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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF El DORADO

CITIZENS FOR SENSIBLE DEVELOPMENT IN EL DORADO HILLS, Petitioner v. COUNTY OF EL DORADO; EL DORADO COUNTY BOARD OF SUPERVISORS; and DOES 1 to 20, Respondents SPANOS CORPORATION; and DOES 21-40, Real Parties in Interest.	Case No. PC20150001 **PETITIONER'S OPENING BRIEF** Hon. Warren C. Stracener Dept.: 9 Date: October 8, 2015 Time: 8:30 am Trial Date: October 8, 2015 Date Filed: January 2, 2015

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I. INTRODUCTION

This action challenges the December 2, 2014 approval of a new project within a relatively large commercial development approved 20 years ago in an area where assumptions regarding traffic, roadway improvements, population growth, air quality and water supply were all very different than they are today.

The new project, which should have been the subject of a new EIR, allows the developer to exceed the General Plan density limits by a factor of two, exempts the developer form setback and height requirements, and relieves the developer of the obligation to sufficiently mitigate the tremendous impacts to aesthetics, air quality, traffic, water supply, land use, noise and public services, all to the detriment of the environment, taxpayers and residents around the El Dorado Hills community.

The 1988 EIR for the applicable specific plan contains information so outdated that it could not be reasonably cited to or discussed in the Mitigated Negative Declaration ("MND") for the new project, and the negative declaration for the more specific commercial project approval in 1995 is similarly deficient. County claimed to tier from these woefully inadequate documents, while at the same time denying that there was any intention to tier from previous analyses. The use of a "subsequent" mitigated negative declaration was highly improper and the presentation of overwhelming substantial evidence in support of a fair argument that there may be multiple significant impacts on the environment was more than enough to require the preparation of an EIR.

The new project at issue included the adoption by the County of El Dorado and El Dorado County Board of Supervisors ("County" or "Respondents") of a Mitigated Negative Declaration and approval of the El Dorado Hills Apartments, General Plan Amendment A14-0001/Specific Plan Revision SP86-0002-R/Rezone Z14-0001/Planned Development Revision PD94-0004-R-2/El Dorado Hills Apartments ("Project"). The Petition alleges that Respondents violated the requirements of the California Environmental Quality Act and the California General Planning Laws.

Petitioner brings this action to enforce the requirements of the California Environmental Quality Act ("CEQA") (Pub. Resources Code § 21000 et seq.), and the CEQA Guidelines[1], as well as the State Planning Laws (Gov't Code § 65300 et seq.).

II. FACTUAL BACKGROUND

A. The Project

The project site is located on the northwest corner of Town Center Boulevard and Vine Street within the Town Center East Commercial Center in El Dorado Hills, El Dorado County, California. (ROP 00183.)[2]

The project site is within the "Village T" area of a larger master planned community identified as El Dorado Hills Specific Plan ("Specific Plan"). The Specific Plan was approved in July 1988 by the El Dorado County Board of Supervisors, which also certified an environmental impact report. Village T comprises the El Dorado Hills Town Center East ("TCE") Commercial Development Plan area, a 925,000-square-foot commercial center. In August 1995, the Board approved development of the TCE project, which included an area of approximately 130 acres. (ROP 00183 and 1757.) The Board adopted a Negative Declaration in 1995 for the TCE project. (*Id*.)

Since approval of the TCE project, development of the Village T area has occurred in phases. All roads (both public and private), site accesses, and amenities (such as Town Center Lake, trails) within the TCE have been constructed, and the majority of the planned buildings have been built. The Project site is one of the remaining vacant properties in the TCE area. (ROP 00183.)

The Project site is 4.565 acres within the 130-acre Village T area, and was designated in the TCE approval for a hotel with no fewer than 100 rooms, a restaurant, a conference facility

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[1] The CEQA Guidelines (the "Guidelines") are found at California Code of Regulations, title 14, section 15000 et seq. Courts have found the Guidelines to be binding on public agencies. (See, e.g., *City of Santa Ana* v. *City of Garden Grove* (1979) 100 Cal.App.3d 521, 528-29.) The Guidelines must be interpreted "so as to afford the fullest possible protection to the environment within the reasonable scope of their language." (*San Franciscans for Reasonable Growth* v. *City and County of San Francisco* (1984) 151 Cal.App.3d 61, 74.)

[2] References to the record of proceedings are to "ROP" and the page number, including leading zeros.

and 3,000 square feet of retail space. (See ROP 00008, 00342 and 00376.)

The Project is a 250-unit luxury apartment complex with an on-site parking structure within the complex. The main orientation of the complex would be toward Town Center Boulevard and would front on Town Center Lake (west) and Vine Street (east), and would be open towards Mercedes Lane (north). (ROP 00183.)

The units would range from 576 square feet to 1,302 square feet in size with a varying mix of 62 percent studio/1- bedroom and 38 percent 2-bedroom. The site would be served by on-site amenities that include a bocce ball court, swimming pool, barbecue area, and fitness clubhouse. The exterior amenities and other commonly owned area comprise approximately 40 percent of the site. (ROP 00183.)

The proposed 250-unit apartment complex would be housed within a 60-foot-tall building up to a maximum of five stories. A 5-tier, 60-foot-tall parking structure would be constructed on-site to serve the complex. The parking structure, which would accommodate a total of 436 stalls, would be located in the middle of the complex. (ROP 00183.)

The Project will be the "highest- density residential project in the unincorporated area of the county to date." (ROP 04919.)

B. Administrative Process

Real Party in Interest's Application for entitlements for the El Dorado Hills Apartments sought approval of a 250-unit apartment project built around a parking structure on a 4.565-acre site located within the 130-acre Town Center East Planned Development ("TCE"). (ROP 00183.) The Project site was part of an area previously approved in 1995 for the development of a hotel with no less than 100 rooms, conference facility, full service restaurant and retail uses; the Hotel Project. (See ROP 00008, 00342 and 00376.)

The County's findings for the Project approval assert that "[a]ll the approvals for this project have been granted and only ministerial permits are required before commencement of construction. The Project will replace and supersede the prior original approved project." (ROP 00008.) In other portions of the record, the Real Party in Interest acknowledges that the

hotel project as approved in 1995 was unlikely to ever be constructed, stating it "just isn't going to happen", and further asserted that if a hotel project would be feasible, it would be much smaller than that approved in 1995. (ROP 00542, 02145-46, 02631 and 02487 [Commissioner questioning why the Hotel Project was considered viable for purposes of economic analysis].) The Mitigated Negative Declaration for the Project used full build out of the Hotel Project as the baseline condition for impact analysis. (See ROP 00378-79.) Issues related to the CEQA baseline are discussed in Section III(A)(5) below.

The entitlements required for the Project were a General Plan Amendment; an Amendment to the El Dorado Hills Specific Plan; a rezone of the project site from General Commercial-Planned Development (CG/PD) to Multi-Family Residential-Planned Development (RM-PD) and revisions to the RM-Zoned District Development standards applicable to the proposed 250 unit apartment complex; and approval of a revision to the approved Town Center East Development Plan approving, among other things, new The El Dorado Hills Town Center East Urban In-Fill Residential Area Residential Design Guidelines (the "Residential Design Guidelines"). (ROP 00008.)

The General Plan amendment portion of the Project approval involved increasing the maximum residential density allowed in the General Plan from 24 dwelling units/acre to a maximum of 55 dwelling units/acre for the 4.565-acre Project site. (ROP 00001.) The El Dorado Hills Specific Plan Amendment incorporated multifamily residential use, density, and related standards for the Project site, allowing that the site be designated as "Urban infill Residential" within the Village T area of the El Dorado Hills Specific Plan. (*Id*.) Project approval also included rezone of Project site from General Commercial-Planned Development (CG-PD) to Multifamily Residential-Planned Development (RM-PD) and revisions to the RM-zone district development standards applicable to the proposed 250-unit apartment complex. (*Id*.) Finally, the Project included revision to the approved Town Center East Development Plan incorporating multifamily residential use, density, and related design and development

standards for the proposed 250-unit apartment complex. (*Id*.) The El Dorado County General Plan includes an upper limit on density of 24 units per acre. (See ROP 00026.)

At a public hearing on December 10, 2013, the County Board of Supervisors ("Board") considered a "Pre-Application/Conceptual Review" for the Project, asserting that this review was intended to "assist in identifying potential project issues and solutions and to provide the applicant with early feedback prior to formal development application." (ROP 00008.)

The Real Party in Interest submitted applications in January 2014, and County staff requested comments from government agencies and the El Dorado Hills Area Planning Advisory Committee ("APAC"). (ROP 00183.) In April 2014, a revised design package was submitted to County staff. (*Id*.)

County Staff caused to be prepared a Subsequent Initial Study/Mitigated Negative Declaration entitled Subsequent Initial Study/Mitigated Negative Declaration, A14-001, Z14-002-R, PD94-0004R-2/El Dorado Hills Apartments, May 2014 ("MND"). The County's findings for the Project assert that the "MND was tiered off of prior environmental analysis performed by the County in the form of a program EIR prepared at the time of approval of the El Dorado Hills Specific Plan ("Specific Plan")." (ROP 00008.) The Specific Plan was approved in 1988. (ROP 14636.) In August 1995, the Board of Supervisors approved the Development of the Town Center East Project by adopting a negative declaration, making a finding that the negative declaration was tiered off of the Specific Plan EIR. (ROP 00008 and 1736.)

While the Board's findings indicate that the MND was "tiered" from previous environmental analyses (ROP 00008), in response to comments, the County stated unequivocally that "[t]he MND is *not a tiered document*, nor does the MND state that it is a tiered document." (ROP 00394, emphasis added.) The issue of tiering is addressed in Section III(A)(3) below.

On June 11, 2014, the County and the Applicant held a Public Meeting to present and discuss the Project. (ROP 00008.) The Project was then considered at public hearings before

the Planning Commission on June 26, 2014 and on September 11, 2014. (ROP 00009.) The Planning Commission recommended denial of the Project for the following reasons: Water supply uncertainty; traffic impacts; unacceptable increase in density; and not meeting General Plan goals. (ROP 02487 and 02488.)

The APAC voted unanimously to recommend denial each time it was considered, including on June 11, 2014. (ROP 02036-40 and 03434-38.) The APAC considered and rejected the Project proposal three separate times. (ROP 02036.) The APAC outlined in detail the flaws in the environmental review and the fatal inconsistency with the General Plan. (*Id*.)

The Project was thereafter considered by the Board at a public hearing on November 4, 2014 and the Board, by a vote of 4 to 1, "conceptually approved" the entitlements and the MND subject to the conditions of approval recommended by staff to the Planning Commission and further subject to appropriate CEQA and other findings being brought back to the Board at a subsequent meeting for adoption. (ROP 00009.)

The Project was approved and the MND adopted on December 2, 2014. (ROP 00001, 00178-00240.) The approval provided for a last minute inclusion of a condition requiring the Real Party in Interest to "comply with any applicable mitigation measures set out in the El Dorado Hills Specific Plan EIR, State Clearinghouse No. 86122912." (ROP 02552.) The Mitigation Monitoring and Reporting Program was not amended to include the "applicable" mitigation measures from the Specific Plan EIR.

III. ARGUMENT

CEQA is designed to "provide long-term protection to the environment," and should be interpreted "to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." (*Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 112.)

With respect to the County's decision not to prepare an EIR, the Court's role is to determine whether it can be fairly argued on the basis of any substantial evidence in the Record that the Project *may* have a significant effect on the environment. The Court's role is not,

however, to apply the typical "substantial evidence" test often applicable in reviewing an agency determination. (See discussion in section III(A)(2) below.)

The Negative Declaration fails to adequately address the Project's significant environmental impacts, and fails to incorporate appropriate mitigation measures. Also, the County attempted to tier the environmental analysis from an environmental impact report that is almost 30 years old, and a negative declaration that is 20 years old. Additionally, the County used the wrong baseline in conducting the impacts analysis in the MND. Finally, the Project is inconsistent with the General Plan and its approval is invalid as a result.

Accordingly, the County's adoption of the Negative Declaration and approval of the Project constitutes a prejudicial abuse of discretion and should be set aside.

A. The County's approval of the Project violated CEQA

1. CEQA's primary objective is informed decisionmaking

The California Legislature has declared "[t]he maintenance of a quality environment for the people of this state now and in the future is a matter of statewide concern." (Pub. Resources Code, § 21000.) "The foremost principle under CEQA is that the Legislature intended the act 'to be interpreted in such a manner to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.'" (*Friends of Mammoth* v. *Board of Supervisors of Mono County* (1972) 8 Cal.3d 247, 259.) This interpretation remains the benchmark for judicial interpretation of CEQA. (*Laurel Heights Improvement Ass'n*. v. *Regents of University of California* ("*Laurel Heights I")* (1988) 47 Cal.3d 376, 390, quoting *Bozung* v. *Local Agency Formation Commission* (1975) 13 Cal.3d 263, 274.)

One of the primary purposes of CEQA is to inform government decision-makers and the public about the potential significant environmental effects of proposed projects (Guidelines, § 15002(a)(1)) and to disclose to the public the reasons for approval of a project that may have significant environmental effects. (Guidelines, § 15002(a)(4); and see *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553; *Laurel Heights I, supra*, 47 Cal.3d 376.) With this primary purpose of CEQA in mind, the California Supreme Court has stated that "[t]he

environmental impact report ("EIR") is the primary means of achieving the Legislature's considered declaration that it is the policy of this State to take all action necessary to protect, rehabilitate, and enhance the environmental quality of the State" (*Sierra Club v. State Board of Forestry* (1994) 7 Cal.4th 1215, 1229.)

As the California Supreme Court has explained, the EIR is "the heart of CEQA" and an "environmental alarm bell whose purpose is to alert the public and its responsible officials to environmental changes before they have reached the ecological point of no return." (*Laurel Heights I*, *supra,* 47 Cal.3d at p. 392.) The EIR is the "primary means" of ensuring that public agencies "take all action necessary to protect, rehabilitate, and enhance the environmental quality of the state." (*Ibid*., quoting Pub. Resources Code, § 21001(a).) The EIR is also a "document of accountability," intended "to demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action." (*Ibid*; quoting *No Oil, Inc*., v. *City of Los Angeles* (1974) 13 Cal.3d 68, 86.) Thus, "[t]he EIR process protects not only the environment but also informed self-government." (*Ibid*.)

A negative declaration may be prepared instead of an EIR only where the lead agency determines that the project "would not have a significant effect on the environment." (Pub. Resources Code § 21080(c).) Such a determination can be made only if "[t]here is no substantial evidence in light of the whole record before the lead agency that such an impact may occur." (*Id*. and Guidelines § 15070(a).)

As set forth in Section III(A)(4) below, the subsequent MND for the Project is subject to the fair argument standard, and an EIR was required if there was any substantial evidence in the record that the Project may have a significant impact.

2. CEQA standards for requiring an EIR – the "Fair Argument" test

The standard in reviewing an agency's decision not to prepare an EIR for a project is subject to the "fair argument test" and is not reviewed under the substantial evidence test that governs review of agency determinations under Public Resources Code sections 21168 and

21168.5.[3] The "substantial evidence test" that generally applies to review of an agency's compliance with CEQA provides that if any substantial evidence in the record supports the agency's determination, then the determination will remain undisturbed by the court.

In stark contrast, an agency's decision to omit the preparation of an EIR is extremely vulnerable on judicial review and must be overturned if the reviewing court finds any substantial evidence in the record that would support a fair argument that the Project may have a significant effect on the environment. (*No Oil, Inc. v. city of Los Angeles* (1974) 13 Cal.3d 68, 75; *Friends of "B" Street v. City of Hayward* (1980) 106 Cal.App.3d 988, 1000-1003.)

A negative declaration "can be made only if there is no substantial evidence in light of the whole record before the lead agency that [a significant] impact *may* occur. [Citations.] An EIR is required, in contrast, whenever substantial evidence in the record supports a 'fair argument' that significant impacts may occur. Even if other substantial evidence supports the opposite conclusion, the agency must nevertheless prepare an EIR. [Citations.] The 'fair argument' standard creates a 'low threshold' for requiring preparation of an EIR. [Citations.] The fair argument standard is founded upon the principle that, because adopting a negative declaration has a terminal effect on the environmental review process, an EIR is necessary to resolve uncertainty created by conflicting assertions and to substitute some degree of factual certainty for tentative opinion and speculation." (See *San Bernardino Valley Audubon Society v. Metropolitan Water District* (1999) 71 Cal.App.4th 382, 389 [emphasis added].) Further, under the fair argument standard, "deference to the agency's determination is not appropriate and its decision not to require an EIR can be upheld only when there is no credible evidence to the contrary. (*Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1318.)

"Section 21151 creates a low threshold requirement for initial preparation of an EIR and reflects a preference for resolving doubts in favor of environmental review when the question is whether any such review is warranted. [Citations.] For example, if there is a disagreement

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[3] All statutory references are to the Public Resources Code unless otherwise indicated

among experts over the significance of an effect, the agency is to treat the effect as significant and prepare an EIR." (*Sierra Club, supra,* 6 Cal.App.4th at 1316-1317.)

The CEQA Guidelines offer guidance regarding the determination of whether an impact may have a significant impact on the environment. "In evaluating the significance of the environmental effect of a project, the Lead Agency shall consider direct physical changes in the environment which may be caused by the project and reasonably foreseeable indirect physical changes in the environment which may be caused by the project." (Guidelines § 15064(d).) If there is substantial evidence of a significant environmental effect regarding even one potential impact of the project, an EIR is required. (Pub. Resources Code § 21151(a).)

Section 21060.5 defines "environment." It states: "'Environment' means the physical conditions which exist within the area which will be affected by a proposed project, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance." (See *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1996) 42 Cal.App.4th 608, 616.) Thus, the agency is required to compare the newly authorized land use with the actually existing conditions; comparison of potential impacts with potential impacts under the existing general plan is insufficient. (*Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1415.) "Certainly a project's impacts may be significant if they are greater than those deemed acceptable in a general plan." (*Gentry v. City of Murrieta, supra,* 36 Cal.App.4th at p. 1416.) On the other hand, we do not agree "that a project's effects cannot be significant as long as they are not greater than those deemed acceptable in a general plan." (*Ibid.*)

Substantial evidence that a project may have a significant impact may be established through "fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact." (Pub. Resources Code § 21080(e)(1).)

Here, as set forth in detail below, the Record contains substantial evidence of several potentially significant adverse environmental impacts. Accordingly, an EIR is required. (Pub. Resources Code § 21151(a).) Furthermore, a lead agency may not avoid an EIR by attempting to "tier" from outdated CEQA documents, and purporting to prepare a "subsequent" environmental

document that omits essential areas of analysis. Finally, the Record reveals that the County impermissibly used full build of the Hotel Project with substantial evidence in the Record supporting a conclusion that the previously approved hotel project would never be constructed.

3. The County violated CEQA when it Attempted to "Tier" the MND from Previous Environmental Documents

As noted above, the County findings in approving the Project clearly state that the MND is "tiered" from the 1988 Specific Plan EIR and the 1995 Village T negative declaration. (ROP 00008 and 01736.) In a response to comments, the County states that the MND is *not* tiered (ROP 00394), but the response to comments was apparently an error, as the Project findings reveal that the staff and decisionmakers did believe that the document was tiered.

The Project findings state that the MND is tiered from a collection of documents referred to as the "TCE Environmental Evaluation", consisting of the following: (1) the 1988 El Dorado Hills Specific Plan EIR; and (2) the Town Center East Negative Declaration, dated May 19, 1995. (ROP 00009.) This attempt to tier from these documents fails for several reasons.

One may not tier from a negative declaration and there is no basis in the Public Resources Code or the Guidelines for doing so. The MND for the Project made vague reference to the negative declaration for the TCE project, without page references, but did not make references to the other purported tiering document, the Specific Plan EIR (which was 27 years old at the time the MND was prepared).

One of the requirements of tiering is to inform the public that the agency is using tiering. (Pub. Resources Code § 21094(e); Guidelines § 15152(g); and *Friends of the Santa Clarita River v. Castaic Lake Water Agency* (2002) 95 Cal.App.4th 1373, 1383-1384.) The County claimed both through the process, that it was tiering, and that it was not.

Another requirement for the use of tiering is for the project under review to be consistent with the program, plan, policy or ordinance for which an EIR has been certified. (Pub. Resources Code § 21094(b).) One of the most troublesome aspects of the Project is that it is completely inconsistent with the General Plan, the Specific Plan *and* the TCE development. The County's effort to tier the MND failed.

4. The use of a "Subsequent MND" was Improper

The Record reveals some confusion on the part of the County regarding what type of environmental review was conducted for the project. As set forth above, it was unclear to the public and the decisonmakers whether or not the MND was "tiered" from a previous document, and it appears that the County *did* intend to tier, although unsuccessfully.

The next layer of confusion surrounds whether the County intended to review the Project in a stand-alone environmental document, or if the intent was to treat the Project as a "modification" of the Hotel Project, a "revision of an existing project." (ROP 01944.) During the Board meeting on November 4, 2014, Supervisor Veerkamp raised the concern that the County had lost the argument over not preparing an EIR many times, and wondered if the MND was "bulletproof." (ROP 02098.) A member of staff reassured him, that "[t]his was analyzed essentially as a modification of an already approved project. Because of that, the – negative declaration looked at essentially the difference between what's already approved and what's proposed." Staff went on to assure the Supervisor that the fair argument standard would not apply, and so the courts would be deferential to the County's decision. (ROP 2098-99.) The staff member was incorrect about the standard of review.

Once an EIR or negative declaration has been prepared, the fair argument standard no longer applies *unless* substantial evidence exists in light of the record as a whole that: (1) subsequent changes are proposed which will require important revisions of the previous EIR or negative declaration due to the involvement of new significant environmental impacts not considered in the previous EIR or negative declaration; (2) substantial changes occur with respect to the circumstances under which the project is undertaken which will require important revisions of the previous EIR or negative declaration due to the involvement of new significant environmental impacts not covered in the previous EIR or negative declaration; or (3) new information of substantial importance to the project becomes available. (Pub. Resources Code § 21166; and Guidelines § 15162 (a).) The County itself determined that a "subsequent" and not a

"supplemental" negative declaration was required because all three of the factors listed above apply. (ROP 00186.)

One commenter explained to the County that the Project was clearly a new project and not the revision of a previous project, citing *Save Our Neighborhood v. Lishman* (2006) 140 Cal.App.4th 1288, 1296-1301, and urging the County to comply with CEQA and prepare an independent project review. (ROP 02611.) The County did not respond to this request.

Public Resources Code section 21166 addresses the situations in which additional environmental review may be necessary following certification of an EIR. It identifies three events, any one of which triggers the requirement for a ''subsequent or supplemental'' EIR, as set forth above.

The CEQA Guidelines divide ''subsequent or supplemental'' environmental review into three categories. Guidelines section 15162 governs the preparation of a subsequent EIR. It tracks the language of Public Resources Code § 21166 and provides additional detail on what qualifies as ''substantial.'' Guidelines section 15163 allows for preparation of a ''supplement to an EIR'' rather than a subsequent EIR when a subsequent EIR would otherwise be required but ''only minor additions or changes'' are necessary to make the original EIR adequate in light of the event causing the change. Guidelines section 15164 allows an ''addendum to an EIR'' when only ''minor technical changes or additions'' to a previously certified EIR are needed and none of the events that would require a subsequent EIR have occurred. CEQA review is reopened when there is a need for ''a subsequent version of an EIR that revises the earlier EIR to make it adequate for a project's approval after conditions have changed.'' (*Mani Brothers Real Estate Group v. City of Los Angeles* (2007) 153 Cal.App.4th 1385, 1397.)

The language and structure of the Guidelines imply a hierarchy, in which a subsequent EIR would involve an essentially ''stand-alone'' document while a supplement to an EIR would largely incorporate previous analysis with relatively small changes. An addendum to an EIR would be appropriate for minor changes unaccompanied by a significant event within the meaning of Section 21166.

The subsequent negative declaration process was for a new project, and is a "stand alone" document that is subject to the fair argument standard.

5. The MND's conclusions proceed from an improper baseline

A foundational part of the County's analytical approach through the MND process set up a false comparison between the "approved" Hotel Project and the subsequent new project proposal in establishing an environmental baseline for the Project. The California Supreme Court has indicated that to provide proper impact analysis under CEQA, the environmental documents "must delineate environmental conditions prevailing absent the project, defining a 'baseline' against which predicted effects can be described and quantified." (*Neighbors for Smart Rail v. Exposition Metro Line Constr. Auth.* (2013) 57 Cal.4th 439, 447. Under Guideline section 15126.6(e)(e)(A), when a project consists of the revision of a plan or policy, the project's impacts are assessed against the existing condition, and future conditions under the existing plan are treated as a "no-project" alternative. (*Woodward Park Homeowners Ass'n v. City of Fresno* (2007) 150 Cal.App.4th 683, 707.) While agencies have some discretion with respect to projects that have already undergone environmental review, in the present case, there is no substantial evidence in the Record to support a decision to pretend that the Hotel Project is the baseline against which the Project's impacts should be measured.

The Hotel Project is "a fantasy" according to Commissioner Heflin (ROP 02487), and the developer repeatedly told the public and decisionmakers that the Hotel Project was never going to be constructed. (ROP 00542, 02145-46, 02631.) Further, the 1995 negative declaration was prepared for the entire 130-acre Village T of the El Dorado Hills Specific Plan, and the Project is on an isolated 4.565-acre portion of that previous commercial project. (ROP 00183.) The Town Center East project was for commercial and office uses, with no residential uses considered or included, and the Project is entirely residential. (ROP 02617.)

The environmental setting has also changed significantly since 1995. In 2004, the County adopted a General Plan indicating that 14 road segments would be allowed to operate at a Level of Service F. (ROP 02612.) In 2006, the County was unable to fully fund the road

improvements required for 20 years of growth under the 2006 General Plan. (ROP 02612.) The traffic impact fee program was underfunded by $130 million. (*Id*.) The anticipated result is that, despite spending over $840 million on road improvements over twenty years, people in peak period traffic on 94 of the 184 road segments in the County will experience, "severe restrictions in speed and freedom to maneuver," "poor levels of comfort and convenience," "frustration," and "queued traffic traveling in a stop-and- go fashion." (See ROP 02612, referring to 2004 General Plan, p. 56, description of LOS D, E, and F; 2006 TIM Fee Program Environmental Review.) The El Dorado County Regional Transportation Plan 2010 - 2030 estimates that the funding shortfall for roads needed through 2030 is now at $339 million. (See ROP 02612, referring to RTP, Chapter 13, Table 13-5, p. 15.) It is this future of congested roadways and unfunded roadway improvements that the Town Center Apartments would be constructed in, not the same environment considered in 1995 when the Town Center East negative declaration was adopted.

Despite substantial evidence in the Record indicating that the Hotel Project would never be constructed and all of the assumptions underlying the "approvals" of the Town Center East Development no longer being valid, the MND for the Project used full build out of the Hotel Project and its associated commercial uses as the baseline against which the Project's impacts would be measured. (See ROP 00378-79.) It bears noting here that the economic analyses revealed that the "approved land uses" would provide actual, long-term economic benefit to the County while the Project will not. (ROP 04859.) At the point this was understood, the developer and the County both readily admitted that the "approved land uses" are not feasible and would never be realized, arguing that the "loss" of revenues was not really a loss. When it came time, however, to analyze Project impacts, the County and the developer were more than happy to argue that one must simply assume full build out of the Hotel Project. Respondents may not have it both ways.

The wrong baseline was used, but it is unclear whether the same baseline was used with respect to individual areas of impact. For air quality impacts, the consultant compared the Project to "approved" uses (by looking to marketing materials for the Project site), including

"seven buildings ranging in size from 2,750 square feet to 24,700 square feet…the total square footage is 74,350 square feet." (ROP 00754.) It is hard to say if this represents the Hotel Project or not.

With respect to traffic impacts, the County staff simply compared the Project to full build out of the three Project site parcels, although admittedly, such full build out is infeasible. (ROP 00342-43, 00542, 02145-46, 02487 and 02631.) This is contrary to the rule of law in California.

Under well-established authority, the proper comparison is between existing conditions on the land and what the project currently proposes. (See *Environmental Planning & Info. Council v. County of El Dorado* (1982) 131 Cal.App.3d 350 [when considering a new general plan that would allow less growth than the existing plan, the EIR must address existing level of actual physical development as baseline for impact analysis, not the existing plan.]) County Commissioner Heflin recognized this when he wondered aloud why the Hotel Project was used as a comparison in reviewing the economic impacts. (ROP 02487.) Nevertheless, County Staff's analysis continued to focus on the Hotel Project, instead of existing conditions, relying on a chart comparing the various proposals. (ROP 00379.)

Any conclusions based upon a comparison with the outdated and infeasible Hotel Project instead of the present conditions are inadequate. Environmental review should "compare what will happen if the project is built with what will happen if the site is left alone." (*Woodward Park* at 708-797.) The false comparisons of the Project to the infeasible Hotel Project in this matter similarly invalidates approval of the Project.

6. The County Failed to Comply with CEQA When it Refused to Acknowledge Substantial Evidence of Significant Adverse Aesthetic Impacts

The MND includes discussion of aesthetic impacts, acknowledging that the Project will be 5 stories high, while the other buildings in the area are between one and three stories. (ROP 00189.) The MND notes that the Project would become the "visually dominant feature in the immediate area" and would be partially visible from US Highway 50, Latrobe Road and El Dorado Hills Boulevard. (ROP 00190.) Despite these facts, the MND concluded, over

considerable public outcry (ROP 00389), that the Project would have a less than significant aesthetic impact. (ROP 00191.)

In an errata to the MND, the County revised the discussion of aesthetics, confusing the original discussion by asserting that the Project will be 53.97 feet tall at its highest point. (ROP 00240.) There is nothing in the Project conditions that would preclude the Project from being constructed to the full 60-foot height as provided in the Project approvals. (ROP 00189, 00603-04, 00607-09.) There is no substantial evidence to support the conclusion in the MND, and no reasonable person could make such conclusions because they are not based upon facts, but upon hopeful reassurance from the developer.

In response to much public comment raising concerns about the size and visual incompatibility with surrounding uses, the Project proponent presented drawings and simulations to assist the public and decision makers in their analysis of the Project's aesthetic impacts. (ROP 00246-61, 00389.) The drawings were misleading and resulted in a failure to disclose the full extent of the impact because the drawings depicted a four-story apartment complex while the Project approval allows for a five-story building. (ROP 00389, 00540, 00613-17.) This would be the largest apartment complex ever approved in the County, and the failure to fully analyze and disclose the visual mass of the Project violated CEQA.

Additionally, the APAC raised concerns about the aesthetic impacts massing, light and glare, as well as of residential balconies facing Town Center Boulevard. (ROP 01278 and 02036.) The APAC's concerns are based upon substantial evidence in the Record, and yet they were ignored.

Many members of the public, as well as the APAC, raised significant concerns regarding the aesthetic impacts of the Project, including light and glare, mass, lack of setbacks creating a "tunnel" effect, as well as a failure of the Project to fit in with existing structures. (ROP 00389, 01278 and 02036.) Despite the language in the MND making claims to the contrary, a fair argument can be made that the Project exceeds be a significant margin the existing patterns of development in the surrounding area. Not only will it be the largest structure anywhere near, but

the density of the Project exceeds anything approved in the County previously be a factor of 2. With spires and other features, the approval allows for a *total height of 75 feet*. (ROP 02563.)

One commenter noted that the County should be clear with the public regarding statements that the building design is in accordance with development standards, since those standards have been modified to accommodate the specific desires of the developer for the Project. (ROP 03119.) The Project is so monstrous, and so anomalous, that special design guidelines had to be adopted. In light of the observations by laypersons as well as APAC members and Planning Commissioners (ROP 00383-0454, specifically 00389, 00428, 00445), a fair argument can be made that the Project will have a significant aesthetic impact.

7. The County Failed to Comply with CEQA When it Refused to Acknowledge Substantial Evidence of Significant Adverse Impacts to Air Quality

The Mountain Counties Air Basin is designated by the California Air Resources Board as "ozone impacted." El Dorado County is currently in federal and state severe non-attainment for ozone levels and state non-attainment for PM_{10}. The Project is also within the boundaries of the El Dorado County portion of the area designated by the U.S. Environmental Protection Agency as the Sacramento Federal Ozone Non-Attainment Area. The Project is subject to the standards established in the Sacramento Ozone Air Quality Attainment Plan ("AQAP") and measures implemented by the AQMD. (ROP 00738-64.)

This area of impact is the first to reveal the trouble with the use of the wrong environmental baseline. The MND concludes that the "very dense infill development will significantly alleviate parking, traffic, air quality and other impacts and will significantly reduce the impacts that would have been encountered had the Town Center area developed as planned." (ROP 00186.) This statement is made in the face of the fact that the Project will create 250 residential units in the Town Center where there are currently *no residential uses*. The MND concludes, with a relatively short discussion, that the Project's air quality impacts would be less than significant, despite the fact that the Project, by the terms of the standard of significance set forth in the MND, is *not* consistent with the Sacramento Regional Ozone Air Quality Attainment Plan. (ROP 00192 and 00197.)

The Project *does* require the change in the existing land use designation (e.g., a general plan amendment or rezone), and projected emission of ROG and NOx from the proposed project are *not* equal to or less than emissions anticipated from the site if developed under the existing land use designation. (*Id*; and see comments at ROP 00395-96 and 03436.) As set forth in detail above, the Hotel Project was not viable or likely under anyone's estimation. The use of the wrong baseline, assuming full build out of the Hotel Project (ROP 00379) results in a flawed finding of no significant impact. The APAC pointed this out to the County, but the County clung to the unfounded and improper baseline. (ROP 00395.)

Substantial evidence in the record supports a fair argument that the Project's air quality impacts are potentially significant.

8. The County Failed to Comply with CEQA When it Refused to Acknowledge Substantial Evidence of Significant Adverse Noise Impacts

The MND concluded that the Project is not in the vicinity of an airport, and so there would be no impact related to airport noise. (ROP 00212.) Elsewhere, in response to comments, County staff acknowledged that the Project is in the flight-path of Mather Airport, and that airport noise is measured as a single event. Sacramento County's recent analysis shows that the percent chance of being awakened at night by aircraft in the Project area will be 6.5 percent by 2035. (ROP 00398.) General Plan Policy 6.5.1.8 provides that new development of noise sensitive land uses will not be permitted in areas exposed to existing or project levels of noise from transportation sources that exceed specific levels. (ROP 01286.) The MND failed to address any of this, and the Project findings make no mention of it, failing to address substantial evidence that there will be significant noise impacts to Project residents.

9. The County Failed to Comply with CEQA When it Refused to Acknowledge Substantial Evidence of Significant Adverse Impacts to Public Services

The MND concluded that there would be no impact to law enforcement services. (ROP 00214.) The Sheriff's office submitted a report regarding the direct impacts of the project, and the need for 2 additional deputies, at a cost of $413,966 per year. (ROP 00345-71.) The stated threshold of significance in the MND for law enforcement is whether the project would

"[s]ubstantially increase or expand the demand for public law enforcement protection without increasing staffing and equipment to maintain the Sheriff's Department goal of one sworn officer per 1,000 residents." (ROP 00214.) Despite the evidence in the Record, the County continued to stick with the finding of no significant impact, while at the same time acknowledging the impact and considering various methods of funding, such as Mello Roos. (ROP 02133, 03890, 04318 and 04320.)

Meanwhile the developer claimed that there was no "nexus" between the project and the impacts to law enforcement service levels (ROP 01996, 02631 and 03070.) Developer's counsel also argued that the impacts to law enforcement resulted only in the need for two deputies and a vehicle, not construction of a new station or similar work. (ROP 03070.) At the Board hearing on December 2, 2014, County Counsel told the Board that the issue may be better addressed through the annual budget hearings, and one of the Supervisors dismissed the Sheriff's Report and concerns, stating "the Sheriff always wants more deputies." (ROP 01946.)

The County ultimately adopted the developer's position that there was no "nexus" between the Project and the increased need for law enforcement staffing and equipment. (ROP 00013.)

Respondents have argued that there is no legal requirement that a developer mitigate for impacts to public services, yet there is currently no case law to support this position. Existing law on the subject supports a finding by this Court that the County was indeed responsible to, at the very least, *evaluate and disclose* the potentially significant impact in an EIR rather than pretending that it did not exist, and the developer is obligated to mitigate for the potential health and safety impacts by adopting measures designed to lessen or avoid the impact.

Delayed response times of emergency services may be a factor in determining whether increased population concentration will result in significant impacts. The focus of such analysis is on the physical changes that may result from economic and social changes. Guidelines section 15064(e) addresses this issue; e.g., population increases, as well as other "economic and social effects of a physical change may be used to determine that the physical change is a significant

effect on the environment" (*See also* Guidelines section 15131; and *Christward Ministry v. Superior Court* (1986) 184 Cal.App.4th 99, 180.)

The County may not ignore the obviously significant impacts to public services in order to avoid preparing an EIR. The question of who must pay for measures to increase staffing and equipment is a secondary issue in the context of an Initial Study and MND. The Record reveals a significant impact, and an EIR must be prepared to analyze that impact, and if indeed the developer is not responsible for funding mitigation, then at the very least the County will be in a position to disclose the impact (which it is doggedly avoiding here), and may prepare a statement of overriding considerations. The MND is fatally flawed because it ignores substantial evidence in the Record. The effects of decreased response capacity, including both physical effects and social/economic effects that lead to physical effects, require environmental review.

10. The County Failed to Comply with CEQA When it Refused to Acknowledge Substantial Evidence of Significant Adverse Impacts to Traffic

As set forth in detail above, the entire traffic analysis is flawed because rather than measuring the true impacts of the Project on the existing environment, the MND compared the traffic impacts of the Project with the traffic impacts of "approved land uses," including all of the development that the County and the developer acknowledged would "never" be built. The baseline for traffic impact should be existing conditions, and had the baseline been proper, the analysis of traffic impacts would have concluded that the Project would have tremendous impacts on the community and the Highway system.

Even with the improper baseline, the MND acknowledges that the Project will have significant impacts, and then relies upon inadequate mitigation measures to conclude that the impacts will be mitigated to a level of insignificance. (ROP 00218.) For example, impacts to Highway 50 (operating in relevant segments at Level of Service F) are proposed to be mitigated through payment of fair share fees, while the improvements have not yet even been identified. (ROP 00402.) The County argues that Caltrans finds the mitigation acceptable, but there is no evidence in the Record showing that payment of the fees will result in mitigation such that the

segment will operate at a level of service consistent with the General Plan. Similarly, the mitigation measure for impacts to the intersection of Latrobe Road and Town Center Boulevard requires payment of fees for an improvement project that has not yet been designed. (ROP 00220.)

It is clear that the LOS for several intersections and roadway segments are inconsistent with the General Plan level of service policies. (ROP 03370-71, 03398-03399, 03418, 03437-38.) The mitigation measures involve payment of traffic impact fees. (*Id*.) Substantial evidence in the Record reveals that the necessary improvements may occur many years in the future, and may not occur at all. (See ROP 03398.) Further, there is no discussion, much less substantial evidence in the Record, to support a conclusion that the proposed improvements will mitigate the level of service impacts such that they are consistent with the General Plan policies, thereby becoming less than significant.

Substantial evidence in the record supports a fair argument that the Project's traffic impacts are potentially significant.

11. The County Failed to Comply with CEQA When it Refused to Acknowledge Substantial Evidence of Significant Adverse Impacts to Land Use

Inconsistency with the General Plan and the Specific Plan and incompatibility with the Town Center area are addressed in several other areas of this brief. With respect to the MND finding regarding land use impacts, the MND simply ignores the absolute inconsistency with the governing land use plans, and describes the *amendments* to those plans that are being adopted to relieve the developer from having to conform to the existing land use vision of the County.

This is not an analysis of impacts but an explanation of how the Project is being given a pass. Substantial evidence in the record supports a fair argument that the Project's impacts to these land uses are potentially significant.

12. The County Failed to Comply with CEQA When it Refused to Acknowledge Substantial Evidence of Significant Adverse Impacts to Water Resources

Evidence submitted to the County during Project review shows that the Project may have significant impacts to water supplies and the MND and CEQA findings rely upon an

inappropriate assumption that El Dorado Irrigation District will *acquire* new water supplies in the future. (ROP 00388 [projected supply through the year 2035 based on securing new supplies.])

The County's findings for the Project did not even address this assumption that the acquisition of new supplies was the basis for the conclusions in the MND, and substantial evidence was submitted indicating that El Dorado Irrigation District (the water supplier) was considering giving up on attempts to "secure" new supplies. (ROP 02623-27.)

As discussed above, APAC and the Planning Commission stated that further water supply analysis was necessary. In light of the Record, water supply impacts should have been evaluated in an EIR.

B. The Project is Inconsistent With the County's General Plan

The Project approval required amendment to the General Plan and the Specific Plan, and also a zoning change. Importantly, these were not minor amendments, but allowed the developer to exceed the density limit of the general plan, which is 24 units per acre, to 55 units per acre. Amendment to the Specific Plan allowed the developer to build an entirely residential use when the Specific Plan previously did not allow for *any residential* uses. (See ROP 00026.) The setback, height and design requirements that applied to all other projects within the Specific Plan were similarly tossed aside for the developer so that the Project could accommodate the extraordinary density. (*Id*. and see ROP 00603-04 and 00607-09.)

The Residential Design Guidelines adopted for the Project essentially exempt the Project from every formerly applicable setback and height restriction, and carve out a place in the General and Specific Plans, as well as within the community, for a Project that simply has no place there. (ROP 00641-46.)

The County received an avalanche of comments from the public, pleading with the decisionmakers to uphold the vision of the community as expressed in the General Plan. (ROP 00396, 00405, 00409, 00416, 00418, 00422, 00423, 00426, 00430, 00431, 00433, 00443, 00447,

02608-15.) The Planning Commission and the APAC found the Project to be inconsistent with the General Plan. (ROP 02036-40, 02487, 02488 and 03434-38.)

In light of all of the substantial evidence in the Record, the County simply dismissed this issue, and not only failed to evaluate the environmental impacts of amended the General Plan (as set forth above regarding Land Use section of MND), but violated the consistency requirements of the Government Code.

1. The County's Determination of General Plan Consistency Is Subject to Review Under The Abuse of Discretion Standard

Every city and county must adopt a "comprehensive, long-term general plan for the physical development of the city or county . . ." (Gov't Code, § 65300.) The California Supreme Court has described the general plan as the "constitution for all future developments." (*Families Unafraid to Uphold Rural El Dorado County* v. *Board of Supervisors of El Dorado County* (1998) 62 Cal.App.4th 1332, 1336, ("*Families Unafraid*") citing *Citizens of Goleta Valley* v. *Board of Supervisors* (1990) 52 Cal.3d 553, 570.) The propriety of an agency's decision affecting land use and development depends on the project's consistency with the objectives, policies and land uses specified in the general plan. (Gov't Code, § 65860; *Corona-Norco Unified School Dist*. v. *City of Corona* (1993) 17 Cal.App.4th 985, 994.)

The requirement that local land use decisions adhere to the governing general plan is known as the "consistency doctrine." (*Corona-Norco Unified School Dist*. v. *City of Corona* (1993) 17 Cal.App.4th 985, 994.) This doctrine is "the linchpin of California's land use and development laws; it is the principle which infused the concept of planned growth with the force of law." (*Ibid*., citing *deBottari* v. *City Council* (1985) 171 Cal.App.3d 1204, 1213.) A project is consistent with the general plan if "it will further the objectives and policies of the general plan and not obstruct their attainment." (*Families Unafraid, supra,* 62 Cal.App.4th at p. 1336.)

The County's determination that the Project is consistent with the General Plan is reviewed under an abuse of discretion standard. (*Families Unafraid to Uphold Rural El Dorado County* v. *Board of Supervisors of El Dorado County* (1998) 62 Cal.App.4th 1332, 1338.) The approval may be overturned if the County did not proceed in a manner required by law, its decision is not

supported by findings, or the findings are not supported by substantial evidence. (*Sequoyah Hills Homeowners Ass'n*. v. *City of Oakland* (1993) 23 Cal.App.4th 704, 717.) The County's action will be reversed if, based upon the evidence before the County, no reasonable person could have reached the same conclusion. (*No Oil, Inc*. v. *City of Los Angeles* (1987) 196 Cal.App.3d 223, 243.)

2. The County Abused its Discretion in Approving the Project

As set forth in detail above, the Project deviates so far from the General Plan and the Specific Plan that it is unrecognizable, and the County's position is that it has created a monumental exception for the Project. New design guidelines that bear no resemblance whatsoever to those applied to all of the other projects in Town Center have been adopted. The density, height and setback requirements have not just been modified, they have been utterly ignored in the place of new, onerous standards that allow the Project inflict environmental impacts on the County and its residence to a degree not yet seen in the El Dorado Hills area.

The Project is inconsistent with following General Plan policies: (1) traffic levels of service (ROP 03370-71, 03398-03399, 03418, 03437-38.); (2) density limits less than half of that of the approved Project (ROP 00026); (3) standards for law enforcement levels (ROP 00214); and (4) limits on noise impacts from airports (ROP 01286). The Project is also inconsistent with height and setback requirements of the Specific Plan, not to mention the fact that the Specific Plan does not include any residential uses. (ROP 00379.)

The special allowances for the Project render it completely inconsistent with the General Plan and the Specific Plan and its approval was an abuse of discretion.

IV. CONCLUSION

In California, including El Dorado Hills and its surrounding community, much has changed since 1995. Citizens of the County are now living with severe drought, insufficient funding for traffic improvements, severe air quality problems, a dwindling water supply and overburdened public services.

PROOF OF SERVICE

I am employed in the County of Yolo; my business address is 131 South Auburn Street, Grass Valley, California; I am over the age of 18 years and not a party to the foregoing action. On June 19, 2015, I served a true and correct copy of

PETITIONER'S OPENING BRIEF

____ (by overnight delivery service) via Federal Express to the person at the address set forth below:

__X__ (by mail) on all parties in said action listed below, in accordance with Code of Civil Procedure §1013a(3), by placing a true copy thereof enclosed in a sealed envelope in a United States mailbox in Davis, California.

David A. Livingston El Dorado County 330 Fair Lane Placerville, CA 95667	***Representing Respondents County of El Dorado and El Dorado County Board of Supervisors***
Arthur F. Coon Sean R. Marciniak Miller Star Regalia 1331 N. California Boulevard, Fifth Flr Walnut Creek, CA 94596	***Representing Respondents County of El Dorado and El Dorado County Board of Supervisors and Real Party in Interest***
John Briscoe Peter S. Prows Briscoe Ivester & Bazel 155 Sansome Street, 7th Floor San Francisco, CA 94104	***Representing Respondents County of El Dorado and El Dorado County Board of Supervisors and Real Party in Interest***

I declare under penalty of perjury that the foregoing is true and correct. Executed on June 19, 2015, at Grass Valley, California.

Marsha A. Burch

PROOF OF SERVICE

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EXCERPTS FROM RECORD OF PROCEEDINGS IN SUPPORT OF PETITIONER'S OPENING BRIEF

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