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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

ROSS CREEK NEIGHBORS et al,

Plaintiffs and Appellants,

v.

TOWN OF LOS GATOS et al.,

Defendants and Respondents;

LINDA COURT PARTNERS LLC,

Real Party in Interest and
Respondent.

No. H036927

(Santa Clara County

Super. Ct. No. CV106461)

Appellants Ross Creek Neighbors, Committee for Green Foothills, and Douglas V. Ownbey challenged the certification of an environmental impact report (EIR) and approval of a project to construct seven homes. The issues in the present appeal are whether respondents¹ Town of Los Gatos and its Town Council (Town) were required to

¹ Respondents also include real parties in interest Linda Court Partners LLC, Mission Way Partners LLC, HBO LLC, Stitegarmac LLC, and Sardan LLC.

circulate an “Addendum-Amendment” (Amendment) to the final EIR and whether the final EIR fails as an informational document.² We affirm the order.

I. Factual and Procedural Background

The project involves the construction of seven single-family homes on 2.35 acres within a developed residential neighborhood in Los Gatos.³ Ross Creek extends along part of the northern edge of the project site. The project also involves the removal of trees, the demolition of two existing structures, and the creation of a protected riparian area of approximately 0.5 acre.

In January 2007, ERAS Environmental, Inc. (ERAS) produced a “Phase I Environmental Site Assessment.” One year later, the Town approved a mitigated negative declaration for the project. Appellants then filed a petition for writ of mandate in which they challenged the Town’s actions regarding the approval of the project. Appellants argued, among other things, that the Town failed to comply with the California Environmental Quality Act (CEQA) when they issued a mitigated negative declaration and did not prepare an EIR. The trial court granted the petition and issued a peremptory writ of mandate ordering the Town to refrain from further approval of the project until it certified an adequate EIR.

In response to the court order, the Town prepared an initial study in February 2009 and a draft EIR in January 2010. After the draft EIR was circulated for public comment, the Town responded to comments that were received. On September 7, 2010, the Town certified the final EIR.

² The final EIR includes the draft EIR, responses to comments on the draft EIR, and changes to the draft EIR.

³ In 2005, the original project application proposed an 11-lot subdivision. In 2006, the application was revised and proposed a nine-lot subdivision. After the planning commission expressed concerns about density, the application was reduced to a seven-lot subdivision.

In November 2010, the Town filed a return in which it requested that the writ be discharged. On March 7, 2011, the trial court issued an order in which it found that appellants' "criticisms of the range of project alternatives studied by the EIR, its consideration of potential impacts on special status species (the dusky-footed woodrat), analysis of hydrology and flooding impacts (including the determination of issues such as the 'top of the bank'), analysis of aesthetic impacts and the project's consistency with local plans and policies are instances where, having acknowledged the disagreements on these issues in the EIR, the Town was entitled to rely on the conclusions reached by its experts supported by substantial evidence in the record. On those issues, the return on the writ is adequate." However, the trial court also found that the Town's "response in the Final EIR to the March 23, 2010 letter by the California Department of Toxic Substances Control ('DTSC') commenting on the Draft EIR was inadequate." Thus, the trial court denied the Town's request to discharge the writ.

In response to the March 2011 order, the Town asked ERAS to reevaluate its earlier conclusion that no testing for pesticides was required. After its reevaluation, ERAS reached the same conclusion. The Town then prepared the Amendment to the final EIR.

On April 19, 2011, the Town published notice in the local newspaper that it would be holding a public hearing on May 2, 2011, regarding the Amendment as well as the ratification and reaffirmance of the prior project approvals. Following the public hearing, the Town recertified the final EIR, and ratified and reaffirmed the prior approval of the project.

On May 5, 2011, the Town filed a second supplemental return to the writ of mandate. Appellants filed their opposition to the return. Following a hearing on May 26, 2011, the trial court issued an order discharging the writ.

II. Discussion

A. Standard of Review

“In reviewing an agency’s compliance with CEQA in the course of its legislative or quasi-legislative actions, the courts’ inquiry ‘shall extend only to whether there was a prejudicial abuse of discretion.’ (Pub. Resources Code, § 21168.5.) Such an abuse is established ‘if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence.’ [Citations.] [¶] An appellate court’s review of the administrative record for legal error and substantial evidence in a CEQA case, as in other mandamus cases, is the same as the trial court’s: The appellate court reviews the agency’s action, not the trial court’s decision; in that sense appellate judicial review under CEQA is de novo. [Citations.]” (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 426-427, fns. omitted (*Vineyard*)). “Judicial review of these two types of error differs significantly: While we determine de novo whether the agency has employed the correct procedures, ‘scrupulously enforce[ing] all legislatively mandated CEQA requirements’ [citation], we accord greater deference to the agency’s substantive factual conclusions.” (*Id.* at p. 435.)

The lead agency’s “approval of an EIR ‘shall be supported by substantial evidence in the record.’ (Guidelines, § 15091, subd. (b).) In applying the substantial evidence standard, ‘the reviewing court must resolve reasonable doubts in favor of the administrative finding and decision.’ (*Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 514.) The Guidelines define ‘substantial evidence’ 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).)” (*Laurel Heights*

Improvement Assn. v. Regents of University of California (1988) 47 Cal.3d 376, 392-393
(*Laurel Heights I.*)

B. Circulation of the Amendment to the Final EIR

After the trial court found that the response to the comment by the California Department of Toxic Substances Control (DTSC) was inadequate, the Town revised its response in the Amendment. Appellants contend that the Town was required to give notice and to circulate the Amendment to the final EIR because the Amendment added significant new information about hazardous pesticides and herbicides.

“We have repeatedly recognized that the EIR is the ‘heart of CEQA.’ [Citations.] ‘Its purpose is to inform the public and its responsible officials of the environmental consequences of their decisions *before* they are made. Thus, the EIR “protects not only the environment but also informed self-government.” [Citation.]’ [Citation.] To this end, public participation is an ‘essential part of the CEQA process.’ [Citations.]” (*Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4th 1112, 1123, fn. omitted (*Laurel Heights II.*))

“The requirement of a detailed written response to comments helps to ensure that the lead agency will fully consider the environmental consequences of a decision before it is made, that the decision is well informed and open to public scrutiny, and that public participation in the environmental review process is meaningful. [Citation.]” (*City of Long Beach v. Los Angeles Unified School Dist.* (2009) 176 Cal.App.4th 889, 904.)

Guidelines section 15088.5, subd. (a)⁴ provides in relevant part: “(a) A lead agency is required to recirculate an EIR when significant new information is added to the EIR after public notice is given of the availability of the draft EIR for public review

⁴ All references to Guidelines are to the CEQA Guidelines, which implement the provisions of CEQA. (Cal. Code Regs., tit. 14, § 15000 et seq.)

under [Guidelines] Section 15087 but before certification. As used in this section, the term ‘information’ can include changes in the project or environmental setting as well as additional data or other information. New information added to an EIR is not ‘significant’ unless the EIR is changed in a way that deprives the public of a meaningful opportunity to comment upon a substantial adverse environmental effect of the project or a feasible way to mitigate or avoid such an effect (including a feasible project alternative) that the project’s proponents have declined to implement.”

Examples of “significant new information” that require recirculation include a disclosure showing: “(1) A new significant environmental impact would result from the project or from a new mitigation measure proposed to be implemented. [¶] . . . [¶] (4) The draft EIR was so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded. (*Mountain Lion Coalition v. Fish & Game Com.* (1989) 214 Cal.App.3d 1043.)” (Guidelines, § 15088.5, subd. (a).)

However, “[r]ecirculation is not required where the new information added to the EIR merely clarifies or amplifies or makes insignificant modifications in an adequate EIR.” (Guidelines, § 15088.5, subd. (b).) “[T]he lead agency’s determination that a newly disclosed impact is not ‘significant’ so as to warrant recirculation is reviewed only for support by substantial evidence. [Citation.]” (*Vineyard, supra*, 40 Cal.4th 412, 447.)

1. Background

In response to the draft EIR, the DTSC commented in relevant part: “The Project site was formerly used for agricultural purposes until the mid 1970s and therefore pesticides and herbicides may have been used. The Initial Study for this project referenced a Phase I Environmental Site Assessment Report prepared by ERAS Environmental, Inc. in January 2007. The report indicated that since these chemicals biodegrade over time and were not used after 1974, the potential for these chemicals to occur on the site does not appear to be a significant environmental concern. Pesticides

and herbicides tend to be persistent in the environment and do not significantly biodegrade over time. Therefore, there is a potential for these chemicals to be present at the Project site. However, there may be other factors such as residential development of the area that may have caused the concentrations of these chemicals in soil to be lower (i.e., due to mixing of soil during grading activities). The level of residual chemicals in the soil and/or groundwater is unknown unless an environmental assessment is done. Therefore, DTSC recommends that soil, and possibly groundwater, sampling be performed at this site for chemicals from past agricultural operations. The sampling results should be discussed in the EIR and any screening levels or criteria that are used in making a determination whether detected contaminants are found at concentrations that pose a risk to human health or the environment should be identified.”

The Town’s response to this comment stated: “2-1, Pesticide Contamination. The comment recommends that soil and groundwater sampling for pesticides be conducted due to past agricultural uses on the site. A Phase 1 Environmental Assessment was conducted for the project (ERAS Environmental, June 2007), and is summarized in the Initial Study (see pages 22-23 of Appendix A of the DEIR). The assessment indicated that the site had been in residential use since early 1948 and part of the property had been used as an orchard until approximately 1955. The report concluded that no evidence was discovered during the assessment to indicate that activities currently or historically conducted on or near the property have contributed to soil or groundwater contamination. The assessment did not recommend soil or groundwater sampling or a Phase II investigation.” (Underscoring omitted.)

In declining to discharge the writ, the trial court found that the Town’s response was “inadequate,” stating that it was in “no position to evaluate, based on the Final EIR, whether pesticides or herbicides are in fact present in the soil or water at the project site at all or at concentrations that pose a risk to human health. . . . Despite the expenditure of

much time and effort by many people the Town's failure to properly respond here to a substantive comment by a public agency with specialized knowledge means that the Final EIR fails as an informational document in this one respect. This is not a dispute over methodology. While it initially listed '[p]otential pesticide contamination in soils from historical agricultural activities,' as one of several 'areas of concern,' the Draft EIR, in apparent reliance on the Initial Study, did not identify the issue as even a potentially significant environmental concern. When the Draft EIR was circulated for comments the DTSC disagreed with the factual premise for the Initial Study's conclusion (the claimed rate of biodegradability of such chemicals over time) and stated its position that such a conclusion could not be reached without soil and possibly groundwater sampling being done at the site. Rather than explain how and why this was not necessary (assuming such a position could be explained and supported by reference to evidence in the record) the Town simply restated the original conclusion and as far as can be determined from the record never addressed the issue again."

In response to the trial court's order, the Town requested that ERAS reevaluate its prior recommendation that no soil or groundwater testing was required. On April 13, 2011, ERAS drafted a letter stating that the 2007 ERAS report had reached conclusions regarding prior use of the site as an orchard, any pesticides would have undergone significant degradation, the site had been developed for residential purposes, and there were no documented environmental impacts related to past use. Following this reevaluation, an Amendment, which summarized the 2011 ERAS letter, was made to the final EIR.

Prior to certifying the final EIR, the Town found the revised response to the DTSC letter: (1) consisted of "a re-analysis of previously available information," and thus did not require either a subsequent EIR or a supplement to the EIR (Guidelines, §§ 15162, 15163, 15164); (2) did not contain "significant new information" that required

recirculation of the final EIR since the “new information provides clarification and additional support for the conclusion in the Final EIR that soil or groundwater sampling for pesticide was not recommended or deemed necessary” (Guidelines, § 15088.5); (3) did not result in a new significant impact and did not result in a substantially more severe significant impact that was analyzed in the final EIR since a significant impact was not identified; (4) did not result in any changes or modifications to the project; and (5) satisfied the CEQA requirements to provide “a good faith, reasoned response, based on evidence in the record.” The Town also found that “further testing is not suggested or required by the DTSC Guidance documents covering such properties.”

2. Amendment to the Final EIR

At issue is whether there was substantial evidence to support the Town’s determination that the Amendment did not add “significant new information” that required circulation of the Amendment to the final EIR.⁵

Laurel Heights II, supra, 6 Cal.4th 1112 considered the issue of what constitutes “significant new information” in a final EIR and thus requires recirculation. (*Id.* at pp. 1119-1120.) The California Supreme Court observed that “the final EIR will almost always contain information not included in the draft EIR” given the CEQA statutory requirements of circulation of the draft EIR, public comment, and response to these comments prior to certification of the final EIR. (*Id.* at p. 1124.) In *Laurel Heights II*, the lead agency, in response to public comment, relied on additional noise data to confirm its prior conclusion in the draft EIR regarding noise levels at the project site, but did not recirculate the final EIR. (*Id.* at p. 1136.) *Laurel Heights II* held that “the addition of new information to an EIR after the close of the public comment period is not ‘significant’ unless the EIR is changed in a way that deprives the public of a meaningful

⁵ Appellants challenge the conclusions reached in the 2011 ERAS letter, which formed the basis for the Amendment. Since the information was essentially the same in both the letter and the Amendment, we will focus on the contents of the Amendment.

opportunity to comment upon a *substantial* adverse environmental effect of the project or a feasible way to mitigate or avoid such an effect (including a feasible project alternative) that the project’s proponents have declined to implement.” (*Id.* at p. 1129.) *Laurel Heights II* concluded: “Regardless of what conclusions may be appropriately drawn from these studies, we find that substantial evidence supports the [lead agency’s] decision that the additional data do not constitute ‘significant new information.’ These studies merely serve to amplify, at the public’s request, the information found in the draft EIR. The basis of the conclusion in both the draft and final EIR’s that mechanical noise effects would be insignificant is the representation that any effects will be mitigated to insignificance by appropriate choices of equipment and installation measures. The new studies do not alter this analysis in any way. Substantial evidence thus supports the [lead agency’s] conclusion that additional public comment is not required.” (*Id.* at p. 1137.)

Similarly, here, there is no “significant new information” in the Amendment. The Amendment includes more specific information about the historical use of the project site to support the Town’s prior conclusion that soil testing was not warranted. This information is based on the aerial photographs referred to in the 2007 ERAS report, which is summarized in the draft EIR and listed as a source reference.⁶ The Amendment then summarizes relevant provisions of the DTSC “Interim Guidance for Sampling Agricultural Properties” (Guidance) and concludes that the project does not meet the

⁶ The Amendment states: “The ERAS Review indicates that the Project site was planted with orchards after 1919 and prior to 1943 and originally consisted of two parcels - a western parcel and an eastern parcel. The southern half of the eastern parcel was developed in 1948 with two residential buildings. Although residual orchard trees remained on the eastern parcel, the change in ownership would have ended the use of the Property as a commercial agricultural operation. Based on historical aerial photograph review, by 1956 the western parcel had been cleared of trees and was open grassland. Subsequent aerial photographs indicated the continued presence of a few residual orchard trees on the eastern portion of the Property, one of which appeared to be of commercial use.”

criteria for pesticide testing under the Guidance.⁷ These findings are: the slope of the property excludes the possibility that the orchard was irrigated and suggests that it was dry-farmed; the eastern portion of the property received 2 to 4.5 feet of fill, thus indicating significant soil disturbance and mixing; the western portion of the property would have been disturbed annually by disking operations; and no physical drainages or irrigation water conveyance features appear in the aerial photographs between 1948 and 1956.⁸ Since these findings were based on the information in the 2007 ERAS report,

⁷ The Amendment states: “In June 2000, DTSC issued interim guidelines regarding sampling for agricultural properties that were being converted to schools to determine whether the past use of agricultural chemicals on those properties could pose a risk to subsequent school uses. In August 2008, DTSC issued a third revision to its ‘Interim Guidance for Sampling Agricultural Soils’ to provide a uniform approach for evaluating former agricultural properties where pesticides have been applied. This revision incorporates and refines the sampling and risk assessment approach to former agricultural properties. The scope of this document is ‘limited to evaluating only agricultural properties during a Preliminary Endangerment Assessment (PEA) or other initial sampling investigation.’ This applies to proposed new and/or expanded school sites or other projects where new land use could result in increased human exposure, especially residential use. The Guidelines further indicate that ‘agricultural properties are lands where pesticides were uniformly applied for agricultural purposes consistent with normal application practices, and where other non-agriculturally related activities have been absent.’ [¶] According to the DTSC’s Guidelines [S]ection[] 2.2 and Section 2.3.2, the guidelines for sampling do not apply to urban sites previously graded and disturbed or to dry-land farmed agricultural soils as outlined below. [¶] 2.2 Properties not covered by this Guidance. This guidance does not apply to former agricultural property that has been graded for construction or other purposes, that has received fill, or has had parking lots or structures placed on it following active use as an agricultural field. An urban residential area that was agricultural property in the past does not qualify for this guidance since the construction of the residences would have resulted in the disturbance and redistribution of potential agricultural contaminants in the soil. [¶] 2.3.2 Dry-Land Farmed Agricultural Soils. Dry-land farming is the practice of growing a crop without irrigation. Many dry-land farming fields are not treated with pesticides or infrequently treated, since the lack of water does not provide a desirable habitat for most agricultural pests. Properties that clearly qualify as dry-land farming do not need further investigation for pesticides or metals.” (Fn. omitted.)

⁸ The Amendment states: “The ERAS Review of the site topography and surveyed topographic map identifies a significant slope transition on the project site from the

there was substantial evidence to support the Town’s conclusion that circulation of the Amendment to the final EIR was not required under CEQA.⁹

Appellants argue, however, that the Town’s decision to analyze the Guidance only in the Amendment deprived the public of the opportunity to refute the Town’s position. They claim that both the Guidance itself and additional information establish that the Town discounted a significant environmental impact.

Appellants contend that Guidance section 2.1 establishes that the Guidance applies to the project site: Section 2.1 states: “This guidance is specific to agricultural properties where pesticides and/or fertilizers were *presumably* applied uniformly, for agricultural

eastern property line to the western of approximately 40 feet. This would exclude the possibility that the orchard was irrigated, but would rather suggest that [it] was dry farmed, as was common practice in Santa Clara Valley during that period. Additionally, no physical drainages or irrigation water conveyance features were apparent on the 1948 and 1956 aerial photos. Therefore, it appears very likely that the former orchards on the Property were dry farmed. [¶] Furthermore, the eastern portion of the Property would have been significantly graded in 1948 to accommodate the residential development due to the natural slope of the former orchard. This area also received considerable fill material as evidenced in two borings drilled by Redwood Geotechnical Engineers in 2006 (B-1 and B-6) as part of the Project geotechnical investigation conducted for the proposed Project in which 2 to 4.5 feet of fill was encountered in the eastern portion of the Property. Additionally, the western portion of the Project site was open grassland from at least 1956. Therefore, this part of the Property would have been disturbed on at least an annual basis since that time by disking operations for weed control. [¶] Based on DTSC’s guidelines, it appears that the Project does not meet the criteria that would have require[d] sampling for pesticides. The previous orchard on the site appears to have been dry farmed based on the significant natural slope of the site, the lack of drainage conveyances, and the agricultural practices of the time, and it is unlikely that agricultural pesticides were used in conjunction with dry farming. Furthermore, based on the history of development on the site, there is documented significant grading and filling of the eastern part of the property over 60 years ago and significant disturbance and mixing of surface soil for the past 55 years on the western portion of the Property.”

⁹ At oral argument, the Town suggested that the issue of whether soil testing is necessary has become moot, because substantial grading has been done on the project site since the trial court discharged the writ. However, the developer’s conduct does not moot this appeal, because the project could still be modified, reduced or mitigated. (*Woodward Park Homeowners Assn. v. Garreks, Inc.* (2000) 77 Cal.App.4th 880, 888.)

purposes consistent with normal application practices” and “applies to proposed new and/or expanded school sites or other project where new land use could result in increased human exposure, especially residential use.” (Italics added.) However, though the property was once used for agricultural purposes, there is nothing in the record to support a presumption that pesticides were applied for this purpose. Moreover, the Preface to the Guidance states in relevant part: “This guidance does not apply to disturbed land, such as land that has been graded in preparation for construction, . . . or any other activity that would redistribute or impact the soil, other than normal agricultural practices, such as disking and plowing.” (Underscore omitted.) Here, there was significant grading and filling of eastern portion of the property, and the western portion of the property has been disked annually. Thus, the pesticide testing requirements of the Guidance were inapplicable.

In challenging the Amendment’s conclusion regarding dry-farming, appellants rely on section 2.3.2 of the Guidance. This section states in relevant part: “For properties where there is *uncertainty* regarding dry-land farming, limited sampling may be conducted at a rate of four discrete samples per site, with one sample collected in each quadrant” and “[i]f it cannot be clearly shown that irrigation did not take place and pesticides were not applied, limited sampling for organochlorine pesticides (OCPs) and arsenic may be necessary.” (Italics added.) Here, the Amendment concluded that it was “very likely” that the property was dry-farmed based on the slope of the site, the lack of drainage or irrigation conveyance features in the aerial photos, and the agricultural practices in Santa Clara County at that time. Thus, since the evidence did not reveal any uncertainty on this issue, test sampling was not necessary under section 2.3.2.

Appellants argue, however, that “the site’s perennial creek provides a constant source of water to breed agricultural pests regardless of the farming technique used.” There is no evidence in the record to support their argument, and this court may not take

judicial notice of this purported fact. (Evid. Code, § 452, subd. (h).) Appellants also claim that there is evidence in the record that suggests that arsenic may have been used on the site. They rely on a statement by Pauline Sprock, who identified herself as one of the neighbors and spoke in opposition to the project at the hearing on the final EIR. She stated: “I wanted to know if they did a soil test for arsenic o[r] lead, as this was a former orchard, and that’s what the old-timers used to spray with all the time.” Sprock did not indicate the basis for her statement, and the Town was entitled to discount her unsubstantiated opinion. (Pub. Resources Code, § 21080, subd. (e)(2).) Appellants also rely on their counsel’s statement in his declaration that, based on conversations with Henry Chiu and Mark Piros of the DTSC, the “DTSC is aware of sites in the South Bay w[h]ere farmers used arsenic and DDT.” Since this declaration was not part of the record before the Town, it was inadmissible. (See *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 571 (*Western States*).) Moreover, this evidence was hearsay, and even assuming that it was admissible, it did not establish where and when such pesticides were used, or that pesticides were used on the project site.¹⁰

¹⁰ Appellants have also challenged information in the final paragraph of the Amendment. This paragraph states: “On March 29, 2011, the Los Gatos Community Development received a letter from the California Department of Toxic Substances Control (DTSC), which indicated that DTSC does not regulate normal application of agricultural chemicals and will not require analysis of soil or groundwater at the Project site. The letter also noted that DTSC received the Final EIR with response to their comment letter, and determined that the response was adequate.” In opposing the Town’s second supplemental return, appellants requested judicial notice of an e-mail from the DTSC and a declaration from David Crites. The e-mail from the DTSC clarifies that “[t]he intent of [its] March 29, 2011 letter was to convey that Health and Safety Code section 25321(d) limits DTSC’s authority to order investigation and cleanup of former agricultural sites where there are residual chemicals from normal application. However, our March 29, 2011 letter was not intended to withdraw the recommendation made in our March 23, 2010 letter.” The e-mail then restates its previous recommendation in 2010 “that soil, and possibly groundwater, sampling be performed because of the project site was formerly used for agricultural purposes until the mid-1970s and pesticides and herbicides may have been used and may be present.” The town and the real parties in

Appellants' reliance on *Preservation Action Council v. City of San Jose* (2006) 141 Cal.App.4th 1336 (*Preservation Action Council*) is misplaced. In *Preservation Action Council*, the project involved the demolition of a historic building and the construction of a 162,000-square-foot warehouse. (*Id.* at pp. 1341-1342.) Opponents of the project wanted to preserve the historic building, and brought a writ challenging the city's approval of the project. (*Id.* at p. 1342.) The trial court found: there was insufficient evidence to support the city's rejection of an alternative that reduced the size of the building; this alternative was "'substantially different from'" the alternatives that were analyzed in the final EIR and there was insufficient evidence that it was infeasible; and the city had failed to adequately respond to the opponent's comments. (*Id.* at p. 1343.) This court concluded that "[t]he City violated CEQA by failing to ensure that the FEIR adequately analyzed the potentially feasible and environmentally superior reduced-size alternative and failing to make a specific finding, based on substantial evidence, regarding the feasibility of the reduced-size alternative." (*Id.* at p. 1357.) Regarding the remedy, *Preservation Action Council* stated: "The revision of the amended DEIR to remedy its inadequate analysis of the reduced-size alternative will necessarily require recirculation of this section of the amended DEIR. 'If, subsequent to the period of public and interagency review, the lead agency adds "significant new information" to an EIR, the agency must issue new notice and must "recirculate" the revised EIR, or portions thereof, for additional commentary and consultation. [Citations.] The revised environmental document must be subjected to the same "'critical evaluation that occurs in the draft stage,'" so that the public is not denied an "'opportunity to test,

interest objected to this evidence. However, the trial court never ruled on either the objections or the request for judicial notice. This evidence was inadmissible because it was not in the record before the Town. (See *Western States Petroleum Assn.*, *supra*, 9 Cal.4th at p. 571.) Even assuming the evidence was admissible, the issue in the present case was whether the Town had adequately responded to the DTSC comments, not whether it was required to follow the DTSC's recommendation.

assess, and evaluate the data and make an informed judgment as to the validity of the conclusions to be drawn therefrom.”’”’ [Citations.] Here, the public should have had the opportunity to assess and comment upon an adequate analysis of the reduced-size alternative.” (*Id.* at pp. 1357-1358.) With respect to the city’s responses to comments, the real parties in interest conceded that “the sufficiency of the responses depends on the adequacy of the amended DEIR’s analysis of the design alternatives.” (*Id.* at p. 1360.)

In *Preservation Action Council*, the new information related to the potential feasibility of an environmentally superior alternative, and thus the information was significant. Here, however, the information included in the Amendment did not reveal “a substantial adverse environmental effect of the project” or “[a] feasible project alternative.” (Guidelines, § 15088.5, subd. (a).)

In sum, there was substantial evidence to support the Town’s determination that the final EIR did not add significant new information requiring recirculation.¹¹

Relying on *Mountain Lion Coalition v. Fish & Game Com.* (1989) 214 Cal.App.3d 1043 (*Mountain Lion Coalition*), appellants next contend that the Town was required to circulate the Amendment to the final EIR because the public never had the opportunity to review and comment on an *adequate* EIR. In *Mountain Lion Coalition*, the appellant Fish and Game Commission adopted regulations that allowed the hunting of mountain

¹¹ Appellants also contend that the EIR relies on undisclosed data, that is, the historic aerial photos and maps, in the Town’s response to the DTSC comment. The 2007 ERAS report was referenced and summarized in the initial study, which was attached as appendix A to the draft EIR. Though not included in the draft EIR, the ERAS report was listed in the references section of the draft EIR. The 2006 Redwood Geotechnical Engineering report was listed in the references section of the final EIR. Figure 6 in the draft EIR and figure 6 in the final EIR is Westfall Engineers’ Grading and Drainage Map, which is drawn on a topographical map of the project site. First, having failed to raise this objection in the administrative proceedings, appellants are barred from raising this issue on appeal. (See *Citizens for Responsible Equitable Environmental Development v. City of San Diego* (2011) 196 Cal.App.4th 515, 527.) Second, under CEQA, these types of technical documents are to be listed as references. (Guidelines, § 15148.)

lions during the 1987 season. (*Id.* at pp. 1045-1046.) The respondents successfully petitioned the trial court for a writ of mandate that suspended the regulations and required the commission to comply with CEQA by preparing and circulating an environmental impact document (EID). (*Id.* at p. 1046.) One month later, the commission filed a return to the writ in which it claimed that it had fully complied with the trial court's directive because it had circulated a four-page cumulative impact analysis. (*Ibid.*) This document concluded that the mountain lion hunt would not have any adverse impacts on the mountain lion population. (*Ibid.*) After the respondents challenged the cumulative impact analysis on numerous grounds, the trial court ruled that the appellant could not proceed with the mountain lion hunt until it had prepared and circulated a legally sufficient cumulative impacts analysis. (*Id.* at pp. 1046-1047.) The trial court also specified how the appellants were to conduct this analysis. (*Id.* at pp. 1047-1048.) Rather than follow the trial court's direction, the appellant proposed new regulations that authorized a mountain lion hunt for the 1988 season, which were the same as the 1987 regulations. (*Id.* at p. 1048.) The appellant prepared a draft EID, circulated it for comment, and after receiving public comment, prepared and adopted a final EID. (*Ibid.*) The trial court "examined the draft EID which was circulated for public review, and found its cumulative impact analysis inadequate because it failed to adequately address, or to address at all, several subjects that were specified in and required by the court's earlier order. The court did not reach the question of whether the final EID, which contained more complete analysis and documentation, cured some of the defects found in the draft EID because the cumulative impact analysis in the final EID had *not* been circulated for public review." (*Id.* at p. 1049.)

The Court of Appeal in *Mountain Lion Coalition* evaluated the 1988 EID in terms of the trial court's criticisms of the 1987 EID. "Given the unambiguous nature of the court's order, the draft EID that was circulated to the public to inform them of the

environmental consequences of the proposed 1988 mountain lion hunt was woefully inadequate.” (*Mountain Lion Coalition, supra*, 214 Cal.App.3d at p. 1050.) The court did “not reach the question of whether the final EID, which was not considered by the trial court, clears up some of the deficiencies of the draft.” (*Id.* at p. 1052.) The court also observed: “If we were to allow the deficient analysis in the draft EID to be bolstered by a document that was never circulated for public comment, we would not only be allowing appellants to follow a procedure which deviated substantially from the terms of the writ, but we would be subverting the important public purposes of CEQA. . . . To evaluate the draft EID in conjunction with the final EID in this case would only countenance the practice of releasing a report for public consumption that hedges on important environmental issues while deferring a more detailed analysis to the final EID that is insulated from public review.” (*Ibid.*)

In *Laurel Heights II*, the California Supreme Court cited *Mountain Lion Coalition* for the proposition that “new information that demonstrates that an EIR commented upon by the public was so fundamentally and basically inadequate or conclusory in nature that public comment was in effect meaningless triggers recirculation” (*Laurel Heights II, supra*, 6 Cal.4th at p. 1130.) *Laurel Heights II* thus summarized *Mountain Lion Coalition* as a case in which “a ‘woefully inadequate’ draft EIR was found to have deprived the public of its opportunity to comment upon the resumption of sport hunting of mountain lions.” (*Id.* at p. 1131.)

The present case is distinguishable from *Mountain Lion Coalition*. Here, the EIR was not fundamentally flawed as an informational document. The Town circulated a 290-page draft EIR. The final EIR, which included comments to the draft EIR and the Town’s responses, added 255 pages. As discussed, *infra*, the final EIR adequately addressed the significant environmental issues and provided the public with the opportunity to comment on these issues. The only portion of the final EIR that was found

inadequate was the Town's response to one comment, and, as previously discussed, the Town's revised response or Amendment did not add significant new information. Thus, *Mountain Lion Coalition* is not controlling.

C. Consideration of the Final EIR Before Approval of the Project

Appellants also contend that the Town did not consider the final EIR before approving the project and improperly approved the subdivision application and the planned development zoning ordinance No. 2193 (Ordinance No. 2193) before it reviewed and considered the final EIR.

Here, the Town approved the subdivision application in October 2010 and Ordinance No. 2193 in September 2010.

After the trial court denied the Town's request to discharge the writ in March 2011, it issued a "NOTICE" on April 4, 2011. This notice stated that the trial court had conferred with the parties by telephone conference call and considered the parties' letter briefs. Relying on Public Resources Code section 21168, the Town argued that the court was not required to order that the prior findings or approvals be voided. The Town contended that the trial court could allow the Town "to re-ratify its decision (if it chooses to do so) without going through the process of vacating its former PD Zoning approval and having the matter re-heard by the Planning Commission and Town Council, [and that this procedure] would accomplish the goal of requiring the Town to undertake only such activities as are required to cure the non-compliance with CEQA." Appellants, however, argued that "premissing a Project approval upon a faulty EIR is a violation of CEQA, [and] thus the current Project approvals must be set aside until the Town complies with CEQA." Citing *Protect the Historic Amador Waterways v. Amador Waterway Agency* (2004) 116 Cal.App.4th 1099 (*Amador Waterways*), the trial court concluded that "[the Town] need only correct the deficiency in the Environmental Impact Report which the

court identified.” *Amador Waterways* held that the EIR did not set forth an adequate statement of reasons explaining why the project would not have a significant effect on local streams. (*Id.* at p. 1103.) The Court of Appeal also stated that its “conclusion does not mean the Agency is required to start the EIR process anew. Rather, the Agency need only correct the deficiency in the EIR that we have identified before considering recertification of the EIR.” (*Id.* at p. 1112.)

Here, the Town complied with the trial court’s notice. The Town “recertifie[d] the Final EIR, as amended, finding that it has been completed in compliance with CEQA,” and “reviewed and considered the information contained in the Final EIR, as amended, prior to ratifying and reaffirming the prior approval” of the project.

Appellants, however, rely on *No Oil, Inc. v. Los Angeles* (1974) 13 Cal.3d 68 (*No Oil*), disapproved on another ground in *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 569-573. *No Oil* is factually distinguishable. In that case, the city enacted three ordinances, which approved an oil drilling project, without preparing an EIR. (*No Oil*, at p. 76.) After the plaintiffs filed an action challenging the ordinances, the city argued an EIR was not necessary and supported its contention by submitting declarations from the eight council members who voted for the ordinances. (*Id.* at p. 77.) These declarations stated their opinions that the project would not have a significant effect on the environment. (*Ibid.*) After the trial court remanded the matter for clarification, the council adopted a resolution stating that “at the time it adopted the subject three ordinances it believed, and now specifically finds, that such ordinances and the restricted activities permitted thereby would have no significant effect on the environment.” (*Id.* at p. 78.) The California Supreme Court held that “a determination that a project does not require an EIR, when that project is not exempt from environmental study under the act or guidelines, must take the form of a written Negative Declaration.” (*Id.* at p. 80, fn. omitted.) *No Oil* also stated: “This is not a case in which

an agency rendered ambiguous findings concerning the environmental effect of the project, but a case of total absence of any written determination on the matter; for all the record reveals, the council may have simply ignored CEQA and enacted the ordinance in the same manner to which it was accustomed before CEQA was enacted.” (*Id.* at p. 81.) Here, the Town certified a final EIR, which was found inadequate only with respect to the Town’s response to the DTSC’s comment, prior to adopting Ordinance No. 2193 and approving the subdivision application. Thus, *No Oil* is not controlling.

D. Adequacy of Final EIR

Appellants contend that the final EIR fails as an informational document because it does not adequately analyze: (1) the impacts to and mitigation for the San Francisco dusky-footed woodrat (woodrat); (2) hydrology and flooding impacts; and (3) project alternatives.¹²

1. Analysis of Impacts to and Mitigation for the Woodrat

Appellants argue that the final EIR fails to adequately analyze the impacts to and the mitigation for the woodrat.

The woodrat is considered a species of special concern by the Department of Fish and Game (DFG). In 2007, the Town’s consultants initially concluded that they did not expect to find woodrats within the project area. However, in 2009, the Town’s

¹² In its March 7, 2011 order, the trial issued an order rejecting appellants’ challenges to the final EIR’s analyses of potential impacts to the woodrat, hydrology and flooding impacts, and project alternatives. On May 13, 2011, appellants filed a notice of appeal from this order. After the Town filed a motion to dismiss the appeal, this court dismissed the appeal as untimely. However, an appeal may only be taken from a final judgment. (Code Civ. Proc., § 904.1.) Here, the trial court stated that “[r]espondent’s request to discharge the writ is DENIED pending further return, and order of this Court, confirming compliance with CEQA,” and thereby retained jurisdiction of the case. Consequently, the March 7, 2011 order was interlocutory and thus not appealable. (Code Civ. Proc., § 904.1, subd. (a)(1)). Accordingly, appellants may raise these issues in the present appeal.

consultants observed an active woodrat nest in this area. In response to a comment, the Town noted that a second active woodrat nest was observed “outside of the project area boundary to the southwest. . . . [A]dditional [woodrat] structures may be present at the time that project activities are initiated,” and the “existing nest/structure lies within the riparian habitat where no disturbance will occur.”

Appellants argue that the final EIR is inadequate because it fails to include information or analysis about the second woodrat nest or any additional woodrat nests.

The purpose of an EIR is to identify a project’s significant effects on the environment and describe how those significant effects can be mitigated or avoided. (Pub. Resources Code, § 21002.1, subd. (a).) “In evaluating the significance of the environmental effect of a project, the lead agency shall consider . . . reasonably foreseeable indirect physical changes in the environment which may be caused by the project. [¶] . . . [¶] (2) An indirect physical change in the environment is a physical change in the environment which is not immediately related to the project, but which is caused indirectly by the project. . . . [¶] (3) An indirect physical change is to be considered only if that change is a reasonably foreseeable impact which may be caused by the project. A change which is speculative or unlikely to occur is not reasonably foreseeable.” (Guidelines, § 15064, subd. (d).)

The potentially significant impact to the woodrat is described as follows: “Clearing activities may result in destruction of refuse sites, such as woody debris, fallen logs, or dense vegetation, or entrap or kill woodrats within the project area.” Thus, the draft EIR states that mitigation measures include requiring a qualified biologist to examine the project area before and during any ground disturbing activities. In addition, if a woodrat nest is encountered in the work area, a protection exclusion zone would be established around any nest before any ground-disturbing activities are initiated. It also states that if a woodrat is encountered and the woodrat does not voluntarily leave the

work area, a biological monitor with the appropriate permits would relocate the animal to a release site approved by the DFG. Since there is no evidence in the record that the project will involve any clearing activities outside of the project area, any indirect effects are speculative. Accordingly, the Town was not required to analyze mitigation measures for any woodrat nests located outside the project area.

Appellants also argue that the Town relies on the DFG's delineation of the western drip line of the project site as part of the protected riparian zone for the woodrat, but when this delineation "conflicted with where the developer wanted to place houses, the Town concluded, *without explanation*, that [DFG] was 'mistaken[]' in its determination." (Italics added.) The record does not support their argument.

In response to a comment about impacts to the woodrat, the Town states that "[t]he trees with the observed woodrat nest are included in the riparian habitat and will not be removed. Similarly other trees in the riparian habitat will be retained, including the referenced blue oak. The DEIR mitigation measures call for preconstruction surveys to identify any future nest/structures prior to any construction activities, particularly vegetation, woody debris, or tree removal or other ground disturbing activities. Protective exclusion zones will be established around the woodrat nest/structure located within the site and any nest identified during future surveys. Based on conversations with D. Johnston of CDFG (2010), the protective exclusion zone for any woodrat nest/structures should follow the riparian dripline and associated buffer." Thus, in 2010, the Town defined the protection exclusion zone for nests to follow the riparian dripline and associated buffer.

Appellants have taken a statement out of context to support their argument that the Town concluded that DFG's definition of the riparian zone was mistaken. In response to a comment regarding earlier maps of the riparian zone, the Town stated: "The comment questions the demarcation of the riparian canopy along the western boundary as it differs

from maps that were prepared for the project in 2007. The mixed evergreen forest on the western boundary of the project site was previously mistakenly identified as riparian habitat, likely due to the contiguous nature of the canopy. However, riparian habitat is determined by the hydrologic influence of the stream on the vegetation as well as by the vegetation type. In the case of the western boundary, the transition in slope marks the boundary between the mixed evergreen and riparian habitat types.” That the Town concluded that the 2007 maps were mistaken in showing the demarcation of the riparian canopy does not mean that the Town rejected the DFG’s delineation of the protective exclusion zone in 2010.

Relying on an e-mail from Johnston, a biologist at the DFG, appellants next argue that woodrat relocation would not mitigate any potential loss of the species. We disagree with appellants’ interpretation of Johnston’s e-mail. The final EIR states that the “[m]ortality of woodrats resulting from development projects has been associated with attempts to relocate woodrats and their houses beyond the immediate vicinity of the current houses/nest structures (Gerber, et al. 2003 and Johnston, personal communication, 2010).” In his e-mail, Johnston stated that “[r]elocation is not an option” However, the mitigation measures do not include relocation of woodrats and their nests from the protective exclusion zone. A woodrat, not its nest, would only be relocated if the woodrat does not voluntarily leave the work area. Johnson did not state that these mitigation measures would be ineffective.

Appellants next challenge the mitigation measure to “[i]nstall a protective exclusion zone around any woodrat nest found within the project area” They claim that “[t]here is no evidence that fencing in live animals is feasible or even humane mitigation.”

Here, EcoSystems West Consulting Group (EcoSystems) provided an independent analysis of impacts and mitigation measures. As previously discussed, the EIR states that

ground disturbing activities would impact the woodrats on the project site. Mitigation measures include requiring a qualified biologist to examine the project area before and during any ground disturbing activities, and, if a woodrat nest is encountered in the work area, a protection exclusion zone would be established around any nest before any ground disturbing activities are initiated. Appellants provided no evidence that these mitigation measures are not feasible. EcoSystems provided its expertise in drafting the mitigation measures, and the Town may defer to its experts' conclusions even though appellants disagree with those conclusions. (*Laurel Heights I, supra*, 47 Cal.3d at pp. 392-393.) Thus, there is sufficient “ ‘relevant information and reasonable inferences from this information that a fair argument [could] be made to support [the] conclusion’ ” that these mitigation measures are adequate. (*Id.* at p. 393.)

2. Hydrology and Flooding Impacts

Appellants next contend that the EIR has an “[i]nadequate [a]nalysis of [h]ydrology and [f]looding [i]mpacts” because it used an “outdated top-of-bank delineation” and “does not offer a ‘good faith, reasoned analysis in response’ to comments regarding the top of bank delineation.”

Robert Curry, one of appellants' experts, states that “[c]orrect identification of the top of bank is important because it marks the historic channel-forming feature and thus provides an indicator of areas subject to flood disturbance.” Curry and two other experts conclude that the delineation of the top of bank in the EIR is incorrect because it does not include the active floodplain. They further indicate that the top of bank delineated in the EIR does not meet the definition of the Guidelines and Standards for Land Use Near Streams (Stream Guidelines), which was adopted by the Santa Clara Valley Water Resources Protection Collaborative (Collaborative) in 2007. The Town is a member of the Collaborative. The Stream Guidelines define the top of bank to include “the active

channel, active floodplain, and their associated banks.”¹³ The top of bank delineation is also used to define a “20 to 25-foot setback” for new construction for “slope stability purposes.”

The EIR analyzes flood hazards and concludes that no mitigation measures are required because no structures would be located within the 100-year floodplain of Ross Creek. This analysis is based on the FEMA Flood Insurance Rate Map and the Schaaf & Wheeler hydraulic analysis that was prepared for the project. The EIR also acknowledges comments “regarding the ‘top of bank’ definition and delineation on project maps,” and explains that “[t]he ‘top of bank’ was identified on the project plans by the project engineers, and this demarcation appears to be the top of the active channel bank.” In response to the comment that “the ‘top of bank’ is not consistent with the [Stream Guidelines],” the EIR states that “the top-of-bank definition is relevant where setbacks for slope stability are an issue, but review of the definition and standard as applied to the project site with [the Collaborative] found that the project is consistent with recommended setbacks for slope stability. The comment cites the ‘Town’s 25 foot bank protection setback zone,’ which appears to be the 20-25 foot setback recommendation in

¹³ The EIR also includes the definitions of “top of bank” and “active floodplain” from the Stream Guidelines. “Top of bank designates a stream channel boundary where a majority of normal discharges and channel forming activities takes place. The top of the bank boundary will contain the active stream channel, active floodplain, and their associated banks. . . . Where there are no distinguishable features to locate top of bank, the local permitting agency or the Santa Clara Valley Water District will make a determination and document, as appropriate. In the absence of this determination, the 100-year water surface will be used.” An active floodplain is defined as “[l]ow lying areas built by watercourse sediment depositions between top of bank that are adjacent to a watercourse and that have been constructed by the present river in the present climate. These areas are susceptible to frequent inundation during moderate and higher flows when the active channel’s capacity is exceeded. Active floodplains are most prominent along low-gradient, meandering reaches and are often absent or undistinguishable along steeper sloped stream channels.”

the Stream Guidelines related to slope stability, and the project is consistent with this guideline as discussed in Response to Comment 6-16.”

The response to comment 6-16 sets forth the definition of “top of bank” and recognizes that it includes the “active floodplain.” The response further states that “these definitions and interpretations were reviewed and confirmed with the Santa Clara Valley Water District staff (Haggerty, personal communication, May 2010). Nonetheless, the proposed structures are set back 20-70 feet from the outer edge of the mapped 100-year floodplain, and not 10 feet as suggested by the comment” Thus, though the EIR includes a definition of top of bank in the project plans that differ from the Stream Guidelines, the project is consistent with the Stream Guidelines.

3. Range of Alternatives

Appellants argue that the EIR fails to analyze a reasonable range of alternatives to the project because it does not consider either a three- or four-home development that sites all of the homes on the opposite side of the street from the creek or a one-home development that complies with the Los Gatos Tree Protection Ordinance (Tree Ordinance).

““CEQA establishes no categorical legal imperative as to the scope of alternatives to be analyzed in an EIR. Each case must be evaluated on its facts, which in turn must be reviewed in light of the statutory purpose.” [Citation.] ‘An EIR shall describe a range of reasonable alternatives to the project, or to the location of the project, which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives. An EIR need not consider every conceivable alternative to a project. Rather it must consider a reasonable range of potentially feasible alternatives that will foster informed decisionmaking and public participation. An EIR is not required to consider alternatives which are infeasible. The lead agency is responsible

for selecting a range of project alternatives for examination and must publicly disclose its reasoning for selecting those alternatives. There is no ironclad rule governing the nature or scope of the alternatives to be discussed other than the rule of reason.’ (CEQA Guidelines, § 15126.6, subd. (a).)” (*Watsonville Pilots Assn. v. City of Watsonville* (2010) 183 Cal.App.4th 1059, 1086.)

In the present case, the EIR identifies five project objectives: (1) development of seven single-family residences; (2) creation of new housing which is designed to fit the site contours; (3) protection and retention of riparian open space; (4) construction of housing with green building techniques; and (5) implementation of riparian restoration that includes replacing non-native species with native vegetation.

The EIR finds the following significant project impacts: (1) disturbance to the woodrat; (2) disturbance to bats if they are present during construction; (3) removal of 31 trees subject to protection under Town ordinances and inadvertent damage to other trees during grading and construction; (4) grading and construction that could result in erosion and sedimentation in Ross Creek; (5) deterioration of air quality as a result of construction emissions; (6) proposed residences could be subject to soil constraints without appropriate soil preparation and engineering measures; and (7) construction noise.

The EIR considers and declines to further analyze one-home and two-home alternatives for two reasons. These alternatives fail to meet the project objective of developing seven homes. They would also result in lot sizes that would be significantly greater than what is allowed under the Town’s general plan, which permits up to five units per acre.

The EIR next considers “Alternative 1” or the “No Project” alternative. Under this alternative, the site would remain vacant and none of the impacts would occur. However, since the site would remain designated for residential uses, a different land use

application with potential environmental impacts could be proposed and considered sometime in the future. Moreover, while the riparian habitat would remain undisturbed, Alternative 1 would not provide the riparian enhancement plan that is part of this project and the riparian corridor dedications would not be made to the Town or the Santa Clara Valley Water District. The “No Project” alternative would meet only one project goal, that is, the riparian corridor would remain undisturbed.

The EIR also considers “Alternative 2” or the “Modified Design with Reduction of One Lot” alternative, which would eliminate either proposed Lot 1 or Lot 2 and the two lots would be sited in the area currently proposed for Lots 1 through 3. Under Alternative 2, the footprints of the homes would be sited five to 10 feet further from the riparian dripline and an additional three trees (trees 61, 19, and 20) would be retained. The potential disturbance to the woodrat during construction would remain a significant impact, though the severity of this impact might be slightly reduced due to the increased buffer. The disturbance to bats if they are present during construction would remain a significant impact because only three trees could be retained under this alternative. The potential damage to retained trees would remain the same. The significant impacts to hydrology and water quality, air quality, geology and soils, and noise would be similar to those of the proposed project. Alternative 2 would only partially meet the objective to develop seven homes.

In addition, the EIR considers “Alternative 3” or the “Reduced Density Reduction of Two Lots” alternative, which would remove two lots and site three lots in the area currently proposed for Lots 1 through 5. The footprints of the homes on current Lots 1, 2, and 4 would then be sited five to 10 feet further away from the riparian dripline. The redesign could result in retaining at least three trees (trees 61, 19, and 20) as well as a “few additional trees.” Alternative 3 would result in the same impacts as with Alternative 2, though a few additional trees would be retained. Alternative 3 would

partially meet the project objective to develop seven homes, but it would meet all other project objectives.

The EIR next considers which alternative is the environmentally superior alternative among the other alternatives. It reasons that neither Alternative 2 nor 3 “would eliminate the significant impacts as most are related to construction disturbances. Potential impacts to special status species (woodrat) would be slightly reduced in Alternatives 2 and 3 over the proposed project.” The EIR concludes that Alternative 2 is the environmentally superior alternative because it would result in some reduction in the severity of significant impacts and meet most project objectives.

Most of the significant impacts, that is, disturbance to woodrats and bats, inadvertent damage to trees, erosion, air quality, soils constraints, and noise, are related to construction. Thus, these impacts would only be slightly reduced under a three- or four-home alternative. This alternative would not meet the project objective of constructing seven homes, though more trees would be retained. Under the rule of reason, the EIR adequately describes a range of alternatives to the project that would attain most of the project objectives, but would substantially lessen the project’s significant effects.

Appellants next contend that the EIR is inadequate because it fails to analyze an alternative that complies with the Tree Ordinance (§ 29.10.0950 et seq.). Implicit in their contention is that the project does not comply with the Tree Ordinance. Respondents counter that collateral estoppel precludes litigation of the Town’s compliance with this ordinance.

“The doctrine [of res judicata] has a double aspect, a prior judgment is a bar in a new action on the same cause of action, and in a new action on a different cause of action the former judgment is a collateral estoppel, being conclusive on issues actually litigated in the former action.” (*Lewis v. Superior Court* (1978) 77 Cal.App.3d 844, 851.) This first aspect of the doctrine is often referred to as claim preclusion or res judicata while the

second aspect of the doctrine is referred to as issue preclusion or collateral estoppel. (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896, fn. 7.) The present case involves the issue preclusion aspect of *res judicata*.

“Collateral estoppel precludes relitigation of issues argued and decided in prior proceedings. [Citation.] Traditionally, we have applied the doctrine only if several threshold requirements are fulfilled. First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding. [Citations.]” (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341, fn. omitted.) Once the threshold requirements are met, courts consider whether application of issue preclusion will further the public policies of “preservation of the integrity of the judicial system, promotion of judicial economy, and protection of litigants from harassment by vexatious litigation.” (*Id.* at p. 343.)

Here, the threshold requirements of *Lucido* have been met as to the issue of whether the project complies with the Tree Ordinance. Appellants contend that the EIR failed to analyze an alternative that complied with the Tree Ordinance, thus assuming that the project does not comply with the Tree Ordinance. This issue is identical to that in appellants’ petition for writ of mandamus to require the Town to set aside its adoption of Ordinance No. 2193, which rezoned the project site. Appellants argued that Ordinance No. 2193 violated various provisions of the Town Code, including the Tree Ordinance.

The next *Lucido* requirement involves a determination of whether the issue was actually litigated in the prior proceeding. “‘An issue is actually litigated “[w]hen [it] is *properly raised*, by the pleadings or otherwise, and is submitted for determination, and is

determined” [Citations.]” (*Castillo v. City of Los Angeles* (2001) 92 Cal.App.4th 477, 482 (*Castillo*)). Here, appellants filed briefing and a hearing was held on the issue of whether the Town’s approval of rezoning for the project site violated, among other things, the Tree Ordinance. The trial court concluded that “[t]he record viewed as a whole contains sufficient evidence that the Town correctly applied its local codes,” and entered judgment in favor of the Town. Thus, the record establishes that the issue was previously litigated.

Lucido also requires “that the issue was ‘necessarily decided,’ [which] has been interpreted to mean that the issue was not “‘entirely unnecessary’” to the judgment in the prior proceeding. [Citation.]” (*Castillo, supra*, 92 Cal.App.4th at p. 482.) Here, the trial court rejected appellants’ contention that the Town’s rezoning of the project site violated the Tree Ordinance, and thus the issue was necessarily decided in the prior proceeding.

The prior judgment was also final and on the merits. Appellants filed a notice of appeal from the judgment, but later filed a notice abandoning their appeal. The decision was on the merits because it followed a “‘full hearing’ in which “‘the substance of the claim [was] tried and determined.’” [Citations.]” (*Castillo, supra*, 92 Cal.App.4th at p. 483.)

As to the final *Lucido* requirement, appellants, the parties against whom preclusion is sought, are parties who participated in both proceedings.

Turning to the public policy considerations, we conclude that they have been met. First, application of issue preclusion in the present case would preserve the integrity of the judicial system. If appellants were allowed to relitigate whether the Town violated the Tree Ordinance, the prior proceedings would be undermined. Second, judicial economy would also be promoted in the present case because “[a]llowing the trial court to rely on the litigated and necessary findings from the [prior judicial proceedings] would ‘minimize repetitive litigation.’ [Citation.]” (*Castillo, supra*, 92 Cal.App.4th at p. 483.)

Third, the policy against vexatious litigation favors applying issue preclusion because appellants had an opportunity in the prior proceeding to show that the Town's approval of Ordinance No. 2193 violated the Tree Ordinance.

In sum, collateral estoppel precludes litigation of the Town's compliance with the Tree Ordinance. Accordingly, we do not consider appellants' contention that the EIR fails to consider an alternative that complies with the Tree Ordinance.

III. Disposition

The order is affirmed.

Mihara, J.

WE CONCUR:

Bamattre-Manoukian, Acting P. J.

Duffy, J.*

* Retired Associate Justice of the Court of Appeal, Sixth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.