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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

MICHAEL D. SRAGO et al.,

Plaintiffs and Appellants,

v.

WEST CONTRA COSTA UNIFIED
SCHOOL DIST. et al.,

Defendants and Respondents.

A132267

(Contra Costa County
Super. Ct. Nos. N09-0027, N09-1910)

INTRODUCTION

Michael D. Srago and other individuals¹ appeal from a judgment of the Contra Costa County Superior Court filed March 15, 2011, in consolidated actions in which appellants sought a writ of mandate and also sought declaratory relief against respondent West Contra Costa Unified School District (district) and the district's Board of Education (board) for asserted violations of the California Environmental Quality Act (Pub.

¹ In addition to Srago, appellants include Castro School and Neighborhood Group, an unincorporated association and the following individuals: Teresa Albro, Harish Bhatt, Milford Brown, KeAloha Couch, Isabel Couch, Sharon Farrell, Madeleine Ferguson, Kathryn Fujisaka, Patrick Halligan, Paul Karawanny, Peter D. Lock, Linda K. Lozito, Isaac Mankita, Rebecca Milliken, Margaret Pennington, Ray Turnipseed, Harry Sardis, Patricia Schwarz, Charles F. Schwarz, Martin Snider, Valerie Snider, and Peggy Wilcox.

Resources Code, § 21000 et seq. (CEQA))² and the Ralph M. Brown Act (Gov. Code, § 54950.5 et seq.) (Brown Act). Appellants challenged respondents' actions in choosing to retrofit Castro Elementary School as a new replacement site for Portola Middle School, after the middle school was determined to be structurally unsafe.

Appellants contend: (1) reversal is required because a notice of exemption (NOE) filed in connection with the Master Plan adoption was not a document "in lieu of" a supplemental environmental impact report (EIR) and the filing of the NOE did not trigger a statute of limitations; (2) the district did not proceed in the manner required by law in certifying the EIR as (a) it did not provide sufficient public access to the draft and final EIRs and (b) the board did not substantially comply with Guidelines § 15090 in reviewing and certifying the final EIR; (3) the district violated CEQA in refusing to recirculate the draft EIR to the California Department of Fish and Game following reports that Cooper's hawks might be nesting at the project site; (4) the draft and final EIRs were inadequate as they failed to address project impacts on full inclusion special education students under section 21083, subdivision (b)(3); and (5) respondents did not adequately consider a range of project alternatives and inappropriately rejected a K-8 alternative. Finally, (6) appellants contend the court erred in rejecting their Brown Act challenges to the asserted failure of the agenda to specify the business to be transacted and to the board's failure to state explicitly or in detail the board's approval of the project as a separate and distinct action from certification of the EIR. We shall affirm.

FACTS AND PROCEDURAL BACKGROUND

Respondent district is a public school district in Contra Costa County. Portola Middle School and Castro Elementary School are located within the City of El Cerrito and in the El Cerrito High School attendance area, which includes eight elementary and three middle schools. Portola Middle School is located less than half a mile from the Hayward Fault and is particularly vulnerable to earthquake activity. In 2006, the

² Undesignated statutory references are to the Public Resources Code. References to guidelines are to those located in California Code of Regulations, title 14, section 15000 et seq. (Guidelines).

Division of the State Architect opined that the safety of students at Portola Middle School was at risk and the situation must be corrected. Further studies and assessments convinced the district that repair or reconfiguration of uses at the Portola Middle School site were infeasible from cost and engineering standpoints and the district sought input on alternative solutions.

In February 2008, the district issued a “Notice of Preparation of an Environmental Impact Report and Notice of Scoping Meeting” for “Construction and Renovation of the Castro Elementary School to Replace the Portola Middle School Project.” The Notice of Preparation included an Initial Study based on a conceptual design for the closure of Portola Middle School and renovation, demolition and construction at Castro Elementary School for the purpose of constructing a middle school that would accommodate 600 middle school students on the site. A draft EIR was prepared following public and agency input. The district issued a final EIR in December 2008, after extensive public input, including input from appellants. At a public meeting held December 10, 2008, the board voted to certify the final EIR and approve the project. The district filed a “Notice of Determination” on December 12, 2008.

On January 12, 2009, appellants filed a petition for writ of mandate (N09-0027) in the superior court, seeking to overturn the district’s passage of Resolution No. 45-0809, certifying the final EIR and approving the project. Appellants alleged the district had violated CEQA procedurally by failing to provide adequate public access to the draft EIR and substantively by failing to include an adequate range of alternatives, failing to properly analyze the impacts of traffic and the presence of middle school students in the neighborhood, failing to adequately analyze impacts of the project upon special education students at the elementary school, and failing to recirculate the draft EIR or include additional mitigation for the Cooper’s hawk. Appellants also alleged that the district had violated the Brown Act in passing the December 10, 2008, resolution when the issue of project approval was not properly on the agenda and by miscounting the votes of the board.

On April 22, 2009, the trial court overruled demurrers filed by the district and denied a motion to strike allegations relating to social effects of the project on students at the elementary school in determining whether or not the physical effect on the environment was significant. On April 29, 2009, upon agreement of the parties, the court issued a no-bond preliminary injunction, prohibiting the district from any demolition or construction at the Castro Elementary School site, but allowing the district to proceed with project design.

The district moved forward with the planning process, completing the Castro Site Master Plan. The Board approved the Master Plan on October 21, 2009. At that board meeting, appellants argued that differences between the final EIR and the Master Plan required preparation of a supplemental EIR and requested that the board direct district staff to prepare a supplemental EIR.

On November 20, 2009, appellants filed a second petition for writ of mandate (N09-1910), alleging a single cause of action that the district violated CEQA by not preparing a supplemental EIR before passing the October 21, 2009 resolution approving the Master Plan. Appellants alleged the Master Plan introduced four substantial changes to the project, requiring further environmental review. The trial court consolidated this “subordinate” action with the original action.

On June 24, 2010, the district filed a response to the first amended petition in the master case, but failed to include a response to the Master Plan challenge raised in the second petition.

On October 1, 2010, the district executed, but did not at that time file, a NOE “for the approval of the Master Plan.” The NOE stated: “Specifically, the Master Plan contemplated a small increase in the foot print of the buildings to be constructed on site from that which was studied in the EIR (less than 1,500 s/f). The Master Plan did not include any other changes from the EIR, including no changes to: increased building heights, increased levels of excavation on site, increase in trees to be removed and replanted or decrease in anticipated students who will bike to the new school.”

(Underlining in original.) The NOE claimed categorical exemptions under four classes, pursuant to Guidelines sections 15301, 15302, 15303 and 15314.³ Appellants were not specifically notified of the existence of the NOE, nor was it mentioned at any time before or during the subsequent November court hearing on the two petitions.

At the November 15, 2010 hearing in the consolidated cases, appellants contended the allegations of the second petition in the subordinate case (the challenge to the failure to prepare a supplemental EIR in connection with changes in the Master Plan) must be deemed admitted, due to the district's failure to file a response to those allegations or a general denial. In a tentative ruling issued November 12, in advance of the November 15 hearing, the court had agreed, treating the district's failure to answer as admitting the allegations relating to the Master Plan. The tentative ruling stated: "However, the issues that are being returned for a supplemental report are very narrow. They are approval of the Master Plan in the following areas: Substantial increase of excavation, substantial increase in number of trees to be removed and corresponding substantial decrease is [*sic*] the number of trees to be replaced and substantial reduction in anticipated use of bicycles. The issue with respect to substantial increase in traffic flows was rendered moot as addition of an automobile drop off was subsequently withdrawn by the school. . . ."

The court issued its ruling on the petitions on November 29, 2010, modifying its tentative ruling by addressing additional arguments made by the district at the hearing, and granting the writ "solely with respect to approval of the master plan. In all other respects the writ is denied." The court reasoned the district's failure to answer allegations with respect to the approval of the Master Plan required that the allegations be

³ The NOE explained: "**Reasons why project is exempt:** Class 1: Operation, repair, maintenance or minor alterations to public facility involving no or negligible expansion of use. Class 2: Replacement or reconstruction of existing structures and facilities where the new structures will be located on the same site as the structures replaced and will have substantially the same purpose and capacity as the structures replaced. Class 3: Construction and installation of limited numbers of new small structures, including accessory structures such as garages and carports. Class 14: Minor addition to existing school within existing school grounds, which increases original student capacity by no more than 25 percent or 10 classrooms."

deemed true. However, the November 29, 2010 modification of the tentative ruling also eliminated the paragraph identifying the particular “issues that are being returned for supplemental report.” The November 29 ruling contained an extensive discussion of the court’s reasons for denying the balance of the two petitions.

The district gave appellants notice of the entry of this unreported minute order “Granting in Part” the petition on December 1, 2010. Two days later, on December 3, 2010, the district filed the October 1, 2010 NOE with the Contra Costa County Clerk. It was posted with the county clerk for 35 days, pursuant to law (Guidelines, § 15062) and it was also posted on the district’s Web site. No action was taken to challenge the NOE within 35 days, the time prescribed by section 21167, subdivision (d)⁴ and Guidelines section 15062, subdivision (d).

Reference was made to the NOE in the district’s case management statement filed February 1, 2011, and served on appellants’ counsel, in connection with the case management conference scheduled for February 7, 2011. A copy of the NOE was attached to the case management statement wherein it was stated that the district had filed

⁴ Section 21167 provides in relevant part:

“An action or proceeding to attack, review, set aside, void, or annul the following acts or decisions of a public agency on the grounds of noncompliance with this division shall be commenced as follows: [¶] . . . [¶] (d) An action or proceeding alleging that a public agency has improperly determined that a project is not subject to this division pursuant to subdivision (b) of Section 21080 . . . shall be commenced within 35 days from the date of the filing by the public agency, or person specified in subdivision (b) or (c) of Section 21065, of the notice authorized by subdivision (b) of Section 21108 or subdivision (b) of Section 21152. If the notice has not been filed, the action or proceeding shall be commenced within 180 days from the date of the public agency’s decision to carry out or approve the project, or, if a project is undertaken without a formal decision by the public agency, within 180 days from the date of commencement of the project. [¶] . . . [¶] (f) If a person has made a written request to the public agency for a copy of the notice specified in Section 21108 or 21152 prior to the date on which the agency approves or determines to carry out the project, then not later than five days from the date of the agency’s action, the public agency shall deposit a written copy of the notice addressed to that person in the United States mail, first class postage prepaid. The date upon which this notice is mailed shall not affect the time periods specified in subdivisions (b), (c), (d), and (e).”

the NOE “to conclude the matter” after the November 15, 2010 hearing, that the NOE had been “duly posted with the County Clerk for 35 days and, further, was posted on the [d]istrict’s website. The statute of limitations has passed for any challenge to the Notice of Exemption. Therefore, this action should be ordered dismissed.”

On March 15, 2011, the trial court entered the judgment that is the subject of this appeal, providing in relevant part as follows:

“[U]pon the Court having determined that Respondent approved a Master Plan for the Project on October 29, 2009 without having prepared a Supplemental Environmental Impact Report with respect to certain issues, and *upon Respondent having filed a Notice of Exemption in lieu of a Supplemental Environmental Impact Report on December 3, 2010, and upon the time for a challenge to the Notice of Exemption having expired*; and upon the Court’s Orders having been filed on November 12, 2010 and on November 29, 2010; and upon the Court having directed that judgment issue in the proceeding:

“IT IS ORDERED THAT:

- “1. Judgment be entered directing respondent to comply with the California Environmental Quality Act (‘CEQA’) with respect to the following Castro Site Master Plan approval issues only:
 - “a. Increase of excavation
 - “b. Increase in number of trees to be removed
 - “c. Corresponding decrease in number of trees to be replaced
 - “d. Reduction in anticipated use of bicycles
- “2. Judgment be entered in favor of Respondent in this proceeding on all other issues.
- “3. The Preliminary Injunction issued by the Court on April 29, 2009 is hereby vacated.
- “4. Each party shall bear their own attorneys fees and costs of suit.

“IT IS SO ORDERED.” (Italics added.)

No writ issued after entry of the judgment. The parties both appear to interpret the judgment as determining that because no challenge was made to the NOE within the statutory period, the NOE satisfied the court order directing respondent to comply with

CEQA with respect to the four narrow Castro Site Master Plan approval issues. All other issues were determined in favor of respondents.⁵

This timely appeal followed.

DISCUSSION

I. CEQA Standards of Review

Standards of judicial review for CEQA determinations are well established:

“ ‘In reviewing an agency’s compliance with CEQA in the course of its legislative or quasi-legislative actions, the courts’ inquiry “shall extend only to whether there was a prejudicial abuse of discretion.” [Citation.] Such an abuse is established “if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence.” ’ [Citation.]” (*Citizens for Responsible Equitable Environmental Development v. City of San Diego* (2011) 196 Cal.App.4th 515, 522, (*CREED*).)

“Judicial review of these two types of error differs significantly: While we determine de novo whether the agency has employed the correct procedures, ‘scrupulously enforc[ing] all legislatively mandated CEQA requirements’ (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564 [(*Goleta II*)]), we accord greater deference to the agency’s substantive factual conclusions. In reviewing for substantial evidence, the reviewing court ‘may not set aside an agency’s approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable,’ for, on factual questions, our task ‘is not to weigh conflicting evidence and

⁵ The judgment here is confusing. As acknowledged by counsel for the district at oral argument, the court adopted counsel’s proposed language requiring the district to “comply with [CEQA]” with respect to the four narrow master plan issues *at the same time* it says the NOE was filed “in lieu” of a Supplemental EIR and was not challenged within the statutory time limit. This confusion likely would have been avoided had the court not simply adopted the proposed judgment submitted by the district, but crafted its own. Nevertheless, it appears the parties’ view of the judgment is accurate, despite the confusing wording. No issue is raised here that would undermine that view of the judgment. However, appellants do challenge the court’s determination that the NOE could serve as a Supplemental EIR.

determine who has the better argument.’ ([*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 393 (*Laurel Heights I*)].)’ (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435 (*Vineyard*.)

“ ‘An appellate court’s review of the administrative record for legal error and substantial evidence in a CEQA case, as in other mandamus cases, is the same as the trial court’s: The appellate court reviews the agency’s action, not the trial court’s decision; in that sense appellate judicial review under CEQA is de novo.’ (*Vineyard, supra*, 40 Cal.4th at p. 427.)” (*CREED, supra*, 196 Cal.App.4th at p. 523.)

II. Failure to Timely Challenge the NOE

Appellants contend the court erred in determining that an NOE filed in connection with the Master Plan adoption was a document “in lieu of” a supplemental EIR and that filing of the NOE triggered the statute of limitations for challenges to its use. We shall conclude that because appellants failed to timely challenge the NOE within the time set forth in Guidelines section 15062, subdivision (d), they are precluded from contending that the NOE was not an appropriate response to the trial court’s order requiring them to comply with CEQA. (Guidelines, § 15062, “Notice of Exemption”).⁶

⁶ Guidelines section 15062 provides in relevant part:

“(a) When a public agency decides that a project is exempt from CEQA pursuant to [Guidelines] Section 15061, and the public agency approves or determines to carry out the project, the agency may file a notice of exemption. The notice shall be filed, if at all, after approval of the project. . . .”

“(b) A notice of exemption may be filled out and may accompany the project application through the approval process. The notice shall not be filed with the county clerk or OPR until the project has been approved.

“(c) When a public agency approves an applicant’s project, either the agency or the applicant may file a notice of exemption.

“[¶] . . . [¶]

“(2) When a local agency files this notice, the notice of exemption shall be filed with the county clerk of each county in which the project will be located. Copies of all such notices will be available for public inspection and such notices shall be posted within 24 hours of receipt in the office of the county clerk. Each

The superior court issued its order modifying its tentative decision on November 29, 2010, granting the writ “solely with respect to approval of the master plan. In all other respects the writ is denied.” In that order, the court rejected respondents’ claim that even if appellants’ allegations regarding the Master Plan were correct, the court would still be required to determine whether the district violated CEQA. The court stated: “c. This case is not as simple. As the allegations are deemed admitted, it then became the district’s burden to cite to facts in the administrative record to show there had not been any ‘substantial’ changes in the master plan or that those changes which did occur did not invoke any of CEQA’s protections which then required the district to prepare a supplemental report. [¶] d. It is not the court’s responsibility to rummage around in the administrative record looking for evidence that shows petitioners are not correct when they claim there have been substantial changes to the master plan that required a supplemental report.”

The district responded to the order by filing and posting the previously executed NOE related to the Master Plan. It is undisputed that the NOE was posted on December 3, 2010, by the county clerk and on the district’s Web site and that appellants did not challenge the NOE within the 35-day time limits set forth in Guidelines section 15062, subdivision (d), for challenges to a properly filed NOE.

notice shall remain posted for a period of 30 days. Thereafter, the clerk shall return the notice to the local agency with a notation of the period it was posted. The local agency shall retain the notice for not less than 12 months.

“(3) All public agencies are encouraged to make postings pursuant to this section available in electronic format on the Internet. Such electronic postings are in addition to the procedures required by these guidelines and the Public Resources Code.

“[¶] . . . [¶]

“(d) *The filing of a Notice of Exemption and the posting on the list of notices start a 35 day statute of limitations period on legal challenges to the agency’s decision that the project is exempt from CEQA. If a Notice of Exemption is not filed, a 180 day statute of limitations will apply.*”

Legal principles related to notices of exemption were summarized in *Great Oaks Water Co. v. Santa Clara Valley Water Dist.* (2009) 170 Cal.App.4th 956, 965-966, (*Great Oaks Water Co.*): “ “[T]he overriding purpose of CEQA is to ensure that agencies regulating activities that may affect the quality of the environment give primary consideration to preventing environmental damage.” [Citation.]’ (*San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School Dist.* (2006) 139 Cal.App.4th 1356, 1372 (*San Lorenzo*)). To be consistent with this strong environmental policy, whenever the approval of a project is at issue, CEQA and the Guidelines “have established a three-tiered process to ensure that public agencies inform their decisions with environmental considerations.” [Citations.]’ [(*Ibid.*)]

“ “The first tier is jurisdictional, requiring that an agency conduct a preliminary review in order to determine whether CEQA applies to a proposed activity. (Guidelines, §§ 15060, 15061.)” [Citation.] CEQA applies if the activity is a “project” under the statutory definition, unless the project is exempt.^[7] (See §§ 21065, 21080.) “If the agency finds the project is exempt from CEQA under any of the stated exemptions, no further environmental review is necessary.” [Citation.]’ (*San Lorenzo, supra*, 139 Cal.App.4th at pp. 1372-1373.) Where this determination has been made, an agency may, but is not required to, file a notice of exemption. (Guidelines, § 15062; *Apartment Assn. of Greater Los Angeles v. City of Los Angeles* (2001) 90 Cal.App.4th 1162, 1171,

⁷ “The Legislature has specified a number of statutory CEQA exemptions. [Citations.] The Legislature also has authorized the State Resources Agency to identify other categories of exemptions, which are contained in the Guidelines. [Citation.]’ (*San Lorenzo, supra*, 139 Cal.App.4th at p. 1380, 44 Cal.Rptr.3d 128.) These are known as categorical exemptions. Because CEQA is statutory in origin, the Legislature has the power to create exemptions from its requirements. Projects and activities can be made wholly or partially exempt, as the Legislature chooses, regardless of their potential for adverse consequences. . . . Categorical exemptions . . . are subject to exceptions that defeat the use of the exemption and the agency considers the possible application of an exception in the exemption determination. [Citation.]” (*Great Oaks Water Co., supra*, 170 Cal.App.4th at p. 966, fn. 8.)

109 Cal.Rptr.2d 504.)” (*Great Oaks Water Co.*, *supra*, 170 Cal.App.4th at pp. 965-966 & fn. 8.)

“Once it has been properly determined that an exemption from CEQA applies, an agency need not conduct further analysis or progress to the second or third tiers of the scheme’s environmental review. (Guidelines, §§ 15002, subd. (k)(1), 15061, subd. (b)(1)[- (5)].)” (*Great Oaks Water Co.*, *supra*, 170 Cal.App.4th at p. 967.)

“If an agency chooses to file a notice of exemption, the notice must be filed *after* the agency approves the project, *but there is no specific time limit for filing the notice.* [Italics added.] If the notice is prepared before the agency takes action on the project and is kept with the project file [citations], it can serve as a record of the agency’s CEQA determination for the project. [(Guidelines § 15061, subd. (d).)]” (1 Kostka & Zische, *Practice Under the Cal. Environmental Quality Act* (Cont.Ed.Bar 2d ed. 2012 update) § 5.116, p. 288 (Kostka & Zische).) “ ‘A notice of exemption has no significance other than to trigger the running of the limitations period.’ (*Apartment Assn. of Greater Los Angeles v. City of Los Angeles*, *supra*, 90 Cal.App.4th at p. 1171, 109 Cal.Rptr.2d 504.)” (*San Lorenzo*, *supra*, 139 Cal.App.4th 1356, 1385, italics added.)

The Guidelines state that a review of an activity to determine whether it is exempt should occur during the preliminary review. (Guidelines, §§ 15060, 15061, subd. (a).) Consequently, the failure to make a specific exemption decision before approving a project may be questionable. (See *Dunn-Edwards Corp. v. Bay Area Air Quality Management Dist.* (1992) 9 Cal.App.4th 644, 656, disapproved on another ground in *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 569-570 & fn. 2; 1 Kostka & Zische, § 5.116, pp. 288-289.) However, as Kostka and Zische recognize, “The CEQA Guidelines provide, however, only that a notice of exemption must be filed, if at all, after approval of a project. There is no time limit on filing the notice of exemption after approval, nor do the Guidelines require that an explicit finding that a project is exempt be made before approval.” (1 Kostka & Zische, § 5.116, p. 289.) Here, the NOE was executed on October 1, 2010 and filed in December 2010, well after both project approval in December 2008 and Master Plan approval in October 2009.

Section 21168.9 describes the range of actions a court may take when it finds that a public agency has failed to comply with CEQA.⁸ It also expressly recognizes that “[n]othing in this section authorizes a court to direct any public agency to exercise its discretion in any particular way. Except as expressly provided in this section, nothing in this section is intended to limit the equitable powers of the court.” (§ 21168.9, subd. (c).) The order here granted the writ solely as to appellants’ specific challenges to the Master Plan adoption. Although the court’s tentative ruling referenced a “supplemental report” to address the deemed substantial changes, its recognition in the judgment that respondents had filed the NOE “in lieu” of a supplemental EIR, the court’s lifting of the preliminary injunction, and its refusal to actually issue the writ thereafter indicates that the court had not previously directed the particular manner in which the district must comply with CEQA.

It may well be the case that the execution and filing of an NOE was not an appropriate response to the court’s direction to comply with CEQA, where the consideration whether the activity was exempt did not occur during the preliminary review of the project; where respondents had already determined to proceed with the EIR

⁸ Section 21168.9 provides in relevant part:

“(a) If a court finds . . . that any determination, finding, or decision of a public agency has been made without compliance with this division, the court shall enter an order that includes one or more of the following: [¶] (1) A mandate that the determination, finding, or decision be voided by the public agency, in whole or in part. [¶] . . . [¶] (3) A mandate that the public agency take specific action as may be necessary to bring the determination, finding, or decision into compliance with this division.

“(b) Any order pursuant to subdivision (a) shall include only those mandates which are necessary to achieve compliance with this division and only those specific project activities in noncompliance with this division. The order shall be made by the issuance of a peremptory writ of mandate specifying what action by the public agency is necessary to comply with this division. . . . The trial court shall retain jurisdiction over the public agency’s proceedings by way of a return to the peremptory writ until the court has determined that the public agency has complied with this division.

“(c) Nothing in this section authorizes a court to direct any public agency to exercise its discretion in any particular way. Except as expressly provided in this section, nothing in this section is intended to limit the equitable powers of the court.”

process for the project; and where the NOE did not relate to the entire project, but to the adoption of a Master Plan that occurred after approval of a final EIR. Indeed, we have found no authority suggesting that after an agency has already determined that CEQA review and compliance is required for a project, an NOE would be an appropriate response to subsequent changes in the project. The exemption question is considered at the preliminary review stage of the project. (Guidelines, §§ 15060, 15061, subd. (a) [“Once a lead agency has determined that an activity is a project subject to CEQA, a lead agency shall determine whether the project is exempt from CEQA.”].)

Nevertheless, we are convinced appellants’ failure to challenge the NOE within the 35-day statutory time limit precludes them from raising these issues on appeal. (*Stockton Citizens for Sensible Planning v. City of Stockton* (2010) 48 Cal.4th 481, 489 (*Stockton Citizens*).)

In *Stockton Citizens, supra*, 48 Cal.4th 481, the California Supreme Court held that “flaws in the decision-making process underlying a facially valid and properly filed NOE do not prevent the NOE from triggering the 35-day period to file a lawsuit challenging the agency’s determination that it has approved a CEQA-exempt project.” (*Id.* at p. 489.) The court explained: “[CEQA] seeks to ensure that public agencies will consider the environmental consequences of discretionary projects they propose to carry out or approve. On the other hand, the Act is sensitive to the particular need for finality and certainty in land use planning decisions. Accordingly, the Act provides ‘unusually short’ limitations periods ([Guidelines] § 15000 et seq. . . . , § 15112, subd. (a)) after which persons may no longer mount legal challenges, however meritorious, to actions taken under the Act’s auspices.” (*Id.* at p. 488.) “Hence, plaintiffs’ claims that the . . . approval action was procedurally flawed, and substantively mistaken, cannot delay commencement of the 35-day statute of limitations triggered by City’s filing of the NOE. Plaintiffs were free to claim, in a lawsuit, that the underlying approval process failed to comply with CEQA, *but only if they commenced such litigation within 35 days after the NOE was filed.*” (*Id.* at p. 489.)

Appellants contend that they did timely commence such litigation. They argue that their *second writ petition* challenging the Master Plan presented a timely challenge to the NOE, because it was filed within 180 days of execution of the NOE and within 35 days of its posting. We disagree. The second writ petition was filed on November 20, 2009, nearly a year *before* the NOE was even executed. The second writ petition alleged that the approval of the Master Plan violated CEQA, because the Master Plan made substantial changes to the project that would require major revisions to the EIR.⁹ The second petition alleged that no supplemental EIR had been prepared and that the “*District did not determine whether further CEQA review was required*. Accordingly, the District abused its discretion in that it failed to proceed as required by law, and the District’s decision approving the Changed Project was not supported by substantial evidence.” (Italics added.) We observe that adoption of the NOE necessarily was a determination by the district that no further CEQA review was required. None of the allegations of the second petition sufficed to challenge the NOE or the district’s determination that the changes to the Master Plan were categorically exempt. The NOE was filed and posted in response to the court order finding that appellants’ challenges were deemed admitted by the district’s failure to answer those allegations and its direction to the district to comply with CEQA. Appellants’ contention that the NOE was not a proper response required them to bring a timely challenge to that document.

Appellants contend that requiring them to file a third petition challenging the NOE after they had successfully prosecuted the second petition would merely create a multiplicity of petitions and would lengthen already lengthy proceedings. Nevertheless,

⁹ The second writ petition alleged that the approval of the master plan violated CEQA “because the Changed Project approved by the District make[s] substantial changes to the Project which will require major revisions to the [EIR]. No revisions to the EIR in the form of a subsequent or supplemental EIR were proposed or certified. Further, the District did not determine whether further CEQA review was required. Accordingly, the District abused its discretion in that it failed to proceed as required by law, and the District’s decision approving the Changed Project was not supported by substantial evidence.” The petition alleged five “substantial changes to the Project” made in the master plan and requiring a subsequent or supplemental EIR.

the Guidelines are clear that “[t]he filing of a Notice of Exemption and the posting on the list of notices start a 35 day statute of limitations period on legal challenges to the agency’s decision that the project is exempt from CEQA. . . .” (Guidelines, § 15062, subd. (d).)

Moreover, there is ample precedent requiring a further challenge to an agency’s asserted deficient response to a court order mandating CEQA compliance following a successful (in whole or part) first petition. *Laurel Heights I, supra*, 47 Cal.3d 376, and *Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4th 1112 (*Laurel Heights II*) are illustrative. In *Laurel Heights I*, petitioner association mounted a partially successful challenge to the adequacy of a 1986 EIR for a project that involved the proposed relocation of the biomedical research facilities of the UC School of Pharmacy. (See *Laurel Heights II*, at p. 1119.) Because of deficiencies in the project description and alternatives discussion, the Supreme Court directed the Regents to prepare and certify an adequate EIR. (*Id.* at p. 1121.) In the wake of that decision, the Regents produced a new draft EIR. (*Ibid.*) The draft EIR was published and after public comments the Regents adopted a final EIR. The final EIR contained new information that was not present in the draft EIR. However, it was not recirculated for public comment. (*Id.* at p. 1122.) The petitioner association filed a second writ of mandate challenging the validity of the final EIR on numerous grounds and requesting vacation of the Regents’ EIR certification. (*Ibid.*) The Court of Appeal held failure to recirculate the final EIR was reversible error. The Supreme Court disagreed, concluding that substantial evidence supported the Regents’ decision not to recirculate the final EIR. (*Id.* at p. 1120.)

We conclude the time for appellants to pursue their CEQA remedies with regard to the exemption determination for the Master Plan has expired.

III. Asserted Violations of CEQA's Procedural Requirements

Appellants assert the district failed to met CEQA's public disclosure requirements for circulation of the draft EIR and that the board violated CEQA's mandate to review and consider the final EIR before adopting it.

A. Availability of the draft EIR

Appellants contend that the draft EIR was not sufficiently made available to the public to comply with the CEQA mandates. Guidelines section 15087 sets forth the notice steps that the lead agency must take to enable public review of the draft EIR. Guidelines section 15087, subdivision (g), provides in relevant part: "To make copies of EIRs available to the public, lead agencies *should* furnish copies of draft EIRs to public library systems serving the area involved. Copies should also be available in offices of the lead agency." (Italics added.) Even ignoring that the verb "should" is directory rather than mandatory, the district complied with this Guideline.

Appellants concede that the district produced 11 hard copies of volume 1 of the draft EIR (the main body of the document), one hard copy of volume 2 (primarily the appendices with reports and studies referenced in volume 1) and 20 CD copies of volume 2 to accompany the other copies of volume 1, and that the district put all the materials on its Web site. One hard copy of volume 1 of the draft EIR with one CD of volume 2 was placed in the public library system, at the El Cerrito Public Library, a library near the project. Copies of the draft EIR were provided to the board, to appellant Castro School and Neighborhood Group, and to appellants' counsel. Although CEQA does not *require* that lead agencies make electronic copies of EIR documents available online, the district did so and the Notice of Availability published by the district unambiguously directed readers to the district's Web site.

Rather than pointing to any particular failure of the district to comply with the Guidelines, appellants argue that the district could have and should have done more to make the documents more widely available. Appellants complain that copies were not

located at more libraries. They also argue that the hard copy of volume 2 (the Technical Appendices) moved around from time to time and that the CD for volume 2 at the El Cerrito Library was difficult to access and that the time allowed on the library computer was limited. Appellants point to an e-mail exchange involving a request for extra copies of the voluminous EIR. In that request, appellant Farrell requested the district's CEQA consultant to provide full hard copies of the EIR (which numbered some 1570 plus pages) for "at least 40 people." Instead of simply denying the request, the consultant attempted to accommodate the request, explaining the practical rationale for printing a limited number of extra copies of the technical appendices of the EIR. She also advised that, "The District Webmaster will be posting the entire document on their website and we can easily make more CDs available, so I would ask that you note that to all interested parties so we can print out only the number of hard copies that are really needed." Moreover, appellants' anecdotal references to difficulties by one person on one occasion in getting the draft to open online (but apparently succeeding in downloading the two documents in about half an hour) and to the failure of district staff at the district office immediately to provide some of the references in the draft EIR to another appellant at his request, did not demonstrate that appellants or the public at large were ultimately prevented from obtaining the information they wanted. Appellants mistakenly maintain that this latter failure to immediately produce the referenced materials violated Guidelines section 15087(c)(5), which provides: "The notice shall disclose the following: [¶] . . . [¶] (5) The address where copies of the EIR and all documents referenced in the EIR will be available for public review. This location shall be readily accessible to the public during the lead agency's normal working hours."¹⁰

¹⁰ We note that appellants' brief does not cite to the record for "evidence" of this asserted failure of the district to respond to the request for reference documents, but to allegations of appellants' writ petition. This is inadequate. (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2010) ¶¶ 9:36, 9:132, pp. 9-12 to 9-13, 9-38 (Eisenberg, Civil Appeals and Writs).)

The district scrupulously complied with CEQA's public disclosure requirements.

B. Board's duty to review and consider the final EIR

At the December 10, 2008 meeting, the board adopted Resolution No. 45-0809, certifying that it had "reviewed and considered the Final EIR and the information contained therein prior to deciding whether to approve the proposed Project" in compliance with CEQA. (§ 21082.1; Guidelines, § 15090.) Guidelines section 15090 provides in relevant part:

"(a) Prior to approving a project the lead agency shall certify that:

"(1) The final EIR has been completed in compliance with CEQA;

"(2) The final EIR was presented to the decisionmaking body of the lead agency and that the decisionmaking body reviewed and considered the information contained in the final EIR prior to approving the project; and

"(3) The final EIR reflects the lead agency's independent judgment and analysis."

Appellants contend "[t]here were significant procedural problems with the Final EIR." Specifically, they contend that the board could not have reviewed and considered the voluminous final EIR (approximately 1,300 pages) before certifying it and approving the project because: (1) The final EIR was distributed on December 2, 2008, but sent to board members' homes on December 5, 2008, along with the agenda for the December 10, 2008 meeting, and other documents. (2) Four board members were in San Diego for a school board convention and did not return until Saturday night, December 6. (3) Two members of the board were recently elected and took office at the start of the December 10 meeting. (4) The final EIR included 66 pages of changes to the draft EIR that had not been integrated into a single document, so that one was required to cross-reference the two to understand the information. Relying on inferences from these facts,

appellants contend the board did not have enough time to integrate the changes, to read, and to consider the 1300 page final EIR.¹¹

In essence, appellants' claim is that the board members could not have "read" all 1300 pages of the final EIR, and that despite that document's including a summary of the changes made to the draft EIR, the board would have had to compare the changes to the original. Appellants cite no authority that such efforts are necessary to constitute the required review and consideration of the information contained in the final EIR. The Legislature did not use the term "read." As stated by Kostka and Zischke: "Decision-makers are not literally required to read the EIR itself; they must certify only that they have 'reviewed and considered the information contained in the final EIR.' [(Guidelines) § 15090[, subd.] (a)(2).]] A requirement that decision-makers read the entire EIR would be unrealistic. EIRs are usually technical, long, and tedious; and . . . board members do not have the time to read the EIR for every project they consider. Instead, they often rely on the EIR's executive summary or written reports and oral presentations by staff, which summarize the information contained in the report." (2 Kostka & Zischke, *supra*, § 17.7, pp. 805-806.) We do not presume that the decision-makers actually reviewed and considered the information in the EIR simply because the agency record contains the report. (*Ibid*; *Kleist v. City of Glendale* (1976) 56 Cal.App.3d 770, 777.) "However, a specific finding reciting that the decision-making body reviewed and considered the information in the final EIR is sufficient evidence that it actually did so. [Citation.]" (2 Kostka & Zischke, *supra*, § 17.7 at p. 806, citing *Greenebaum v. City of Los Angeles* (1984) 153 Cal.App.3d 391, 402-403 [distinguishing *Kleist v. City of Glendale* on the basis that members of the city council each received copies of the draft and final EIRs, numerous hearings were held before the council, and most critically, "this

¹¹ Appellants again cite to the allegations of their petition, rather than to the record, for the factual assertion that four members of the board candidly admitted later in the board meeting that they had not *read* the final EIR.

City Council, in direct contrast to the Glendale City Council in *Kleist*, voted to certify the finding that they had, ‘reviewed and considered the information in the final EIR’ and also, that the EIR had been ‘completed in compliance with . . . CEQA . . . and the State’s and City’s Guidelines’ ”].) By adopting Resolution No. 45-0809, the board in this case certified it had reviewed and considered the EIR in compliance with CEQA.

(*Greenebaum v. City of Los Angeles, supra*, at pp. 403-404.) We do not second guess that representation.

C. Refusal to recirculate the draft EIR to the Department of Fish and Game upon receiving new information about Cooper’s hawks nesting habitat

Appellants contend the district failed to comply with CEQA by failing to recirculate the draft EIR to the Department of Fish and Game upon receiving additional information about Cooper’s hawks in the project area.

The draft EIR listed the Cooper’s Hawk among the “special status” migratory birds and described its habitat. However, it omitted the species from the list of special wildlife species in the biological resources section and erroneously stated that there was no suitable habitat for the bird within the study area. The biological impact study, community comments and recommended mitigation measures assumed that other special status migratory birds could be present on the site. Therefore, mitigation measure 4.3.2 required the district to retain a qualified biologist to conduct a pre-construction survey for any active nests, maintain an exclusion zone of 100 feet if an active nest was found, and to alter the construction schedule to minimize impacts on any such birds during nesting and fledging period.

Appellants reported a pair of Cooper’s hawks at the site and commented on the proposed mitigation, “demand[ing] that Mitigation Measure 4.3.2 be revised [to] the standard 250 feet buffer and state: ‘. . . If an active nest is located within the 250-foot survey area, other restrictions may include establishment of exclusion zones (no ingress of personnel or equipment at a minimum radius of 250 feet around the nest as confirmed

by the appropriate resource agency) . . .’ ” The final EIR incorporated this mitigation, increasing the buffer zone to 250 feet. The district concluded that implementation of the mitigation measure “would reduce impacts to special-status avian species, including migratory birds, to a **less than significant** level.” The district refused to recirculate the draft EIR.

As the California Supreme Court explained in *Laurel Heights II, supra*, 6 Cal.4th at p. 1132: “Recirculation was intended to be an exception, rather than the general rule.” “Normally, an EIR is circulated for one round of review and comment by the public and by public agencies. In some instances, however, an EIR must be recirculated for a second round of review and comment.” (2 Kostka & Zischke, *supra*, § 16.15, pp. 786-787.) Where significant new information is added to an EIR after public review, but before final certification of the EIR, the lead agency must issue a new notice and recirculate the EIR for comments and consultation. (*Ibid.*; § 21092.1; Guidelines, § 15088.5; *Vineyard, supra*, 40 Cal.4th at p. 447.) “New information added to an EIR is not ‘significant’ unless the EIR is changed in a way that deprives 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) that the project’s proponents have declined to implement. . . .” (Guidelines, § 15088.5, subd. (a); see *Laurel Heights II, supra*, 6 Cal.4th at p. 1120; *Vineyard, supra*, 40 Cal.4th at p. 447; *California Oak Foundation v. Regents of University of California* (2010) 188 Cal.App.4th 227, 266 (*California Oak Foundation*); 2 Kostka & Zischke, § 16.15 at p. 787.)

“Recirculation is not required where the new information added to the EIR merely clarifies or amplifies or makes insignificant modifications in an adequate EIR.” (Guidelines, § 15088.5, subd. (b); *Laurel Heights II, supra*, 6 Cal.4th at pp. 1129-1130; 2 Kostka & Zischke, *supra*, at § 16.15. p. 789.)

“We review an agency’s decision not to revise and recirculate a [draft] EIR only to ensure it is supported by substantial evidence. (Guidelines, § 15088.5, subd. (e).) In doing so, we resolve reasonable doubts regarding the agency’s decision in favor of upholding the administrative decision. (*Laurel Heights [II, supra,]* 6 Cal.4th at pp. 1133, 1135)” (*California Oak Foundation, supra*, 188 Cal.App.4th at p. 266; accord, *Silverado Modjeska Recreation & Parks Dist. v. County of Orange* (2011) 197 Cal.App.4th 282, 303-304.)

We are convinced that substantial evidence supports the decision not to recirculate the draft EIR following discovery that the Cooper’s hawks were present at the site. The draft EIR, although erroneously listing stating that the habitat was unsuitable for Cooper’s hawks, did recognize that other special status species might be present. It recognized that the project could result in the loss of populations or essential habitat for special-status avian species through tree removal and other construction activities and that this would be considered a potentially significant impact. The mitigation measure MM 4.3.2 adopted in the draft EIR was aimed at reducing that potentially significant impact for *all* special status birds. In the final EIR, Cooper’s hawk was added to the list of special-status wildlife species that have the potential to occur in the project area or immediate vicinity. The district’s response to comments on the draft EIR states that, “The additional language was added as a *clarification* to the reader that Cooper’s hawk will be protected per the Migratory Bird Treaty Act and measures outlined in mitigation measure MM 4.3.2.” (Italics added.) Further, the final EIR incorporated the increased preconstruction survey and buffer zone as demanded by appellants. The response concluded that the revision of the discussion and mitigation measure “does not change the impact analysis or require recirculation.”

Nor do we find persuasive appellants’ reliance upon *Sierra Club v. Gilroy City Council* (1990) 222 Cal.App.3d 30, 37, disapproved on other grounds in *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 570, fn. 2, 576, fn. 6, to support

recirculation. In that case, the appellate court affirmed the city council's adoption of the final EIR that had been recirculated to the Department of Fish and Game after significant new information had been received relating to the presence of the California Tiger Salamander. The department had responded to a draft EIR that had not addressed the salamander or its habitat. (*Sierra Club v. Gilroy City Council, supra*, at p. 36.)

Thereafter, the department requested that the potential existence of the species on the site be studied for the first time. Following additional studies, the EIR was properly recirculated to the department to allow it the opportunity to comment on the information it did not have previously. (*Id.* at p. 38.) The department recommended additional mitigation measures. (*Ibid.*) This case is factually distinguishable. Here the draft EIR already took account of the potential existence of special-status migratory birds and contained mitigation measures calling for a buffer, among other measures, as if the hawks were actually present.

Substantial evidence supports the district's determination that the discovery of Cooper's hawks near the project site was not "significant" as it did not change the EIR "in a way that deprives 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) that the project's proponents have declined to implement. . . ." (Guidelines, § 15088.5, subd. (a); see *Laurel Heights II, supra*, 6 Cal.4th at p. 1120; *Vineyard, supra*, 40 Cal.4th at p. 447; *California Oak Foundation, supra*, 188 Cal.App.4th at p. 266; 2 Kostka & Zischke, § 16.15 at p. 787.) As our Supreme Court observed in *Laurel Heights II*, "[T]he Legislature did not intend to promote endless rounds of revision and recirculation of EIR's. Recirculation was intended to be an exception, rather than the general rule." (6 Cal.4th at p. 1132.)

IV. Impacts to Full Inclusion Program and Harm to Special Ed Students

Appellants contend the draft and final EIRs were deficient as they did not adequately consider project impacts in dismantling the full inclusion program at Castro

Elementary School and the harm to the special needs students served by that program in moving them to other schools. Appellants attempt to distinguish *Citizen Action To Serve All Students v. Thornley* (1990) 222 Cal.App.3d 748 (*Thornley*), which held that closure of a popular high school with its attendant serious economic and social effects on low income and bilingual students was not a decision impacting the environment within the meaning of CEQA. (*Id.* at pp. 758-759.)¹² Appellants assert this issue is one of first impression.

However, we agree with respondents that the issue is moot, because “the Castro Elementary School Full Inclusion Program has already been relocated successfully to other [district] schools.”¹³ The preliminary injunction that issued in April 2009, did not prevent the closure of Castro Elementary School that had been announced to the community and parents. It enjoined the district from proceeding with demolition and construction at the site, but permitted the closure of the school and reassignment of students. Castro Elementary School was closed in its entirety by June 30, 2009, and the full inclusion program and all students in the program were relocated to two other elementary school sites in the district in August 2009. Appellants do not dispute that Castro Elementary School has been closed, and its students moved to other schools in the district. Nor do they dispute respondents’ claim that this issue is, therefore, moot.

¹² As the appellate court in *Thornley* reasoned: “CEQA concerns itself with physical changes to the physical environment. ‘Effects analyzed under CEQA must be related to a physical change.’ (Guidelines, § 15358, subd. (b).) The Guidelines define ‘[e]nvironment’ as ‘the physical conditions which exist within the area which will be affected by a proposed project. . . .’ (Guidelines, § 15360.)” (*Thornley, supra*, 222 Cal.App.3d at p. 758.) “‘An economic or social change by itself shall not be considered a significant effect on the environment.’ (Guidelines, § 15382.) Such a change is only to be considered to determine if a physical change (either the cause or the effect of the economic and social changes) is a significant impact. (Guidelines, § 15065; [citation].)” (*Ibid.*)

¹³ We take judicial notice of these facts as set forth in the declaration of Stephen Collins, district’s Director of the Special Education Local Plan Area. (Evid. Code, §§ 459, 452, subd. (h), 453.)

“ ‘An appellate court will not review questions which are moot and which are only of academic importance.’ [Citations.] A question becomes moot when, pending an appeal . . . events transpire that prevent the appellate court from granting any effectual relief. [Citations.]” (*Gonzalez v. Munoz* (2007) 156 Cal.App.4th 413, 419; see, e.g., *In re Anna S.* (2010) 180 Cal.App.4th 1489.) “The policy behind a mootness dismissal is that courts decide ‘actual controversies’ and normally will not render ‘advisory opinions.’ [Citations.]” (Eisenberg, *Civil Appeals and Writs*, *supra*, ¶ 5:22, p. 5-6.)

V. Consideration of a Reasonable Range of Alternatives

Appellants contend that the district did not consider a “range of reasonable alternatives to the project.” (Guidelines, § 15126.6.)¹⁴ They maintain that two of the

¹⁴ Guidelines section 15126.6 provides in pertinent part:

“(a) Alternatives to the Proposed Project. An EIR shall describe a range of reasonable alternatives to the project, or to the location of the project, which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives. An EIR need not consider every conceivable alternative to a project. Rather it must consider a reasonable range of potentially feasible alternatives that will foster informed decisionmaking and public participation. An EIR is not required to consider alternatives which are infeasible. The Lead Agency is responsible for selecting a range of project alternatives for examination and must publicly disclose its reasoning for selecting those alternatives. There is no ironclad rule governing the nature or scope of the alternatives to be discussed other than the rule of reason. ([*Goleta II*, *supra*,] 52 Cal.3d 553 and *Laurel Heights I*, *supra*,] 47 Cal.3d 376).

“[¶] . . . [¶]

“(c) Selection of a range of reasonable alternatives. The range of potential alternatives to the proposed project shall include those that could feasibly accomplish most of the basic objectives of the project and could avoid or substantially lessen one or more of the significant effects. The EIR should briefly describe the rationale for selecting the alternatives to be discussed. The EIR should also identify any alternatives that were considered by the Lead Agency but were rejected as infeasible during the scoping process and briefly explain the reasons underlying the Lead Agency’s determination. Additional information explaining the choice of alternatives may be included in the administrative record. Among the factors that may be used to eliminate alternatives from detailed consideration in an EIR are: (i) failure to meet most of the

four alternatives studied in the final EIR are “strawmen” alternatives that the district rejected as infeasible before preparation of the draft EIR. Appellants also contend that a feasible alternative, the K-8 alternative, was improperly rejected before the environmental analysis began.

During the scoping process and later alternatives analysis, the district considered a broad range of options. Four project alternatives and the required no-project alternative were discussed in detail. Nine additional options were considered, but rejected as infeasible. Among those considered, but rejected as infeasible was the K-8 option.

Two of the feasible alternatives considered in the EIR included relocating Portola students to schools other than Castro Elementary (including the Fairmont Elementary site) and a third considered the acquisition of a new site and construction of school facilities thereon (the Dolan Lumber alternative). When it certified the EIR, the district made nearly 50 pages of findings, including five pages on the subject of alternatives. They address both the alternatives analyzed in the draft EIR and the alternatives rejected as infeasible. The findings address all five project alternatives, including the “no project” alternative, and relate the district’s reason for rejecting proposed alternatives in detail.

“CEQA establishes no categorical legal imperative as to the scope of alternatives to be analyzed in an EIR. Each case must be evaluated on its facts, which in turn must be

basic project objectives, (ii) infeasibility, or (iii) inability to avoid significant environmental impacts.

[¶] . . . [¶]

“(f) Rule of reason. The range of alternatives required in an EIR is governed by a ‘rule of reason’ that requires the EIR to set forth only those alternatives necessary to permit a reasoned choice. The alternatives shall be limited to ones that would avoid or substantially lessen any of the significant effects of the project. Of those alternatives, the EIR need examine in detail only the ones that the Lead Agency determines could feasibly attain most of the basic objectives of the project. The range of feasible alternatives shall be selected and discussed in a manner to foster meaningful public participation and informed decision making.”

reviewed in light of the statutory purpose.” (*Goleta II, supra*, 52 Cal.3d at p. 566.) *Goleta II* reaffirmed “the principle that an EIR for any project subject to CEQA review must consider a reasonable range of alternatives to the project, *or to the location of the project*, which: (1) offer substantial environmental advantages over the project proposal (Pub. Resources Code, § 21002); and (2) may be ‘feasibly accomplished in a successful manner’ considering the economic, environmental, social and technological factors involved. (Pub. Resources Code, § 21061.1; Guidelines, § 15364; [citation].)” (*Goleta II*, at p. 566.)

“[I]t is appellants’ burden to demonstrate that the alternatives analysis is deficient. ‘Where an EIR is challenged as being legally inadequate, a court presumes a public agency’s decision to certify the EIR is correct, thereby imposing on a party challenging it the burden of establishing otherwise.’ [Citation.]” (*California Native Plant Society v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 987 (*California Native Plant Society*)). Furthermore, under the Guidelines, an EIR need discuss only a range of reasonable alternatives. (Guidelines § 15126.6, subds. (a), (c); *California Native Plant Society, supra*, at p. 992; 1 Kostka & Zischke, *supra*, § 15.17, pp. 750-751.) “An EIR is not deficient if it excludes other potential alternatives from its analysis if it discusses a reasonable range of alternatives. [Citations.] Each case must be reviewed on the facts, and the facts must, in turn, be reviewed in light of the purpose of CEQA’s alternatives requirement. [Citations.]” (1 Kostka & Zischke, *supra*, at p. 750; citing *Goleta II, supra*, 52 Cal.3d 553 and *Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 546.)

A. Alleged “strawmen” alternatives

Appellants argue that the draft EIR discussion of the Dolan Lumber site and the Fairmont site were “strawmen” alternatives because they had been rejected as infeasible before the environmental review process began. They argue the Dolan Lumber site alternative was eliminated from consideration as infeasible on October 3, 2007, and the Fairmont site on December 12, 2007. They assert that as these alternatives had been

determined to be actually infeasible before the environmental review process began, they could not be counted among the required reasonable range of alternatives to be analyzed. We disagree.

The middle school working group established by the district to investigate, evaluate, and make recommendations potential sites, eventually recommended that commercial sites such as the Dolan Lumber site be eliminated from consideration due to the overall cost and availability of those commercial sites. That determination did not prevent it from serving as a “potentially feasible” alternative to the project. (Guidelines, § 15126.6.) The Dolan Lumber site was eliminated from consideration because it was undesirable from a cost and availability standpoint, not because it was not potentially feasible for CEQA evaluation purposes. In June 2007, the board determined to begin anew the process of finding a middle school site. Fairmont had originally been selected to be the new middle school site, but that decision was reversed and a new process begun, five major criteria were established, public discussion and debate occurred and a citizen’s committee (the working group) was established to review the proposals. That group recommended and the board selected the Castro Elementary School site as the lead proposal. That the Fairmont site was not considered the most desirable, did not eliminate it from consideration as a potentially feasible alternative. Appellants have pointed to no evidence in the administrative record that either the Dolan Lumber site or the Fairmont site alternatives were not potentially feasible alternatives for purposes of environmental analysis.

B. K-8 option

Appellants contend respondents improperly eliminated the K-8 alternative as infeasible. The district considered, but rejected, nine additional alternatives as infeasible during the scoping process. The draft EIR contains a brief explanation of each of these nine alternatives. One of these was the proposed alternative “Create a K-8 Campus at the Castro Elementary School Campus.” The EIR explained that “this concept was rejected

because it is not a model that [the district] currently embraces and would have an effect in terms of number of students served, number of students in each grade level and other impacts. In addition, the total size of the parcel in combination with the State requirements for the creation of classrooms, indoor and outdoor recreation space, and other requirements for a K-8 campus. [*Sic.*] Lastly, this concept would not create a campus that would accommodate all of the current Portola Middle School students, so some of these students would still need to be relocated to other middle schools within the District.”

Appellants contend that the K-8 alternative was potentially feasible, but was not analyzed and that no evidence demonstrated this alternative was not feasible. We disagree. The district explained why it considered this alternative (and another proposed alternative that all middle schools be closed and all elementary schools be converted to K-8) to be infeasible. The district’s infeasibility findings are entitled to “great deference.” (*California Native Plant Society, supra*, 177 Cal.App.4th at p. 997.) “They ‘are presumed correct. The parties seeking mandamus bear the burden of proving otherwise, and the reviewing court must resolve reasonable doubts in favor of the administrative findings and determination.’ (*Sierra Club v. County of Napa* (2004) 121 Cal.App.4th 1490, 1497, 19 Cal.Rptr.3d 1.)” (*Id.* at p. 997.)

Moreover, appellants’ argument assumes that all feasible alternatives must be considered. This is not the case. As Kostka and Zische observe, “[I]anguage in several cases implies that an EIR must discuss ‘all reasonable alternatives’ to the project [Citations.] These statements, which recite a dictum in *Wildlife Alive v. Chickering* (1976) 18 C[al.]3d 190, 197 . . . , an exemption case, are inconsistent with the Guidelines standard providing that an EIR should contain a reasonable range of alternatives sufficient to foster informed decision making. [(Guidelines) § 15126.6[,subd.] (a).[]] Under the applicable standard, an EIR may be found legally inadequate only if the range

of alternatives it presents is unreasonable in the absence of the omitted alternatives.” (1 Kostka & Zische, *supra*, § 15.17, p. 752.)

In the words of the Court of Appeal in *California Native Plant Society, supra*, 177 Cal.App.4th 957: “We find no violation of CEQA’s informational mandates in the alternatives analysis. The EIR presented sufficient information to explain the choice of alternatives and the reasons for excluding [the proposed alternatives]. The information ‘did not preclude informed decisionmaking or informed public participation and thus did not constitute a prejudicial abuse of discretion.’ [Citation.] [¶] As to the [public agency’s] substantive decisions concerning which alternatives to analyze and which to omit, we find sufficient evidence in the administrative record as a whole to support those determinations. Judged against the rule of reason that governs our review, a reasonable range of alternatives was selected for analysis in the EIR; ‘no more was required.’ [Citation.]” (*Id.* at p. 995.)

VI. Alleged Brown Act Violations

Appellants argue that respondents violated the Brown Act as the agenda failed to specify the business to be transacted and the board failed to state explicitly the board’s approval of the project as a separate and distinct action from certification of the EIR. The trial court found no violation. To the extent the facts here are undisputed, we review the trial court’s determination of the asserted Brown Act violations de novo. (*Californians Aware v. Joint Labor/Management Benefits Committee* (2011) 200 Cal.App.4th 972, 978.)

The agenda for the December 10, 2008 board meeting with respect to this action item was captioned: “Compliance with the California Environmental Quality Act: Adopt Resolution 45-0809 Authorizing Adoption of the Final Environmental Impact Report for the Construction and Renovation of Castro Elementary School to Replace Portola Middle School Project.” The Comment and the Recommendation that followed the agenda caption did not expressly state that action would be taken to approve the project.

However, the Comment did state in relevant part: “The Board has designated the Castro Elementary site as the preferred option for the relocation of the students from the Portola Middle School site. The next step in the process is to complete the environmental reviews and approve the project. . . .” The agenda item contained the “Recommendation: Adopt Resolution 45-0809 Authorizing Adoption of the Final Environmental Impact Report for the Construction and Renovation of Castro Elementary School to Replace Portola Middle School Project.” A copy of Resolution No. 48-0809 was included in the accompanying Board Packet and was posted by the district at least 72 hours before the meeting. The title of that resolution made clear it included both “CERTIFYING THE FINAL ENVIRONMENTAL IMPACT REPORT FOR *AND APPROVING THE CONSTRUCTION AND RENOVATION OF THE CASTRO ELEMENTARY SCHOOL . . .*”¹⁵ (Italics added.) In addition to approving, certifying and adopting the final EIR for the project (Resolution, § 8) the body of the resolution states “[t]he Board of Education hereby approves the Project as identified and evaluated in the Final EIR.” (Resolution, § 11).

Requirements relating to the content of the agenda are set forth in Government Code section 54954.2, subdivision (a), which provides in relevant part: “(1) At least 72 hours before a regular meeting, the legislative body of the local agency, or its designee, shall post an agenda *containing a brief general description of each item of business to be*

¹⁵ The resolution was entitled: “RESOLUTION NO. 45-0809: RESOLUTION OF THE BOARD OF EDUCATION OF THE WEST CONTRA COSTA UNIFIED SCHOOL DISTRICT CERTIFYING THE FINAL ENVIRONMENTAL IMPACT REPORT FOR *AND APPROVING THE CONSTRUCTION AND RENOVATION OF THE CASTRO ELEMENTARY SCHOOL TO REPLACE PORTOLA MIDDLE SCHOOL PROJECT, ADOPTING ENVIRONMENTAL FINDINGS PURSUANT TO THE CALIFORNIA ENVIRONMENTAL QUALITY ACT, STATEMENT OF OVERRIDING CONSIDERATIONS, AND MITIGATION MONITORING AND REPORTING PROGRAM.*” (Italics added.)

transacted or discussed at the meeting, including items to be discussed in closed session. *A brief general description of an item generally need not exceed 20 words. . . .* [¶] (2) No action or discussion shall be undertaken on any item not appearing on the posted agenda, except [exceptions that are inapplicable here].” (Italics added.)

Appellants first argue that the title of the resolution in the agenda did not match the title of the resolution in the board packet. However, appellants fail to cite any authority that the “brief general description” of this item of business need quote the title of the actual resolution verbatim, and we have found none.

Quoting from the section applicable to *special* board meetings, and to a case discussing that section, appellants contend the agenda here failed to “specify . . . the business to be transacted” (Gov. Code, § 54956, subd. (a)) in that it failed “ ‘to name or state explicitly or in detail’ ” (*Moreno v. City of King* (2005) 127 Cal.App.4th 17, 26 (*Moreno*)) the board’s approval of the project as distinct and separate action from certification of the EIR. First, this was not a special meeting of the board, but a regular board meeting with numerous agenda items to which Government Code section 54956 did not apply. Further, in *Moreno*, the court rejected the city’s argument that the special meeting agenda need not comply with the requirements of Government Code section 54954.2 that the agenda must “give ‘*a brief general description* of each item of business to be transacted or discussed’ (italics added).” (*Moreno, supra*, 127 Cal.App.4th at p. 26.) The agenda for the special meeting at issue in *Moreno* “provided no clue that the dismissal of a public employee would be discussed at the meeting.” (*Id.* at p. 27.) Rather, it stated the only item to be considered would be a closed session consideration “ ‘Per Government Code section 54957: Public Employee (employment contract).’ ” (*Moreno*, at p. 21.) The employee was not notified that his employment would be discussed at this meeting. (*Id.* at p. 21.) The appellate court held that the trial court did not err in finding the agenda inadequate. (*Id.* at p. 27.) *Moreno* is easily distinguishable from the instant case. This well-attended regular board meeting was properly noticed, the

agenda contained a brief, but adequate general summary, referencing the actual resolution that accompanied the agenda and that described approval of the project as one of the actions to be taken. Members of the public commented both on adoption of the EIR and approval of the project. Hence the agenda did give an accurate description of the action item—adoption of the particular resolution.

Appellants point out that confusion occurred at the board meeting when, during a staff presentation of background information before public comment, a slide showed that project approval would occur in the future¹⁶ and staff member Savidge stated: “Your action tonight would allow the project to proceed, but it does not commit the Board to any further action and any further actions would be brought back to the Board for approval, as an example, to retain an architectural firm to complete drawings to begin construction, et cetera.” After public comment, counsel clarified that “when Mr. Savidge said that you were not being asked to approve the project on one of his slides, in fact, the Board resolution, as is typical, is to approve the EIR, adopt the mitigation measures and also to approve the project as it’s described in the document so that the project planning can go forward.” When the motion to adopt the resolution was made, the board president asked once again for clarification as to “what the approval of this resolution actually means” Counsel once again stated that along with approving the EIR and the mitigation measures, the board “is approving the project as described in the EIR, in other words, the Portola to Castro project is being approved.” Any possible confusion from the staff member’s mistake was rectified by counsel’s clarification and the board discussion of the resolution.

Here, we find no violation of Government Code section 54954.2, subdivision (a). “An action taken that is alleged to have been taken in violation of [Government Code]

¹⁶ The slide stated that “Board adoption of the EIR [¶] . . . [¶] Allows the project to proceed [¶] But does not commit the Board to any further action [¶] Any further project actions would be brought back for Board approval.”

Section . . . 54954.2 . . . shall not be determined to be null and void if any of the following conditions exist: [¶] (1) The action taken was in *substantial compliance* with [Government Code] Section . . . 54954.2” (Gov. Code, § 54960.1, subd. (d)(1), italics added.) As we have stated, the title of the agenda item gave a brief, general description of the action to be taken. The agenda specifically referenced the resolution by number. The resolution, both in its title and in its body, clearly included approval of the project as part of the action being taken. The resolution was included in the packet that was published and posted online by the district. In the circumstances, respondents substantially complied with Government Code section 54954.2, subdivision (a). (Gov. Code, § 54960.1, subd. (d).)

Further, appellants have not shown that they or others were prejudiced by the alleged agenda deficiency they assert. “The cases have held that a violation of the Brown Act will not automatically invalidate an action taken by a local agency or legislative body. The facts must show, in addition, that there was *prejudice* caused by the alleged violation. [Citations.] ‘Even where a plaintiff has satisfied the threshold procedural requirements to set aside an agency’s action, Brown Act violations will not necessarily “invalidate a decision. [Citation.] Appellants must show *prejudice*.” [Citation.]’ (*San Lorenzo*[, *supra*,] 139 Cal.App.4th 1356, 1410.)” (*Galbiso v. Orosi Public Utility Dist.* (2010) 182 Cal.App.4th 652, 670-671.) On appeal, appellants do not argue that they or others were prejudiced in any way by the alleged violation. Interested persons appeared at the board meeting and presented their views on both the EIR adoption and the project approval. In light of the vigorous public participation that occurred throughout the process and at this particular board meeting, no prejudice is apparent.

Finally, appellants suggest, but do not actually argue, that the resolution was not actually or properly adopted. They relate that on the motion to adopt the resolution, one board member voted, “Yes.” One member voted “Aye” and one board member stated, “On the EIR certification I vote yes.” Two board members voted no. The board

president, after voting “no,” stated, “It passes.” A notice of determination of project approval was filed the next day. The board president stated the resolution had passed. There was no later objection by any board member. The minutes relate that the board approved the resolution by a 3-2 vote. Further, appellants have cited no statute or case declaring that the outcome of a vote can constitute a violation of the Brown Act and we find none here. The trial court did not err in finding no Brown Act violation here.

DISPOSITION

The judgment is affirmed. Each party shall bear its own costs in connection with this appeal.

Kline, P.J.

We concur:

Haerle, J.

Richman, J.