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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

RESPONSIBLE DEVELOPMENT FOR
WATER TANK HILL,

Petitioner and Appellant,

v.

COUNTY OF SAN MATEO et al.,

Respondents;

SAN MATEO REAL ESTATE, INC.,

Real Party in Interest and
Respondent.

A150883

(San Mateo County
Super. Ct. No. CIV 537745)

The Ascension Heights Subdivision Project (the project) is a proposed housing development in an unincorporated area of San Mateo County known locally as Water Tank Hill. In February 2016, San Mateo Real Estate, Inc. (Developers) secured approval to proceed with the project from the County of San Mateo (County). However, Responsible Development for Water Tank Hill (Appellant) challenged the County's decision by filing a petition for a writ of mandate. This is an appeal from the denial of Appellant's petition. Appellant contends the County's approval of the project violates (1) the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.), and (2) the Subdivision Map Act (Gov. Code § 66410 et seq.). We affirm the judgment.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The Project

The project site consists of 13.32 acres of hillside land in an unincorporated area, approximately two miles southwest of the City of San Mateo. The site covers six contiguous parcels, which surround another parcel that is not part of the project. A water tank and cellular transmitter sit on that separate parcel (the tank/cell tower parcel). The site is undeveloped, except for a paved road for accessing the tank/cell tower parcel.

Residential neighborhoods surround the project site, which is less than a quarter mile from the College of San Mateo. There are single-family homes on roads along three borders of the project site. The site itself is zoned for single-family residential use with a minimum lot size of 7,500 square feet. It is designated in the County's general plan as a medium low density residential area, authorizing 2.4 to 6 dwelling units per acre.

In 2002, Developers filed an application for a planning permit to construct a major subdivision of 25 residential lots at the project site. After completing an environmental review under CEQA, the County's Planning Commission (the Commission) declined to approve the project, citing "non-conformance to specific General Plan policies, and geotechnical and drainage/erosion impacts, and visual impacts." In June 2010, the County's Board of Supervisors (the Board) denied Developers' appeal, but remanded the matter to the Commission to review a revised development plan.

Following the Board's decision, Commission staff worked with Developers to solicit community input about a project redesign, holding 10 public meetings between November 2010 and September 2011. The primary concern that emerged from these meetings pertained to the number of lots; community members advocated for fewer lots confined to an area of the site that would reduce its visual impact. Accordingly, the project was redesigned as a "reduced intensity project," which limited "residential development to the northwestern portion of the project site, thereby reducing the subdivision request and associated number of proposed residential units."

In November 2011, Developers "officially" submitted a revised plan, which triggered a new review and environmental analysis of the project. The current

development plan is to subdivide the property into 21 lots and construct a development consisting of 19 single-family homes, a new access roadway, and 7.8 acres of open space. The new roadway will provide access to each home and the tank/cell tower parcel. Architecture and landscaping will conform with existing neighborhoods in the area, and landscaping will be designed to reduce erosion and maximize soil stability, and to screen existing view-sheds while minimizing obstruction of solar access for each residence.

B. The County's Review of the Proposed Project

1. Background

In May 2013, the County retained Analytical Environmental Services (AES) to conduct an environmental review of the project, and in October 2013, it issued a notice that an environmental impact report (EIR) would be prepared.

During a scoping period in late 2013, the County gathered information and solicited public input about the project. At an October 2013 scoping meeting, representatives of Baywood Park Homeowners Association (Baywood HOA) and other interested citizens expressed the following concerns: (1) project aesthetics would negatively affect neighbors; (2) construction activities would adversely impact air quality; (3) removing trees would adversely impact wildlife; (4) constructing housing on the steep slope would exacerbate existing soil erosion issues; (5) the project would exacerbate hydrology and water quality issues at the site; (6) converting open space to housing would not further zoning and land use policies; (7) construction noise would adversely impact the surrounding area; (8) additional housing would impede emergency access and create a potential fire hazard; (9) increased construction related traffic would burden surrounding neighborhoods; and (10) the impact on soil stability, erosion, landslides and public infrastructure would be cumulatively considerable. The County used these concerns to identify environmental impacts to address in the EIR.

2. Draft EIR

In April 2014, the County published a draft EIR and notified the public it was available for review and comment. The draft EIR identified the following project objectives: provide needed housing; provide a development consistent with economic

and social needs as well as environmental constraints; preserve and enhance environmental quality of affected residential areas through appropriate mitigation programs; work with pertinent agencies to create mitigation measures that reduce or eliminate project impacts on existing residents; provide open space in residential areas; provide a well-designed development that is compatible with surrounding land uses; and provide orderly visual and land use transitions.

The draft EIR analyzed the impacts of the project on the following resources: aesthetics; air quality and greenhouse gas emissions; biological resources; geology and soils; hazards and hazardous material; hydrology and water quality; land use; noise and vibration; population and housing; public services, utilities, and recreation; and transportation and circulation. For each resource, AES identified potential environmental impacts, analyzed the significance of the possible impact, and proposed mitigation measures for impacts that were potentially significant. According to the draft EIR, “[a]ll potential impacts would be either less than significant or would be reduced to a less-than-significant level with incorporation of proposed mitigation measures.”

The draft EIR also contained a discussion of alternatives to the proposed project, which were evaluated to determine whether they could achieve the objectives of the project with more or less impacts on the environment. The draft EIR discussed three specific alternatives: (A) no development; (B) reduced intensity; and (C) alternate design with fewer residences. AES concluded that alternative A would cause the least damage to the environment, but would not achieve any of the project objectives. Alternative C was identified as the environmentally superior alternative because some project objectives could be achieved, and there would be lesser or equal impacts as compared to the proposed project in all but one issue area. However, the draft EIR concluded that “the proposed low density construction would not meet the objectives, which require sufficient housing supply to meet County projected housing needs. Low density development would impact the ability of the County and the City of San Mateo to meet housing needs as stated and required by the General Plan Housing Element.”

In May 2014, the Commission held a public hearing to afford the community the opportunity to present comments about the draft EIR for Commission staff and AES to review and address in the final EIR (FEIR).

3. FEIR

In December 2014, the County published a FEIR for the project. Volume 1 of the FEIR contained comments about the draft EIR and staff responses to those comments, as well as a mitigation monitoring and reporting plan. Volume II consisted of a revised draft EIR.

On January 28, 2015, the Commission held a public hearing to consider certification of the FEIR. Commission staff submitted an executive summary and report recommending that the Commission: (1) pass a resolution certifying the FEIR as complete, correct, and adequate under CEQA; (2) pass a resolution adopting the mitigation monitoring report, and a proposed statement of findings and facts; and (3) approve a vesting tentative map for the project. This report summarized the background of the project, the review process, and evidence supporting proposed findings that the project complied with the County's general plan, zoning law, subdivision regulations, grading regulations, and that the requirements of CEQA had been satisfied. The Commission received the report, took comments from 28 speakers, and then continued the matter.

At a continued hearing on February 25, 2015, the Commission heard comments from 12 speakers. Then, Developers requested additional time to revise their plans or gather additional materials responsive to concerns that had been raised. The Commission granted that request and directed its staff to prepare an alternative set of findings in the event of a decision to deny approval.

In August 2015, the County published a revised FEIR, which included (1) an updated draft EIR, (2) additional material submitted by Developers, and (3) expanded analyses of project impacts on air quality, biological resources, public services, traffic, as well as project alternatives.

On October 14, 2015, the Commission held another public hearing to consider whether to certify the FEIR. Commission staff proposed a set of findings in the event the project was not approved, although it recommended that the Commission certify the FEIR and approve the project. The staff also provided an analysis of new information submitted by Developers, outlined project revisions that Developers made to respond to concerns about the project, and proposed additional conditions for approving the project. The Commission received the staff report and evidence and heard comments from 17 speakers before voting to close the public hearing. Then, by a 3-2 vote, the Commission approved the project and adopted proposed findings and conditions of approval.

In January 2016, the County published a revised FEIR, which was modified to reflect the outcome of the Commission hearings.

4. Appeal by Baywood HOA

Baywood HOA appealed to the Board to reverse the Commission's approval of the project, alleging a lack of process, inadequate FEIR, and insufficient evidence to support the Commission findings.¹ The Commission responded with a written report, which addressed Baywood HOA's claims and other issues of concern, described the lengthy review process, and ultimately recommended that the Board deny the appeal. An executive summary submitted by the County's community development director also recommended that the Board deny the appeal. The director emphasized that the Commission had adopted conditions of approval that specifically addressed the main concerns voiced by community members. Those conditions required: (1) a 20-foot setback in the rear of lots bordering Parrott Drive, which was not required by law; (2) trees and landscaping to screen the development; (3) height restrictions that were lower than restrictions imposed by the zoning law; and (4) design guidelines to maintain low profiles for homes on sloped lots on the project site.

¹ Baywood HOA's numerous claims were outlined in a letter from its counsel, who is also counsel of record for Appellant. Notably, counsel's letter was dated the day before the Commission approved the project.

On February 9, 2016, the Board held a public hearing to consider Baywood HOA's appeal. Commission staff presented its report and recommendations, and statements were made by representatives of the Developers and the Baywood HOA and by numerous private citizens. By a vote of 4-1, the Board denied the appeal and upheld the Commission's decision to approve the project after further modifying the conditions of approval.

C. The Present Action

In March 2016, Appellant filed a petition for writ of mandate seeking to set aside the project approvals, and to compel the County to comply with pertinent laws and its own general plan. In the petition, Appellant described itself as "an unincorporated association of residents and homeowners' associations based in San Mateo County" that is "dedicated to preserving the character, environment and well-being of the Baywood Park neighborhood, as well as ensuring that the County follows sound land use practices, including those set forth in the County Code and General Plan." Appellant alleged that its members, particularly Baywood HOA, "participated extensively in the administrative process," voiced their concerns, and objected to the approval of the project at virtually every stage of the review process.

The petition's first cause of action alleged that the County violated CEQA by (1) certifying a FEIR that failed to adequately analyze, disclose and/or mitigate significant impacts of the project; (2) failing to adopt feasible mitigation measures that would adequately reduce or avoid significant environmental impacts; (3) adopting findings that were not supported by substantial evidence; and (4) failing to recirculate the FEIR after making changes that constituted " 'significant new information.' "

In its second cause of action, Appellant alleged that the County violated provisions of the Government Code that require a county to make land use determinations that are consistent with its general plan and zoning laws. (See Gov. Code, §§ 65300, 65860, 66411.) In support of this claim, which incorporated an alleged violation of the Subdivision Map Act, Appellant alleged that approval of the project was inconsistent with the following policies or laws: (1) a general plan policy to avoid geological hazards;

(2) a local subdivision regulation precluding approval of a tentative map that is not physically suitable for the density and character of the proposed project; and (3) a local tree ordinance regulating the removal of certain types of trees.

On January 23, 2017, the trial court filed an order after hearing denying the writ of mandate. The court first concluded that the County’s approval of the FEIR comported with CEQA. In reaching this conclusion, the court rejected Appellant’s specific challenges to the environmental analysis of four elements: (1) air quality; (2) aesthetics; (3) hydrology; and (4) noise. In each instance, the element was properly analyzed in terms of impact and mitigation and the County’s determinations were supported by the evidence. The court also concluded that Appellant failed to establish that the County committed any of the Government Code violations alleged in the second cause of action. Appellant’s primary argument was that the County violated the Subdivision Map Act but it did not demonstrate that the project was inconsistent with any policy in the general plan.

II. CEQA DISCUSSION²

“In CEQA cases, as in other mandamus cases, we independently review the administrative record under the same standard of review that governs the trial court. [Citation.]’ [Citation.]” (*San Francisco Baykeeper, Inc. v. State Lands Com.* (2015) 242 Cal.App.4th 202, 216.) Under that standard, the agency’s determinations and decisions are reviewed for abuse of discretion. “An agency abuses its discretion when it fails to proceed in a manner required by law, or when its determination or decision is not supported by substantial evidence. [Citations.] Judicial review of these two types of error differs significantly: While we determine de novo whether the agency has employed the correct procedures, scrupulously enforcing all legislatively mandated CEQA requirements, we accord greater deference to the agency’s substantive factual conclusions. [Citation.]” (*Ibid.*)

² Statutory references in Section II of this opinion are to the Public Resources Code unless otherwise stated. All references to “Guidelines” are to the CEQA Guidelines promulgated under section 21083. (Cal. Code Regs., tit. 14, § 15000 et seq.)

A. Issues on Appeal

Appellant contends that the County violated CEQA by certifying a FEIR that fails to analyze properly and/or mitigate significant impacts of the project on (1) noise, and (2) air quality.

Preliminarily, Developers argue that Appellant cannot raise these issues on appeal because it failed to adequately exhaust administrative remedies. “ “No action or proceeding may be brought pursuant to Section 21167 unless the alleged grounds for noncompliance . . . were presented to the public agency orally or in writing” (§ 21177, subd. (a).) [Citation.] “The essence of the exhaustion doctrine is the public agency’s opportunity to receive and respond to articulated factual issues and legal theories before its actions are subjected to judicial review.” [Citation.] Comments must express concerns so the lead agency has “ “its opportunity to act and to render litigation unnecessary.” ’ ” [Citation.] ‘The purposes of the doctrine are not satisfied if the objections are not sufficiently specific so as to allow the Agency the opportunity to evaluate and respond to them.’ [Citation.] “ “[R]elatively . . . bland and general references to environmental matters’ . . . , or ‘isolated and unelaborated comment[s]’ ” do not satisfy the exhaustion requirement. [Citation.] Rather, “[t]he ‘exact issue’ must have been presented to the administrative agency” ’ [Citation.] Requiring anything less ‘would enable litigants to narrow, obscure, or even omit their arguments before the final administrative authority because they could possibly obtain a more favorable decision from a trial court.’ [Citation.] Exhaustion of administrative remedies is a ‘jurisdictional prerequisite.’ [Citation.]” (*North Coast Rivers All. v. Marin Municipal Water Dist. Bd. of Directors* (2013) 216 Cal.App.4th 614, 623–624.)

In the present case, Baywood HOA and many other citizens vigorously opposed this project at every stage of the administrative process. Furthermore, Developers do not dispute that members of Appellant’s organization and other interested citizens consistently objected to the CEQA analysis of the noise and air quality impacts of this project. Instead, they complain that Appellant is presenting new arguments to support those objections. We conclude that Appellant’s arguments to this court may be refined,

but they are essentially the same claims that were presented to and rejected by the County. Thus, Appellant did exhaust its administrative remedies. By the same reasoning, we reject Developers' related claim that some arguments Appellant made to the County were not adequately preserved in the trial court. Therefore, we decide the CEQA issues on their merits. As noted, both claims pertain to the adequacy of the FEIR.

“ ‘ “The EIR is the heart of CEQA” and the integrity of the process is dependent on the adequacy of the EIR. [Citations.]’ [Citation.] ‘The purpose of an [EIR] is to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project.’ (§ 21061.)” (*Citizens for a Sustainable Treasure Island v. City and County of San Francisco* (2014) 227 Cal.App.4th 1036, 1045 (*Treasure Island*).

“An EIR should be prepared with a sufficient degree of analysis to provide decisionmakers with information which enables them to make a decision which intelligently takes account of environmental consequences. An evaluation of the environmental effects of a proposed project need not be exhaustive, but the sufficiency of an EIR is to be reviewed in the light of what is reasonably feasible The courts have looked not for perfection but for adequacy, completeness, and a good faith effort at full disclosure.” (Guidelines, § 15151.)

B. Noise

Appellant contends the County violated CEQA because the FEIR admits that project related construction noise will significantly impact the environment and yet the County made no finding to justify approving the project despite that impact. We reject this contention because, as discussed below, the FEIR concluded that noise impacts from construction activity can be mitigated to a less than significant level, and this conclusion, which is based on a detailed analysis of several relevant criteria, is supported by substantial evidence.

1. Background

FEIR section 4.8 assessed impacts of the project on the existing ambient noise environment in the vicinity of the project site. Ambient noise was defined as “the all-encompassing noise level associated with a given noise environment.” To quantify the noise levels, the FEIR used a decibel scale (dB), adjusted for frequency with a standardized A-weighting network (dBA), which AES described as a standard tool of environmental noise assessments.

The dBA calculation can be used to apply “composite noise descriptors” that estimate an average noise level over a 24-hour period, such as the “Day-Night Average Level (Ldn) and community noise equivalency level (CNEL).” In this case, AES used the Ldn descriptor to report some noise data pertinent to the impacts analysis. However, AES explained that, “[b]ecause Ldn represents a 24-hour average, it tends to disguise short-term variations in the noise environment. Where short-term noise sources are an issue, noise impacts may be assessed in terms of maximum noise levels, hourly averages, or other statistical descriptors.”

As a starting point for analyzing potential noise impacts of the project, AES conducted a 24-hour noise assessment of existing ambient noise conditions. The primary source of noise in the area was traffic on roads surrounding the site, although some airplane noise was also noted. AES measured noise levels at six locations “adjacent to sensitive noise receptors and where project-related noise ha[d] the potential to raise the ambient noise level.” The nearest sensitive receptor was approximately 50 feet from the northwest boundary of the project site, at the location of a cluster of single-family homes. The results of this assessment were reported in a table in the FEIR. The ambient noise measures ranged from 40.4 dBA, Ldn to 51.7 dBA, Ldn.

AES consulted several resources to gather criteria for assessing whether changes in ambient noise levels would be significant, which included: (1) Federal Transit Administration (FTA) guidelines for calculating acceptable vibration levels; (2) a general plan policy requiring an acoustical analysis for all new residential development in an unincorporated area that experiences a noise level of 60 CNEL or greater; (3) County

nuisance ordinances, which establish (a) scales of acceptable levels of interior and exterior noise at a residential location, and (b) an exemption for construction activities conducted at specified times; (4) a general plan policy of the City of San Mateo (the City), which prohibits a new land use that generates noise levels of 60 dB or greater at the property line, excluding existing ambient noise; and (5) the City's noise ordinance, which adopts a threshold standard of acceptability of 90 dB for authorized construction activities.

AES used these resources and CEQA Guidelines to formulate the following criteria for evaluating whether a given activity would significantly impact the ambient noise environment: (1) exposure of persons to noise levels that exceed standards established in the general plan, noise ordinance, or other applicable agency standards; (2) exposure of persons to excessive ground borne vibration or noise levels; (3) a substantial permanent increase in ambient noise levels in the vicinity of the project; (4) a substantial temporary or periodic increase in ambient noise levels in the vicinity of the project; (5) exposure of people to or generation of noise levels "in excess of the County's noise threshold of 60 dB Ldn, exterior or 45 dB Ldn, interior"; (6) exposure of people to or generation of ground borne vibration or noise levels that exceed the threshold of annoyance adopted by the FTA; and (7) operation of construction equipment on weekdays between the hours of 6:00 p.m. and 7:00 a.m., on Saturdays between 5:00 p.m. and 9:00 a.m., and any time on Sundays, Thanksgiving, and Christmas.

The FEIR analyzed six potential noise impacts associated with the project: (1) noise from construction activities at the site; (2) construction related traffic noise; (3) ground borne vibration noise during construction; (4) traffic noise within the development after project completion; (5) increased traffic volumes in surrounding neighborhoods following project completion; and (6) the cumulative increase of traffic and development noise levels at new and existing residences. Applying one or more of the significance criteria outlined above, AES determined that noise impacts (3) through

(6) were less than significant. Appellant does not challenge these conclusions.³ AES concluded that impact (1), noise from construction activities at the project site, and impact (2), construction related traffic noise, would be less than significant with mitigation.

To analyze impact (1), AES used data about noise emission levels for several types of construction equipment to predict maximum noise levels (Lmax) that were likely to occur during the construction phase of the project. Assuming an existing ambient noise level of 51.7 dBA Ldn, AES reported that “the resulting maximum noise level as a result of construction activities that would occur at the nearest sensitive receptor northeast of the project site would be 85 dBA, Lmax.” AES pointed out that these noise effects would be temporary and limited to daytime hours, but nevertheless concluded they were potentially significant. AES next concluded that the impact of noise from construction activities could be reduced to a less than significant level by implementing **Mitigation Measure 4.8-1**, which stated:

“The project applicant shall ensure through contractual agreements that the following measures are implemented during construction:

“[1] Construction activities shall be limited to occur between the hours of 7:00 A.M. to 6:00 P.M. Monday through Friday, and 9:00 A.M. to 5:00 P.M. on Saturdays. Construction activities shall not occur on Sundays, Thanksgiving, or Christmas. The intent of this measure is to prevent construction activities during the more sensitive time period and minimize the potential for effects.

³ Impact (3), vibration during construction, would have less than a significant impact because the predicted increase in vibration from construction would not cause vibration levels in the area to exceed the significance threshold established by the FTA. Impacts (4) and (5), traffic noise levels within the completed development area and the increase in traffic volumes in the surrounding neighborhoods, were less than significant because they would not cause noise levels to exceed the County’s noise threshold of 60 dBA, Ldn for residential sensitive receptors. Finally, impact (6), the cumulative effects of increased traffic and development on noise levels at new and existing residences, was less than significant because it would not cause noise levels to exceed County noise thresholds for outdoor activity areas.

“[2] Stationary equipment and staging areas shall be located as far as practical from noise-sensitive receptors.

“[3] All construction vehicles or equipment, fixed or mobile, shall be equipped with properly operating and maintained mufflers and acoustical shields or shrouds, in accordance with manufacturers’ recommendations.

“[4] Construction activities shall conform to the following standards: (a) there shall be no start-up of machines or equipment, no delivery of materials or equipment, no cleaning of machines or equipment and no servicing of equipment except during the permitted hours of construction; (b) radios played at high volume, loud talking and other forms of communication constituting a nuisance shall not be permitted.

“[5] The general contractors for all construction activities shall provide a contact number for citizen complaints and a methodology for dealing with such complaints such as designating a noise disturbance coordinator. This noise disturbance coordinator shall receive all public complaints about construction related noise and vibration, shall be responsible for determining the cause of the complaint, and shall implement any feasible measures to be taken to alleviate the problem. All complaints and resolution of complaints shall be reported to the County weekly.”

In concluding that **Mitigation Measure 4.8-1** would reduce the impact of construction related noise to a less than significant level, AES reasoned as follows: First, although construction activities would cause the noise level to exceed 60 dB, it would not exceed 90 dB at 25 feet, which is the threshold of acceptability for construction activities in the City noise ordinance. Second, **Mitigation Measure 4.8.1** would have the overall effect of reducing construction noise and facilitating the resolution of noise complaints. Third, there was no feasible mitigation measure that would prevent all noise from exceeding 60 dB, due to the nature of construction activities. However, the day and time restrictions would exempt the construction phase from the 60 dB noise threshold in the County noise ordinance.

In assessing impact (2), increased construction traffic noise, AES focused on a worst-case scenario by assuming that all construction trips would occur during the peak

traffic hour. Under that scenario, AES found that the noise impact could still be reduced to a less than significant level by implementing **Mitigation Measure 4.8-1** because the additional vehicle trips per day attributable to the project would not cause noise levels to exceed the 60 dB, Ldn noise significance threshold.

2. Analysis

Appellant argues that the County violated CEQA by finding that “construction noise impacts” were less than significant even though these impacts will “indisputably” exceed the 60 dBA significance criteria adopted in the FEIR. As a corollary to this claim, Appellant contends that because the FEIR concedes that construction noise impacts cannot be reduced to a less than significant level, the County committed legal error by approving this project without finding that significant construction noise impacts were outweighed by “specific overriding economic, legal, social, technological, or other benefits of the project.” (§ 21081, subd. (b).)

First, Appellant misinterprets the information in the FEIR. Under Appellant’s reading, ambient noise in the community will increase by 64 to 110 percent during construction because the current noise level is between 40.4 and 51.7 dBA Ldn, while the noise level during construction will be 85 dBA, Lmax. However, the Ldn calculation of the existing ambient noise level is not an equivalent measure to the Lmax calculation of anticipated construction related noise. Ldn represents a 24-hour average of the ambient noise level in the community, while Lmax represents the highest possible noise emission from “the loudest activities associated with construction . . . at 50 feet from the construction equipment,” which was the location of the nearest sensitive noise receptor. As discussed above, the distinction between these two measures was fully explained in the FEIR.

Second, the FEIR did not conclude that construction noise will exceed the pertinent significance criteria, as Appellant contends. AES contemplated that at some time(s) during the construction phase, Developers would use their loudest equipment and temporarily cause the ambient noise level to raise as high as 85 dBA. For this reason, AES concluded that construction activities had “the potential to generate a substantial

temporary or periodic noise level greater than existing ambient levels in the project vicinity.” Because of this potentially significant impact, AES recommended implementing **Mitigation Measure 4.8-1**.

Third, Appellant misconstrues its claim as an issue of law. The County did not approve the project despite the fact that construction noise will significantly impact the environment. It approved an FEIR that found that the project’s construction noise impacts were *less than significant* with mitigation. “A less than significant impact does not necessarily mean no impact at all. [Citations.]” (*Oakland Heritage Alliance v. City of Oakland* (2011) 195 Cal.App.4th 884, 899.) The question whether an impact can be “mitigated to a less than significant level is properly treated as one of fact.” (*Ibid.*) We review this factual finding for substantial evidence.

Appellant contends there is “no substantial evidence” that **Mitigation Measure 4.8-1** will reduce the impact of construction noise “below the 60 dBA threshold adopted by the EIR.” However, this argument assumes that the 60 dBA, Ldn threshold was the sole determinant of whether construction noise would have a significant environmental impact, when that was actually one of several factors AES considered in order to assess the six potential noise impacts associated with this project. As to this impact, other pertinent criteria included the City’s 90 dBA threshold that applies specifically to construction noise, as well as the day and time restrictions that exempt construction noise from the County’s noise ordinance.

Appellant repeatedly contends that the County was required to use the 60 dBA, Ldn standard as a mandatory maximum threshold for construction noise. But it provides neither reason nor legal authority for this assertion. AES considered the 60 dBA standard in its analysis because it is used in other contexts by the County and the City to evaluate whether an exterior land use activity generates excessive noise. However, that standard is not an appropriate tool for measuring the impact of construction noise, which changes constantly due to the periodic and temporary use of different types of noise generating equipment at a construction site. For this reason, AES did not quantify construction noise activity into a single number (i.e., a Ldn or CNEL). Instead, it considered the noise

levels associated with different types of equipment and then selected 85 dBA as the highest potential noise level (i.e., L_{max}) that was likely to occur.

Thus, the question is not whether **Mitigation Measure 4.8-1** will guarantee that construction noise levels never exceed 60 dBA, L_{dn}. The pertinent issue is whether substantial evidence supports the County's finding that implementing these mitigation measures would reduce the impact of construction noise to a less than significant level considering the multiple criteria outlined in the FEIR. That evidence is summarized in the FEIR itself. As discussed, **Mitigation Measure 4.8-1** will: restrict construction activity to the hours approved in the County's noise ordinance; require a formal protocol for resolving noise complaints; restrict the placement of stationary equipment to locations far away from noise sensitive receptors; require the use of mufflers and other acoustical shields; and implement policies to ensure that construction workers do not engage in other types of activities that could create a noise nuisance. The County concluded reasonably that implementing these additional measures would reduce the impact of construction related noise to a less than significant level.

Taking a different tack, Appellant contends the County violated CEQA by ignoring significant noise impacts simply because the project would comply with a noise ordinance. Under this theory, **Mitigation Measure 4.8-1** would ensure that the project qualified for an exemption from the County noise ordinance, but it would not reduce the noise impact to a less than significant level because there was no way to "consistently reduce noise levels below the 60 dBA threshold adopted by the EIR." Thus, Appellant posits, the County's reliance on **Mitigation Measure 4.8-1** violated CEQA, "which does not allow lead agencies to ignore serious environmental impacts simply because a project activity complies with other local ordinances or state standards."

First, as discussed above, the FEIR analysis of noise impacts was comprehensive, covering six distinct project specific impacts that were analyzed by considering several potentially relevant criteria. Appellant fails to identify any potential noise impact that was allegedly ignored. Second, to the extent Appellant is suggesting that local noise ordinances are not relevant criteria, we disagree. Both the County and the City that was

closest to the unincorporated area where the project is located have adopted ordinances that (1) explicitly carve out construction activity from other types of land use activities that might create excessive noise and (2) establish specific criteria for regulating that activity. The County did not abuse its discretion by using these noise level standards as significance criteria for assessing construction noise impacts in this case. Finally, as we have already discussed, the day and time restrictions were only one component of **Mitigation Measure 4.8-1**. Because Appellant ignores the other components of this mitigation measure, its substantial evidence challenge necessarily fails.

Appellant relies on *Berkeley Keep Jets Over the Bay Com. v. Board of Port Cmrs.* (2001) 91 Cal.App.4th 1344 (*Berkeley Jets*), which reinforces our conclusions. In that case, Division Two of this court reviewed an EIR for an airport expansion project at the Oakland International Airport. (*Id.* at pp. 1349–1350.) EIR used the CNEL cumulative noise descriptor to evaluate the noise impacts of the project. (*Id.* at p. 1373.) Adopting 65 CNEL as the threshold of acceptable noise, analysts calculated anticipated CNEL noise levels at various locations in the vicinity of the airport. Ultimately, the EIR concluded that all noise impacts on neighborhoods in the project area that were not otherwise subject to an aviation easement were not significant and required no mitigation. (*Id.* at pp. 1373–1374.) The *Berkeley Jets* court found that this analysis was inadequate and incomplete; because the EIR relied exclusively on the CNEL measure, the EIR failed to consider other noise impacts, such as the increased number of night time flights, the frequency of those flights, and their effect on sleep. (*Id.* at pp. 1377–1383.)

Obviously, the permanent noise impacts of an airport expansion project on a community are fundamentally different from the temporary construction noise impact of a housing development project. With this caveat, *Berkeley Jets* provides useful guidance for conducting a proper CEQA analysis of the noise impacts of a project. First, that case highlights the fact that CEQA imposes an independent requirement to assess environmental impacts from noise by considering “ ‘qualitative factors as well as economic and technical factors.’ ” (*Berkeley Jets, supra*, 91 Cal.App.4th at pp. 1379–1380, italics omitted, quoting § 21001, subd. (g).) Second, *Berkeley Jets* explained that

CEQA does not define “significant noise impacts simply in terms of whether a project would violate applicable local, state, or federal noise standards.” (*Id.* at p. 1380.) Instead, CEQA requires the lead agency to use “a site-sensitive threshold of significance for noise,” and recognizes that “[a]n ironclad definition of significant effect is not always possible because the significance of an activity may vary with the setting. For example, an activity which may not be significant in an urban area may be significant in a rural area.” [Citations.]” (*Id.* at pp. 1380–1381)

In the present case, the noise impacts analysis comports with the principles outlined in *Berkeley Jets*. The FEIR separately addressed noise-specific impacts during the two distinct phases of the project, construction and operation, and Appellant does not challenge any of the conclusions pertaining to long-term noise impacts during the operational phase. Furthermore, AES did not use a single fixed standard for measuring significance during the construction phase, but a combination of criteria that included qualitative factors, such as the temporary, periodic, and unfixed nature of noise associated construction activities, as well as the days and times when construction noise would likely be more bothersome. By contrast, Appellant’s myopic focus on the 60 dBA Ldn standard is difficult to square with the holding of *Berkeley Jets*. That standard is not a site-sensitive threshold of significance for construction noise because it is a fixed 24-hour average measure just like the CNEL measure that was used in *Berkeley Jets*. AES recognized this fact, and thus considered other pertinent factors in conducting its assessment. Appellant fails to demonstrate any material error in that analysis.⁴

C. Air Quality and Climate Change

Appellant contends that the FEIR analysis of the impacts of pollutant emissions during the construction phase of the project was flawed, leading to conclusions that are

⁴ In summary fashion, Appellant contends that while the FEIR purported to use a “qualitative threshold” of significance by evaluating the significance of temporary and period noise hikes, the County refused to actually apply this standard. In a similar vein, Appellant argues that the FEIR did not actually rely on the 90 dBA significance standard derived from the City noise ordinance. However, the record shows that AES applied both of these significance criteria.

not supported by the evidence. Again, we disagree; the FEIR's comprehensive analysis of these impacts is supported by substantial evidence.

1. Background

Section 4.2 of the FEIR analyzed project impacts on air quality and climate change. The air quality impacts analysis covered two general categories of pollutants: (1) criteria air pollutants (CAPs), common air pollutants known to be detrimental to human health that are monitored by the United States Environmental Protection Agency (USEPA) and the California Environmental Protection Agency (CEPA); and (2) toxic air contaminants (TACs), substances that are monitored by the California Air Resources Board (CARB) because they are likely to be emitted in California and potentially have adverse health effects.

The FEIR analysis of climate change pertained to the emissions of anthropogenic greenhouse gasses (GHGs). AES acknowledged the controversy about the extent to which human activities affect global climate change, but assumed that GHGs contribute to climate changes. The FEIR analysis of GHG emissions centered on carbon dioxide (CO₂), a GHG that is regulated as a pollutant by the Clean Air Act.

The FEIR assessment of the existing air quality and climate change setting established the following pertinent facts. The project site is in the San Francisco Bay Area Air Basin (SFBAAB), which falls under the jurisdiction of the Bay Area Air Quality Management District (BAAQMD). National and California Ambient Air Quality Standards designate the following CAPs as pollutants of concern for the SFBAAB: reactive organic gas (ROG) and nitrogen oxides (NO_x), which combine to create ozone; and two types of particulate matter that are distinguished by their size, PM-10 and PM-2.5. Diesel particulate matter (DPM), which is classified by the state as a TAC, was also a potential concern for the SFBAAB. DPM is a complex mixture of pollutants visible in the emissions of diesel exhaust that has the potential to cause cancer and other serious health problems. Primary sources of DPM emissions in the project area were diesel powered vehicles traveling on nearby state highways and arterial roadways. Emergency generators were another source of DPM.

With respect to climate change, there are many sources of GHG emissions in the project area, including vehicles, trucks, airplanes and airports, natural gas dispensing stations, and electricity generation facilities. The FEIR used a method called carbon dioxide equivalent (CO₂e) to convert the value of all GHGs to a common value. As AES explained, “[b]y providing a common measurement, CO₂e provides a means for presenting the relative overall effectiveness of emission reduction measures for various GHGs in reducing project contributions to global climate change.”

The FEIR analyzed separately the construction and operation phases of the project because each posed distinct issues of concern with respect to air pollutants and GHG emissions. AES used different models to estimate emissions depending on the type of pollutant and the phase of the project.

The FEIR also discussed the complex regulatory schemes that have been implemented at the federal, state, and local levels to address the problems of air pollution and climate change. This discussion recognized California’s role as a leader with respect to implementing a comprehensive climate change strategy to substantially reduce total statewide GHG emissions in the future. That state strategy “is multifaceted and involves a number of State agencies implementing a variety of State laws and policies.” The FEIR explained that CARB is primarily responsible for monitoring these efforts and has implemented emission reduction measures, but CARB has not established a “definitive numerical GHG emissions threshold.”

The FEIR analyzed potential emissions impacts of eight project specific activities. For context, we summarize the material conclusion here, and discuss details later to the extent they relate to a specific claim of error. Impacts (1), (2), and (3) pertained to the construction phase of the project.

Impact (1) analyzed potential effects of CAP emissions during construction. The FEIR concluded that emissions of ROG, PM-10 and PM-2.5 would not be significant. Emissions of NO_x could exceed BAAQMD thresholds, but this impact would be less than significant if two sets of proposed mitigation measures were implemented.

Impact (2) analyzed construction related emissions of DPM. AES found that DPM emissions from diesel engines during construction would temporarily increase existing DPM levels in the area, but the impact was not significant because construction related DPM emissions would be temporary and intermittent and would not exceed the emission threshold contained in the BAAQMD guidelines.

Impact (3) addressed the potential of construction activities to emit odors from diesel equipment, paint solvents, and other construction materials. These odors would be temporary, intermittent, and not likely to extend beyond the site. The FEIR concluded that these odor impacts would be less than significant.

Impacts (4), (5), and (6) were corollaries of the first three impacts, which addressed the operational phase of the project. AES concluded that all three categories of emissions during operation of the project would be less than significant. Impact (7) addressed whether emissions during the operational phase of the project would have a cumulative impact along with other development projects on the overall air quality in the region as of the year 2030. AES concluded that this cumulative impact would be less than significant.

Finally, impact (8) considered whether the project would generate cumulatively considerable GHG emissions. AES concluded that GHG emissions during the operation phase of the project would be less than significant because they would not exceed the emission threshold established by the BAAQMD. However, no agency had established a quantitative threshold of acceptable construction-related GHG emissions. Therefore, AES assumed that GHG emissions would be significant and proposed a mitigation measure that would reduce project generated emissions by 26 percent.

2. Analysis of Air Quality Issues

Appellant contends that the County violated CEQA by failing to adopt “feasible” measures to mitigate the significant air quality impacts of the project. As discussed above, the FEIR contained separate analyses of CAPs and TACs. Each category of pollutant was analyzed twice to account for differing conditions during the construction and operational phases of the project, and AES reached different substantive conclusions

with respect to the impacts of CAP emissions as opposed to TAC emissions. Appellant fails to tailor its arguments to a specific impact, although it appears to focus exclusively on the construction phase of the project. We consider separately the evidence supporting the FEIR conclusions as to impact (1) involving CAPs, and impact (2), which addressed DPM.

a. CAP Emissions During Construction

AES used a “California Emissions Estimator Model” (CalEEMod) to estimate CAP emissions from all construction related sources. Then it used BAAQMD emission thresholds to evaluate the effects of these emissions on regional air quality. Reported data showed that without mitigation, the emissions would exceed the BAAQMD threshold for NOx. AES concluded this impact was potentially significant notwithstanding the fact that emissions during construction would be short-term, temporary, and intermittent. To reduce CAP emissions to an acceptable level, the FEIR proposed implementing two sets of mitigation measures.

Mitigation Measure 4.2-1a stated: “The Applicant shall ensure through the enforcement of contractual obligations that construction contractors implement a fugitive dust abatement program during construction, which shall include the following elements consistent with the Basic Construction Mitigation Measures recommended by the BAAQMD:

“[1] Cover all trucks hauling soil, sand, and other loose materials or require all trucks to maintain at least two feet of freeboard. [¶] [2] Cover all exposed stockpiles. [¶] [3] Water all exposed roadway and construction areas two times a day. [¶] [4] Sweep paved streets three times daily (with water sweepers) if visible soil material is carried onto adjacent streets. [¶] [5] Limit traffic speeds on unpaved roads to 15 miles per hour (mph). [¶] [6] After grading is complete, construction of paved surfaces (e.g. roadways, driveways, sidewalks, building pads) should be completed as soon as possible unless protected by seeding, soil binders, or other similar measures. [¶] [7] Limit idling time to a maximum of five minutes and turn off equipment when not in use; clear signage indicating this shall be displayed at the project site access point. [¶] [8] All construction

equipment shall be maintained and properly tuned in accordance with manufacturer's specifications and shall be checked by a certified visible emissions evaluator.

[¶] [9] Suspend excavation and grading activity when winds (instantaneous gusts) exceed 25 mph. [¶] [10] Any burning of cleared vegetation shall be conducted according to the rules and regulations of the BAAQMD's Regulation 5 (BAAQMD, 2008). Prior notification to BAAQMD shall be made by submitting an Open Burning Prior Notification Form to BAAQMD's office in San Francisco. [¶] [11] A publicly visible sign shall be posted with the telephone number and person to contact at the County regarding dust complaints. A response and corrective action shall occur within 48 hours. The BAAQMD's phone number shall also be visible to ensure compliance with applicable regulations.”

Mitigation Measure 4.2-1b stated: “The applicant shall ensure through contractual obligations with construction contractors that the following Best Management Practices (BMPs) shall be implemented during all stages of construction: [¶] [1] All heavy duty construction equipment be equipped with a diesel particulate matter filters. [¶] [2] Only low ROG coatings shall be utilized. [¶] [3] The applicant shall use only Tier 2 or better heavy duty construction equipment.”

AES conducted additional modeling using the CalEEMod to estimate emissions of CAPs during a construction phase that incorporated these mitigation measures. That data showed that the CAP emissions, including emissions of NOx, would be below BAAQMD thresholds.

In this court, Appellant does not directly challenge any aspect of the CAP impacts analysis, or directly dispute any factual conclusion in this section of the FEIR. Instead, Appellant contends that the County violated CEQA because the FEIR does not require Developers to use “Tier 4 construction equipment,” which Appellant describes as “a feasible and commonplace mitigation measure necessary to bring emissions down to levels safe for local residents.” As support for this contention, Appellant invokes the CEQA policy of avoiding significant adverse impacts on the environment when feasible mitigation measures are available. (§ 21002 [“public agencies should not approve

projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects”]; Guidelines, § 15250 [programs exempt from EIR requirement remain subject to the CEQA “policy of avoiding significant adverse effects on the environment where feasible”]; see also *Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 134.)

As noted above, the extensive mitigation measures proposed in the FEIR include a requirement to use Tier 2 construction equipment. Appellant fails to demonstrate that these measures are inadequate to reduce the environmental impacts of CAP emissions during construction to a less than significant level. Absent such a showing, Appellant cannot substantiate its factual premise that Tier 4 equipment was necessary to bring emissions down to a “safe” level. For the same reason, Appellant erroneously relies on the CEQA policy of avoiding significant adverse impacts on the environment when feasible mitigation measures are available. To establish that this policy was violated, Appellant would have to show that the mitigation measures the County actually adopted will not reduce emission impacts to a less than significant level.

b. DPM Emissions During Construction

The impact (2) analysis addressed TAC emissions of DPM from the use of diesel engines during the construction phase of the project. The FEIR discussed relevant circumstances, including that the health hazards of exposure to DPM can be severe, but that construction activities would occur during a fixed period and that DPM emissions during that period would be “temporary and intermittent.”

AES used the state-approved CalEEMod to calculate the pounds per day of emissions of DPM during the construction phase. It then used BAAQMD guidelines to evaluate the cancer risk and non-cancer health risks of exposures at sensitive receptor locations in the vicinity of the project.⁵ The receptors showing the greatest cancer and

⁵ To access cancer risk, AES used a formula that multiplies the exposure concentration by its cancer unit risk factor (URF) to determine an estimated lifetime cancer risk for a continuous exposure. This calculation is based on an assumption that

chronic non-cancer health risks did not exceed the threshold for TAC emissions established by the BAAQMD. Based on this evidence, the FEIR concluded that the impacts of DPM exposure were less than significant.

Because DPM is a health hazard, AES also addressed the impacts of the anticipated dispersion of DPM simultaneously emitted from on-site construction equipment, off-site equipment and material transport, and vehicle emissions from the nearby roadways. It used USEPA dispersion models to calculate those effects, but explained in the FEIR that the results were of limited use because in order to make these standard dispersion models work, AES had to assume that “all the DPM sources would emit simultaneously, 24-hours a day for an entire year.” The dispersion data showed that the “maximum unit concentration of DPM is 224.96 micrograms per cubic meter ($\mu\text{g}/\text{m}^3$) over the first construction year and occurs west of the intersection of Bel Aire Road and Ascension Drive.”

In the FEIR, AES explained why the dispersion modeling did not alter its conclusion that DPM emissions would not have a significant environmental impact: “the BAAQMD typically does not recommend that dispersion modeling and the associated health risk assessment be conducted for construction projects due to the intermittent nature of the actual emission sources and short-term duration (8 to 11 hours per day with the majority of emissions occurring during a 30 to 90 day period of grading). However, the modeling was conducted in response to concerns from local residents regarding short-term and long-term impacts from project construction. Accordingly, because of these assumptions utilized in the modeling and the nature of the calculations, comparison of the

the risk is proportional to the concentration level regardless of the period of actual exposure. AES noted that this was a conservative assumption for low dose exposures, but chose this formula as it was consistent with the regulatory approach used by the California Office of Environmental Health Hazard Assessment (OEHHA). To assess non-cancer health risk, AES used a hazard index, which calculates acceptable levels of exposure to air toxic compounds based on a ratio of the concentration of the compound in the air to an acceptable reference exposure level (REL). Under this index, exposure below chronic REL is a “no-effect exposure” because the body is capable of eliminating or detoxifying the chemical rapidly enough to avoid accumulation.

model results to ambient air quality standards are not appropriate and are misleading. Emissions assessing compliance with the NAAQS and CAAQS are assessed using the California-approved CalEEMOD as described above which determine the pounds per day of emissions from the project in order to assess implications to the overall air quality of the SFBAAB.”

In this court, Appellant contends that the County violated CEQA by ignoring DPM’s “severe health impacts due to exposures lasting less than 24 hours.” First, as outlined above, the FEIR acknowledged that DPM can have serious health effects. Second, the County explained why the FEIR does not include a separate analysis of the acute health risk of exposure to DPM in volume I of the FEIR, which contained the County’s responses to public comments about the EIR. As Commission staff explained: “Due to the size of the project, number of residences being constructed (19), the intermittent nature of construction, and lack of DPM and toxic air contaminants (TAC) sources within 1,500 feet of the project site, in accordance with the BAAQMD CEQA Guidelines, Risk and Hazard Screening Analysis Process Flow Chart, DPM and TAC concentration would not be substantial. Because the area surrounding the project site does not have any significant sources of TAC or DPM emissions (see Impact 4.2-5, Section 4.2 of the EIR), an acute health risk analysis is not warranted as outlined in the BAAQMD CEQA Guidelines, Risk and Hazard Screening Analysis Process Flow Chart.” This evidence shows that, contrary to Appellant’s argument here, the County did not ignore acute health risks associated with DPM exposure, but concluded instead that emissions associated with this project would not be substantial enough to warrant a separate analysis of that risk.

Appellant contends the FEIR itself contains evidence demonstrating that the project will cause DPM concentrations of nearly 225 micrograms per cubic meter, which is a significant impact. We disagree with this interpretation of the FEIR’s dispersion data. As discussed above, that data represents an estimated maximum concentration over the first year of construction at a specific sensitive receptor location, which was calculated by a model that assumed diesel powered sources in the area would operate

24 hours a day. As AES explained, “these are conservative emission rates annualized over the first construction year in order to assess worse-case cancer risk and health indexes. The receptors showing the greatest cancer and chronic [health index (HI)], while well below BAAQMD thresholds, are located near the east border and center of the project site. Cancer risk and chronic HI at these receptors do not exceed the BAAQMD TAC thresholds of 10 in 1,000,000 (1.0E-5) for a cancer risk and 1.0 for a chronic HI. This is a less-than-significant impact.”

3. Analysis of Climate Change Issues

Appellant contends that the FEIR employed a flawed method to conclude that GHG emissions during construction could be mitigated to a less than significant level.

a. Background

The FEIR analysis of impact (8) considered whether the project would generate cumulatively considerable GHG emissions. AES used CalEEMod to estimate project related direct and indirect GHG emissions during the construction and operational phases of the project. It summarized that data in the FEIR, and analyzed separately the potential impacts of GHG emissions during each phase of the project.

AES analyzed operational GHG emissions by applying significance criteria established in the 2010 BAAQMD CEQA Guidelines. According to that criteria, the threshold of significance for operational GHG emissions is 1,100 metric tons (MT) per year. AES concluded that operation of the development would not exceed that threshold and, therefore, operational impacts on GHG levels were less than significant.

AES explained that there was no available quantitative measure establishing an acceptable threshold of construction related GHG emissions. Therefore, AES used a statewide goal of reducing GHG emissions by 26 percent as a method of evaluating the impacts of construction GHG emissions. AES reasoned that the construction phase of the project would have less than a significant cumulative impact on GHG emissions if

mitigation measures reduced the project related emissions by 26 percent.⁶ Accordingly, the FEIR proposed **Mitigation Measure 4.2-8**, which stated:

“The applicant shall purchase CO₂e emissions reduction credits in the amount of 249 MT prior to the start of construction. GHG CO₂e emissions reduction credits are generated by projects that reduce their GHG emissions by the use of technology or a reduction in business over business as usual. The CO₂e emission reduction credits must be permanently retired by the project applicant, thereby reducing annual emissions for the lifetime of the Proposed Project.”

The FEIR concluded that if **Mitigation Measure 4.2-8** was implemented, “construction of the Proposed Project would not generate GHG emissions, either directly or indirectly, that would have a significant impact on the environment or conflict with an applicable plan, policy, or regulation adopted for the purpose of reducing the emissions of GHGs.”

b. GHG Emissions During Construction

Appellant contends the County abused its discretion by finding that construction GHG emissions will not significantly impact the environment because there is “no evidence that reducing construction emissions for this new development by 26% will achieve California’s emissions reduction objectives.” (Italics & fn. omitted.) According to this argument, the FEIR conclusions depend on an assumption of parity between a percentage reduction at the project level and a percentage reduction at the state level, which violates the holding of *Center for Biological Diversity v. Department of Fish & Wildlife* (2015) 62 Cal.4th 204, 215–216, 218 (*Center for Biological Diversity*).

In *Center for Biological Diversity, supra*, 62 Cal.4th 204, the California Supreme Court reviewed an EIR pertaining to a 20-year plan to develop approximately 12,000 acres along the Santa Clara River. (*Id.* at p. 213–214.) The proposal included

⁶ The FEIR stated: “Since CARB and BAAQMD do not have a significant threshold for construction GHG emissions, for this analysis a 26 percent or greater reduction in construction-related GHG emissions would be a less-than-significant impact to global climate change. The 26 percent reduction mirrors the State reduction goal provided in [Assembly Bill] 32.”

more than 20,500 dwelling units as well as commercial structures, schools, and recreation and community areas. (*Id.* at p. 214.) An EIR for the development’s land use plan had been approved, but disputes arose with respect to the certification of a related EIR approving two natural resources plans for the project. (*Id.* at p. 213.) The lead agency, the Department of Fish and Wildlife (the DFW), determined that the project would not have a significant impact on GHG emissions because it would not interfere with the statewide goal of reducing GHG emissions by 29 percent. DFW based this conclusion on a model demonstrating that the project design would generate 31 percent less GHG emissions than a hypothetical business as usual development in which no regulatory actions were taken to reduce emissions. (*Id.* at p. 218)

The *Center for Biological Diversity* court held that DFW did not violate CEQA by using the statewide GHG reduction goals “as its significance criterion” for evaluating the project impacts on GHG emissions. (*Center for Biological Diversity, supra*, 62 Cal.4th at p. 219.) The court reasoned: “Given the reality of growth, some greenhouse gas emissions from new housing and commercial developments are inevitable. The critical CEQA question is the cumulative significance of a project’s greenhouse gas emissions, and from a climate change point of view it does not matter where in the state those emissions are produced. Under these circumstances, evaluating the significance of a residential or mixed-use project’s greenhouse gas emissions by their effect on the state’s efforts to meet its long-term goals makes at least as much sense as measuring them against an absolute numerical threshold.” (*Id.* at pp. 220–221.)

The *Center for Biological Diversity* court also found that DFW did not violate CEQA “by comparing the project’s expected emissions to a hypothetical business-as-usual scenario rather than to a baseline of emissions in the existing physical environment.” (*Center for Biological Diversity, supra*, 62 Cal.4th at p. 224.) However, the court ultimately concluded there was no substantial evidence to support the DFW’s assumption that a reduction of project level GHG emissions as compared to a business as usual hypothetical would have the equivalent effect of achieving the state goal for reducing statewide GHG emissions. As the court explained: “The EIR simply assumes

that the level of effort required in one context, a 29 percent reduction from business as usual statewide, will suffice in the other, a specific land use development. From the information in the administrative record, we cannot say that conclusion is wrong, but neither can we discern the contours of a logical argument that it is right. The analytical gap left by the EIR's failure to establish, through substantial evidence and reasoned explanation, a quantitative equivalence between the . . . statewide comparison and the EIR's own project-level comparison deprived the EIR of its ' "sufficiency as an informative document." ' [Citation.]" (*Id.* at p. 227.)

In the present case, Appellant posits that the FEIR's conclusion regarding the less significant cumulative impact of construction GHG emissions was based on the "same erroneous approach struck down" in *Center for Biological Diversity*. We disagree. *Center for Biological Diversity* addressed the impact of GHG emissions resulting from the operation of a massive development project. Here, Appellant does not challenge the FEIR conclusion that *the operation* of this project will not generate GHG emissions that significantly impact the environment. This appeal pertains solely to the analysis of GHG emissions during a finite construction phase of the project.⁷

Furthermore, *Center for Biological Diversity* reviewed a factual conclusion that GHG emissions associated with the operation of a development would not significantly impact the environment. By contrast, in the present case the FEIR did *not* conclude that construction phase impacts on climate change were less than significant. After performing modeling to calculate separately the GHG emissions from construction activities, AES determined there was no quantitative threshold for determining whether those emissions would be significant and, therefore, assumed that they were. Then, AES proposed a mitigation measure for reducing construction GHG emissions by requiring Developers to purchase CO₂e emission reduction credits prior to the start of construction.

⁷ This separate analysis of construction GHG emissions was limited to the first year of construction, "which would include the highest emission rates due to grading and other site preparation activities." As the FEIR explained, additional GHG emissions during the subsequent periods of "phased construction of the residential units" was incorporated into the analysis of operational emissions.

Importantly, this mitigation measure was not based on a subjective analysis or a hypothetical business as usual comparative model. It was an objective concrete method of reducing the amount of GHG emissions attributable to this specific project. AES concluded reasonably that, by purchasing credits equivalent to the desired reduction in the amount of estimated GHG emissions during the construction phase, Developers would essentially cancel out this aspect of the project’s cumulative contribution to GHG emissions.

Appellant insists that *Center for Biological Diversity* precludes an agency from using a mitigation measure modeled on the statewide emissions reduction goal to support a finding in an EIR that the project is consistent with that statewide goal. Not so. As discussed above, the DFW concluded that a GHG mitigation measure was not required because the GHG impacts were not significant, and it was precisely that conclusion that lacked substantial evidence. Furthermore, in remanding the case to the DFW with directions to consider whether “adding hundreds of thousands of tons of greenhouse gasses to the atmosphere has a cumulatively significant effect,” the Supreme Court contemplated that the project could nevertheless be approved if the DFW elected to “adopt whatever feasible alternatives and mitigation measures exist beyond the efficiency and conservation features already incorporated in the project design.” (*Center for Biological Diversity, supra*, 62 Cal.4th at p. 231.) Here, as discussed, the County adopted a mitigation measure that imposed an independent collateral obligation on Developers to directly reduce the amount of GHG emissions attributed to the construction phase of the project. Appellant fails to provide any reason or authority for challenging the sufficiency of this measure.

III. THE SUBDIVISION MAP ACT CLAIM⁸

Appellant contends that even if the County complied with CEQA, the mandate petition should have been granted because the County violated the Subdivision Map Act by approving the project.

⁸ Statutory references in Section III of this opinion are to the Government Code unless otherwise stated.

A. Issues Presented and Standard of Review

“The Subdivision Map Act is ‘the primary regulatory control’ governing the subdivision of real property in California. [Citation.] The Act vests the ‘[r]egulation and control of the design and improvement of subdivisions’ in the legislative bodies of local agencies, which must promulgate ordinances on the subject. (§ 66411.) The Act generally requires all subdividers of property to design their subdivisions in conformity with applicable general and specific plans and to comply with all of the conditions of applicable local ordinances. [Citation.]” (*Gardner v. County of Sonoma* (2003) 29 Cal.4th 990, 996–997, fn. omitted.)

Here, Appellant contends that the County violated the Subdivision Map Act by approving the tentative parcel map for this project even though it is inconsistent with Chapter 15 of the general plan, which limits “development on steep slopes and in other geotechnical hazard areas.”

“ ‘[A] governing body’s conclusion that a particular project is consistent with the relevant general plan carries a strong presumption of regularity that can be overcome only by a showing of abuse of discretion.’ [Citations.] . . . This review is highly deferential to the local agency, ‘recognizing that “the body which adopted the general plan policies in its legislative capacity has unique competence to interpret those policies when applying them in its adjudicatory capacity. [Citations.] Because policies in a general plan reflect a range of competing interests, the governmental agency must be allowed to weigh and balance the plan’s policies when applying them, and it has broad discretion to construe its policies in light of the plan’s purposes. [Citations.] A reviewing court’s role ‘is simply to decide whether the city officials considered the applicable policies and the extent to which the proposed project conforms with those policies.’ [Citation.]” [Citation.]’ [Citation.]” (*Friends of Lagoon Valley v. City of Vacaville* (2007) 154 Cal.App.4th 807, 816 (*Friends of Lagoon Valley*)).

“Because an appellate court’s task in review of a mandate proceeding is essentially the same as that of the trial court, we review the agency’s actions directly and are not

bound by the trial court’s conclusions. [Citations.]” (*Friends of Lagoon Valley, supra*, 154 Cal.App.4th at p. 816.)

B. Chapter 15 of the General Plan

Chapter 15 is titled “Natural Hazard Policies.” The stated goals and objectives of these policies are to minimize risks from natural hazards, educate the public about these risks and how to minimize them, and integrate information about natural hazards into the County’s review of land use and development proposals.

Chapter 15.5 defines geotechnical hazards as (1) “seismic events,” such as earthquakes, (2) “non-seismic unstable conditions, including but not limited to landsliding, cliff retrenchment, erosion, subsidence, soil creep and shrink/swell conditions,” and (3) debris flow and avalanches.

Chapter 15.9 establishes the following rules for designating an area as a geotechnical hazard area: “Designate as Geotechnical Hazard Areas those areas that meet the definition of geotechnical hazards, including but not limited to: [¶] a. The areas illustrated on the Natural Hazards map as Alquist-Priolo Special Studies Zones, Tsunami and Seiche Flooding Areas, Coastal Cliff Stability Areas and Areas of High Landslide Susceptibility. [¶] b. Any additional area delineated by other investigations, mapped in greater detail, and/or considered to be hazardous by the County Department of Public Works, including but not limited to areas delineated on the Geotechnical Hazards Synthesis maps, maps prepared by [United States Geological Survey] and other appropriate sources.”

Chapter 15.20 establishes the following “Review Criteria for Locating Development in Geotechnical Hazard Areas”: “a. Avoid the siting of structures in areas where they are jeopardized by geotechnical hazards, where their location could potentially increase the geotechnical hazard, or where they could increase the geotechnical hazard to neighboring properties. [¶] b. Wherever possible, avoid construction in steeply sloping areas (generally above 30%). [¶] c. Avoid unnecessary construction of roads, trails, and other means of public access into or through geotechnical hazard areas. [¶] d. In extraordinary circumstances when there are no

alternative building sites available, allow development in geotechnically hazardous and/or steeply sloping areas when appropriate structural design measures to ensure safety and reduce hazardous conditions to an acceptable level are incorporated into the project.”

C. The County’s Approval of the Tentative Parcel Map

When the Commission certified the FEIR, it also approved a vesting tentative map, and adopted findings and conditions of approval.⁹ As support for its approval of the tentative parcel map, the Commission found: “That the proposed map . . . is consistent with the applicable County general and specific plans. The subdivision will create 21 parcels, of which 19 will be developed, consistent with the use and density stipulated by the Medium-Low Density Residential General Plan land use designation. The proposed density of 1.58 dwelling units per acre conforms to the maximum allowed within the Medium-Low Density Residential General Plan land use designation.”

The Commission made several other findings in approving this project as a major subdivision that indirectly supported its conclusion that the tentative parcel map was consistent with its general plan, including that: “the site is physically suitable for residential development”; “[t]he 19 parcels proposed for development are of sufficient size and shape to support single-family residences”; the “project will be required to adhere to the San Mateo Countywide Stormwater Pollution Prevention Program and General Construction and Site Supervision Guidelines”; grading and construction activities will not have any significant environmental impact; and “the project that will result in a zero-net increase in sanitary discharge through improvements to existing infrastructure in the vicinity by the [Developers].”

When the County denied Baywood HOA’s appeal and affirmed the Commission findings, it relied on evidence summarized in the Commission staff report. Regarding the

⁹ The CEQA review of this project included assessment of potential impacts on the geological environment. The FEIR proposed mitigation measures to ensure these impacts would not be significant. Appellant does not discuss this part of the FEIR, or the geotechnical report prepared for this project and incorporated into the FEIR. Nor does it challenge any CEQA finding with respect to the less than significant impacts of the project on geological resources.

geological condition of the project site, the Commission staff advised the Board that slopes below the planned residential parcels ranged from 12 percent to 48 percent, with an average of 35 percent. Staff also reported that the policy in Chapter 15 of the general plan discouraging development on steeply sloped areas did not apply to this project because the location of the project was “outside of the established Geotechnical Hazard Area.” Further, geotechnical reports prepared as part of the CEQA review did not identify any potential hazards associated with the development of this project. Finally, the staff reported that during the public hearing before the Commission, citizens expressed concern that nearby neighborhoods had experienced landslide problems. However, the “detailed geological studies” demonstrated that conditions at the project site were “different and more stable than the surrounding area and able to support engineered development without being subject to or creating a geological hazard.”

The Commission staff report also contained a separate discussion of project compliance with applicable County regulations, including conformance with the general plan. That discussion addressed several policies in the general plan that were consistent with this project. With respect to Chapter 15, the report stated: “The proposal is consistent with Geotechnical Hazards Policies, specifically with Policy 15.18 (Determination of Existence of a Geotechnical Hazard), as the site is not located on the San Mateo County Natural Hazards Map, within the Alquist-Priolo Hazard Zone. Therefore, Policy 15.19 (Appropriate Land Uses and Densities in Geotechnical Hazard Areas) is not applicable. The slopes of the proposed 19 parcels range from 12 percent to 48 percent, with the average being approximately 35 percent. The slope of the terrain is typical of other hillside developments within the County unincorporated areas. Based on the submitted geotechnical reports included within the EIR, no potential hazards were identified with developing the site as proposed. The development regulations contained in Policies 15.20.a through 15.20.d (Review Criteria for Locating Development in Geotechnical Hazard Areas), which discourage development on steeply sloping areas (generally above 30 percent), are also not applicable due to the project site’s location outside of the established Geotechnical Hazard Area (Alquist-Priolo Hazard Zone).”

D. Analysis

Appellant contends that the County violated the Subdivision Map Act by approving this project without making a finding under Chapter 15.20(d) of the general plan that the project presents “extraordinary circumstances when there are no alternative building sites available.” An essential premise of this claim is that the policies in Chapter 15.20 “plainly apply” to this project. We disagree.

By its express terms, Chapter 15.20 applies to a development located in a geotechnical hazards area. In this case, the County’s finding that the project site is not a geotechnical hazard area is supported by substantial evidence summarized above, which establishes that (1) the project is not located in any area that is designated on an official map as a geotechnical hazard area, and (2) project specific geological reports prepared during the review of this project did not disclose any potential geotechnical hazards.

Appellant contends that it does not matter if the project site is a geotechnical hazardous area because Chapter 15.20(b) “clearly applies” to this project. Appellant reasons that the slopes on the property site range from 12 to 48 percent, with an average of approximately 35 percent, “well in excess of the 30% standard set forth in Policy 15.20(b).” Again, Appellant ignores the plain language of Chapter 15.20, which establishes policies for locating a development in a geotechnical hazard area. In other words, Chapter 15.20(b) does not apply unless the development is located in geotechnical hazard area. This project is not.

Because Appellant fails to demonstrate that Chapter 15.20 applies to this project, it cannot substantiate its claim that the County violated the Subdivision Map Act by failing to make an express finding under Chapter 15.20(d) that this is an “extraordinary” project because no alternative building sites are available. Furthermore, there are independent problems with Appellant’s claim that the County violated Chapter 15.20(d) in particular.

First, during the administrative review, Appellant argued that approving the project would violate Chapter 15.20(a) and Chapter 15.20(b), but as best we can determine, Appellant never argued that the County had to make a finding under Chapter 15.20(d) before it could approve the project. Apparently, Appellant first presented this

theory in its reply brief in support of the mandate petition. Thus, Appellant did not exhaust its administrative remedies as to this issue. (See *Williams & Fickett v. County of Fresno* (2017) 2 Cal.5th 1258, 1268.)

Second, we are not persuaded by Appellant’s contention that Chapter 15.2(d) requires the County to make some additional express finding before approving a project located in a geotechnical hazard area. Implicitly acknowledging that the policy itself imposes no such requirement, Appellant relies on section 66473.5, which states: “No local agency shall approve a tentative map . . . unless the legislative body finds that the proposed subdivision, together with the provisions for its design and improvement, is consistent with the general plan” Here, as discussed, the County did make the required finding that the tentative map for the project was consistent with the general plan.

Finally, as noted above, a general plan reflects a range of competing interests, and the local agency has broad discretion to weigh those interests. (*Friends of Lagoon Valley, supra*, 154 Cal.App.4th at p. 816.) Appellant makes no effort to establish that discretion was abused here. Instead, Appellant argues that the County had no such discretion with respect to Chapter 15.20(d) because the language of this policy does not “implicitly or explicitly allow for balancing with other general plan policies.” (Citing *Families Unafraid to Uphold Rural El Dorado County v. Board of Supervisors* (1998) 62 Cal.App.4th 1332, 1341–1342.) The County strongly disagrees with Appellant’s interpretation of Chapter 15.20(d), arguing that the policy language confers discretion on the County to approve development in a geotechnical hazard zone in appropriate cases. (Citing *San Francisco Tomorrow v. City and County of San Francisco* (2014) 229 Cal.App.4th 498, 517.) Under the circumstances presented here, we need not resolve this dispute. Instead, we find that the evidence in the administrative record substantially supports the County’s determination that this project is not located in a geotechnical hazard area and, therefore, Chapter 15.20(d) would not apply in this case even if Appellant had raised this issue below.

IV. DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal.

SMITH, J.*

We concur:

STREETER, Acting P. J.

REARDON, J.

* Judge of the Superior Court of California, County of Alameda, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

