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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN FRANCISCO

MIDCOAST ECO

Petitioner and Plaintiff,

v.

CALIFORNIA COASTAL COMMISSION,

Respondent and Defendant.

SAN MATEO COUNTY, SAN MATEO COUNTY BOARD OF SUPERVISORS, and DOES 1 through 20, inclusive,

Real Parties in Interest and Defendants.

Civil Case No. CPF-21-517430

CEQA CASE

Assigned for All Purposes to
Hon. Cynthia Ming-mei Lee, Dept. 503

**PETITIONER'S REPLY BRIEF IN SUPPORT OF WRIT OF MANDATE**

HEARING DATE: February 24, 2023
TIME: 9:30 P.M.
DEPT.: 503
ACTION FILED: APRIL 21, 2021

HON. CYNTHIA MING-MEI LEE

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## INTRODUCTION

Petitioner Midcoast ECO filed this action to ensure thorough, transparent environmental review under CEQA and to ensure Coastal Act compliance in the Commission's adoption of the LCP Amendment (or "Amendment").

The Commission can not contest that the sole purpose of this LCP Amendment was to facilitate the developer's environmentally significant project. AR4394 [LCP Amendment "first step" in the proposed development]. Nor does the Commission contest that the baseline used in evaluating impacts was development under hypothetical conditions, not existing conditions.

The Commission repeatedly points to a subsequent CDP process, not in the record, for its CEQA review and Coastal Act consistency determination. Not only is this improper, but the County CDP review will likely *not* be appealable to the Commission. (AR7; Commission Opposition Brief ("CCC Opp.") p.15:6.). By avoiding mitigation of development traffic impacts, there will be no major public works which would trigger Commission appellate review of the CDP. (Public Resources Code[1] §30603(a)(5).) Thus, the Staff Report at issue is likely the only time the Commission will review the impacts of development resulting from the LCP Amendment under CEQA and the Coastal Act. Further, the law clearly provides that LCP amendments, even where they reduce the number of units, must be evaluated for the secondary effects they will likely have on the existing physical environment.

Respondents would have this Court overlook the obvious environmental errors here based on claims that affordable housing constitutes "environmental justice," without addressing the significant impacts of locating low-income households on contaminated soil, and so far from basic services that "significant, unavoidable" traffic impacts will result.

There is simply no basis for the Commission's unwarranted aspersions that Petitioner "seeks to prohibit site development" or "prevent an affordable housing development" or "undermine the existing, certified LCP." (*Cf* Complaint, ¶14 [Midcoast ECO brings this action not for the purpose of delay, nor for the purpose of thwarting the low- or moderate-income nature of the foreseeable housing development].)

Because the Commission violated CEQA's mandatory procedures, failed to evaluate certain Coastal Act provisions for consistency, and substantial evidence undermines the conclusions of insignificant impacts and Coastal Act consistency, the agency abused its discretion and a writ of mandate should issue.

[1] All statutory references herein are to the Public Resources Code, and are designated by § or section.

## STANDARD OF REVIEW

The Commission erroneously argues that its CEQA decisions are reviewed solely for substantial evidence. (CCC Opp. p.12:6.) The cases which the Commission cites make clear that CEQA violations under certified regulatory programs are evaluated for procedural errors as well as whether substantial evidence supports the findings. In *Ebbetts Pass Forest Watch v. California Dep't of Forestry & Fire Prot*. (2008) 43 Cal.4th 936, the California Supreme Court explained that a court's CEQA review is based on whether there was a prejudicial abuse of discretion.

> Such an abuse is established if the agency *has not proceeded in a manner required by law or* if the determination or decision is not supported by substantial evidence. *Judicial review of these two types of error differs significantly*.

(*Id.*at 944 [emphasis added] citing *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 426; *see also Ebbetts* at 945, 949, 954.) An agency abuses its discretion where the agency fails to "proceed in the manner required by law, its order or decision is not supported by the findings, or its findings are not supported by substantial evidence." (*McAllister v. California Coastal Com*. (2009) 169 Cal.App.4th 912, 921.) Section 21080.5 and 14 CCR 15252 specify substantive "procedural" requirements for a certified program's environmental review of a proposed LCP amendment. (*Ross v. California Coastal Com*. (2011) 199 Cal.App.4th 900, 907 & 932.) *LT-WR LLC v. Cal.Coastal Com*, (2007) 152 Cal.App.4th 770, was not a CEQA challenge, and thus the court reviewed whether the findings were supported by substantial evidence. (*Id.* at 780.)

## ARGUMENT

### I. THE STAFF REPORT VIOLATED CEQA.

The Commission ignores CEQA in arguing that only "the Coastal Act establishes the parameters that guide the Commission's review of the LCP Amendment. (CCC Opp. p.13:3-5.) The Commission need not prepare an EIR, but "must comply with all" of CEQA's substantive requirements. (§§ 21080.5 & 21080.9; *Mountain Lion Found. v. Fish & Game Com.* (1997) 16 Cal.4th 105, 114.) This includes the substantive CEQA requirements to analyze impacts, alternatives, mitigation measures, and provide written responses to comments. (§ 21080.5, subd. (d)(2); *Strother v. California Coastal Com*. (2009) 173 Cal.App.4th 873, 878.) "The documentation 'required of a certified program essentially duplicates' that required for an EIR." (*City of Arcadia v. State Water Res. Control Bd.* (2006) 135 Cal.App.4th 1392, 1422.) There is no conflict between the Coastal Act and CEQA, and courts "are obligated to harmonize the objectives common to both statutory schemes to the fullest extent the language of the statutes fairly permits." (*Mountain Lion Found.,* 16 Cal.4th at 122.) The

Commission's regulations replace the EIR with a requirement for a "comparable form of environmental review." (*Santa Barbara Cnty. Flower & Nursery Growers Assn. v. Cnty. of Santa Barbara* (2004) 121 Cal.App.4th 864, 872.) The Commission's flawed CEQA analysis are not exempt based upon a litigation claim that the Amendment is programmatic or at a "high level." (CCC Opp. p.9:6.)

Because the role of the Staff Report under CEQA is to inform the Commissioners of potentially significant impacts *before* they approve or disapprove an LCP Amendment, the final adopted findings cannot serve that role. Thus, it is the Commission's Staff Report (CCC Opp. p.13:24), not the Commission's final adopted findings (CCC Opp. p.14:5), which serves as the agency's environmental review document. (*Strother, supra,* 173 Cal.App.4th at 878.)

**I.A. <u>The Commission Failed to Analyze Reasonably Foreseeable Impacts of the Amendment</u>.**

The Commission cannot dispute that factually there will be reasonably foreseeable development from the Amendment approval. The Commission points to the "LCP Amendment's associated site plan," (CCC Opp. p.16:9), citing to the developer's submission to the Commission describing the Amendment as "necessary to allow" development (AR7234), and a minimum number of parking spaces (AR7241). The Commission concedes that this Amendment is "project-driven" LCP Amendment." (CCC Opp. p.17:3; AR4631.) The Commission can't contest that (1) the Amendment furthers "specific site plan and specific development standards" (County Answer, ¶4; AR3478), (2) development must comply with the Exhibit 5 site plan (AR6, 53), (3) the plans include grading, construction of 18 buildings, new water and sewer infrastructure, and a minimum of 142 parking spaces. AR46-49. The Commission relied on the Cypress Point Family Community plan (AR4629) including its required grading and stormwater plans. AR1509, 1511.

The Commission concedes it reviewed material related to a proposed development project on this very parcel. (CCC Opp. p.9:22 citing AR 25.) There is no case holding that development is "speculative" where the LCP Amendment includes an "associated site plan which tracks" the development. (CCC Opp. p.16:9-11.) CEQA does not alleviate the duty to evaluate impacts at the general plan or LCP Amendment phase where the development configuration is not "precise" or simply because the development is "not within the Commission's control." (CCC Opp. p.9:21-22.) (*See City of Carmel-By-The-Sea v. Board of Supervisors* (2006) 183 Cal.App.3d 229, 250 comparing review of zoning to review of precise development plan, "the difficulty of assessing future impacts of a zoning ordinance does not excuse [environmental review]; such difficulty only reduces the level of specificity required and shifts the focus to the secondary effects.")

The Commission is wrong that it was not required to consider impacts from foreseeable

development. (CCC Opp. p.15:12-16.) General plans amendments potentially result in physical changes and are subject to CEQA. (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 793-794.) The Commission does not address any of the case law Petitioner cited. (*See* Petitioner's Open "(POB") pp.9-10.)

The case law does not support the Commission's flawed approach. In contrast to the instant matter, in *Topanga Beach Renters Assn. v. Dept. of Gen. Services* (1976) 58 Cal.App.3d 188, there was no evidence of potential future development; on this basis the court found that was no need yet for environmental review. (*Id*. at 196.) *Save Tara v. City of W. Hollywood* (2008) 45 Cal.4th 116 considered what constituted "project approval" under CEQA, not if environmental review was adequate. (*Id*. at 121–22.) The Supreme Court noted that environmental review "should be prepared as early as feasible in the planning process to enable environmental considerations to influence project program and design" (*Id*. at 129), that environmental review must be "done early enough to serve, realistically, as a meaningful contribution to public decisions" (*Id*. at 135), and that there is no broad rule permitting environmental review "to be postponed in all circumstances" by use of a subsequent CEQA compliance condition. (*Id*. at 133.) Nor did *Union of Medical Marijuana Patients, Inc. v. City of San Diego*, (2019) 7 Cal.5th 1171, hold that the Commission can ignore reasonably foreseeable impacts of the LCP Amendment. (CCC Opp. p.15:16-19)

In *Ross v. California Coastal Com*., (2011) 199 Cal.App.4th 900, the Commission was required to consider the "*secondary effects* that could follow from the local coastal program amendment." (*Id.* at 945, emphasis added.) The *Ross* Staff Report analyzed impacts to biological resources on the subject property (*Id.* at 912-913), but was not required to conduct site-specific biological reports where there was "no reason to expect" lots will be further subdivided. (*Id*.) In contrast, here there is a reasonably foreseeable development which will result from this project-driven LCP Amendment which includes a site plan and development standards with which any development must comply. County Answer, ¶4; AR6, 46, 53.

*POET, LLC v. California Air Resources Board*, (2013) 218 Cal.App.4th 681, does not hold that the Commission can avoid analysis of the reasonably foreseeable impacts of the LCP Amendment. (CCC Opp. p.15:24-16:2.) CEQA's purpose of informing decision makers about environmental issues applies equally whether the "review document is an EIR or documentation prepared under a certified regulatory program." (*POET* at 731 citing Pub. Res. Code §§ 21002 & 21080.5.)

The Commission erroneously argues it was prevented from analyzing the impacts of the LCP Amendment as this would be "premature, given [San Mateo] County's responsibility to first issue a CDP." (CCC Opp. p.15:24-25.) There is no case law to support this position. Coastal Act section 30519

does not limit the Commission's CEQA review of LCP amendments; it only provides that the County will review a subsequent Coastal Development permit. So too, the Commission's position that it can avoid environmental review because it is not the lead agency (CCC Opp.. p.16:26) has been expressly rejected by the courts. (*See Ross, supra*, 199 Cal.App.4th at 939-940 [the Commission, not the county, must comply with CEQA in review of LCP amendments].

Here, there is no dispute that the LCP Amendment, a fundamental land use decision, furthers a very specific development proposal. The Staff Report procedurally violated CEQA by failing to analyze this reasonably foreseeable development.

**I.B. <u>The Commission Improperly Deferred Analysis of Reasonably Foreseeable Impacts</u>.**

The Commission fails to contest any of the Staff Report record citations provided by Petitioner demonstrating that analysis of impacts was improperly deferred to a "subsequent process" for foreseeable coastal resources (AR4624), traffic (AR4625-27), sensitive habitats (AR4630), hazardous soils (AR4628), and sewage impacts (AR4625).

The law does not support the Commission's flawed approach of deferring environmental review. (CCC Opp. p.17:10.) Environmental impacts must be analyzed before project approval. (14 CCR § 15004(a); *POET, supra,* 218 Cal.App.4th at 716-717.) In *Towards Responsibility in Planning v. City Council*, (1988) 200 Cal.App.3d 671, the court rejected that the agency should wait before adopting an EIR until a five-year study was complete. (*Id.* at 68.) "The sufficiency of an EIR as an informative document is judged in light of what is reasonably feasible." (*Id*.) Here, it was feasible for the Staff Report to analyze the foreseeable development impacts given the specifics of the site plan tied to the Amendment (AR6, 46-49, 53, 1509, 1511, 4629) and the wealth of information submitted by experts.

Nor does *Schaeffer Land Trust v. San Jose City Council*, (1989) 215 Cal.App.3d 612, provide that environmental review of a planning amendment may be completely deferred. (CCC Opp. pp.17:15; 26:14.) That court reiterated that an environmental review of a general plan amendment "should focus on the secondary effects *that can be expected to follow*" from the amendment. (*Id*. at 625, emphasis added.) Environmental review associated with a construction project will be more detailed because the effects "can be predicted with greater accuracy." (*Id*.) Here, there is nothing speculative about the "specific site plan and specific development standards" resulting from the Amendment. (County Answer, ¶4.)

Rather than engage in analysis of secondary impacts the Commission deferred that analysis to a CDP process which is not in the record and likely will never be before the Commission. Petitioner does not seek an EIR. (CCC Opp. p.17:22.) Environmental review of an LCP amendment "shifts the focus to

the secondary effects," but does not excuse environmental review. (*City of Carmel-By-The-Sea, supra,* 183 Cal.App.3d at 250.)

**I.C. <u>The Commission Failed to Analyze the Impacts to the Existing Environment</u>.**

The Commission does not contest the record citations showing the LCP Amendment was compared to hypothetical conditions of PUD-124, rather than existing conditions. *See* traffic (AR4558, 4565-66, 4572), sensitive habitats (AR4558), cultural resources (AR4569), visual (AR4558, 4577, 4629), water and sewer (AR4557, 4572), and wildfire evacuation (AR4569-70).

The courts have repeatedly rejected the Commission's argument that this approach is permissible. First, courts do not "generally defer to an agency's selection" of the baseline. (CCC Opp. pp.17:27-18:2.) Existing conditions are the norm, and a departure from this norm is justified only if there is substantial evidence "that an analysis based on existing conditions would tend to be misleading or without informational value." (*Neighbors for Smart Rail v. Exposition Metro Line Constr. Auth*. (2013) 57 Cal.4th 439, 445.)

> Our holding that the analysis must measure impacts against actually existing conditions was in contrast to the use of hypothetical permitted conditions, not projected future conditions. And our holding that *agencies enjoy discretion to choose a suitable baseline, subject to review for substantial evidence, related to the choice of a measurement technique for existing conditions,* not to the choice between an existing conditions baseline and one employing solely conditions projected to prevail in the distant future.

(*Id.* at 449, emphasis added.) Here, there is no evidence that analysis based on existing conditions would be without informational value, and there is no evidence of a change in environmental conditions expected to occur before project implementation. Thus, the Commission impermissibly compared the LCP Amendment to hypothetical permitted conditions.

Second, the law does not support the Commission's wild claim that if a "no project alternative analysis" is identical to the "existing environmental setting analysis," then the agency is exempt from comparing the project to existing conditions.[2] (CCC Opp. p.18:3.) The Commission cites to Kosta, but that practice guide contradicts its position. In review of plan amendments, impacts are ordinarily assessed against existing conditions. In contrast, hypothetical future conditions under the existing plan are only treated as a no-project alternative. (1 Kostka, *Practice Under the Cal. Environmental Quality Act* (CEB 2020) § 12.21.)

CEQA nowhere calls for evaluation of the impacts of proposed general plan amendments on an existing general plan; CEQA concerns itself with the impacts on existing physical conditions. (*Env't Plan. & Info. Council v. Cnty. of El Dorado* (1982) 131 Cal.App.3d 350, 354; *Woodward Park*

[2] The Commission did not consider alternatives. AR0025, 4581.

*Homeowners Ass'n v Cit of Fresno* (2007) 150 Cal.App.4th 683, 707 [environmental review for planning change rejected where compared only to hypothetical development under preexisting plan, and failed to compare against existing conditions.) The misleading nature of the evaluation renders the environmental review document inadequate as an informational document. (*San Joaquin Raptor/Wildlife Rescue Ctr. v. Cnty. of Stanislaus* (1994) 27 Cal. App. 4th 713, 729.)

**I.D. <u>Commission Findings Are Contradicted by Substantial Evidence</u>.**

The Commission does not contest that the no significant impact finding (AR24, 4580) relied on the Preliminary Environmental Evaluation, the Biological Resource Assessment, the Traffic Impact Analysis and Cultural Resource Evaluation. (AR34; 25 [reports "relied upon by" staff].)

The Commission claims it explained its conclusion. (CCC Opp. p.19:10.) The record cites it provides undercuts this argument. *See* AR4631(bare conclusion that staff report and addendum identify substantial evidence, without listing any such evidence); *see also* AR237-39 (developer's report concluding impacts significant), AR4496 (County document). The developer's reports do not constitute Commission Staff Reports. (14 CCR §13057; *Strother, supra,* 173 Cal.App.4th at 877.)

*Mountain Lion Coalition v. Fish & Game Com*., (1989) 214 Cal.App.3d 1043, 104, held that environmental review must support conclusions with "references to specific scientific and empirical evidence." This *Mountain Lion* holding was not based on the length of the analysis. (CCC Opp. p.19:24.) Unsubstantiated opinion does not constitute substantial evidence. (14 CCR §15384(a).) For each of the below findings, the Staff Report and Addendum did not explain how it could find impacts insignificant when the evidence which the Commission "relied upon" (AR25) found the impacts significant. (*Laurel Heights Improvement Assn. v. Regents of Univ. of California* (1988) 47 Cal.3d 376, 404 [bare conclusions without explanation of factual and analytical basis is not a sufficient analysis].)

This Court is not asked to substitute its judgment, and make a conclusion of significance. (CCC Opp. p.19:17.) However, as the Commission concedes, this court may reverse the Commission's decision if based on the evidence "a reasonable person could not have reached the conclusion." (*Kirkorowicz v. California Coastal Com*. (2000) 83 Cal.App.4th 980, 986.) In determining whether substantial evidence supports a Commission's decision, the court looks to the "'whole' administrative record and consider all relevant evidence, including that evidence which detracts from the decision." (*Feduniak v. California Coastal Com*. (2007) 148 Cal.App.4th 1346, 1360.) This task "involves some weighing to fairly estimate the worth of the evidence." (*Id*.)

1. <u>Soil</u> - The Commission relied on the Preliminary Environmental Evaluation and the Supplemental Report as the basis for its conclusion. AR34, 4628. These two reports determine

significance. (AR210, 1692, 1700, 1723.) Incredibly, the Commission's response is that the "evidence" to support the insignificance conclusion will be the County's subsequent review of a CDP and a "site management plan (CCC Opp. p.20:10-15), both of which are yet to be prepared and not in the record.

2. Biological - The Commission relied on the Biological Resource Assessment to make its insignificant impact conclusion regarding sensitive habitats. AR34, 4630, fn. 8. This Assessment found a significant impact to the California red-legged frog. AR1962 [while "not observed on the project site …[n]evertheless, the potential for impacts exists, so this impact is considered significant."

3. Traffic - The Commission's litigation position contradicts its administrative findings which relied on the Traffic Impact Analysis. AR28 at fn. 6, 34, 4626 at fn. 3. The Commission's argument that the record and the traffic findings do not conflict is based on its position that its conclusions can ignore all the evidence of "significant, unavoidable" traffic impacts that will follow (AR1077-89, 2141-42), including Caltrans' evaluation. AR2653. A CDP is not in the record. (*Cf* CCC Opp. p.21:7). The Commission relied on a draft "Connect the Coastside" plan. AR17, AR28 at fn.7, AR5379, AR5390. (*See Fed'n of Hillside & Canyon Associations v. City of Los Angeles* (2000) 83 Cal. App. 4th 1252, 1260 [transportation finding not supported by substantial evidence where mitigation was speculative as no funding or guarantee of implementation]; *Kostka, supra*, § 14.11 [mitigation inadequate where so undefined impossible to gauge effectiveness].)

4. Cultural Resources - The Staff Report and Addendum found no significant cultural resource impact based on the Cultural Resource Evaluation. AR34, 4581. Yet, this very Evaluation determined a significant cultural impact. AR 473-74, 2050. The Commission does not contest otherwise and can't point to where it provided an analytical route from the evidence - which all points to a significant impact - to the Commission's finding of no significant impact.

5. Wildfires - The Commission cannot point to where it explained its analytical route from the evidence - that traffic "may affect future potential evacuations" from wildfire (AR4627), traffic deficiencies would be exacerbated (AR 4565), there is no Emergency Evacuation Plan (AR1724), and the site is a Community at Risk zone close to Very High Fire Hazard Severity Zones (AR1722) – and its conclusion of no significant wildfire impact. The Commission's reference to its hypothetical baseline comparison and future CDP review do not rectify its substantial evidence problem.

Because the Commission's findings were not supported by substantial evidence or an explanation of its analytical route from evidence to conclusion, it prejudicially abused its discretion.

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**I.E. <u>The Commission Failed to Respond to Significant Issues</u>.**

Insufficient agency responses may be grounds for the issuance of a writ to set aside an approval. (*Ebbetts Pass, supra,* 123 Cal.App.4th at 1356.) The Commission's responses are not held to a lower standard. Under a CEQA certified program, the agency "must specifically respond to the most significant environmental questions raised" and "set forth in detail the reasons why the particular comments and objections were rejected." (*Id.* at 1356-57.) Conclusory responses unsupported by empirical information, scientific authorities or explanation do not meet the requirement of meaningful, reasoned responses. (*Id.* at 1357.)

*Environmental Protection Information Center, Inc. v. Johnson,* (1985) 170 Cal.App.3d 604, did not hold that a CEQA response to comments is waived based on the response of another agency. (CCC Opp. p.23:12-15.) When an agency adequately addresses an environmental issue in response to one commenter, the agency may refer to *its own* prior response when addressing other commenters. (*Id.* at 487, fn. 9.) Nor does *Ross* allow the Commission to omit a response based on San Mateo County's responses. The Commission "has the burden" of CEQA compliance for the LCP amendment, not the County. (*Ross*, 199 Cal.App.4th at 940-41.)

The Commission cannot point to its response to the serious issued raised by experts. The Commission cites AR80-90 and AR1550-60 (CCC Opp. p.23:4), but these are not the Commission's responses; these are developer's summary of issues raised by the public to the County years before the matter was before the Commission. Likewise, the reference to AR4481-96 is misplaced (CCC Opp. p.23:5) as these are County planning staff responses to issues raised by its Planning Commission, not responses by the Commission. AR4984-5000 is the developer's response, not the Commission's.

1. <u>Soil Contamination</u> - The Commission (CCC Opp. p.23:16-21) does not point to any of its own responses to expert comments that (1) lead in surface soil is 9 times higher than Regional Water Board's levels (AR5159), (2) the extent of the lead contamination is unknown (AR5160), (3) more lead hot spots may be found with further testing (AR5160), and (4) testing results should be submitted to regulatory agencies. AR5160-61. There is no Commission response to lead levels, range, or testing issues at AR30, AR85 (developer's response to San Mateo County 2017 meeting), or AR4487 (same). The developer's consultant (CCC Opp. p.23:4 citing AR2133-34) is not the Commission's response.

2. <u>Sewer</u> - The Commission can't point to its response to expert comments that 1) the sewage system has repeatedly discharged raw sewage, or (2) that adequate wastewater impact analysis must consider this history of sewage spills. AR5204-05. In opposition, the Commission points only to the

developer's 2017 response to issues. (CCC Opp. p.23:26 citing AR86, 1566.) A promise that the issue will be addressed later (CCC Opp. p.23:28) is not an adequate response to the above issues.

3. Traffic - The Commission cannot point to its response to comments (1) by San Mateo County's traffic engineer that the traffic impact analysis was inadequate and mitigations unacceptable (AR5407), (2) by Caltrans requesting evaluation of pedestrian and transit impacts, and questioning mitigation funding (AR5413-16, 2652-2655), (3) by Pang Engineers, Inc. (*see* POB pp.18:11-21) or (4) by Plaintiff that significant unavoidable traffic impacts haven't been mitigated. AR5218. By review of the Staff Report and Addendum, neither the Commissioners nor the public would know that these issues had ever been raised or how the Commission intended to resolve them.

Responses by others are not Commission responses. (CCC Opp. p.24:2-16 citing AR81-84 (developer's 2017 response), AR1040 & 1047 (developer consultant 2018 traffic report), AR2544 (developer consultant 2020 traffic report), AR4478 (County summary of public participation prior to submission to Commission). There is no CDP traffic analysis in the record and the Commission relied on a draft "Connect the Coastside" plan. AR28 at fn.7, AR5379, AR5390. (*Cf* CCC Opp. p.24:9.)

4. Biological - The Commission did not respond to comments 1) about whether the project will violate the Endangered Species Act, the Clean Water Act, or California's Wetlands Conservation Policy (AR5182), 2) that project drainage "which likely will adversely impact wetlands" (AR5183), or 3) that the "Vegetation Assessment was "incomplete and understates the native flora that would be impacted by development." AR5154-55. In opposition, the Commission vaguely points to AR12-13, 20, 30, but examination of these cites does not provide any response to the above issues.

The Commission violated CEQA by failing to provide responses to significant issues, particularly where its position varied from objections raised. (§ 21080.5, subd. (d)(2)(D); *King & Gardiner Farms, LLC v. County of Kern* (2020) 45 Cal.App.5th 814, 882.)

**I.F. The Commission Failed to Evaluate Mitigation Measures.**

The Commission does not address the holdings in *Strother v. California Coastal Com.* (2009) 173 Cal.App.4th 873, 878 or *Schoen v. Dep't of Forestry Protection* (1997) 58 Cal.App.4th 556, 572 that analysis of mitigations is required in EIR functional equivalent documents. Nor does the Commission contest that deferred mitigation is improper. In opposition, the Commission does not address 1) its 2018 comment that significant traffic impacts "must be" mitigated (AR2657), 2) proposed traffic mitigation measures TRAF-lA, TRAF-1B and TRAF-5A (AR2183-84, 2193), 3) mitigation measures for hazardous material impacts (AR1692, 4628), 4) mitigation measures BIO-2 and BIO-3 for impacts to the California red-legged frog (AR1962, 1967-68), 5) mitigation measures

CUL-1, CUL-2, and CUL-3 to reduce the significant cultural impacts (AR474-76), or 6) mitigation for fire evacuation (AR4627).

The Commission's citations to the record only support that development impacts and mitigations are reasonably foreseeable. (CCC Opp. p.26:6 citing AR 1564–65, 1582–1615.) AR1564 is the developer consultant's summary, not the Commission's, and opines that "feasible mitigation measures are identified …that could reduce significant impacts." AR1567, 1575. AR1582–1615 is the table of recommended mitigations submitted by the developer's consultant to the Commission. By failing to evaluate mitigation measures, the Commission procedurally violated CEQA.

**I.G. <u>The Commission Failed to Evaluate Alternatives.</u>**

The Commission does not contest that its Findings and Staff Report found it "unnecessary" to even suggest alternatives. AR25, 4581. Nor does the Commission address that an agency under a certified regulatory program must demonstrate "meaningful consideration of alternatives." (*Mountain Lion Foundation, supra,* 16 Cal.4th at 134.) Here, the developer had suggested six alternatives. (CCC Opp. pp.25-26 citing AR1577, 1745-1783.) If an agency concludes there are no feasible alternatives, it must explain in meaningful detail the basis for its conclusion. (*Preservation Action Council v. City of San Jose* (2006) 141 Cal.App.4th 1336, 1350-1351.) The Commission cannot point to where in the Staff Report it explained why any of these alternatives were not evaluated for feasibility. By failing to evaluate alternatives, the Commission procedurally violated CEQA.

**II. THE COMMISSION VIOLATED THE CALIFORNIA COASTAL ACT.**

Notably, the Commission does not argue that substantial evidence demonstrates that the LCP Amendment is consistent with Coastal Act policies. Instead, the Commission repeats its flawed baseline argument that the LCP Amendment would result in potentially less significant impacts to coastal resources "than any development that could occur under the existing, certified LCP." (CCC Opp. p.26:24.) The Staff Report recommendation "must be" supported by "specific findings with analysis" of Coastal Act conformity. (14 CCR § 13057.) The Commission did not do so here.

**II.A. <u>The Commission Improperly Made its Consistency Determinations and Findings.</u>**

The Commission concedes that its consistency determination compared the LCP Amendment to hypothetical PUD-124 conditions. (CCC Opp. p.26:24.)

**II.B. <u>The LCP Amendment is Inconsistent with Coastal Act Section 30232.</u>**

The Commission claims it "reviewed consistency with section 30232," but can't point to where in the record section 30232 is evaluated. (CCC Opp. p.28:5.) The Staff Report does not even mention Coastal Act section 30232. AR4557-81. The Commission points to a "Supplemental Environmental

Evaluation Report" as its hazardous materials consistency determination.[3] AR4628. Yet, this report is by the developer's consultant, not the Commission, and does not examine section 30232 consistency. Further, it concluded that given the toxics in soil revealed to date "hazardous materials during construction of the proposed project would be a *significant* impact." AR1722-23. This is the same significance finding the Preliminary Environmental Evaluation reached. AR210, AR34.

The Commission must protect against hazardous substances for new development, and consider hazard containment and cleanup. (§ 30232.) There is no evidence showing Commission protection against the known significant lead contamination or consideration of containment. Lead has been detected in surface soil at up to nine times higher than the Regional Water Board's Environmental Screening Level. AR5159-60, 5632, 5589, County Answer, ¶27. Asbestos has been detected. AR5912, County Answer, ¶25. The horizontal extent of the lead contamination has not been determined and additional elevated lead hot spots may be found. AR5160. The Commission has not required further analysis of the degree and extent of the contamination.

**II.C. <u>The LCP Amendment is Inconsistent with Coastal Act Section 30253.</u>**

The Commission claims it considered section 30253 consistency for wildfire evacuation, pointing to its own findings and a report by the developer's consultant. (CCC Opp. p.28:12.) Conclusions of "greater opportunities for defensible space" or comparison to prior, never-implemented zoning (AR4569-70) is not an evaluation of whether the LCP Amendment will "minimize" risks to lives related to fire evacuation. (§ 30253.) The Staff Report and Addendum impermissibly skip that analysis, and promise it will be provided later after LCP Amendment approval. AR4558, 4627. There is no adopted Emergency Response Plan or Emergency Evacuation Plan for the project area. AR1724. The Commission does not explain the minimization of fire risk given the absence of evacuation plans or its own admissions that a future residential project at the site "may affect future potential evacuations" from wildfire (AR4627) while traffic deficiencies would be exacerbated by any development at the proposed location. AR 4565.

The Commission is required to ensure that new development minimize risks to life "in areas of high …fire hazard." (§ 30253.) Defendants admit that "the site is located within a Community at Risk zone." AR4569; AR4627, fn. 6; County Answer, ¶28. The California Public Utility Commission shows the site on its "High Fire-Threat District Map San Mateo County." AR5376. The developer's consultant claims the project site is not within a "designated Hazardous Fire Area" (AR1675), but this is not a

[3] The developer's reports do not constitute Commission Staff Reports. (14 CCR §13057; *Strother, supra,* 173 Cal.App.4th at 877.) Thus, the Commission can rely upon the Supplemental Report for evidence to support a conclusion, but *not* for the Commission's analysis of Coastal Act consistency.

term used by the Coastal Act. The developer's consultant concedes that open space 0.5 miles from the project site "are within the High and the Very High Fire Hazard Severity Zones. …The project site could be vulnerable to these wildland fires, should they occur." AR5444.

## II.D. The LCP Amendment is Inconsistent with Coastal Act Sections 30230, 30231, and 30240 and LUP Policy 7.3, and the Staff Report Did Not Adequately Consider Consistency.

The Commission concedes that the Staff Report and the Addendum fail to address section 30230 and 30231consistency.[4] (CCC Opp. p.30:5-6.) No case law or Commission regulation holds that vaguely "addressing an issue" is equivalent to determining Coastal Act consistency. The Commission argues that "the findings are supported by substantial evidence in the Record" (CCC Opp. p.30:7), but doesn't specify any evidence which supports the consistency determinations it failed to make.

Remarkably, the Commission argues that there are no wetlands, sensitive areas or ESHA "on site." (CCC Opp. p.30:9-11.) Coastal Act sections 30230 and 30231 do not limit the Commission's protection and evaluation to "on site," and section 30240 and LUP Policy 7.3 specifically reference development "adjacent to" sensitive habitats.

The record contradicts the Commission's baseless assertion that development would not affect erosion or impacts to Montara Creek. (CCC Opp. p.30:10-15.) In fact, the developer's consultant provided evidence, upon which the Commission claims it relied, that

> Potential impacts to …surface water quality could occur both during construction and operation of the proposed project. Temporary increases in the erosion of exposed soils during construction of the project could result in minor on-or-off-site water quality impacts, particularly if rainfall events occur during an active construction phase. Additionally, chemicals used in construction (fuels, lubricants, paints, coatings) could be released to the environment if spilled. Construction of the proposed Cypress Point project would disturb a significant portion of the 10.875-acre project site. On-site soils are subject to severe water erosion hazards

AR1700. The Commission does not contest (1) the Montara Creek riparian corridor, parallel to the site's northern border, is an ESHA (AR4568; County Answer, ¶7), (2) that Montara Creek drains to the Fitzgerald ASBS downstream from the project site (AR1696 [Montara Creek is within Fitzgerald ASBS watershed boundary]), (3) there are wetlands where Montara Creek meets the Pacific Ocean within the Fitzgerald ASBS (County Answer, ¶36), (4) the project site slopes up to 50 percent (AR5458, County Answer, ¶34) and (5) stormwater from the entire project site discharges to Montara Creek within the Fitzgerald ASBS watershed. (AR5458; County Answer, ¶37.)

[4] Coastal Act section 30230 requires marine resources to be enhanced, and special protection given to Areas of Special Biological Significance (ASBS). Section 30231 requires that the coastal stream and wetland be maintained by minimizing waste discharges and controlling runoff.

Further, the Staff Report avoids any analysis of section 30240 consistency, summarily claiming that "any future development of the subject site would be required to meet such LCP policies, and thus would be required to protect coastal resources" and defers the LCP Amendment consistency to a subsequent CDP that may never be before the Commission. AR4568-69, 4626, 4630. Finally, the California Ocean Plan or a future County CDP evaluation (CCC Opp. p.30:25-28) does not absolve the Commission from its obligation to evaluate Coastal Act consistency for the LCP Amendment.

**II.E. <u>The Amendment is Inconsistent with Section 30253 by Not Minimizing Vehicle Miles Travelled, and the Staff Report Did Not Adequately Consider Consistency.</u>**

The Commission points to the flawed baseline comparison to the hypothetical LUP-124 conditions. (CCC Opp. p.28:20 citing AR10.) There is no analysis of whether Vehicle Miles Travelled ("VMT") will be "minimized" or section 30253 consistency. The Commission also points to AR2544, but this is a consultant memo to the County urging an update to its transportation analysis - as VMT had not yet been considered. There is no Commission consideration of the comments of Caltrans or Pang Engineers regarding minimization of VMT. AR5200, 5413, 2652.

**II.F. <u>The LCP Amendment is Inconsistent with Section 30250 and LUP Policy 1.18(c)</u>.**

The Commission's opposition concedes that for traffic capacity, the Staff Report employs the flawed baseline comparison to the hypothetical conditions under LUP-124 (AR4565) and relied on a draft "Connect the Coastside" plan. (CCC Opp. p.29:7; *see also* AR28 at fn.7.)

The Commission does not contest that in evaluating Section 30250 consistency, the Staff Report did not evaluate Caltrans' conclusion that "the project's impact on state facilities are significant" (AR2653), Highway1 intersections must be reconfigured (AR2652, 5413-14), and that the Commission itself commented that "significant traffic and transportation impact that would result" (AR2657).

As for coastal resources, the Commission provides no evidence that it considered the significant impacts from (1) hazardous materials (AR1692), (2) water quality (AR1700), (3) California red-legged frog (AR1962), or (4) cultural resources (AR473-74) in evaluating whether the foreseeable development will be located "where it will not have significant adverse effects, either individually or cumulatively, on coastal resources." (§ 30253.)

**III. THE COMMISSION, BY RELYING ON A SUPPLEMENTAL REPORT NOT MADE AVAILABLE TO THE PUBLIC, FAILED TO PROVIDE A FAIR HEARING.**

A writ is appropriate where the petitioner has been deprived of a fair hearing. (Code Civ.Proc., § 1094.5, subd. (b). The Commission released a Staff Report Addendum on March 12, 2021 - the day of its approval of the environmental review document for the LCP Amendment and approval of the

LCP Amendment in reliance thereon. County Answer, ¶165; AR4623-32. The Addendum relied upon a Supplemental Environmental Evaluation Report. AR4625. This report was never made available to the public, including Petitioner. The Commission does not contest this argument. The County provides no evidence that this report was made available to the public before the hearing. (County Opposition Brief, pp. 6-7.) By reliance upon a Supplemental Environmental Evaluation Report which was never made available to Petitioner, the Commission deprived Petitioner of a fair hearing on March 12, 2021.

**CONCLUSION**

A writ of mandate should issue as the Commission prejudicially abused its discretion. The Staff Report omitted required analysis of impacts, its conclusions are contradicted by the evidence, and its Coastal Act consistency and CEQA findings are not supported by reasonable explanation.

Respectfully submitted,

Dated: January 9, 2023 LAW OFFICES OF BRIAN GAFFNEY APC

By: 

Brian Gaffney
Attorneys for Petitioner

**PROOF OF SERVICE**

**MIDCOAST ECO v CALIFORNIA COASTAL COMMISSION et al**
**San Francisco Superior Case No. CPF-21-517430**

I am over the age of 18 years and not a party to the above entitled action. My business address is 2370 Market Street, Suite 103-318, San Francisco, CA 94114and I am a resident of or employed in the County of San Francisco, California.

On January 9, 2023, I served **PETITIONER'S REPLY BRIEF IN SUPPORT OF WRIT OF MANDATE**

attached hereto by transmitting a true copy via File&ServeXpress to the following:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on January 9, 2023 at San Francisco, California.

Brian Gaffney