Case No. C087102 (consolidated for limited purposes with No. C087117)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

LEAGUE TO SAVE LAKE TAHOE, MOUNTAIN AREA PRESERVATION FOUNDATION, and SIERRA WATCH

Petitioners and Appellants,

v.

COUNTY OF PLACER and PLACER COUNTY BOARD OF SUPERVISORS

Respondents and Cross-Appellants,

and

SIERRA PACIFIC INDUSTRIES, MOUNTAINSIDE PARTNERS, LLC and MVWP DEVELOPMENT, LLC

Real Parties in Interest and Cross-Appellants.

APPELLANTS' OPENING BRIEF

Appeal from Judgment Entered in Favor of Petitioners,
Placer County Superior Court Case No. SCV38666
(consolidated with SCV38578)
Honorable Michael W. Jones, Judge

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INTRODUCTION

This case challenges Placer County's approval of a massive, "second home" development ("Project") on forested land directly adjacent to the Lake Tahoe Basin, a resource of unquestionable national significance. As Appellants League to Save Lake Tahoe ("League"), Mountain Area Preservation Foundation, and Sierra Watch demonstrate, that approval violated two state laws designed to protect the environment: the California Environmental Quality Act ("CEQA"), Public Resources Code section 21000 et seq.,[1] and the Timberland Productivity Act, Government Code section 51100 et seq.

The Project at issue—760 luxury residences and extensive commercial development on a site encompassing 7,000 acres—would radically transform Martis Valley and the North Tahoe region, and its impacts would threaten Lake Tahoe itself. Isolated from other development in the area, the Project would raze over 20,000 trees and build structures as high as 75 feet on a scenic ridgeline above Lake Tahoe. It would send nearly 1,400 car trips per day into the Tahoe Basin, creating emissions and sediment that would significantly contribute to the degradation of the Lake's famed clarity and the Basin's fragile air quality. Additionally, the Project's homes would be built in a "Very High" fire severity zone,

[1] Except as otherwise noted, all future statutory references are to the Public Resources Code.

increasing the risk of catastrophic wildfire in the region and exposing residents, visitors, and fire-fighters to dangerous conditions.

Numerous residents, agencies, and organizations warned that the immense Project threatened Tahoe's unique and sensitive environment, and that the County's Environmental Impact Report ("EIR") plainly failed to comply with state law. After hearing many hours of public testimony, the Placer County Planning Commission recommended denial of the Project. Despite the public outcry, however, a majority of the Board of Supervisors ("Board") voted to approve the Project and certify the defective EIR. Tellingly, the Supervisor who represents the Tahoe area voted to deny the Project and reject the EIR.

As Appellants demonstrate herein, the EIR avoided confronting the consequences of this damaging development and violated CEQA by systematically masking the Project's most severe environmental effects. *See Stanislaus Natural Heritage Project v. County of Stanislaus* (1996) 48 Cal.App.4th 182, 186 (EIR must provide "detailed statement setting forth '[a]ll significant effects on the environment'" of proposed project). Its flaws include both basic omissions and analytic distortions that subvert CEQA's core policies of public participation and agency accountability. *See Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 392 ("*Laurel Heights I*") (EIR must demonstrate "that the [government] agency has, in fact, analyzed and considered the ecological

implications of its action") (citation omitted).

Perhaps most egregiously, the EIR essentially ignored the Project's impacts on Lake Tahoe. Although a portion of the Project site lies within the Tahoe Basin, and the Project's development would occur directly adjacent to the Basin, the County refused even to describe this important element of the regional setting, much less adequately analyze the Project's significant impacts on the Lake and Basin. As a result, the EIR evaluated no mitigation measures that might lessen the Project's damaging effects on the Basin's unique resources. These deliberate omissions disregarded CEQA's specific mandate to protect this environmentally significant area. *See, e.g.*, Guidelines §§ 15206(b)(4)(A) (recognizing Tahoe Basin as area of "Statewide, Regional, or Areawide Significance"), 15125(d).[2]

While the trial court upheld the EIR's nondisclosure on the ground that all Project construction would occur outside of the Tahoe Basin, and thus beyond the jurisdiction of the Tahoe Regional Planning Agency ("TRPA"), the court was wrong. Appellants never argued that the Project is subject to TRPA's jurisdiction, but only that CEQA requires the County to assess all the Project's impacts, including those outside the agency's borders. The California Supreme Court has long held that an agency must

[2] The CEQA Guidelines, California Code of Regulations, Title 14, section 15000 et seq. ("Guidelines") "implement the provisions of CEQA" and are afforded "great weight … except when a provision is clearly unauthorized or erroneous under CEQA." *Laurel Heights I*, 47 Cal.3d at 391, fn. 2.

analyze and mitigate impacts "not just on the agency's own property but 'on the environment,' which is … 'the area which will be affected by a proposed project.'" *City of Marina v. Bd. of Trustees of Cal. State Univ.* (2006) 39 Cal.4th 341, 359–360 (citing § 21060.5).

This pattern of understating or overlooking the Project's effects persists throughout the EIR, even with respect to serious public safety issues. For example, the EIR summarily dismisses the Project's emergency evacuation hazards as "insignificant." The Project, however, would feature a potentially deadly combination of extremely high fire danger and limited transportation infrastructure. All travelers to and from the Project (including emergency responders and those escaping wildfire) would use State Route ("SR") 267—and the EIR admits that SR 267 would be gridlocked even under non-emergency conditions. Accordingly, no evidence supports the EIR's finding of insignificance.

Likewise, the County erred in addressing the Project's significant impacts on climate change. After admitting that the climate analysis in the Draft EIR ("DEIR") was legally inadequate under a new Supreme Court decision (*Center for Biological Diversity v. Dept. of Fish & Wildlife* (2015) 62 Cal.4th 204 ("*CBD*")), the Final EIR ("FEIR") revamped that section, using an entirely different metric to evaluate these impacts. When the County's new analysis revealed more severe impacts, Appellants requested that the County recirculate the document for public comment on these new

conclusions and consider additional climate mitigation. The County's refusal to do so violated CEQA. *See* Guidelines § 15088.5(a).

Finally, the County violated the state Timberland Productivity Act ("Act") by illegally rezoning protected forestland to accommodate the Project. To safeguard the state's forest resources, the Act awards large tax breaks to landowners who place forestland into highly restrictive Timberland Production Zones ("TPZ"). Because of this generous tax break, the Act imposes a lengthy, ten-year waiting period on any rezoning out of TPZ. Landowners can avoid this waiting period only in narrow circumstances: a local agency may immediately remove forestland from TPZ only if it determines that use of the subject property is no longer "necessary" or "desirable" for timber production. Gov. Code § 51130.

Here, the approval of the present Project involved immediately rezoning a large portion of the site—the "West Parcel"—out of TPZ. The County, however, never determined that the West Parcel, a productive forest, is no longer needed or desirable for timber use. Instead, it relied on the fact that the applicant was placing *other land*—the "East Parcel"—into TPZ. Yet, the language of the Act nowhere authorizes an immediate rezoning merely because the rezoned land is deemed part of a "land swap," and no case permits this action. Compounding the problem, the County adopted various other findings to justify the rezoning that either have no support in the administrative record or are legally unavailable. Accordingly,

the County's action flatly violated the Act.

Placer County Superior Court ruled for Appellants on one of their CEQA claims—that the EIR's analysis of the Project's impacts on emergency evacuation was legally inadequate. The trial court otherwise upheld both the EIR's defective analysis of the Project's Tahoe Basin and climate impacts, and the County's unlawful actions under the Timberland Productively Act. Appellants respectfully request that this Court reverse these adverse portions of the trial court's ruling.

STATEMENT OF THE CASE

I. Statement of Facts

A. The Environmental Setting of the Project

The Project site encompasses over 7,000 acres of mountainous, forested land in the Martis Valley, an environmentally sensitive area bordering the Lake Tahoe Basin. *See* AR:2:899, 902.[3] The site consists of two large parcels owned by Sierra Pacific Industries ("SPI"): the "East Parcel" (6,376 acres) and the "West Parcel" (1,052 acres). *See* AR:2:899, 902, 905. The parcels are bisected by SR 267, a heavily congested, two-lane road that is a primary connection between Interstate 80 and Lake Tahoe. *See* AR:3:1262, 1487. The Project site's rolling forests and prominent ridgeline comprise a significant part of the scenic landscape for the region.

[3] Citations to the Administrative Record ("AR") appear as AR:volume number:page number.

The Project site, located in "High" and "Very High" Fire Severity Zones, is completely undeveloped. AR:2:902, 924; 3:1260. Both the East and West Parcels have historically been used for logging and, more recently, outdoor recreation. *See* AR:2:899, 902. Approximately 130 acres of the site lie within the Tahoe Basin, on the scenic ridgeline of Brockway Summit. *See* AR:3:1259. The Tahoe Rim Trail, a federally designated National Recreation Trail, runs along the site's southern border. AR:3:1700-01.

B. Regulatory and Development Background of the Project Site

The County has regulatory jurisdiction over most of the Project site. The County's Martis Valley Community Plan ("MVCP") and Zoning Code establish, respectively, the general plan and zoning designations for these lands. TRPA governs the portion of the site within the Tahoe Basin. AR:3:1259.

Prior to Project approval, the MVCP designated the West Parcel as Forest. *Id.* The West Parcel also fell within TPZ zoning, which limits land uses to timberland production or compatible uses. *Id.* At that time, the majority of the East Parcel was designated Forest and zoned TPZ. AR:3:1260. Prior to Project approval, the MVCP also designated a portion of the East Parcel as Low Density Residential and General Commercial; the County zoned that portion Single-Family Residential and Neighborhood Commercial. *Id.*

Around 2009, Appellants Sierra Watch and Mountain Area Preservation Foundation began discussions with SPI regarding its plans for the site, hoping to establish a shared vision for appropriate development. *See* AR:2:783-84; 3:1267. This effort culminated in the 2013 Martis Valley Opportunity Agreement ("MVOA").[4] *Id*. The MVOA's goal was to facilitate the permanent conservation of the East Parcel and to create a framework for discussions regarding limited development of a portion of the West Parcel. *See* AR:2:706, 784. The MVOA included a tentative, conceptual agreement for a residential subdivision on the West Parcel, with a collaborative process to settle on the final development. AR:3:1267.

That collaborative process ultimately broke down. The applicants proposed a project that, Appellants believed, far exceeded the bounds of the MVOA. *See* AR:1:400; 2:706-07. That project included: (1) a 760-unit housing component whose design invited sprawling development, and (2) a 550-site campground and recreational facility within the Tahoe Basin ("Brockway Campground"). *See* AR:2:706-07. Because the Campground lay within the Basin, it needed approval from both the County and TRPA, which operates under federal law. Consequently, to facilitate the development, on March 28, 2014, the County issued a Notice of Preparation ("NOP") of a combined EIR under CEQA and an

[4] Appellant League to Save Lake Tahoe ("League") participated in some discussions but was not a party to the MVOA. *See* AR:3:1267.

environmental impact statement under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq. AR:2:1154; 21:11690.

Appellants and numerous others expressed serious concern about the severe environmental harm the development posed for the Lake Tahoe Basin. *See, e.g.*, AR:4:2269-73, 2292-93, 2297-99; 29:16742-53. Facing this public controversy, and in an attempt to expedite environmental review for their housing development, the applicants revised the project to exclude the Brockway Campground, which they proposed as a separate project. AR:2:1165; 13:7454-55. However, the applicants never withdrew the Campground proposal or addressed Appellants' concerns about the remainder of the planned development.

C. The Final Proposed Project

As revised, the Project proposed to construct 760 luxury residences and 56,500 square feet of commercial uses and amenities on 662 acres of the West Parcel. *See* AR:2:708; 3:1267. It would include a mix of dwellings, but the vast majority of the residences would serve as second-homes (*see* AR:3:1274); some would sit directly adjacent to the popular Tahoe Rim Trail (*see* AR:1:514). The Project would allow buildings as high as 75 feet on a scenic ridgeline above Lake Tahoe. *See* AR:1:17; 2:707. It would be completely isolated from all existing development, accessible only by a single, new entry/exit point off of SR 267. AR:3:1262.

To convert the West Parcel to urban development, the Project would immediately remove it from TPZ. AR:1:33. The applicant would then place

into TPZ the portion of the East Parcel previously zoned residential and commercial. *Id.*; AR:1:38.

On February 27, 2015, the County issued a revised NOP and Initial Study for the Project, which excluded the Brockway Campground development. AR:4:1865. Because the new proposal excluded plans for construction in the Tahoe Basin (requiring TRPA approval), the County prepared environmental documents only pursuant to CEQA, and not NEPA. *Id.*

D. Environmental Review, Public Comment, and Project Approval

On October 22, 2015, the County circulated the Draft EIR ("DEIR") for the Project. AR:2:1132. The DEIR generated significant attention, with at least 175 agencies (including TRPA), organizations, and individuals commenting. AR:6:3050-55. In particular, Appellants submitted comprehensive comments on the DEIR detailing the document's numerous deficiencies. *See* AR:36:21041-63; 37:21150-21206. Despite its flaws, the DEIR revealed that the Project would result in several significant and unavoidable impacts, including gridlocked traffic on SR 267 and severe climate impacts. *See* AR:1:118-20.

In May 2016, the County issued the Final EIR ("FEIR"), including responses to the comments on the DEIR. AR:6:3042. Again, the County received extensive comments, including from Appellants, explaining that the FEIR failed to adequately respond to or correct the DEIR's errors. *See*

AR:14:8181-84; 30:17257-70, 17271-17322. Notably, the California Attorney General commented that the environmental review did not adequately analyze or mitigate the Project's impacts on the Tahoe Basin or on climate change, two issues of particular concern to the state. *See* AR:29:16763-81.

On May 12, 2016, the North Tahoe Regional Advisory Council considered but declined to support the Project. AR:38:22142-45. Instead, the Council voted to request that the County Planning Commission postpone action for thirty days, to allow time for review of the FEIR, which had been released only ten days before. AR:38:22145.

Rejecting the Council's request, the Planning Commission held a public hearing on the Project on June 9, 2016. *See* AR:19:10386-89. After receiving testimony from forty-one members of the public who mostly opposed the Project, the Commission continued the hearing to receive additional information on the Project's impacts to Lake Tahoe and its defective plans for emergency evacuation. AR:21:11495; *see also* AR:30:17248-53. Staff then prepared a memo for the Commission with some additional information regarding the Project's potential impacts to Lake water clarity, but which did not correct the deficiencies in the EIR. AR:17:10159-63.

At the continued July 7, 2016 hearing, the public again expressed near-unanimous opposition to the Project, citing impacts to Lake Tahoe and

development in high fire-risk areas. *See* AR:20:11169-11224. After considering these extensive, serious concerns, the Planning Commission, by a five-to-two vote, recommended denial of the Project and disapproval of the EIR. AR:20:11266.

On September 13, 2016, the Board of Supervisors held a public hearing on the Project. Public turnout was the largest yet, with sixty members of the public testifying, mostly opposing the Project and the EIR. AR:20:10935-11043; *see also* AR:29:16685-91, 16717-41, 16742-53. Despite the public outcry, the Board rejected the Planning Commission's recommendation to deny the Project. Instead, the Board voted four-to-one to tentatively approve it, and then continued the matter for a month. AR:20:11105-06. Notably, the Supervisor representing the Tahoe area voted against the Project. *See id.*

On October 11, 2016, the Board again voted four-to-one to approve the Project.[5] The Board adopted a specific plan and related planning approvals (AR:1:4, 34; 2:889, 1107, 1121, 1126); certified the FEIR; and approved CEQA findings of fact, a statement of overriding considerations, and a mitigation monitoring plan (AR:1:100). The Project approvals included immediately rezoning the West Parcel out of TPZ (AR:1:33) and

[5] The County included as an attachment to the staff report for the October 11, 2016 meeting a lengthy response to all comments made on the Final EIR. *See* AR:14:8181. This document, which is not itself part of the EIR, was not a part of the staff report for the Board's September 13 meeting.

placing the East Parcel into TPZ (AR:1:38).

On October 12, 2016, the County filed its Notice of Determination. AR:1:1.

II. Procedural History of Litigation

On November 10, 2016, Appellants timely filed their Petition for Writ of Mandate against the County, alleging violations of CEQA and the Timberland Productivity Act. JA:1:67-96.[6] The petition named SPI, Mountainside Partners LLC, and MVWP Development LLC as real parties in interest. *Id*. The California Clean Energy Committee ("CCEC") had earlier filed a CEQA petition challenging the Project approvals. JA:1:43-64. The court eventually consolidated the two cases for limited purposes, allowing for separate briefs and judgments. JA:1:186-93.

After a writ hearing on December 14, 2017, the trial court issued its Ruling in Appellants' case on March 12, 2018. JA:7:1371-84. This Ruling granted the petition in part, concluding that the EIR's analysis of the Project's impact on emergency evacuation violated CEQA. JA:7:1384. In accordance with the Ruling, the court issued judgment and a writ of mandate directing the County to vacate approval of the Project, certification of the EIR, and related findings as they pertain to emergency evacuation procedures. JA:7:1384; 8:1557-60, 1577-79. The Ruling rejected Appellants' other CEQA claims and their Timberland Productivity Act

[6] Citations to the Joint Appendix ("JA") appear in this brief as JA:volume number:page number.

cause of action. JA:7:1371-84.

On March 12, 2018, the trial court also issued its Ruling in the CCEC case, denying all CCEC's claims. JA:6:1353-63. CCEC has appealed.

On May 10, 2018, Appellants timely filed their Notice of Appeal. JA:7:1529-30. This Court subsequently consolidated Appellants' appeal with the CCEC appeal for the purposes of the record on appeal, oral argument, and decision.

STATEMENT OF APPEALABILITY

This is an appeal from a final ruling entered on March 12, 2018, and a subsequent judgment entered on June 6, 2018. JA:8:1557-76. Code Civ. Proc. § 904.1(a)(1) (an appeal may be taken from a final judgment); *see also* California Rules of Court, Rule 8.104. The judgment carries out the trial court's ruling that the County violated CEQA by failing to adequately analyze the Project's impacts on emergency evacuation, and it directs the issuance of a writ of mandate. JA:8:1558-59, 1572-73, 1575. However, the trial court's ruling and judgment also denied Appellants' remaining CEQA claims as well as their Timberland Productivity Act claim. JA:8:1558-59. Where a party secures a ruling in its favor, it may appeal unfavorable portions of it. Code Civ. Proc. § 902; *see also* § 21005(c) (directing a reviewing court to address "each of the alleged grounds for [CEQA] noncompliance").

ARGUMENT

I. Standard of Review

A. CEQA

CEQA's dual standard of review is well-settled. When reviewing an agency's compliance with CEQA, "a reviewing court must adjust its scrutiny to the nature of the alleged defect, depending on whether the claim is predominantly one of improper procedure or a dispute over the facts." *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435, rehg. den. Mar. 29, 2007 ("*Vineyard*"). If an EIR fails to address an issue or omits essential information, courts employ de novo review to determine whether the agency violated the statute's disclosure requirements. *Banning Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal.5th 918, 935 ("*Banning Ranch*"). By contrast, courts use the "substantial evidence" test to review an agency's "substantive factual conclusions." *Vineyard*, 40 Cal.4th at 435.

Respondents argued at trial that the court should review all of Appellants' claims under the "substantial evidence" test (JA:4:867, 875, 880, 886, 888), but the case law says otherwise. For example, the EIR's failure to include a complete description of the Project's environmental setting is an error of law. *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 729 ("*Raptor*") (environmental setting deficiency rendered EIR "inadequate as a matter of law"). Likewise, the EIR's omission of an analysis of the Project's impacts

on the Tahoe Basin's unique environmental resources constitutes legal error. *See Banning Ranch*, 2 Cal.5th at 935-36. Similarly, whether the Project's mitigation measures for climate change violate CEQA because they are illusory and unenforceable presents a question of law. *City of Marina*, 39 Cal.4th at 365-66; § 21081.6(b) (mitigation measures must be "fully enforceable").

The trial court properly held that the "substantial evidence" test applies to Appellants' claim that the EIR must be recirculated, although it failed to correctly apply the standard. JA:4:888. "Substantial evidence" is "evidence of ponderable legal significance, reasonable in nature, credible, and of solid value." *American Canyon Community United for Responsible Growth v. City of American Canyon* (2006) 145 Cal.App.4th 1062, 1070. Here, no substantial evidence supported the County's decision not to recirculate the FEIR's substantially revised analysis of the Project's climate impacts.

Finally, the EIR's errors and omissions were prejudicial. The County certified a flawed EIR that precluded informed decision-making and meaningful public participation. In doing so, the agency prejudicially abused its discretion. *Banning Ranch*, 2 Cal.5th at 942; *see also* 2 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act (Cont.Ed.Bar 2017) § 23.37, pp. 23-47–23-48 (CEQA violation resulting in failure to disclose important environmental information is presumed "prejudicial").

B. Timberland Productivity Act

Pursuant to Code of Civil Procedure section 1094.5, this Court reviews Appellants' claim that the County improperly approved the immediate rezoning of the West Parcel under an abuse of discretion standard. Abuse of discretion occurs where an agency has not proceeded in the manner required by law, or where its findings are not supported by the evidence. Code Civ. Proc. § 1094.5(b). Section 1094.5 thus establishes a dual standard of review.

Where an agency fails to proceed in the manner required by law, courts review the matter de novo, as a question of law. *Coe v. City of San Diego* (2016) 3 Cal.App.5th 772, 781. Where an agency's findings are not supported by the evidence, courts apply the substantial evidence test. Code Civ. Proc. § 1094.5(c). In the present case, Appellants assert that the County's action to approve the immediate rezoning suffers from both infirmities.

II. The County Failed to Comply with CEQA.

A. The EIR's Inadequate Discussion of the Lake Tahoe Basin Fails to Perform Its Informational Function.

The Project site straddles the Lake Tahoe Basin and would have severe impacts on that Basin. In peak periods the Project would add approximately 1,400 car trips and nearly 14,000 vehicle-miles traveled ("VMT") *per day* to this sensitive area. AR:3:1259; 6:3118. Consequently, it would degrade the Basin's air quality and impair the Lake's famed water

clarity and quality. Nonetheless, the EIR failed to disclose crucial information about the environmental setting of the Lake Tahoe Basin and never meaningfully assessed the Project's impacts on this treasured resource. Given the regional environmental importance of the Basin, the trial court's decision to uphold the EIR's scant analysis must be reversed.

1. Federal and State Laws Recognize the Lake Tahoe Basin as a Unique and Nationally Important Environmental Resource.

As the United States Supreme Court confirmed, "All agree that Lake Tahoe is 'uniquely beautiful,' that President Clinton was right to call it a 'national treasure that must be protected and preserved,' and that Mark Twain aptly described the clarity of its waters as 'not merely transparent, but dazzlingly, brilliantly so.'" *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency* (2002) 535 U.S. 302, 307 (internal citations omitted).

Responding to development threatening this distinctive resource, in 1969 Congress approved a bi-state Compact between California and Nevada, which "set goals for the protection and preservation of the lake." *Id*. at 309. The Compact established TRPA and tasked that agency with adopting regulations to conserve the 501 square-mile Tahoe Basin. *Id*. Later, in 1980, Congress approved a comprehensive amendment to the Compact, greatly enhancing TRPA's authority to protect the Lake. *Id*. at 309-10; *see also* AR:6:3154.

This amendment required TRPA to establish regional "environmental threshold carrying capacities." *Tahoe-Sierra Preservation Council*, 535 U.S. at 310. The 1980 Compact defines "environmental threshold carrying capacity" as:

> an environmental standard necessary to maintain a significant scenic, recreational, educational, scientific or natural value of the region or to maintain public health and safety within the region. Such standards shall include but not be limited to standards for air quality, water quality, soil conservation, vegetation preservation and noise.

Gov. Code § 66801; AR:40:23430. TRPA based these environmental capacities on science and measures their attainment through "indicators." These are "measurable physical phenomena within the Tahoe region whose status, according to the best available scientific information, has a direct relationship to the status of attainment or maintenance of one or more thresholds or standards." AR:4:1993 (citing TRPA Code § 16.3.3).

Scientific research has proven that motor vehicles are a major cause of both air and water pollution in the Basin. Tailpipe emissions contribute to decreased visibility and poor air quality that results in negative health impacts. *See, e.g.*, AR:6:3155-57: 15:8725-26; 29:16765-67: 45:26517, 26584-85: 60:35665, 35668, 35673, 35760. These emissions also cause nitrogen deposition in the Lake, which in turn generates algae growth that threatens the Lake's remarkable clarity. *See id*. In addition to emissions, cars and trucks produce finely-crushed road sediment that further degrades the Lake. *See id*.

To address these impacts in response to such scientific information, TRPA established, among other standards, a Basin-wide, *cumulative* carrying capacity threshold for motor vehicles of 2,067,600 VMT. AR:6:3118: 60:35767. This threshold represents the total VMT that the Basin can sustain before it reaches a "tipping point" and loses the environmental attributes that make the area unique. Gov. Code § 66801. Indisputably, at the time of the Project's approval, the Basin was dangerously close to reaching TRPA's cumulative threshold for VMT. *See* AR:6:3155; 29:16772. TRPA also adopted a *project-level* standard of 200 daily vehicle trips or 1,150 VMT. AR:6:3119, 3155. A project exceeding that level is considered to have a significant environmental impact. *Id*.

The CEQA Guidelines also expressly designate the Basin as an area of "Statewide, Regional, or Areawide Significance," thus meriting particular attention. Guidelines § 15206(b)(4)(A). They further mandate that an "EIR shall discuss any inconsistencies between the proposed project and applicable general plans, specific plans, and regional plans … [including] plans for the protection of the … Lake Tahoe Basin." Guidelines § 15125(d).

2. The EIR Fails to Adequately Describe the Regional Environmental Setting for the Project.

a. CEQA Requires a Complete Description of the Project's Environmental Setting.

An EIR must first identify a proposed project's environmental setting. The discussion of the setting "must include a description of the

physical environmental conditions in the vicinity of the project … from both a local and regional perspective." Guidelines § 15125(a). Such information will normally serve as the "baseline" from which an agency will determine whether an impact of the project is significant. *Id.*

Importantly for the present case, the setting for the project is not merely the immediate, localized area where it is sited. Rather, "[k]nowledge of the regional setting is critical to the assessment of environmental impacts." Guidelines § 15125(c). Further, "[s]pecial emphasis should be placed on environmental resources that are rare or unique to that region and would be affected by the project." *Id.*; *see also id.* § 15064(b) ("significance of an activity may vary with the setting"). Thus, CEQA does *not* limit the EIR's description of the environmental setting to the project site or to the lead agency's jurisdiction, as Respondents erroneously argued to the trial court. *See* JA:4:869-72. Rather, the statute demands a regional approach that focuses on unique resources such as the Tahoe Basin.

Courts have repeatedly held that where an EIR contains an "inadequate description of the environmental setting for the project, a proper analysis of project impacts [i]s impossible." *Galante Vineyards v. Monterey Peninsula Water Management Dist.* (1997) 60 Cal.App.4th 1109, 1122 (EIR with only passing references to surrounding viticulture violated CEQA); *Friends of the Eel River v. Sonoma County Water Agency* (2003) 108 Cal.App.4th 859, 873-75 (EIR's description of environmental setting

failed to describe regional setting for water diversions). Thus, if an EIR fails to include adequate information on the environmental setting that would allow readers to understand the sensitivity of resources at stake, "prejudice is presumed." *Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1236-37 ("*Board of Forestry*") (invalidating project approval based on environmental document that "contained no site-specific data regarding the presence of four old-growth-dependent species").

For the present case, the court's decision in *Raptor*, 27 Cal.App.4th at 729, is particularly apt. The development project at issue there included 633 homes, a commercial area, and a park. *Id.* at 718. The project site lay near a wetland wildlife preserve, and the project's park was situated adjacent to the San Joaquin River. *Id.* at 724. The EIR purported to evaluate the development's impacts on waterfowl and other resources in the project area. *Id.* at 729. However, the court found that the EIR's information on the environmental setting was "incomplete and misleading" because it included little reference to the sensitive riparian resources in the region. *Id.* at 723-29. This omission violated CEQA:

> [The EIR's] failure to provide clear and definite analysis of the location, extent and character of wetlands possibly within and definitely adjacent to the development project and failure to discuss SJWF [the neighboring wildlife preserve], precludes this court from concluding that all the environmental impacts of the development project were identified and analyzed in the FEIR.

Id. at 729.

Similarly, in *Cadiz Land Co. v. Rail Cycle* (2000) 83 Cal.App.4th

74, 92-95, the court invalidated an EIR for failing to provide adequate information about an underlying aquifer. The EIR had presented detailed information about the project's groundwater, including "its presence, quality, drawdown and recharge rate, and protection measures." *Id*. at 91-92. Nonetheless, the court invalidated the document because it omitted critical *contextual information* about the underlying aquifer, such as its size and volume of water. *Id*. at 92-93. Without that information, decision makers could not evaluate the risk of contamination or "determine[] how soon depletion will occur" of this "valuable and relatively scarce resource in the region." *Id*.

b. The EIR's Refusal to Meaningfully Describe the Tahoe Basin Violated CEQA.

In the present case, just as in *Raptor* and *Cadiz*, the EIR's omission of information about the Tahoe Basin renders the EIR fatally defective. Critically, the EIR includes only a few, widely scattered references to the Basin in its discussion of the Project's environmental setting. The EIR does not meaningfully describe the current physical conditions in the Basin or discuss the importance and sensitivity of this resource. Indeed, it does not even disclose that the Basin is reaching its environmental carrying capacity for VMT. *See* AR:3:1531-37, 1633-39.

Instead of providing a complete description of the Basin, the EIR repeatedly recites that the Project's development footprint lies outside Basin boundaries. *See, e.g.*, AR 3:1267, 1269, 1295-96, 1318-19, 1324.

Indeed, in addressing "Surrounding Land Uses," the EIR's project description section does not discuss Lake Tahoe at all. It states in full:

> Similar to the East and West Parcels, much of the surrounding area is undeveloped and consists of coniferous forest (Exhibit 3-4). The Northstar California Resort is located approximately one mile west of the West Parcel. The Truckee-Tahoe Airport is located approximately 1.5 miles from the northwest portion of the East Parcel (to the eastern edge of the Airport) and approximately 4 miles northwest of the northern portion of the West Parcel. The communities of Kings Beach and Tahoe Vista are located approximately four miles southeast of the proposed project entrance at SR 267.

AR 3:1260. CEQA does not allow an agency to put on such blinders. *See* Guidelines § 15125(c).

Similarly, the EIR's chapters on individual resource areas fail to meaningfully address the Tahoe Basin. In particular, the chapters on water quality and air quality setting, where readers would expect this information, barely touch on the subject.

i. The EIR's Discussion of Water Quality Setting.

While the EIR's 15-page discussion of the setting information for Hydrology and Water Quality is the obvious place to address Lake Tahoe, this material only mentions "Lake Tahoe" twice in passing. First, the EIR states:

> The MVWPSP project site is located within the North Lahontan Hydrologic Region …[which] covers approximately 3.91 million acres …. Significant geographic features include the Sierra Nevada, the volcanic terrain of the Modoc Plateau, Honey Lake Valley, Martis Valley, and Lake Tahoe (DWR 2003).

AR:3:1633. The second reference is even more tangential: "In 2008 a TMDL was developed addressing suspended sediment concentrations in the segment of the Truckee River from the outflow of Lake Tahoe at Tahoe City to the California/Nevada state line." AR:3:1640.

The EIR thus says nothing about the current status of Lake Tahoe's water quality or its famed water clarity. Nor does it disclose whether the Lake is nearing its environmental carrying capacity.

At trial, Respondents offered two weak arguments to defend this startling omission. First, they claimed that because Project construction would not occur within the Basin, stormwater runoff from the Project would not drain into the Lake. JA:4:867-68. But this argument simply ignores the other various ways in which the Project's operation will impact the Basin. For example, the Project would add a staggering 14,000 VMT to the Basin each day in peak periods, resulting in air and water quality impacts—facts Respondents do not dispute. *See, e.g.*, AR:15:8724-27. CEQA requires that an EIR describe the regional setting in order to permit an adequate evaluation of *all* of the Project's environmental impacts. Guidelines § 15125(c).

Second, Respondents asserted that the EIR need not provide detailed water quality information for Lake Tahoe because impacts from cars were already "accounted for in the development of the Lake Tahoe Total Maximum Daily Load [TMDL] pollutant load reduction strategy."

JA:4:868. This argument is a red herring. Regardless of any plan for reducing pollutants that affect Lake Tahoe, the EIR must describe existing environmental resources in the Project vicinity and evaluate the Project's impacts on those resources. *See Communities for a Better Environment v. S. Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 320. The County cannot unilaterally exempt itself from this analysis by claiming that a separate agency's regulation also considered these impacts.

ii. The EIR's Discussion of Air Quality Setting.

Similarly, the discussion of the environmental setting in the DEIR's "Air Quality" chapter failed to address current conditions in the Tahoe Basin. Remarkably, this chapter limited the Project's setting information as follows: (1) "[t]he MVWPSP project site is located in a portion of eastern Placer County that is part of the Mountain Counties Air Basin (MCAB)" (AR:3:1531), and (2) "[a]ir quality within the Placer County portion of the MCAB is regulated by the EPA, ARB, and PCAPCD" (AR:3:1537). The document never revealed the current air quality conditions of the Lake Tahoe Air Basin or the current level of VMT in the Basin. *See* AR:3:1531-41; 6:3311-12. Likewise, it failed to mention the Basin's environmental carrying capacity, leaving readers entirely in the dark as to whether air pollution around the Lake is nearing the "tipping point" established by that capacity.

In lieu of this essential information, the DEIR referenced data from *one* monitoring station in South Lake Tahoe—located 26 miles from the Project—and calculated mobile source emissions from the Project's traffic only within Placer County. AR:3:1542, 1533. But this scant raw data lacked the essential contextual information needed by readers to assess the Project's actual impacts on the Tahoe Basin's air quality. Without complete information on the environmental setting, the EIR could not analyze whether cars from this Project streaming into the Tahoe Basin will adversely affect the Basin's air quality. *See Cadiz*, 83 Cal.App.4th at 91-95. Because an "EIR must demonstrate that the significant environmental impacts of the proposed project were … considered in the full environmental context" (Guidelines § 15125(c)), the DEIR's paltry treatment of Basin air quality violated CEQA.

The FEIR attempted to repair the DEIR's failure to describe current conditions in the Basin by adding a single statistic: a 2010 estimate of total VMT in the Basin. AR:6:3118. However, this isolated, outdated figure does not begin to satisfy CEQA's requirement for a detailed discussion of the current environmental setting. *See* Guidelines §15125 ("An EIR must include a description of the physical environmental conditions in the vicinity of the project, as they exist at the time the notice of preparation is published."); *Cadiz,* 83 Cal.App.4th at 92-95.

Finally, at trial, Respondents offered a last-ditch justification for the EIR's cursory discussion. They claimed that the EIR did not have to provide detailed information about the Tahoe Basin because the applicant "did not need a permit from TRPA." JA:4:868; AR:3:1295-96. Once again, however, Respondents sought to distract the court with an irrelevant argument. Whether a project does or does not need a permit from a separate public agency in no way determines the scope of information on the environmental setting needed to analyze the project's impacts.

The law is well-settled on this point. For example, in *Friends of the Eel River*, a project relying on diversions from the neighboring Eel River did not need a permit from the Federal Energy Regulatory Commission. Nonetheless, the lead agency could not omit information from the EIR about the Commission's process for protecting the River—information needed to analyze the project's environmental effects. 108 Cal.App.4th at 873-75. Conversely, even if a project does require a permit under a separate legal mechanism, that requirement does not immunize the project from the environmental analysis required by CEQA. In *Board of Forestry*, 7 Cal.4th at 1228-29, the Supreme Court held that an environmental document for a timber harvesting permit must provide the full information on environmental setting required by CEQA despite the separate requirements of the Forest Practices Act.

The question, then, is not whether the existence or nonexistence of a separate legal permit from another agency immunizes the agency from discussing the environmental setting. It does not. Rather, the issue is whether the agency must disclose and consider information from a separate program if that information is relevant to the setting. Again, the law is clear: the agency must do so. Here, information about TRPA's program to protect the Tahoe Basin is relevant to the environmental analysis for three related reasons: (1) the Project site is located within and adjacent to the Basin; (2) the Project would significantly impact Basin resources; and (3) the science underpinning TRPA's standards is directly relevant to the CEQA analysis. *See Banning Ranch*, 2 Cal.5th at 936-37; *Cleveland Nat. Forest Foundation v. San Diego Assn. of Governments* (2017) 3 Cal.5th 497, 515 ("*CNFF I*").

In sum, the EIR violated CEQA because it lacked basic information about the Project's environmental setting in proximity to the Tahoe Basin, an unique resource of regional significance.

3. The EIR Fails to Adequately Analyze the Project's Significant Environmental Impacts on the Lake Tahoe Basin.

Because the EIR failed to include the required information on the environmental setting of the Project, its analysis of impacts on the Lake Tahoe Basin was necessarily flawed. Here, the County recognized as much at the eleventh hour, but its hurried attempt to remedy the deficiency failed.

a. CEQA Requires Detailed Environmental Analysis of Both Significant Project-Specific Impacts and Cumulative Impacts.

After describing the environmental setting, an EIR must "identify the significant effects on the environment of a project, [] identify alternatives to the project, and [] indicate the manner in which those significant impacts can be mitigated or avoided." § 21002.1(a); *see also* §§ 21100(b), 21061; Guidelines § 15126.6(f)(1). "'Environment' means the physical conditions which exist within the area which will be affected by a proposed project, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance." § 21060.5. The EIR must base its assessment of significant environmental impacts on objective facts and "meaningful analysis." *See Laurel Heights I*, 47 Cal.3d at 404-05; Guidelines § 15384.

The EIR must also analyze a project's significant cumulative impacts, and then evaluate mitigation measures or alternatives to lessen those impacts. CEQA defines cumulative impacts as "two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts." Guidelines § 15355. An effect is "cumulatively considerable" when the "incremental effects of an individual project are significant when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects." Guidelines § 15065(a)(3).

Finally, the EIR must reach a conclusion about a potential impact and reveal how significant that impact will be. *See Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1109 ("*Amador*") (The EIR "must determine whether any of the *possible* significant environmental impacts of the project will, in fact, be significant."); *Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 831 ("What is needed is some information about how adverse the adverse impact will be.").

b. The EIR Failed to Adequately Analyze Both the Project's Individual Impacts and Its Cumulative Impacts on the Basin.

Here, the DEIR contained no discussion of the Project's individual or cumulative impacts on Lake Tahoe's water quality and clarity, or of its impacts on the Basin's fragile air quality. It provided no environmental thresholds to assess those impacts on the Lake and Basin, and it provided scant reference to programs of other agencies, such as TRPA, to protect these resources. As a result, the DEIR failed to reach any conclusion about the significance of the Project's impacts on the Basin or the Lake, and thus did not identify any mitigation for those impacts. *See* AR:1:191-99, 220-35.

The DEIR omitted this critical information even though, early in the process, the public had specifically requested that the DEIR address the Project's impacts on the Basin and the Lake. AR:2:1165; AR:4:2297-98. And it did so even though one of the Project objectives was to "[c]onsider

the regional implications of development in the Martis Valley on resources outside of the Valley (i.e., Truckee River, Lake Tahoe Basin)." AR:3:1264. Numerous commenters, including TRPA and the League, informed the County that the DEIR's approach was inadequate under CEQA. *E.g.*, AR:6:3154-57, 3448-55.

In response, the FEIR tried to correct the problem with two "fixes." First, it finally acknowledged TRPA's VMT thresholds for the Basin. AR:6:3118-19 ("TRPA posited that more VMT would result in increased traffic congestion, increased nitrate loading into the atmosphere (and subsequent deposition into Lake Tahoe), and an increase in the airborne concentration of particulate matter known to adversely affect regional and sub-regional visibility and human health."). The FEIR, however, did not adopt TRPA's VMT thresholds, or any other threshold, to assess the Project's impacts on the Basin. *Id.*

Second, and *for the first time*, the FEIR revealed that under peak daily conditions, the Project would generate an additional 1,394 car trips, and an additional 13,745 VMT, in the Basin. AR:6:3118.[7] The FEIR then surveyed prior environmental documents prepared for various other regional projects. This survey revealed that TRPA and the County (for the

[7] Evidence in the record suggests these numbers are underestimates. *See, e.g.*, AR:13:7589-92; 30:17377-90, 17403 (traffic expert noting EIR vastly understates Project's trip generation and thus VMT). Still, even the County's figures demonstrate the Project's significant impacts on the Basin.

Homewood project) had utilized project-specific thresholds of 200 daily trips or 1,150 VMT to assess those projects' impacts on the Basin. AR:6:3118-19. If the FEIR had actually used one of these project-specific thresholds, it would necessarily have concluded that the Project would have significant environmental impacts on the Basin. *See* AR:6:3118.

However, the FEIR deliberately employed a subterfuge to make those project-specific thresholds appear irrelevant. It concluded that the Project would not cause the Basin to exceed TRPA's *cumulative* total VMT carrying capacity threshold of 2,067,600 VMT. *Id*. In other words, because this Project's total VMT would not trigger an exceedance of the *Basin-wide* limits, the County dismissed its environmental impacts. It thereby avoided making *any* determination whether the Project, individually, would significantly impact the Basin. AR:6:3118-19. This omission alone violates CEQA. *See Amador*, 116 Cal.App.4th at 1109 (agency must reach significance determination).

Moreover, the FEIR's attempt to use a cumulative standard to avoid a significance determination on the Project's impacts fails for another reason: the FEIR's passing reference to TRPA's cumulative threshold (AR:6:3118) did not even meet CEQA's requirements for analyzing cumulative impacts. Specifically, it failed to calculate the cumulative VMT from the Project in combination with other past, current, and probable future projects. *See* Guidelines § 15065(a)(3); *Citizens to Preserve the Ojai*

v. County of Ventura (1985) 176 Cal.App.3d 421, 430-431 (adequate cumulative impact analysis is critical to valid EIR); AR:30:17302. This error is particularly egregious given the County's simultaneous environmental review of an expansion plan for a Squaw Valley resort that would also generate a large number of trips to the Basin. AR:17:10014; 29:16749-50; 30:17302. The FEIR's failure to mention that large project or others planned for the region violates CEQA.

c. Respondents' Series of Excuses for Omitting Analysis of the Project's Impacts on the Basin Is Untenable.

Undoubtedly recognizing that these eleventh hour "fixes" were insufficient, Respondents offered four justifications to excuse the EIR's abbreviated discussion of Basin impacts. Each is unavailing.

First, the FEIR claims that mitigation calling for increased transit funding will reduce the Project's VMT in the Basin. AR:6:3119 ("Mitigation Measure 10-5 would generate permanent ongoing funding to expand transit services, which would reduce VMT impacts of the project in the Basin."). However, the cited mitigation does not guarantee that any of the transit benefits would be realized in the Basin. *See* AR:3:1517; 17:10009-10; 29:16750-51. Indeed, this mitigation measure was not even designed to reduce impacts on the Basin.

In any event, agencies may not rely on possible mitigation to avoid *analyzing* impacts of a proposed project. The environmental analysis

required by CEQA is sequential: an EIR must first analyze the severity of the impact, and then identify mitigation measures to lessen that impact. As the court explained in *Ukiah Citizens for Safety First v. City of Ukiah* (2016) 248 Cal.App.4th 256, 264, "CEQA EIR requirements are not satisfied by saying an environmental impact is something less than some previously unknown amount." *See also Lotus v. Dept. of Transp.* (2014) 223 Cal.App.4th 645, 653-54 (EIR improperly conflated impacts analysis with discussion of mitigation) (citation omitted).

Second, Respondents argued that the County has broad discretion to select the EIR's thresholds of significance and then leapt to the conclusion that the EIR's thresholds for evaluating *traffic* impacts could serve as a sufficient proxy for *air and water* impacts on the Tahoe Basin. JA:4:869. Respondents are wrong, for CEQA does not countenance such illogic. While the County possesses some discretion in selecting thresholds, it may not choose standards that obscure rather than elucidate the impacts of concern. *See, e.g.*, *Berkeley Keep Jets Over the Bay Com. v. Bd. of Port Comrs.* (2001) 91 Cal.App.4th 1344, 1381-82 (EIR improperly relied on "daily average" threshold for noise impacts that omitted critical information about nighttime noise).

Here, the EIR's traffic thresholds were used to determine whether the Project would exceed "level of service" standards for traffic congestion. *See* AR:3:1490. Analyzing congestion, however, differs fundamentally

from analyzing the Project's potential air and water quality environmental impacts on unique resources such as Lake Tahoe. As the record shows, VMT from the Project would significantly affect air and water quality in the Basin *and* impair TRPA's plans for protection of these resources. *See, e.g.*, AR:6:3156-57; 29:16765, 16771-72; 30:17436-46. The EIR may not avoid analyzing these impacts by citing a separate threshold for traffic significance.

Third, Respondents argued that the EIR did not need to analyze the Project's impacts on the Tahoe Basin because the "project does not occur in the Basin and is not under the jurisdiction of TRPA." AR:6:3110, 3118. The trial court agreed, stating: "The lynchpin that requires this additional analysis is the location of the development within the Basin …. The record here reflects that the Project no longer falls within the Basin, so there are no additional TRPA requirements applicable here." JA:7:1381.

This reasoning is wrong as a matter of law: *CEQA*, not TRPA, mandates analysis of impacts on the Basin. *See, e.g.*, §§ 21002.1(a), 21060.5. The Supreme Court has long held that a lead agency's jurisdictional boundary does not operate as a legal barrier that curtails an EIR's analysis of impacts occurring outside that boundary. As the Court explained years ago: "[A]n EIR may not ignore the regional impacts of a project proposal, including those impacts that occur outside of its borders." *Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 575;

see Guidelines § 15126.6(f)(1). It then reiterated the point in several additional cases: "Indeed, 'the purpose of CEQA would be undermined if the appropriate governmental agencies went forward without an awareness of the effects a project will have on areas outside of the boundaries of the project area.'" *Save the Plastic Bag Coal. v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 173 (citation omitted); *see also City of Marina*, 39 Cal.4th at 359–360; *City of San Diego v. Bd. of Trustees of Cal. State Univ.* (2015) 61 Cal.4th 945, 961.

Fourth, Respondents again veer into the irrelevant by arguing that CEQA does not require the County to adopt TRPA's thresholds of significance. JA:4:869. Appellants, however, have never claimed that the County must adopt TRPA's thresholds. *See* JA:3:539-40; 5:1100. What the County must do is determine whether the Project would cause significant impacts on the Basin or plans for its protection, and then evaluate mitigation to avoid or lessen such impacts. *See, e.g.*, § 21002.1(a). The County's refusal to do so here violated CEQA. *Amador*, 116 Cal.App.4th at 1109.

In undertaking those analytical tasks, though, the County must use the best science available. Thus, while the County is not required to adopt TRPA's standards, it cannot ignore the *science* underlying those standards. The Supreme Court clarified that principle in its recent *CNFF I* decision. The Court held that, to analyze the impacts from climate change, the lead

agency did not have to adopt a standard for greenhouse gas reductions set in a gubernatorial executive order. However, the agency must employ the science underlying that order, for "[t]his scientific information has important value to policymakers and citizens in considering the emission impacts of a project." *CNFF I*, 3 Cal.5th at 515.

The Supreme Court's recent decision in *Banning Ranch* is also instructive. In that case, a city's EIR for a development project in the coastal zone failed to evaluate whether the project would significantly impact environmentally sensitive habitat areas ("ESHA"), which are defined and protected by the California Coastal Commission, and thus failed to evaluate any project alternatives or mitigation to lessen impacts to ESHA. *Banning Ranch*, 2 Cal.5th at 936-41. Like Respondents here, the city argued that the EIR did not need to analyze the impacts to unique biological resources based on another agency's standards. *Id*. at 932-33, 936. The Court rejected this approach as "untenable," holding that the city could not ignore "the ample evidence that ESHA are present on Banning Ranch" and that the project would impact those ESHA. *Id*. at 936-37.

Similarly here, Respondents cannot ignore: (1) that TRPA has established science-based environmental carrying capacities for the Basin, or (2) the ample record evidence that the Project would impact the Basin's sensitive resources. At trial, Respondents attempted to distinguish *Banning Ranch* on the grounds that the project there was under the Coastal

Commission's jurisdiction, whereas the present Project is not under TRPA's jurisdiction. JA:4:872. But the Court's decision did not depend on that fact. Rather, the Court emphasized that "a lead agency must consider related regulations and matters of regional significance when weighing project [impacts and] alternatives." *Banning Ranch*, 2 Cal.5th at 937-39. Because the Project here would unquestionably impact an area of regional significance, CEQA requires that the EIR evaluate and mitigate those significant impacts—based on the best available science—regardless of jurisdictional boundaries.

4. The County's Last-Minute, "Supplemental" Response to Comments Does Not Salvage the EIR.

Undoubtedly recognizing the EIR's failure to sufficiently analyze impacts on the Tahoe Basin, the County prepared a last-minute, "supplemental" response to comments. This response—released to the public only days before Project approval but buried in an attachment to a staff report—contains some information about Lake Tahoe water quality standards and cumulative impacts. AR:15:8724-28. The supplemental response also finally recognizes a critical point: that "[t]he connection between VMT and Lake clarity is important, as vehicle emissions and roadway fine [sediment] are known contributors to loss of clarity." AR:15:8726. Remarkably, however, the response then tries to rewrite the history of the environmental review that the County had just concluded. In particular, it suddenly claims that the FEIR *did* rely on TRPA's cumulative

threshold for VMT "and determined that the standard would not be exceeded by the addition of the project generated VMT." AR:15:8727; *see also* AR:15:8748 (claiming that FEIR found the impact from Project's adding VMT to Basin to be "less than significant").

This eleventh-hour response is patently insufficient for several reasons. First, the representation that the County used the TRPA VMT threshold directly contravenes express statements to the contrary in the EIR. *See* AR:3:1295-96; 6:3110, 3118. It also conflicts with the County's approval documents, which make no finding regarding significance under the TRPA threshold. *See* AR:1:141-263. The statement in the supplemental response is simply inaccurate revisionism of the record.

Second, no substantial evidence supports the County's last-minute "analysis" of cumulative VMT impacts on the Tahoe Basin. Here, rather than analyzing information regarding the Project before it, the County extracts and then relies on snippets of data from the EIR for *another* project, the Tahoe Basin Area Plan/Tahoe City Lodge. AR:15:8727-28. But since the County omits all the background for the extracted data, the public cannot assess its validity. *See Vineyard*, 40 Cal.4th at 443. Moreover, the new information is unreliable on its face. The County concludes that "the cumulative VMT for Highway 267 in the subject EIR/EIS [for the Tahoe Basin Area Plan/Tahoe City Lodge] is less than the 13,745 shown in the Martis F[inal] EIR for the Martis West project alone." AR:15:8728. In

other words, the cumulative VMT—which includes the VMT for the Project—is less than the VMT for the Project alone. That conclusion is mathematically impossible.

Third, even assuming arguendo that this figure did properly represent the Project's *cumulative* VMT impacts, the supplemental response does not cure the County's failure to analyze the Project's *individual* impacts on the Basin. While now professing to have used the TRPA thresholds, the County continued to ignore TRPA's project-level thresholds of 200 car trips or 1,150 VMT. AR:15:8727. Nor did it adopt any other rational, project-level threshold. *Id*.

Finally, the County's attempt to shore up its failed analysis came too late to satisfy CEQA. It is well settled that any analysis of environmental impacts must be included in the EIR itself. Guidelines § 15120; *Ukiah Citizens*, 248 Cal.App.4th at 266-67 (subsequent analysis cannot cure EIR's deficiencies). The County's last-minute document deprived the public of its right to comment on a critically important issue and undercut the statute's goals for transparency and public participation. *See id.*; *Vineyard*, 40 Cal.4th at 448-49 (revelation late in administrative process that project might result in reduced flows during dry periods showed potentially significant impact requiring recirculation of DEIR).

In sum, just as the EIR failed to address the Project's environmental setting in the Tahoe Basin, so it omitted any meaningful analysis of the

Projects impacts on the Basin. Because the County refused even to adopt thresholds of significance for this resource, the EIR did not come close to meeting CEQA's requirements. Accordingly, the trial court's cursory dismissal of these claims must be reversed.

B. The County Failed to Recirculate the DEIR After Completely Revising Its Climate Analysis and Failed to Reconsider Mitigation in Light of that Revision.

The DEIR used an analytic approach for assessing the Project's climate impacts that the Supreme Court later declared unlawful. Admitting the error, the County included a brand new climate analysis in the FEIR, but it did not recirculate that analysis for public review and comment. The County's action violated CEQA in two respects.

First, because the FEIR's revamped discussion demonstrated the inadequacy of the DEIR's analysis and revealed new climate impacts, it constituted "significant new information" that required recirculation. Second, the FEIR never reconsidered the DEIR's climate mitigation in light of the new impacts revealed in the FEIR.

The trial court addressed these issues in two cursory paragraphs (JA:6:1363; 7:1383), but provided no grounds for upholding the County's action. Its decision should be reversed.

1. The FEIR Significantly Altered the DEIR's Climate Change Analysis, Triggering the Need to Recirculate.

CEQA requires the lead agency to recirculate a draft EIR whenever it adds "significant new information" after that document's release for

public comment. § 21092.1. Changes to the EIR qualify as "significant new information" if failure to recirculate would "deprive the public of a meaningful opportunity to comment upon a substantial adverse environmental effect of the project or a feasible way to mitigate or avoid such an effect (including a feasible project alternative)." Guidelines § 15088.5(a).

In particular, recirculation is required where the EIR's new information (1) discloses a new significant environmental impact or a "substantial increase in the severity of an environmental impact," or (2) demonstrates that the draft EIR was "fundamentally and basically inadequate and conclusory in nature." Guidelines §§ 15088.5(a)(1), (2), (4). The recirculation requirement "was intended to encourage meaningful public comment" and is thus an "essential part of the CEQA process." *Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.* (1993) 6 Cal.4th 1112, 1123-25, 1130 ("*Laurel Heights II*") (citation omitted).

Here, the County violated CEQA by failing to recirculate the EIR after adding significant new information about the Project's impacts on climate change. This information not only revealed that the Project's climate impacts were different and more severe than previously acknowledged, but also exposed the DEIR as fundamentally inadequate.

The DEIR's discussion of climate impacts relied on a two-tiered threshold of significance. AR:3:1567. For projects emitting less than 1,100

metric tons per year of CO_2, the DEIR considered climate change impacts to be less than significant. *Id*. For projects emitting more than that amount, like the Project here, the DEIR utilized an "efficiency" standard. *Id*. This standard assumed that climate impacts would be insignificant if the Project met AB 32's statewide reduction target for greenhouse gas ("GHG") emissions. To determine whether that reduction target would be met, the document compared the Project's annual GHG emissions against a "no action taken" or "business as usual" ("BAU") scenario. AR:3:1567, 1572-73. The DEIR also noted that the state might adopt different reduction targets in the future, but asserted it was too "speculative" to apply such unknown long-term targets to the Project. AR:3:1573-74.

Thereafter, the Supreme Court expressly rejected this approach to climate analysis for a housing project. *CBD*, 62 Cal.4th at 227-28. It held that local agencies cannot rely on state efficiency standards without providing substantial evidence that those standards have a substantial linkage to the local project. *Id.; accord Golden Door Properties, LLC v. County of San Diego* (2018) 27 Cal.App.5th 892, 895-96.

After Appellants alerted the County to this new decision (AR:7:3610-11), the FEIR abandoned the DEIR's BAU threshold. AR:6:3130; *see also* AR:6:3121-23, 3130. The FEIR accordingly adopted a new, static threshold of significance: any project emitting more than 1,100 metric tons per year of CO_2 would have a significant environmental impact.

AR:6:3131-32. Using this new threshold, the FEIR's revised analysis revealed that the Project would cause far more severe climate impacts than the DEIR had previously disclosed.

Notably, the DEIR had found the Project *would not exceed* the BAU threshold in 2020 but "may be less efficient than necessary" after 2020. AR:3:1571. By contrast, the FEIR disclosed that the Project, which would emit roughly 30,000 metric tons of CO_2 per year at buildout, would *vastly exceed* the new significance threshold of 1,100 per year. AR:6:3131-33; *see also* AR:30:17311-12.

The FEIR's revelation of more severe climate impacts is exactly the sort of "significant new information" that requires recirculation. The public must be allowed to comment on the FEIR's new analysis, which shows for the first time that the Project would (1) exceed the new climate threshold *by over 2,600%*, and (2) have significant climate impacts even in its early phases. *See* Guidelines § 15088.5(a)(1), (2); *American Canyon Community*, 145 Cal.App.4th at 1078-81 (new information showing traffic increases of only 2.3% constituted "substantially increased effects").

At trial, Respondents offered three excuses for refusing to recirculate. Each is unavailing.

First, Respondents argued that the FEIR did not actually change the GHG threshold because the FEIR retained the DEIR's numeric threshold for projects emitting *under* 1,100 MT CO_2/year. JA:4:889. The DEIR,

however, never applied this threshold to the Project, which will emit roughly *30,000 MT CO_2 per year.* AR:3:1567, 1571-72. Instead, it employed the efficiency standard, which the FEIR later abandoned. AR:6:3131-32.

Respondents next claimed that because the FEIR's revisions showed a small decrease in the Project's GHG emissions, the FEIR revealed no new climate impacts. JA:4:889. This reasoning is faulty. Under CEQA, providing raw data on a project's GHG emissions is only the first step in an EIR's climate change analysis. *See* Guidelines § 15064.4. To determine whether those emissions will cause a significant impact, the agency must evaluate "[w]hether the project emissions *exceed a threshold of significance* that the lead agency determines applies to the project." *Id.*, subd. (b)(2) (emphasis added). Here, when the FEIR changed its significance threshold, its climate change analysis changed dramatically—and this revised analysis revealed that the Project would impact the environment more severely than initially disclosed. AR:6:3131-32. CEQA guarantees the public the right to review and comment on such a new threshold and analysis. § 21092.1; Guidelines § 15088.5(a)(2), (4).

Finally, Respondents argued that recirculation was not required because use of the new threshold did not change the EIR's overall conclusion that the Project's long-term GHG impacts would be significant. JA:4:889-90; AR:6:3123. This argument fails for two reasons. First, the

FEIR revealed for the first time that the Project's impacts would be significant in the *short term*. *Compare* AR:3:1571, 1575 *with* AR:6:3077, 3081. This new information alone requires recirculation. Guidelines § 15088.5(a)(2).

Second, an EIR must not only reach a significance conclusion, it must also inform the public exactly how significant the impacts will be. *Santiago County Water Dist.*, 118 Cal.App.3d at 831 (invalidating EIR's "bare conclusion" that impact is significant). Here, the County abandoned the DEIR's analysis of climate impacts because it was based on a flawed threshold. AR:6:3076. The FEIR corrected that analysis to provide important new information on the nature and severity of the climate impacts. Under CEQA, the public must be allowed to comment on the new analysis. *See* Guidelines § 15088.5(a)(4) (recirculation required where draft EIR fundamentally inadequate); *Mountain Lion Coal. v. Fish & Game Com.* (1989) 214 Cal.App.3d 1043, 1052-53 (recirculation required where draft EIR lacked adequate cumulative impacts analysis).

2. The County Failed to Reevaluate Feasible Mitigation Measures in Light of the FEIR's New Climate Change Analysis.

The County erred not only by refusing to recirculate the FEIR's climate analysis, but also by failing to reconsider the efficacy of the DEIR's long-term climate mitigation in light of the new analysis. Under CEQA, after an EIR identifies a project's significant environmental effects, it must

evaluate feasible mitigation to avoid or minimize those effects. §§ 21002, 21002.1(a), 21061. Here, the FEIR's omission of mitigation to lessen the Project's newly revealed, significant impacts on climate change contravenes this core requirement.

The DEIR included just one mitigation measure (Measure 12-2) addressing the Project's long-term climate impacts. AR:3:1574-75. However, this measure was geared entirely towards meeting future, "yet to be set" statewide efficiency standards. *Id*. Commenting on the DEIR, Appellants warned the County that these statewide efficiency standards could not serve as the basis for mitigating the Project's impacts. AR:7:3614; *see also* AR:7:3615-16 (suggesting numerous immediate measures the EIR should consider).

After the FEIR revised its climate analysis, it never reconsidered Measure 12-2's reliance on statewide efficiency standards. *See* AR:6:3080-81; 30:17315-17. Yet Measure 12-2 is admittedly defective as a matter of law. It requires the developer to mitigate only if the Project conflicts with "GHG targets adopted by the state," where such targets are "based on a substantiated linkage between the project … and statewide GHG reduction goals." AR:6:3080. The County, however, acknowledges the nonexistence of such targets AR:6:3081, 3077 ("There are no current mechanisms available to determine the level of GHG-efficiency needed on a single

project in order to determine if it fits within the [state's] Scoping Plan targets.").

To justify its mitigation, the EIR suggests that targets might be developed in the future, and measures could then be employed to ensure compliance with such targets. AR:6:3080-82. CEQA, however, prohibits this approach. Guidelines § 15126.4(a)(1)(B) (EIR generally may not defer evaluation of mitigation until a later date); *Cleveland Nat. Forest Foundation v. San Diego Assn. of Governments* (2017) 17 Cal.App.5th 413, 432-34 (mitigation measures "assuring little to no concrete steps toward emissions reduction" do not suffice) ("*CNFF II*"); *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 94-95 (unspecified GHG mitigation is inadequate). Moreover, as Appellants explained, numerous feasible measures are now available that the County must consider to mitigate the Project's newly identified significant climate impacts. *See* AR:7:3615-16; 30:17315-17; Guidelines § 15088.5(a)(3) (when feasible mitigation is presented prior to EIR certification that could lessen the project's significant impacts, and the agency failed to analyze or adopt it, recirculation is required). Under these circumstances, it was legal error to rely on the illusory mitigation set forth in Measure 12.2. *See* § 21081.6(b) (mitigation measures must be "fully enforceable").

In sum, the County's refusal to reconsider Measure 12-2 in light of the FEIR's new climate analysis left the Project with no effective mitigation for this significant impact. The FEIR cannot stand.

III. The County Violated the Timberland Productivity Act.

The trial court erred in denying Appellants' claim under the Timberland Productivity Act. The Project's development requires the razing over 20,000 trees and replacing them with commercial and residential development. AR:2:708; 3:1267, 1330. Consequently, the County removed 662 acres of forestland on the West Parcel from TPZ zoning, a restrictive designation designed to protect forest resources, and immediately placed the land into residential and commercial zoning.[8] The Act, however, requires a ten-year waiting period for any rezoning of TPZ land. A local agency may approve an "immediate rezoning" of TPZ land only in rare circumstances, where use of the land for timber production is no longer "necessary" or "desirable." Gov. Code § 51130.

Here, the County's action to immediately rezone the West Parcel violated the Act's stringent requirements. The County never determined that the West Parcel acreage was no longer needed or desirable for timber production. Instead, it relied on other justifications—principally, the landowner's intent to place *other land* into TPZ—that the Act does not

[8] This immediate rezoning is subject to final approval by the State Board of Forestry and Fire Protection. Gov. Code § 51133(b).

allow. In addition, the County failed to explain, as it must, why it was necessary to deviate from the ten-year waiting period. The trial court nevertheless concluded, summarily, that "the Board made the appropriate findings that are supported [by] substantial evidence." JA:7:1384. This ruling must be reversed.

A. The Timberland Productivity Act Severely Restricts the Immediate Rezoning of TPZ Land.

In 1976, the Legislature passed the Timberland Productivity Act to "protect California's forest resources and timberlands" threatened by the state's growing population. *Clinton v. County of Santa Cruz* (1981) 119 Cal.App.3d 927, 934; *see also* Gov. Code § 51101. The Act's purpose is to discourage both the "premature or unnecessary conversion of timberland to urban and other uses" and the "expansion of urban services into timberland." Gov. Code § 51102. In particular, the Legislature sought to safeguard vulnerable forests in "areas where second home subdivisions have been encroaching on valuable timberland." *Clinton*, 119 Cal.App.3d at 934 fn.7 (quoting Act's legislative history).

To accomplish this purpose, the Act confers generous property tax breaks upon owners of timberland in exchange for placing their land into TPZ, a designation which strictly confines the land's use to timber production and limited "compatible" uses. *Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1148. The Act thus implements the California Constitution's mandate that any preferential tax system for

timberlands "shall encourage the continued use of timberlands for the production of trees" and shall restrict other uses on those lands. *See* Cal. Const., art. XIII, § 3(j).

Significantly, if any landowner seeks to remove a parcel from TPZ, the Act prescribes a ten-year waiting period for that rezoning to become effective. Gov. Code § 51120(d). This lengthy freeze ensures that developers cannot hold land in TPZ (and pay lower taxes) while awaiting the most propitious moment to develop it. Discussing an analogous provision in the Williamson Act, the California Supreme Court explained that, without such a required waiting period, the Act would "simply function as a tax shelter for real estate speculators." *Sierra Club v. Hayward* (1981) 28 Cal.3d 840, 853 (superseded by statute on other grounds).

The legislative history of the Act further illuminates the purpose of the ten-year waiting period. As originally drafted, the Act included no waiting period for rezoning timberland out of TPZ. The Legislative Counsel warned, however, that such unrestricted ability to rezone would not pass constitutional muster. *See* Appellants' Motion and Request for Judicial Notice ("RJN") (filed concurrently with this brief), Exh. 1, at RJN012. The Legislature therefore amended the bill to require that landowners must wait ten years for any rezoning of TPZ land to take effect and must pay increased property taxes during that period. Gov. Code §

51120(d). The Act's waiting period thus ensures that, if a landowner decides to convert land from forest use, Californians continue to receive the environmental and economic benefits of the forestland for an additional decade—a fair exchange in return for the landowner's receipt of generous tax breaks in the preceding years. *See Clinton*, 119 Cal.App.3d at 932 (pointing out the tradeoff).

A landowner can avoid the ten-year waiting period only in narrowly drawn circumstances that relate solely to the TPZ land proposed for rezoning. Specifically, a local agency may approve "immediate" rezoning of TPZ land only if it determines that "the continued use of land in the timber production zone is neither necessary nor desirable." Gov. Code § 51130. The local agency also must find:

> (1) "that immediate rezoning is not inconsistent with the purposes of subdivision (j) of Section 3 of Article XIII of the California Constitution and of [the Timberland Productivity Act]"[9]; and
>
> (2) "that immediate rezoning is in the public interest."

Gov. Code § 51133(a)(2)-(3).[10]

Finally, the Legislature further discouraged overuse of this exception

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[9] Subdivision (j) authorizes the Legislature (1) to establish an alternative taxation system for forest land to encourage the continued use of timberlands for trees or timber products, and (2) to restrict the use of timberland to the production of timber products and compatible uses, with taxes based on those restrictions. Cal. Const., art. XIII, sec. 3(j).

[10] Here, the County mistakenly made findings under Government Code section 51134(a). *See* AR:1:31-32. As Respondents recognized below, section 51133 is the applicable provision. JA:4:892 fn.9.

by requiring a four-fifths vote to approve any immediate rezoning. Gov. Code § 51133; *compare* Gov. Code § 51120 (simple majority vote for regular, ten-year rollout).

B. The County's Action to Immediately Rezone the West Parcel Was Unlawful.

The Timberland Productivity Act allows a local agency to approve an immediate rezoning of TPZ land "only when the continued use of land in the timber production zone is neither necessary nor desirable." Gov. Code § 51130. Here, when the County took action to immediately rezone 662 acres of the Project's West Parcel from TPZ, it never made this crucial determination. Nor could it have done so, for those acres constitute a productive, well-managed forest. AR:17:9622. Without that determination, the rezoning is invalid as a matter of law.

Instead of making the decision required under Government Code section 51130, the County adopted a series of findings that purported to justify the immediate rezoning on other, unrelated grounds. These findings are unlawful for four separate reasons.

First, rather than focusing on the viability of the West Parcel for continued timber use, the County's findings relied on the landowner's agreement to place *other land*—the East Parcel—into TPZ. The Act, however, does not authorize using such land "swaps" to justify immediate TPZ rezoning. Second, the County found that the immediate rezoning would address a "demand" for new residences in the area, but no record

evidence indicates that such a demand exists. Third, the County found that the rezoning would boost local tax revenues, but the courts have rejected that justification as undermining the Act's fundamental purpose. Finally, the County's findings failed to address, as they must, the necessity of deviating from the normal, ten-year process for removing parcels from TPZ. Each of these points is discussed below.

1. The County Cannot Justify the Immediate Removal of the West Parcel from TPZ by Citing the Landowner's Intent to Place the East Parcel into TPZ.

Rather than determining that the West Parcel was no longer needed or desirable for timber production, the County's findings cited the developer's intention to place the *East Parcel* into TPZ. The County reasoned that the West Parcel's immediate rezoning was "not inconsistent with the Act" because "placing 670 acres of the East Parcel back into TPZ" would add to TPZ in the area generally.[11] AR:1:32; *see also id.* (finding that immediate rezoning "is in the public interest in that … [t]he rezone of the West Parcel would allow for the East parcel to be placed back into TPZ"). The County's approach constitutes legal error: it contravenes the plain language of the Timberland Productivity Act, which requires that the County focus solely on the land "in the timber production zone." *See* Gov.

[11] The East Parcel had previously been zoned TPZ, but the County began the ten-year rollout process for rezoning that parcel in 2003, and it converted out of TPZ in 2013. AR:19:10702.

Code § 51130.

Respondents argue that an agency can "package" an immediate rezoning of land out of TPZ with other land-use actions, and then justify the immediate rezoning by relying on purported benefits from those other actions. JA:4:892. But the Act does not allow such "land swaps." Rather, the Act authorizes immediate rezoning "only when the continued use of *land in the [TPZ]* is neither necessary nor desirable." Gov. Code § 51130 (emphasis added). Similarly, the agency must find that the immediate rezoning *itself* is not inconsistent with the Constitution and the Act. *See* Gov. Code § 51133(a)(2) (Board must "make[] written findings *that immediate rezoning* is not inconsistent with the purposes" of the Constitution and the Act) (emphasis added).

In sum, no statutory language permits a local agency to immediately rezone productive TPZ land based on a landowner's intent to place *other* land into TPZ. Nor can the Court read such authorization into the Act. *See Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 545 (court "may not broaden or narrow the scope of the provision by reading into it language that does not appear in it or reading out of it language that does"). The Act's legislative history documents the Legislature's intent to make immediate rezonings exceedingly rare. *See* RJN009-12 & Exh. 3 (original draft of Act amended to require lengthy waiting period and stringent findings). Case law likewise confirms that immediate rezonings may occur

only rarely. *See Sierra Club*, 28 Cal.3d at 853 (discussing analogous provision in Williamson Act, Supreme Court declared: "[W]e harbor no doubt that the Legislature intended cancellation to be approved only in the most extraordinary circumstances."). Tellingly, Respondents have cited no case law to support their expansive construction of the Act, for that construction contradicts the Act's purpose.

Moreover, any such interpretation would create a huge loophole in the law. Under Respondents' reading, a landowner could immediately take a developable parcel out of TPZ merely by locating some other parcel to "replace" it. This loophole would entirely circumvent the specific, narrow circumstances in which the Legislature allowed immediate rezonings. The loophole also could be virtually unbounded: the new TPZ parcel could be situated far from the existing TPZ parcel, or in an area where there is little risk of urban or suburban development.

Finally, the facts of the present case illustrate the importance of strictly adhering to the statutory language. The TPZ-zoned West Parcel is exactly the kind of forested land that the Act intended to protect. It sits at the edge of other forestland being whittled away by second-home and resort developments. *See Clinton*, 119 Cal.App.3d at 934, fns. 6 & 7 (Legislature intended to specifically protect "areas where second home subdivisions have been encroaching on valuable timberland"). The loophole sought by Respondents would authorize the exact type of conversion that the Act

sought to prevent.

2. No Substantial Evidence Supports the County's Finding that the Immediate Rezoning Would Address a Housing "Demand" in the Area.

As a second justification for its action, the County found that the immediate rezoning of the West Parcel was "not inconsistent with the purposes of" the Act because it would address "residential demands of the area." AR:1:32. But the record contains no evidentiary support for this assertion. The Project is a second-home "resort community" with less than 20% of the homes projected to be occupied full-time. AR:3:1274. This projection itself is highly optimistic, as similar nearby developments currently average just over 7% full-time occupancy. *Id.* Furthermore, the vacancy rate for homes in the area was 51% in 2010, up from 45% in 2000, while California as a whole averages a home vacancy rate of just 8.1%. AR:3:1339-40.

In short, no evidence supports the County's finding that the construction of more second-homes will address "residential demands of the area." The record contains no evidence of any demand for new *residences* in the area, let alone second-homes.

Attempting to bolster the County's weak findings, Respondents below invented a new type of "demand" for the Project. They argued that the Project would alleviate an affordable housing shortage by constructing lower-cost, "workforce" housing. JA:4:894. Again, the record

unequivocally proves otherwise. The Project would include housing for 47 employees and pay fees to build five more units. AR:20:10900-01. However, it also would draw between 66.58 and 122.68 full-time equivalent service-wage workers to the area. AR:3:1342. Thus, rather than alleviating the area's affordable housing shortage the Project would exacerbate that shortage.

3. The County Cannot Justify Removal of Land from TPZ Zoning by Citing Increased Local Tax Revenues.

As a third justification, the County found that the immediate rezoning of the West Parcel was "in the public interest" because it would "benefit … the local tax base through increased property and business tax revenue." AR:1:32. This finding is legally unavailable.

In *Sierra Club*, the Supreme Court addressed a similar attempt to abruptly remove land from Williamson Act protection. Like the Timberland Productivity Act, the Williamson Act provides generous tax breaks for landowners who place their agricultural land into protective contracts, and restricts local agencies' ability to cancel those contracts prematurely.[12] The Court held that, before approving any cancellation of a Williamson Act contract, the local agency must "analyze the interest of the public as a

[12] Because the Timberland Productivity Act was intended to replace Williamson Act contracts on timberland (*see* Gov. Code § 51110(b)), the two statutes contain essentially identical provisions. Courts thus routinely rely on Williamson Act cases when interpreting the Timberland Productivity Act. *See, e.g.*, *Clinton*, 119 Cal.App.3d at 932.

whole in the value of the land for open space and agricultural use." *Sierra Club*, 28 Cal.3d at 856; *see* Gov. Code § 51101 (discussing importance of timberland to "the health and stability of the state's economy and environment"). While local agencies may consider the interests of local communities, "no decision regarding the public interest can be based exclusively on their parochialism." *Sierra Club*, 28 Cal.3d at 856. Here, because the County considered only the local community and its tax base—and not the state's interest in preserving valuable timberland—its finding is invalid as a matter of law.

Any other result would render the Act entirely ineffective. By definition, TPZ lands are taxed at a much lower rate than other lands. Gov. Code § 51110(b). Consequently, *any* rezoning out of TPZ will increase local tax revenues. If local agencies could cite revenue increases as the "public interest" justification for immediately rezoning TPZ land, all rezonings would be allowable, thus "render[ing] the Act ineffective as a land-use control device." *Sierra Club*, 28 Cal.3d at 853. Accordingly, in order to give effect to the Act, this Court must reject the County's "local tax base" finding. *See Carter v. Seaboard Finance Co.* (1949) 33 Cal.2d 564, 573 (statute must not be construed in a way that "would render it ineffective"); *Malek v. Blue Cross of Cal.* (2004) 121 Cal.App.4th 44, 64 (same).

Respondents argued below that *Sierra Club* is inapplicable because

the Legislature amended the Williamson Act after *Sierra Club* was decided. JA:4:894-95. Respondents are wrong. *Sierra Club* interprets language from the earlier version of the Williamson Act that is nearly identical to language in the Timberland Productivity Act. *Compare* language quoted in *Sierra Club*, 28 Cal.3d at 854, *with* Gov. Code § 51133(a)(2). Its holding thus remains applicable here.

4. The County's Findings Cite No Substantial Evidence that Deviating from the Act's Ten-Year Waiting Period Was Necessary.

Finally, the County's finding that the immediate rezoning was "not inconsistent with the purposes of" the Timber Productivity Act (AR:1:32) fails for another reason: the County cited no evidence to justify deviating from the normal, ten-year waiting period. Under *Sierra Club*, this omission is fatal.

In *Sierra Club*, the Supreme Court struck down a local agency's similar finding that cancellation of a Williamson Act contract was "not inconsistent with the purposes of" the Williamson Act. 28 Cal.3d at 854. The agency had cited no "substantial evidence that awaiting normal termination of the contract would fail to serve the purposes that purport to justify cancellation." *Id*. The Court concluded: "It is inconsistent with the purposes of the act to allow abrupt cancellation if [the normal ten-year termination process] would accomplish the same objective." *Id.*

Likewise here, the County's findings cite no evidence that following

the ten-year rollout for TPZ rezoning would not serve the "purposes that purport to justify cancellation": the development of a second-home subdivision. *See* AR:1:32. In fact, the record evidence indicates that the normal procedure likely *would* adequately serve that goal. At present, additional vacation residences in the Tahoe area are not needed to meet the area's residential needs, and a large percentage stand vacant. *See* AR:3:1274.

Furthermore, even if such homes were needed, the County's findings are inadequate for yet another reason. In *Sierra Club*, the Court further held that cancellation of a Williamson Act contract "is inconsistent with the purposes of the act if the objectives to be served by cancellation should have been predicted" ten years earlier. 28 Cal.3d at 855. Here, even if additional second-homes were needed in the Tahoe area, the County made no findings—and the record includes no evidence—regarding whether a market for such homes could not have been predicted a decade ago.

In sum, the County's failure to explain why the normal ten-year waiting period would not serve the landowner's purpose, or why the alleged need for the rezoning could not have been predicted earlier, alone requires overturning the agency's action.

CONCLUSION

In view of the foregoing, Appellants respectfully request that this Court reverse the trial court's decision with respect to the EIR's incomplete

discussion of environmental setting and inadequate analysis of Project impacts on the Tahoe Basin; the County's failure to recirculate the EIR's analysis regarding the Project's climate impacts or to reconsider climate mitigation; and the County's failure to comply with the Timberland Productivity Act, with directions to grant the writ of mandate on these grounds.

DATED: October 29, 2018 SHUTE, MIHALY & WEINBERGER LLP

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CERTIFICATE OF WORD COUNT
(California Rules of Court 8.204(c))

I certify that this brief contains 13,999 words, not including tables of contents and authorities, signature block, and this certificate of word count as counted by Microsoft Word, the computer program used to produce this brief.

DATED: October 29, 2018 SHUTE, MIHALY & WEINBERGER LLP

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PROOF OF SERVICE

League to Save Lake Tahoe et al. v. County of Placer et al.
Case No. C087102
(consolidated for limited purposes with Case No. C087117)
California Court of Appeal, Third Appellate District

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the City and County of San Francisco, State of California. My business address is 396 Hayes Street, San Francisco, California 94102.

On October 29, 2018, I served true copies of the following document(s) described as:

APPELLANTS' OPENING BRIEF

on the parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY ELECTRONIC SERVICE: I served the document(s) on the person listed in the Service List by submitting an electronic version of the document(s) to TrueFiling, through the user interface at www.truefiling.com.

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Shute, Mihaly & Weinberger LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and

mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on October 29, 2018, at San Francisco, California.

/s/ Patricia Larkin
PATRICIA LARKIN

SERVICE LIST

League to Save Lake Tahoe et al. v. County of Placer et al.
Case No. C087102
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California Court of Appeal, Third Appellate District

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