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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

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| VINEYARD AREA CITIZENS FOR RESPONSIBLE GROWTH, INC., et al.,<br><br>Plaintiffs and Appellants,<br><br>v.<br><br>CITY OF RANCHO CORDOVA,<br><br>Defendant and Respondent;<br><br>SUNRISE DOUGLAS PROPERTY OWNERS ASSN. et al.,<br><br>Real Parties In Interest and Respondents. | C044653<br>(Sup.Ct.No. 02CS01214) |

This land-use case raises claims under the California Environmental Quality Act ("CEQA"; Pub. Resources Code, § 21000 et seq.), the Planning and Zoning Law (Gov. Code, § 65000 et seq.) and the public trust doctrine.

Vineyard Area Citizens for Responsible Growth, Inc. and others (collectively, petitioners) challenged the approval by

Sacramento County (County) of a project proposed by AKT Development Corp. and others (collectively, Developer). The newly formed City of Rancho Cordova (City) succeeded to the County's interest in this case and appears as the sole governmental respondent.

The trial court denied the petition to overturn the County's approval of the Sunrise Douglas Community Plan and SunRidge Specific Plan (collectively, Project) and Petitioners filed a timely notice of appeal.

We agree with the Developer that the CEQA arguments lack merit and we agree with the City that the zoning and public trust claims lack merit. We shall affirm.

## BACKGROUND

Judge Cadei summarized the gist of the case thus:

> This is a proceeding under Code of Civil Procedure sections 1085 and 1094.5 in which petitioners challenge the actions of the [County] approving a long-range community plan and a nearer-term specific plan (collectively, "the project") to govern development of the so-called Sunrise Douglas and SunRidge areas in eastern Sacramento County. The 6,015-acre area covered by the project now consists primarily of rural open space, and contains some environmentally sensitive features such as wetlands, seasonal creeks and vernal pools. [Developer] ultimately propose[s] to urbanize the area by developing it with a mix of residential and commercial uses, including up to 22,500 dwelling units. Urbanization on such a scale inevitably brings with it environmental and social impacts, which can generate significant opposition. This project has not avoided creating some controversy. Notably during the course of environmental review of the project, it became necessary to completely restructure the original water supply plan for the project as the result of groundwater

> contamination originating from the Aerojet site, which lies north of the plan area. The undeniable environmental impacts of the project, along with the still-vexing water supply issues, are at the heart of this proceeding."

A Draft Environmental Impact Report (DEIR) was released in March 1999, and in May 2001 a different water supply plan was included in a revised recirculated DEIR (RRDEIR). The Final EIR (FEIR) was published in November 2001 and after several hearings the County certified it on June 19, 2002.

On July 17, 2002, the County passed resolutions (Nos. 2002-0900, 2002-0901 and 2002-0902) and ordinances (Nos. SZC 2002-0014 and SZC 2002-0015) that amended the general plan and zoning to approve the Project. In connection therewith the County issued a statement of findings which, exclusive of supporting documentation, exceeded 150 pages of detailed analysis.

On August 19, 2002, Petitioners filed a petition for writ of mandate. A judgment denying their petition was entered on June 30, 2003, and Petitioners filed this appeal on July 30, 2003.

## STANDARD AND SCOPE OF REVIEW

In CEQA cases a court decides whether "the agency has not proceeded in a manner required by law" and "the act or decision is supported by substantial evidence in the light of the whole record." (Pub. Resources Code, §§ 21168, 21168.5; see *Neighbors of Cavitt Ranch v. County of Placer* (2003) 106 Cal.App.4th 1092,

1099-1100.) "The agency is the finder of fact and we must indulge all reasonable inferences from the evidence that would support the agency's determinations and resolve all conflicts in the evidence in favor of the agency's decision." (*Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 117.) Accordingly, the burden is on the challenger. (*Barthelemy v. Chino Basin Mun. Water Dist.* (1995) 38 Cal.App.4th 1609, 1617 (*Barthelemy*).)

Except as otherwise provided (e.g., Pub. Resources Code, §§ 21167.1, subd. (a) [calendar preference], 21167.6, subd. (h) [restricting briefing extensions]) CEQA appeals are subject to normal appellate rules. (See 2 Practice under CEQA (Cont.Ed.Bar 2003) Judicial Review, §§ 23.136, 23.140; 1 Cal. Environmental & Land Use Practice (Lexis/Nexis 2003) Judicial Review, §§ 12.70, 12.89. E.g., *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 962, fn. 15 (*County of Amador*); *Barthelemy*, *supra*, 38 Cal.App.4th at p. 1613, fn. 2.)

In non-CEQA cases we have held that an appellant's duty to comply with procedural requirements increases with the size and complexity of the record. (*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 76; *Akins v. State of California* (1998) 61 Cal.App.4th 1, 17, fn. 9.) "Under the best of circumstances, [CEQA cases] are complicated." (*County of*

*Amador*, *supra*, 76 Cal.App.4th at p. 939.) Here, the administrative record is over 25,000 pages long.

Many cases observe that CEQA appeals review the legality of an entity's actions de novo and that the trial court's views are not binding. (E.g., *Planning & Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892, 912.) This does not mean an appellate court reviews legal issues not properly raised. Specifically, in a non-CEQA case we observed that "legal issues arise out of facts, and a party cannot ignore the facts in order to raise an academic legal argument." (*Western Aggregates, Inc. v. County of Yuba* (2002) 101 Cal.App.4th 278, 291 (*Western Aggregates*).)

We agree with Developer that petitioners do not fairly state the facts and have therefore forfeited many of their claims. For example, they imply the Project will raze prime farmland and "obliterate" "irreplaceable wetlands". Although some land is farmed and some has vernal pools, *all* has been in the general plan's "Urban Growth Area" since 1993, only "isolated" pieces of farmland are considered "prime" and those are too small "to be farmed on a practical basis," and wetlands loss will be mitigated by a preserve and offsite restoration. As another example, petitioners claim the Project will "obliterate" Morrison and Laguna Creeks. Such hyperbole is unsupported by the record, which shows these "are normally dry

creek beds" and that the Project as approved preserves Laguna Creek by creating an open space corridor, and that Morrison Creek crosses "a small portion" of a corner of the Project land which will be subject to a site-specific design process subject, inter alia, to approval by the Department of Fish and Game. Petitioners do not have to believe the County's evidence, but as appellants they have a duty to confront it. As Developer and the City point out, petitioners make many such misstatements and omissions.

In non-CEQA appeals, the lack of a fair statement of facts forfeits evidentiary claims. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881-882; *Western Aggregates*, *supra*, 101 Cal.App.4th at pp. 290-291.) The same is true in CEQA cases. (*Markley v. City Council* (1982) 131 Cal.App.3d 656, 673-674; *Cleary v. County of Stanislaus* (1981) 118 Cal.App.3d 348, 360; see *No Slo Transit, Inc. v. City of Long Beach* (1987) 197 Cal.App.3d 241, 250, fn. 5.)

In this case, "Instead of a fair and sincere effort to show that the trial court was wrong, appellant's brief is a mere challenge to respondents to prove that the court was right. . . . An appellant is not permitted to evade or shift his responsibility in this manner." (*Estate of Palmer* (1956) 145 Cal.App.2d 428, 431.)

If petitioners assumed that because we review the legal issues de novo, they did not have to paint the facts fairly, they are wrong. In summary judgment cases, which we review de novo, an appellant must present an objective statement of evidence on which the trial court ruled. (*Lewis v. County of Sacramento* (2001) 93 Cal.App.4th 107, 112-114.) Thus, the fact we review CEQA claims de novo does not mean we try the case in the first instance.

Further, petitioners do not acknowledge the existence of the trial court's decision. We agree that the trial court's decision is not "binding," but that does not make it irrelevant. As stated in the summary judgment context, "The fact that we review de novo a grant of summary judgment does not mean that the trial court is a potted plant in that process. . . . As one text states this rather basic proposition: 'Fundamentally, unlike trial, the purpose of an appeal is *not* to determine the case on its merits, but to review for trial court error.'" (*Uriarte v. United States Pipe & Foundry Co*. (1996) 51 Cal.App.4th 780, 791; original italics.) Treating de novo review as if the trial court's ruling in a CEQA case is merely a ticket of admission to the Court of Appeal improperly denigrates the trial court's role. (See *Koster v. County of San Joaquin* (1996) 47 Cal.App.4th 29, 44-45 ["in many [CEQA] cases, trial

courts provide us with a thorough written opinion which helps to clarify issues for appeal"] (*Koster*).)

Judge Cadei issued a persuasive 18-page decision explaining in detail why the challenges raised lack merit. To ignore this decision, as Petitioners do, would be wasteful of judicial resources. Of course, petitioners did not have to *agree* with Judge Cadei. But they should have discussed his reasoning on each issue and explained how he was wrong, for example, by pointing to facts he missed, or by explaining how his legal conclusions were incorrect. Instead, in large part petitioners replicated long, verbatim or near-verbatim passages of their trial court papers into their brief. If they wanted to persuade us to reverse, the way to do it was to persuade us Judge Cadei was wrong, not hope that we would not read his decision.

Developer and the City exhaustively detailed the evidence supporting the County's and Judge Cadei's decisions and petitioners failed to file a reply brief. Because petitioners fail to state the facts fairly as to most of the issues they raise, we conclude most of their claims have been forfeited, although we will briefly discuss some of the evidence pertaining to some of those claims. We will address claims properly raised with reference to Judge Cadei's decision and the record to explain why petitioners fail to demonstrate error.

## DISCUSSION

### I. CEQA Water Issues.

#### A. Introduction.

In separate but related claims petitioners assert the Project should not have been approved because the County did not ensure there is an adequate water supply, and a critical component of the Project, the new well field, will have significant environmental impacts, such as spreading perchlorate and drying up wetlands.

We must first explain the concept of "tiered" environmental review, yet another point not mentioned by petitioners, although it was explicitly discussed by the County in making some of the findings challenged on appeal, as Developer points out.

Tiering is a method whereby initial CEQA reviews can be made of general policies, such as whether to create a new town or high school district. Once such a policy has been approved, further review about implementing the policy may be conducted. (*Endangered Habitats League, Inc. v. State Water Resources Control Bd*. (1997) 63 Cal.App.4th 227, 235-237; *Koster*, *supra*, 47 Cal.App.4th at pp. 35-42; *Stand Tall on Principles v. Shasta Union High Sch. Dist.* (1991) 235 Cal.App.3d 772.) "[T]he first 'tier' may consist of a general plan or program EIR, which discusses agency-wide programs, policies and cumulative impacts. The second tier may consist of a specific plan EIR, which

discusses a particular region within the agency. The third tier may consist of an ordinary development project EIR, which discusses a particular site." (*Koster*, *supra*, 47 Cal.App.4th at pp. 36-37.)

Tiering is important here in several ways. First, the Project area was selected for urban development *in the 1993 general plan*. Petitioners press the notion that this area should be used for something else, but the time to challenge the policy decisions made in 1993 has passed. Second, a multi-jurisdictional massive water policy project known as the water forum plan (WFP), which underwent environmental review in 1999, plays a key role in the water supply for the Project; again, petitioners impliedly want the courts to reexamine or nullify those decisions. Third, this EIR adopts the policy of building a new well field, but site-specific review will be conducted before it is built.

The water plan described in the RRDEIR distanced the groundwater pumping from Aerojet and other contamination plumes, to a location five miles south of the Project known as the North Vineyard Well Field (NVWF) on either side of Excelsior Road, between Florin Road and Elder Creek Road in the Vineyard area. The first phase would build facilities to deliver 2,265 acre-feet per year (afy). The second phase would add 3,262 afy.

The NVWF water is not enough to service the built-out Project. The plan to close the shortage, as set forth in the County's findings, is as follows: The Sacramento County Water Agency (SCWA) established its "Zone 40" "to manage groundwater resources within the influence area of the Elk Grove cone of depression . . . . Zone 40 facilities will be constructed to meet the long-term water needs of the Project area by providing for the conjunctive use of groundwater and surface water. . . . A Water Supply Master Plan was adopted for Zone 40 in 1987." That master plan was updated in 1995, and in 1998 plans for areas adjacent to Zone 40 were developed. The Project is in the "Expanded Zone 40 Study Area" and fees exacted for development therein will pay for water facilities. The CEQA process for the "Zone 40 Master Water Supply Plan Update" is ongoing.

Separately, the WFP "brought together a diverse group of stakeholders . . . to evaluate water resources and future water supply needs of the Sacramento metropolitan region." The "South Area" of the WFP includes the Project and the NVWF, and sets an extraction limit of 273,000 afy which "represents an amount equal to the projected 2005 groundwater pumping rates. Because of limits placed on the extraction of groundwater by the [WFP], delivery of additional surface water to the South Area will be required to meet total water demand in 2030." The WFP provides for "an equilibrium condition around which the groundwater

system would be allowed to fluctuate[.]" Before further building can occur, water must be available, and development entitlements dependent thereon "are applied toward the development cap on a first-come first-serve basis[.]"

In 1999, SCWA "signed water supply contracts with the Bureau of Reclamation that provided for a long-term surface water supply of 15,000 [afy] (Fazio water) for the Zone 40 area." However, due to federal environmental laws, only 7,200 afy can be delivered "until new fish screens are installed at the City's Sacramento River water treatment plant" which should take place in late 2003, after which the full amount can be delivered. Separately, the WFP indicates that SCWA has reached an "agreement-in-principle" with SMUD for 15,000 afy "of SMUD's existing contract with" the Bureau of Reclamation and they have "begun negotiations for purchase by the SCWA" "of a second 15,000 [afy] block of SMUD's USBR contract."

The NVWF will be "the sole source of water supply over the near-term, with reliance on a conjunctive use supply over the long-term through integration with the Zone 40 system." NVWF will be "at a down-gradient location intended to eliminate the possibility of contamination of the well field by known contaminant plumes [e.g., the Aerojet perchlorate plume]. . . . Because the ultimate 'safe yield' of the NVWF will be [about 10,000 afy] groundwater usage will be limited to that amount, as

a maximum, with the result that development requiring additional water may have to await completion of the Zone 40 conjunctive use program, with new surface supplies [e.g., Fazio water].” However, the NVWF water may be used by SCWA for other entitlement-holders. “This phasing of new development, expressly linking incremental growth to the availability of reliable long-term water supplies, eliminates any credible danger that development within the [Project] area will threaten existing water supplies or undermine SCWA’s ability to service its existing or future customers. With each proposed tentative map, [SCWA], in determining whether NVWF groundwater is available, will be able to consider factors such as (i) progress made by Aerojet/Boeing in remediating groundwater contaminated by its past practices and in developing new water supplies to replace those lost to contamination, (ii) the possible need for SCWA itself to supply ‘replacement water’ to existing well users whose wells might be shut down due to contamination, (iii) the movement of contamination [plumes], and (iv)” perfection of surface water supplies expected under the WFP.

“The total amount of groundwater projected to serve the Project is a small fraction (3%) of the current total production . . . being pumped for agricultural uses. [Citation.] There are no data showing that this small increase . . . will create a sudden worsening of the conditions in the Cosumnes River.

[Citation.] Much of the basin is hydrologically disconnected from the Cosumnes . . . except at two places, upstream of Dillard Road and downstream of Twin Cities Road. . . . [P]otential hydrological impacts will occur only in those two places, and will be very small and insignificant [citation].” Although the County cited specific items of evidence for these statements, that evidence is not discussed or cited by Petitioners in their brief.

The ordinance establishing the Sunridge specific plan provides in part “Entitlements for urban development within the Sunrise Douglas Plan area (i.e., subdivision maps, parcel maps, use permits, building permits, etc.) shall not be granted unless agreements and financing for supplemental water supplies are in place, consistent with General Plan Policy CO-20.” This mitigation measure was imposed in part because the EIR process for the Zone 40 Master Plan Update was not yet finished. Thus, no tentative maps shall be approved unless there is enough water from another source or the NVWF water does not exceed 10,000 afy *and* does not cause more than a 10-foot drop in groundwater elevations *and* does not cause a “significant effect on groundwater contaminant movement” without a finding by SCWA that it is consistent with the WFP and can be mitigated.

B. Exhaustion of Remedies.

A CEQA challenger must raise issues "prior to the close of the public hearing" where hearings are provided. (Pub. Resources Code, § 21177, subd. (a); *Tahoe Vista Concerned Citizens v. County of Placer* (2000) 81 Cal.App.4th 577, 588-592.) Developer argues we should disregard some evidence about groundwater pumping because petitioners presented it late.

As stated, the County *certified* the FEIR on June 19, 2002. The County's statement of findings recites that it considered documents submitted "through the close of the public hearing on June 19, 2002." Based on the certified FEIR, the County *approved* the Project on July 17, 2002. That was the date on which counsel for petitioners submitted his letter, which attached a letter by Dr. Robert Curry, a geologist who criticized the EIR. Someone read the letter into the record, but an unidentified person stated that the County had already certified the EIR.

Because County "received the comments at issue before it took final action" Judge Cadei concluded petitioners could pursue all their claims. Assuming we agree, allowing Petitioners to raise certain claims does not equate to allowing them to rely on *evidence* not considered by the County. But given the muddled record we will discuss that evidence in our analysis.

C. Water Impacts.

Petitioners allege the environmental review process "fails to adequately disclose the impacts" of (1) "lowering of the flow of Deer Creek and the Cosumnes River" and the ensuing impact on fauna, (2) the proposal "to pump up to 32,800 acre-feet annually" from NVWF and "the project's obliteration of over 200 acres of wetlands[.]" Although they discuss a number of cases involving failure to address impacts, here the impacts were addressed.

First, the response section of the FEIR explained that "the available data suggest groundwater extraction at the proposed well field will not significantly impact flows in either Deer Creek or the Cosumnes River" and goes on to explain the supporting evidence, including an absolute cap on pumping as well as a cap if the groundwater drops more than ten feet, the small volume of water proposed as compared to what is already pumped, the specific topography and hydrology of the well field aquifer system which "is not in direct hydraulic connection with either Deer Creek or the Cosumnes River" for the most part, and other factors, largely ignored by petitioners.

Second, as Judge Cadei explained:

> Petitioners contend that the EIR does not adequately disclose the project's impact on groundwater levels in southern Sacramento County, and . . . the impact of groundwater pumping on the Cosumnes River. . . .

. . . The issue of groundwater impacts was thoroughly addressed in the Final EIR, which contained a detailed discussion of the proposed use of groundwater to supply initial phases of the project. While the EIR did not address the issue of alleged impacts on the flow of the Cosumnes River, substantial evidence supports the Board's finding that the project would not result in a substantial adverse impact on the River. Therefore, no discussion of that issue was required in the EIR itself . . . .

Much of petitioners' dissatisfaction with the EIR's handling of the groundwater issue appears to stem from the fact that the problem of encroaching contamination from the Aerojet site required a complete overhaul of the water supply plans for the project in the middle of the process of environmental review. The major change in the project water supply plan was the substitution of the [NVWF] as the primary initial source of water for the project in place of wells located on the project site itself. Petitioners argue that this change resulted in the Final EIR varying substantially from the Draft EIR in its discussion of water supply issues. Thus, they argue, the entire process of environmental review violated CEQA because it was not based on an adequate and stable project description.

Admittedly, the Final EIR analyzed a very different set of water supply issues than was presented in the Draft EIR. But a change of this nature does not necessarily render the process fatally defective. The courts have recognized that the requirement of a good faith, reasoned analysis in response to comments on the Draft EIR will "almost always" result in the Final EIR containing information not included in the draft document. [Citation.] That appears to [be] what happened here: the Board responded to concerns about the safety of the wells originally proposed to serve the project, and, in response to those concerns, developed a new plan involving a different well field. This change, standing alone, is not sufficient to invalidate the entire process. The critical issue is: were the new water supply plan and its environmental effects adequately described in the final EIR?

The Court finds that they were. A revised draft EIR was prepared and recirculated with a full discussion of the new water supply plan, information that is also set forth in detail in the Final EIR. This discussion makes it clear that the project will rely on groundwater from the [NVWF]

for near-term development needs. There is a detailed analysis of the existing environment in the area, including the current situation with regard to groundwater levels. Among other things, the Final EIR notes the existing groundwater overdraft situation in the south County, specifically citing the so-called 'Elk Grove cone of depression', a zone of depressed groundwater levels in the southern part of the County. In the Court's view, the Final EIR's discussion of groundwater-related issues is comprehensive, thorough, and based on specific and sound data, none of which is specifically challenged by petitioners. It clearly puts the project's water supply plans, specifically, its reliance on groundwater from the [NVWF], in the context of the existing environment, and thus represents a good faith effort to fulfill the informational purpose of CEQA.

Beyond the description of the environmental baseline, the Final EIR contains a very detailed description of the expected impacts of drawing groundwater from the [NVWF]. The Final EIR contains an analysis of several different 'demand scenarios' and thoroughly describes the impacts on groundwater that may be expected under each scenario. Petitioners have not demonstrated that this discussion is incomplete, wrong, or not based on substantial evidence. Petitioners do suggest that one of the criteria the Board adopted for identifying a significant adverse effect on groundwater, namely, a 10-foot drop in groundwater levels, is an improper threshold of significance. They do not demonstrate why it is improper, however, and in the absence of any persuasive reason to the contrary, the Court will defer to the Board's discretion in determining, as a matter of fact and a choice of methodology, what level of impact will be deemed significant. [Citation.] Petitioners thus have not demonstrated that the Board committed a prejudicial abuse of discretion in the treatment of the project's groundwater impacts.

Admittedly, the discussion of the existing environmental baseline and of groundwater related impacts does not include a discussion of the effects of groundwater pumping on Cosumnes River flow levels. Petitioners contend that this omission was a prejudicial abuse of discretion because they believe that there is substantial evidence that the extraction of groundwater from the [NVWF] will affect the River. The Court finds, however, that the omission of this issue was not a prejudicial abuse of discretion. The EIR

> is required to deal only with significant impacts of a project. In this case, there is substantial evidence in the record suggesting that the Cosumnes River is in hydrological contact with the groundwater basin from which the well field will draw in only two locations, and that the decline in groundwater levels due to pumping in those locations will be too minor to result in a significant adverse impact on the River. The Court is aware that petitioners submitted their own evidence suggesting a more significant impact. [Citation to Dr. Curry's letter.] Nevertheless, the Board, as the finder of fact in this matter, had discretion to make the factual determination regarding the existence or nonexistence of the impact. The Court will defer to such a determination when it is supported by substantial evidence, as it was here. The Court thus finds that the Board had a proper basis for determining that the alleged impact on the River did not need to be addressed in the Final EIR.
>
> Moreover, the Board adequately responded to public comment on the Cosumnes River issue by providing the analysis of hydrological conditions cited above. On this as on other issues on which petitioners contend the Board's responses to comments were lacking, the Court finds that the responses represented a good faith and reasoned analysis describing the disposition of significant environmental issues raised, as required by law. [Citation.]
>
> For the reasons stated above, the Court finds no violation of CEQA in the manner in which the Board addressed groundwater-related issues in the environmental review of the project.

Petitioners make no refutation of the County's findings and do not mention Judge Cadei's detailed ruling. They do complain that the *Draft* EIR failed to address certain water impacts. As Judge Cadei explained, that was because the DEIR discussed a different water source. The RRDEIR thoroughly discussed issues relating to the new proposed source. We agree with Developer that their failure to acknowledge the RRDEIR represents "tactics

that ought to result in their entire argument being deemed waived by this court."

To the extent petitioners argue the EIR hid significant effects on wetlands, the claim lacks merit. As Judge Cadei found: "[T]he EIR clearly describes the loss of wetlands and vernal pools that will occur through development of the project. The . . . Final EIR sets forth an inventory of the wetlands and vernal pools on the project site, amounting to approximately 247 acres, and clearly states that more than 200 acres would be lost to development. [Citations.] The Final EIR flatly described the impact on wetlands and vernal pools as significant and unavoidable. [Citation.] Moreover, the Final EIR also described potentially significant and unavoidable impacts to wetland habitat and associated species that would occur as the result of the channelization and realignment of Laguna and Morrison Creeks. [Citations.] The Final EIR thus fulfilled its purpose as an informational document in this regard." We agree with Judge Cadei.

D. Water Supply.

We set out above a lengthy description of the proposed water sources. Several cases reject the notion that an EIR can be certified despite the absence of a specific supply of water for a development project, because absent that component it is

not possible to assess project impacts or weigh the feasibility of alternatives.

For example, in a case cited by the County in its findings herein, *Stanislaus Natural Heritage Project v. County of Stanislaus* (1996) 48 Cal.App.4th 182 (*Stanislaus*), a public entity "in essence approved an EIR for a 25-year project when water for the project had not been assured beyond the first 5 years of the 15-year first phase of the project. The County knew neither the source of the water the project would use beyond the first five years, nor what significant environmental effects might be expected when the as yet unknown water source (or sources) is ultimately used." (*Id*. at p. 195.) The court found the purpose of CEQA had been bypassed, in that the approval was made without an informed decision about the environmental impacts of the water supply, *because no water supply was identified*. (*Id*. at pp. 195-206; see also *Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 829-831 (*Santiago*) [similar holding].)

Petitioners argue that this project and its EIR is similarly flawed because between now and full build-out, the complete water supply is uncertain. Judge Cadei issued a cogent discussion of this point:

> Petitioners allege . . . that no firm source of water has been identified for later phases of the project, and thus there has been no analysis of the environmental impacts of

supplying the substantial amount of water the project will need. Their contention arises out of the fact that, under the final water supply plan, groundwater drawn from the [NVWF] is only expected to serve a portion of the full project's needs. The water for the later phases of the project is expected to come from surface water deliveries. Petitioners contend that the sources of such surface water deliveries have not been identified or confirmed, rendering the entire process of environmental review fatally incomplete and uncertain.

Identifying a source of water for a project, and addressing the environmental effects of obtaining water from that source, are critical issues under CEQA that the appellate courts have addressed repeatedly in recent years. On several occasions, the courts have overturned project approvals and disapproved project EIRs on the ground that the issue of water supplies was not dealt with adequately. [Citations.]

. . . In all of the above-cited cases, there had been a complete failure to identify any actual or potential sources of water for the projects in question, leaving the question of whether the water would in fact turn out to be available entirely speculative. [I]n [*Santiago*, *supra*, 118 Cal.App.3d 818] the local water company had not indicated that it could supply the amount of water the project would demand; in [*Stanislaus*, *supra*, 48 Cal.App.4th 182] the EIR flatly acknowledged that no sources had been established for later phases of the project (and suggested that if such sources never were found, the later phases simply would not be built); and in [*Santa Clarita Organization for Planning the Environment v. County of Los Angeles* (2003) 106 Cal.App.4th 715 (*Santa Clarita*)] the State Water Project allotments that were relied upon . . . were demonstrably illusory. Since the actual sources of water for the projects were not known, a full and realistic environmental review of the effects of supplying water to the projects from those sources simply could not have been done.

In this case, by contrast, potential water supply sources have been identified and studied in detail. The Final EIR describes how water for the project will be supplied through a combination of groundwater for near-term development, with longer-term supplies coming from surface water sources to be delivered through the so-called 'conjunctive use' system. At least one potential source of

surface water is specifically identified in the Final EIR, namely the so-called 'Fazio water' that is expected to be delivered from a diversion point near Freeport on the Sacramento River. [Citations.] Beyond that, the Final EIR describes more generally how future surface water supplies will be provided through the so-called Water Forum Plan/Water Forum Agreement. [Citations.]

The [WFP] is the product of a much larger process intended to ensure a secure and environmentally safe water supply to meet Sacramento County's long-term demands. Part of that process was a detailed environmental review culminating in the preparation of a full EIR, which was certified in November, 1999, prior to action on this project. . . . The [WFP] EIR specifically identified the potential sources of water that would be tapped to fulfill future county water needs. It also identified and discussed the significant unavoidable environmental impacts of tapping those sources. The project EIR specifically referred to the EIR for the [WFP] and, further, specifically stated that the [WFP] would have significant environmental impacts in a number of areas. [Citations.] Such reference was sufficient to incorporate the results of the [WFP] environmental review into the project's Final EIR. [Citation.] Moreover, the [WFP] EIR was actually before the [County] and the public in this proceeding, and was physically made part of the record of this proceeding. [Citations.] The detailed treatment of water supply sources and environmental impacts therein thus was before the [County] and the public . . . .

The direct connection between this project and the [WFP] process makes this case fundamentally different from those cited above. Instead, this case appears to be similar to the 'compromise' position described by the Court in *Napa Citizens for Honest Government v. Napa County Board of Supervisors* (2001) 91 Cal.App.4th 342, 373 [*Napa*], which suggests that an EIR is adequate if it identifies and analyzes potential sources of water even though the final availability of those sources is not confirmed. Such an approach makes sense as a practical matter. To hold otherwise would require each project covered by the [WFP] to revisit all of the issues addressed in that massive collaborative effort each time a new project was proposed . . . . Such an approach would be wasteful and even possibly counterproductive in that it might touch off a confused scramble for water rights rather than the planned, thoughtful approach that appears to be in place. . . .

The last case discussed by the trial court involved a project which partly depended on water to be supplied by another entity although "the necessary agreements have not yet been reached, and as the Project has no control over those agreements, it cannot ensure that they will be reached." (*Napa*, *supra*, 91 Cal.App.4th at p. 373.) The EIR "identified sources for water and facilities for the treatment of wastewater, although their availability has not been absolutely established. Moreover, the [EIR] analyzes the capacities of the existing systems and concludes that the anticipated resources, if available, will be able to handle the Project area's needs for water and disposal of wastewater." (*Ibid*.) The court discussed the cases cited by petitioners and a case holding "that an EIR is not required to engage in speculation in order to analyze a 'worst case scenario.'" (*Ibid*.) "It follows that a compromise between the positions adopted in those cases is in order. We conclude that the [EIR] need not identify and analyze all possible resources that might serve the Project should the anticipated resources fail to materialize. Because of the uncertainty surrounding the anticipated sources for water and wastewater treatment, however, the [EIR] cannot simply label the possibility that they will not materialize as 'speculative,' and decline to address it. The County should be informed if other

sources exist, and be informed, in at least general terms, of the environmental consequences of tapping such resources. Without either such information or a guarantee that the resources now identified in the [EIR] will be available, the County simply cannot make a meaningful assessment of the potentially significant environmental impacts of the Project." (*Id*. at pp. 373-374.)

In this case, the identified sources were not speculative, although they were not completed. The County was fully informed about the issues regarding those sources, and, indeed, the County had been a co-lead agency in the EIR process for the WFP, and that agreement was discussed in the instant EIR. We also agree with Developer that the County here did exactly what we recommended in *County of Amador*, *supra*, 76 Cal.App.4th 931, when we explained the importance of conducting tiered review of the interrelationship between water supply and growth, as was done here in both the WFP and the Zone 40 Master Plan Update. (*Id*. at pp. 949-951; see also *Stanislaus*, *supra*, 48 Cal.App.4th at p. 205 ["We are not concluding respondent must first find a source of water for the 'project' before an EIR will be adequate"].)

Petitioners fault the FEIR because it "relies on the hypothetical availability of 10,000 [afy] from the proposed NVWF" but that water "will be available on a 'first come, first served' basis[.]" Petitioners go on to argue that it is

unlikely Developer will be in an advantageous place in line due to increased water contamination, new growth in the south area and the purported fact that the WFP limit on groundwater pumping (which they baldly claim "is certainly far too high") has nearly been reached, and the 10,000 afa will not be available if the groundwater drops over 10 feet. The "first come, first served" rule and the ten-foot drop trigger are discussed in the environmental documents. The County was not required to adopt the most pessimistic view, but was simply required to consider a range of reasonable scenarios and explore the environmental issues surrounding each. (See *Napa*, *supra*, 91 Cal.App.4th at p. 373.) Similarly, petitioners claim the Fazio water is uncertain, but the same analysis applies: The County was not required to take a "'worst case scenario'" approach. (*Ibid*.)

Pointing to new facts about groundwater contamination and other issues, petitioners fault the environmental review process pertaining to the WFP. This argument (like many others in their brief) is not fairly embraced by the heading under which it appears and is therefore forfeited. (Cal. Rules of Court, rule 14 (a)(1)(B); *Landa v. Steinberg* (1932) 126 Cal.App. 324, 325.) Moreover, the time to challenge that EIR has passed. The fact new information may exist does not render the WFP EIR invalid for tiering purposes. Finally, as Developer points out, the record citation supplied by petitioners to show that the WFP EIR

did not address groundwater contaminants refutes their claim.

Petitioners complain that the County's reliance on the development cap was inappropriate. As stated, the CEQA documents emphasize that certification of the EIR did not confer entitlements and that vested rights, such as approvals of tentative maps and building permits, depended on the availability of water.

Petitioners rely heavily on *Santa Clarita*, *supra*, 106 Cal.App.4th 715. There an EIR dependent on illusory State Water Project deliveries provided that each project in the area would have to show water availability "'as part of the subdivision approval process. So long as each . . . demonstrates water availability prior to the project approval, cumulative development would not result in an unavoidable significant cumulative impact on Santa Clarita Valley water resources.'" (*Id*. at p. 719.) Because the water supply was illusory, the CEQA process based on it failed to paint a fair picture of the background and probable impacts of the project. (*Id*. at pp. 721-723.) "Nor is the inadequacy cured by the requirement that [the project proponent] demonstrate an adequate supply of water before the tract map is recorded. An EIR's purpose is to inform. This purpose is not satisfied by simply stating information will be provided in the future." (*Id.* at p. 723.)

We agree with Judge Cadei that *Santa Clarita, supra,* 106 Cal.App.4th 715 presented a different problem. There, the EIR relied on water which did not exist and would not exist in the foreseeable future. Therefore, the EIR failed to analyze impacts of servicing the project. Here, specific sources of water have been identified and the impacts thereof analyzed. Although they do not exist, they are *future* water supplies, not *illusory* supplies. That is a critical difference: It is possible to conduct environmental review of future supplies, which is what was done here, whereas, as shown by *Santa Clarita*, reviewing impacts of imaginary supplies is as useless as counting angels on the head of a pin.

II. CEQA Mitigation Measures.

Petitioners claim the County violated CEQA by rejecting two mitigation measures, referred to in the record as Alternative 3A and Alternative 3B.

"An EIR must 'describe a range of reasonable alternatives to the project . . . which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives.' [Citation.] It must contain 'sufficient information about each alternative to allow meaningful evaluation, analysis, and comparison with the proposed project.' [Citation.] 'The

statutory requirements for consideration of alternatives must be judged against a rule of reason.'" (*Association of Irritated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1400 (*AIR*).) A public entity may decide that a proposed alternative which reduces significant impacts is infeasible provided it gives a rational explanation supported by substantial evidence. (*San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 737-739.) Petitioners emphasize the EIR did not make the same infeasibility findings made by the County. However, the County had the duty to make its own findings and it was not bound by staff analysis. (*Protect our Water v. County of Merced* (2003) 110 Cal.App.4th 362, 372.)

Alternative 3A contemplated an on-site wetlands preserve which eliminated many dwelling units and commercial space. According to the FEIR, "General Plan consistency would improve with regard to on-site biological mitigation, however, this Alternative presumably creates a fundamental inconsistency with the County's determination that this should be an area of growth and development to accommodate projected population growth." The County concluded Alternative 3A was infeasible because it would conflict "with the stated goal of improving the housing/jobs balance within the Highway 50 corridor" and provide "no obvious biological benefit for doing so" and the fewer units

would increase the cost of each unit and of project financing, making it economically infeasible.

In concluding Alternative 3A gave no superior biological advantage the County's findings cite to evidence not mentioned by petitioners. We have nonetheless looked at the record, which includes an analysis by a qualified expert who explained in detail why an on-site preserve was not biologically superior. In short, after discussing the way in which vernal pools were distributed on the site, he concluded (referring to both Alternatives 3(A) and 3(B): "Any on-site preserves in the plan areas would ultimately be in an urban setting, and offsite mitigation for wetland preservation and construction will have to be done, regardless of the preserve configuration. Given these considerations, it makes far more sense to combine mitigation requirements in larger, offsite preserves, remote from urban uses, than to consume more valuable development lands with marginal mitigation." Petitioners make no argument attacking the sufficiency of this supporting evidence.

Alternative 3B also assumed an on-site wetlands preserve "but retains the same holding capacity as the proposed project by increasing development densities within the remainder of the planning area." The County found this was infeasible because it was not biologically superior and was economically infeasible because the increased density and large wetlands preserve "is

unattractive to potential home buyers and very difficult to market. . . . Thus, the developers would be left with significant amounts of virtually unmarketable land." Further, "the large amounts of on-site preservation acreage required under the biological mitigation alternatives are ultimately inappropriate uses of land within an Urban Policy Area[.]" As the County stated elsewhere, it refused "to adopt a wetlands mitigation strategy that would place very large areas of the subject property off-limits to the very urban uses for which the property has been intended since 1993."

Judge Cadei concluded the County was "not required to re-examine fundamental land use decisions about the direction of future development that are embodied in documents such as General Plans. [Citing *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 570-573.]" Thus, conflicts with urbanization goals support the County's findings of infeasibility. He also found the County "cited specific written testimony submitted by experts in the real estate marketing and finance fields stating that a restructured project with increased residential densities could not be marketed successfully, and thus would not support the financing of necessary public services and infrastructure. [Citation.] Moreover, written testimony of an expert environmental consultant provided information suggesting that on-site

preservation of vernal pools would be an inefficient use of land given the relatively low density of the vernal pools on the project site. [Citation.] Such testimony . . . is substantial evidence supporting the . . . determination that alternatives . . . involving greater density were not feasible[.]"

As the Developer points out, it is not improper (nor, indeed, uncommon) for an agency to rely on economic or other technical analysis provided by a project proponent. (See *AIR*, *supra*, 107 Cal.App.4th at p. 1401 [reliance on lender's letter and evidence by project proponent]; *San Franciscans Upholding the Downtown Plan v. City and County of San Francisco* (2002) 102 Cal.App.4th 656, 684 (*SFUDP*).) Valuation opinions of real estate experts are accepted in CEQA cases. (See *SFUDP*, *id.* at pp. 681-682.)

Taking language from other cases out of context, petitioners fault the County for not conducting an "independent financial or economic analysis" of the alternatives. First, an *EIR* is not the place for a discussion of fiscal factors, that analysis is for the public agency, based on substantial evidence. (*SFUDP*, *supra*, 102 Cal.App.4th at pp. 689-692.) Second, the cases petitioners cite do not support their claim, they simply hold that an applicant's view of economic feasibility is not determinative and the decisionmaker must be provided with the basis for a feasibility opinion, so that it

can make "'an independent, reasoned judgment.'" (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 735-736.) To the extent petitioners extract a rule that the decisionmaker *cannot* rely on a reasoned analysis provided by the project applicant, but must obtain "an independent feasibility analysis," they are wrong.

Tim Youmans, an urban land economist had over 23 years of experience "in real estate market research, development feasibility, and public finance," including environmental reviews. He reviewed the impact of both alternatives and concluded they "will hurt the project's ability to achieve the mix of retail and service commercial property necessary to maintain a proper balance with the residential development planned for the project." His opinion provided evidence supporting the County's conclusion of infeasibility as to both alternatives.

Doug Elmore, a real estate broker with *31 years of experience* in "residential subdivision land sales to merchant home builders" in the Sacramento area, had reviewed the SunRidge specific plan and the proposed alternatives. Increasing density would degrade the ability "to build different products which appeal to different market segments. While it is theoretically possible to provide large lot 'move-up' housing and still achieve the average densities set forth in . . . Alternative

3(b), it would require extremely high density development on the remaining land within the Plan in order to offset any significant number of larger lots[]. The market for lots with [such high density] in the Sacramento region is extremely limited. Therefore, in order to achieve the required average densities under . . . Alternative 3(b), the developer would be left with a significant amount of land area which would probably not be marketable either in today's market or historically, in the Sacramento region." For this reason, the alternative "would probably not be an economically feasible project and no house builder would want to compete in such a community. [¶] For these reasons, I do not believe . . . Alternative 3(b) is feasible from a marketing standpoint or an economic standpoint." Elmore's resume listed several large local subdivisions he had worked on.

Petitioners call Elmore's conclusion "unsupported by any evidence" and "speculation." This claim borders on the frivolous. Elmore has been in this precise business, marketing development lots to large builders, in this geographic region, for a long time. He did not simply conclude the project was infeasible, he explained why. His expert conclusion was evidence the County could, and did, accept as true. If petitioners thought his methodology was poor, "the challenge must be raised in the course of the administrative proceedings.

Otherwise, it cannot be raised in any subsequent judicial proceedings." (*SFUDP*, *supra*, 102 Cal.App.4th at p. 686.)

Because the record contains evidence supporting the County's findings that each alternative discussed on appeal was infeasible, their claims lacks merit.

III. Public Trust Doctrine.

Petitioners argue the Project will sometimes "dewater" the Cosumnes River, impairing rights flowing from California's sovereignty, the California Constitution and cases explicating the public trust doctrine. (Cal. Const., art. I, § 25, art. X, §§ 2 & 4; *Personal Watercraft Coalition v. Marin County Bd. of Supervisor* (2002) 100 Cal.App.4th 129, 140, 144-145.)

Judge Cadei found their argument "centers entirely on the contention that [County] failed to consider the effect of the project on the Cosumnes River, a navigable waterway. As described above, however, the [County] did, in fact, consider the potential impact on the River and concluded that it would be less than significant. Furthermore, that finding was supported by substantial evidence. Thus, without reaching the issues of whether the public trust doctrine would apply to local land use decisions . . . the Court finds no violation[.]"

Petitioners fail to explain why this conclusion is wrong. They do not fairly state the evidence, or indeed, state *any* of the evidence relied on by the County and the trial court, they

simply point to evidence in their favor. Critically, they rely on the arguably belated letter by Dr. Curry. It may be that he is the best hydrologist in the country, but no information about his training or education, apart from the letterhead use of his degrees, was before the County, and in any case the County was not required to accept his opinions. (See *Greenebaum v. City of Los Angeles* (1984) 153 Cal.App.3d 391, 413.) Petitioners point to snippets of evidence from other sources, but their failure to fairly state all the evidence forfeits the contention of error.

Moreover, as explained above, the County did consider the effects of the Project on the Cosumnes River, petitioners are simply unhappy with the result of the deliberative process because evidence they favor would have or might have reached a different result. That does not establish a violation of law, only a policy disagreement.

## IV. Planning and Zoning Consistency.

Petitioners contend approval of the project was "inconsistent" with the General Plan.

### A. Introduction.

As the City observes petitioners point to isolated general plan goals, construe them in their favor, then paint the evidence in their favor to try to show the Project conflicted with those goals. This mode of argument is ineffectual. A project is "consistent" if it furthers the objectives and

policies of the General Plan and does not obstruct their attainment. (*Families Unafraid to Uphold Rural etc. v. Board of Supervisors* (1998) 62 Cal.App.4th 1332, 1336 (*FUTURE*).) But "General plans ordinarily do not state specific mandates or prohibitions. Rather, they state 'policies,' and set forth 'goals.'" (*Napa*, *supra*, 91 Cal.App.4th at p. 378.) "The body that adopts general plan policies in its legislative capacity has unique competence to interpret those polices when applying them in its adjudicatory capacity. It follows that a reviewing court gives great deference to an agency's determination that its decision is consistent with its general plan. [Citation.] 'Because policies in a general plan reflect a range of competing interests, the governmental agency must be allowed to weigh and balance the plan's policies when applying them, and it has broad discretion to construe its policies in light of the plan's purposes.'" (*Id*. at p. 386.) General plans have goals and policies relating to disparate issues, and most projects involve trade-offs among them. Such flexibility does not equate to "inconsistency." (*FUTURE*, *supra*, 62 Cal.App.4th at p. 1336 ["A given project need not be in perfect conformity with each and every general plan policy"]; see also *Karlson v. City of Camarillo* (1980) 100 Cal.App.3d 789, 803 [that an entity's interpretation of consistency is debatable is not grounds for overturning its findings].) As in other cases, the appellant in

a zoning case must paint the evidence fairly. (*Jacobson v. County of Los Angeles* (1977) 69 Cal.App.3d 374, 388.)

The City argues the challenges raised on appeal are barred because petitioners did not exhaust their remedies, making in essence the same claim about Dr. Curry's letter as does the Developer, but also pointing out that that it did not discuss consistency with the specific general plan policies discussed on appeal. General plan issues, like CEQA issues, must be raised administratively if possible. (See Gov. Code, § 65009, subd. (b); *Park Area Neighbors v. Town of Fairfax* (1994) 29 Cal.App.4th 1442, 1447-1449.) The trial court rejected the failure-to-exhaust claim. We decline to disturb the trial court's ruling on this point and will reach the merits.

B. Open Space and Conservation.

The City points out that Petitioners have ignored significant parts of the general plan in arguing that the Project was inconsistent therewith. As the City points out and as Judge Cadei explicitly found, the argument that the Project violates the "open space" designation of the general plan collapses when it is recalled that the 1993 general plan does not designate this land as "open space" but as an *urban growth area*. As Judge Cadei found: "While [the 'the General Plan's Open Space Element'] does refer to the open spaces of the Sunrise Douglas area in general terms, and does contain

implementation policies calling for permanent protection of certain kinds of open space, nothing therein declares or mandates that the project area itself is intended to be maintained as permanent open space. Quite to the contrary, the Plan clearly designated the project area as a future 'urban growth area.' At most, the Plan stated that the project site might provide ' . . . temporary open space pending completion of urban land use and infrastructure plans.' [Citation.] The project is entirely in harmony with the Plan in this respect." Petitioners offer no refutation and we agree with Judge Cadei.

Similarly, the conservation element arguments misrepresent facts that were before the County when it made its decision. We adopt Judge Cadei's view:

> [T]he Court is not persuaded by petitioners' contention that the project is inconsistent with mandatory General Plan policies related to water, namely, staging development to match available water supplies and protecting groundwater levels. Petitioners specifically cite Conservation Element policies C0-20, C0-25 and C0-28 as the bases of their challenge. Policy C0-20 states that entitlements for urban development in new development areas shall not be granted until a master plan for water supply has been adopted by the Board and all agreements and financing for supplemental water supplies are in place. Policy C0-25 states that no building permits for urban commercial and residential uses shall be issued if the Board determines that there is a significant adverse effect on groundwater. Policy C0-28 discourages urban land uses in unincorporated areas with moderate or very high groundwater recharge capability. The project does not conflict with these policies because the mandates of policies C0-20 and C0-25 specifically have been incorporated into the project as conditions of approval and as part of the project's implementing ordinances.

Moreover, as the Board correctly argues, approval of a specific or community plan is not the granting of an "entitlement" or the issuance of a building permit within the meaning of the cited policies. As policy C0-20 specifically states: 'The land use planning process may proceed, and specific plans and rezoning may be approved.' The project is not fatally inconsistent with policy C0-28 because that policy does not forbid, but merely discourages, development in areas of moderate to very high groundwater recharge capability. It thus does not override the Plan's decision that the project area was a proper one for urban development. The Court thus does not find that the project conflicts with the General Plan's water-related policies.

On the question of preservation of wetlands and vernal pools, petitioners' argument is similarly flawed. As with the Conservation Element policies discussed above, the General Plan policies mandating no net loss of wetlands and vernal pools (policies C0-62 and C0-83-87) specifically have been imposed as conditions of project approval, adopted as mitigation measures pursuant to CEQA, and written into the project's implementing ordinances. To that extent, the project clearly is not in conflict with the General Plan. Moreover, petitioners have not cited to any policy in the General Plan mandating the preservation of any specific level of wetlands or vernal pools in the project area. It is apparent from the designation of the project area for urban development, as well as from the 'no net loss' provisions cited above, that the Plan contemplates that some amount of wetlands and vernal pools inevitably will be lost in exchange for necessary development, but that such losses will be mitigated in other areas. The record also reveals that a preserve has been established in the project area containing at least 44 acres of wetlands. The project is thus not incompatible with the General Plan in this respect.

With regard to the alleged inconsistency between the project and General Plan policies regarding protecting the environmental values of streams and rivers, no such inconsistency is apparent to the Court. Obviously, some alteration of Laguna and Morrison Creeks will be necessary to permit the contemplated level of urban development, but the record does not substantiate petitioners' contention that a complete 'obliteration' of those creeks will occur. Once again, in light of the Plan's designation of the

> project area for urban development, some alteration of natural values cannot be a *per se* inconsistency with the General Plan. Petitioners' other contention, that extraction of groundwater to supply the project will result in the "dewatering" of the Cosumnes River during low flow periods, is not borne out by the record either. Instead, substantial evidence suggests that the river is not in a hydrological contact with the groundwater basin from which the project wells will draw water except in two small areas, and that the impact on groundwater levels in those areas (and thus on the flow of the river) will be less than significant. The project thus does not violate any fundamental General Plan policies in this regard.

Nothing petitioners offer in their brief impairs Judge Cadei's holding on conservation issues.

C. Housing Element

Government Code section 65588 states in part that a general plan's "housing element" "shall" be revised at least every five years. Petitioners, pointing out the County's housing element expired, argue *no development* can be "consistent" with the general plan.

Judge Cadei found: "[T]he failure to update the Housing Element by the statutory deadline does not make that element invalid. The statutory deadline has been found to be directory, not mandatory, thus providing no basis for invalidating actions taken in connection with the General Plan. [Citation.] Moreover, petitioners have not demonstrated that there is any substantive defect in the existing Housing Element, or shown that the project [is] inconsistent with any policies or goals stated in it." A published case holds that an expired housing

element does not invalidate a general plan because the use of "shall" in Government Code section 65588 is directory, not mandatory. (*San Mateo Coastal Landowners' Assn. v. County of San Mateo* (1995) 38 Cal.App.4th 523, 544-545.) This case is directly on point and was cited by Judge Cadei as the reason for rejecting the claim petitioners renew on appeal. Petitioners do not cite this case, nor discuss directory and mandatory usages of "shall" in statutes. We thus see no purpose in further discussion of this point.

In a separately subheaded claim, petitioners allege that the Project is "fundamentally inconsistent" with the outdated housing element's call "for multi-family housing to meet the increased housing demands and the need for affordable housing." Counsel asserts that the Project does not have a proper "balanced mix" of multi-family and single-family housing and "by focusing on lower density housing, places the development beyond the reach of lower income individuals." Counsel has failed to mention contrary evidence, he simply throws out Project percentages and asserts that they are not good enough. For example, he states "a mere 1.6% of the total acreage" of the specific plan is devoted to medium density residences. Absent discussion of the goals of the extant (albeit outdated) housing element, and absent any explanation of why Project percentages

conflict therewith, this mode of argument lacks persuasive value.

Further, the record before the County referred to a stipulated settlement, approved by Judge Tochterman in 1996, between the County, Legal Services of Northern California, and others which sets forth a comprehensive affordable housing planning solution. The County's findings explicitly address the Project's consistency with the County's legal obligations under the settlement, finding it "meets and exceeds those targeted minimums" relating to affordable housing. Petitioners fail to mention the County's consideration of this legal obligation in their brief, and thereby again omit critical facts, forfeiting their claim of error.

DISPOSITION

The judgment is affirmed. Petitioners shall pay the City's and the Developer's costs of this appeal.

MORRISON, J.

We concur:

DAVIS, Acting P.J.

RAYE, J.

Filed 3/10/05

**CERTIFIED FOR PUBLICATION**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

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|---|---|
| VINEYARD AREA CITIZENS FOR RESPONSIBLE GROWTH, INC., et al.,<br><br>Plaintiffs and Appellants,<br><br>v.<br><br>CITY OF RANCHO CORDOVA,<br><br>Defendant and Respondent;<br><br>SUNRISE DOUGLAS PROPERTY OWNERS ASSN. et al.,<br><br>Real Parties In Interest and Respondents. | C044653<br>(Sup.Ct.No. 02CS01214)<br><br>***ORDER FOR PUBLICATION*** |

APPEAL from the judgment of the Superior Court of Sacramento County. Raymond M. Cadei, Judge. Affirmed.

Stephan C. Volker and Gretchen E. Dent for Plaintiffs and Appellants.

Meyers, Nave, Riback, Silver & Wilson, Steven R. Meyers, Julia L. Bond and Andrea J. Saltzman for Defendant and Respondent.

Remy, Thomas, Moose and Manley, James G. Moose and Sabrina V. Teller for Real Parties in Interest and Respondents.

THE COURT:

The opinion in the above-entitled matter filed on February 8, 2005, was not certified for publication in the Official Reports. For good cause it now appears that the opinion should be published in the Official Reports and it is so ordered.

THE COURT:

DAVIS, Acting P.J.

RAYE, J.

MORRISON, J.