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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

SAVE OUR SAN JUAN,

Plaintiff and Appellant,

v.

THE KOLL COMPANY et al.,

Defendants and Respondents.

G044541

(Super. Ct. No. 30-2009-00305377)

O P I N I O N

Appeal from a judgment and order of the Superior Court of Orange County,
Thierry P. Colaw, Judge. Affirmed in part, reversed in part with directions.

Mark S. Rosen for Plaintiff and Appellant.

Allen Matkins Leck Gamble Mallory & Natsis, Patrick E. Breen and
Heather S. Riley, for Defendants and Respondents The Koll Company and Scott
Meserve.

Woodruff, Spradlin & Smart, and Ricia R. Hager, for Defendant and
Respondent City of San Juan Capistrano.

INTRODUCTION

Save Our San Juan (SOSJ) appeals from the denial of its writ of mandate regarding the approval of an office development in San Juan Capistrano proposed by the Koll Company. SOSJ has several complaints about the way the City of San Juan Capistrano (the City) reviewed the project under the California Environmental Quality Act (CEQA).

SOSJ objected to the certification of the project's final environmental impact report (EIR) on three grounds. First, the scope of the project should have been larger. It should have included the entire northeastern part of San Juan. Second, the City did not consider two feasible alternatives to the Koll project, alternatives proposed by SOSJ. Finally, the City did not properly consider mitigation of anticipated traffic increases at two already busy intersections.

SOSJ also objected to the City's adoption of a statement of overriding considerations, which allowed Koll to go ahead with the project despite its inability to mitigate certain significant environmental impacts. SOSJ claims the statement is not supported by substantial evidence.

We agree with Koll, the City, and the trial court that the City properly certified the EIR. Our review of the certification procedure is limited to prejudicial abuse of discretion, and we see no abuse of the discretion CEQA affords the City regarding the decisions it made on the EIR issues SOSJ identified in this appeal.

The statement of overriding considerations, however, is another story. We agree with SOSJ that this statement lacks substantial supporting evidence; in fact, on this record it lacks *any* evidence. The City abused its discretion, because it did not proceed in the manner CEQA provides.

The City and Koll argue that SOSJ did not exhaust its administrative remedies by objecting to the statement at the two public hearings on the project. The

City did not, however, give proper notice to the public of what was going to be discussed at these public hearings; exhaustion of administrative remedies is therefore excused.

FACTS

Koll applied to the City for permission to develop a nine-acre site at the northern end of San Juan Capistrano, just east of the I-5 freeway and bordering the east side of a major thoroughfare, Rancho Viejo Road. The immediate general area was zoned for office complexes, among other uses, and already included a substantial development, the aptly named Mammoth Professional Offices. The Koll site, just to the south, was formerly the location of a school, now demolished. It was, in essence, vacant land. Koll proposed to construct 9 one- and two-story office buildings, totaling nearly 67,000 square feet. A draft EIR was available for review in November 2008.

The project was opposed by residents of the neighborhood immediately to the south, a rural, equestrian area. They were particularly concerned about the prospect of losing a knoll and several berms to grading if the project went forward as planned. But they also believed the project would worsen traffic conditions on Rancho Viejo Road, which was already congested and, they maintained, dangerous. The residents had only one way in and out of their neighborhood: through Spotted Bull Lane, the sole outlet to Rancho Viejo Road.

The traffic and circulation portion of the draft EIR considered effects only on major intersections within San Juan itself: Rancho Viejo Road and Via Escobar (north of the project), Rancho Viejo Road and Junipero Serra Road (to the south), and the freeway ramps at Junipero Serra. The report concluded that long-term (i.e., not construction-related) traffic mitigation was needed only at the intersection of Rancho Viejo Road and Junipero Serra and at the northbound Junipero Serra freeway ramps.

Mission Viejo, San Juan's immediate neighbor to the north, commented on the draft EIR, pointing out that the traffic in San Juan Capistrano was not the only concern. Traffic effects of the project would be felt in Mission Viejo too, specifically at

the Avery Parkway freeway ramps. Mission Viejo also wanted the two closely-spaced freeway ramp intersections at Avery Parkway and at Junipero Serra evaluated together.

Traffic Mitigation

Heeding the comments received on the draft EIR, the City revised and recirculated the report. The new report featured a greatly expanded traffic study, which included eight additional important intersections, some of which were in Laguna Niguel (another northern neighbor) and in Mission Viejo. The recirculated EIR, dated April 2009, studied the intersections of Avery Parkway and Marguerite Parkway (Rancho Viejo Road's name in Mission Viejo), and at the Avery Parkway freeway ramps, among others. As Mission Viejo's earlier comment had implied, traffic at all three spots was, not to put too fine a point on it, terrible. The Koll project would make it worse.

The recirculated EIR proposed two mitigation measures for these intersections. For the Avery Parkway/Marguerite Parkway intersection, the report provided, "Prior to issuance of the certificate of occupancy, the project applicant shall install a southbound right-turn lane as mitigation for the direct impact. Based on field measurements, the southbound right-turn lane can be striped within the existing pavement." For the problem with the Avery Parkway freeway ramps, the report proposed that Koll pay a fair-share fee for improving the ramps before it obtained a certificate of occupancy. With these mitigation measures in place, the report stated, the traffic environmental impacts at both of these spots would be less than significant.

Mission Viejo disagreed. After reviewing the recirculated EIR, Mission Viejo's community development department sent the City a four-page memorandum, dated May 19, 2009, voicing its complaints about the expected increase in traffic. In particular, Mission Viejo saw the intersection at Avery Parkway and Marguerite Parkway, which was already operating at a failed level of service, getting worse because of the project. The proposed mitigation measure – a new dedicated right-turn lane within

the existing pavement – would not work, because it would eliminate a bike lane, contrary to Mission Viejo’s street standards.¹

Koll too was dissatisfied with the mitigation measure for the Marguerite Parkway/Avery Parkway intersection. In a comment letter dated May 15, 2009, Koll’s counsel asked to have the measure revised. Instead of being an installation of a new right-turn lane at Avery and Marguerite, Koll wanted the mitigation measure to be a commitment letter sent to Mission Viejo agreeing either to install the right-turn lane or to pay a fair share of the cost of installing it. Because the City had no control over Mission Viejo, Koll recommended “a better approach”: the commitment letter and a statement of overriding considerations. The City agreed to these revisions. It also prepared a statement of overriding considerations to be included in the entire package to be presented to the city council.

Feasible Alternatives

As required by CEQA, the draft EIR studied alternatives to the Koll project. These were: (1) no project/no development; (2) a reduced intensity project; (3) an alternative design; and (4) an alternate site. The alternate site was undesirable because of inadequate road access and potentially dangerous geologic factors. The alternative design was a project introduced several years earlier by the previous property owner (Zion Enterprises), which contemplated a three-building office development of approximately 72,000 square feet. This alternative included medical offices, which generate more traffic than ordinary offices, and was much bulkier than the Koll project. Faced with neighborhood opposition, Zion had ultimately withdrawn this project. The

¹ In its response to this comment, the City promised to incorporate into the mitigation Mission Viejo’s concern about the right turn lane not fitting in the existing pavement because of the bike lane. No such incorporation occurred.

draft EIR identified the “reduced intensity” alternative, the second alternative, as an environmentally superior alternative.²

SOSJ identified two other alternatives. Before Zion’s project (which SOSJ had opposed) came up for city council approval in 2005, Zion had met with an SOSJ representative and hammered out a compromise plan, one that SOSJ and Zion could live with. Zion and SOSJ had then asked the city council to continue the hearing on project approval, so they could solicit comments from the other neighbors about the compromise plan. The city council would not agree to continue the hearing. At that point, Zion threw in the towel, withdrew its project, and sold the property.

SOSJ revived this compromise proposal – called the Zion ‘05 project – and submitted it to the City in September 2007 as an alternative to the Koll project. The EIR did not specifically consider the Zion ‘05 project as one of the alternatives.³

On June 3, after receiving notice of the June 16 public hearing on the Koll project, SOSJ contacted the City to obtain documents regarding the withdrawn Zion project (*not* the Zion ‘05 project, but the larger one), evidently planning to present them or refer to them at the June 16 hearing. SOSJ asked to have these documents included in the staff report for the hearing. They were before the city council at the hearing.

On June 28, 2009, after the initial city council hearing, SOSJ proposed another alternative, the Koll ‘09 project. Based on the Zion ‘05 project, it called for the elimination of about 13,000 square feet, and included a site diagram. The City did not consider this proposed alternative.

² If “no development” is the environmentally superior alternative, the guidelines require the public agency to identify a superior alternative from among the others. (Cal. Code Regs., tit. 14, § 15126.6, subd. (e)(2).)

³ The Zion ‘05 (compromise) project should not be confused with the project for which Zion sought the City’s official approval in 2005, which was quite a bit larger than the Zion ‘05 project and which Zion ultimately withdrew. This larger project was the Zion project considered in the EIR as the “alternative design.”

Project Approval

The project came up for review and approval at the city council meeting on June 16, 2009. Notice of this hearing was mailed to affected property owners and published in the local newspaper. After hearing testimony from the staff, from Koll, and from the public, the council continued the matter for two months, to give Koll and the objecting neighbors a chance to try to work out an acceptable compromise. Two community workshops took place afterwards, under the auspices of the City's planning department. At that time, concerns about traffic, lighting, views, signage, noise, and landscaping were addressed. Koll also agreed to a small reduction in the project's gross square footage.⁴

The city council took up the issue again at a public meeting on August 18, 2009, and this time the council adopted a resolution certifying the final EIR, adopting findings of fact, approving the statement of overriding considerations, and adopting the mitigation monitoring reporting program. The adjustments Koll had promised as a result of the community forum were added to the resolution. Some small revisions to the project were approved on September 1, 2009.

SOSJ then filed a petition for writ of mandate asking to have the final EIR set aside. The court denied SOSJ's petition on August 27, 2010, on the grounds that SOSJ had failed to show the findings and evidence insufficient to support certification of the final EIR. The court specifically disagreed with SOSJ's positions on the feasible alternatives, the impacts, and traffic mitigation. It also found the statement of overriding considerations was proper. This appeal followed.

DISCUSSION

⁴ The project was already well under the maximum square footage permitted by the City's land use and zoning for that area.

SOSJ has identified four issues on appeal. First, SOSJ claims the City defined the project too narrowly. It should have included the entire area along Rancho Viejo Road from Avery Parkway (in Mission Viejo) to Junipero Serra Boulevard. Second, the City did not consider feasible alternatives to the proposed project. The EIR also did not provide for mitigation of the traffic impacts on Rancho Viejo Road. Finally, the statement of overriding considerations was not supported by substantial evidence.

Three of these issues directly attack the content of the EIR itself. The fourth issue, however, deals with a document – the statement of overriding considerations – that is not part of the EIR. Accordingly we review SOSJ’s contentions with respect to each document separately.

I. The EIR

A. Standard of Review

The California Supreme Court has explained how to review the adequacy of an EIR. The Public Resources Code restricts any such review “only to whether there was a prejudicial abuse of discretion.” (Pub. Resources Code, § 21168.5.)⁵ An agency abuses its discretion “either by failing to proceed in the manner CEQA provides or by reaching factual conclusions unsupported by substantial evidence. [Citation.] Judicial review of these two types of error differs significantly: While we determine de novo whether the agency has employed correct procedures, . . . we accord greater deference to the agency’s substantive factual conclusions. In reviewing for substantial evidence, the reviewing court ‘may not set aside the agency’s approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable,’ for, on factual questions, our task ‘is not to weigh conflicting evidence and determine who has the better argument.’ [Citation.]” (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of*

⁵ All further statutory references are to the Public Resources Code, unless otherwise indicated. This section applies to any review of a CEQA “determination, finding, or decision 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,” not just EIR certification. (§ 21168.)

Rancho Cordova (2007) 40 Cal.4th 412, 435.) Our review of the administrative record for legal error is the same as the trial court's. We review the agency's action, not the lower court's decision. (*Id.* at p. 427.) The certification of an EIR is presumed correct, so the challenger bears the burden of proving its inadequacy under CEQA. (*Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 530.)

B. Project Definition

On appeal, SOSJ protests that the project boundaries are too narrowly drawn. According to SOSJ, the City improperly limited the project to the Koll property. SOSJ contends that the project should include the northern entrance to the City, the Rancho Viejo Road corridor, and both the Spotted Bull and the Country Hill Estates neighborhoods. Because of the effect on Rancho Viejo Road, SOSJ argues, the City should have included the entire area between Avery Parkway and Junipero Serra Road in the project. SOSJ's suggestion for mitigation was the dedication of the knoll at the intersection of Spotted Bull Lane and Rancho Viejo Road to the Spotted Bull neighborhood property owners at no cost to them.

The CEQA guidelines define "project" as the term applies to Koll's proposed office buildings as "the whole of an action, which has the potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and that is . . . [¶] . . . [¶] [a]n activity involving the issuance to a person of a lease, license, certificate, or other entitlement for use by one or more public agencies." (Cal. Code. Regs., tit. 14, § 15378, subd. (a)(3).) CEQA defines "environment" as "the physical conditions which exist within the area which will be affected by a proposed project, including land, air, water, minerals, flora, fauna, noise, objects of historical or aesthetic significance." (§ 21060.5.) An EIR is required on any project that "may have a significant effect on the environment." (§§ 21100, subd. (a), 21101, 21151, subd. (a).) A "'significant effect on the environment' means a substantial,

or potentially substantial, adverse change in any of the physical conditions *within the area affected by the project . . .*” (Cal. Code Regs., tit. 14, § 15382, italics added.)

The relevant statutes and guidelines do not support SOSJ’s objections to the Koll project’s scope. A project is an “activity” or an “action,” not a place. The only activity at issue here is the construction of office buildings. The City had to prepare an EIR if constructing the office buildings would significantly affect the environment, that is, the physical conditions in the area affected by putting up the office buildings.

The draft EIR studied the effects that constructing the office buildings would have on land use, traffic, air quality, noise, and aesthetics (including changes to the view), among other possible impacts, not just impacts on the specific site. The draft EIR also took into account effects on the Spotted Bull neighborhood, specifically traffic, noise, light, and view impairment. The recirculated EIR concentrated on traffic impacts on Rancho Viejo Road between Avery Parkway to the north and Junipero Serra Road to the south, as well as on other nearby intersections and roadways.

The only discrepancy between what actually happened in the environmental review process and what SOSJ claims should have happened is a study of the effects on the Country Hills Estates neighborhood.⁶ Otherwise, the two EIRs together considered the effects on the Rancho Viejo Road view corridor and the traffic caused by the project, as well as all the other effects the project would have on the area’s physical conditions. SOSJ has not explained why failing to study the project’s specific effects on the Country Hills Estates neighborhood renders either EIR inadequate as an informational document. SOSJ has not carried its burden to show that the Koll project was improperly defined.

C. Feasible Alternatives

As stated above, it is not our task to decide whether the City was correct in preferring the Koll project to any of the alternatives identified in the EIR, or to the Zion

⁶ The draft EIR places the Country Hills Estates neighborhood somewhere east of the Koll site. At the August 18 city council meeting, the staff placed the neighborhood immediately east of the site.

'05 project, or the Koll '09 project. It is our task to determine whether the City followed the law and whether it has supported its findings regarding alternatives with substantial evidence. We review procedural violations of CEQA de novo and an agency's factual determinations for substantial evidence. (*California Native Plant Society v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 987.)

One important purpose of an EIR is to identify and discuss alternatives to the proposed project that would lessen the impact on the environment. (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564-565; § 21002.1, subd. (a).) The guidelines require a discussion of a reasonable range of alternatives and a comparison of the merits of these alternatives. (Cal. Code Regs., tit. 14, § 15126.6, subds. (c), (d).) To be legally sufficient, the discussion of project alternatives in an EIR "must permit informed agency decisionmaking and informed public participation." (*California Native Plant Society v. City of Santa Cruz, supra*, 177 Cal.App.4th at p. 988.)

SOSJ does not contend that the alternatives contained in the EIR were unreasonable or that they did not represent a range of alternatives. (See *Village Laguna of Laguna Beach, Inc. v. Board of Supervisors* (1982) 134 Cal.App.3d 1022, 1029.) SOSJ's complaint is that the City did not include the two projects SOSJ recommended – the Zion '05 project and the Koll '09 project – among the alternatives considered.

The City was not required to include SOSJ's proposed alternatives in the EIR so long as it included a range of reasonable alternatives. (See, e.g., *Mann v. Community Redevelopment Agency* (1991) 233 Cal.App.3d 1143, 1151.) The City did consider a "reduced intensity" design – a 43,000 square-foot design – which was, in essence, what both the Zion '05 and the Koll'09 projects were.

The City followed the procedure mandated by CEQA for the consideration of alternative projects, by considering a range of reasonable alternatives. It was not required to consider alternatives proposed by SOSJ just because SOSJ proposed them.

In addition, the trial court held, and we agree, that to the extent Koll ‘09 differed from Zion ‘05, SOSJ brought it forward far too late in the approval process. It is not enough just to list a set of advantages and present a diagram. Reasonable alternatives must be analyzed with respect to their impacts on traffic, air quality, land use, and other environmental factors. And they must be “feasible,” that is, “capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors.” (§ 21061.1; see also *In re Bay-Delta etc.* (2008) 43 Cal.4th 1143, 1163 [EIR need not consider speculative alternatives and alternatives ““whose effect cannot be reasonably ascertained””].) SOSJ presented no evidence at the August 18 hearing or elsewhere to support the notion that the Koll ‘09 plan was feasible.⁷

D. Traffic Mitigation

SOSJ has two complaints about the traffic mitigation portion of the EIR. First, it asserts that the City did not properly mitigate the traffic effects the project would cause at the intersection of Avery Parkway and Marguerite Parkway in Mission Viejo. Second, it asserts that the mitigation for the intersection of Rancho Viejo Road and Junipero Serra Road is inadequate.

The draft EIR did not include a study of the intersection at Avery Parkway and Marguerite Parkway.⁸ The intersection was included in the recirculated EIR. The draft EIR studied the intersection of Rancho Viejo and Junipero Serra, as did the recirculated EIR.

1. Junipero Serra/Rancho Viejo Intersection

⁷ At the August 18 city council hearing, the person who drew up the plan for the Koll ‘09 project admitted that he was not an architect or a civil engineer. The Koll representative at the hearing opined that this design would actually lower the knoll the residents wanted to preserve, disregarded the tiered design of the Koll project, and eliminated ADA ramps between buildings.

⁸ The draft EIR mentioned traffic impacts at the Marguerite/Avery intersection in connection with the analysis of the Zion alternative design project as one of the disadvantages of that alternative.

The draft EIR acknowledged that the Koll project would affect traffic at the Junipero Serra/Rancho Viejo intersection. The report recommended constructing dual eastbound left turn lanes and a shared through/right lane at the intersection as a mitigation measure. Koll was also required to pay a fair share for an exclusive eastbound right turn lane and dual northbound left turn lanes.

The recirculated EIR reevaluated the Junipero Serra/Rancho Viejo intersection. The proposed mitigation measure was modified: “Prior to the issuance of a certificate of occupancy, the applicant shall construct a dual eastbound left-turn lanes [sic] and a shared through/right-turn lane to mitigate the project-related direct impact at [this location]. In addition, the applicant shall pay a fair share fee (19.5 percent) for an exclusive eastbound right-turn lane and dual northbound left-turn lanes to mitigate the significant project-related cumulative impact at this intersection. [¶] Should a construction contract be awarded for these improvements by the City, or construction of these improvements be undertaken by another entity, the applicant shall pay a fair share fee to be determined by the City for the project-related direct impact mitigation described above, in addition to the fair share fee for the project-related cumulative impact.” The City ultimately adopted these mitigation measures. With this mitigation, the recirculated EIR asserted, traffic impacts at the intersection would be reduced to less than significant levels.

We review a challenge to an EIR, not to determine whether its conclusions are correct, but rather to determine whether substantial evidence supports them and whether the EIR gives sufficient information about them. (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 407.) We look at the evidence supporting the agency’s conclusions. (*Ibid.*)

The recirculated EIR included substantial evidence in the form of traffic analyses regarding the Junipero Serra/Rancho Viejo Road intersection, both as to its

present condition and projected conditions. SOSJ has not called any of this evidence into question or suggested why or how the traffic analyses are defective.

Instead, SOSJ asserts that the mitigation measures proposed for this intersection are illusory for two reasons. First, fixing the intersection by adding left- and right-turn lanes requires approval by Caltrans, over which the City has no authority. Second, the mitigation measures are so much pie-in-the-sky, because other mitigation measures for other projects have not been implemented even though those projects obtained their certificates of occupancy.

As to the first objection, it is not at all clear to us that improving the intersection at Junipero Serra and Rancho Viejo Road would require Caltrans approval. When Caltrans commented on the recirculated EIR, it asked for fair-share calculations for the Avery Parkway freeway ramps and for a right turn lane at Junipero Serra Road/I-5 northbound freeway ramp; Caltrans also observed that an encroachment permit would be required for “this project.”

An encroachment permit is required for any activity on a state highway right-of-way. (Sts. & Hy. Code, §§ 660, 670.) It does not appear, however, that either Rancho Viejo Road or Junipero Serra Road is a state highway.⁹ Caltrans prescribes uniform specifications for traffic control devices, such as lines on the roadway (Veh. Code, § 21400), but local authorities are responsible for placing and maintaining traffic control devices in their own jurisdictions. (Veh. Code, § 21351.)

The City responded to the Caltrans letter by referring to an encroachment permit already submitted to Caltrans for striping plans for Junipero Serra Road and Rancho Viejo Road. The comment does not identify or explain the work encompassed by these striping plans. The City also submitted calculations for Koll’s fair-share

⁹ According to Caltrans, the state route nearest to the Koll Project is Pacific Coast Highway. I-5 is also a “state highway” (Sts. & Hy. Code, §§ 300, 305), as is the toll road Route 73, which merges into or branches off from the I-5 at San Juan Capistrano. (*Id.* at § 373.) Alterations to a freeway ramp would therefore require an encroachment permit.

contribution to the intersection improvements, even though Caltrans did not ask for this information. The City promised to apply for an encroachment permit when it became necessary, as it would when alterations were made to freeway ramps, which would be “within the Caltrans right-of-way.”

Even assuming Caltrans would have to approve the mitigation measures at Junipero Serra and Rancho Viejo Road, the mitigation monitoring plan provides that Koll cannot receive a certificate of occupancy until the improvements are completed. Regardless of which agency does or does not have approval authority over the intersection, no one can rent an office at the Koll project – and thereby generate traffic – until the mitigation takes place. Furthermore, it appears from the testimony at the first public hearing that some road construction in that area was due to start in the summer of 2009.

Once the City has placed conditions on the Koll project, it is not free to ignore them or to grant a certificate of occupancy if they have not been fulfilled. (See *Lincoln Place Tenants Assn. v. City of Los Angeles* (2005) 130 Cal.App.4th 1491, 1508.) If the City decides to modify the mitigation measure later, it must include the modification in a supplemental EIR and support it with substantial evidence. (*Id.* at p. 1509.) The City cannot simply ignore mitigation measures after it has imposed them; they “are not mere expressions of hope.” (*Id.* at p. 1508.)

SOSJ can pursue its administrative and legal remedies if it turns out that Koll has not fulfilled the conditions imposed by the City. We cannot speculate in advance that these measures will not take place and order the EIR decertified on that ground.

2. Marguerite Parkway/Avery Parkway

After reviewing the draft EIR, Mission Viejo commented that the traffic impact section did not take into account the impacts that could be expected within its city limits. Accordingly, the City revised and recirculated the EIR, which consisted mostly of

a far more intense and wide-ranging traffic study. This time Mission Viejo had more specific comments, in particular about the proposed mitigation at the Marguerite Parkway/Avery Parkway intersection. The proposed mitigation was constructing a dedicated southbound right-turn lane, striped within the existing pavement. Mission Viejo objected that this measure would not work, because it would require eliminating a bike lane, one required by Mission Viejo's own street plan. On the contrary, "the project needs to be conditioned to provide the southbound right turn lane with *no qualification* that it be within the existing pavement (italics added)."

The final EIR and the mitigation monitoring program report simply ignored this objection. The relevant mitigation measure simply repeats that the new striping can take place within the existing pavement, directly contradicting Mission Viejo's assessment that it could not. The mitigation measure, at Koll's prompting, was changed to a commitment letter to (1) install a dedicated right-turn lane or (2) to pay its fair share of installing the lane.

Obviously the adopted mitigation measure will not reduce this traffic impact to an insignificant level, because Mission Viejo has stated it will not allow a dedicated right-turn lane that eliminates a bike lane.¹⁰ But CEQA provides a means to allow projects to go ahead, even in the face of significant and unmitigated environmental impacts, provided the public agency meets certain criteria. Specifically, the agency must adopt a statement of overriding considerations, and it must support this statement with substantial evidence. Thus, even if the City could not insure mitigation of traffic impacts at Marguerite Parkway and Avery Parkway, it could approve the project, so long as the statement of overriding considerations passed muster. We now consider whether it does.

II. Statement of Overriding Considerations

¹⁰ There is no evidence in the record that anyone went back to the intersection after learning of Mission Viejo's objection, re-measured the street, and determined that the existing pavement would accommodate both a bike lane and a dedicated right-turn lane.

A. Standard of Review

As stated above, we review an agency’s compliance with CEQA for abuse of discretion. “Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination is not supported by substantial evidence.” (*Dry Creek Citizens Coalition v. County of Tulare* (1999) 70 Cal.App.4th 20, 26.)

“Substantial evidence” is “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. . . . Argument, speculation, unsubstantiated opinion or narrative, evidence which is clearly erroneous or inaccurate, or evidence of social or economic impacts which do not contribute to or are not caused by physical impacts on the environment does not constitute substantial evidence.” (Cal. Code Regs., tit. 14, § 15384, subd. (a).)

B. Compliance with Section 21081 and Guidelines

We begin with the relevant statute, section 21081:

“Pursuant to the policy stated in Sections 21002 and 21002.1, no public agency shall approve or carry out a project for which an environmental impact report has been certified which identifies one or more significant effects on the environment¹¹ that would occur if the project is approved or carried out unless both of the following occur: [¶] (a) The public agency makes one or more of the following findings with respect to each significant effect: [¶] (1) Changes or alterations have been required in, or incorporated into, the project which mitigate or avoid the significant effects on the environment. [¶] (2) Those changes or alterations are within the responsibility and jurisdiction of another public agency and have been, or can and should be, adopted by that other agency. [¶] (3) Specific economic, legal, social, technological, or other considerations, including considerations for the provision of employment opportunities

¹¹ “Significant effect on the environment’ means a substantial, or potentially substantial, adverse change in the environment.” (§ 21068.)

for highly trained workers, make infeasible the mitigation measures or alternatives identified in the environmental impact report. [¶] (b) With respect to significant effects which were subject to a finding under paragraph (3) of subdivision (a), the public agency finds that specific overriding economic, legal, social, technological, or other benefits of the project outweigh the significant effects on the environment.”

Pursuant to section 21081.5, the public agency must base its findings on substantial evidence in the record. (*Sierra Club v. Contra Costa County* (1992) 10 Cal.App.4th 1212, 1223, disapproved on other grounds in *Voices of the Wetlands v. State Water Resources Control Bd.* (2011) 52 Cal.4th 499.) The associated guideline also requires the public agency to support a statement of overriding considerations with substantial evidence in the record. (Cal. Code Regs., tit. 14, § 15093, subd. (b).) The decision-making agency must “balance, as applicable, the economic, legal, social, technological, or other benefits . . . of a proposed project against its unavoidable environmental risks when determining whether to approve a project.” (Cal. Code Regs., tit. 14, § 15093, subd. (a).)

Adopting a statement of overriding considerations, if one is necessary, is part of the approval process. (Cal. Code Regs., tit. 14, § 15092.) It is a step separate from certifying the EIR, although the two activities often occur together. (See *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1200.) “Overriding considerations contrast with mitigation and feasibility findings. They are ‘larger, more general reasons for approving the project, such as the need to create new jobs, provide housing, generate taxes, and the like.’ [Citation.] This does not mean, however, that an agency’s unsupported claim that the project will confer general benefits is sufficient. The asserted overriding considerations must be supported by substantial evidence in the final EIR or somewhere in the record.” (*Woodward Park Homeowners Assn., Inc. v. City of Fresno* (2007) 150 Cal.App.4th 683, 717.)

In this case, the City issued a two-page statement of overriding considerations dealing with the traffic problems the project would cause in Mission Viejo, specifically the increased congestion at both the Avery Parkway/Marguerite Parkway intersection and on the northbound and southbound freeway ramps at Avery Parkway.¹² Although these effects were unavoidable, the City could not mitigate them because the necessary road improvements were within Mission Viejo's and Laguna Niguel's jurisdictions. The City therefore adopted a statement of overriding considerations, because the public benefits outweighed the environmental impacts. The public benefits were: "1. Project implementation will create employment-generating opportunities for residents of [the City] and the surrounding communities. [¶] 2. Site development would result in the generation of increased property taxes that would augment the city's economic base. The increase in property tax revenue would be available to continue to fund public services and facilities, including but not limited to police and fire protection, parks and recreation, as well as unfunded planned improvements. [¶] 3. The proposed project will complete the development anticipated for CDP 90-2 (Mammoth Properties), which would achieve the long-range goals and objectives articulated in the General Plan and Planned Community. . . ."

We agree with SOSJ that the City failed to support the statement of overriding considerations with substantial evidence. (See *Sierra Club v. Contra Costa County*, *supra*, 10 Cal.App.4th at p. 1224.) Neither Respondent has pointed us to any such evidence in their briefing, and our own search of the record has turned up none. The "public benefits" section, perfunctory and formulaic, is devoid of any specifics, let alone evidence or some indication of where evidence may be found.

¹² The City did not find that the significant effects on the environment had been avoided or mitigated (§ 21081, subd. (a)) or that Mission Viejo had, could, or should adopt the mitigation measure. (§ 21081, subd. (b).) Instead it tuned its findings to section 21081, subdivision (c) alone.

The failure to provide any evidence at all seems inexplicable. If Koll had provided some projections about such things as occupancy and operating expenses, as it did in *Toward Responsibility in Planning v. City Council of the City of San Jose* (1988) 200 Cal.App.3d 671, 684 fn. 4 [City received, *inter alia*, market study, job projection study, and inventory of vacant industrial land before making decision on rezoning of Koll project], these could have formed the basis for a presentation to the members of the city council on jobs and taxes. This does not seem unduly burdensome.

An agency does not fulfill its CEQA duties when it purports to solve its environmental problems simply by uttering a few magic words – “property tax revenues,” “jobs.”¹³ If that were all it took, environmental review would be a great deal easier than it is. Any commercial development will generate property taxes; most will create jobs of some kind, if only in construction. The real question: is it worth damaging the environment to have these taxes and these jobs? The answer requires weighing evidence, of which there is none in this record.¹⁴ As Justice Sills said in a somewhat different context, “There is a sort of grand design in CEQA: Projects which significantly affect the environment *can* go forward, but only after 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.) Nothing in this record suggests that any City noses were incommoded before the council adopted the statement of overriding considerations. On this record, the City should not have approved the Koll project.

C. Exhaustion of Administrative Remedies and Notice

¹³ Or, in the City’s more elegant phrasing, “employment-generating opportunities.”

¹⁴ For example, how much *net* increase in property tax revenue could be expected from the Koll project? How many and what kind of jobs will be created? How does this project “ensure provide [*sic*] high quality unobtrusive development?” Nothing in the record even hints at the answers to these questions. Hard-and-fast numbers are not necessary, but something to indicate these questions have been given more than lip service must be provided.

The City and Koll argue that SOSJ did not object to the adoption of a statement of overriding considerations at the public hearings in June or in August 2009 and therefore failed to exhaust its administrative remedies. Section 21177, subdivision (a), provides: “An action or proceeding shall not be brought pursuant to Section 21167 unless the alleged grounds for noncompliance with this division were presented to the public agency orally or in writing by any person during the public comment period provided by this division or prior to the close of the public hearing on the project before the issuance of the notice of determination.” SOSJ maintains in this appeal that the City approved a statement of overriding considerations without supporting substantial evidence; such an approval would represent noncompliance with sections 21081 and 21081.5.

The record does not contain any evidence of an objection made by anyone to the adoption of the statement of overriding considerations. The necessity – and the ability – to exhaust remedies, however, is predicated on notice to the public as “required by law” about what is going to take place at the public hearing.¹⁵ (§ 21177, subd. (e); see also *Woodward Park Homeowners Assn., Inc. v. City of Fresno*, *supra*, 150 Cal.App.4th at p. 720.)

The City’s Municipal Code sets out the notice procedures for a public hearing regarding a land use decision. “Notice of the time and place of the public hearing, a general explanation of the matter to be considered, and a general description of the area affected and the place where further information on the application may be obtained shall be given at least ten (10) calendar days before the hearing by posting at three (3) public places in the City.”¹⁶ (San Juan Capistrano Mun. Code, § 9-2.302, subd.

¹⁵ We asked the parties to submit additional briefing on the notice issue, which we have received.

¹⁶ The notice provisions of the City’s Municipal Code follow Government Code section 54954.2, subdivision (a)(1), (part of the Brown Act), which requires legislative bodies of local agencies to “post an agenda containing a brief general description of each item of business to be transacted or discussed at the meeting. . . . A brief general description of an item generally need not exceed 20 words.” The Brown Act also prohibits any action or discussion “on items of business not appearing on the posted agenda” (*Id.*, § 54954.2, subd. (b).)

(f)(1).) In addition, notice must be published in a local newspaper of general circulation, mailed to anyone who has requested notice, and mailed to surrounding property owners.

In this case, there were actually three resolutions before the city council on June 16. One was to certify the EIR. Attached to this resolution were the findings of fact, the statement of overriding considerations, and the mitigation monitoring reporting program, which set forth all of the mitigation measures Koll needed to take. A second resolution conditionally approved the project's tentative parcel map, architectural control, and grading plan modification. Attached to this resolution were over 20 pages of conditions. Finally, the council had before it a proposed ordinance amending the zoning of the Koll property. The City ultimately adopted both resolutions and passed the ordinance.

The published notice of the meeting referred only to the approval of the parcel map, the architectural control, the grading plan modification, and the rezoning; it said nothing about certifying a final EIR or adopting a statement of overriding considerations.¹⁷ Although the notice included a brief general description of the necessity for adopting the parcel map and the rezoning, it did not describe, or even mention, the recirculated EIR or the statement of overriding considerations resulting from the expanded traffic study. The City also sent form letters to individuals and entities that had commented on the EIR, informing them that EIR certification was coming up for hearing on June 16. The letter did not mention that some environmental impacts could not be mitigated, so the council was also contemplating a statement of overriding considerations.

As far as this record reveals, the only way a member of the public could have realized that the city council was considering a statement of overriding

¹⁷ The notice mentioned that a draft EIR had been necessary for the project, that one had been prepared, and that the comment period had closed. It also informed the public that it could still see the draft EIR on line. The notice did not mention the recirculated EIR, where the Marguerite/Avery Parkway intersection was first discussed. No statement of overriding considerations is attached to either the draft EIR or the recirculated EIR.

considerations on June 16 – or was considering going ahead with the project despite the inability to mitigate a significant environmental impact – was to get a copy of the staff agenda item memo for the meeting and read its title and the attached proposed resolution.¹⁸ The City does not explain how the public was supposed to do this or even how the public was supposed to know such an effort was required.¹⁹

The ineffectiveness of the notice is borne out by the complete absence at the hearings of any discussion by anyone – council members, the City’s staff, the Koll representative, the public – about jobs and property taxes outweighing the environmental impact of the increased traffic at the Marguerite/Avery Parkway intersection.²⁰ The staff’s presentation to the council at the first hearing was particularly inaccurate. The chief staff representative twice told the council that the traffic problems at Marguerite and Avery could be mitigated, when the reason for adopting a statement of overriding considerations is that an environmental impact *cannot* be mitigated. What is far more disturbing, the staff presented the statement of overriding considerations to the council at the June 16 hearing as a mere formality, to be deployed when implementation of a

¹⁸ The memo itself does not mention or discuss a statement of overriding considerations. The paragraph in which such a discussion might be expected to occur is mysteriously truncated.

¹⁹ Koll suggests that SOSJ had actual knowledge of the proposed statement because “the Planning Commissioners discussed the need for a statement of overriding considerations at length on the May 26, 2009, Planning Commission hearing.” No such discussion took place. One of the commissioners pointed out the discrepancy between a statement in the draft Planning Commission resolution that all environmental impacts had been reduced to insignificance and a statement in the responses to comments that some of the traffic impacts could not be mitigated. The commissioner remarked that the city council needed to correct this discrepancy and used the term “override” in connection with this correction. This was the extent of the discussion; the term “statement of overriding considerations” was never used at the meeting.

Even assuming a discussion at a planning commission meeting could satisfy the requirements for notice to the public of a city council hearing, this does not do the job. One would have to be initiated into the deepest mysteries of environmental review and fluent in CEQA-speak to understand that this casual reference to “overriding” meant the adoption of a statement of overriding considerations allowing the City to go ahead with the project despite unmitigated environmental impacts.

²⁰ In addition, it seems to have bothered no one that the resolution and the statement of overriding considerations do not match. The resolution states the override is necessary because certain traffic impacts cannot be mitigated without Caltrans permits, which the City cannot issue. The statement of overriding considerations itself and the mitigation measures to which it refers say nothing about Caltrans. Instead the override is necessary because the requisite permits have to be secured from Mission Viejo and Laguna Niguel, for road improvements within their jurisdictions.

mitigation measure rested with another jurisdiction, without any discussion whatsoever of its terms or of the evidence required to support it.²¹

We conclude the notice to the public regarding the adoption of the statement of overriding considerations did not measure up to the requirements of section 21177, in that it was not “the notice required by law.” Consequently SOSJ is excused from having to exhaust its administrative remedies as to this aspect of the environmental review of Koll project.

One of the environmental safeguards built into CEQA is the insistence on keeping the public informed of each step in the process. “[T]here must be a disclosure of the ‘analytic route the . . . agency traveled from evidence to action’ [citation] . . . [¶] . . . [¶] especially in light of CEQA’s fundamental goal that the public be fully informed as to the environmental consequences of action by their public officials.” (*Laurel Heights Improvement Assn. v. Regents of University of California, supra*, 47 Cal.3d at p. 404.) The City did not disclose the analytic route traveled between evidence and the adoption of the statement of overriding considerations, because there was no evidence from which to begin the journey. And the City did not notify the public that it was considering adopting a statement of overriding considerations, an action separate from certifying an EIR. The City both failed to proceed in the manner CEQA provides and made factual conclusions unsupported by substantial evidence. The approval of the Koll project must accordingly be reversed.

DISPOSITION

Insofar as it approves the certificate of the EIR, the judgment of the trial court is affirmed. Insofar as it approves the statement of overriding considerations, the

²¹ The City’s traffic engineer also suggested that Mission Viejo could “take the monies” (presumably the fair-share contribution). In light of Mission Viejo’s categorical opposition to the mitigation measure, this speculation appears to have no factual basis and certainly had no basis in any evidence before the council.

judgment of the trial court is reversed. The City is directed to vacate its approval of the Koll project and proceed to evaluate the project in accordance with the conclusions expressed herein. The parties are to bear their own costs on appeal.

BEDSWORTH, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.