STATEMENT OF DECISION ON VERIFIED PETITION OF MANDATE AND COMPLAINT FOR INJUNCTIVE RELIEF

WRIT GRANTED

RULINGS ON PETITIONERS' REQUESTS FOR JUDICIAL NOTICE

CENTER FOR BIOLOGICAL DIVERSITY and ENDANGERED HABITATS LEAGUE v. COUNTY OF LOS ANGELES, et al, and Real Parties in Interest, NORTHLAKE ASSOCIATES, et al, Case No. 19STCP01610

INTRODUCTION:

The Project is the Northlake Specific Plan (the "Project"). The applicant is NorthLake Associates, LLP and related entities.

The Project is residential project to be built on 1,330 acres of disturbed but undeveloped land north of Castaic and east of the Interstate 5 Highway (the "I-5"). The site is 3.5 miles on the side that parallels the I-5 and about a half mile wide. The I-5 is a divided highway at this point with the northbound lanes separated from the southbound to create an island of undeveloped land between the two segments. (This isolated middle area becomes important in discussing wildlife connectivity issues.) The Project site's western edges are variable distances from the I-5's southbound lanes ranging between 50 feet and about 500 feet. AR 8474, 8480.The land between the southbound I-5 and the site's western edges is undeveloped.

The County Planning Commission by a divided vote (3-1) approved the Project on April 18, 2018.

The Board of Supervisors by a divided vote (4-1) approved the Project on April 2, 2019.

Petitioners filed a verified Petition for Writ of Mandate on May 1, 2019. The Petition was argued on September 24, 2020, and stood submitted once the Court received the transcript.

Petitioners in their writ of mandate action allege the County's approvals of the Project violated the California Environmental Quality Act ("CEQA"), Public

Resources Code (PRC) 21000 et seq.[1] Petitioners allege four causes of action, but only two were briefed and argued. The causes of action that were argued are the first, that alleges various findings made in the supplemental environmental impact report (SEIR) and the approvals based thereon are not supported by substantial evidence; and the third, that alleges the County failed to recirculate the SEIR when the applicant made changes in the Project after the public comment period was closed. The causes of action that have been abandoned are: the second, alleging that a statement of overriding considerations for the Project is not supported by substantial evidence (the briefs fail even to cite the applicable Guidelines section 15093 for SOCs); and the fourth, alleging violation of California's Planning and Zoning Laws (Gov. Code section 65300 et seq.).

The Court grants relief on the first cause of action, finding the SEIR is deficient in its alternates analysis and in failing to define adequate mitigation measures for the relocation of an amphibian and plants of special concern due to the loss of their habitat. The Court does not find that the SEIR required re-circulation, and, therefore, denies relief on the second cause of action.

GENERAL DESCRIPTION OF THE PROJECT AND PROJECT SITE:

The Project site is 3.5 miles long but tapering at each end with maximum width of half a mile. The site drops 1,200 feet north to south. The site on its west side overlooks the I-5 and on its east side rises to a ridge that overlooks the Castaic Lake Reservoir state recreation area. Hills having steep slopes stud the site's western boundary. For aerial photos and diagrams, see AR 3618-3620, 4114-4118, 8256 et al.

National forests surround the area. The Los Padres National Forest is located to the north and west, and the Angeles National Forest is located to the east and southeast. AR 3826 (map). The Project site lies within the Sierra Madre-Castaic Connection which links the wildlife protected areas of Los Padres and Angeles National Forests. AR 3612-21, 31172-34, 30100-10, 30132.

Grasshopper Canyon bisects the site along the north-south axis. AR 3903 and 7760. Grasshopper Creek lies at the bottom of Grasshopper Creek. The development plan will fill-in Grasshopper Canyon with dirt excavated elsewhere on the site to create level building areas. Thirty-three million cubic yards of earth will be excavated and moved within the site to accommodate the planned construction. The fill-in will eliminate the blue-stream Grasshopper Creek at the bottom of the Canyon. The Creek's water shed creates a biological habitat for plants and animal species. The destruction of Grasshopper Canyon will have a significant impact on biological resources. The SEIR Biological Resources Assessment provides:

[1] CEQA Guidelines (authorized in PRC 21083) are codified in title 14, section 15000 et seq. of the California Code of Regulations.

> Grasshopper Canyon and Grasshopper Creek comprise the dominant topographic features of the Project site and therefore contain biological resources unique to these areas. While the majority of the Project site consists of scrub and grassland habitats, Grasshopper Canyon contains various riparian vegetation types.... AR 7758.

The Project requires the relocation of five species of rare plants and the western spadefoot toad, a species of special concern, now living in the habitat created by Grasshopper Canyon.

The Project, in two phases, will build out with 2,295 dwelling units, with additional units allowed up to a unit cap of 3,150 dwelling units allowed. AR 455. (A build-out of 3,150 dwelling units would house a population of about 9,734 residents.) The dwelling units will be mix of condominiums, apartments, live/work space and detached dwelling units. AR 499. From the photographs, the completed Project will have the appearance of two- and three-story apartment blocks. AR 10457-58. The Regional Planning Commission required that some 315 units be deed restricted as affordable housing, 95 of which are to be senior-living affordable units. AR 10163. The Project will include a 23-acre school site in phase 2 and a 1.4 acre pad for a future fire station. AR 7391. Project-related improvements that would extend outside the site include a 4.64 acre connection with a park on the state recreational land, 2.39 acres in trail connections, and a 5 acre pad for a water tank.

SUMMARY OF ADMINISTRATIVE PROCEEDINGS AND ACTION ON PETITION:

The Northlake Specific Plan was considered two times, 25 years apart by the County—in 1987-1992 and in 2015-2019. The 1992 proposal would preserve Grasshopper Canyon and its Creek, but the 2018/2019 proposal would fill-in the Canyon to make building sites.

The Northlake Specific Plan in 1992.

The County voted approval of the Northlake Specific Plan in 1992. AR 450, 1818. The DEIR for the current Project states for the 1992 project:

> The NorthLake Specific Plan included a statistical summary of uses allocated within very general land use areas.... At the time of the 1992 approvals, it had been anticipated that a focused Site Plan review and follow-up CEQA review would be conducted, as more project-specific level details were developed to implement phases of the NorthLake Specific Plan. AR 1818.

The 1992 Northlake Specific Plan included residential, commercial (13.2 acres), industrial (50.1 acres) and recreational uses (including a "championship golf course") on the same 1,330 acre site, but it would protect Grasshopper Canyon as a "landform feature and natural resource" of the site. AR 2682, 2688. The DEIR advises: "Subsequent to the 1992 approval of the Northlake Specific

Plan, market conditions and changes in property ownership placed development ... on hold." AR 1818. The development approvals expired in April 2013. AR 1818, 1826.[2] The current applicant, by letter dated April 3, 2018, abandoned the development agreement the County had approved in 1992. AR 10168.

The Northlake Specific Plan in 2017-2019

The steps taken by the County are presented in chronological order in the Findings made by the Board of Supervisors (AR 449-468) and are not repeated here. The Court does note that the applicant changed its Project by eliminating industrial uses and reducing commercial uses after the public comment period had ended. Based on this, petitioners argue that a recirculation of the SEIR is required.

The Planning Commission after an Initial Study released its supplemental environmental impact report (SEIR) on May 2, 2017. AR 14020, 1703.Two SEIR errata were subsequently released to address Project changes made during the public review process. Public hearings were held on May 24, 2017 at a Northlake Elementary School in Castiac and on February 21, 2018 before the Planning Commission.

In between, the Planning Commission released the Final SEIR on January 20, 2018. AR 9579-80.

The Commission, at the February 21, 2018 hearing, instructed the applicant to consider adding an affordable housing component and continued the hearing to April 18, 2018. On April 5, 2018, the Planning Commission released a Supplemental Memorandum that included the applicant's response to the Commission's comments at the February 21 hearing. AR 10163-66. The applicant agreed to these changes in the SEIR development plan: the elimination of industrial uses and a reduction in commercial uses; an increase in dwelling units from 1,974 to 2,295 units (AR 455); the relocation of 323 dwelling units from a phase 2 site to space vacated by industrial uses, with the build-out of those units to occur in phase 1 and in a location closer to the southbound I-5; the placing of affordable housing deed-restrictions on 315 units. AR 10174. The April 5, 2018 Supplemental Memo included another Errata to the SEIR. The new Errata announced that recirculation of the SEIR was not required, saying: "The Revised Project would not create a new significant impact or substantial increase in the severity of previously identified effects." AR 10185.

After a further hearing on April 18, 2018, the Planning Commission adopted entitlements and CEQA findings, certified the SEIR, and approved the Northlake Specific Plan. AR 552. The vote was 3 to 1. AR 453. The Center for Biological Diversity, Santa Monica Mountains Conservancy, and Golden State

[2] The County in its June 15, 2017 response to the CDFW letter asserts: "It should be noted that the 1992 Specific Plan is still a valid approval.... The Proposed Project can be viewed as a less dense alternative to the previously approved 1992 Northlake Specific Plan Project."

Environmental Justice Alliance filed appeals from the Commission's approvals to the Board of Supervisors.

On August 28, 2018, the County released an Errata to the Northlake Specific Plan including as Attachment E a Health Risk Assessment. AR 8345-8738.

In mid-September 2018, the County circulated a 47-page letter from Glenn Lukos Associates Regulatory Services dated September 13, 2018 (the Tony Bomkamp letter). The SEIR that the Planning Commission approved had been prepared by BonTerra Psomas, the applicant's consultant. The Lukos Associates' letter, which biologist Tony Bomkamp prepared and signed, described the letter as an "Independent Review of Biological Resources Assessment by BonTerra Psomas for the Northlake Final Supplemental EIR." The Bomkamp letter addresses the objections to the Project raised by the three appellants. AR 15999-16043 (not all pages included). County and Real Parties in their Joint Opposition Brief refer to the Bomkamp letter as containing the opinions of "the Peer Review Expert Biologist."

The Board of Supervisors conducted a public hearing on the Northlake Specific Plan and the appeals on September 25, 2019. The Board Chair allowed the three appellants a total of four minutes to present their objections. The Board voted (four ayes, with Supervisor Kuehl abstaining) to reject the appeals, and to uphold the Planning Commission approvals and to make findings to certify the SEIR. AR 454-458, 553, 12475-12477 (hearing record). The Board instructed staff to draft the necessary findings.

On April 2, 2019, the Board held a public hearing and adopted findings and conditions for vesting the tentative tract map, adopted the Final Supplemental Environmental Impact Report (FSEIR); and made finings and statement of overriding considerations. AR 12570; 448-760; 859-956. Four supervisors voted aye; Supervisor Kuehl abstained. A Notice of Determination (NOD) was filed and posted on April 4, 2019. AR 1-5.

On May 1, 2019, petitioners Center for Biological Diversity and Endangered Habitats League commenced this action by filing their verified Petition against the County of Los Angeles, its Board of Supervisors, its Planning Commission and its Department of Regional Planning (collectively "County") and Real Parties-In-Interest.

THE COURT DENIES PETITIONERS' FOUR REQUESTS FOR JUDICIAL NOTICE:

The Court will first address petitioners' requests that the Court take judicial notice of documents in support of petitioners' briefs. Petitioners filed four requests of judicial notice ("RJN"). Petitioners rely upon Evidence Code sections 452(c) and 453.

The administrative record (AR) was certified on February 3, 2020. The certified AR is "the record of proceedings related to the subject matter of the action or proceeding." PRC 21167(a). If a court receives documents offered through an RJN during the briefing, the court is, in effect, an augmenting the AR with the additional documents.

The parties' briefs were filed shortly after the AR was certified: the opening brief on February 7, 2020; the County's and Real Parties' Joint Brief on May 11, 2020; and Petitioners' reply on June 17, 2020.

County and Real Parties filed objections to the RJN because the documents tendered through the RJNs were not included in the administrative record and did not qualify as exceptions to PRC 21167. County and Real Parties argue that under CEQA review is limited to the evidence that was before the agency when it made the decision challenged by the petition, citing Western States Petroleum Association v. Superior Court (1995) 9 Cal.4th 559, 576. Evidence that was not before the agency when the project was approved is "extra-record" evidence and is not admissible, subject to limited exceptions. Id. at 576. This exclusion is to ensure that courts do not "engage in independent fact finding rather than engaging in a review of the agency's discretionary decision." Friends of the Old Trees v. Cal. Dept. of Forestry & Fire Protection (1997) 52 Cal.App.4th 1383, 1391.

The Supreme Court in Western States specified limits for extra record evidence that may be admitted under exceptional circumstances:

> *Extra record evidence is admissible under this exception only in those rare instances in which (1) the evidence in question existed before the agency made its decision, and (2) it was not possible in the exercise of reasonable diligence to present this evidence to the agency before the decision was made so that it could be considered and included in the administrative record.* (Id. at 578; emphasis original.)

With this background, the Court turns to the documents which the petitioners offer into evidence in their RJNs.

Petitioners offered for judicial notice a 53-page memorandum from the director of CDFW (California Department of Fish and Wildlife) to respond to a request that the Southern California/Central Coast Mountain Lion be listed as a threatened species under the California Endangered Species Act (codified as Fish and Game Code 2050 et. seq.). See, RJN filed March 2, 2020. County/Real Parties filed an opposition on May 11, 2020; petitioners filed a Reply on June 17, 2020. Petitioners in their Reply advised that the California Fish and Game Commission had granted "candidate species" status to the Central Coast/South mountain lion population.

Next, on June 17, 2020, petitioners filed a Supplemental Request for Judicial Notice to put into evidence the Los Angeles County After Action Review

of the Woolsey Fire that ignited on November 8, 2018. (The Report is undated but was prepared after the April 2, 2019 date when the County approved the Project.) The Report has 108 pages with a 35-page appendix "History and Context Prior to the Woolsey Fire" with Exhibits A, B and C. The Exhibit A provides a tabulation of wildfires occurring in the Santa Monica Mountains from1897 to present. The County and Real Parties filed their opposition to the Supplemental RJN on June 29, 2020.

The certified AR is "the record of proceedings related to the subject matter of the action or proceeding." PRC 21167(a).

The Court declines to receive the CDFW report re the local mountain lion population and the County's After-Action Report for the Woolsey Fire because the documents were not available before the County approved the Project. Documents that were not considered nor available for consideration at the time action was taken may not be received in a mandamus action reviewing an administrative decision. Western States, supra, at 578.

Petitioners rely on Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora (2007) 155 Cal.App.4th 1214, but that case is not apposite. In Tuolumne County the issue was whether the EIR for a shopping center was deficient because it omitted analysis of street alignments that were imposed as a condition to project approval. The appellate court held that the whole of the project was a legal issue, and, in that case, the issue could be decided by the appellate court because the documents pertinent the street alignment were included in the administrative record. That is not the case here: the reports that petitioners want the Court to judicially notice did not exist as the time the Project approval and are not part of the administrative record.

Petitioners' Second Supplemental RJN filed on September 2, 2020 seeks to introduce three pages from the California Fish and Game Commission's California Policy for Native Plants. The Native Plant Policy was adopted by the Commission on June 11, 2015. Petitioners argue that, since the SEIR concludes that the Project's impacts will be reduced to less than significant levels by transplantation, the CDFW's view about the efficacy of transportation should be considered. AR 7398; Pets.' Br. at 23.

The Native Plant Policy excerpt that Petitioners offer in their Second Supplemental Request did exist before the Board approved the Project. The issue under Western States is whether petitioners could have presented the documents "in the exercise of reasonable diligence...to the agency before the decision was made." Petitioners provide no declaration to show they exercised reasonable diligence but were unable to offer the Native Plant Policy to support their arguments to the Board of supervisors. The Court will not take judicial notice of the Native Plant Policy as petitioners have not shown their failure to provide the document to the County is excused by their failure after exercise of reasonable diligence.

Petitioners' Third Supplemental Request for Judicial Notice was filed on December 17, 2020. (The courtesy copy arrived in the courtroom on January 6, 2021.) The third RJN provides night-time photographs of a mountain lion entering the site area from undercrossing (or tunnel) No. 2 taken by an automated wildlife camera at about 3 a.m. on November 4, 2020. The six photographs are authenticated in the declaration of Chad Christensen, an employee of the Mountains Recreation and Conservation Authority (MRCA), an affiliate of the Santa Monica Mountains Conservancy. (The photos show the mountain lion on MRCA conservation land immediately west of the Project site at the location of tunnel No. 2.) Petitioners argue that the photographs do not contradict evidence in the AR but rather confirm statements in the EIR (AR 7642, 7635) that "mountain lions may occur on the Project site." County and Real Parties filed objections based on the Western States decision.

The Court declines to receive the mountain lion photographs because they were not available when the County approved the Project and therefore were unavailable to provide to the decisionmakers when the Project was approved. Western States, supra, at 578. The Court also overrules the evidentiary objections.

ISSUE ONE: COUNTY'S DECISION TO NOT RECIRCULATE THE SEIR IS SUPPORTED BY SUBSTANTIAL EVIDENCE:

Petitioners argue that recirculation of the SEIR was required under PRC 21092.1 because the new information that the County released on April 5, 2018 is "significant new information." Recirculation is required for "significant new information" under PRC 21092.1. The phrase is interpreted in Guidelines section 15088.5(a), subd. (1) and (2), reading:

> (a) A lead agency is required to recirculate an EIR when significant new information is added to the EIR after public notice is given of the availability of the draft EIR for public review under Section 15087 but before certification.... "Significant new information" requiring recirculation includes, for example, a disclosure showing that:
> (1) A new significant environmental impact would result from the project or from a new mitigation measure proposed to be implemented.
> (2) A substantial increase in the severity of an environmental impact would result unless mitigation measures are adopted that reduce the impact to a level of insignificance.

The parties dispute whether the "Supplemental Memo for Project Update and Response" that the Planning Commission staff released on April 5, 2018 is "significant new information" of the type that requires recirculation.

The Planning Commission decided that issue in the negative. On April 5, 2018, it issued an Errata to conform to Guidelines section 15088.5 that stated: "The Revised Project would not create a new significant impact or substantial

increase in the severity of previously identified effects." AR 10185. And a new Section 11 was added to the FSEIR to state: "The Final SEIR and Errata merely ... makes insignificant modifications to the adequate SEIR." AR 445.

The Court, on this point, agrees with the County. It finds the County's conclusion that the new information added by the Supplemental Memo on April 5, 2018 did not require recirculation is supported by substantial evidence.

Petitioners identify as the "significant new information" the applicant's proposed Project changes "to replace the industrial and commercial uses next to the freeway with residential uses." See, Pets.' Br. at p. 33, citing the staff's notice to Planning Commissioners. AR 10163-166. Petitioners previously raised the issue in their pre-filing letter of April 17, 2018, saying: "[T]he 'Supplemental Memo'... disclosed [] revisions to the Project ... which removed virtually all of the commercial and industrial uses in favor of more dwelling units. Such revisions effect (sic) the traffic analysis, and by extension the air quality analysis and GHG analysis, as well as the studies supporting those analyses." AR 28001.

This "significant new information" that petitioners identify was contained in a packet of documents that were released on April 5, 2018 with a "Supplemental Memo for Project Update and Response." The Supplemental Memo included the applicant's April 3, 2018 letter response to the Commission's comments from the February 21 hearing. AR 10168-10170. The applicant in its letter made these changes to the proposed development: it eliminated industrial uses and confined reduced commercial uses to centrally located mixed use locations (AR 455); it increased the dwelling units from 1,974 to 2,295 units (AR 455); it relocated 323 dwelling units from a phase 2 site to a now empty industrial site, thus building those units earlier as phase 1 development and placing them closer to traffic on the southbound I-5; and it deed-restricted low income housing for 315 units. AR 10174.

Petitioners do not support with evidence their assertion that the changes made in the Supplemental Memo require the recirculation of the SEIR. The elimination of industrial and commercial uses from the Project will not cause "a new significant environmental impact." The addition of 323 dwelling units to the Project newly approved for 2,297 dwelling units alone does not qualify as a "substantial increase in the severity of the environmental impact." Both the previous approval for 1,974 units and the new approval for 2,297 units are still within the cap of 3,150 dwelling units. The SEIR analyzes the environmental impacts for a build-out of 3,150 dwelling units.

Petitioners' argument is more narrow: petitioners argue that where the 323 new dwelling units are to be placed on the site constitutes a "substantial increase" in environmental impact because those units will be placed closer to the I-5 traffic than other housing groupings. A Project map (AR 8480) shows the locations previously designated for industrial or commercial uses where the

323 new dwelling units will be placed. All of these units are designated as "affordable units," except the eight live/work units. The 323 units will be placed in five groupings on both sides of Ridge Route Road. Their distances from the I-5 traffic is not provided, but petitioners assert that some units, apparently those at the most northly location, are 470 feet from the I-5. If so, the map shows that most of the units at that location would be at a greater distance than 470 feet from the I-5.[3]

Petitioners' argument, to narrow it further, is based on studies that have suggested that it may be hazardous to reside within 500 feet of a freeway. Pets.' Br., pp. 33-34. Petitioners cite to the Center's letter to the County dated April 16, 2018 and specifically to its page 28 where it states "... the scientific literature cited above indicates that the closer people live to a freeway, the more severe and pervasive the potential impacts are upon these persons." AR 28001. County/Real Parties point out that petitioners rely on general studies and provide no evidence that the locations for the build-out of the 323 units are significantly more hazardous than other housing scheduled for construction in phase 1.

The traffic analysis including for air quality and GHG studies has already been completed in the SEIR for the 1,974 units that were scheduled for construction in phase 1. The draft EIR discussed the air quality effects on multi-family homes within 900 to 1500 feet of the I-5's southbound lanes. AR 1898. Petitioners do not demonstrate that an increase of 323 more homes, even if some are sited at a distance of 500 feet from the I-5, is "significant new information" that requires recirculation under Guidelines section 15088.5.

Petitioners argue also that a Board resolution adopted on December 18, 2018 requesting further information about the Woolsey Fire (AR 28976) is "significant new information." (The Woolsey Fire began on November 8, 2018.) The Court does not understand this argument because the criteria for recirculation applies when "significant new information is added to the EIR after public notice is given of the availability of the draft EIR for public review." Guidelines section 15088.5(a). The SEIR errata published on April 5, 2018 could not refer to the later occurring Woolsey Fire nor change SEIR's conclusions (AR 10177) as to fire hazard or greenhouse gas emissions. After the Woolsey Fire, the Center sent letters to the County dated April 1, 2019 and February 11, 2019 (AR 28962 and 28970) to argue that the Board's finding that more wildfires are the "new normal" should be evaluated, but that information was not included in the County's new information released on April 5, 2018 and therefore could not be argued as a basis for recirculation.

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[3] The record does not disclose precisely where the 323 houses will be placed, other than in the color-coded patches found at AR 8480, so the Court is unable to determine whether any units will be built within 470 feet of the I-5 and, if so, how many. The opposing brief at footnote 16, points out that petitioners "fail to differentiate the Project's development footprint, which is the building areas, from the Project Site boundary." Opp. Br., p. 14, fn. 34.

The County's decision that the Errata that recirculation was not required because of new information released with the Supplemental Memo of April 5, 2018 is supported by substantial evidence. The Court denies relief under the second cause of action.

ISSUE TWO: THE REASONABLE RANGE OF ALTERNATIVES PRESENTED IN THE SEIR IS DEFICIENT FOR FAILING TO CONSIDER AN ALTERNATIVE THAT WOULD PRESERVE THE GRASSHOPPER CREEK HABITAT:

CEQA requires the lead agency to consider a reasonable range of alternatives to evaluate whether an alternative to the Project exists that will reduce or better mitigate the significant environmental impacts of a project. PRC 21002; Guidelines section 15126.6. An EIR is to "ensure that all reasonable alternatives to proposed projects are thoroughly assessed" by the decision-makers. Laurel Heights Improvement Association v. Regents of the University of California (1988) 47 Cal.3d 376, 400.

The SEIR's alternate analysis for the Project does not include an alternative that would protect Grasshopper Creek (AR 2403-2426), and for that reason is fatally flawed.

The applicant for the 1992 Project submitted "a land plan ... that avoided [filling-in] the creek bottom that runs through the middle of the project." "This land plan placed development on one side of the creek...to minimize grading. This plan was attempting to avoid impacting the creek habitat...." AR 2403 (Project DSEIR).

In re-presenting the Project in 2015 the current applicant discarded any consideration of this "creek avoidance" alternative at the screening stage. AR 2403. The DSEIR considered four alternatives: no project; the proposed Project; no industrial uses; and a development limited to Phase 1. AR 24189 (CDFW's letter June 15, 2017). Objectors criticized the SEIR for its failure to include a "creek avoidance' alternative in its alternatives discussion. AR 7492 (letter from Santa Monica Mountains Conservancy of May 22, 2017; AR 24189 (CDFW letter of June 4, 2017; and AR 7537 (petitioners' letter).

An applicant has considerable leeway to determine the range of reasonable alternatives, but that discretion is governed by the "rule of reason" and any exclusion of a reasonable alternative for economic reasons must be justified by substantial evidence. Preservation Action Council v. City of San Jose (2006) 141 Cal.App.4th 1336, 1352-57. The applicant's exclusion of the "creek avoidance" alternative is not supported by substantial evidence in the record.

The inclusion of a "creek avoidance" alternative in a range of alternatives that should be considered is appropriate for many separate reasons. The Court includes these reasons for its ruling to require the consideration of a "creek avoidance" alternative in a reasonable range of alternatives. The "creek avoidance" alternative would: (1) preserve Grasshopper Creek with its regionally

significant wildlife habitat; (2) avoid as a mitigation requirement a need to relocate from Grasshopper Creek its population of special interest species Western spadefoot toad; (3) avoid as a mitigation requirement a need to relocate the rare plant species found in the Grasshopper habitat; (4) avoid adverse impacts to the Castaic Lake recreational lands that are east of the site (see CDFW letter, AR 7397); and (5) reduce substantially the grading and earth movement needed to fill-in Grasshopper Canyon (with the grading own adverse impacts on air quality and GHG emissions).

That an alternative exists that may protect the habitat of an amphibian and plant species of special concern in itself requires a consideration of the "creek avoidance" in a reasonable range of alternatives. Whether that alternative would meet the major economic objectives of the Project and whether it would protect the existing habitat for species of special concern cannot be predicted, but those issues should be considered in an alternatives analysis. The exclusion of a "creek avoidance" alternative requires that the approvals for the Project be voided so that a more appropriate alternatives analysis can be provided.

County and Real Parties give four reasons for screening out any consideration of a "creed avoidance" alternative. (Opp. Br., pp. 27-33; see also discussion in the SEIR. AR 7561, 7500, 7562, 7570.) These specific reasons, in the Court's view, demonstrate affirmatively the need to analyze the "creek avoidance" alternative, rather than eliminating it from an alternatives analysis.

The County and Real Parties argue that the "creek avoidance" alternative will nonetheless require the excavation of 10 million cubic yards of soil to buttress the building sites. That argument concedes these benefits: a reduction in the earth excavation of 23 million cubic yards, plus the preservation of the Grasshopper Creek habitat; this reason, therefore, fails to justify the screening out of the "creek avoidance" from the alternatives analysis. The applicant, secondly, argues that the "creek avoidance" alternative would require the elimination of the industrial and commercial uses in the Project. That depends on the development plan. The 1992 Project included 50 acres of industrial uses, as well as a greater number of housing units, and would still preserve the Grasshopper Creek habitat. This argument, however, was mooted when the applicant on April 3, 2018 eliminated the industrial and commercial uses. AR 10168-69 (applicant letter to the Planning Commission). This reason surely does not justify an alternative analysis that screens out the "creek avoidance" alternative. The applicant, thirdly, argues that the "creek avoidance" alternative would require that Grasshopper Creek be spanned by utility pipelines to serve housing on both sides. Whether that creates a possibility of "accidental spills" may be evaluated in an alternatives analysis; the possibility, however, is speculative, and does not justify any screening out a "creek avoidance" alternative. The final reason given for not studying a "creek avoidance" alternative is that it would reduce the Project's developable acreage. That

result would not necessarily make a "creek avoidance" alternative infeasible, and it is not, therefore, a basis to screen out a "creek avoidance" alternative.

The four reasons given by the County for screening out the "creek avoidance" alternative, whatever their merits, are not supported by substantial evidence in the record.

Given that Grasshopper Creek and its riparian habitat is a dominant physical feature of the site and connects to the state recreational lands east of the site, the County's failure to consider an alternative that would preserve Grasshopper Canyon is a failure to provide an EIR to serve as an informational document for the decision-makers. That role is mandated for an EIR in Guidelines section 15151. That section reads:

> An EIR should be prepared with a sufficient degree of analysis to provide decisionmakers with information which enables them to make a decision which intelligently takes account of environmental consequences.

Without necessarily finding a violation of section 15151, the Court finds that the County's exclusion of the "creek avoidance" alternative from the range of alternatives is not supported by substantial evidence. That failure is a violation of Guidelines section 15126.6 and, therefore, of PRC 21002. The failure invalidates the approvals given for the Project and requires the submittal of an amended EIR that includes an appropriate analysis section for consideration by the County's decisionmakers.

ISSUE THREE: THE BASELINE AND MITIGATION MEASURES PROVIDED IN THE SEIR TO PROTECT THE WESTERN SPADEFOOT TOADS ARE NOT SUFFICIENT UNDER CEQA:

A project has a significant effect on the environment if it will eliminate a species of special concern from the Project site. Guidelines 15065. Section 15065(a) provides:

> A lead agency shall find that a project may have a significant effect on the environment ... where there is substantial evidence ... that any of the following conditions may occur (1) The project ... threaten[s] to eliminate a plant or animal community ....

In that event, section 15065(b)(2) requires the project proponent to:

> implement mitigation requirements relating to such species and habitat pursuant to an approved habitat conservation plan or natural community conservation plan.

The Western spadefoot toad ("WST") is a California species of special concern. AR 3665 (CDFW letter); see AR 3644 defining "species of special concern." A self-sustaining WST population exists at the Project site in and adjacent to Grasshopper Canyon. AR 3689. The WST habitat in Grasshopper

Creek and nearby seasonal wet areas will be eliminated by the Project. Grasshopper Canyon itself will be filled in and levelled for building sites. The DSEIR acknowledges the Project will destroy the WST habitat along Grasshopper Canyon.

> Since this Grasshopper Canyon population is one of few known populations in the region and Project impacts would result in the loss of these populations (or a substantial portion thereof), impacts to this species would be considered significant... AR 1943.

The County has approved Mitigation Measure 5.2-9 to relocate the WST population to a new habitat that the applicant is to create (at an as yet unspecified location) and monitored for five years.

The parties dispute, first, the sufficiency of the baseline biological surveys for the site, and, thus, dispute not only the number of individuals in the WST community that are to be relocated but also the number and characteristics of the breeding pools that will have to be created to sustain the population in a new habitat. The applicant's Biological Technical Report, Appendix D relies on a single biological survey for its count of WST: "The western spadefoot was observed incidentally during previous amphibian surveys, and in the focused surveys conducted for the species in 2014 (Bon Terra 2000b, 2014c)." AR 1943. Petitioners argue the BonTerra's surveys underestimate the WST population on the site because the surveys were taken during draught years when the WST numbers were reduced.

The parties dispute, secondly, that the mitigation measures ensure that the relocation of the WST to a new habitat will be successful. The Biological Technical Report asserts that "[i]mplementation of Mitigation Measure 9 [MM 2.5-9] would reduce this impact [on the WST] to less than significant level." Id. Petitioners argue the mitigation measures are inadequate to assure that result.

The mitigation measures approved by the County to mitigate the loss of WST habitat will require that the existing WST population on the project site be captured and relocated to new WST habitat. The DSEIR promises:

> "Implementation of MM 5.2-9 which requires a western spadefoot relocation program, would reduce this impact to a less than significant level through translocation of individuals to suitable habitat. This measure would result in substantial avoidance of direct impacts to the western spadefoot and as a result the western spadefoot is expected to persist in the region following project implementation." AR 1943.

The actual mitigation measure MM 2.5-9 reads in its entirety:

> A relocation program for western spadefoot toad will be conducted prior to construction during the spring at the height of the breeding season for

this species....Results of the relocation program shall be provided to the CDFW and the LACDRP.

(a)Prior to implementing the Spadefoot Relocation Plan, a focused survey will be conducted within the prior appropriate season. If any additional ephemeral ponds are determined to be occupied besides those identified in recent surveys (i.e.2015), the Spadefoot Relocation Plan will be modified to include replacement of the additional occupied pond as well as others.

(b)The intent of the Relocation Plan is to capture and relocate as many western spadefoot toads as possible. Western spadefoot toads shall be relocated on or off site to an area of suitable habitat, as reviewed by the CDFW and the LACDRP. The relocation site shall be of similar (or better) quality as the habitat within the project impact area where the western spadefoot toads are captured. If no suitable habitat is available for relocation, suitable habitat shall be created.

Petitioners, to reiterate, argue that the WST relocation project violates CEQA because (1) the baseline definition of the WST population understates the extent of the habitat of the species on the Project site; and (2) the mitigation plan to relocate the existing WST population is unformulated and therefore does not assure the WST will be successfully introduced at another location.

These arguments, in the Court's view, are well taken.

The applicant has prepared a detailed relocation plan for the Western spadefoot toad. There is the Relocation Plan itself (AR 7831-7846) and a feasibility analysis (AR 8385-8417). The Relocation Plan specifies the steps that are to be taken to remove the WST population (including larvae, tadpoles and mature specimens) from their existing habitat and to replant them in or near pools that have been constructed to match the dimensions and depths of the pools from the original habitat and inoculized with soils from their original habitat. The pools would be situated in areas having similar vegetation to the original habitat. The feasibility study identifies six sites that could be constructed to recreate the original habitat (two at the site's north end and two on the adjacent state recreational area). The pools apparently are to be replenished by rainfall only.

The Relocation Plan, however, is designed to duplicate the conditions for the WST habitat that were identified in the 2014 BonTerra Psomos focused survey. That survey and earlier incidental surveys were allegedly taken in drought years, and, therefore, as petitioners argue, underestimate the extent of the WST habitat and the number of WST individuals. (In drought years the adult WST may stay underground in hibernation.) The parties have not, so far as the Court can ascertain, provided the rainfall data for the years in which the surveys were taken nor established whether those years had below average rainfall. The

petitioners, however, assert that surveys taken in 2014 and general surveys taken in 2004 and 2005 were drought years. This issue was raised during the public comment periods, and the Court is unable to find evidence in the record to refute that the surveys were taken in drought years. The issue bears on whether the implementation of MM 2.5-9 will reduce the impact on the WST to less than significant. Petitioners argue that there are 8 to 10 seasonable pools in which the WST have been observed to breed and where larvae and tadpoles live, but the Relocation Plan intends to construct only three breeding pools. If petitioners are correct, Relocation Plan is inadequate to maintain the WST population.

The County's biologist, Joseph Decruyenaere, criticized the SEIR, telling the Planning Commission: "Mitigation for the spadefoot needs to address impacts to all 8 previously documented breeding pools, not just the two that have been observed since 2014." AR 25823. The CDFW in its June 15, 2017 letter spotted the same problem, telling the Planning Commission: "the Department considers the 2014 surveys not adequate for determining the extent of the western spadefoot toad." AR 7395.

The Errata later attempted to address this issue by requiring additional surveys to determine the extent of the WST habitat. The Errata (AR 8330) provides:

> Prior to implementing the Spadefoot Relocation Plan, a focused survey will be conducted within the two prior appropriate seasons prior to the issuance of a grading permit. If any additional ephemeral ponds are determined to be occupied besides those identified in recent surveys (i.e. 2015), the Spadefoot Relocation Plan will be modified to include replacement of the additional occupied pond as well as others.

The Relocation Plan as a mitigation measure is intended to reduce the impacts of the destruction of the WST habitat to less than significant. This requires that the habitat that is to be destroyed must be measured in a manner that obtains its maximum dimensions so that those potential dimensions may be realized in the new circumstances at the site where the WST is relocated. The applicant's focus on its 2014 (or 2015) survey is inadequate because it ignores information indicating that with average or greater than average rainfall the extent of the WST habitat is larger with more breeding pools to support a larger WST population. The Errata, in other words, is inadequate because it establishes a restriction on the number of breeding ponds that will be duplicated at the new WST habitat, e.g. those identified in the 2014 survey plus any identified in "two prior appropriate seasons" before a grading permit is issued. This restricts the extent of a recreated WST colony because it establishes fewer than the maximal number of breeding pools. What happens if the applicant establishes three breeding pools based on the 2014 survey and a year later there is deluge rainfall? The site unlike Grasshopper Canyon may not naturally expand the

number of breeding pools. The WST has survived in Grasshopper Canyon through wet years and draught years. The evidence indicates Grasshopper Canyon has the potential to increase its number of breeding pools in wet years and thus to support a larger WTS population. This potential will be lost if the applicant mechanically duplicates the number of breeding pools that it finds from surveys taken before the grading of Grasshopper Canyon begins.

Concluding on the first issue, the applicant has not established a baseline for the WST habitat that must be re-created to preserve the WST population presently existing on the Project site. The mitigation measure for the WST is inadequate for that reason.

On the second issue, petitioners argue the relocation plan provided in MM 5.2-9 is inadequate. While the MM 5.2-9 requires the newly created habitat be monitored for five years the steps that will be taken to ensure success are unspecified. (The amphibian relocation plan is described in the SEIR, Appendix C (Biological Resources Plan) at AR 7839.) The CDFW also raised objections to the relocation plan. AR 7390-7405 (CDFW letter of June 15, 2017). The CDFW notes the applicant has not identified a specific site for relocation and does not promise that successful transplantation can be accomplished. AR 7396. The CDFW, as a trustee agency, does not have authority to approve or disapprove a project; however, it is required to be consulted and may comment as to projects that involve fish and wildlife, rare and endangered native plants, wildlife areas and ecological reserves.

The promise the applicant will create a habitat in which the transplanted WST population will flourish is deferred mitigation. The parties concede that the success of an alternate habitat is uncertain and will require on-going attention during and maybe beyond the monitoring period. The standard governing the acceptability of deferred mitigation measures is provided in Guidelines section 15126.4(a)(1)(B), reading:

> Where several measures are available to mitigate an impact, each should be discussed and the basis for selecting a particular measure should be identified. Formulation of mitigation measures shall not be deferred until some future time. The specific details of a mitigation measure, however, may be developed after project approval when it is impractical or infeasible to include those details during the project's environmental review, provided the agency (1) commits itself to the mitigation; (2) adopts specific performance standards the mitigation will achieve, and (3) identifies the type(s) of potential action(s) that can feasibly achieve that performance standard that will be considered, analyzed, and potentially incorporated in the mitigation measure.

The Court does not find a specific response to the contention that the applicant's deferred mitigation for the loss of the WST habitat does not provide sufficient detail, lacking particularly a specified location for a successful

reconstruction of the Grasshopper Canyon WST community. The applicant relies on the September 13, 2018 letter from Glenn Lukos Associates (the Tony Bomkamp letter) to supply substantial evidence that the applicant will succeed in transplanting the WST population. The Bomkamp letter does not make any commitment; it merely points to the process described in the SEIR (AR 7839) and says Bomkamp personally has been involved in establishing "seasonal pools for western spadefoot toads" in Orange County, without providing further detail. AR 16011.

More is required by Guidelines section 15126 for mitigation measures that are deferred. The MM standards required for future projects are that the mitigation measure itself "inform [the lead agency] what it is to do and what it must accomplish, and they commit [the agency] to mitigating impacts before proceeding." See, Center for Biological Diversity v. Department of Fish & Wildlife (2015) 234 Cal.App.4th 214, 240, 245. The deferred mitigation to create a new habitat for the WST community is inadequate in detail and commitment. The mitigation measures to assure relocation of the WST population at the Project site does not comply with CEQA requirements.

ISSUE FOUR: THE MITIGATION MEASURES PROVIDED IN THE SEIR TO PROTECT THE RARE PLANTS ARE NOT SUFFICIENT UNDER CEQA:

Five special status plant species have been identified during surveys to exist at various locations on the Project site. These are the round-leaved filaree, the club-haired mariposa lily and the slender mariposa lily (collectively lilies); the paniculate tarplant, and the southwestern spiny rush. AR 1926-29. As special status plant species, a destruction of their habitat must be mitigated to less than significance. Guidelines 15065(a)(1). The loss of these plants through the site development is to be mitigated by the transplantation of all existing individual plants as well as seeds or bulbs that are found. The FSEIR states:

> A less than significant impact would be achieved through implementation of MM 5.2-2, MM 5.2-3 and MM 5.2-11... which require a Riparian Restoration Program be developed and approved by USACE [US Army Corps of Engineers], CDFW, and LACDRP prior to issuance of grading permits, ... AR 8564

MM 5.2-4 specifies procedures for the lilies. Seeds are to be collected and bulbs excavated for transplantation to a mitigation site and established as a self-sustaining population. A Biological Monitor is to prepare a Mitigation Plan for approval of LACDRP and is to oversee its implementation. AR 8568.

MM 5.2-5 specifies procedures for the round-leaved filaree, paniculate tarplant, and southwestern spiny rush. The Project applicant is to prepare procedures to collect and store the plants and seeds, create an alternate site to include soil preparation, irrigation, methods to control competing plants at the new site and prepare a list of "County-approved success criteria."

The CDFW challenges the adequacy of the mitigation measures, pointing out that the sites for transplantation are not selected, that the procedures to accomplish transplantation are not specified, and that success criteria are yet to be determined. CDFW believes that the rare plants cannot be transplanted on the site as the available patches after development will be fragmented. The CDFW is likewise dubious about transplantation off-site:

> The Department has concerns when the DSEIR states it will transplant species off-site as this implies other areas will be subject to impact by this action. This additional impact would then need mitigation as this ecosystem is now being altered. AR 7398.

CDFW was concerned that the mariposa lilies might not survive transplantation, saying it was unaware of any population created by seeding or translocation having been successful "at demonstrating long-term self-sustaining population."

CDFW expressed dissatisfaction with the generality of the mitigation measures, saying:

> MM7 [now MM 5.2-4 and -5] does not allow the Department to comment on the appropriateness of the location, technique, success criteria, monitoring methods, density, length of time monitoring is required, or the method proposed for long-term protection and funding. AR 7399.

The deficiencies identified in the CDFW letter demonstrate that the deferred mitigation measures for transplantation of the rare plants do not satisfy the CEQA standards set forth in Guidelines section 15126.4(a)(1)(B).

The applicant relies on the Glenn Lukos Associates (Bomkamp) letter to supply the evidence that deferred mitigation measures for the relocation of the six plant varieties are guidance enough. AR16015-18. Bomkamp's letter advises that there are various locations where the soil conditions are suitable to re-establish the individual plant varieties, but, beyond that, no information is provided to address the deficiencies identified by the CDFW. Further detail is required for the mitigation measures proposed for the rare plants in order to mitigate the destruction of their habitat to a less than significant threshold.

The mitigation measures for successful relocation of the rare plants found at the Project site do not comply with CEQA requirements.

ISSUE FIVE: THE SEIR'S CONCLUSION THAT THE PROJECT LIKELY WILL NOT CREATE A NEW IMPEDIMENT TO MOUNTAIN LION USE OF UNDERCROSSINGS ADJACENT TO THE PROJECT IS SUPPORTED BY SUBSTANTIAL EVIDENCE:

The term "Sierra Madre-Castiac Connection" is used to describe a "habitat linkage" between the Los Padres National Forest and the Angeles National Forest. AR 31172-73. These protected forest areas are separated by the I-5. The I-5 due to its structure and high traffic volume has been a barrier to the passage by animal species from one national forest to the other. Petitioners

argue that the I-5 barrier has prevented mountain lions from passing readily between protected forest environments for breeding purposes and, thus, furthered a loss of genetic diversity in the species.

There are three tunnels (or undercrossings) beneath the southbound lanes of the I-5 along frontage that parallels the 3.5 mile Project site. The tunnel locations are described with photographs in the SEIR Appendix D (Wildlife Crossing Assessment Memo). AR 7847-7859.

Petitioners' narrow argument is that the Project will impede the passage of special status animals, and in particular mountain lions, crossing under the southbound lanes of the I-5 once the Project is built out because animals then will be deterred from entering the Project site to use the existing tunnels adjacent to the Project's western edge. There are three undercrossings opposite the Project site. Their locations are shown on a map overlay at AR 7852. Undercrossing No. 1 is opposite the extreme south point of the site; undercrossing No. 2 is opposite the mid-point of the site; and undercrossing No. 3 is opposite the north end of the site. These three tunnels are apparently used to provide utility crew access; they were not built as wildlife corridors. Animals travelling through these particular tunnels (going from east to west) would cross under the southbound I-5 lanes to an island of undeveloped land between the I-5's northbound and southbound lanes. There are tunnels under the northbound lanes, but those tunnels are not directly opposite to tunnels Nos. 2 and 3 to provide a straight route under both branches of the I-5. AR 7409.

There is a fourth tunnel that is five miles north of the Project site at Templin Highway. This undercrossing is a double lane public highway. The I-5's northbound and southbound at this point are joined. The Templin Highway passes entirely under the I-5's eight lanes of traffic. An animal using the Templin highway undercrossing would have access to a national forest on both sides of the I-5.

Undercrossing No. 3 is at the southern end of the Sierra Madre-Castiac Connection. The Connection runs for 17 miles northward of the Project site.

The County in its FSEIR impliedly concluded that tunnels Nos. 1, 2 and 3 were not being used by large animals and that, therefore, the build-out of the Project would not create a new impediment to the movement of mountain lions between the two national forests separated by the I-5. The Court finds the County's determination is supported by substantial evidence. The Court, therefore, rejects petitioners' argument that the Project will have a significant adverse effect on the range of mountain lions.

The premise of petitioners' argument is that animals of special concern—mountain lions being the paradigm--use or may in the future use the undercrossings to traverse the I-5 in search of a broader mating pool. The

Project, they argue, will foreclose this opportunity to enhance genetic diversity, and, therefore, would limit the range and eventually the survival of any local species imperiled by a lack of genetic diversity. Petitioners rely on Guidelines section 15065 in their argument. Section 15065 provides that a project will a significant effect if it "substantially reduce(s) the number or restrict(s) the range of an endangered, rare or threatened species."

Petitioners' argument finds support in the record from the CDFW's letter of June 15, 2017 (AR 7390-7405) which in Comment #3 (DSEIR's "Analysis of Wildlife Crossing and Use of Site") states that:

> The South Coast Wildlands Missing Linkages Report7 (2005) identified the Project area and adjacent crossings in the linkage design [for the Sierra Madre-Castiac Connection] and considers this area as highly suitable for American badger, mule deer, pacific kangaroo rat, California spotted owl, and western pond turtle—the latter two being species of special concern. AR 7394.

The CDFW recommended that "the DSEIR include studies that track wildlife dispersal, including that for large mammals, across the Project site and across the three under-crossings discussed above, and discuss how the Project will affect the use and dispersal patterns." Id.

The applicant followed the CDFW's recommendation, but further studies did not provide support for petitioners' arguments. The further studies included site visits by experienced biologists employed by Bon Terra Psomos, the applicant's consultant, and the study of aerial photographs to identify terrain features and vegetative covering that would encourage animal use. Only at undercrossing No. 4, the underpass at Templin Highway five miles north of the Project site, did the biologists locate evidence of large animal (mule deer) presence.

The use of the undercrossings by large animals was thoroughly discussed in the SEIR and a response was made to the CDFW letter in the FSEIR dated January, 2018. AR 7409-11. The Bomkamp letter of September 13, 2018 addressed the studies as to whether the tunnels had provided significant wildlife corridors. AR 16008-10. The County had the best available information on the topic when it approved the Project in April 2019. The County's implied determination that the Project will not interfere with mountain lion crossings of the I-5 is supported by substantial evidence.

PREPARATION OF JUDGMENT AND ORDERS:

The Court denies petitioners' challenge to the Project based on alleged the SEIR having an inadequate analysis of aesthetics (viewshed) impacts; an inadequate disclosure and analysis of the air quality and public health impacts; and an inadequate wildfire analysis.

The Court shall enter judgment for petitioners on the first cause of action based on its rulings on Issues 2, 3 and 4 above that find the SEIR to be inadequate. The Court shall enter judgment for the County and Real Parties on the third cause of action based on its ruling on issue 3. Petitioners did not submit briefs in support of their second and fourth causes of action, and the Court shall enter judgment for the County and Real Parties on those causes of action.

The Court directs the petitioners to prepare and lodge a judgment and any orders appropriate to implement this Statement of Decision within ten days.

The Court Clerk shall enter and serve the Statement of Decision on the parties by U.S. Mail this date.

JANUARY 11, 2021

RICHARD L. FRUIN, JR.
Superior Court of California
County of Los Angeles