of these goals (AR 16801-02) because "[a]dditional GHG-reducing control measures are likely to be introduced and implemented over time" and "some of these measures are likely to reduce the Project's GHG emissions" (AR 16800). This is speculation more suited for science fiction, not substantial evidence that the Project is consistent with the Executive Orders.

Additionally, the determination that the Project is consistent with the Executive Orders hinges on the Project's purported consistency with the RTP/SCS. *See, e.g.,* AR 16801-02 (stating CARB "has recognized that compliance with Sustainable Communities Strategies is essential to meeting 2050 goals"); Opp. Br. at 44:14-16 (claiming consistency with the RTP/SCS supports consistency with the Executive Orders because "[t]he RTP/SCS evaluates the region's existing and future GHG emissions, including the specific growth contemplated by the Project, and determined that the region will achieve the GHG emissions reduction requirements during the 2016-2040 timeframe"). For the multiple reasons explained previously, the Project is inconsistent with the RTP/SCS. The analysis of the Executive Orders is thus flawed for those same reasons. CEQA requires substantial evidence for any conclusion in an EIR. *Woodward Park Homeowners Assn., Inc. v. City of Fresno* (2007) 150 Cal.App.4th 683, 705. Without evidence supporting Project consistency with the RTP/SCS, the record lacks evidence that the

Project's emissions reductions are consistent with and would not "impede the achievement" of the Executive Orders.

III. The City Approved Physically Raising Parts of the Project Site to Avoid the Project's Floodplain Impacts, Without Any Evidence of the Required Amount of Fill or Its Effects on Flooding Onsite or Downstream.

The City approved the Project explicitly on the ground that physically raising portions of the site out of the floodplain would mitigate flooding impacts. But the EIR omitted any information on the amount of fill required to achieve this, or an analysis of the on-site and downstream effects from placing this fill in the floodplain. Respondents attempt to cast Petitioners' claim as subject to the more deferential substantial evidence standard on the grounds that they "think the City should have reached a different decision based on the information on the record." Opp. Br. at 49:21-27. Yet, as the following discussion explains, Petitioners do not challenge the sufficiency of the City's evidence or analysis of the amount of fill to be placed in the floodplain and its effect on flooding. Instead they challenge the *omission* from the EIR's Project description of the amount of fill required to elevate the Project out of the floodplain, and the failure to conduct any analysis of the onsite or downstream impacts of that fill. This omission violates CEQA as matter of law. The EIR's significance determination and the City's approval of the Project are subject to de novo review and not the substantial evidence standard. *Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal.App.4th 48, 76-77, disapproved on other grounds; *Clover Valley Foundation v. City of Rocklin* (2011) 197 Cal.App.4th 200, 211.

Respondents concede this information was not in the record at all, but erroneously assert that the EIR did not *have* to analyze these impacts because the EIR "need not analyze an impact that will not occur." *Id.* at 52:12. This is based on the unsupported claim that no part of the Project is in the floodplain. The EIR and the City's own findings establish otherwise.

It is undisputed that 68 acres of the Project site, including proposed residential and commercial overlay uses, lie within the currently mapped 100-year flood zone at the southern edge of the site. AR 16877, 16860 (FEMA flood hazard map showing portion of project site within floodplain). In approving the Project, the City found that "[t]he proposed Project has the

potential to place housing within a 100-year flood hazard area as mapped on a federal Flood Hazard Boundary or Flood Insurance Rate Map" and "the potential to place within a 100-year flood hazard area structures which would impede or redirect flood flows." AR 437. However, the City found that by elevating the Project areas within the 100-year floodplain by roughly 20 feet, these areas would be "removed from the floodplain" (*id.*). The City concluded that "[e]levating proposed habitable structures removes these areas from the floodplain and once removed from the floodplain, these areas will not—by definition—impede or redirect the flood flows." AR 438.

To implement this plan, the City adopted a two-step mitigation measure (MM HYD 3), which first requires the Project get from FEMA a Conditional Letter of Map Revision ("CLOMR") confirming that the proposed grading plan would remove the subject area from the floodplain. AR 437-38. Once grading is complete, the Project must get a Letter of Map Revision confirming that the grading has in fact removed the subject areas from the floodplain. *Id.* A building permit may not issue without such a letter. *Id.* Put simply, the City found that part of the Project would be in the floodplain, but that it would be elevated out of the floodplain with fill, and then certified as having been removed from the floodplain.

Respondents now deny the whole thing. They claim, in direct contradiction of the EIR and the City's findings, that the FEMA flood hazard map published in the EIR (AR 16860) is incorrect, and *none* of the Project lies within the 100-year floodplain. Opp. Br. at 44-52, 50:24-25, 52:12. Respondents concede that the EIR does not quantify any amount of fill placed in the floodplain to mitigate the Project's impacts (*id.* at 52:12), but claim that the EIR did not have to quantify this fill, or analyze the impacts of placing this fill in the floodplain, because the EIR "need not analyze an impact that will not occur" (*id.*).

The problem with Respondents' litigation strategy is that it is irreconcilable with the EIR and the City's findings. Although Respondents claim that "[s]ubstantial evidence in the record demonstrates 'that the flood plain for Mill Creek does not extend to the areas the Project proposes for residential or commercial purposes'" (*id.* at 47:5-7), Respondents have never said where in the record this "substantial evidence" exists. The only place in the record where this

explanation for approving the Project appears is a City consultant's May 2016 letter. AR 35620-23 (consultant's letter, mis-dated May 2014). The letter states, "based on the data and our years of experience with these types of issues, we determined that the flood plain for Mill Creek does not extend to the areas the project proposes to develop for residential or commercial purposes." AR 35621. There is no factual basis for this opinion in the record, nor did the City even rely on it in approving the Project. It does not constitute substantial evidence that the City can purport to rely on now.

In fact, the report cited as supporting the consultant's statement actually shows the Project *is* partially in the floodplain. Respondents point to the 2013 Hydrology and Sedimentation Technical Study prepared for the Project (Final EIR Appendix I) as the source of the alleged "data" referred to by the consultant. Opp. Br. at 46:22-24. They assert that the study "evaluate[d] the potential for flooding as a result of storm flows in Mill Creek." AR 35620. Yet the 2013 study concludes, based on nearly 800 pages of data (AR 21643-22404), that "[t]he southern boundary of the Harmony project is located within the FEMA Zone A (100-year floodplain studied by approximate methods) designation along Mill Creek" (AR 21625). Thus, "[a]ny proposed residential or commercial uses that lie within the Zone A floodplain will be graded and elevated so that they are removed from the floodplain." AR 21638. Furthermore, prior to issuance of any grading permit or recordation of any tentative tract map containing lots which lie within Zone A, the study states that the developer "shall provide evidence . . . that a [CLOMR][7] has been received from FEMA acknowledging that the proposed improvements remove the subject area from the flood plain." AR 21640. The same language was published in the EIR and restated in the City's findings approving the Project. AR 16860, 16877, 437-38. It does not support Respondents' new, contrary position.

[7] A CLOMR is "FEMA's comment on a proposed project that would, upon construction, affect the hydrologic or hydraulic characteristics of a flooding source and thus result in the modification of the existing regulatory floodway, the effective Base Flood Elevations (BFEs), or the Special Flood Hazard Area (SFHA) . . . . Once a project has been completed, the community must request a revision to the Flood Insurance Rate Map (FIRM) to reflect the project." *See* https://www.fema.gov/conditional-letter-map-revision (last visited Feb. 27, 2018).

Respondents attempt to write off the language in the EIR and the City's findings as "conditional," claiming that references to "*any* proposed residential or commercial uses" in the 100-year floodplain does not mean that part of the Project *is* within the floodplain. Opp. Br. at 50:2-11 (emphasis added). This is sophistry. The EIR clearly refers to *actual* development, stating that "[t]he Project layout and the Conceptual Grading Plan will avoid placing structures within the 100 year flood zone by elevating the building pads outside of the 100 year flood plain (Figure 5.93 – FEMA Flood Hazard Map)." AR 16870 (referring to the current FEMA Zone A map at AR 16860).

Respondents also claim that the reference to "proposed improvements" in the mitigation measure requiring developer to get FEMA clearance "that the proposed improvements remove the subject area from the floodplain" (AR 596) does not refer to the physical act of filling the floodplain to raise the site elevation, but rather to an "engineering analysis" to correct the allegedly inaccurate FEMA flood hazard zone map. Opp. Br. at 47:18–48:10. When read in context, the City's findings speak for themselves: the "proposed improvements" are the "Project's grading plan [which] proposes to raise the elevation of these planning areas to between 2,280 feet and 2,480 feet." AR 438 (City's findings). Furthermore, that the measure requires a developer first to obtain from FEMA a letter stating that the proposed grading plan would remove the area from the floodplain, and then confirmation that the subject areas *have been* removed from the floodplain, confirms that the purpose of the mitigation measure is to physically elevate these areas. AR 437-38, 596.

The City now claims that there is no flood risk and thus no need to physically elevate part of the site; only a bureaucratic adjustment is needed. But the City cannot deny what its own findings said: that the site must be elevated to avoid flooding. Under CEQA, a lead agency is bound by the analysis and conclusions in the EIR and the reasoning underlying the agency's findings approving the Project; it cannot, after approval, point to an alternative rationale for its action that is not supported by substantial evidence in the record. *See Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 443 ("The audience to whom an EIR must communicate is not the reviewing court but the public and the

government officials deciding on the project. . . . The question is [] not whether the project's significant environmental effects *can* be clearly explained, but whether they *were*." (original emphasis)). The City's findings approving the Project must "form an analytic bridge between the evidence and the agency's decision," and "inform[] the parties and reviewing courts of the theory upon which an agency has arrived at its ultimate finding and decision." *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1989) 214 Cal.App.3d 1348, 1356-57 (citation omitted). The explicit language of the City's findings is entirely clear: the City relied on physically raising portions of the Project site in the 100-year floodplain by roughly 20 feet as mitigation for potential flooding impacts. AR 437-38.

In light of this required fill, the EIR's flaw is incontestable. Its project description does not describe the amount of fill required to elevate the Project out of the floodplain. Its analysis follows this error, failing to include any analysis of the onsite or downstream impacts of that fill. Petitioners have shown that the fill could cause potentially significant flooding on site and in downstream communities. AR 37751-57. The EIR ignored that risk and found that flooding impact would be less than significant. AR 437-38. Its omission violates CEQA as matter of law. Because the EIR completely omitted information relating to a potentially significant impact of the Project—one that exposes the future residents of this Project and of Redlands, Mentone, San Bernardino, and Colton to a real, FEMA-recognized flood risk—the EIR's significance determination and the City's approval of the Project are subject to de novo review. *Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal.App.4th 48, 76-77, disapproved on other grounds; *Clover Valley Foundation v. City of Rocklin* (2011) 197 Cal.App.4th 200, 211. They cannot survive that scrutiny.

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Conclusion

For the reasons above, Petitioners respectfully request that the Court issue a judgment granting their petition, and a writ of mandamus directing the City to set aside its Project approvals until it fully complies with CEQA.

DATED: March 16, 2018

SHUTE, MIHALY & WEINBERGER LLP

By: _____

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PROOF OF SERVICE

Greenspot Residents Association, et al. v. City of Highland, et al.
Case No. CIVDS 1615280
San Bernardino County Superior Court

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

On March 16, 2018, I served true copies of the following document(s) described as:

PETITIONERS' REPLY BRIEF

on the parties in this action as follows:

SEE ATTACHED SERVICE LIST

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

BY OVERNIGHT DELIVERY: I enclosed said document(s) in an envelope or package provided by the overnight service carrier and addressed to the persons at the addresses listed in the Service List. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight service carrier or delivered such document(s) to a courier or driver authorized by the overnight service carrier to receive documents.

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

Executed on March 16, 2018, at San Francisco, California.

Yesenia Franco

SERVICE LIST

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