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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

LOMAS CANTADAS GROUNDWATER
PROTECTION COMMITTEE et al.,

Plaintiffs and Appellants,

v.

CITY OF ORINDA et al.,

Defendants and Respondents;

EDWARD VOGT et al.,

Real Parties in Interest.

A132765

(Contra Costa County
Super. Ct. No. MSN10-0750)

The City of Orinda (City) granted the application of Edward Vogt for a lot line adjustment between two contiguous properties. Lomas Cantadas Groundwater Protection Committee (Committee)¹ and Carol Karp (jointly Appellants) opposed the application, and petitioned the superior court for a writ of mandate seeking to vacate the City's decision, arguing that the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.; hereafter, CEQA) required preparation of an environmental impact report (EIR). The trial court denied the petition. We affirm.

¹ Committee consists of property owners in the area surrounding Vogt's properties. On February 3, 2012, we granted the application of the Friends of The Little Farm and Grizzly Peak Stables, representing certain other neighboring properties, to submit briefing as amici curiae in support of Appellants.

I. BACKGROUND AND PROCEDURAL HISTORY

Vogt owns two parcels of real property located on Lomas Cantadas Road in a hilly, semi-rural area of Orinda. The larger 2.22 acre parcel is developed with an existing 1,500 square-foot residence and is served by a septic system and well water. The surrounding neighborhood is not served by public water and relies upon well water and springs. A public water main cannot be installed on Lomas Cantadas because it is above the Dos Osos (Reservoir) Pressure Zone, which serves a maximum elevation of 1,250 feet.

Vogt purchased a .66 acre adjacent parcel from the East Bay Municipal Utility District (EBMUD) in 2002. In 2003, Vogt first applied to the City for a lot line adjustment to move the boundary of the smaller lot onto the larger one. The resulting boundary change would have made each parcel about 1.44 acres. The City's Planning Commission denied the application on the grounds that, among other things, the resulting reconfigured lots would be nonconforming to existing zoning and would be inconsistent with the City's general plan. Vogt then made a second application for a similar lot line adjustment, but offering to create a scenic easement over one of the resulting parcels, providing an arguable public benefit. The City conducted an initial study under CEQA,² and on June, 14, 2005, the Planning Commission approved this amended proposal with a negative declaration under CEQA, finding that the proposed project would not have a significant adverse effect on the environment. That approval was appealed to the City Council for de novo review.

In August 2005, the City's Planning Department (Department) issued a revised initial study and a mitigated negative declaration. The Department found that

² Under the implementing guidelines for CEQA (Cal. Code Regs., tit. 14, § 15000 et seq.; hereafter, Guidelines), minor alterations to land such as lot line adjustments are generally exempt from CEQA review, but only "in areas with an average slope of less than 20%." (Guidelines, § 15305.) The lots at issue here have an average slope of about 35 percent. If a project is not exempt from review, the Guidelines require the lead agency to "conduct an initial study to determine if the project may have a significant effect on the environment. . . ." (Guidelines, § 15063, subd. (a).)

“[h]ydrology and water quality could potentially be affected as a result of this lot line adjustment if a new well for domestic water, or if a new septic system were to be installed on the vacant parcel.” The Department recommended that, as a condition of approval of the application, Vogt be required to provide domestic water and sewer services to the vacant parcel prior to the issuance of grading and building permits. The Department opined that “[t]he process of meeting applicable regulations and established review processes for both sanitary sewer service and a legal domestic water supply will provide the mitigation necessary to avoid any of the potential adverse impacts identified in the Initial Study.”

Following a public hearing on December 12, 2005, the City Council continued the hearing to June 6, 2006, to allow Vogt to secure permits for water and sewer service for the unimproved lot.³ Vogt was unable to secure the permits by June 6, 2006, and the City Council denied Vogt’s request for a further 90-day continuance. By Resolution No. 40-06, the City Council denied the application, finding that the proposed project did not comply with applicable building code standards for domestic water and sanitary sewer facilities. The decision expressly made no findings regarding compliance with the City’s general plan or CEQA.

On September 15, 2006, Vogt filed a petition for writ of mandate (*Vogt v. City of Orinda* (Super. Ct. Contra Costa County, 2006, No. N06-1494); hereafter, Vogt Writ Proceeding) challenging the denial of his application and contending that the Subdivision Map Act (Gov. Code, § 66410 et seq.) prohibited the City from imposing conditions on

³ The Committee filed a petition for writ of mandate on January 17, 2006 (*Lomas Cantadas Groundwater Protection Committee v. City of Orinda* (Super. Ct. Contra Costa County, 2006, No. N06-0064)) alleging that the City had failed to comply with CEQA. A request for preliminary injunction in that action was denied by the court on the basis that the petitioners had failed to exhaust their administrative remedies. The petition was subsequently dismissed with prejudice on a stipulated settlement.

approval of a lot line adjustment.⁴ After hearing, the court (Hon. Barry Baskin), by order dated September 3, 2008, granted the petition, invalidating Resolution No. 40-06, and directing the City Council to consider Vogt's lot line adjustment application "on its merits," limiting its review and approval "to a determination of whether or not the parcels resulting from the lot line adjustment will conform to the local general plan, any applicable specific plan, and zoning and building ordinances."⁵

The Department then prepared a new initial study with a proposed negative declaration (Guidelines, § 15070, subd. (b)(2)), finding no substantial evidence that the project would have a significant effect on the environment.⁶ The negative declaration acknowledged that granting the lot line adjustment would increase the likelihood that a single-family residence would be constructed on the vacant parcel and/or allow for the

⁴ The seven-volume administrative record from the Vogt Writ Proceeding, including expert opinion offered by project opponents, was posted and included in the administrative record in the instant matter.

⁵ See Government Code section 66412, subdivision (d), in relevant part requiring that a local agency limit its review and approval of a lot line adjustment "to a determination of whether or not the parcels resulting from the lot line adjustment will conform to the local general plan, any applicable specific plan, any applicable coastal plan, and zoning and building ordinances. An advisory agency or local agency shall not impose conditions or exactions on its approval of a lot line adjustment except to conform to the local general plan, any applicable specific plan, any applicable coastal plan, and zoning and building ordinances, to require the prepayment of real property taxes prior to the approval of the lot line adjustment, or to facilitate the relocation of existing utilities, infrastructure, or easements."

⁶ "A public agency shall prepare or have prepared a proposed negative declaration or mitigated negative declaration for a project subject to CEQA when: [¶] (a) The initial study shows that there is no substantial evidence, in light of the whole record before the agency, that the project may have a significant effect on the environment, or [¶] (b) The initial study identifies potentially significant effects, but: [¶] (1) Revisions in the project plans or proposals made by or agreed to by the applicant before a proposed mitigated negative declaration and initial study are released for public review would avoid the effects or mitigate the effects to a point where clearly no significant effects would occur, and [¶] (2) There is no substantial evidence, in light of the whole record before the agency, that the project as revised may have a significant effect on the environment." (Guidelines, § 15070.)

construction of a larger home on that parcel than could be constructed without the lot line adjustment.⁷ The Department noted that any residence developed on the vacant lot would require both water and sewer service; that a moratorium on new septic systems in the area would require an extension and connection to the Central Contra Costa Sanitary District sewer line; and that necessary water to serve the residence would need to be obtained by the developer by either: 1) purchasing EBMUD water and pumping it to the property, or 2) relying on well water. Recognizing that it could not condition approval of Vogt's application under the terms of the court's order, and that it could not be determined when or if the vacant lot would be developed, or which option for providing water service would ultimately be selected, the Department concluded that "based on available information" the potential future development of the property "would not result in any significant adverse environmental impacts, including to groundwater resources." Specifically, in evaluating the hydrology and water quality impacts, the Department evaluated the environmental impacts of each of the two alternatives for water service to the parcels. With respect to the use of EBMUD water supplies, the Department reviewed the various approvals and encroachment rights that Vogt would have to obtain in order to use this water source, and determined that if Vogt "is ultimately able to obtain water from EBMUD and convey it to his vacant lot, construction of a new single-family residence on that parcel would have no impact on groundwater supplies (i.e., would not deplete, pollute or otherwise impact groundwater)."

The Department acknowledged evidence that the groundwater aquifer in the area was already strained and its capacity exceeded by existing users. It agreed that groundwater supplies in the area would be adversely impacted if Vogt were to rely on that source, but that the nature and extent of this potential impact could not be exhaustively evaluated in the absence of any development application. The Department nevertheless concluded that the hydrology and water impacts of any future development

⁷ The amended project then before the Planning Commission proposed a reduction of the developed parcel to 1.51 acres, and enlargement of the undeveloped parcel to 1.37 acres.

would be “less than significant” because of the operation of applicable regulatory and permitting requirements to any future development proposal relying on groundwater sources.

The Department cited the need for a permit from the Contra Costa Environmental Health (CCEH) in order to install a new well on the vacant parcel, or alternatively, the need for a permit to operate a “small water system” if the existing well on the developed parcel were to be used. The Department attached an October 14, 2009 letter from Sherman Quinlan, Environmental Health Director for CCEH, confirming the role of CCEH in administering and enforcing well permitting requirements under the City’s municipal code (Orinda Mun. Code, ch. 8.36), outlining well permit requirements, and stating its intent to “vigorously implement[] these standards” to “protect groundwater resources in the Lomas Cantadas area of Orinda.”

The Department noted that, under the “well-established and rigorous review process” for well permits, an applicant would be required to provide a full hydrogeological study based on a specific development proposal. A new well, or expanded use of any existing well, would only be allowed if the proposed well water use would not: “(1) interfere with other existing wells or developed springs, (2) result in a drawdown that would adversely affect wells or developed springs needed to support existing or planned and permitted land uses, (3) interfere with the ability of existing area wells or developed springs to supply water at existing rates and quantities, (4) cause the aquifer to be overdrafted in the future, and/or (5) exacerbate any existing aquifer overdraft situation.” The Department concluded that “clearly applicable regulatory standards contain objective performance criteria that will ensure any impacts to groundwater resources will be less than significant.”

After a public hearing on December 8, 2009, the Planning Commission adopted the initial study and negative declaration and approved the lot line adjustment. Carol

Karp and Norma Sue Scholz appealed the Planning Commission's action.⁸ On March 16, 2010, the City Council conducted a de novo public hearing and approved the lot line adjustment and the negative declaration. That decision was memorialized in Resolution No. 24-10, adopted on April 13, 2010. In adopting that resolution, the City said, "Although the record before the Council evidences that the project opponents' primary concern is that any future expansion of groundwater use to serve the vacant parcel will harm the wells and/or springs belonging to other groundwater users in the area, approval of the Application does not authorize any such expansion. [CCEH], a qualified expert body acting for the City, would apply its mandatory objective standards to any future application for expansion of groundwater use to ensure that the proposal would not result in any significant hydrology or groundwater impacts. Moreover, the City will continue to comply fully with CEQA in acting on any future applications for discretionary approvals." The Committee submitted objections to the proposed Council resolution on April 6, 2010.

The Committee filed the present petition for writ of mandamus on May 10, 2010. (*Lomas Cantadas Groundwater Protection Committee v. City of Orinda* (Super. Ct. Contra Costa County, 2010, No. 10-0750).) On May 6, 2011, the court (Hon. Barbara Zuniga) issued a tentative ruling denying the petition, finding no evidence in the record that "merely moving the lot line between the two parcels" would have any significant effect on the environment. Judgment was entered for the City of May 27, 2011. A motion for new trial was denied on July 27, 2011. A notice of appeal was timely filed on July 29, 2011.

II. DISCUSSION

The grant of a land use permit or variance is an adjudicatory act, subject to review by administrative mandamus. (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 566–567; *Saad v. City of Berkeley* (1994) 24 Cal.App.4th 1206, 1211.)

⁸ While the appeal letter to the City Council was submitted on Committee letterhead, Karp later clarified that she and Scholz were pursuing the appeal in their individual capacities.

“The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.” (Code Civ. Proc., § 1094.5, subd. (b); Pub. Resources Code, § 21168⁹; *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1375 (*Gentry*)).

Our task in review of a mandate proceeding is essentially identical to that of the trial court. (*American Canyon Community United for Responsible Growth v. City of American Canyon* (2006) 145 Cal.App.4th 1062, 1070.) Accordingly, “we review the agency’s actions directly and are not bound by the trial court’s conclusions. [Citations.]” (*Friends of Lagoon Valley v. City of Vacaville* (2007) 154 Cal.App.4th 807, 816–817 (*Lagoon Valley*)). We must therefore independently determine whether the administrative record demonstrates any legal error by the City and whether it contains substantial evidence to support the City’s factual determinations. (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 427.)

A. CEQA

“ The basic purposes of CEQA are to: [¶] (1) Inform governmental decision makers and the public about the potential, significant environmental effects of proposed activities. [¶] (2) Identify ways that environmental damage can be avoided or significantly reduced. [¶] (3) Prevent significant, avoidable damage to the environment

⁹ Public Resources Code section 21168 provides: “Any action or proceeding to . . . review . . . a determination, finding, or decision of a public agency, made as a result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in a public agency, on the grounds of noncompliance with the provisions of this division shall be in accordance with the provisions of Section 1094.5 of the Code of Civil Procedure. [¶] In any such action, the court . . . shall only determine whether the act or decision is supported by substantial evidence in light of the whole record.”

by requiring changes in projects through the use of alternatives or mitigation measures when the governmental agency finds the changes to be feasible. [¶] (4) Disclose to the public the reasons why a governmental agency approved the project in the manner the agency chose if significant environmental effects are involved.’ ([Guidelines], § 15002).” (*Tomlinson v. County of Alameda* (2012) 54 Cal.4th 281, 285–286.) CEQA’s purpose is to compel government to make decisions with environmental consequences in mind. (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 393 (*Laurel Heights*).

“CEQA establishes ‘a three-tiered process to ensure that public agencies inform their decisions with environmental considerations. . . . [¶] . . . [¶] The first step is ‘jurisdictional, requiring that an agency conduct a preliminary review in order to determine whether CEQA applies to a proposed activity.’ [Citations.] . . . As part of the preliminary review, the public agency must determine the application of any statutory exemptions or categorical exemptions that would exempt the proposed project from further review under CEQA. [Citations.] . . . [¶] . . . [¶] If the project does not fall within an exemption, the agency proceeds to the second step of the process and conducts an initial study to determine if the project *may* have a significant effect on the environment. (Guidelines, § 15063.) If, based on the initial study, the public agency determines that ‘there is substantial evidence, in light of the whole record . . . that the project may have a significant effect on the environment, an [EIR] shall be prepared.’ ([Pub. Resources Code], § 21080[, subd.](d).)” (*Banker’s Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego* (2006) 139 Cal.App.4th 249, 257–258 (*Banker’s Hill*).

“[I]f there is no substantial evidence of any net significant environmental effect in light of revisions in the project that would mitigate any potentially significant effects, the agency may adopt a mitigated negative declaration. [Citation.] A mitigated negative declaration is one in which ‘(1) the proposed conditions “avoid the effects or mitigate the effects to a point where *clearly* no significant effect on the environment would occur, *and* (2) there is *no substantial evidence* in light of the whole record before the public agency

that the project, as revised, may have a significant effect on the environment.” [Citation.]’ [Citations.]” (*Citizens for Responsible & Open Government v. City of Grand Terrace* (2008) 160 Cal.App.4th 1323, 1331–1332 (*Grand Terrace*), quoting *Architectural Heritage Assn. v. County of Monterey* (2004) 122 Cal.App.4th 1095, 1119.) “If no negative declaration is issued, the preparation of an EIR is the third and final step in the CEQA process. [Citations.]” (*Banker’s Hill, supra*, 139 Cal.App.4th at p. 259.)

A city’s decision to rely on a mitigated negative declaration or a negative declaration under CEQA is reviewed for abuse of discretion under the “fair argument” standard. “ “CEQA requires preparation of an EIR ‘whenever it can be fairly argued on the basis of substantial evidence that the project may have significant environmental impact.’ [Citations.] Thus, if substantial evidence in the record supports a ‘fair argument’ significant impacts or effects may occur, an EIR is required and a negative declaration cannot be certified.” [Citation.]’ [Citation.]” (*Porterville Citizens for Responsible Hillside Development v. City of Porterville* (2007) 157 Cal.App.4th 885, 899; see also Guidelines, § 15064, subd. (f)(1) [“if a lead agency is presented with a fair argument that a project may have a significant effect on the environment, the lead agency shall prepare an EIR even though it may also be presented with other substantial evidence that the project will not have a significant effect”].) “ ‘The fair argument standard is a “low threshold” test for requiring the preparation of an EIR. [Citations.] It is a question of law, not fact, whether a fair argument exists, and the courts owe no deference to the lead agency’s determination. Review is de novo, with a preference for resolving doubts in favor of environmental review.’ [Citation.]” (*Grand Terrace, supra*, 160 Cal.App.4th at p. 1331, quoting *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 928 (*Pocket Protectors*).) “When a challenge is brought to an agency’s determination an EIR is not required, ‘the reviewing court’s “function is to determine whether substantial evidence supported the agency’s conclusion as to whether the prescribed ‘fair argument’ could be made.” ’ [Citation.]” (*Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 150–151.) “If such evidence exists, the reviewing court must set aside the agency’s decision to adopt a negative declaration or a mitigated negative

declaration as an abuse of discretion in failing to proceed in a manner as required by law. [Citation.]” (*Grand Terrace*, at p. 1332.)

B. *Evidence Regarding Environmental Impacts*

It appears undisputed that the lot line adjustment—the immediate project at issue here—results in no direct physical environmental impacts, and neither requires nor permits new or expanded use of groundwater supplies.¹⁰ There are no environmental consequences directly arising from grant of Vogt’s application requiring mitigation.

The City acknowledged, however, that “[e]nlarging the vacant lot as proposed could . . . increase the likelihood that a single-family residence will be constructed on the vacant parcel and/or allow for construction of a larger home on that parcel than could currently be constructed.”¹¹ Appellants contend that any future residential development of the enlarged parcel would of necessity rely on groundwater resources, and a complete EIR with a detailed hydrogeological analysis is therefore immediately required.

Appellants, however, ignore or dismiss the substantial evidence in the administrative record that EBMUD water resources remain potentially available, and reliance on those

¹⁰ We will assume for our discussion, as did the City, that the future development of the property is a reasonably foreseeable indirect physical change in the environment arising from the lot line “project” under consideration and must therefore be discussed and addressed under CEQA. (See Guidelines, § 15378, subd. (a); *Laurel Heights*, *supra*, 47 Cal.3d at p. 396 [“EIR must include an analysis of the environmental effects of future expansion or other action if: (1) it is a reasonably foreseeable consequence of the initial project; and (2) the future expansion or action will be significant in that it will likely change the scope or nature of the initial project or its environmental effects”].)

¹¹ The parties disagree about the possibility of residential development of the smaller parcel even without the boundary adjustment. Petitioners insist here, and insisted below, that the lot as currently configured is not buildable. The City responded that the lot line adjustment was not a proposed subdivision or resubdivision of property, would not create a new legal lot of record and would not create a new buildable site where none already existed. As the City notes, the trial court in the Vogt Writ Proceeding found that both parcels were “legal lots,” and the City found that under existing zoning and city ordinances the .66 acre parcel could be developed.

resources, while perhaps problematic, has not been foreclosed.¹² If Vogt obtains nonstandard water service from EBMUD under a “Conditional Low Pressure Service Agreement,” there will be no environmental impact from future development on groundwater resources. Only if Vogt seeks to use groundwater resources for any future development do environmental concerns arise at all.¹³

The evidence, both expert and anecdotal, before the City Council supports more than a fair argument that drilling a new well, or expanding the use of the existing well, on Vogt’s property could have a potentially significant effect on the environment. The City did not dispute the arguments of Appellants or their experts and accepted “as a given” that groundwater supplies in the Lomas Cantadas neighborhood are extremely constrained and the limited aquifers already stressed. No new wells have been drilled in upper Lomas Cantadas for about 30 years. Existing wells in the area seasonally run low-to-dry, and the groundwater quality is poor due to pollution. Water must be hauled in by truck for the Grizzly Peak Stables, near the Vogt property, to supplement low well yield during annual dry periods. As noted by Planning Commission staff responses to public comments, “In short, there is no dispute that groundwater supplies could be adversely impacted if [Vogt] were to rely on groundwater to serve development of a single-family residence on the vacant parcel.” The City issued the negative declaration premised on its ability to eliminate or adequately mitigate any specific water impacts when and if building permits were sought for future development of the parcels, and in the event Vogt sought to rely on groundwater resources.

¹² In this analysis we apply the substantial evidence test. (*Oakland Heritage Alliance v. City of Oakland* (2011) 195 Cal.App.4th 884, 898 (*Oakland Heritage Alliance*) [the substantial evidence standard is applied to conclusions, findings and determinations].)

¹³ As the City observed in the initial study, evaluation of environmental impacts associated with future development of Vogt’s property could not be exhaustively evaluated in the absence of a specific development proposal, and it remains unknown whether Vogt will be able to obtain EBMUD water. CEQA does not require evaluation of speculative impacts. (Guidelines, §§ 15144, 15145.)

Appellants contend that issuance of the negative declaration in these circumstance constitutes an “impermissible deferral and delegation of the analysis of environmental impact.”¹⁴ “ ‘[I]t is improper to defer the formulation of mitigation measures until after project approval; instead, the determination of whether a project will have significant environmental impacts, and the formulation of measures to mitigate those impacts, must occur *before* the project is approved.’ [Citations.]” (*Oakland Heritage Alliance, supra*, 195 Cal.App.4th at p. 906; *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296 (*Sundstrom*)). In *Sundstrom* a use permit for a private sewage treatment plant was granted based on a negative declaration. (*Id.* at pp. 301–303.) The permit included conditions requiring the applicant to obtain hydrological studies analyzing the effect of the project on adjacent sewage disposal systems, surface and ground water hydrology, and other factors effecting soil stability and flooding of downslope properties, and then to mitigate any negative effects identified by the studies. (*Id.* at p. 306.) Division One of this court held that “[t]he requirement that the applicant adopt mitigation measures recommended in a future study is in direct conflict with the guidelines implementing CEQA. . . . [¶] By deferring environmental assessment to a future date, the conditions run counter to that policy of CEQA which requires environmental review at the earliest feasible stage in the planning process. . . . [¶] It is also clear that the conditions improperly delegate the County’s legal responsibility to assess environmental impact by directing the applicant himself to conduct the hydrological studies subject to the approval of the planning commission staff.” (*Id.* at pp. 306–307.) Similarly, Division Four of this court held that an EIR for a Richmond refinery project was defective where it identified only “a menu of potential mitigation measures, with the specific measures to be selected by Chevron and approved by the City Council a year after [p]roject approval.”

¹⁴ We agree with the City that there is no issue here of improper “delegation” of the City’s responsibilities or authority. The City is statutorily empowered to designate CCEH as the agency responsible for administering and enforcing its water well standards. (Orinda Mun. Code, § 8.36.020.) Appeals from CCEH decisions are heard by the City Council. (Orinda Mun. Code, § 8.36.160.)

(*Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 92.)

Deferral of selection of mitigation measures is permissible, however, “ ‘for kinds of impacts for which mitigation is known to be feasible, but where practical considerations prohibit devising such measures early in the planning process . . . , the agency can commit itself to eventually devising measures that will satisfy specific performance criteria articulated at the time of project approval. Where future action to carry a project forward is contingent on devising means to satisfy such criteria, the agency should be able to rely on its commitment as evidence that significant impacts will in fact be mitigated. [Citations.]’ [Citation.]” (*Sacramento Old City Assn. v. City Council* (1991) 229 Cal.App.3d 1011, 1028–1029 (*SOCA*); *California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 621 (*CNPS*)).

In *SOCA*, an EIR was prepared dealing with, among other topics, mitigation of traffic and parking impacts of the expansion of the downtown Sacramento Convention Center complex and construction of a nearby office tower. (*SOCA, supra*, 229 Cal.App.3d at p. 1015.) The plaintiffs challenged the adequacy of mitigation measures provided in the EIR. (*Id.* at p. 1026.) On appeal from denial of a petition for a writ of mandate, the court distinguished *Sundstrom* and found that the proposed mitigation measures satisfied CEQA. (*SOCA*, at p. 1030.) The agency acknowledged the potential environmental impacts, set forth a list of alternatives to be considered in the formulation of a transportation management plan (to be prepared by the agency and not the applicant), and had “committed itself to mitigating the impacts of parking and traffic.” (*Id.* at pp. 1028–1030; see also *Gentry, supra*, 36 Cal.App.4th at pp. 1394–1396 [no improper deferral of mitigation for residential development where mitigated negative declaration required the applicant to submit improvement plans, grading plans, and a final map for approval, plans that would be “subject to a host of specific performance criteria imposed by various ordinances, codes, and standards, as well as other mitigation

conditions”¹⁵].) *CNPS* also involved a challenged EIR which determined that the proposed project would significantly impact vernal pools, wetlands, and associated animal species. The lead agency identified and formulated a specific measure to mitigate these impacts, including “preservation or creation of replacement habitat offsite in a specific ratio to the habitat lost as a result of the [p]roject.” (*CNPS, supra*, 172 Cal.App.4th at p. 622.) The court found that the agency did not have to identify the exact offsite mitigation location, and that it was appropriate to defer such analysis where there was nothing in the record that suggested “the offsite mitigation measures the [c]ity proposed were not feasible or that the [c]ity had not fully committed to implementing those measures.” (*Id.* at pp. 622–623.) More recently, in *Oakland Heritage Alliance, supra*, 195 Cal.App.4th 884, Division Four of this court considered a challenge to an EIR for an large Oakland development project which found that seismic risks could be mitigated to less than significant levels by requiring site-specific, design level geotechnical investigation for each site area, preparation of final design parameters for the site improvements in compliance with applicable city ordinances and policies and the California Building Code, review and approval by a registered geotechnical engineer, and approval of final plans by the City of Oakland Building Services Division prior to the commencement of the project. (*Id.* at p. 889.) The court rejected the challenge, observing that “ ‘when a public agency has evaluated the potentially significant impacts of a project and has identified measures that will mitigate those impacts, the agency does not have to commit to any particular mitigation measure in the EIR, as long as it commits to mitigating the significant impacts of the project. Moreover, . . . the details of exactly how mitigation will be achieved under the identified measures can be deferred pending completion of a future study.’ . . . [¶] Furthermore, a condition requiring compliance with regulations is a common and reasonable mitigation measure, and may be proper where it

¹⁵ The *Gentry* court found that one condition allowing the developer “to obtain a biological report regarding the Stephens’ kangaroo rat” and “comply with any recommendations in the report . . . improperly defer[red] the formulation of mitigation.” (*Gentry, supra*, 36 Cal.App.4th at p. 1396.)

is reasonable to expect compliance.” (*Oakland Heritage Alliance*, at p. 906 [relying on *CNPS, SOCA, Sundstrom, & Gentry*].)

Here, the environmental concerns Appellants raise, and the City acknowledges, are not implicated until such time as Vogt seeks building permits for his property. Should Vogt succeed in his efforts to obtain an EBMUD connection for the water he needs, those concerns are obviated and “construction of a new single-family residence on that parcel would have no impact on groundwater supplies (i.e., would not deplete, pollute or otherwise impact groundwater).” If Vogt fails to do so, and seeks to expand his existing well or drill a new one, the City found that the nature and extent of the potential environmental impact could not be exhaustively evaluated in the absence of an actual development application. Approval of the lot line adjustment does not give Vogt any right to permits for a new well, or to expand his existing well. Further, the City was prohibited under the terms of the court’s order in the Vogt Writ Proceeding from requiring an established source of water for the property as a condition of the lot line adjustment. The City is not, however, precluded from conditioning building permits on such a requirement.¹⁶

It is undisputed that in order to install a new well, or alternatively to operate a “small water system” using the existing well, Vogt must obtain a permit from the CCEH. (Orinda Mun. Code, § 8.36.030, subd. A.) CCEH administers and enforces well permitting requirements under chapter 8.36 of the Orinda Municipal Code. Appellants and amici curiae argue that neither the City nor CCEH have any regulations or standards for assessing an individual well’s impact on groundwater supply, and that the relevant provisions of the Orinda Municipal Code do not address the impact of “drawdown” on neighboring wells. They note that the City’s municipal code focuses on “ensuring that the groundwaters of the city will not be polluted or contaminated” (Orinda Mun. Code, § 8.36.010), as do the Model Well Standards adopted by the State Water Resources

¹⁶ Development of the lot would require permits or approvals for “construction, grading, tree removal, drainage, water supply and sewage disposal”

Control Board (Model Ordinance, § 1.1). They also point to a March 31, 2006 letter from CCEH Environmental Health Director Quinlan to the City Planning Director, submitted in connection with Vogt's earlier application, in which Quinlan stated that CCEH "does not have sufficient 'performance standards' to prevent adverse impacts . . . as may occur following the issuance of a water supply permit by this Division." Thus, they conclude, adoption of the negative declaration "would forever foreclose study of environmental impact." We believe the evidence fails to support this conclusion.¹⁷

First, the March 2006 letter that Appellants cite, submitted in response to a then pending application by Vogt for operation of a small water system, also clearly stated CCEH's position that, "since provision of a water supply for the vacant parcel may disrupt the provision of water supplies for existing residential occupancies in the vicinity, a detailed comprehensive hydrogeological report must be completed" to show "sufficient quality and quantity of water will be available to supply not only [Vogt's] own properties, but also the properties of the residents already occupying homes in this area" Second, the reservation expressed by Quinlan about "performance standards" dealt with the limitation on the ability of CCEH to address any adverse impacts "following the issuance of a water supply permit." (Italics added.) He went on to state that as a consequence "this Division is unlikely to consider approving any require permits for a water supply [for Vogt's properties] without an EIR that fully addresses the anticipated results of issuance of such a water supply permit."

CCEH must deny an application for a well permit "if, in its judgment, issuance of a permit is not in the public interest." (Orinda Mun. Code, § 8.36.030, subd. D.) In the October 14, 2009 letter from Quinlan to the City Planning Director submitted in the instant proceeding, CCEH confirmed its intent to "vigorously implement [applicable

¹⁷ We question this as a legal conclusion as well. (See *Laurel Heights, supra*, 47 Cal.3d at p. 396 [if a future action is not considered at time of initial project approval, it may have to be discussed in a subsequent EIR before the future action can be approved under CEQA].) We also note that the City, in its resolution approving Vogt's application, committed to "comply[ing] fully with CEQA in acting on any future applications for discretionary approvals."

regulatory] standards” to “protect groundwater resources in the Lomas Cantadas area of Orinda.” To obtain required permits, Vogt “would be required to provide a full hydro-geological study . . . based on a specific development proposal.” CCEH assured the City that a permit would be issued only if the proposed well water use would not:

“(1) interfere with other existing wells or developed springs, (2) result in a drawdown that would adversely affect wells or developed springs needed to support existing or planned and permitted land uses, (3) interfere with the ability of existing area wells or developed springs to supply water at existing rates and quantities, (4) cause the aquifer to be overdrafted in the future, and/or (5) exacerbate any existing aquifer overdraft situation.” Under those criteria, a well permit will either not be issued at all (resulting in no environmental impact), or will be issued only if any impacts to groundwater resources can be reduced to less than significant.

In adopting the resolution approving Vogt’s lot line adjustment, the City confirmed its reliance on the CCEH review process for any future well application for the property, and committed to “comply[ing] fully with CEQA in acting on any future applications for discretionary approvals.” The question is simply whether the City could reasonably rely on what it termed a “well-established and rigorous review process” through CCEH as its designated agent, and the unqualified assurances from CCEH that no well permit will be issued without compliance sufficient to eliminate any significant environmental impact.¹⁸ This case appears to us to “fall squarely within the rule of *CNPS* that ‘when a public agency has evaluated the potentially significant impacts of a project and has identified measures that will mitigate those impacts,’ and has committed to mitigating those impacts, the agency may defer precisely how mitigation will be achieved under the identified measures pending further study. [Citation.]” (*Oakland Heritage Alliance, supra*, 195 Cal.App.4th at p. 910.) To the extent that the City can be said to have deferred mitigation of what are still speculative and uncertain impacts arising from

¹⁸ The acknowledged fact that no new wells have been drilled in the area in the past 30 years would appear to provide an additional reason to credit these assurances.

this project, it has acknowledged the environmental concerns, committed the City to mitigation of those concerns, and identified what would be required to do so. “That is enough.” (*Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1276.)

C. *Compliance with the Orinda General Plan and Zoning*

Appellants also challenge approval of the lot line adjustment on the ground that the project violates the City’s general plan provisions protecting the environment. Conflict with applicable general plan provisions can, in some cases, trigger the need to prepare an EIR. (*Pocket Protectors, supra*, 124 Cal.App.4th at p. 930 [“if substantial evidence supports a fair argument that the proposed project conflicts with [an adopted land use plan], this constitutes grounds for requiring an EIR”].)

The general plan land use designation for the site is “Residential Single-Family Very Low Density” with a minimum density of 10 acres per unit. However, the City concluded that the lot line adjustment would not result in any change in density since it “would not increase the existing density of lots in the area” and thus would not conflict with the general plan designation. The City, in the resolution approving Vogt’s application, found the application to be consistent with the general plan, and that it would not preclude development of the vacant site “in a manner that is consistent with the general plan.”

The zoning is designated “RVL-E Residential Very Low Density – Estates.”¹⁹ Both the existing and adjusted parcels, by virtue of their size, are nonconforming with current zoning (as is the improved parcel that Vogt’s home now occupies). Orinda Municipal Code section 17.20.5 provides for discretionary approval of a lot line adjustment if: “(1) the reconfiguration reduces the degree of nonconformity of each reconfigured parcel; or (2) does not substantially increase the degree of an existing nonconformity, so long as in either case the change will enhance neighborhood property

¹⁹ The findings of the resolution state that the parcels “are located in a transition zone between the RVL-E and the RL-20 zoning districts” with minimum lot sizes of 10 acres and 1/2 acre respectively. The median lot size within a 300-foot radius of the project site is 1.37 acres.

values and contribute to the quality of development in the area.” The Department found that the lot line adjustment would result in both increases and decreases in the degree of nonconformity with local quantitative standards on lot size, lot dimensions and building setbacks, with an overall decrease in the number and degree of nonconformities. As previously discussed, the existing parcel is a legal, buildable lot. With the lot line adjustment, the vacant parcel could be developed with “a somewhat larger home” with “fewer aesthetic impacts than would be associated with the placement of a smaller home on the existing vacant parcel.” Department staff observe that “[l]arger homes that are well designed and meet the City’s design review standards contribute more to neighborhood property values than smaller homes that loom over the roadway and have little or no natural topographic or vegetative screening.” The City also found that the proposed lot line adjustment would enhance property values in the neighborhood by allowing any construction to be sited with better setbacks from the roadway, and with better screening from views from the surrounding neighborhood, and would not degrade the quality of development in the area.

On land use issues, “ ‘[a] governing body’s conclusion that a particular project is consistent with the relevant general plan carries a strong presumption of regularity that can be overcome only by a showing of abuse of discretion.’ [Citations.]” (*Lagoon Valley, supra*, 154 Cal.App.4th at p. 816.) “We may neither substitute our view for that of the city council, nor reweigh conflicting evidence presented to that body. [Citation.]” (*Sequoiah Hills Homeowners Assn. v. City of Oakland* (1993) 23 Cal.App.4th 704, 717.) “This review is highly deferential to the local agency, ‘recognizing that “the body which adopted the general plan policies in its legislative capacity has unique competence to interpret those policies when applying them in its adjudicatory capacity. [Citations.] Because policies in a general plan reflect a range of competing interests, the governmental agency must be allowed to weigh and balance the plan’s policies when applying them, and it has broad discretion to construe its policies in light of the plan’s purposes. [Citations.] A reviewing court’s role ‘is simply to decide whether the city officials considered the applicable policies and the extent to which the proposed project

conforms with those policies.’ [Citation.]’ [Citation.]’ [Citation.]’” (*Lagoon Valley*, at pp. 816–817.) We must “resolve reasonable doubts in favor of the administrative findings and decision.” (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 514–515.)

Appellants’ reliance on *Pocket Protectors* is misplaced. In that case, the City of Sacramento approved a large planned unit development, despite statements by city staff that the project did not fulfill the intent of the planned unit development land-use designation insofar as it did not incorporate the landscaping and open space concepts. (*Pocket Protectors*, *supra*, 124 Cal.App.4th at p. 910.) The city planning commission voted to deny the project application, making detailed written findings of fact that the project was not consistent with sound principals of land use, and that the project was not consistent with Sacramento’s general plan update. (*Id.* at pp. 918–919.) The Sacramento City Council subsequently voted to approve the project, making contrary findings. (*Id.* at pp. 923–925.) In finding that an EIR was required, the court found that the petitioners raised a fair argument of environmental impacts and had adduced substantial evidence that the project conflicted with the objectives of a site specific planned unit development plan previously adopted by the City of Sacramento, and that the Sacramento City Council’s contrary findings in an mitigated negative declaration were “devoid of reasoning and evidence.” (*Id.* at pp. 931–932.) Here, Appellants point only to the City’s general plan land use policy goals to “maintain the semi-rural character of Orinda” (Policy 2.1.1(A)), “maintain the dominance of wooded and open ridges and hillsides” (Policy 2.1.1(B)), and require “progressively lower density as slopes increase” (Policy 2.1.2(C)). They make no attempt to show how approval of Vogt’s lot line adjustment, between currently developable parcels, is inconsistent with these general policy goals, or what environmental impact is even arguably implicated by merely adjusting the lot line.²⁰

²⁰ Amici curiae argue only that the lot line adjustment violates the City’s lot size and slope density requirements, which are zoning issues and not elements of the general plan. Amici curiae likewise point to no environmental impact arising from a variance from zoning requirements.

Even if we were to assume an inconsistency, “an inconsistency between a project and other land use controls does not in itself mandate a finding of significance. (See [Pub. Resources Code,] § 21083, subd. (b); Guidelines, § 15065, subd. (a).) It is merely a factor to be considered in determining whether a particular project may cause a significant environmental effect. [Citation.]” (*Lighthouse Field Beach Rescue v. City of Santa Cruz* (2005) 131 Cal.App.4th 1170, 1207.)

As we have discussed at length above, no direct environmental impacts are created by virtue of the lot line adjustment, and the City has reasonably concluded in its negative declaration that any environmental impacts arising from potential future development will be fully addressed and obviated by the applicable permitting processes. To the extent that approval of the application involved exercise of the discretionary authority granted to the City Council under the Orinda Municipal Code, substantial evidence supports the City’s findings and no abuse of that discretion is shown.

III. DISPOSITION

The judgment is affirmed.

Bruiniers, J.

We concur:

Jones, P. J.

Needham, J.