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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

CALIFORNIA HEALTHY COMMUNITIES
NETWORK,

Plaintiff and Appellant,

v.

CITY OF PORTERVILLE,

Defendant and Respondent;

WAL-MART STORES, INC.,

Real Party In Interest and Respondent.

F067685

(Super. Ct. No. VCU246336)

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. Melinda M. Reed, Judge.

M. R. Wolfe & Associates, P.C., John H. Farrow for Plaintiff and Appellant.

McCormick, Kabot, Jenner & Lew, Nancy A. Jenner; Manatt, Phelps & Phillips LLP, Jack S. Yeh, Brady R. McShane, and Keli N. Osaki for Defendant and Respondent and Real Party in Interest and Respondent.

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This case involves a challenge under the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.)¹ (CEQA) to a city’s approval of a shopping center project. After reviewing the record, we conclude that the city failed to comply with CEQA in its treatment of a single issue. Defendant City of Porterville (city) included a finding in its environmental impact report (EIR) that the project’s greenhouse-gas emissions would fall below a numerical significance threshold recommended by regulators. This finding was the basis of the EIR’s conclusion that the project’s impact from greenhouse-gas emissions would not be significant. Yet the city failed to present evidence in the EIR or elsewhere in the administrative record that would support a major portion of the reduced quantity of emissions claimed.

The city issued a memorandum addressing this topic on the day it approved the project. The memorandum did not supply any additional data in support of the EIR’s quantitative analysis. Instead, it supplied a new quantitative analysis not discussed in the EIR. Assuming this new analysis was adequate in itself, it was nonetheless procedurally improper, since it expressly stated that it made the EIR’s discussion “moot”—effectively replacing that discussion—but was presented to the public at the last minute and never included in any version of the EIR.

These deficiencies compel reversal of the trial court’s decision to deny the writ of mandate requested by plaintiff California Healthy Communities Network (CHCN). The city will be required to remedy the EIR’s defects before it can again consider approving the project.

FACTS AND PROCEDURAL HISTORY

The proposed project, called Riverwalk Marketplace Phase II, is a shopping center in Porterville. It consists of 202,854 square feet of retail space on a 21.8-acre site,

¹Subsequent statutory references are to the Public Resources Code unless otherwise noted.

anchored by a 161,602-square-foot Wal-Mart Supercenter. Adjacent to the site is the existing 360,000-square-foot Riverwalk Marketplace Phase I shopping center, occupying 40 acres and anchored by a Lowe's home improvement store. Surrounding the site are low-to-medium-density housing and commercial properties.

After receiving an application for approvals necessary to build the project, the city determined that an EIR was required. It issued a notice of preparation of the EIR in September 2008. A draft EIR (DEIR) was issued in March 2010 and a revised draft EIR (RDEIR) in February 2011.

One environmental impact discussed in the RDEIR is the emission of greenhouse gases that will be caused by the project, an impact the city found to be less than significant. The sufficiency of the evidence supporting this finding and the adequacy of the city's responses to CHCN's comments and requests for information on this topic are the only issues in this appeal.

The RDEIR explained that greenhouse gases, most importantly carbon dioxide, have a role in causing global climate change and that the burning of fossil fuels is the primary source of carbon dioxide emissions. Global climate change caused the average temperature of the earth's lower atmosphere to increase at the rate of 0.2 degrees Celsius per decade from 1990 to 2005 and is likely to continue causing temperature increases during the current century. These increases could lead to a variety of effects, including rising sea levels, extreme weather, and droughts. In California, the consequences could include water supply failures as a result of sea water intrusion into the Sacramento-San Joaquin River Delta and a declining Sierra snowpack.

In an effort to reduce California's contribution to global climate change, the Legislature passed the California Global Warming Solutions Act of 2006 (Act). (Health & Saf. Code, § 38500 et seq.) The goal of the Act is to reduce California's greenhouse-gas emissions to the level of 1990 by 2020. (Health & Saf. Code, § 38550.) Pursuant to its duties under the Act, the California Air Resources Board (CARB) determined that the

1990 level was 427 million metric tons of carbon dioxide equivalents (MMTCO₂e),² that under “business as usual” (BAU)—i.e., without action to reduce emissions growth—the level would rise to 596 MMTCO₂e by 2020,³ and that a reduction by 29 percent relative to BAU by 2020 was therefore necessary to achieve the Act’s goal.

The Natural Resources Agency promulgated regulations on the significance for CEQA purposes of greenhouse-gas emissions from new projects. The regulations were incorporated into the CEQA Guidelines.⁴ (California Natural Resources Agency, Adopted and Transmitted Text of CEQA Guidelines Amendments (Adopted Dec. 30, 2009).⁵) The regulations do not include any specific quantitative requirements, and they permit a lead agency to determine in its discretion whether to “[u]se a model or methodology to quantify greenhouse gas emissions resulting from a project, and which model or methodology to use.” (Guidelines, § 15064.4, subd. (a)(1).) The agency is also permitted to choose to rely on “a qualitative analysis” or “performance based standards.” (Guidelines, § 15064.4, subd. (a)(2).) Having chosen a methodology and selected a significance threshold, the agency should determine whether the project exceeds that threshold. (Guidelines, § 15064.4, subd. (b)(2).)

²State of California Air Resources Board Resolution 07-55, Dec. 6, 2007 <www.arb.ca.gov/cc/inventory/1990level/arb_res07-55_1990_ghg_level.pdf> (as of Aug. 28, 2014).

³<www.arb.ca.gov/cc/inventory/archive/forecast_archive.htm> (as of Aug. 28, 2014). This figure was later adjusted to 507 MMTCO₂e <www.arb.ca.gov/cc/inventory/data/forecast.htm> (as of Aug. 28, 2014).

⁴The CEQA Guidelines (“Guidelines”) are the regulations that implement CEQA, codified at California Code of Regulations, title 14, section 15000 et seq.

⁵See <http://resources.ca.gov/ceqa/docs/Adopted_and_Transmitted_Text_of_SB97_CEQA_Guidelines_Amendments.pdf> (as of Aug. 28, 2014). The amendments added sections 15064.4, 15183.5, and 15364.5 to the Guidelines and amended existing sections 15064, 15064.7, 15065, 15086, 15093, 15125, 15126.2, 15126.4, 15130, 15150, 15183, and Appendices F and G.

In 2009, the San Joaquin Valley Air Pollution Control District (SJVAPCD) adopted two documents, called “Guidance for Valley Land-use Agencies in Addressing GHG Emission Impacts for New Projects under CEQA”⁶ and “District Policy—Addressing GHG Emission Impacts for Stationary Source Projects Under CEQA When Serving as the Lead Agency.”⁷ These documents declined to mandate any numerical thresholds for greenhouse-gas emissions for land-use projects and endorsed the notion of using qualitative analysis or, where they have been developed for a particular emissions source, performance-based standards (also referred to as best performance standards or BPS). Recognizing that performance-based standards did not exist for many types of emission sources, however, SJVAPCD also concluded that a project’s greenhouse-gas emissions should be considered less than significant for CEQA purposes if the project’s emissions were 29 percent below an established baseline. This figure was taken from CARB’s findings. The baseline would be a BAU project, similar to the proposed project but lacking any emission-reduction features beyond those required by statutes or regulations in effect during the baseline period, defined as 2002-2004.

The RDEIR adopts both the quantitative/29 percent approach and the qualitative/BPS approach recommended by SJVAPCD:

“[T]he project’s significance with respect to GHG emissions and global climate change will be assessed based on project features and GHG reduction measures that are consistent with the SJVAPCD’s recommended BPS and the 29 percent reduction target as compared with [an] established BAU baseline for commercial developments.”

The RDEIR does not explicitly say which approach—the qualitative/BPS approach or the quantitative/29 percent approach—it is applying to various emission

⁶<<http://www.valleyair.org/programs/ccap/12-17-09/3%20ccap%20-%20final%20lu%20guidance%20-%20dec%2017%202009.pdf>> (as of Aug. 28, 2014).

⁷<<http://www.valleyair.org/programs/ccap/12-17-09/2%20ccap%20-%20final%20district%20policy%20ceqa%20ghg%20-%20dec%2017%202009.pdf>> (as of Aug. 28, 2014).

sources. It does, however, present the reductions claimed for the project quantitatively, in the form of a table purporting to show a total reduction greater than 29 percent:

Estimated Annual Operational GHG Emissions

<u>GHG Emissions Source</u>	<u>Emissions (Metric Tons CO₂e/year)</u>		
	<u>BAU Project</u>	<u>Proposed Project with Features</u>	<u>Percent Reduced from BAU</u>
Amortized Construction	11.81	11.81	0.0%
Motor Vehicles	11,799.97	7,052.23	40.2%
Area Sources (Natural Gas and Landscaping Equipment)	390.98	354.28	9.4%
Electricity Consumption	1,590.20	976.54	38.6%
Solid Waste Generation	161.54	161.54	0.0%
Water Supply, Treatment, and Distribution	9.70	3.75	61.4%
Wastewater Treatment	1.07	0.43	59.9%
Fugitive HFC Emissions (Refrigeration)	2,543.41	2,543.41	0.0%
Fugitive HFC Emissions (Air Conditioning)	926.49	705.31	23.9%
Annual Total GHG Emissions	17,435.17	11,809.30	32.3%

As the RDEIR notes, most of the total emissions are from motor vehicles. Of the total reduction of 5,625.87 metric tons of CO₂ equivalent emissions per year, 4,747.74 are from the claimed 40.2 percent reduction in motor vehicle emissions—almost 85 percent of the total reduction. This claimed reduction in vehicle emissions, without which the project would be far from achieving the reduction goal of 29 percent, is the focus of the appeal in this case.

As far as we can tell, there is no organized presentation in the RDEIR of the way in which the 40.2 percent reduction in vehicle emissions was derived. The RDEIR refers the reader generally to its own appendix 5.1, but we are not able to find in that appendix any account of the reasons why the project would have greenhouse-gas emissions from vehicles 40.2 percent lower than a comparable BAU project. In the absence of such an organized presentation, we have followed a table in CHCN's opening brief to piece together the following description, which totals approximately 40 percent. The city does not dispute the accuracy of CHCN's table.

In two places, the RDEIR refers to a 20 percent reduction in vehicle miles traveled and a 3 percent reduction in vehicle trips, which would account for more than half of the 40.2 percent reduction in vehicle emissions. Both of these references attribute the 20 percent reduction in miles traveled to the project's status as an "Infill Development." One also attributes the 3 percent reduction in trips to that status, while the other attributes it to the fact that the project will include "Mixed Uses." Two citations are given in support of the 20 percent and 3 percent figures: "California Air Pollution Control Officer's Association, *CEQA and Climate Change* (2008)" and "Sacramento Metropolitan Air Quality Management District, *Recommended Guidance for Land Use Emission Reductions* (2010)." Another citation given for the same figures is "Fehr & Peers 2007," but the city later disavowed this citation, saying in response to an inquiry by CHCN that it took the citation from the California Air Pollution Control Officers' Association (CAPCOA) document and was not able to obtain a copy of the Fehr & Peers study. In its brief in this appeal, the city states that the Fehr & Peers study was cited "inadvertently."

A table in the RDEIR provides a definition, taken from the 2008 CAPCOA paper, of an infill development that can be assumed to generate 20 percent fewer vehicle miles traveled and 3 percent fewer trips than a comparable BAU development:

“Infill Development: Project site is on a vacant infill site, redevelopment area, or brownfield or greyfield lot that is highly accessible to regional destinations, where the destinations rating of the development site (measured as the weighted average travel time to all other regional destinations) is improved by 100% when compared to an alternate greenfield site.” (CAPCOA, CEQA & Climate Change (Jan. 2008) p. B-19.)⁸

It is undisputed that the project in this case is “on a vacant infill site,” but the RDEIR contains nothing to support the proposition that its “destinations rating ... (measured as the weighted average travel time to all other regional destinations) is improved by 100% when compared to an alternate greenfield site.”

The RDEIR also includes a definition of “mixed use” development that can be expected to produce a 3 percent reduction in trips:

“Mixed Uses: The proposed project would locate a retail center with multiple uses within 0.25 mile of existing and future residential development.”

The 2008 CAPCOA paper and the 2010 Sacramento Metropolitan Air Quality Management District (SMAQMD) paper both have similar but not identical definitions. Those definitions, which describe the project characteristic in question as “Suburban Mixed-Use” both require the project either to have onsite, or be located within a quarter mile of, at least three of the following uses: retail, residential, park, open space, or office. (CAPCOA, CEQA & Climate Change, *supra*, p. B-18⁹; SMAQMD, Recommended Guidance for Land Use Emission Reductions (Jan. 12, 2010) p. 23.¹⁰) While it is undisputed that the project is a retail development and is within a quarter mile of

⁸<<http://www.capcoa.org/wp-content/uploads/downloads/2010/05/CAPCOA-White-Paper.pdf>> (as of Aug. 28, 2014).

⁹<<http://www.capcoa.org/wp-content/uploads/downloads/2010/05/CAPCOA-White-Paper.pdf>> (as of Aug. 28, 2014).

¹⁰<www.airquality.org/ceqa/GuidanceLUEmissionReductions.pdf> (as of Aug. 28, 2014).

residential neighborhoods, nothing in the RDEIR shows that it is within a quarter mile of open space, park, or office uses.

The RDEIR's section on greenhouse-gas emissions claims several other, more minor, emission-reducing features related to vehicle usage: a pedestrian network connecting stores in the project to surrounding streets (1 percent reduction); landscaped or shaded pedestrian paths through the parking lots to transit facilities (0.5 percent reduction); "End of Trip" facilities, i.e., lockers and showers for employees (0.625 percent reduction); and bicycle parking (0.625 percent reduction). All of these figures are drawn from the SMAQMD paper.¹¹ (SMAQMD, Recommended Guidance for Land Use Emission Reductions, *supra*, pp. 9, 11, 16.¹²) There is no dispute in this appeal about whether the evidence supports the claim that the project will generate these reductions.

The vehicle-related emissions reductions discussed above sum to only 28.75 percent (20 [vehicle-miles-traveled reduction for infill development] + 3 [trip reduction for infill development] + 3 [mixed-use development] + 1 [pedestrian network to streets] + 0.5 [pedestrian connectivity to transit] + 0.625 [end-of-trip facilities] + 0.625 [bicycle parking] = 28.75). This is substantially less than the 40.2 percent claimed for the project by the RDEIR. We are able to find no additional vehicle-related reductions attributed to the project in the RDEIR's section on greenhouse-gas emissions.

In an apparent attempt to present the best case for the city before attacking it, CHCN's brief attributes to the greenhouse-gas analysis an additional 13 percent reduction taken from the RDEIR section on traffic. The RDEIR's traffic-impact analysis takes credit for a "capture rate of 13 percent" to "account for the interaction of trips between

¹¹The RDEIR described the "End of Trip Facilities" as also being bicycle parking, but it appears that this was inadvertent.

¹²<www.airquality.org/ceqa/GuidanceLUEmissionReductions.pdf> (as of Aug. 28, 2014).

the Walmart and the [other] shopping center stores.” In other words, the project will generate 13 percent fewer trips than a comparable quantity of retail construction not concentrated in a single shopping center. The 13 percent figure was derived from a method described in Institute of Transportation Engineers (ITE), Trip Generation Handbook, second edition (June 2004). This publication states: “An *internal capture rate* can generally be defined as a percentage reduction that can be applied to the trip generation estimates for individual land uses to account for trips internal to the site.” It further explains that “the development of mixed-use or multi-use sites is increasingly popular. While the trip generation rates for individual uses on such sites may be the same or similar to what they are for free-standing sites, there is potential for interaction among those uses within the multi-use site, particularly where the trip can be made by walking. As a result, the total generation of vehicle trips entering and exiting the multi-use site may be reduced from simply a sum of the individual, discrete trips generated by each land use.” With this additional 13 percent trip reduction, the vehicle-use reduction features claimed by the RDEIR total around 40 percent.

CHCN sent a comment letter on the RDEIR to the city on April 8, 2011, during the public-comment period.¹³ The letter raised numerous issues, including the following points about the RDEIR’s claimed reductions in vehicle usage: the RDEIR did not provide data to show how the project met the definition of an infill development qualifying for the 20 percent reduction in vehicle miles traveled or the 3 percent reduction in trips; it did not provide data establishing that the project was a multi-use development qualifying for the claimed 13 percent capture rate; it did not show that the project had the characteristics necessary to claim the 3 percent reduction for being a mixed-use development; and it did not show that the project’s features would satisfy the

¹³A notice of availability of the RDEIR was published in the Porterville *Recorder* on February 22, 2011. As stated in the notice, the public-comment period ran from February 22 to April 8, 2011.

criteria for the reductions for bicycle parking, end-of-trip facilities, pedestrian network, or pedestrian pathway through parking. The common theme was that, although the RDEIR relied on reduction figures drawn from guidance documents (the CAPCOA and SMAQMD papers and the ITE handbook), it did not contain evidence that the project satisfied the criteria necessary to qualify for the reductions.

The city responded to CHCN's comment letter in the final environmental impact report (FEIR), which was issued on January 27, 2012. While acknowledging that reduction figures in the EIR were taken from the CAPCOA and SMAQMD documents, the response rejected the notion that the EIR was required to contain evidence that the project satisfied those documents' criteria before claiming reductions of the magnitudes stated in the documents: "The trip reductions claimed for the project for design features were based on SMAQMD guidance and CAPCOA's 2008 CEQA and Climate Change report, but the City is not required to conform to the exact verbiage espoused by these sources." Instead, the city claimed the reductions on the basis of "the judgment of [its] expert consulting firm" and the following qualitative factors: "The site is in an ideal location to take advantage of existing bicycle and transit facilities and the project provides supporting facilities and infrastructure to support their use. The site is adjacent to existing residential development that will provide large numbers of people within walking distance of the project site. The parking lot and store access is designed to encourage pedestrian access. The project is near the starting point of the Tule River Parkway class 1 bike path at Vandalia Avenue and Indiana Street that will encourage people more distant from the site to bicycle for work and shopping." There was no attempt to show quantitatively, for instance, that as an infill development, the project would reduce travel times to other destinations by enough to produce a 20 percent reduction in vehicle miles traveled relative to a BAU project that was not an infill development.

The FEIR also discussed the 13 percent capture rate claimed on the basis of the project's status as a multi-use development. It stated that the figure was backed by calculations performed in accordance with the ITE handbook's instructions, using the project's square footage data.¹⁴

CHCN submitted a response to the FEIR 10 days later, on February 6, 2012, the day before the public hearing scheduled for the city council's consideration of the project. Among other things, the response contended that the FEIR failed to rectify the RDEIR's deficiencies on the issue of greenhouse-gas emissions as pointed out in CHCN's earlier comment letter. The city still had not presented evidence to show that the project met the criteria necessary to claim credit for the vehicle-usage reductions described in the CAPCOA and SMAQMD documents. Regarding the 13 percent reduction for the project's status as a multi-use development, the letter further argued that if the calculations were based on the square footage devoted to various uses, the reduction relative to BAU should have been zero because the BAU project assumed for purposes of comparison should have the same mix of uses. The letter also stated that some of the claimed reductions were duplicative and the total amount claimed greatly exceeded the amount that can properly be attributed to all combined transportation-related strategies as stated in one of the guidance documents the city relied on. Finally, the letter stated that the city relied on inconsistent factual findings: the traffic-impact analysis found the traffic generated by the project would be greater than the traffic projected for purposes of the greenhouse-gas impact analysis. CHCN attached a letter by its expert, Tom Brohard, supporting its contentions.

¹⁴On April 1, 2011, in response to a request, the city provided CHCN with a worksheet showing these calculations. It does not appear that the worksheet was ever added to the EIR.

The city responded to CHCN's letter by issuing a memorandum the next day, February 7, 2012, which was the day of the public hearing. Attached were three more memoranda, written by the city's consultants.

One of the three consultant memos, written by Dave Mitchell of Michael Brandman Associates, addressed the greenhouse-gas impacts. In one part of his memo, Mitchell took essentially the same approach to CHCN's arguments as was taken in the FEIR. He made an argument similar to the argument in the FEIR that the project qualified for the reductions stated in the CAPCOA and SMAQMD documents on the basis of "professional judgment and interpretation" and several qualitative factors: The project will serve an underserved area, allowing residents to avoid traveling longer distances to shop; it will provide one-stop shopping so shoppers will not have to drive to various locations within Porterville; housing is within walking distance of it.

Mitchell added a new suggestion that, when added to the existing Phase I, the project would provide a "comprehensive mix of uses" now unavailable in Porterville, and that this is a special local consideration justifying "the use of the higher factor [for vehicle-usage reduction] than what may occur elsewhere" Related to this was another new notion not mentioned in the RDEIR or FEIR: that the project would reduce "retail sales leakage" to other towns by providing a type of shopping experience not presently available in Porterville, allowing Porterville residents to avoid driving long distances for this experience. This line of reasoning was unrelated to the EIR's claims about emissions reductions relative to a BAU project, since a BAU project would still be a project in Porterville, not a project in a distant town.

In another portion of the memo, Mitchell also took a new approach to the largest of the claimed reductions: the 20 percent reduction in vehicle miles traveled plus the 3 percent reduction in trips based on the project's status as an infill development. Mitchell reported that his firm had prepared an analysis of the effects of new regulations that went into effect after CARB determined that a 29 percent reduction in greenhouse gases

relative to BAU was necessary to achieve the Legislature's goal. These included new standards for motor vehicle emissions, low carbon fuels, electricity generation, and refrigerant management.¹⁵ This analysis concluded that, by themselves, these regulatory changes would result in a reduction of greenhouse-gas emissions for the project of 32.7 percent. This shows, Mitchell said, that "the reductions from land use and location strategies," i.e., the project's status as an infill development (and perhaps also its status as a multi-use or mixed-use development), "are not needed to demonstrate that the project would achieve reductions exceeding the SJVAPCD 29 percent significance threshold." Consequently, "the concern that credit for land use measures was overstated is moot, since the project remains less than significant [with respect to the impact from greenhouse-gas emissions] even when the reductions being questioned are not used." Mitchell asserted that this analysis also made unnecessary any other response to CHCN's contention that the reduction claimed for the project's status as an infill development was duplicative when combined with other measures.

On the issue of the 13 percent capture rate based on the project's being a multi-use development, Mitchell was equivocal in responding to CHCN's contention that the BAU project would have to have the same capture rate if it really was a comparable project. On one hand, Mitchell wrote that the RDEIR "considered the benefits of the shopping center as a whole and the interaction of all components, not just Phase II." This suggested that part of what qualified the project for the 13 percent reduction was its location next to Phase I, a point not made in the RDEIR or FEIR. Mitchell also said that building multi-use projects "has not yet achieved the status as business as usual,"

¹⁵These regulations, and their significance in the context of calculating a project's greenhouse-gas emissions, are discussed in the SJVAPCD's Final Draft Staff Report Addressing Greenhouse Gas Emissions Impacts Under the California Environmental Quality Act, issued November 5, 2009. On January 30, 2014, the city filed a request that we take judicial notice of pages of this document containing this discussion. The request is granted.

implying that any multi-use project would be entitled to claim a vehicle-usage reduction credit on this basis relative to a BAU project. On the other hand, Mitchell appeared to concede that a BAU project would have to have the same mix of uses as the project to be a proper reference point: “The commenter has argued that any similar project would also be eligible for this reduction. We agree with this statement. Any similar project would achieve similar reductions and should be so credited. The [commenter] refers to the BAU scenario that doesn’t include multi-use as a straw man not allowed by CEQA. We understand that there may be an appearance that this is the case, but no gaming of the system is intended.” Mitchell went on to state that this issue was moot as well, in light of the reductions from regulatory changes discussed above.

Mitchell did not deny that the trip-generation figure used in the RDEIR’s traffic-impact analysis was greater than the trip-generation figure used in its greenhouse-gas-impact analysis, as CHCN’s letter claimed. Instead, he stated that the figure used for the greenhouse-gas analysis included reduction measures while the figure used for the traffic analysis did not. This was a matter of convention and did not mean the lower figure used for the greenhouse-gas analysis was incorrect: “[T]raffic analyses traditionally have not used trip reduction measures to estimate intersection impacts except in large cities that have multi-modal traffic models capable of accounting for the measures.” Mitchell also concluded that this issue, like others, was moot in light of the new regulatory analysis.

Mitchell’s discussion did not attempt to supply any additional quantitative data or evidence to show that the project satisfied the criteria for the reductions as stated in the CAPCOA and SMAQMD documents.

The city council voted to approve the project at the end of the meeting on February 7, 2012. It certified the FEIR, adopted a statement of overriding considerations, and granted the necessary land-use approvals.

CHCN filed a petition for a writ of mandate in superior court on March 9, 2012, and a first-amended petition on September 21, 2012. The first-amended petition alleged

numerous CEQA violations as well as violations of the Planning and Zoning Law (Gov. Code, § 65000 et seq.) and the Porterville Municipal Code. The petition prayed for a writ of mandate directing the city to set aside its certification of the EIR and approval of the project.

In the trial court, CHCN chose to pursue only the following claims: the EIR's finding of no significant impact from greenhouse-gas emissions was not supported by substantial evidence; the city failed to make adequate responses to CHCN's comments on the RDEIR or to CHCN's requests for information; the new discussion in the memoranda the city issued in response to CHCN's additional comments submitted after issuance of the FEIR did not cure the EIR's deficiencies because it did not result in recirculation of the EIR; the city failed to adopt feasible mitigation measures for the project's traffic impact; and the project's noise impact violated the Porterville Municipal Code.

The trial court denied CHCN's petition in a written order. On the issue of greenhouse-gas emissions, the court found there was sufficient evidence in the EIR to support the findings that the project qualified for the claimed vehicle-usage reductions. It approved the qualitative factors the city relied on (for instance, that the project is adjacent to homes and businesses and that residents now drive to other towns to shop at large shopping centers), implicitly rejecting the view that the city is not entitled to claim the quantitative vehicle-usage reductions described in the CAPCOA and SMAQMD guidance documents unless it makes a quantitative showing that the project meets the criteria stated in those documents. The court also rejected CHCN's argument that the city relied on a new analysis in the memoranda it issued after the FEIR. Those memoranda only "supplied additional information and clarification." Further, the court rejected the claim that the 13 percent capture rate was unjustified because the BAU project should have the same mix of uses as the proposed project. It accepted the city's explanation that multi-use projects are a new phenomenon and "would not be considered

business as usual” Finally, the court ruled that the city made adequate responses to CHCN’s comments and requests for information.

The court also rejected CHCN’s arguments about traffic mitigation measures and noise impacts, issues not presented in this appeal. Judgment was entered on April 11, 2013.

DISCUSSION

I. Standards of review

We have summarized the applicable standards of review as follows:

“If a CEQA petition challenges agency action that is quasi-adjudicatory in character, the trial court’s role is only to determine whether the action is supported by substantial evidence in the record. (§ 21168.) If the agency action was quasi-legislative in character, the trial court reviews the action for abuse of discretion. The agency abuses its discretion if it does not proceed in the manner required by law or if the decision is not supported by substantial evidence. (§ 21168.5.) “Substantial evidence” is defined in the Guidelines as ‘enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached.’ (Guidelines, § 15384, subd. (a).) The formulations in sections 21168 and 21168.5 embody essentially the same standard of review. Both require the trial court to determine whether the agency acted in a manner contrary to law and whether its determinations were supported by substantial evidence, and neither permits the court to make its own factual findings. (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 392, fn. 5; *Burbank-Glendale-Pasadena Airport Authority v. Hensler* (1991) 233 Cal.App.3d 577, 589-590.) The Court of Appeal reviews the trial court’s decision de novo, applying the same standards to the agency’s action as the trial court applies. (*Neighbors of Cavitt Ranch v. County of Placer* (2003) 106 Cal.App.4th 1092, 1100.)” (*Woodward Park Homeowners Assn., Inc. v. City of Fresno* (2007) 150 Cal.App.4th 683, 705.)

II. Exhaustion of administrative remedies and preservation of issues for appeal

As a threshold matter, the city and real party in interest Wal-Mart Stores, Inc. (Wal-Mart), claim that CHCN failed to exhaust administrative remedies with respect to some issues raised in this appeal, describing CHCN’s letter and memo of February 6,

2012, as a “late-hit,” a “document dump” and an “ambush.” The city also claims CHCN forfeited its claims on some issues by failing to raise them in the trial court. As we will explain, CHCN exhausted administrative remedies with respect to all the issues it is necessary for us to address in this opinion. CHCN also preserved those issues for appeal.

Before a petitioner can assert a CEQA violation against an agency in court, someone—not necessarily the petitioner—must raise the same issue before the agency in the administrative proceedings. (§ 21177, subd. (a).) The petitioner itself need only have raised *some* objection before the agency (§ 21177, subd. (b)); if it has, it may then litigate any issue raised before the agency by anyone, so long as the claimed violation and the evidence on which it is based have been raised by someone in the administrative forum. (*Barthelemy v. Chino Basin Mun. Water Dist.* (1995) 38 Cal.App.4th 1609, 1620-1621.) “[L]ess specificity is required to preserve an issue for appeal in an administrative proceeding than in a judicial proceeding,” since citizens are not expected to bring legal expertise to the administrative proceeding. (*Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151, 163.) The exhaustion doctrine serves to give the agency an opportunity to respond to specific objections before those objections are subjected to judicial review. (*Park Area Neighbors v. Town of Fairfax* (1994) 29 Cal.App.4th 1442, 1449.) Where there was no public hearing or other opportunity for the public to raise objections, the exhaustion requirement does not apply. (§ 21177, subd. (e).)

We ordinarily do not consider claims of error where an objection could have been but was not made in some appropriate form at trial. It is usually unfair to the trial court and the adverse party to take advantage of an error on appeal which could have been corrected during the trial. (*People v. Saunders* (1993) 5 Cal.4th 580, 590; *Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 184-185, fn. 1.)

In light of our analysis below, the timing of CHCN’s February 6, 2012, letter has little bearing on the issue of exhaustion of administrative remedies in this case. The

primary issues in this appeal were raised by CHCN in the administrative proceedings much earlier, during the public comment period. CHCN's earlier letter, submitted on April 8, 2011, discussed at length the contention that the RDEIR did not contain sufficient evidence to justify its claims about reductions in vehicle usage. This letter discussed the claimed reductions based on infill development, mixed-use/internal capture, end-of-trip facilities, and bicycle and pedestrian features. The letter exhausted administrative remedies as to these issues. As will be seen, our resolution of the case does not involve any other issues.

The same is true of the claim that CHCN failed to preserve issues for appeal by raising them in the trial court. Our disposition of the case requires resolution only of issues that were raised in the trial court.

III. Insufficiency of evidence supporting greenhouse-gas significance finding

The main issue in this appeal is whether the EIR contained substantial evidence to support the finding that the project's impact from greenhouse-gas emissions will be less than significant. We agree with CHCN's contention that it did not.

The EIR has often been called the heart of CEQA. (*Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4th 1112, 1123.) It has two fundamental functions. First, it is an informational document whose purpose is to inform the public and decision makers of the environmental consequences of agency decisions before they are made. (*Ibid.*) Second, it can lead to affirmative legal obligations for agencies. They are required to "mitigate or avoid the significant effects on the environment" identified in an EIR "whenever it is feasible to do so" if they approve projects that have significant effects. (§ 21002.1, subd. (b).)

The EIR's *significance findings* are crucial to both of these functions. An EIR must "identify and focus on" those environmental impacts of the project that it finds to be significant. (Guidelines, § 15126.2, subd. (a).) If the agency has determined that possible impacts are not significant, the EIR must make a finding to that effect.

(Guidelines, § 15128.) If it finds that an impact is significant, the EIR must describe feasible measures that could minimize significant impacts. (Guidelines, § 15126.4, subd. (a)(1).) When an EIR finds an environmental impact to be less than significant, it effectively tells the public it can rest easy with respect to that impact, and at the same time it tells the lead agency it need not require the project proponent to take feasible steps to mitigate the impact.

Significance findings, consequently, are the foundation of what the Court of Appeal has called the “grand design” of CEQA:

“There is a sort of grand design in CEQA: Projects which significantly affect the environment *can* go forward, but only after the elected decision makers have their noses rubbed in those environmental effects, and vote to go forward anyway.” (*Vedanta Society of So. California v. California Quartet, Ltd.* (2000) 84 Cal.App.4th 517, 530.)

The EIR’s significance findings are what rub the noses of decision makers (and the public) in the environmental impacts of a project. This is why it is important for significance findings to be supported by substantial evidence. The EIR can do neither its public-information job nor its job of requiring feasible mitigation for significant impacts if its significance findings are unfounded.

As a part of the requirement that findings be supported by substantial evidence, CEQA demands that an EIR present findings and the evidence supporting them in a reasonably intelligible manner. “The data in an EIR must not only be sufficient in quantity, it must be presented in a manner calculated to adequately inform the public and decision makers, who may not be previously familiar with the details of the project.” (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 442 (*Vineyard*)). No one’s nose is rubbed in findings or data that cannot be understood.

The EIR in this case did not contain substantial evidence in support of its significance finding on greenhouse-gas emissions and did not present the data it did contain in an intelligible fashion. We begin with intelligibility.

A reader studying the RDEIR's sections on greenhouse-gas emissions, sections 5.1.7 to 5.1.11, learns that the project's emissions will not cause a significant environmental impact if they are at least 29 percent below BAU, in accordance with the findings of CARB and the guidance of SJVAPCD. Then the reader sees a table purporting to show that the project's greenhouse-gas emissions will be 32.3 percent below BAU, and that the bulk of this reduction comes from a 40.2 percent reduction in emissions from motor vehicles. The reader will also see, in another table, that portions of the vehicle-usage reductions, shown as 20 percent and 3 percent, are being claimed on the grounds that the project is an infill development and a mixed-use development.

A reader seeking the evidence upon which these claims are based finds a footnote referring to the RDEIR's appendix 5.1 as a whole, with no specific page references. Appendix 5.1, titled "Air Quality Calculations," is about 15 pages of tables displaying data related to various aspects of the RDEIR's discussions of various air-quality issues. A determined reader reviewing each table will not find any calculation showing a 40.2 percent reduction in vehicle emissions. Instead, he or she will find, in footnotes to two of the tables, references to the reductions discussed in the CAPCOA and SMAQMD documents. No combination of figures attributed to those reductions adds up to 40.2 percent, or any number close to it. As we have mentioned, a number close to it can be reached if the reader supplies the 13 percent reduction based on internal capture, which is found in a different section of the RDEIR, the traffic section.

The path we have just described appears to be the path taken by CHCN in arriving at the calculations, unchallenged by the city, that are presented in CHCN's opening brief in this appeal. It is not reasonable to expect members of the public to have discovered this path. The situation is similar to that in *Vineyard*, in which "[f]actual inconsistencies

and lack of clarity” in the final EIR left the reader and the decision makers without substantial evidence to support the finding that the project would have an adequate water supply. (*Vineyard, supra*, 40 Cal.4th at p. 439.) A reader would have to make an unreasonable effort to “ferret out” the necessary data. (*Id.* at p. 442.) In this case, we would never have been able to guess the components of the 40.2 percent figure had CHCN’s brief not put the pieces together for us.

Once the pieces have been assembled, it becomes apparent that the EIR contains no data to back up the largest piece. The sole support offered for the reduction based on the project’s infill status is the guidance documents from CAPCOA and SMAQMD. These documents offer general guidance, not data about Wal-Mart’s project. They state that a given reduction in vehicle usage can be attributed to a project *if* the project satisfies certain criteria. The CAPCOA document states that an infill project can claim a 20 percent reduction in vehicle miles traveled only if the project reduces travel times from other locations by a specified amount. The CAPCOA and SMAQMD documents state that a mixed-use project can claim a 3 percent reduction in trips only if it results in certain combinations of uses existing within a certain radius. The RDEIR contained no data showing that these conditions were satisfied. When the city responded in the FEIR to CHCN’s comment on this point, it merely asserted that it was entitled to claim the reductions without conforming to the documents’ “exact verbiage.” This response perhaps suggested that there was *some* quantitative data that justified claiming reductions of the quantities specified in the documents, just not the precise facts the documents contemplated. Yet the FEIR did not reveal any such alternative data.¹⁶

¹⁶At oral argument, we gave counsel for Wal-Mart a final opportunity to mention places in the administrative record where we could find evidence to support the EIR’s claim that the project would reduce greenhouse-gas emissions by a stated quantity relative to a hypothetical BAU project. We have reviewed the material counsel cited. It includes qualitative evidence regarding reductions in emissions, but it does not include quantitative evidence sufficient to support the EIR’s quantitative claims.

It might be argued that the EIR contains both a qualitative and a quantitative analysis and that, even though the quantitative analysis is unsupported, the city was under no obligation to provide any quantitative analysis at all, since the Guidelines permit a lead agency to employ a qualitative approach. The qualitative aspects of the analysis in the EIR, it might be said, were sufficient on their own. We might agree with this argument had the EIR clearly set forth the two analyses as separate and independent bases for the significance conclusion (or if the EIR had contained a qualitative analysis alone). Then the reader would know that the city considered either analysis adequate and that its decision to approve the project did not depend on both. As it is, however, the two analyses are interlaced in the EIR and the reader is led to view the quantitative part as essential. The EIR presents not a qualitative analysis supplemented by an independent quantitative one, but rather a qualitative analysis decorated with baseless numbers. This misled the public.

A related point that might have been made in the city's favor is that an EIR's discussion of an effect found to be less than significant, like the project's impact on greenhouse-gas emissions here, is not required to be extensive. (See, e.g., *North Coast Rivers Alliance v. Marin Municipal Water Dist. Bd. of Directors* (2013) 216 Cal.App.4th 614, 637-638 (*North Coast Rivers*)). "An EIR shall contain a statement *briefly* indicating the reasons that various possible significant effects of a project were determined not to be significant and were therefore *not discussed in detail* in the EIR." (Guidelines, § 15128, italics added.) The discussion must still be supported by sufficient evidence in the administrative record, but it can be short and even "may be contained in an attached copy of an initial study." (*Ibid.*) In this case, if the city had written *less* in the EIR and not committed itself to numerical claims it could not back up, the EIR might have passed muster under the "brief discussion" standard. But that is not what happened. Instead, the city included strong, extensive quantitative claims that were not supported. We cannot

uphold a discussion of that character under the “brief discussion” standard because it is misleading to the reader.

Finally, the city and Wal-Mart argue that the memoranda the city issued on February 7, 2012, the day of the hearing at which the project was approved, contained substantial evidence sufficient to support the significance finding on greenhouse-gas emissions even if the EIR did not, and therefore cured any deficiency in the EIR. We do not agree.

The new discussion in Mitchell’s February 7 memorandum failed to supply the missing evidentiary basis for the EIR’s quantitative claims. It did, however, provide a new quantitative analysis based on regulatory changes, in addition to reiterating and marginally bolstering the qualitative analysis in the EIR. These new aspects arguably succeed as an independent basis for the EIR’s finding that the project’s greenhouse-gas emissions will not be significant.

In our view, an analysis outside the EIR and presented at the final public hearing before project approval cannot cure the insufficiency of the EIR under the circumstances of this case. It has, we acknowledge, been held that substantial evidence outside an EIR but within the administrative record can be relied upon to support a brief discussion of an impact found to be less than significant. (*North Coast Rivers, supra*, 216 Cal.App.4th at p. 638.) But we do not think that this holding applies to a situation like this one, in which the EIR contains extensive, unsupported discussion of a nonsignificant impact and the additional discussion outside the EIR primarily substitutes a different analysis in place of the one provided in the EIR. This is particularly so where the additional discussion was not made public until the final hours before project approval. To uphold the EIR’s significance finding based on Mitchell’s February 7 memorandum would undermine CEQA’s purpose of placing the facts before the public in time for the public to process them and submit potential objections to the agency. Under these circumstances, we must rely on the more general proposition that “[i]t should be understood that whatever is

required to be considered in an EIR must be in that formal report; what any official might have known from other writings or oral presentations cannot supply what is lacking in the report.” (*Environmental Defense Fund, Inc. v. Coastside County Water Dist.* (1972) 27 Cal.App.3d 695, 706.)

We cannot agree with the city and Wal-Mart’s contention and the trial court’s ruling that the February 7 memoranda merely clarified and reinforced the analysis in the EIR. The EIR stated that the project’s impact from greenhouse-gas emissions will not be significant because they will be more than 29 percent below BAU, while the Mitchell memorandum asserts that the EIR’s quantitative analysis is unnecessary and moot and that regulatory changes mean the project will achieve the 29 percent reduction goal by other means. The city and Wal-Mart argue that the new regulations were mentioned in the EIR, but merely mentioning them is a far cry from relying on them to establish a quantitative finding, as the Mitchell memorandum aimed to do.

In sum: If the EIR had contained a brief discussion explaining the conclusion that the project’s greenhouse-gas emissions will be less than significant, and if the EIR or administrative record had contained substantial evidence supporting that discussion and conclusion, the city and Wal-Mart could have prevailed. But that is not what happened. The EIR claims its significance finding on greenhouse-gas emissions is supported by a quantitative analysis establishing that emissions are reduced by a certain amount by the project’s features and location. For a major portion of the reductions claimed by this analysis, however, there is no substantial evidence in the EIR or elsewhere in the administrative record. A memo outside the EIR presenting a new and different analysis was not presented to the public in time to allow meaningful review and therefore could not cure the EIR’s deficiencies. It follows that the EIR was not properly certified.

CHCN offers other reasons, in addition to those discussed above, why there was insufficient evidence to support the finding that the project’s greenhouse-gas emissions will be insignificant. It says the claimed 40.2 percent reduction in vehicle emissions

exceeded a cap for such reductions set forth in one of the guidance documents cited by the city. It asserts that the 13 percent reduction based on the project's mixed-use status was improperly claimed because any comparable BAU project would involve the same retail uses. It also argues that the city's February 7 memoranda included arguments that were incoherent or contradicted the EIR. In light of our analysis, it is unnecessary to address these additional contentions.

IV. Remaining issues

In addition to the substantial evidence issue, CHCN's appeal raises the following claims: The city failed to provide the Fehr & Peers study we mentioned above; the city failed to include in the FEIR adequate responses to CHCN's timely comments; and the city failed to recirculate the EIR after adding new information in the February 7 memoranda.

As for the Fehr & Peers study, as we have said, the city asserted that the EIR referred to that study inadvertently. When CHCN asked for it, the city replied that it did not have a copy and it disavowed any reliance on the study. It disavows any reliance on it again on appeal. We conclude that this issue is moot.

The issues of comment responses and recirculation are rendered moot by our conclusion that the EIR's greenhouse-gas-emissions analysis was insufficiently supported. It is unnecessary to address those issues.

DISPOSITION

The judgment is reversed. The trial court is directed to issue a writ of mandate ordering the city to reverse its actions certifying the EIR and granting project approvals. Respondents' request for judicial notice, filed January 30, 2014, is granted. Appellant shall recover its costs on appeal.

Chittick, J.*

WE CONCUR:

Cornell, Acting P.J.

Franson, J.

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