Holland & Knight

50 California Street, Suite 2800 | San Francisco, CA 94111 | T 415.743.6900 | F 415.743.6910
Holland & Knight LLP | www.hklaw.com

Daniel R. Golub
+1 415-743-6900
Daniel.Golub@hklaw.com

November 29, 2021

Via email: cityattorney@sfcityatty.org
David Chiu
City Attorney
City Hall
1 Dr. Carlton B. Goodlett Place, Room 244
San Francisco, CA 94102-4689

Via email: Board.of.Supervisors@sfgov.org
Angela Calvillo
Clerk of the Board of Supervisors
City Hall
1 Dr. Carlton B. Goodlett Place, Room 244
San Francisco, CA 94102-4689

Re: **450-474 O'Farrell Street/532 Jones Street Project Application**
Case No. 2013.1535EIA-02

Dear Mr. Chiu and Ms. Calvillo:

Holland & Knight LLP[1] has been retained to represent Fifth Church of Christ, Scientist (the "Applicant") to protect its rights under California housing law for the 450-474 O'Farrell Street/532 Jones Street Project. The project includes "316 group housing units (632 beds), 172,323 square feet of residential use, including amenities and common areas, 4,900 square feet of open space, 6,023 square feet of restaurant/retail space, and 9,924 square feet for religious institution use (i.e., replacement of the existing church)" (the "Project"). (Addendum 2 to Environmental Impact Report ("Addendum 2"), June 23, 2021, at 3.) As we described in our many prior communications in the record, the Project is fully protected under numerous state housing laws, including but not limited to the Housing Accountability Act ("HAA"), the Housing Crisis Act (also known as SB 330), and the Permit Streamlining Act. These laws were enacted and revised to meet the state's devastating housing supply crisis and to ensure the prompt approval of housing developments such as the Project.

As you are aware, the California Department of Housing and Development ("HCD") wrote to the City and County of San Francisco ("City") on November 22 to express HCD's concern about the Board of Supervisors' ("Board") October 5 "effective denial" of this Project, and in particular the practice of "prior Planning Commission approvals of significant housing projects being overturned by the … [Board] – without any documented findings." We write to further

[1] The Applicant is also represented by David Cincotta as well as Storzer & Associates, P.C. in connection with the Religious Land Use and Institutionalized Persons Act (RLUIPA) and other federal laws. This letter focuses on violations of California housing law, but the Applicant also reserves its right to enforce RLUIPA and other federal laws.

emphasize why the Board's decision violated state housing law and why this violation cannot be remedied by *post hoc* rationalizations produced long after the Board made its decision.

The Planning Commission issued the approvals for the Project on June 24, 2021, as the HAA and other state laws required. However, the approvals were appealed to the Board of Supervisors on July 21, 2021. Section 308.1 of the San Francisco Planning Code required the Board to decide the appeal "not more than 90 days from the date of filing of the appeal." The code further provides that if no final decision is rendered within 90 days, the Planning Commission decision is deemed approved. On October 5, 2021, the Board of Supervisors voted to approve a motion to conditionally grant the appeal. The 90-day deadline for a final decision then lapsed on October 19, 2021. Despite this, we understand that City staff is still preparing further "findings" intended to constitute part of the Board's decision, with the expectation that these later-prepared findings would then retroactively become part of the Board's decision, despite occurring long after the code-mandated timeline has expired. This would be an *ultra vires* act in violation of the Planning Code. If the Board has yet to formally act to deny the approval, then the Planning Commission's approval of the Project is now deemed approved. (Obviously, we would welcome the City confirming that this is the case.) If not, however, then the only alternative consistent with the Planning Code is that the Board's October 5, 2021 motion – and not any later-adopted findings – comprises the final decision of the Board subject to review in mandamus.

Even if the City's own Planning Code did not require this result, it would be required under well-established principles of law. "Findings are not supposed to be a *post hoc* rationalization for a decision already made." Bam, Inc. v. Bd. of Police Commissioners (1992) 7 Cal.App.4th 1343, 1346; *see also* T-Mobile South, LLC v. City of Roswell, Ga. (2015) 574 U.S. 293, 304, n. 3 (a court reviewing a local agency action must review findings "to ensure that those reasons are not post hoc rationalizations"). In any litigation challenging the unlawful disapproval of the Project, a reviewing court will only look to the decision that the Board actually made on October 5, and the record that was before the Board when it made that decision. *See, e.g.,* La Costa Beach Homeowners' Assn. v. California Coastal Com. (2002) 101 Cal.App.4th 804, 819 (unless findings "reflect[ed] in writing the rationale that the Commissioners and staff articulated on the record at the . . . public hearing," they are impermissible *post hoc* rationalizations). "[R]evised findings are meant to capture actions, not change them." San Diego Navy Broadway Complex Coalition v. California Coastal Com. (2019) 40 Cal.App.5th 563, 577, n. 8.

As the U.S. Supreme Court held when striking down the Trump Administration's unlawful attempt to end the DACA program, in litigation an agency is "limited to the agency's original reasons," and the position an agency takes in litigation "'must be viewed critically' to ensure that" the agency's decision "is not upheld on the basis of impermissible 'post hoc rationalization.'" Dep't of Homeland Sec. v. Regents of the Univ. of California, __ U.S. __, 140 S. Ct. 1891, 1908 (2020).[2] California courts have been just as consistent in affirming this principle. The California Court of Appeal, for example, recently refused to consider *post hoc* rationalizations supplied by California Coastal Commission staff that did not conform precisely

[2] Chief Justice Roberts authored this opinion for the Court, joined by Justices Ginsburg, Breyer, Sotomayor and Kagan.

to the stated reasons articulated by the Commissioners at the time the Commission made its decision. Friends, Artists And Neighbors Of Elkhorn Slough v. Cal. Coastal Commission, No. H048088, H048409 (Cal. Ct. App. Nov. 15, 2021) (attached hereto).

As outlined in our prior letters, the Project is subject to protections from several state housing laws. With respect to the HAA in particular, no Board or staff member at the October 5 hearing disputed – because it cannot be disputed – that the Project is a "housing development project," as defined in Gov. Code § 65589.5(h)(2). *See, e.g.*, Yes In My Back Yard v. City of Simi Valley, No. 56-2020-00539590-CU-WM-VTA (Ventura Cty. Super. Ct. May 17, 2021) (attached hereto). It has also always been undisputed that the Project complies with "applicable, objective general plan, zoning, and subdivision standards and criteria, including design review standards, in effect at the time that the application was deemed complete." Gov. Code § 65589.5(j)(1). This is true as a matter of fact but also as a matter of law. The application was deemed complete on February 28, 2020 under the Permit Streamlining Act, and the City did not provide written documentation identifying inconsistencies with any objective standards within the mandatory 60-day deadline, and so the Project is now deemed to satisfy the standards as a matter of law. *See* Gov. Code § 65589.5(j)(2); *cf.* Ruegg & Ellsworth v. City of Berkeley (2021) 63 Cal. App. 5th 277, 327 (enforcing nearly identical "deemed to satisfy" requirement in Gov. Code § 65913.4). Therefore, the Board was only lawfully permitted to disapprove the Project if it made the public health and safety findings in Gov. Code § 65589.5(j)(1), which the Board did not do, and in any event could not have done. To the extent any of this is subject to debate, recent published case law has confirmed that the HAA will "be interpreted and implemented to 'afford the fullest possible weight' to the approval of housing." California Renters Legal Advoc. & Educ. Fund v. City of San Mateo (2021) 68 Cal. App. 5th 820, 894 (*quoting* Gov. Code § 65589.5(a)(2)(L)).

Moreover, the City conducted eight hearings on the Project, in direct violation of the Housing Crisis Act and Permit Streamlining Act. Section 65905.5(a) of the Government Code plainly states in mandatory terms that the City "shall not conduct more than five hearings….in connection with the approval of that housing development project" and that the "city and county shall consider and either approve or disapprove the application at any of the five hearings allowed under this section consistent with the applicable timelines under the Permit Streamlining Act." It was only after the mandatory limit in state law had been exceeded that the Board voted to disapprove the Project, and the disapproval is for this additional reason an unlawful action.

At the October 5 hearing, the Board disapproved the Project on the basis of plainly subjective considerations, without making the findings required by the HAA, and therefore the Board violated the HAA. *See* California Renters, 68 Cal. App. 5th at 883. The Board's October 5 decision – the only determination to disapprove the Project that was made within the mandatory timeline in the City's own Planning Code – violated state law.

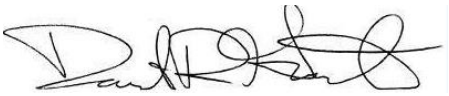
We note that our client, of course, would be deeply disappointed if it is necessary to seek judicial relief in order to enforce state housing law as well as federal law. In any litigation, the Applicant will seek to recover its attorneys' fees, as well as to recover applicable fines and penalties. *See* Gov. Code § 65589.5(k). We would welcome exploring alternatives to litigation. However, absent hearing from you immediately that this is of interest, we are likely to take immediate steps

to enforce the law. In the interim, please observe a "litigation hold" preserving all city records and communications related to the Project, and please be advised the City is under a mandatory duty to prepare the administrative record at its own cost within 30 days that any petition for mandate is served. *See* Gov. Code § 65589.5(m).

Please let us know as soon as possible if you would like to discuss.

Sincerely yours,

HOLLAND & KNIGHT LLP



Daniel R. Golub

DRG:lmw

cc: Divya Sen, Department of Housing & Community Development (Divya.Sen@hcd.ca.gov)
David Murray, Fifth Church of Christ, Scientist (david.murray08@gmail.com)
Ela Strong, Fifth Church of Christ, Scientist (ela@elastrong.com)
David Cincotta, Law Office of David Cincotta (davidc@dpclawoffices.com)
Robin Pick, Storzer Law (pick@storzerlaw.com)
Roman Storzer, Storzer Law (storzer@storzerlaw.com)
Sonja Trauss, YIMBY Law (sonja@yimbylaw.org)

Attachment 1 – Friends, Artists And Neighbors Of Elkhorn Slough v. Cal. Coastal Commission, No. H048088, H048409 (Cal. Ct. App. Nov. 15, 2021)

Attachment 2 - Yes In My Back Yard v. City of Simi Valley, No. 56-2020-00539590-CU-WM-VTA (Ventura Cty. Super. Ct. May 17, 2021)

ATTACHMENT 1

Filed 11/15/21 Friends, Artists And Neighbors Of Elkhorn Slough v. Cal. Coastal Commission CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

FRIENDS, ARTISTS AND NEIGHBORS OF ELKHORN SLOUGH et al.,

Plaintiffs and Appellants,

v.

CALIFORNIA COASTAL COMMISSION,

Defendant and Respondent;

HERITAGE/WESTERN COMMUNITIES, LTD, et al.,

Real Parties in Interest and Respondents.

H048088, H048409
(Monterey County
Super. Ct. No. 18CV001000)

I. INTRODUCTION

Respondents Heritage/Western Communities, Ltd and Heritage Development Corporation (collectively, Heritage) sought to develop property in Monterey County. Heritage obtained the requisite government approvals, including a coastal development permit, from Monterey County.

Appellant Friends, Artists and Neighbors of Elkhorn Slough (FANS) filed an appeal with respondent California Coastal Commission (Coastal Commission) regarding Monterey County's approval of the coastal development permit. Coastal Commission staff prepared a report recommending denial of Heritage's coastal development permit

application primarily due to the lack of adequate water supply. At a public hearing on November 8, 2017, the Coastal Commission expressed disagreement with staff's recommendation and approved Heritage's permit application. Commission staff thereafter prepared written revised findings to support the commission's action, and those revised findings were later adopted by the commission on September 13, 2018.

Appellants FANS and LandWatch Monterey County (LandWatch) filed a petition for writ of mandate in the trial court, contending that the Coastal Commission's approval of the coastal development permit to Heritage violated the California Environmental Quality Act (CEQA; Pub. Resources Code, § 21000 et seq.)[1] and the California Coastal Act of 1976 (Coastal Act; § 30000 et seq.). The court denied the petition and entered judgment against FANS and LandWatch.

On appeal, FANS and LandWatch contend that the trial court erred in denying the petition for writ of mandate and the Coastal Commission's approval of Heritage's coastal development permit should be set aside, because the Coastal Commission failed to complete the requisite environmental review before approving Heritage's permit application.

For reasons that we will explain, we determine that the Coastal Commission's environmental review was incomplete at the time it approved Heritage's coastal development permit application on November 8, 2017. This failure to complete the requisite environmental review before approving the application requires that the approval be vacated. We will therefore reverse the judgment and direct the trial court (1) to vacate its decision denying the petition for writ of mandate, (2) to enter a new judgment granting the petition against the commission, and (3) to issue a writ of mandate directing the commission to vacate its approval of the coastal development permit.

---

[1] All further statutory references are to the Public Resources Code unless otherwise indicated.

II. OVERVIEW: COASTAL DEVELOPMENT PERMITS

"The Coastal Act 'was enacted by the Legislature as a comprehensive scheme to govern land use planning for the entire coastal zone of California. The Legislature found that "the California coastal zone is a distinct and valuable natural resource of vital and enduring interest to all the people"; that "the permanent protection of the state's natural and scenic resources is a paramount concern"; that "it is necessary to protect the ecological balance of the coastal zone" and that "existing developed uses, and future developments that are carefully planned and developed consistent with the policies of this division, are essential to the economic and social well-being of the people of this state . . . ." [Citation.]' [Citation.] The Coastal Act is to be 'liberally construed to accomplish its purposes and objectives.' [Citation.]" (*Pacific Palisades Bowl Mobile Estates, LLC v. City of Los Angeles* (2012) 55 Cal.4th 783, 793-794 (*Pacific Palisades*).)

The Coastal Act "requires local governments to develop local coastal programs, comprised of a land use plan and a set of implementing ordinances designed to promote the act's objectives of protecting the coastline and its resources and of maximizing public access. [Citations.] Once the California Coastal Commission certifies a local government's program, and all implementing actions become effective, the commission delegates authority over coastal development permits to the local government. [Citations.]" (*Pacific Palisades*, *supra*, 55 Cal.4th at p. 794.) In this case, the record reflects that Monterey County's local coastal program (LCP) was certified in 1988.

The Coastal Act generally requires that a coastal development permit be obtained for "any development in the coastal zone" in addition to obtaining any other permit required by law. (§ 30600, subd. (a); see *Pacific Palisades*, *supra*, 55 Cal.4th at p. 794.) A local government's action on a coastal development permit application may be appealed to the Coastal Commission. (See § 30603, subd. (a); *Pacific Palisades*, *supra*, at p. 794.) If the Coastal Commission on appeal "finds that the proposed development is

in conformity with the certified local coastal program," a coastal development permit must be issued. (§ 30604, subd. (b).)

III. FACTUAL AND PROCEDURAL BACKGROUND

A. *Monterey County's Approval of Coastal Development Permit*

In August 2000, Heritage/Western Communities, Ltd applied for a combined development permit, including a coastal development permit, from Monterey County for the "Rancho Los Robles Subdivision." The proposed project was located in the northern part of the county and initially included more than 100 residential units and a commercial parcel. Monterey County prepared an environmental impact report (EIR) for the project. The EIR contained several alternatives to the project, including an alternative that reduced the number of residential units.

In October 2008, the Monterey County Planning Commission recommended denying the project due to water supply and traffic congestion issues and because the project's benefits would not outweigh the environmental effects. The planning commission's decision was appealed to the county board of supervisors.

In December 2008, the Monterey County Board of Supervisors disagreed with the planning commission's recommendation. The board of supervisors approved a combined development permit (which included a coastal development permit) with 102 conditions for a staff-proposed, reduced density alternative to the project, which included only 80 residential units.[2] The board of supervisors also certified the EIR and adopted a

[2] The reduced project, as approved by the county, provided for the following: (1) the division of two parcels (33.58 acres total) into 76 lots, consisting of 68 single-family residential parcels, four duplex lots, a 1.76-acre mixed-use parcel, and 9.7 acres of common area parcel which included a 2.5-acre community recreation area with a small parking lot and two 0.5-acre miniparks; (2) the development of a commercial parcel and the construction of a four-unit apartment building above the commercial space; (3) the removal of up to 25 coastal oak trees and on-site relocation of 0.1-acre of willow trees; (4) the demolition of two single-family dwellings, two barns, and a garage, and the removal of two mobilehomes; and (5) the development on slopes greater than 25 percent.

statement of overriding considerations regarding significant and unavoidable traffic impacts on State Route 1 and on regional groundwater and seawater intrusion.

B. ***Appeal by FANS to the Coastal Commission***

In 2009, FANS[3] filed an appeal with the Coastal Commission regarding the county's approval of the coastal development permit.[4] A second appeal was filed by two commissioners from the Coastal Commission.[5]

In 2011, Coastal Commission staff asked Heritage whether it intended to continue pursuing the development. Commission staff indicated that they would be recommending denial of a coastal development permit for the project due to the project's inconsistencies with the LCP, including regarding water supply and potential adverse impacts to environmentally sensitive habitat areas (ESHA).[6]

In 2015, Heritage Western Communities, Ltd. indicated that it was still interested in pursuing the project, and that it was revising the project in an attempt to address the issues raised. Coastal Commission staff subsequently met with Heritage several times to discuss project issues. By mid-2017, Heritage had modified the proposed project,

---

[3] FANS describes itself as "an association of citizens committed to preserving and enhancing the Elkhorn Slough and its watershed through public education, citizen activism and advocacy."

[4] A Coastal Commission staff report noted that the county's approval of the project was appealable to the Coastal Commission because, among other reasons, the proposed development was located within 100 feet of a wetland. (See § 30603, subd. (a)(2).)

[5] An appeal to the Coastal Commission may be filed by an applicant, an aggrieved person, or any two members of the commission. (§ 30625, subd. (a).)

[6] "ESHA . . . are 'rare or especially valuable' habitat areas in the coastal zone, given enhanced protection by the Coastal Act. [Citation.]" (*Banning Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal.5th 918, 936.)

including by: (1) reducing the number of residential units from 80 to 54, (2) dedicating land for future parks and other facilities, and (3) eliminating the commercial space.[7]

The Coastal Commission determined that the appeals raised a substantial issue, and the matter was set for a de novo hearing. (See § 30625, subd. (b)(2).)

1. Coastal Commission's De Novo Review and Approval of Permit Application

a. *2017 staff report recommending denial of coastal development permit*

In October 2017, Coastal Commission staff issued a report (hereafter 2017 staff report) that recommended denial of the coastal development permit for the project on de novo review by the commission. Commission staff described the project as being "located in the unincorporated community of Las Lomas in North Monterey County. Las Lomas is a small, rural, mostly residential community surrounded by North Monterey County's characteristic rolling hills consisting of open space, agriculture, and very low-density residential development. The project site consists of sloping hills containing 16.5 acres of oak woodland habitat and 11 acres of strawberry row-crop agricultural production."

[7] The modified project included 50 single-family residences and four units in duplexes. Two of the single-family residences would be reserved as "Workforce Housing for families earning up to 180% of Monterey County median income," and the duplexes would be designated as affordable rental homes. Heritage would pay the county an "affordable housing in-lieu fee" to satisfy remaining affordable housing requirements. In addition, 3.5 acres of land would be dedicated to the county for public park and recreation improvements. Also, approximately 17 acres of land would be dedicated to a to-be-formed community service district. Specific community facilities would be identified and built subject to the community service district securing funding and separate approval by the community service district in the future. The proposed commercial space was eliminated from the project. The revised project also included the demolition of one single-family residence and two barns, the removal of two mobilehomes, and the construction of roads and related improvements.

Commission staff indicated that the primary reason for the denial was the lack of adequate water supply. The project was "inconsistent with the LCP's water supply and priority land use policies," "because the project proposes to convert existing high-priority agricultural uses to allow for the construction of a low-priority 54-unit residential subdivision within a groundwater basin that is severely overdrafted." "When such a combination results," that is, a residential subdivision which is "a low-LCP-priority use" in an area "with known water supply deficiencies," "the LCP affirmatively requires the proposed development to be denied." Commission staff indicated that the project must be denied under these policies even if the proposed project would result, as argued by Heritage, in "a 'no-net increase' use of water, . . . including through proposed water offsets and retrofits to make the project 'water neutral.' "

Significantly, commission staff indicated that even if the project was consistent with the LCP regarding water supply, then the commission would still need additional information or documentation, such as project modifications and design alternatives, from Heritage addressing issues pertaining to (1) oak woodland,[8] (2) water quality, (3) visual resources and community character, (4) agricultural areas, and (5) traffic. However, because commission staff was recommending "independently denying the project based on the lack of an adequate water supply," commission staff indicated that additional information or documentation regarding these other issues was "not warranted at this time," and that any additional analysis, modification, or alternatives with respect to these other issues was rendered "moot."

Commission staff observed that the Coastal Commission was required to determine whether the coastal development permit application was consistent with CEQA. To that end, commission staff stated that "the proposed project would have

[8] Regarding oak woodland on a portion of the project site, commission staff determined that such oak woodland was an ESHA, and that the proposal to subdivide this area into residential lots was "not allowed within this habitat."

significant adverse effects on the environment" as detailed in the report's findings. "[T]o avoid the significant effects on coastal resources," denial of the project was necessary. Commission staff concluded that, by denying the project, CEQA and its requirements did not apply to the project. (See Cal. Code Regs., tit. 14, §§ 15042, 15270, subd. (a).)[9]

Heritage subsequently sent a letter dated November 7, 2017, to the Coastal Commission. The letter was more than 40 pages long and had over 400 pages of exhibits. Among other arguments in the letter, Heritage contended that the project was "water positive and will generate no net draw on the aquifer," and therefore the project "cannot cause water to be extracted at a level that exceeds its LCP-required safe yield amount." Heritage argued that if commission staff's "water related recommendations" were adopted, it would "result in a de facto moratorium" on development. Heritage also contended that commission staff had incorrectly interpreted LCP policies to require "complete avoidance of oak woodlands and a buffer around the entire habitat." Heritage contended that the policies instead allowed for oak tree removal and development within oak woodlands. Heritage further argued that the conditions included with the county's approval of the project, along with additional special conditions proposed by Heritage, provided sufficient mitigation measures.

In response to Heritage's letter, commission staff issued an addendum dated November 7, 2017, to the staff report. The addendum reiterated that "it is not enough to have a 'water neutral' (or even 'water positive') project; rather the groundwater resource itself is required to be in a safe, long-term yield condition to be able to support new residential subdivisions in North Monterey County. The LCP simply does not allow approval of residential subdivisions when the basin is in its current state of severe overdraft." Regarding oak woodland, the addendum reiterated that the LCP designated

[9] All further undesignated references to regulations are to title 14 of the California Code of Regulations (Regulations).

oak woodland as ESHA, and that subdivisions were not allowed within ESHA even if oak tree removal was minimized. Finally, the addendum reiterated that "while many of the project's LCP conformance issues could be addressed by project modifications, including with respect to avoidance of residential subdivision and development within oak woodland ESHA, on prime/productive agricultural soils, and along the ridgeline (albeit with what would most likely be a substantially reduced project size), such modifications are moot because the project is and would remain inconsistent with the LCP's water supply, groundwater resources, and priority land use policies and standards."

b. *2017 Coastal Commission de novo hearing*

On November 8, 2017, the Coastal Commission held a public hearing in connection with its de novo review of Heritage's application for a coastal development permit. At the hearing, commission staff made a presentation and recommended denial of the permit application. Commission staff emphasized that the project consisted of a "large, suburban-style residential subdivision in a predominantly rural agricultural area with severe water supply deficiencies and on land comprised of oak woodland ESHA and productive agricultural soils." Heritage made a presentation recommending approval of the project, contending that its water balance study showed the project would be "water positive"; that the property was designated medium-density residential, not agricultural for crop farming; that development was allowed on oak woodlands; and that the project was otherwise consistent with the LCP. FANS argued against the project, contending that the project was inconsistent with the LCP as described in the report by commission staff, and that there were flaws in Heritage's water balance study. Other speakers at the hearing included LandWatch[10] which opposed the project, and a Monterey County

[10] LandWatch describes itself as nonprofit public benefit corporation with the following purposes: "to promote sound land use planning and legislation at the city, County, and regional levels, to combat urban sprawl, and to promote livability in the

employee who had been involved in the county's review of the project and who expressed "a different perspective" than commission staff regarding water supply, ESHA, and agriculture.

The Coastal Commissioners primarily asked staff about water supply and ESHA issues. One of the commissioners expressed disagreement with the staff report regarding whether the relevant policies imposed a "moratorium" on residential development based on the condition of the aquifer, and indicated that he believed the proposed project could be approved based on evidence in the record that the project would not have the requisite impact on the aquifer. The commissioner also expressed a belief that the policy regarding ESHA and oak woodlands did not contain a "blanket prohibition" on development, and that Heritage's, not commission staff's, interpretation of the policy appeared to be correct. Another commissioner referred to the needs of "disadvantaged unincorporated communities" and indicated that the developer for this project was "very willing" to provide various amenities, including "build a park, fix the streets, [and] do some lighting," for the community.

At the conclusion of the hearing, the Coastal Commission voted seven to five in favor of approving Heritage's coastal development permit application.

2. Coastal Commission's Revised Findings

a. *2018 staff report regarding revised findings*

In August 2018, Coastal Commission staff issued a report (hereafter 2018 staff report) containing revised findings in support of the commission's approval of Heritage's

---

region's cities and towns, through public policy development, advocacy, and education," and "to preserv[e] economic vitality, high agricultural productivity, and environmental health in Monterey County by encouraging effective public participation in the land use planning process."

coastal development permit.[11] Whereas the prior staff report recommended denial of the permit primarily due to the lack of adequate water supply, the 2018 staff report determined that water supply was no longer an issue that necessitated denial of the project, and that other LCP policies supported approval of the project.

Regarding water, commission staff acknowledged that, "in order to both protect groundwater resources and to ensure that scarce water supply remains available for priority uses," "the LCP does not allow certain development." However, "[t]he LCP also includes policies identifying the need for affordable housing and other community goods in Las Lomas, specifically identifying Las Lomas as one of only three areas in the entire North County area appropriate for such growth given natural resource and public service capacity constraints. In addition, the County also has argued that the LCP's water supply and groundwater resources policies should not be read as prohibiting all development in all cases when an overdraft condition exists, but rather that certain limited projects that provide needed (and LCP envisioned) community goods that are undertaken in a manner that will not adversely impact the underlying groundwater basin (i.e., will not generate a water demand exceeding or adversely impacting the safe, long-term yield of the local aquifer) can be found consistent with the LCP's overall framework. The Commission in this case agreed based on the specific facts presented. Specifically, because this project included on-site low and moderate income housing (as well as an in-lieu fee for additional off-site affordable housing), parks, and infrastructure improvements within the Las Lomas urban services line called out by the LCP for allowable growth, and because the [Heritage's] project-specific water balance study found the project to have a net

[11] By this time, as we set forth below, FANS and LandWatch had filed their December 7, 2017 petition for writ of mandate in the trial court, challenging the Coastal Commission's approval of Heritage's project.

positive effect on the groundwater basin,[12] the Commission found that the project meets these LCP goals and requirements. Relying on . . . groundwater recharge conclusions [from Heritage's water balance study], the Commission found the project to be supplied by a long-term adequate water supply that would not negatively impact the underlying aquifer. These factors—the project's proposed community investments (affordable housing, parks, open space, and infrastructure improvements), within a community the LCP explicitly identifies as appropriate for such investment, and positive groundwater recharge are what differentiate it with other proposed North County residential subdivision projects the Commission has denied. Those projects were located outside of Las Lomas, did not provide the type of community goods proposed here (i.e., they were strictly residential subdivisions), and did not demonstrate positive (or even neutral) groundwater recharge. As such, the project's factset here is unique and specific due to what is being proposed and where, and the Commission approved this project as consistent with the relevant LCP policies considering these specific facts and circumstances."

---

[12] Commission staff indicated that Heritage's water balance report showed that the project would be "water positive." Specifically, "with proposed stormwater improvements, groundwater infiltration, and water recycling, the project would actually result in a positive groundwater recharge of 7.61 [acre-feet per year] (i.e., 7.61 [acre-feet per year] more water would infiltrate the groundwater basin than the development will consume from the basin, based on . . . water usage of 18.21 [acre-feet per year] and infiltration of 25.82 [acre-feet per year] . . . . [T]he project will have a net positive effect on groundwater supplies." Further, "additional recharge associated with the project is expected to improve groundwater health." Commission staff also explained that Heritage's water balance report indicated that the proposed project's estimated use of 18.21 acre-feet per year of water was "slightly less than the current estimated water usage of 23.7 [acre-feet per year], and further indicates that the project would result in a net benefit to the aquifer even if the existing water use at the site is not taken into account. Thus, based on the Water Balance Report's findings that the project will improve groundwater aquifer health relative to the project's water usage, the Commission found that the project can be served by a long term, adequate water supply." (Fn. omitted.)

The staff report also addressed the other issues that had been identified as the basis for commission staff's earlier recommendation to deny approval of the permit application. For example, regarding oak woodland, the staff report explained that "the project minimized disruption and habitat loss, and also included both oak woodland restoration and preservation via dedication."[13] Regarding agricultural use, the staff report indicated that the LCP had designated the site for concentrated development, not agricultural use, and that the site was zoned for medium-density residential use. Further, "[t]he Commission also found the proposed project consistent with other LCP requirements, including with respect to water quality, visual resources, and traffic." The staff report indicated that project approval was based on certain project parameters relating to road improvements, residential siting and design features, water quality protection measures, and water use audits. Further, the county's earlier conditions of approval would also apply to the project, and those conditions were to be "adjusted where necessary" and "implemented in a manner consistent with" the parameters of the project as approved by the Coastal Commission.

Regarding the coastal development permit application's consistency with CEQA, commission staff observed that CEQA prohibited project approval if there were feasible alternatives or feasible mitigation measures that would substantially lessen any significant adverse effect the project may have on the environment (§ 21080.5, subd. (d)(2)(A)). Commission staff stated that "the project as proposed appropriately addresses any potential adverse impacts to . . . coastal resources," and that "the proposed

---

[13] Regarding the approximately 17 acres of land that would be dedicated to a to-be-formed community services district or other appropriate public entity, commission staff explained that the land was for "recreation and for habitat preservation for the remaining undeveloped oak woodland, wetland, and willow habitat areas. [Heritage] would undertake the restoration of these habitat areas and then dedicate the land . . . , but the additional specific community facilities would be identified and built subject to the [community services district] securing funding and separate . . . approval in the future."

project avoids significant adverse effects on the environment within the meaning of CEQA. As such, there are no additional feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse environmental effects . . . ."

b. *2018 Coastal Commission hearing regarding revised findings*

On September 13, 2018, the Coastal Commission held a public hearing to consider revised findings to support the commission's earlier November 8, 2017 approval of Heritage's coastal development permit application. At the hearing, Heritage requested that the commission make modifications to commission staff's proposed revised findings. Heritage's proposed modifications, including regarding water, oak woodlands/ESHA, and traffic, were set forth in a September 7, 2018 letter from Heritage to the commission. Heritage contended that its proposed modifications "better reflect[ed]" the commission's earlier approval of the permit application. At the public hearing, Heritage also contended that its project, as proposed to the commission, "always included" the county's 102 conditions of approval, and that commission staff had incorporated certain specifics from those conditions into the description of the project that was contained in the staff report.

At the hearing, commission staff expressed disagreement with the modifications proposed by Heritage. Staff indicated that the proposed revised findings by staff reflected "what was presented to the Commission in November," and that staff had "tried to be as accurate as possible in that regard." Staff explained that "the commission was presented with . . . a project that would use that amount of water, and because it was using that amount of water, it would have this net positive per [Heritage's] calculations and [its] water report. And that's what we have reflected in the project description and also reflected throughout the revised findings in the report." One commissioner responded, "I don't know that we drew to a specific standard, we simply said in the aggregate, if it's neutral or positive, then we can find consistency with the LCP provision." Commission staff agreed that "that was the discussion," but that staff was

"trying to reflect what we thought [Heritage] was bringing forward in terms of the project . . . ."

Of the seven commissioners who originally voted in favor of the permit application, three were present at the hearing regarding revised findings. One of those three commissioners remarked: "[W]e find ourselves in a situation where the interests, generally speaking, of the Commission in terms of the permit itself and that of [Heritage] should be somewhat aligned. So it is in the interest of [Heritage] to strengthen our findings from their perspective, not to weaken them. [¶] It's also in the interest of the Commission to have the most defensible findings possible here in the interest of [Heritage] and the Commission should be aligned because the Commission granted the permit. We granted the application. [¶] . . . [P]rocedurally we neglected to notice that we needed to also mention in our motion that we should incorporate all of the recommended conditions at the time of the hearing. But as [Heritage] points out, based upon the Commission's action, I believe they are inclusive of the County conditions of approval." The commissioner later stated, "I think that generally the staff's revised findings accurately reflect the hearing, but I also think that I have no objection to the suggested modifications made by [Heritage] because I think they also in most cases -- they strengthen and broaden and add to the findings that were made by the majority at that hearing. And so I would personally have no objection to incorporating that." A second commissioner who had voted in favor the of the permit stated, "[Heritage's] revised findings do adequately reflect what my thought process was and why I voted the way I did." The third commissioner who had voted in favor of the permit stated, "I agree with my colleagues . . . that the revised findings reflect what my thought process was that day as well."

Those three commissioners, who were the only commissioners present who were eligible to vote on the revised findings, voted in favor of the staff's proposed revised findings, as modified by Heritage.

After holding the public hearing, the Coastal Commission issued its final adopted findings, which were based on the 2018 staff report and the modifications requested by Heritage. The final adopted findings included a statement by the commission that it "found the project consistent with the LCP . . . ."

The Coastal Commission issued the coastal development permit for the project on September 18, 2018. The permit indicates that it "was approved by the California Coastal Commission on November 8, 2017," which was the date of the de novo hearing.

C. *FANS and LandWatch's Petition for a Writ of Mandate*

In the meantime, on December 7, 2017, after the Coastal Commission had approved Heritage's coastal development permit application but before the 2018 staff report was prepared or the commission held its hearing on revised findings, FANS and LandWatch (collectively, FANS) filed a petition for writ of mandate in the trial court,[14] challenging (1) the decision by the Coastal Commission to approve the permit application and (2) the decision by Monterey County[15] to certify the EIR and approve the project. In the petition, Heritage/Western Communities, Ltd and Heritage Development Corporation were identified as real parties in interest.

The petition alleged the following three causes of action: (1) the Coastal Commission violated the Coastal Act, (2) the Coastal Commission and Monterey County violated CEQA, and (3) Monterey County violated planning and zoning requirements. Based on the alleged violations, FANS sought (1) a peremptory writ of mandate directing the Coastal Commission and Monterey County to set aside their approvals of the project and to comply with the requirements of CEQA, the Coastal Act, and/or planning and

---

[14] The petition was originally filed in Alameda County Superior Court. Heritage and Monterey County filed a motion for change of venue. The motion was granted, and the matter was transferred to Monterey County Superior Court.

[15] Monterey County is not a party to this appeal.

zoning provisions, and (2) injunctive relief preventing the commission, the county, and Heritage from proceeding with development of the project pending such compliance.

The Coastal Commission and Heritage each answered the petition.

D. *Monterey County's Demurrer and Dismissal from the Action*

Monterey County filed a demurrer to the two causes of action alleged against it—the second cause of action for violation of CEQA and the third cause of action for violation of planning and zoning provisions. Heritage joined the county's demurrer. The county and Heritage contended that the Coastal Commission "assumed exclusive jurisdiction over the project application," and that the commission's de novo review and subsequent approval of the project "superseded the [c]ounty's decision by operation of law." Thus, the county's "certification of an EIR under CEQA and approval of the project" were "no longer a proper subject for judicial review." FANS and the Coastal Commission opposed the demurrer, each contending that the commission did not have jurisdiction over the entirety of the project, and that the commission's jurisdiction was limited to the coastal development permit.

The trial court concluded that Monterey County's approval of the project, including subdivision approval and certification of the EIR, was superseded by the Coastal Commission's de novo review, and thus the county's decisions were no longer the proper subjects for judicial review. The court sustained the demurrers to the second and third causes of action against the county without leave to amend. A judgment of dismissal was entered in favor of the county on April 2, 2019.

E. *Denial of Petition for Writ of Mandate*

FANS filed an opening brief in support of the petition for writ of mandate regarding the remaining causes of action against the Coastal Commission. FANS argued that the petition should be granted because the Coastal Commission failed to proceed in a manner required by law. Specifically, (1) the Coastal Commission violated CEQA by failing to conduct the requisite environmental review and make the requisite findings

before approving the project, and (2) the commission's post-approval findings failed to state a valid basis for approving the project and constituted improper post hoc rationalizations. Both the Coastal Commission and Heritage filed opposition to the writ petition.

After a hearing on the petition, the trial court filed a statement of decision denying the petition for writ of mandate. In the statement of decision, the court made the following determinations.

First, the trial court disagreed with FANS's contention that the Coastal Commission violated CEQA by approving the project without environmental review and prior to making findings. The court determined that the 2017 staff report demonstrated that the Coastal Commission engaged in environmental review before approving the project. The court observed that the 2017 staff report included "around 30 pages of discussion and analyses of the [p]roject's potential environmental impacts," including regarding water supply, water quality, ESHA, and agriculture. The court determined that, although the commission "ultimately took an action different than that recommended in the staff report and later adopted revised findings consistent with that decision . . . , this fact does not mean [the commission] failed to conduct any environmental review in the first instance." The court also noted that "the change of direction taken by the Commission was not ultimately predicated on new and different evidence relating to the Project's environmental impacts but a different view of how the LCP policies should be interpreted relative to the evidence that had already been considered."

Second, the trial court rejected FANS's contention that the Coastal Commission failed to state a valid basis for approving the project and that the commission's revised findings constituted improper post hoc rationalizations. In making this determination, the court found that there was "a lack of clarity" and inadequate analysis regarding portions of FANS's argument, and for that reason, the court "construe[d] [FANS's] challenge as being directed solely towards the adequacy of the statements made by the commissioners

at the *de novo* hearing." Turning to the merits of the challenge, the court stated: "Taking together the requirement that environmental review precede project approval and the requirement that adopted findings ultimately bridge the analytic gap between evidence and the agency's decision to approve or deny a project, the Court acknowledges the tension that could arise when the Commission utilizes the procedure it employed here where it adopts revised findings after the hearing to support its decision to approve a project." The court found, however, the procedure was authorized by Regulations, section 13096. The court further concluded that "the commissioners stated the basis for their [p]roject approval in sufficient detail at the November 8, 2017 de novo hearing," such that the later prepared revised findings did not constitute improper post hoc rationalizations. In particular, the court found that the commission's final written revised findings regarding (1) water supply and (2) oak woodlands and ESHA were consistent with oral statements made by the commission at the de novo hearing before the commission voted to approve the project.

In March 2020, FANS filed objections to the trial court's statement of decision. In April 2020, FANS filed a notice of appeal regarding the trial court's statement of decision.

In June 2020, the trial court filed a judgment in favor of the Coastal Commission and Heritage on the first cause of action for violation of the Coastal Act and the second cause of action for violation of CEQA. The judgment incorporated the court's written statement of decision. The Coastal Commission filed a notice of entry of judgment on July 13, 2020. On September 4, 2020, FANS filed a second notice of appeal, this time from the judgment.

This court ordered the two appeals by FANS to be considered together for purposes of record preparation, briefing, oral argument, and disposition.

IV. DISCUSSION

FANS contends that the Coastal Commission "failed to employ the proper procedures required by CEQA when it approved the [project] prior to conducting environmental review pursuant to its regulatory program." (Italics and bold omitted.) Before addressing the substance of FANS's contention, we first set forth (1) the standard of review and (2) general legal principles regarding environmental review by a certified regulatory program, such as the Coastal Commission's program for coastal development permits.

A. *Standard of Review*

A decision by the Coastal Commission may be challenged by filing a petition for writ of administrative mandate under Code of Civil Procedure section 1094.5. (Pub. Resources Code, § 30801.) "The inquiry in such a case shall extend to the questions whether the [commission] has proceeded without, or in excess of, jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the [commission] *has not proceeded in the manner required by law*, the order or decision is not supported by the findings, or the findings are not supported by the evidence." (Code Civ. Proc., § 1094.5, subd. (b), italics added.)[16]

Relevant here, "[i]n determining whether the agency complied with the required procedures . . . , the trial court and the appellate courts essentially perform identical roles. We review the record de novo and are not bound by the trial court's conclusions. [Citations.]" (*Environmental Protection Information Center v. California Dept. of Forestry & Fire Protection* (2008) 44 Cal.4th 459, 479; accord, *La Costa Beach Homeowners' Assn. v. California Coastal Com.* (2002) 101 Cal.App.4th 804, 814-815 (*La Costa Beach*).)

[16] FANS expressly indicates that it is not challenging any factual finding that would implicate the substantial evidence standard of review.

"[I]f the manner in which an agency failed to follow the law is shown to be prejudicial, or is presumptively prejudicial, as when the department or the board fails to comply with mandatory procedures, . . . the decision [must] be set aside . . . ." (*Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1236; see *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 515 ["failure to comply with the law subverts the purposes of CEQA" and constitutes prejudicial error "if it omits material necessary to informed decisionmaking and informed public participation"].)

B. *General Legal Principles Regarding Environmental Review by Certified Regulatory Programs*

1. Certified Regulatory Program

Under CEQA, the EIR "is 'the primary means of achieving the Legislature's considered declaration that it is the policy of this state to "take all action necessary to protect, rehabilitate, and enhance the environmental quality of the state." [Citation.]' [Citation.]" (*Sierra Club v. State Bd. of Forestry*, *supra*, 7 Cal.4th at p. 1229.) Generally, "[w]henever a project may have a significant and adverse physical effect on the environment, an EIR must be prepared and certified. [Citations.]" (*Mountain Lion Foundation v. Fish & Game Com*. (1997) 16 Cal.4th 105, 113 (*Mountain Lion Foundation*).)

"An EIR is not required for all projects subject to governmental approval, however. The Legislature has provided that the Secretary of the [Natural] Resources Agency may certify a regulatory program of a state agency as exempt from the requirement of EIR preparation *if* the program requires that a project be preceded by the preparation of a written report containing certain information on the environmental impacts of the project. (§ 21080.5, subd. (a).)" (*Sierra Club v. State Bd. of Forestry*, *supra*, 7 Cal.4th at pp. 1229-1230; see Gov. Code, § 12805, subd. (a) ["Resources Agency" renamed as "Natural Resources Agency"].) The certified regulatory program "involv[es] essentially the same consideration of environmental issues as is provided by

use of EIRs and negative declarations." (Regs., § 15002, subd. (*l*).) Thus, the "state agencies, operating under their own regulatory programs, generate a plan or other environmental review document that serves as a functional equivalent of an EIR. [Citations.]" (*Mountain Lion Foundation, supra*, 16 Cal.4th at p. 113.)

To be certified, the regulatory program must meet the statutory criteria set forth in section 21080.5. (See, e.g., *id.*, subd. (d).) Among other requirements, the regulatory program must adopt rules and regulations that "[r]equire that an activity will not be approved or adopted as proposed if there are feasible alternatives or feasible mitigation measures available that would substantially lessen a significant adverse effect that the activity may have on the environment." (*Id.*, subd. (d)(2)(A).)[17]

The Coastal Commission's regulatory program—regarding the consideration and granting of coastal development permits under the Coastal Act—has been certified as meeting the requirements of section 21080.5. (Regs., § 15251, subd. (c).) As a result,

---

[17] The regulatory program must also adopt rules and regulations that:

"(B) Include guidelines for the orderly evaluation of proposed activities and the preparation of the plan or other written documentation in a manner consistent with the environmental protection purposes of the regulatory program.

"(C) Require the administering agency to consult with all public agencies that have jurisdiction, by law, with respect to the proposed activity.

"(D) Require that final action on the proposed activity include the written responses of the issuing authority to significant environmental points raised during the evaluation process.

"(E) Require the filing of a notice of the decision by the administering agency on the proposed activity with the Secretary of the Resources Agency. Those notices shall be available for public inspection, and a list of the notices shall be posted on a weekly basis in the Office of the Resources Agency. Each list shall remain posted for a period of 30 days.

"(F) Require notice of the filing of the plan or other written documentation to be made to the public and to a person who requests, in writing, notification. The notification shall be made in a manner that will provide the public or a person requesting notification with sufficient time to review and comment on the filing." (§ 21080.5, subd. (d)(2)(B)-(F).)

"[u]nder the terms of section 21080.5, subdivision (c), that certification expressly exempts the [coastal development permit] process from the provisions of chapters 3 and 4 and section 21167 of CEQA. [Citation.] Chapters 3 and 4 deal, in large part, with the various requirements of an EIR at both the state level (chapter 3) and the local level (chapter 4). Section 21167 sets forth the time within which an action challenging a public agency's decision under the provisions of CEQA must be filed." (*Sierra Club v. State Bd. of Forestry, supra*, 7 Cal.4th at p. 1230.)

Although "[a]n agency operating pursuant to a certified regulatory program" is not required to prepare an EIR, the agency is still required to "comply with all of CEQA's other requirements. [Citations.]" (*Mountain Lion Foundation, supra*, 16 Cal.4th at p. 114; see Pub. Resources Code, § 21080.5, subd. (c); Cal. Code Regs., tit. 14, § 15250.) Further, "to claim the exemption from CEQA's EIR requirements, an agency must demonstrate strict compliance with its certified regulatory program. [Citations.]" (*Mountain Lion Foundation, supra*, 16 Cal.4th at p. 132.)

2. Functional Equivalent Document

As stated above, a state agency operating a certified regulatory program "generate[s] a[n] . . . environmental review document that serves as a functional equivalent of an EIR. [Citations.]" (*Mountain Lion Foundation, supra*, 16 Cal.4th at p. 113.) "The document used as a substitute for an EIR or negative declaration in a certified program" must include a "description of the proposed activity." (Cal. Code Regs., tit. 14, § 15252, subd. (a)(1); see Pub. Resources Code, § 21080.5, subd. (d)(3)(A).) Relevant here, the document must also include either:
"(A) Alternatives to the activity and mitigation measures to avoid or reduce any significant or potentially significant effects that the project might have on the environment, or [¶] (B) A statement that the agency's review of the project showed that the project would not have any significant or potentially significant effects on the environment and therefore no alternatives or mitigation measures are proposed to avoid

or reduce any significant effects on the environment. This statement shall be supported by a checklist or other documentation to show the possible effects that the agency examined in reaching this conclusion." (Cal. Code Regs., tit 14., § 15252, subd. (a)(2)(A), (B); see Pub. Resources Code, § 21080.5, subd. (d)(3)(A)). The functional equivalent EIR must be "available for a reasonable time for review and comment by other public agencies and the general public." (§ 21080.5, subd. (d)(3)(B).)

Requiring specific findings about alternatives and mitigation measures "ensures there is evidence of the public agency's actual consideration of alternatives and mitigation measures, and reveals to citizens the analytical process by which the public agency arrived at its decision. [Citations.] Under CEQA, the public agency bears the burden of affirmatively demonstrating that, notwithstanding a project's impact on the environment, the agency's approval of the proposed project followed meaningful consideration of alternatives and mitigation measures. [Citation.]" (*Mountain Lion Foundation, supra,* 16 Cal.4th at p. 134; see *POET, LLC v. State Air Resources Bd.* (2013) 218 Cal.App.4th 681, 714 (*POET*) ["environmental review must be completed before project approval"]; *John R. Lawson Rock & Oil, Inc. v. State Air Resources Bd.* (2018) 20 Cal.App.5th 77, 98 [public agency's "required environmental review was incomplete at the time of the CEQA project approval" and therefore agency "violated CEQA's timing requirement"].)

3. Coastal Commission's De Novo Review of Permit Application

As we set forth above, a local government's decision on a coastal development permit application may be appealed to the Coastal Commission. (§ 30603, subd. (a); see *Pacific Palisades, supra,* 55 Cal.4th at p. 794.) The commission considers the application de novo. (§ 30621, subd. (a); *Security National Guaranty, Inc. v. California Coastal Com.* (2008) 159 Cal.App.4th 402, 411.) "[I]n effect, the Commission hears the application as if no local governmental unit was previously involved, deciding for itself whether the proposed project satisfies legal standards and requirements. [Citations.]"

(*Kaczorowski v. Mendocino County Bd. of Supervisors* (2001) 88 Cal.App.4th 564, 569.) The commission must determine whether the proposed development is in conformity with the certified LCP. (§ 30604, subd. (b); see § 30603, subd. (b)(1).) If it is, the commission must issue a coastal development permit. (§ 30604, subd. (b).)

The commission's regulations in effect during the relevant timeframe set forth the following procedure for reviewing an application. (See Regs., §§ 13115, subd. (b), 13321.)

a. *Written staff report*

Prior to a public hearing, the executive director, who is appointed by the commission (Pub. Resources Code, § 30335), must "prepare a written staff report" that includes the following: (1) a description of the proposed development and the project site, (2) the significant questions of fact, (3) the applicable policies of the Coastal Act, (4) public comments regarding the application, (5) any legal issues regarding the application's compliance with the Coastal Act, (6) a copy or summary of the EIR as it relates to the issues of concern to the commission, and (7) staff's recommendation. (Cal. Code Regs., tit. 14, § 13057, former subds. (a) & (b), Register 99, No. 39 (Sept. 20, 1999); see *id.*, § 13057, subd. (a)(1)-(4).)

The staff recommendation must include: (1) "[s]pecific findings, including a statement of facts, analysis, and legal conclusions as to whether the proposed development conforms to the requirements of the Coastal Act"; (2) specific findings evaluating the conformity of the development with the requirements of Public Resources Code section 21080.5, subdivision (d)(2)(A), which provides that an activity will "not be approved or adopted as proposed if there are feasible alternatives or feasible mitigation measures available that would substantially lessen a significant adverse effect that the activity may have on the environment"; (3) responses to significant environmental points raised during the evaluation of the proposed development as required by CEQA; (4) a recommendation regarding whether the application should be granted with or without

conditions, or denied; and (5) if approval with conditions is recommended, then the specific conditions must be identified, along with a discussion of why the conditions are necessary to ensure the development will be in accordance with the Coastal Act. (Cal. Code Regs., tit. 14, § 13057, former subd. (c), Register 99, No. 39 (Sept. 20, 1999); see *id.*, § 13057, subd. (a)(1)-(4).)

The staff report must be distributed to Coastal Commission members, the applicant, affected cities and counties, and people who have specifically requested it, among others. (Regs., § 13059.) The staff report must be "distributed within a reasonable time to assure adequate notification prior to the scheduled public hearing." (*Ibid.*)

Written comments regarding the application or the staff report must be received at the appropriate district office. (Regs., § 13060, subd. (b).) The executive director generally must distribute the text or a summary of the communications to commission members. (*Id.*, § 13060, subds. (a) & (c).) Any person may review the written communications at the commission office during normal working ours. (*Id.*, § 13060, subd. (d).)

b. *Public hearing*

The matter must be set for a public hearing. (Regs., § 13062.) "Evidence before the [Coastal] Commission includes, but is not limited to, the record before the local government." (*Id.*, § 13118.) At the public hearing, the "technical rules relating to evidence and witnesses" need not be followed, and "[a]ny relevant evidence shall be considered if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs." (*Id.*, § 13065.)

Regarding the order of proceedings, the executive director must make a presentation regarding the project and include a summary of the staff recommendation. (Regs., § 13066, subd. (a)(1).) The applicant and other people supporting or opposing the application may also speak at the hearing, and the executive director and the applicant

may respond. (*Id.*, § 13066, former subd. (b)(1)-(3), Register 99, No. 39 (Sept. 20, 1999); see *id.*, § 13066, subds. (a)(2)-(4), (b) & (c).) The commissioners may ask questions following any person's presentation. (*Id.*, § 13066, subd. (e).) "At the conclusion of the public testimony portion of the public hearing, the executive director may propose to change the staff recommendation or the commission may propose to add, delete, or modify the conditions contained in the staff recommendation. The applicant and the executive director shall have an opportunity to comment briefly and specifically on any proposed change." (*Id.*, § 13066, subd. (f).)

c. *Vote by the commission*

The commission must then vote on the permit application. (Regs., § 13066, subd. (g).) "[A] motion to grant the permit shall be deemed to include the terms proposed in the project description as modified by the applicant at the hearing and the conditions and findings proposed in the staff report as modified by staff at the hearing." (*Id.*, § 13092, subd. (a).)

"Any commissioner may move to add, delete or modify proposed terms, conditions or findings." (Regs., § 13092, subd. (b).) If "the commission moves to vote on an application with terms different from those proposed by the applicant in the application or conditions different than those proposed by the staff in the staff recommendation, the applicant, appellant, and the executive director shall have an opportunity to state briefly and specifically their views on the conditions." (*Id.*, § 13090, subd. (d).)

Voting is final upon the chairperson announcing the tally. (Regs., § 13094, subd. (c).)

d. *Written findings supporting the commission's decision*

"All decisions of the commission relating to permit applications shall be accompanied by written conclusions about the consistency of the application with [the LCP] and [CEQA], and findings of fact and reasoning supporting the decision. The

findings shall include all elements identified in section 13057[, former subdivision] (c)" of the regulations regarding the content of the staff recommendation. (Regs., § 13096, former subd. (a), Register 99, No. 39 (Sept. 20, 1999); see *id.*, § 13096, subd. (a).)

"The purpose of requiring written findings is to record the grounds on which the decision of the Commission rests and thus render its legality reasonably and conveniently reviewable on appeal. [Citations.] Without appropriate written findings, the trial court cannot properly perform its function in a proceeding for administrative mandate and determine whether the agency's decision is supported by its findings and its findings are supported by the evidence. [Citation.]" (*McAllister v. California Coastal Com.* (2008) 169 Cal.App.4th 912, 941.)

Generally, "an action taken consistent with the staff recommendation shall be deemed to have been taken on the basis of, and to have adopted, the reasons, findings and conclusions set forth in the staff report as modified by staff at the hearing." (Regs., § 13096, subd. (b).)

Relevant here, "[*i*]*f the commission action is substantially different than that recommended in the staff report*, the prevailing commissioners *shall state the basis for their action in sufficient detail* to allow staff to prepare a revised staff report with proposed revised findings that reflect the action of the commission. . . ." (Regs., § 13096, subd. (b), italics added.) A public hearing must be held regarding the revised findings. (*Id.*, § 13096, subd. (c).) "The public hearing shall solely address whether the proposed revised findings reflect the action of the commission." (*Ibid.*) After the public hearing, a vote must be taken by the commission. Adoption of the revised findings "requires a majority vote of the members from the prevailing side present at the meeting of the commission, with at least three of the prevailing members present and voting." (Pub. Resources Code, § 30315.1; see Cal. Code Regs., tit. 14, § 13096, subds. (b) & (c).)

"[R]evised findings are meant to capture actions, not change them. [Citations.]" (*San Diego Navy Broadway Complex Coalition v. California Coastal Com.* (2019) 40

Cal.App.5th 563, 577, fn. 8; see *La Costa Beach*, *supra*, 101 Cal.App.4th at p. 819 [revised findings "reflect[ed] in writing the rationale that the Commissioners and staff *articulated on the record* at the . . . public hearing" and were not post hoc rationalizations (italics added)].)

C. *Analysis*

FANS contends that the Coastal Commission "failed to employ the proper procedures required by CEQA" because the commission approved Heritage's coastal development permit application "prior to conducting environmental review pursuant to [the commission's] regulatory program." (Italics & boldface omitted.) FANS argues that a certified regulatory program's written document regarding environmental review (the functional equivalent of an EIR) must (1) contain certain elements, including a discussion of impacts, alternatives, and mitigation measures, and (2) be prepared before a project is approved. FANS contends that the 2017 staff report, which was prepared prior to the Coastal Commission's de novo hearing at which the commission approved the project, was inadequate because that report did not discuss alternatives or mitigation measures despite finding significant impacts. FANS argues that the subsequent 2018 staff report, which contained revised findings, could not constitute the requisite document, because it was prepared after the Coastal Commission had already approved the project. FANS contends that the 2018 staff report was "an extreme example of post hoc rationalization."

The Coastal Commission contends that its "de novo review *process* is the functional equivalent of an EIR for purposes of CEQA." According to the commission, the "de novo review process in this case involved two hearings and two versions of a report prepared by staff," that is, the de novo review and revised findings hearings, and the staff reports prepared prior to those two hearings. The Coastal Commission contends that the final adopted revised findings "memorialize the Commission's decision at the de novo hearing to approve the application for a coastal development permit, a decision it made with the benefit of full environmental review."

Heritage contends that the "functional equivalent document was the [Coastal] Commission's decision, as reflected in its revised findings." Heritage argues that the Coastal Commission complied with its regulations, and that "[t]here was no new or different evidence and no new or different environmental analysis or LCP determinations made following the Commission's vote to approve the [p]roject." Heritage argues that the revised findings "were not . . . a 'post-hoc rationalization,' but rather were informed by the LCP itself, [Heritage's] analysis and expert evidence, and the comments of two Coastal Commissioners who took the lead at the de novo hearing in addressing LCP inconsistency and the environmental justice benefits of the [p]roject to the Las Lomas community." Heritage contends that the prevailing commissioners at the de novo hearing determined that (1) the LCP did not create a moratorium on development when the groundwater basin is in overdraft, and the project could proceed based on evidence that the project was water neutral or water positive, and (2) the oak woodlands at the project site did not constitute ESHA.

We determine that the Coastal Commission's environmental review was incomplete at the time it approved Heritage's coastal development permit application on November 8, 2017, and that this failure to complete the required environmental review before approving the permit application requires that the approval be vacated.

Under CEQA, "to claim the exemption from . . . EIR requirements, [the Coastal Commission] must demonstrate strict compliance with its certified regulatory program. [Citations.]" (*Mountain Lion Foundation, supra*, 16 Cal.4th at p. 132.) This includes complying with the requirement "that a project be *preceded* by the preparation of a written report containing certain information on the environmental impacts of the project. [Citation.])" (*Sierra Club v. State Bd. of Forestry, supra*, 7 Cal.4th at p. 1230, italics added.) This "environmental review document that serves as a functional equivalent of an EIR" (*Mountain Lion Foundation, supra*, 16 Cal.4th at p. 113) must include "alternatives to the activity, and mitigation measures to minimize any significant adverse

effect on the environment of the activity" (Pub. Resources Code, § 21080.5, subd. (d)(3)(A); see *id.*, § 21080.5, subd. (d)(2)(A); Cal. Code Regs., tit. 14, § 15252, subd. (a)(2)(A), (B); *Pesticide Action Network North America v. Department of Pesticide Regulation* (2017) 16 Cal.App.5th 224, 245; *Strother v. California Coastal Com.* (2009) 173 Cal.App.4th 873, 878; *Schoen v. Department of Forestry & Fire Protection* (1997) 58 Cal.App.4th 556, 572).

Consistent with these requirements of CEQA, the Coastal Commission's certified regulatory program required the staff report to include findings evaluating the conformity of the development with the requirements of Public Resources Code section 21080.5, subdivision (d)(2)(A), which provides that an activity will "not be approved or adopted as proposed if there are feasible alternatives or feasible mitigation measures available that would substantially lessen a significant adverse effect that the activity may have on the environment." (See Cal. Code Regs., tit. 14, § 13057, former subd. (c)(2), Register 99, No. 39 (Sept. 20, 1999); *id.*, § 13057, subd. (a)(1), (3).) Along these lines, the staff report was also required to include a discussion of any necessary conditions for the project. (*Id.*, § 13057, former subd. (c)(4), (5), Register 99, No. 39 (Sept. 20, 1999); see *id.*, § 13057, subd. (a)(3), (4).)

These requirements of the Coastal Commission's certified regulatory program follow CEQA's "substantive mandate that public agencies refrain from approving projects for which there are feasible alternatives or mitigation measures," and that an agency not approve a project for which significant environmental effects have been identified unless the agency makes specific findings about alternatives and mitigation measures. (*Mountain Lion Foundation*, *supra*, 16 Cal.4th at p. 134; see §§ 21002, 21081.) A public agency "is required to carry out [this mandate] even when operating pursuant to its certified regulatory program. [Citations.]" (*Mountain Lion Foundation*, *supra*, at p. 134.)

A public agency must engage in a "meaningful consideration of alternatives and mitigation measures" before approving a project. (*Mountain Lion Foundation*, *supra*, 16 Cal.4th at p. 134; see *POET, supra*, 218 Cal.App.4th at p. 714 ["environmental review must be completed before project approval"].)) Requiring specific findings about alternatives and mitigation measures "ensures there is evidence of the public agency's actual consideration of alternatives and mitigation measures, and reveals to citizens the analytical process by which the public agency arrived at its decision. [Citations.]" (*Mountain Lion Foundation*, *supra*, at p. 134.)

In this case, the 2017 staff report, which was prepared prior to the Coastal Commission's approval of the project, acknowledged that "the proposed project would have significant adverse effects on the environment." The report also acknowledged that project modifications and design alternatives were necessary to address issues pertaining to (1) oak woodland, (2) water quality, (3) visual resources and community character, (4) agricultural areas, and (5) traffic. However, neither the 2017 staff report nor its addendum contained a complete analysis of mitigation measures or alternatives, as required by CEQA and the Coastal Commission's regulatory program. (Pub. Resources Code, § 21080.5, subd. (d)(2)(A), (3)(A); Cal. Code Regs., tit. 14, §§ 15252, subd. (a)(2)(A), 13057, former subd. (c)(2), Register 99, No. 39 (Sept. 20, 1999); see Cal. Code Regs., tit. 14, § 13057, subd. (a)(1), (3); *Mountain Lion Foundation*, *supra*, 16 Cal.4th at p. 134.) The 2017 staff report and addendum also did not analyze any specific conditions that were necessary for approval of the project. (Regs., § 13057, former subd. (c)(4), (5), Register 99, No. 39 (Sept. 20, 1999); see *id.*, § 13057, subd. (a)(3), (4).) Instead, because the 2017 staff report was recommending "independently denying the project based on the lack of an adequate water supply," the 2017 staff report indicated that additional information or documentation regarding these other issues (e.g., oak woodland, water quality, visual resources and community character, agricultural areas,

and traffic) was "not warranted at this time," and that any additional analysis, modification, or alternatives with respect to these other issues was rendered "moot."

At the November 2017 de novo hearing, the Coastal Commissioners primarily asked staff about water supply and ESHA/oak woodland issues. One of the commissioners expressed disagreement with staff regarding policy interpretations concerning water supply and ESHA/oak woodland. None of the commissioners made a statement that expressed a view regarding mitigation measures or alternatives, or regarding any conditions that might be necessary to approve the project.

After the project was approved at the November 2017 de novo hearing, Coastal Commission staff in the 2018 staff report analyzed for the first time various "components" of the project, mitigation measures, and/or conditions for the project. The 2018 staff report ultimately determined that, after "review[ing] the relevant coastal resource issues associated with the proposed project," "the project as proposed appropriately addresses any potential adverse impacts to such coastal resources." Commission staff further found "that the proposed project avoids significant adverse effects on the environment within the meaning of CEQA. As such, there are no additional feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse environmental effects that approval of the proposed project, as modified, would have on the environment within the meaning of CEQA." This *new* environmental analysis of various "components," mitigation measures, and/or conditions for the project that "appropriately addresse[d] any potential adverse impacts to . . . coastal resources" included the following:

First, regarding habitat resources (previously referred to by commission staff as ESHA), the 2018 staff report contained a *new environmental analysis* regarding whether the proposed residential subdivision within oak woodland, including the removal of oak trees, was consistent with the LCP. The staff's new environmental analysis relied on, among other things, recommendations set forth in a forester's assessment, project

conditions approved by Monterey County regarding oak woodland mitigation, and the anticipated preparation of an oak woodland restoration plan. With these parameters or conditions on the project (which affected the lots regarding size, location, siting, design, bulk, and boundaries and also reduced oak tree removal), commission staff determined that the project "sufficiently minimized the amount of oak tree removal, and included measures to ensure its long-term maintenance and enhancement per the LCP."

Second, regarding water quality, the 2018 staff report contained a *new environmental analysis* regarding whether the project was consistent with applicable LCP requirements governing water quality. In its new environmental analysis, commission staff determined that water quality concerns would be sufficiently addressed by the project's proposed water quality protection measures during and after construction.[18]

Third, regarding the protection of visual resources and community character, the 2018 staff report contained a *new environmental analysis* regarding whether the project was consistent with the applicable policies. In its new environmental analysis, commission staff considered, among other matters, the siting and design of residences, vegetative screening, and the existence of and consistency with the oak woodland restoration plan. Based on the measures included in the project, commission staff determined that "the project [was] consistent with applicable visual resources and community character protection policies."

---

[18] Regarding the water quality protection measures, commission staff stated: "Specifically, as proposed, the project will include new stormwater infrastructure, including a post-construction drainage and erosion control system/detention pond designed to capture and infiltrate stormwater. The stormwater control measures will be sited and designed to the maximum extent feasible: to collect, filter, treat, and direct all site drainage and runoff in a manner designed to protect and enhance coastal resources; to prevent pollutants, including sediments, from entering coastal waters or wetlands; to retain runoff from roofs, driveways, decks, and other impervious surfaces onsite; to use low impact development BMPs; and to include maintenance and management procedures applicable for the life of the project (including with respect to any homeowners association agreements as appropriate)."

Regarding traffic, the 2018 staff report contained a *new environmental analysis* regarding whether the project was consistent with the LCP. The new environmental analysis included a discussion of "transportation improvements designed to mitigate for project traffic impacts." Commission staff determined that "the project's traffic mitigations [were] sufficient to offset its impacts consistent with the LCP . . . ." After the 2018 staff report was issued, Heritage proposed additional policy analysis to be added regarding the project's consistency with the LCP, and the Coastal Commission adopted the proposed language at the hearing on revised findings.

The 2018 staff report thus contained new environmental analysis regarding components, mitigation measures, and/or conditions for the project, and those revised findings (along with modifications proposed by Heritage) were adopted by the Coastal Commission at the September 2018 hearing. As we have explained, however, the Coastal Commission was required to consider project alternatives, mitigation measures, and conditions for the project *before* approving the coastal development permit application at the 2017 de novo hearing. (*Mountain Lion Foundation*, *supra*, 16 Cal.4th at p. 134; *POET*, *supra*, 218 Cal.App.4th at p. 714; see §§ 21002, 21081.)

The Coastal Commission's certified regulatory program does contemplate that the commission might take an "action . . . substantially different than that recommended in the staff report." (Regs., § 13096, subd. (b).) Thus, notwithstanding the 2017 staff report recommending denial of Heritage's coastal development permit application, the commission might properly take a "substantially different . . . action" and approve the application. (*Ibid.*) To properly take this action, however, the prevailing commissioners were required to "*state the basis* for their action *in sufficient detail* to allow staff to prepare a revised staff report with proposed revised findings that reflect[ed] the action of the commission." (*Ibid.*, italics added.) In this case, none of the prevailing commissioners at the 2017 de novo hearing expressed a view regarding mitigation measures or project alternatives, or regarding any conditions that might be necessary for

project approval. Indeed, commission staff did not provide a substantive analysis of many "components" of the project, mitigation measures, and/or necessary conditions until the 2018 staff report, which was after the project had been approved by the commission.

Our conclusion that the Coastal Commission failed to follow the proper procedure is further supported by the prevailing commissioners' statements at the hearing regarding revised findings in 2018, which was after the commission had approved the project and after FANS had filed the petition for writ of mandate in the trial court. At the 2018 hearing regarding revised findings, the prevailing commissioners discussed whether to adopt Heritage's proposed modifications to the 2018 staff report regarding revised findings. One of the commissioners remarked: "[W]e find ourselves in a situation where the interests, generally speaking, of the Commission in terms of the permit itself and that of [Heritage] should be somewhat aligned. So it is in the interest of [Heritage] to strengthen our findings from their perspective, not to weaken them. [¶] It's also in the interest of the Commission to have the most defensible findings possible here in the interest of [Heritage] and the Commission should be aligned because the Commission granted the permit. We granted the application." The commissioner subsequently stated, "I have no objection to the suggested modifications made by [Heritage] because I think they also in most cases -- they strengthen and *broaden and add to the findings* that were made by the majority at that hearing. And so I would personally have no objection to incorporating that." (Italics added.) A second commissioner stated, "[Heritage's] revised findings do adequately reflect *what my thought process was* and why I voted the way I did." (Italics added.) A third commissioner stated, "I agree with my colleagues . . . that the revised findings reflect *what my thought process was* that day as well." (Italics added.) These statements by the prevailing commissioners at the 2018 hearing support the conclusion that the commission's revised findings, including the modifications proposed by Heritage, went beyond the limited statements about policy interpretations

concerning water supply and ESHA/oak woodland that were expressed by the prevailing commissioners at the earlier 2017 de novo hearing when the application was approved.

In this regard, the commission's regulations require that the prevailing commissioners expressly "*state* the basis for their action in sufficient detail to allow staff to prepare a revised staff report with proposed revised findings." (Regs., § 13096, subd. (b), italics added.) As the trial court in this case observed, this provision "ensure[s] that the Commission's environmental review and reasoning occur before any action is taken as it effectively requires commissioners to set forth the analytic route between the evidence and the action *at the hearing before approval*. Put another way, the requirement that commissioners state the basis for their action in enough detail that staff can later prepare revised findings reflective of their decision is essentially a requirement that the commissioners layout the analytic route for their decision *before* the approval occurs. Under these circumstances, the revised findings are then not post hoc rationalizations but a mere 'reflect[ion] in writing' of the rationale articulated by the Commission at the hearing in which approval is granted. [Citation.]" (Fn. omitted, italics added.) In this case, the commission's 2018 revised findings went beyond the limited statements about LCP policy interpretations concerning water supply and ESHA/oak woodland that were expressed by the prevailing commissioners at the earlier 2017 de novo hearing when the application was approved, and instead the 2018 staff report and revised findings ultimately adopted by the prevailing commissioners included new environmental analysis regarding project components, mitigations measures, and/or conditions that were necessary to address potential adverse impacts to coastal resources.

The Coastal Commission and Heritage rely on various cases for the general proposition that the commission at the de novo hearing could properly reject staff's recommendation contained in the 2017 staff report. We agree with the general proposition that the Coastal Commission may reject a staff recommendation contained in a staff report. (See Regs., §§ 13096, subd. (b) [addressing the circumstance when "the

commission action is substantially different than that recommended in the staff report"]; 13090, subd. (d) [addressing the circumstance if "the commission moves to vote on an application with . . . conditions different than those proposed by the staff in the staff recommendation"].) However, none of the cases cited by the Coastal Commission or Heritage involves facts similar to this case, where a project with potential adverse impacts to the environment is approved before a complete analysis is conducted regarding alternatives, mitigation measures, and/or project conditions.

For example, *Ocean Harbor House Homeowners Assn. v. California Coastal Com.* (2008) 163 Cal.App.4th 215 (*Ocean Harbor*), a case cited by Heritage, is factually distinguishable in significant respects from the present case. In *Ocean Harbor*, a homeowners association sought to build a seawall to protect the association's condominium complex from erosion that threatened the complex's structural integrity. (*Id.* at p. 219.) Coastal Commission staff prepared a report recommending the grant of a coastal development permit with conditions. (*Id.* at pp. 220-221.) Because the seawall would cause an acre of beach to erode, which in turn would cause the loss of lateral access along the beach and the loss of recreational use, the staff report recommended an in-lieu mitigation fee to be used to buy beach property elsewhere for public recreational use. (*Id.* at p. 221.) The staff report "discussed three methods to determine the value of the acre of beach that would be lost and thus the amount of the mitigation fee." (*Ibid.*) The three methods were the sand-replacement method, the real estate value method, and the economic recreational value method. (*Id.* at p. 221-222.) "Each method considered the loss of beach from a different perspective." (*Id.* at p. 221.) Although the staff report recommended the second valuation method, which would result in a $1 million mitigation fee, the commission ultimately voted in favor of the third valuation method, which was estimated to result in a fee of more than $5 million. (*Id.* at p. 223-224.) The commission later adopted revised findings to reflect its action. (*Id.* at p. 225.)

The homeowners filed a petition for writ of mandate, contending "the fee was arbitrary and based on post hoc rationalization because the Commission first decided to increase the fee from $1 million to $5 million and then sought a justification for doing so." (*Ocean Harbor, supra,* 163 Cal.App.4th at p. 226.) The trial court denied the petition, and the appellate court affirmed. (*Id.* at p. 220.)

The appellate court explained that the staff report "provided detailed analyses of three ways the fee could be determined, each of which took a different perspective on the nature of the loss of beach: the loss of sand; the loss of real estate; and the loss of recreational value. Staff recommended the second way, which resulted in a fee of $1 million. However, staff admitted that its recommendation provided only partial mitigation and, in light of the economic recreational value method, underestimated the impact." (*Ocean Harbor, supra,* 163 Cal.App.4th at p. 245.) A Coastal Commissioner "echoed the staff's admission," "objected to the recommendation," explained the basis for his objection, and "recommended that the Commission adopt the economic recreational value approach [(the third method)], which was fully detailed in the report." (*Ibid.*) The commission thereafter voted to adopt the third method. (*Ibid.*) The appellate court found that "the detailed explanation of the [third method] and the resulting fee in the staff report provided an ample factual basis and explanation for the Commission's decision to reject the staff recommendation and adopt a different methodology and fee." (*Ibid.*) The appellate court further found that "revisions" to the staff report "were relatively minor and cannot reasonably be considered a post hoc rationalization for predetermined decision." (*Ibid.*)

In contrast, in this case, the 2017 staff report for the de novo hearing found that the project had a water supply issue, would have significant adverse effects on the environment, and recommended denying the permit application. Unlike the staff report in *Ocean Harbor* which contained a "detailed explanation" of three valuation methods for calculation of a mitigation fee (*Ocean Harbor, supra,* 163 Cal.App.4th at p. 245), the

2017 staff report prepared for the de novo hearing in this case did not include a complete analysis of alternatives, mitigation measures, or conditions that might be necessary for project approval. Moreover, in this case, none of the commissioners at the de novo hearing expressed a view regarding alternatives, mitigation measures, or conditions that might be necessary to address significant adverse effects the project may have on the environment, yet a majority of commissioners voted to approve the application. (Cf. *La Costa Beach, supra*, 101 Cal.App.4th at p. 819 [subsequent revised findings "reflect[ed] in writing the rationale that the Commissioners and staff *articulated on the record* at the . . . public hearing" and were not post hoc rationalizations (italics added)].) It was not until the preparation of the 2018 staff report that an analysis was completed regarding various project components, mitigation measures, and/or conditions that were determined necessary to avoid potential adverse impacts on coastal resources. This environmental analysis should have been completed before the commission voted to approve the project. (See, e.g., *Mountain Lion Foundation, supra,* 16 Cal.4th at p. 134; *POET, supra,* 218 Cal.App.4th at p. 714.)

We also are not persuaded by Heritage's characterization of the procedure in this case – in which the Coastal Commission "[i]n approving the [p]roject, . . . disagreed with its staff, thus requiring that the matter return to the Commission for adoption of revised findings" – as "roughly analogous to when a trial court provides its tentative ruling on a matter at a hearing and only later adopts its written order or findings setting forth its decision, either consistent with or different from the tentative." When a matter is under submission, a trial court is free to change its tentative ruling, including its reasons and ultimate decision. The Coastal Commission, however, must *complete* the requisite environmental analysis before the commission decides to approve the project at the de novo hearing, and the prevailing commissioners *must state the basis for their action in sufficient detail at that hearing* if the commission's action is substantially different than the staff recommendation. The revised findings issued thereafter should "reflect in

writing the rationale that the Commissioners . . . articulated on the record at the [de novo] hearing." (*La Costa Beach*, *supra*, 101 Cal.App.4th at p. 819.) In this case, as we have explained, the commission's environmental analysis was incomplete at the time of the application's approval at the 2017 de novo hearing, and the subsequent 2018 staff report, which was adopted with modifications by the prevailing commissioners, contained new environmental analyses regarding the project's components, mitigation measures, and conditions in relation to potential adverse impacts to coastal resources.

We are also not persuaded by Heritage's contention that FANS failed to exhaust its administrative remedies and is barred from raising a claim that the Coastal Commission did not analyze the project's impacts regarding visual resources, agricultural resources, and transportation impacts before approving the project. Heritage argues that FANS never raised an issue regarding impacts to these resources in the Coastal Commission proceedings or in the trial court. Heritage primarily relies on section 21177[19] and *Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 535

---

[19] Section 21177 states: "(a) An action or proceeding shall not be brought pursuant to Section 21167 unless the alleged grounds for noncompliance with this division were presented to the public agency orally or in writing by any person during the public comment period provided by this division or before the close of the public hearing on the project before the issuance of the notice of determination.

"(b) A person shall not maintain an action or proceeding unless that person objected to the approval of the project orally or in writing during the public comment period provided by this division or before the close of the public hearing on the project before the filing of notice of determination pursuant to Sections 21108 and 21152.

"(c) This section does not preclude any organization formed after the approval of a project from maintaining an action pursuant to Section 21167 if a member of that organization has complied with subdivision (b).

"(d) This section does not apply to the Attorney General.

"(e) This section does not apply to any alleged grounds for noncompliance with this division for which there was no public hearing or other opportunity for members of the public to raise those objections orally or in writing before the approval of the project, or if the public agency failed to give the notice required by law."

[exact issue must be presented to the public agency in order to advance exhaustion doctrine's purpose of providing agency with opportunity to act before litigation occurs].)

" ' "Exhaustion of administrative remedies is a jurisdictional prerequisite to maintenance of a CEQA action." [Citation.] Subdivision (a) of . . . section 21177 sets forth the exhaustion requirement . . . .' " (*California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 615-616 (*California Native Plant*).) The requirement is satisfied if "the alleged grounds for noncompliance with [CEQA] were presented to the public agency orally or in writing by any person during the public comment period provided by [CEQA] or before the close of the public hearing on the project before the issuance of the notice of determination." (§ 21177, subd. (a).) " 'The purpose of the rule of exhaustion of administrative remedies is to provide an administrative agency with the opportunity to decide matters in its area of expertise prior to judicial review. [Citation.] The decisionmaking body " 'is entitled to learn the contentions of interested parties before litigation is instituted.' " ' [Citation.] [¶] To exhaust administrative remedies, '[m]ore is obviously required' than 'generalized environmental comments at public hearings.' [Citation.] 'On the other hand, less specificity is required to preserve an issue for appeal in an administrative proceeding than in a judicial proceeding.' " (*California Native Plant*, *supra*, 172 Cal.App.4th at p. 616.) Generally, " 'the exhaustion requirement does not apply when the administrative procedure did not provide for a public hearing or other opportunity for members of the public to raise objections before project approval. [Citation.]' [Citation.]" (*Hines v. California Coastal Com*. (2010) 186 Cal.App.4th 830, 854; see § 21177, subd. (e).)

In this case, the 2017 staff report prepared prior to the de novo hearing did not contain a complete environmental analysis of alternatives, mitigation measures, and conditions for project approval because commission staff recommended denial of Heritage's permit application. Despite the staff recommendation to deny the application, the Coastal Commission instead approved the project at the 2017 de novo hearing.

Thereafter, and prior to the commission's hearing regarding revised findings, FANS and LandWatch in a letter to the Coastal Commission dated September 7, 2018, objected to the 2018 staff report regarding revised findings, contending that the report contained "improper after-the-fact rationalizations," was an "attempt to justify an approval that occurred without any conditions or findings in support of approval," "serve[d] as a *post hoc* rationalization for a project that was already approved on November 8, 2017," and "include[d] after-the-fact environmental review in violation of CEQA." FANS further contended that the prevailing commissioners at the de novo hearing "failed to provide an adequate basis" for approving the project, including regarding water, ESHA, and agriculture, and that the project was approved "without conditions and without mitigations." FANS argued that although the prevailing commissioners apparently disagreed with staff on certain policy issues, the commissioners' reasoning on those policies was "insufficient" to support approval and the "after-the-fact [s]taff [r]eport and revised findings do not cure this defect." FANS cited to Public Resources Code section 21080.5, subdivision (d)(2)(A) [certified regulatory program's rules must require that an activity will not be approved if there are feasible alternatives or mitigation measures that would substantially lessen a significant adverse effect] and California Code of Regulations, title 14, section 13096, subdivision (b) [if commission action is substantially different than staff recommendation, then prevailing commissioners must state the basis for the their action in sufficient detail to allow preparation of proposed revised findings that reflect commission's action].

Similarly, FANS in its opening brief in support of the petition for writ of mandate filed in the trial court reiterated its contentions that the Coastal Commission failed to conduct the requisite environmental review before approving the project, and that the post-approval findings constituted improper post hoc rationalizations, again citing Public Resources Code section 21080.5, subdivision (d) and California Code of Regulations, title 14, section 13096, subdivision (b). We further observe that Heritage, in opposition

to the petition by FANS, argued that the 2018 staff report regarding revised findings "fully addressed the environmental impacts of the [p]roject," and that the report included a "comprehensive review and analysis" of coastal resource issues regarding "water supply and groundwater resources," "habitat resources," "water quality," "visual resources and community character," "agriculture," and "traffic."

On this record, we determine that FANS has preserved the dispositive issue of this appeal, that is, whether the Coastal Commission failed to complete the requisite environmental review before approving Heritage's permit application at the 2017 de novo hearing (see, e.g., Pub. Resources Code, § 21080.5, subd. (d)(2)(A), (3)(A)), which includes the question of whether the prevailing commissioners sufficiently stated the basis for their action at the hearing to properly allow staff to prepare a report regarding revised findings (Cal. Code Regs., tit. 14, § 13096, subd. (b)).

We observe that FANS on appeal also contends that the 2018 staff report "is not an adequate functional equivalent document in any event" because it "fails to address alternatives," "it improperly conflates Project features and mitigation measures," and "it reverses previous conclusions without adequate explanation." As we have explained, the Coastal Commission failed to comply with the requirements of CEQA and the commission's own regulatory program when it approved Heritage's coastal development permit application without first completing an analysis of mitigation measures (including conditions on the project) and project alternatives. The 2018 staff report containing revised findings, which was prepared after project approval, does not remedy this defect in procedure. We therefore do not reach these additional issues raised by FANS.

Lastly, all the parties raise the issue of Monterey County's EIR in relation to the Coastal Commission's approval of Heritage's coastal development permit application. We do not address the issue further, as (1) FANS contends that the commission "did *not* truly rely on the County's EIR," (2) the commission contends that its approval of the permit application was proper "*without* the County's EIR," and (3) Heritage

acknowledges that, notwithstanding the existence of the county's EIR, the commission was required to "reach[] its *own* conclusions on whether and how to approve the project." (Italics added.)

In sum, the record reflects that the Coastal Commission did not complete an analysis of mitigation measures (including conditions for the project) or alternatives, as required under CEQA and the commission's certified regulatory program, until the 2018 staff report was prepared, which was after the project had already been approved. Under these circumstances, we conclude that the commission failed to comply with the requirements of CEQA and the commission's own regulatory program by approving Heritage's coastal development permit application without first completing an analysis of mitigation measures (including conditions for the project) and alternatives. Because the commission did not proceed in accordance with the procedures mandated by law, the commission abused its discretion in approving the permit application. (Code Civ. Proc., § 1094.5, subd. (b); see *Mountain Lion Foundation, supra,* 16 Cal.4th at p. 137 ["failure to proceed in accordance with law presumptively prejudicial when mandatory procedures not followed"], citing *Sierra Club v. State Bd. of Forestry, supra,* 7 Cal.4th at pp. 1235-1237; *Sierra Club v. County of Fresno, supra,* 6 Cal.5th at p. 515 ["failure to comply with the law subverts the purposes of CEQA" and constitutes prejudicial error "if it omits material necessary to informed decisionmaking and informed public participation"].)

V. DISPOSITION

The judgment is reversed. On remand, the trial court is directed (1) to vacate its decision denying the petition for writ of mandate, (2) to enter a new judgment granting the petition against the California Coastal Commission, and (3) to issue a writ of mandate directing the commission to vacate its approval of the coastal development permit application. Appellants Friends, Artists and Neighbors of Elkhorn Slough and LandWatch Monterey County shall recover their costs on appeal.

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

ELIA, ACTING P.J.

DANNER, J.

Friends, Artists and Neighbors of Elkhorn Slough v. California Coastal Commission
H048088
H048409

ATTACHMENT 2

VENTURA
SUPERIOR COURT
FILED
MAY 17 2021
MICHAEL D. PLANET
Executive Officer and Clerk
By: _____, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF VENTURA

YES IN MY BACK YARD, Plaintiff, v. CITY OF SIMI VALLEY, Defendant.	CASE NO. 56-2020-00539590-CU-WM-VTA **TENTATIVE DECISION** HON. MARK S. BORRELL DEPT. 40

Before the court are two petitions that raise the same issue: Is the project known as Melrose West Senior Living Community, a senior assisted living facility in Simi Valley, a "housing development project" within the meaning of the Housing Accountability Act ("HAA").[1] Petitioners say it is; the respondent city says it's not. The court conducted a single hearing on both petitions and, therefore, renders a joint tentative decision[2]. This tentative decision shall also constitute the proposed statement of decision.

---

[1] See Government Code, section 65580, *et seq*. All references are to the Government Code unless indicated otherwise.

[2] The other case is *JM Squared Development v. City of Simi Valley*, Case No. 56-2020-00539593-CU-WM-VTA

Background

Petitioner JM Squared Development, LLC ("JM") is the developer of the subject project. Petitioner Yes In My Back Yard ("YIMBY") is a nonprofit corporation and a "housing organization" within the meaning of the HAA.[2]

The project site is 19.2 acres in Simi Valley. (AR 03, 04, 22.) The development would occupy 1.6 acres and would include a two-story structure with 40 memory care units and 68 assisted living units. (AR 22, 913.) The proposed residential units would include sleeping areas, living areas, bathrooms, and closets. (AR 1239, 1244.) They would not include kitchens or kitchenettes; meals would be taken in a common area. (AR 665.) In addition to the living spaces, the development would include a game room, lounges, a gym, a media room, and a multi-purpose room. Originally, the project was intended to also have cottages for seniors, but during the application process the cottages were removed from the plans. It is conceded that the project is in a medium residential zone and, therefore, requires a conditional use permit (CUP) as the project exceeds the density for such zone.

JM submitted an application for a CUP on March 1, 2018 to respondent, the City of Simi Valley ("City"). Staff for the City Planning Commission initially recommended approving the project (AR 913-946), but after a public hearing the Planning Commission denied the application. Three reasons were stated for the denial. First, the proposed development would not blend in with the natural environment due to the large scale of the proposed building. Second, the proposed development would not be consistent with the General Plan regarding housing type and scale. Finally, the proposed development would

///

---

[2] As relevant here, a " 'housing organization' means a trade or industry group whose local members are primarily engaged in the construction or management of housing units or a nonprofit organization whose mission includes providing or advocating for increased access to housing for low-income households and have filed written or oral comments with the local agency prior to action on the housing development project." (Gov. Code, § 65589.5, subd. (k)(1)(ii)(C)(2).)

not comport with local standards for "aesthetics, character, scale, and view protection." (AR 1123-1134.)

JM appealed the denial of the CUP application to the City Council. It argued that the project fell within the provisions of the HAA and that the findings required by the act had not been made. In response, City Council staff reported to the council that the project was not a "housing development project" ("HDP") within the meaning of the HAA and, therefore, the act did not apply. (AR1349-1350.) The City Council voted to uphold the Planning Commission's denial (AR 1682-1689), finding further that there was a safety concern due to the narrow access road to the project. (AR1683).

JM and YIMBY now petition for an administrative writ of mandate directing the City reverse the denial of the CUP application and, further, compelling the City to approve the project. The City opposes these requests, asserting that the application was properly denied.

Standard of Review

The question presented to the court is a legal one. The core facts are not in dispute. What is contested is whether those undisputed facts show the project is an HDP under the HAA. For this reason, the standard of review is independent judgment.

Whether an agency has proceeded in the manner required by law is a legal issue subject to independent review where that determination rests on undisputed facts. As stated in *POET, LLC v. State Air Resources Bd.* (2013) 218 Cal.App.4th 681, 712–713:

> Our choice between independent and substantial evidence review is guided by the California Supreme Court's statement that "a reviewing court must adjust its scrutiny to the nature of the alleged defect, depending on whether the claim is predominantly one of improper procedure or a dispute over the facts." (*Vineyard Area, supra,* 40 Cal.4th at p. 435, 53 Cal.Rptr.3d 821, 150 P.3d 709.) Thus, when plaintiffs' CEQA claim is predominantly one of procedure, we will conduct an independent review. When plaintiffs' CEQA claim disputes the factual findings made by ARB, we will review the record to determine whether the challenged finding is supported by substantial evidence.

When a local agency disapproves a project subject to the HAA without making the required findings, that entity has not proceeded in the manner required by law. (*Honchariw v County of Stanislaus* (2011) 200 Cal.App.4th 1066, 1072.) That is

precisely the issue here.

In reviewing an administrative decision under the independent judgment standard, the court is not bound by the legal determinations made by the respondent agency, but it must give appropriate consideration to an administrative agency's expertise underlying its interpretation of an applicable statute. (*Building Industry Assn. of San Diego County v. State Water Resources Control Bd.* (2004) 124 Cal.App.4th 866, 879.)

Discussion

The HAA "was designed to limit the ability of local governments to reject or render infeasible housing developments based on their density without a thorough analysis of the 'economic, social, and environmental effects of the action....' " (*Kalnel Gardens, LLC v. City of Los Angeles* (2016) 3 Cal.App.5th 927, 938, quoting § 65589.5, subd. (b).) "When a proposed development complies with objective general plan and zoning standards, including design review standards, a local agency that intends to disapprove the project, or approve it on the condition that it be developed at a lower density, must make written findings based on substantial evidence that the project would have a specific, adverse impact on the public health or safety and that there are no feasible methods to mitigate or avoid those impacts other than disapproval of the project." (*Id.*, at pp. 938-939; also see § 65589.5, subd. (j).) If petitioners establish that the HAA applies to this project, then the burden is on the City to show that its decision to disapprove the project conformed to the requirements of the act. (See § 65589.6.)

Here, the principal dispute is whether the project is an HDP within the meaning of the HAA. The act defines an HDP as "a use consisting of" one or more of three defined categories. (§ 65589.5, subd. (h)(2).) Under the first of those categories, a project is deemed to be an HDP if it consists of "[r]esidential units only." (*Id.*, subd. (h)(2)(A).) The second category of HDP is "[m]ixed-use developments consisting of residential and nonresidential uses with at least two-thirds of the square footage designated for residential

use." (*Id.*, subd. (h)(2)(B).) The final category of use constituting an HDP is "[t]ransitional housing or supportive housing." (*Id.*, subd. (h)(2)(C).)

Petitioners contend this project is an HDP under any of these definitions. The City says none of these definitions apply. Because the court concludes that the project would be "a use consisting of . . . [m]ixed-use developments consisting of residential and nonresidential uses with at least two-thirds of the square footage designated for residential use," it limits its analysis solely to that definition.

The City argues in its opposition brief that the project does not involve a "residential *unit*" – a phrase found in the first of the three definitions of HDP. (See § 65589.5, subd. (h)(2)(A), emphasis added.) The City does not, however, clearly address whether the project would consist of a mixed-use including "residential . . . *uses*" – a distinct element of the second definition. (*Id.*, subd. (h)(2)(B), emphasis added.) Rather, the City seems to confound these concepts – residential *unit* and residential *use* – but, to the court, there seems no justification to do so. When the Legislature uses distinct terms with a subdivision, it must be inferred that distinct meanings were intended absent a compelling reason to conclude otherwise. (See *People v. Santos* (2020) 53 Cal.App.5th 467, 473.) Here, no such reason has been demonstrated.

The HAA does not define a "residential use." It does, however, expressly define several other terms. This implies this phrase was not intended to have a technical meaning. Nor is a technical meaning implied by the manner in which this phrase is used in the act. Therefore, the court focuses on the meaning of the phrase in ordinary speech.

The common meaning of "residential use" is not difficult to grasp: a "residential use" is where one uses a location as a residence. The focus of the definition centers how the place is used and not the characteristics of the place.

This begs the question: what is a "residence"? Generally, a residence as a place where someone actually lives. (See https://www.merriam-webster.com/dictionary/residence ["the place where one actually lives as distinguished from one's domicile or a place of temporary sojourn"]; Black's Law Dictionary (11th ed. 2019) ["The place where

one actually lives, as distinguished from a domicile"].) A "residence" is in contrast to a "domicile." "A person can have two places of residence, such as one in the city and one in the country, but only one domicile." (https://legal-dictionary.thefreedictionary.com /Residence.) A "domicile" is one's permanent home. (See https://www.merriam-webster.com/dictionary/domicile ["a person's fixed, permanent, and principal home for legal purposes"]; Black's Law Dictionary (11th ed. 2019) ["a person's true, fixed, principal, and permanent home, to which that person intends to return and remain even though currently residing elsewhere"].) On the other hand, "residence" implies something more permanent that, for example, visiting with friends or staying for a short time in a hotel. (See https://www.definitions.net/definition/residence ["any address at which you dwell more than temporarily"].)

The City contends that the project would not consist of "residential uses." This contention, however, stands in conflict with the City Planner's testimony. The City Planner described this project as a "residential care facility" (AR 1691) with a "residential use" (AR 1699). Nevertheless, the City argues that the living units of this project do not involve "residential uses" because the units would not include kitchens or kitchenettes. But this limitation is not supported by anything identifiable in the provisions of the HAA or from the common understanding of the terms involved. Perhaps because of this, the City attempts to support its position with sources of information unrelated to the HAA. The attempt is unpersuasive. No showing has been made that the Legislature intended these more restrictive meanings to be used to construe the act. (See § 65589.5, subd. (a)(2)(L) ["It is the policy of the state that this section be interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, housing"].)

The City also asserts that its position is supported by bills not passed by the Legislature. But the Legislature does not make law when it does not enact a bill. The courts apply the laws that *are passed*, not the ones that aren't. Nor are unpassed bills particularly helpful in understanding what the Legislature intended when it passed a

different bill at a prior time. (See *Nevarrez v. San Marino Skilled Nursing & Wellness Centre, LLC* (2013) 221 Cal.App.4th 102, 133 [courts "do not consider unsuccessful subsequent bills to be helpful in determining the Legislature's earlier intent"].)

The evidence shows that the intended residents of the project would use the living units as their residences. That is, this would be the place where residents would actually live – more than in a transitory sense and not quite as permanently as a legal domicile. Thus, the project does include a component of "residential use." It also includes a component of "non-residential use," consisting of administrative offices and, among other things, a hair salon and a gym. The space devoted to residential use is considerably more than two-thirds of the total area. Therefore, this project is an HDP within the meaning of subdivision (h)(2)(B) of section 65589.5 because it would consist of "[m]ixed-use developments consisting of residential and nonresidential uses with at least two-thirds of the square footage designated for residential use."

Because the project is an HDP, the HAA applied to the review of JM's application for a CUP. This finding shifts the burden to the City to establish that its decision to disapprove the project "conformed to all of the conditions specified in Section 65589.5." (§ 65589.6.) Among other things, section 65589.5 requires a local agency that disapproves a project to make certain findings "[w]hen a proposed housing development project complies with applicable, objective general plan, zoning, and subdivision standards and criteria, including design review standards, in effect at the time that the application was deemed complete." (§ 65589.5, subd. (j)(1).) In that instance, the agency must make "written findings supported by a preponderance of the evidence on the record that both of the following conditions exist:

> (A) The housing development project would have a specific, adverse impact upon the public health or safety unless the project is disapproved or approved upon the condition that the project be developed at a lower density. As used in this paragraph, a "specific, adverse impact" means a significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete.

(B) There is no feasible method to satisfactorily mitigate or avoid the adverse impact identified pursuant to paragraph (1), other than the disapproval of the housing development project or the approval of the project upon the condition that it be developed at a lower density.

(§ 65589.5, subd. (j)(1).)

The three reasons given by the City's Planning Commission for denial of the CUP application, and later adopted by the City Council, were predicated on subjective factors such as whether the project would blend in with the surroundings or comport with local standards for things like aesthetics, character and scale. The City continues to argue that these findings exempt this project from the HAA. The court disagrees. The 1999 amendments to subdivision (j) of section 65589.5 were "intended to strengthen the law by taking away an agency's ability to use what might be called a 'subjective' development 'policy' (for example, 'suitability') to exempt a proposed housing development project from the reach of subdivision (j)." (*Honchariw v. County of Stanislaus* (2011) 200 Cal.App.4th 1066, 1076.) Therefore, the court finds that the City had to make the findings required by subdivision (j) of section 65589.5 to disapprove the project. The court further finds that the City did not make those findings.

Arguably, the City Council, on the appeal of the denial of the CUP application, made a finding consistent with section 65589.5, subdivision (j)(1)(A), concerning "a specific, adverse impact upon the public health or safety." The City Council found that the 40-foot wide Cochran Street road size presented a difficulty of turnaround for large vehicles and area congestion during emergency situations, all of which posed potential safety concerns. (AR 1682-83.) But, at best, this only represents half of what the HAA required the City to find. The City did not make the finding required by section 65589.5, subd. (j)(1)(B), that there "is no feasible method to satisfactorily mitigate or avoid [these] adverse impacts" other than disapproving the project. Therefore, the City has not demonstrated that the disapproval of the project "conformed to *all* of the conditions specified in Section 65589.5." (§ 65589.6, emphasis added.)

Petitioners, therefore, are entitled to a remedy. The nature of that remedy is the

next point of dispute between the parties.

When a local agency disapproves a project without making the findings required by section 65589.5, the court shall issue an order compelling one of two possible forms of relief. (See section 65589.5, subd. (k)(1)(A).) Which of those two forms of relief the court must order depends on whether "the court finds that the local agency acted in bad faith when it disapproved . . . the housing development . . . in violation of [section 65589.5]." When a local agency disapproves a project in bad faith the court may order the agency to approve the project. Therefore, the court addresses that issue first.

The HAA does not define "bad faith." Perhaps "bad faith" is a term that, as frequently as it is used but as seldom as it is defined, has an "I know it when I see it" quality.[3] Black's Law Dictionary (11th ed. 2019), citing Comment (d) to the Restatement (Second) of Contracts section 205, gives several examples of "bad faith" in the law of contracts and that, by rough analogy, provides some guidance in this context: "evasion of the spirit of the [act], lack of diligence and slacking off, willful rendering of imperfect [compliance with the act], abuse of a power [granted by the act]." Synthesizing these concepts here, it would appear that a local agency acts in "bad faith" under the HAA when it disapproves a project as a result of either an inexcusable indifference to the requirements of section 65589.5 or a willful failure to comply.

Here, neither an inexcusable indifference nor a willful failure to follow the requirements of the HAA has been established. Although the court has not embraced the City's argument that the HAA does not apply, it has not been persuaded that those argument are either pretextual or manifestly unreasonable. Neither side has directed the court to statutory or case law that provides clear guidance as to the applicability of the HAA to this set of facts. The answer to that question is one of statutory interpretation based on analysis and analogy, and, importantly, one where reasonable legal minds may differ. The City has not acted in bad faith.

[3] A phrase given legal significance by Justice Potter Stewart in *Jacobellis v. Ohio* (1964) 378 U.S. 184, 197, 84 S.Ct. 1676, 12 L.Ed.2d 793.

Therefore, the remedy petitioners are entitled to is a "judgment compelling compliance with [section 65589.5] within 60 days." (Section 65589.5, subd. (k)(1)(A)(ii).) That relief is granted. In addition, the court shall retain jurisdiction to ensure that its judgment is carried out. (*Ibid.*)

This tentative decision is the court's proposed statement of decision and shall become the court's final statement of decision unless, within 10 days after announcement or service of the tentative decision (plus five days for service by mail), a party specifies those principal controverted issues as to which the party is requesting a statement of decision or makes proposals not included in the tentative decision. (See Code Civ. Proc. § 632; Cal. Rules of Court, Rule 3.1590, subd. (c).) If no such request/proposal is made within the specified time (see Cal. Rules of Court, Rule 3.1590, subd. (d)), counsel for petitioners is to prepare, serve and submit a proposed judgment within 20 days of the service of this tentative decision.

The clerk is directed to serve this tentative decision upon the parties.

Dated: May 17, 2021

MARK S. BORRELL
JUDGE OF THE SUPRIOR COURT

PROOF OF SERVICE
CCP § 1012, 1013a (1), (3) & (4)

STATE OF CALIFORNIA)
) ss.
COUNTY OF VENTURA)

Case Nos: 56-2020-00539590-CU-WM-VTA
Case Title: Yes In My Back Yard v. City of Simi

I am employed in the County of Ventura, State of California. I am over the age of 18 years and not a party to the above-entitled action. My business address is 800 Victoria Avenue, Ventura, CA 93009. On the date set forth below, I served the within:

TENTATIVE DECISION

on the following named parties:

Ryan Patterson
Emily L. Brough
ZACKS FREEDMAN & PATTERSON PC
235 Montgomery Street #400
San Francisco, CA 94104
Attorneys for Petitioner

Lonnie J. Eldridge, City Attorney
Dion J. O'Connell, Asst. City Attorney
City of Simi Valley
2929 Tapo Canyon Road
Simi Valley, CA 93063
Attorneys for Respondent

☒ **BY MAIL**: I caused such envelope to be deposited in the mail at Ventura, California. I am readily familiar with the court's practice for collection and processing of mail. It is deposited with the U.S. Postal Service on the dated listed below.

☐ **BY FACSIMILE**: I caused said document(s) to be sent via facsimile to the interested party at the facsimile number set forth above from telephone number (805)_____.

☐ **BY ELECTRONIC MAIL:** I caused said document(s) to be sent via email to the interested parties at the email addresses set for above.

I declare under penalty of perjury that the foregoing is true and correct and that this document is executed on May 17, 2021, at Ventura, California.

By: _____
Isabel H. Alarcon, Clerk

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF VENTURA
VENTURA

MINUTE ORDER

DATE: 06/11/2021 TIME: 10:54:00 AM DEPT: 40

JUDICIAL OFFICER PRESIDING: Mark Borrell
CLERK: Isabel H Alarcon
REPORTER/ERM:

CASE NO: **56-2020-00539590-CU-WM-VTA**
CASE TITLE: **Yes In My Back Yard vs. City of Simi Valley**
CASE CATEGORY: Civil - Unlimited CASE TYPE: Writ of Mandate

EVENT TYPE: Miscellaneous Hearing (CLM)

APPEARANCES

NATURE OF PROCEEDINGS: HEARING RE STATEMENT OF DECISION

On May 18, 2021, the court filed and served its tentative decision in this and the related case, and it gave notice that its tentative decision would be its proposed statement of decision. Subsequently, respondent, City of Simi Valley ("City"), served and filed its request that the court address additional matters in its statement of decision and that it order relief to petitioners in a form different from that specified in the tentative decision. Each of the petitioners opposes the City's requests.

Among other things, the City asks that the court make findings of fact and conclusions of law concerning whether extraordinary circumstances exist that would preclude an award of attorneys' fees. (See Gov. Code, § 65589.5, subd. (k)(1)(A)(iii).) However, an award of attorneys' fees as an element of costs is a matter to be determined post-trial. (See Code Civ. Proc., § 1032 *et seq*.) Until petitioners bring a motion for an award of attorneys' fees, the City's request is premature.

The City also requests findings with respect to aspects of HAA that the court was not required to consider because it determined the case on other grounds. (See, Tentative Decision, "Because the court concludes that the project would be 'a use consisting of . . . [m]ixed-use developments consisting of residential and nonresidential uses with at least two-thirds of the square footage designated for residential use,' it limits its analysis solely to that definition.")

"A statement of decision need not address all the legal and factual issues raised by the parties. Instead, it need do no more than state the grounds upon which the judgment rests . . .." (*Muzquiz v. City of Emeryville* (2000) 79 Cal.App.4th 1106, 1124–1125.) Because the court's decision does not rest on grounds that it did not consider, it is not appropriate to include such other matters in the statement of decision.

For the same reason, it is unnecessary for the court to make findings in the statement of decision as to whether the project is a Supportive Housing Development. Such a finding is collateral to the matters supporting the court's determination.

Therefore, the City's request that the proposed statement of decision be augmented to include each of these matters is denied.

The City does, however, make one further request. It requests that the remedial provisions of the tentative decision and, derivatively, the writ that will issue, be expanded and modified. Petitioners object to the City's proposed modifications. The court believes the parties' respective positions frame an important issue that was not clearly addressed in the tentative decision. That issue is how best to reconcile the provisions of Government Code section 65589.5, subdivision (k)(1)(A)(ii) and subdivision (j)(2)(A)(i), and *Honchariw v. County of Stanislaus* (2011) 200 Cal.App.4th 1066, at pages 1081–1082.

The City asks to add language to the statement of decision, not considered in *Honchariw*, that the application be deemed "complete" for purposes of subdivision (j)(2)(A)(i), based on the filing of the court's statement of decision. Petitioners take the position that the 30-day window under that subdivision lapsed long ago and, consequently, by operation of subdivision (j)(2)(B), the City must deem the project compliant.

In each of the two pending cases, the court sets the matter for further hearing on this limited issue and no other. No further briefing is requested or permitted. The hearing will be July 1, 2021, at 8:30 a.m., in Department 40.

The clerk is directed to give notice, with a courtesy copy by email to each counsel.