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COUNTY OF SANTA CLARA
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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA - UNLIMITED JURISDICTION

HALF MOON BAY COASTSIDE FOUNDATION aka SAVE OUR BAY, OSCAR BRAUN, ANDREA BRAUN, and H. JOHN PLOCK, JR.

Petitioners,

vs.

MID-PENINSULA REGIONAL OPEN SPACE DISTRICT, and DOES 1 through 200, Inclusive,

Respondents.

Case No. 1-03-CV-011766

ASSIGNED TO CEQA JUDGE

PETITIONERS' TRIAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDATE

CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)
[Public Res. Code §21000 et seq.]

Date: April 13, 2004
Time: 9:00 AM
Before: Hon Leslie C. Nichols
Dept: 6

BY FAX

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page No.(s)

Cases

Statutes/Regulations

I. INTRODUCTION AND STATEMENT OF FACTS

A. Nature of the Case

This action is brought pursuant to the California Environmental Quality Act (CEQA), Public Resources Code §21000 *et. seq.* Petitioners challenge Respondent Mid-Peninsula Regional Open Space District's (the "District" or "MROSD") June 5, 2003 certification of an Environmental Impact Report ("EIR") associated with the District's proposal to annex approximately 140,000 acres of San Mateo County Coastal Lands (the Coastal Annexation Area, or "CAA").

The District holds itself out as a public agency that acquires and manages land, in order to keep the land undeveloped. (AR:3:000664, IKON:685).[1] The District has operated lands in Santa Clara, Santa Cruz, and San Mateo Counties since its inception in 1972. (AR:20:004780, IKON 4818).

The proposed annexation to the District is subject to approval by San Mateo LAFCO, which must approve any annexation applications within San Mateo County pursuant to Govt. Code §§56000 *et seq.* The District submitted its LAFCO application to San Mateo LAFCO on October 31, 2003.[2]

The bases of Petitioner's' challenge to the EIR are: (1) It is undisputed that the risk posed by wildland fire associated with the annexation is a significant environmental impact under CEQA. Petitioners assert that public recreation and under-restricted access in the area will increase fire risk and create a significant environmental hazard. (2) The EIR has an inadequate discussion of reasonably foreseeable future actions which petitioners assert is an attempt to unlawfully piecemeal the process to avoid judicial review: (3) There is no

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[1] For the Court's ease of reference, all citations to the record will continue to include the volume number and a parallel cite to the searchable IKON disk prepared by Petitioner. To the extent possible, all cited pages from the administrative record are attached in numerical order as Exhibit A to the Declaration of H. Ann Liroff, filed herewith.

[2] The LAFCO application was submitted despite a stay in this action which was put in place as a result of the District's Motion to Change Venue. While the District proceeded with its LAFCO application, Petitioners were prohibited from filing this motion for preliminary injunction as a result of the stay.

discussion of the District's past record in its pre-existing lands, and therefore no baseline analysis in the record. (4) The District's reliance on the foregone conclusions of the retained experts report are insufficient and not supported by the record. (5) There is insufficient evidence in the record to support the District's conclusion in the EIR that the risk of wildland fire because of increased public access due to the MROSD annexation is rendered insignificant by its proposed mitigation measures.

B. Brief Overview Of CEQA.

CEQA, which is widely considered to be the most important environmental law in California, has both substantive and procedural elements. The "heart" of CEQA is the provisions requiring preparation of an Environmental Impact Report (EIR) if a proposed project may have a significant effect on the environment. Pub. Res Code § 21151, *No Oil, Inc., v. City of Los Angeles* (1974) 13 Cal.3d 68, 84.

CEQA requires a public agency to avoid or minimize environmental damage where feasible, and when it is not feasible to set forth any overriding considerations support project approval. Pub.Res.Code §§ 21002, 21002.1. In Public Resources Code Section 21002, the state legislature indicated its intention that public agencies may not approve projects as proposed if 'feasible' alternatives or mitigation measures would substantially lessen the significant environmental effects. Identification of alternatives and mitigation measures is a stated purpose of CEQA's requirement that agencies prepare EIRs on proposed activities. Pub. Res Code §21002.1(a).

The other of CEQA's basic purposes is to inform governmental decision-makers and the public about the potential significant environmental effects of proposed projects and to disclose to the public the true reasons for approval of a project that may have significant environmental effects. 14 Cal Code Regs. §§15002(a)(1), 15002(a)(4).

An EIR must identify and focus on the "significant environmental effects" of a proposed project. Pub Res. Code §21100(b)(1); 14 Cal. Code Regs §§15126(a), 15126.2(a), 15143. A significant effect on the environment is defined as a substantial or

potentially substantial adverse change in the environment. Pub. Res Code §21068. Direct and indirect significant effects of the project must be identified and described in the EIR, with consideration given to both short-term and long term effects. 14 Cal Code Regs §15126(a).

CEQA's substantive elements appear in the form of general objectives, including: (1) The disclosure of environmental impacts; (2) The identification and prevention of environmental damage; (3) The disclosure of Agency decision making; (4) The enhancement of public participation; (5) Fostering of inter-governmental coordination.[3] Pub.Res.Code §§21001, 21002, 21002.1, 21003, 21003.1.

After a public agency determines that an activity is a project that falls within the scope of CEQA and is not exempt from the law, and that the project causes significant environmental effects on the environment (that could not be addressed by a mitigated negative declaration) an environmental impact report (EIR) must be prepared. Pub. Res. Code §§21080(d), 21082.2(d), 14 Cal. Code Regs. §15064.[4] In all cases, the purpose of an EIR is to inform governmental decision makers and the public of the environmental consequences of a given project, to allow the political process to integrate environmental concerns with the analysis and evaluation of the project and thus, intelligently arrive at a decision that considers environmental issues. Pub. Res. Code §21061.

An EIR must discuss a cumulative impact if the project's incremental effect combined with the effects of other projects is "cumulatively considerable." 14 Cal. Code Regs §15130(a). The CEQA guidelines define cumulative impacts as "two or more individual effects which, considered together, are considerable or which compound or increase other environmental impacts." 14 Cal. Code Regs §15355.

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[4] To accommodate the diversity of projects, the Guidelines describe several type of EIRs, which maybe tailored to different situations. This is a Program EIR (AR:000700, IKON:721), which applies to an agency program or series of projects that can be characterized as one large project and are related either (1) geographically, (2) as logical parts in the chain of contemplated actions, (3) in connection with issuance of rules, regulations, plans, or other general criteria to govern the conduct of a continuing program, or (4) as individual activities carried out under the same or authorizing statutory or regulatory authority and having generally similar environmental effects which can be mitigated in similar ways. Guidelines Sec. 15168.

C. The CEQA Standard Of Review.

The judicial standard of review under CEQA is a "much more stringent inquiry" than normal judicial review of agency actions. *Western States Petroleum Association v. Superior Court* (1995) 9 Cal.4th 559, 576. The courts are required to take a "hard look" at the sufficiency of findings and EIRs under CEQA. *Laurel Heights Improvements Association v. Regents of the University of California* (1988) 47 Cal.3d, 376. The first Supreme Court decision construing CEQA held that the Legislature intended the act "to be interpreted in such a manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 259. Precise information regarding the environmental consequences of a project must be afforded at the earliest possible stage. *Bozung v. Local Agency Formation Commission of Ventura County* (1975) 13 Cal.3d 263, 282.

There are generally four paths to take to contest the sufficiency of an EIR: (1) Inadequate identification of significant environmental impacts, Pub. Res. Code §21000(a) and 14 Cal. Code of Regs. §§15126(a) and 15126.2; (2) Inadequate consideration of measures to mitigate adverse environmental impacts. Pub. Res. Code §21100(c) and 14 Cal. Code Regs. §§15126(e) and 15126.4, 15092(b); (3) Inadequate response to comments on the EIR. 14 Cal. Code Regs. §15088(b); and (4) Inadequacy of respondents' CEQA findings. 14 Cal. Code Regs. §15091. Petitioners' objections in this case fall into all of these categories.

The court reviewing the CEQA challenge is required to address each of the alleged grounds for non-compliance. Pub. Res. Code §21005. A court finding a CEQA violation may void the agency action, suspend all agency and relevant project actions that could have environmental impacts until CEQA compliance is achieved, or order the agency to comply with CEQA. Pub. Res. Code §21168.9. A court may enjoin project implementation

upon finding that a specific activity will prejudice the consideration or implementation of a particular mitigation measure or alternative. Pub. Res. Code §21168.9(a)(2).

II. LEGAL ARGUMENT

A. IT IS UNDISPUTED THAT THE RISK POSED BY WILDLAND FIRE ASSOCIATED WITH THE ANNEXATION IS A SIGNIFICANT ENVIRONMENTAL IMPACT UNDER CEQA.

The District acknowledges that the wildland fire risk associated with annexation is a significant environmental impact of the project. The EIR identifies as a significant environmental impact of the project:

> "**Impact HAZ -2:** When Open space areas are opened to the public, users could potentially be exposed to the risk of a wildland fire. There is also the concern that allowing public recreation access to an area carries an increased likelihood of wildland fire in the area as a whole. "
>
> (AR:1:000043, IKON 63).

The District also acknowledges that wildland fires are the biggest public hazard in the CAA, and states that there is a risk range up to a high fire risk in the CAA. (AR:3:000769, IKON:790). Fire is included as an example of an 'emergency' under CEQA, Pub. Res. Code §21060.3.

The fire history in coastal San Mateo County includes a 1946 wildland fire which lasted for six weeks, and completely burned down the coastal community of Montara, which is within the CAA. (AR:5:001204, IKON:1227, and AR:10:002423, IKON:2451).

CEQA provides that an EIR must identify and focus on the significant environmental effects of a proposed project, giving due consideration to both the short term and long term effects. Pub. Res. Code §21000(a) and 14 Cal. Code Regs. §§15126(a) and 15126.2.

The Fire Hazard and Risk Appraisal relied upon by the District acknowledges that:

> … some areas of the proposed annexation have significant fire hazards. These areas may have steep slopes, south to west aspects (the most

> hazardous direction of slope) and relatively high prevailing winds out of the west-northwest. Some areas have limited emergency access.
>
> The combination of exacerbating weather, fuels, topographic conditions, limited emergency water supply, poor equipment access and slow response time could lead to a significant uncontrolled fire on these rural areas. (AR:3:000631, IKON:652)

In spite of these acknowledgments, the District has failed to adequately address or mitigate the significant fire risk associated with the project.

B. THE EIR HAS AN INADEQUATE DISCUSSION OF REASONABLY FORESEEABLE FUTURE ACTIONS WHICH PETITIONERS ASSERT IS AN ATTEMPT TO UNLAWFULLY PIECEMEAL THE PROCESS TO AVOID JUDICIAL REVIEW:

1. The Legal Standard: The District Is Not Allowed To Piecemeal The CEQA Process To Avoid Judicial Review And CEQA Compliance, and The EIR Should Take Into Account Reasonably Foreseeable Future Acquisitions Of Land By The District.

The term 'project' under CEQA refers to the whole of an action and to the underlying activity being approved, not to each governmental approval. 14 Cal. Code Regs. §15378(a), (c)-(d). This definition ensures that the action reviewed under CEQA is not the approval itself but the development or other activities that will result from the approval. See discussion following 14 Cal. Code Regs. §15378.

The definition of 'project' under CEQA is broad in order to maximize protection of the environment. One of the 'overwhelming considerations' of CEQA is this requirement that environmental consideration not be concealed by separately focusing on isolated parts, overlooking the cumulative impact of the whole action. *See Bozung, supra, at 283-284, City of Sacramento v. State Water Resources Control Board* (1992) 2 Cal.App.4th 960, *McQueen v. Board of Directors of the Midpeninsula Regional Open Space District* (1988) 202 Cal.App.3d 1136, 1144, *Lexington Hills Ass'n v. State* (1988) 200 Cal.App.3d 415, *City of Carmel-By-The-Sea v. Board of Supervisors* (1986) 183 Cal.App.3d 229, 241.

A public agency may not divide a single project into smaller individual subprojects to avoid responsibility for considering the environmental impact of the project as a whole. *Orinda Ass'n v. Board of Supervisors* (1986) 182 Cal.App.3d 1145, 1171. CEQA "cannot be avoided by chopping up proposed projects into bite-sized pieces which, individually considered, might be found to have no significant effect on the environment or to be only ministerial. *Plan for Arcadia, Inc., v. City Council* (1974) 42 Cal.App.3d 712, 726.

To ensure that the whole of the project is considered, project descriptions must give an accurate view of the project as a whole, revealing any indirect or ultimate environmental effects of the activity being approved. In *McQueen*, *supra*, at 1136, 1144, the Court of Appeal held that the District improperly defined its proposed activity as acquisition of surplus federal lands for open space but did not describe steps that would have to be taken to clean up and dispose of the environmental contaminants on site.

2. <u>The District Has in the past attempted to unlawfully piecemeal its acquisitions to avoid judicial review.</u>

As set forth below, Petitioners assert that the district is attempting to piecemeal the project and avoid judicial review of specific parcels the District plans to acquire soon. Such a piecemeal approach, which the District has tried before, is contrary to the letter and spirit of CEQA. A brief review of this case will assist the court to put Petitioners' concerns into a proper context.

In *McQueen v. Board of Directors of the Midpeninsula Regional Open Space District* (1988) 202 Cal.App.3d 1136, the Sixth District Court of Appeal reviewed an attempt by the District in the late 1980's to avoid judicial review under CEQA for polluted property in Santa Clara County. In 1986, the District sought to purchase a parcel of surplus federal property in Santa Clara County consisting of a former Air Force station on Mount Umunhum and a ground air transmitter receiver site one mile east of the summit of Mount Thayer. The property contained transformers which were filled with polychlorinated

biphenyls (PCBs), and the site was so contaminated with toxic materials that a complete cleanup was far from complete over ten years later. (AR:19:4750, IKON 4787).

The *McQueen* opinion shows that the district failed to notify neighboring landowners about the PCB problem, and instead proceeded to apply a categorical exemption from CEQA review. The plaintiff Mr. McQueen brought a petition for writ of mandate asserting that the District had failed to comply with CEQA. The District's counsel argued that it was too speculative to determine what would be done with the toxics on the sites because the district had not identified a plan of action. Judge Fogel of the Santa Clara Superior court denied the petition, but was reversed by the Sixth District Court of Appeal. *McQueen, supra* at 1143.

The Court of Appeal held that the District employed an incomplete and misleading description of the project, and impermissibly divided the project into segments to avoid judicial review. The Court of Appeal also held that the District's position that any plans for the property were speculative was unfounded because the District appeared to have a plan, even though it was unstated in the written plan documents. *McQueen, supra* at 1146.

Petitioners assert that the District is again, attempting to do the same sort of piecemealing and deception about its true plans in an order to avoid judicial review, that it tried and failed to do in Santa Clara County. Petitioners will show that the District's game of 'hide the ball' renders its analysis of impacts and mitigation measures inadequate to pass CEQA review.

3. The EIR Is Fatally Inconsistent Regarding The Likelihood That Certain Parcels Will Be Acquired By The District, And The EIR Ignores The Reality Of Reasonably Foreseeable Future Acquisitions Of Putative Open Space Lands Such As Those Owned By POST.

The District repeatedly states that it parcels to be acquired by the District after annexation "have not been identified." [5] Petitioners assert that the record shows that it is reasonably foreseeable that the district will acquire one or more of several parcels identified in the EIR and in supporting documents in the record, in addition to other properties, and that the District failed to adequately assess the potential environmental damage to those sites as part of its plan to piecemeal the project to avoid judicial review.

The district's failure is significant because CEQA requires a plan applicant or lead agency to analyze environmental effects of future actions that are a reasonably foreseeable consequence of the project. In *Laurel Heights Improvement Association*, the California Supreme Court held that an EIR must include an analysis of the environmental effects of future expansion or other action if (1) it is a reasonably foreseeable consequence of the initial project and (2) the future expansion or action will be significant in that it will likely change the scope or nature of the initial project or its environmental effects.[6] *Laurel Heights Improvement Association, supra, at 376.* If it is reasonably foreseeable that the District will acquire a specific parcel, the impacts of the project on that parcel should have been considered in this EIR.

a. Lands Identified In The Record Are Reasonably Likely To Be Acquired By The District And Should Have Been Fully Analyzed In The EIR.

In the final EIR, the District acknowledges that there are at least six parcels for which the owner has expressed an interest in selling to the District. (AR:1:000148, IKON

[5] The statement appears over thirty times in the record. For example, the first dozen instances are AR: 1: 000055, IKON 75; AR:1: 000147, IKON 167; AR:1: 000198, IKON 218; AR:1: 000202, IKON 222; AR: 1: 000208, IKON 228; AR:1: 000238, IKON 258; AR: 3: 000621, IKON 642; AR: 3: 000664, IKON 685; AR:3: 000694 , IKON 715; and AR:3: 000695, IKON 716.

[6] The District has argued that the annexation itself has no environmental effects, and that the effects will come as a result of the actual acquisition of lands. Thus, the acquisition of lands will have a different impact in scope and nature than the original project.

168). The District's environmental consultant Thomas Reid Associates even did short preliminary site assessments for the six sites, which total 5,328 acres. (AR:10:002347-68, IKON 2375-96). Three of the parcels are owned by private parties, and three are owned by the Peninsula Open Space Trust, which has long been an eager 'willing seller' for the District.[7]

The District provides ample evidence from which to conclude that the acquisition of one or more of these parcels is a reasonably foreseeable consequence of the project. According to the Fiscal Analysis prepared in support of the EIR, the District plans to acquire 1,640 acres per year, for a total of 8,200 acres in the first five years after the annexation. (AR:4:000982, IKON 1004). Furthermore, the District has purportedly pledged only to acquire land from "willing sellers" (a belated response to fears that the District would seize lands by eminent domain as it had done in the past). (AR1:000079, IKON99). It is a reasonably foreseeable consequence of the project that these parcels (or at least some of them) will be acquired in the immediate future should the annexation proceed.

b. The District's Special Partnership With The Peninsula Open Space Trust And The Reasonable Likelihood That The District Will Shortly Acquire Post Lands.

The District has never denied Petitioners' assertion that the District plans to acquire significant amounts of land from the Peninsula Open Space Trust (POST), including lands containing landfill and other pollutants. The District's special relationship with POST is acknowledged at AR:12:002981-2, IKON:3011-2. POST is the most enthusiastic willing

[7] One of these parcels is the 556 acre Miramontes Ridge property, currently owned by POST. (AR:10:002359, IKON 2387). The District will not deny that it has been given a grant of $2,050,000 toward the purchase of this property.

seller in the record with a long list of properties ready to be transferred to the District, and has quite openly stated its desire to transfer land to the District. [8]

In its "Findings for the Proposed Midpeninsula Regional Open Space District San Mateo Coastal Annexation Project" the District states that the total of lands to be managed or owned by the District within the CAA within 15 years is 11,800 acres. (AR:1:000028, IKON:48). The EIR fiscal analysis estimates that about 80% of the lands to be acquired by the District over the first 15 years after annexation will be from land trusts, other non-profits like POST and public agencies. (AR:4:000900, IKON:922).[9] It is quite apparent that POST lands, and in particular, those POST lands specifically identified in the EIR, will be acquired by the District in the near term and should have been analyzed more fully in the EIR.

c. The District Does Not Want To Identify Lands To Be Acquired Because That Would Make It More Difficult To Evade Judicial Review Under CEQA For The Parcels.

The District's repeated use of the phrase "specific lands to be acquired by the District have not been identified" is a masterful use of writing in the passive voice, and has a far different meaning than saying the District does not know which lands will be acquired first. Of course, only the District and no one else can identify the lands to be acquired first, and the District has chosen not to do so. The District is well aware of which parcels are targeted to be acquired first, but kept the information from public review and discussion

[8] In August 2002, POST praised the District as the missing "public partner" it had been waiting for to be a recipient buyer of its lands in the CAA. (AR:2:000338, IKON:358). One of these parcels is known as the "Johnston Ranch", which POST acquired in 1998. The potential acquisition of the Johnston Ranch is of particular concern because of the existence of a well known waste landfill and other pollutants on the property. (AR:11:2514-2562,IKON:2543-2591) (Because of their large number these pages are not attached to the appendix filed herewith.) In 1998, POST announced its plans to transfer the ranch to an appropriate public agency. (AR:10:002557, IKON:2586). Interestingly, the District has never denied that the Johnston Ranch is a target, even when the subject was raised by the public during the comment period.

[9] Much of this land is already off of the property tax rolls because it is operated by land trusts. This is the primary reason that the District estimates there will not be a significant tax loss to the county because of future land acquisitions. (AR4:000900, IKON:922).

in violation of one of the primary purposes of CEQA.[10] Just as it did in the Santa Clara County land acquisition later discussed in the *McQueen* case, the District has a plan but is keeping it a secret from the record, in other words 'hiding the ball' by dismissing discussion of specific acquisitions as speculative, until after the annexation has been approved and the District can follow through with the individual acquisitions.

Acquisitions from POST are reasonably foreseeable consequences of the annexation and are likely to change the scope of the annexation as described by the District, and accordingly should be analyzed in this EIR. The District's analysis of significant environmental effects of the project and mitigation measures are intentionally vague and fall short of CEQA requirements because the actual lands to be acquired first are not adequately analyzed. The court should take no comfort in the District's assurances that adequate environmental review can be achieved some time in the future because, as will be shown below, the District hopes to avoid any future CEQA review of the specific parcels to be acquired.

4. The District Hopes to Piecemeal The Process So That It Will Have A Better Chance To Avoid Judicial Review by Claiming CEQA Exemptions For Future Acquisitions, As the District Has Done In the Past.

The District has a motive to obfuscate the record and 'hide the ball' about the lands it intends to acquire. By piecemealing the process, the District wants to break down the project into smaller bite size segments so that it may attempt to evade CEQA review by applying categorical exemptions. The District states that the CEQA process can wait for specific parcels (AR1:000153, IKON173), but they are likely to apply CEQA exemptions to avoid CEQA review in the future.[11]

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[10] As described above, one of the two primary purposes of CEQA is to inform governmental decision-makers and the public about the potential significant environmental effects of proposed projects and to disclose to the public the true reasons for approval of a project that may have significant environmental effects. §§15002(a)(1) and 15002(a)(4).

[11] 14 Cal. Code Regs Secs. 15316 and 15317, are potential exemptions the District is likely to apply to the future land acquisitions.

Petitioners assert that the District knows which parcels it intends to acquire over the next fifteen years, and is intentionally omitting a discussion of these acquisitions as part of its EIR and the record in the hope that it could piecemeal the process and apply categorical exemptions to CEQA review to the individual parcels when the time comes. This plan flies in the face of CEQA's requirement that an EIR must discuss cumulative environmental impacts. 14 Cal. Code Regs §15130(a).

The District states that it hopes to put off and delay any CEQA analysis of future acquisitions of land. In its "Findings for the Proposed Midpeninsula Regional Open Space District San Mateo Coastal Annexation Project," the District states that "Subsequent District Land use acquisitions will be subject to the District's Open Space Use and Management Planning Process, and subsequent preparation of site specific Use and Management Plans. Project-specific CEQA documentation will be prepared on each acquisition." (AR:1:000027, IKON:47).

If the project is piecemealed in this way, the District is apt to use the segmentation to avoid judicial review under CEQA and to minimize the consideration of cumulative impacts of acquisition of various parcels. Pub. Res. Code §21084(a) states that the regulations set forth a list of certain classes of projects that are exempt from CEQA, known as 'categorical exemptions'. The District has made arrogant and cavalier use of these categorical exemptions in the past and has been sharply criticized by the Sixth District Court of appeal for doing so.

Section 15316 creates an exemption (known as a Class 16 exemption) to CEQA review for land acquisitions in order to create a park when the land is in its natural condition or contains historical or archaeological resources and the plan it to keep it that way. It should be noted that, In McQueen v. Midpeninsula Regional Open Space District (1988) 202 Cal. App. 3d 1136, the court ruled that the taking or acquiring property "as-is" does not constitute a "natural condition" when there is substantial evidence in the record that hazardous waste and environmental contaminants have been upon it. The McQueen court also held that the District's acquisition of property on which transformers containing PCBs were stored is not exempt from CEQA, because it cannot be asserted that there is no possibility that storage, use, or disposal of PCBs may eventually cause adverse change in physical conditions.

Section 15317 (Class 17) creates a categorical exemption for the establishment of agricultural preserves, the making and renewing of open space contracts under the Williamson Act, or the acceptance of easements or fee interests in order to maintain the open space character of the area.

In *McQueen*, *supra*, at 1136, the court of appeal criticized this same District for failing to conduct an adequate environmental review of an acquisition of property which contained hazardous waste and toxic pollutants so severe that the cleanup has taken over ten years and may still be far from complete. (AR:19:4750, IKON 4787). The Court of Appeal then rejected the District's attempts to apply categorical CEQA exemptions to the project to avoid required review under CEQA. Among other things, the court held that the District "impermissibly divided the project into segments which evade CEQA review." *McQueen*, *supra* at 1146.

The District's history of misapplying categorical exemptions are particularly significant in this case. The State Supreme Court has stated,

> Because an EIR cannot be meaningfully considered in a vacuum devoid of reality, a project proponent's prior environmental record is properly a subject of close consideration in determining the proponent's promises in an EIR. *Laurel Heights*, *supra*, at 376, 420.

Accordingly, the District's motive for its vague descriptions of its intentions and specific parcels to be acquired shortly after annexation is so that it could avoid judicial review under CEQA altogether. Yet again, the District is scheming to impermissibly divide the project into segments to evade CEQA review.

C. THERE IS NO DISCUSSION OF THE DISTRICT'S PAST RECORD IN ITS PRE-EXISTING LANDS, AND THEREFORE NO BASELINE ANALYSIS IN THE RECORD.

The EIR suffers from a lack of discussion and analysis of the District's existing policies on the 48,000 acres of land it now manages.

1. The EIR Is Insufficient Because There Is No Adequate Discussion Of the Baseline of Current and Past Practices And Procedures On MROSD Lands Or Past Fires On District Lands.

The lack of historical analysis of District lands leaves the District without a 'baseline' to analyze the potential impacts and mitigations relating to the proposed annexation, so the lack of a history makes identification of significant impacts inadequate and discussion of mitigation measures inadequate. This omission also constitutes a failure to adequately respond to comments. The District has failed to discuss its current fire prevention policies and practices and how effective those policies and practices have been in battling wildfire on its existing lands. The District gives no data or background information about fires on its existing lands.[12]

The District says that its experience in Bayside management leads it to believe that the risk to the public from wildland file is higher. However, the District also gives no data of any kind from its existing lands or analysis of its past and present procedures to support its conclusion. (AR:3:000640, IKON:661).

Local fire agencies noted the lack of discussion of fire history in District lands. For example, the comments of the La Honda Fire Brigade dated August 9, 2002 and received by MROSD August 13, 2002 state:

> On lands that the district already owns within our response area there are now large tracts of grass that, in the summer and fall can easily ignite and rapidly carry fire. The introduction of people into such an area will clearly increase the possibility of ignition. It is important to note that the two largest Wildland Fires, both greater than twenty acres (1), which have occurred in this area over the last six years, have been on District Lands. (AR:2:000343, IKON:363) {Footnote 1 states: "Largest Wildland Fire within CDF/County Fire Battalion Five 1995-2001; Incident # CZU-3902, Apx 20 acres, Nov 23, 1995. Incident # CZU-6430, Apx 54 Acres, Oct. 14, 2001.}
>
> (AR:2:000347, IKON:367)

There is no discussion of how such fire history may have educated the District, and what the District may have learned from its experiences. This failure highlights the

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insufficiency of the proposed mitigation measures because there is no way to gauge the effectiveness of the proposed mitigation measures.

The District also failed to adequately inform the public about its own history in acquiring lands and evading CEQA review with regard to the land acquisition which later became the basis for the *McQueen* opinion. Any description of the *McQueen* opinion or of the underlying facts concerning that acquisition were kept from the record and any public communications by the District. The District thus withheld from the public in San Mateo County crucial facts about its land management practices and its willingness to evade judicial review under CEQA to suit its purposes.

D. THE DISTRICT'S RELIANCE ON THE FOREGONE CONCLUSIONS OF THE MORITZ REPORT AND THE FIREWISE REPORT ARE INSUFFICIENT AND NOT SUPPORTED BY THE RECORD.

It is impossible to evaluate the value of the reports relied upon by the District because the reports contain scarce discussion of the actual fire risk in the affected area. There is no discussion of the prior history of the experts working together with the District, whether other experts were consulted whose opinions are not in the public record, and also no discussion of the compensation paid to the experts.

Most importantly, because of the vague description of the project and the District's disingenuous insistence that lands to be acquired can not be "identified" until some later time, crucial information was either withheld from or ignored by the retained experts, and the wildfire risk with regard to the specific parcels targeted by the District was completely disregarded.

1. In Assessing The Fire Risk And The Mitigation Measures, The EIR Improperly Relies On Data From A Study Based On A 1996 Survey Of Sonoma County Trail Use, While Ignoring Data From San Mateo County Or Data From Other Counties With More Significant Wildfire Histories.

The EIR relies on fire data from a fire study done in Sonoma County in 1996, which appears in a report entitled "Fire Hazard and Ignition Risk Appraisal" (AR:3:000629, IKON:650). There is no discussion of the wildfire history in San Mateo County. There is no discussion of San Mateo County data regarding causes of fires, costs of fire protection, past fires on MROSD lands. The EIR contains no interviews with local fire officials about local conditions, and no specific discussion of local biota.

Further, there is no discussion of the status of vegetative management programs in the county with regard to wildfire safety, and their relation to fire risk in particular places. This is contrary to the guidelines' requirement that the EIR describe the conditions from a local, as well as a regional perspective. 14 Cal. Code Regs. 15125. The EIR should include analysis of local conditions. *Bozung*, *supra*, at 283.

Moritz states that he relies upon a Planning Guide for Fire Management in the Wildland Urban Interface. Although this planning guide has no San Mateo County-specific data or analysis, it does highlight the need for analysis of local fire history to adequately assess fire risk in an area.[13] (AR:21 005183, IKON 5222). Moritz ignores this guideline.

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[13] The guideline reads:

"A study of fire history provides information on the frequency and extent of past fires in the area. Information on frequency of burning, when known, gives some indication of how often fires can be expected in the future. As well as explaining plant and fuel conditions, the extent of past fires also provides preliminary indications of the size and intensity of fires that can be expected in the future.

Fire history is approached primarily by investigation of archived data. The first phase of the investigation generally is a thorough search of records in fire stations, local libraries, newspaper offices, and other local sources of historical records and documents.

In the 1930's the Work Project Administration completed an important work on state fire history, organized by county, that should be checked for references to fires. The Sacramento office of the CDF and local agencies are also known to house some fire records. Additionally, the California state Fire Marshal's Office can provide access to information from the California Fire Incident Reporting system.

Assuming *arguendo* that the use of out-of-county data is acceptable, several questions arise concerning the use of 1996 Sonoma County data. Ray Moritz, the preparer of the report, lives and has his offices in Marin County. Mr. Moritz testified, "I live in coastal Marin under similar fuel type and weather situation." (AR: 31:007596, IKON7644). Marin County is a high risk area for wildfire. (AR:5:001226, IKON 1249). It stands to reason that Marin County fire data would easily be available to Mr. Moritz, but such data would have had to include the catastrophically destructive Mt. Vision fire which ravaged Coastal Marin County in 1995. It appears that the District's expert 'cherry picked' data from a study which supported the conclusion the District wanted to reach.

2. There is no basis in the record for the conclusions in the FIREWISE report and the District's reliance on this report is misplaced.

The "Firewise" Study relied upon by the District Program (AR:3: 000636, IKON 657) is likewise deficient. The report does not discuss in any detail the District's practices in fire prevention and management on its existing lands, and fails to discuss the adequacy of the District's proposed mitigation measures to reduce the risk of damage by catastrophic wildfire. Again, there is no historical fire data for the existing District lands or the CAA for which to make an accurate assessment. The author also confirms that the District has no Fuels Management Program (AR:3: 000640, IKON 661), and that one is necessary.

Further, the author dismisses the comments and suggested mitigation measures by the La Honda Fire Brigade without consideration, criticizing the Brigade for failing to take the District's resources into consideration. (AR:3: 000639, IKON 660). The author's blithe dismissal of the requested mitigation measure only highlights the fact that he failed to analyze whether the District's resources are adequate.

E. THE MITIGATION MEASURES PROPOSED BY THE DISTRICT FAIL TO REDUCE THE SIGNIFICANT WILDFIRE RISK IN THE COASTAL ANNEXATION AREA TO LESS THAN SIGNIFICANT LEVELS.

The District acknowledges that wildfire risk is a potentially significant environmental impact of the project. However, the EIR and its supporting findings fail to adequately address the issue of increased wildfire risk associated with increased public access to coastal lands if the annexation of coastal lands to the District is approved. Specifically, the EIR identifies as a significant environmental impact of the project:

> "**Impact HAZ -2:** When Open space areas are opened to the public, users could potentially be exposed to the risk of a wildland fire. There is also the concern that allowing public recreation access to an area carries an increased likelihood of wildland fire in the area as a whole. "
>
> (AR:1:000043, IKON 63).

The District includes inadequate mitigation measures to mitigate the significant fire risk to insignificant levels. CEQA requires a public agency to avoid or minimize environmental damage where feasible, and when it is not feasible to set forth any overriding considerations support project approval. Pub.Res.Code sections 21102

CEQA requires that, for each significant impact identified in the EIR, the EIR must discuss feasible mitigation measures to avoid or substantially reduce the project's significant environmental effect. 14 Cal. Code Regs. §15126.4(a).

A measure brought to the attention of the lead agency staff should not be left out of the EIR unless it is infeasible on its face. *Los Angeles Unified School District v. City of Los Angeles* (1997) 58 Cal.App.4th 1019.

The guidelines provide for five categories of mitigation – measures that avoid, minimize, rectify, reduce or eliminate, or compensate for the significant environmental effect of the proposed project. 14 Cal. Code Regs. §15370.

To be considered adequate, mitigation measures should be specific, feasible actions that will actually improve adverse environmental conditions. Mitigation measures should be measurable to allow monitoring of their implementation. Mitigation measures consisting only of further studies, or consultation with regulatory agencies that are not tied

to a specific action plan, may not be adequate. *Sundstrom v. County of Mendocino* (1998) 202 Cal.App.3d 296, 306.

Put another way, an adequate mitigation measure will tell the public why it is necessary, how it will be implemented, who is responsible for its implementation, where it will occur, and when it will occur.

1. The Proposed Mitigation Measures Have Not Been Applied To The Prospective Land Acquisitions, And The Mitigation Measures Are Vague And Without Adequate Performance Standards.

The mitigation measures proposed to purportedly render the aforementioned significant environmental impacts insignificant are insufficient because they are non-specific and non-measurable, without a specific action plan. Furthermore, there is no way to gauge the effectiveness of the indistinct proposed measures without the context of an analysis of apparent near- future land acquisitions, fire history data in San Mateo County, or scrutiny of past District fire management practices.

The District first proposes to review water sources and consult with other agencies about the feasibility of dry hydrants. (Mitigation HAZ 2a.(a).). (AR:1:000043, IKON 63). There is nothing in this mitigation measure that requires the district to take any concrete step to protect any parcel of land from fire. Mitigation measures consisting only of further studies, or consultation with regulatory agencies that are not tied to a specific action plan, may not be adequate. *Sundstrom v. County of Mendocino* (1998) 202 Cal.App.3d 296, 306.

The District next indicates that it plans to purchase a water truck at some unspecified time (Mitigation HAZ 2a.(a)) (AR:1:000043, IKON 63), but obscures the fact that the truck is in fact to be purchased for road maintenance reasons and that any use for

fire suppression support was added only as an afterthought. (AR:3:000639, IKON 670). There is no discussion of where in Santa Cruz, Santa Clara or San Mateo Counties the tender would be stationed or how it would conceivably be used.

The District next indicates that it plans, within the bounds of feasibility, to select seeds and plants for fire protection. (Mitigation HAZ 2a.(b).). (AR:1:000043, IKON 63). This measure is vague and non-enforceable, and of questionable value even if the district had a fuels management program, which it lacks.

The District next proposes:

> Where compatible with other trail characteristics, planners shall locate trial alignments and access points to allow trails to also serve as emergency access routes for patrol or emergency medical transport. Where feasible for more remote areas, emergency helicopter landing sites shall be provided. (Mitigation HAZ 2b.) (AR:1:000043, IKON 63). (Emphasis added.)

This proposed measure is so loaded with qualifiers that it is impossible to determine how, if ever, the proposed measures would be implemented. Here, the District's total failure to discuss its past practices, local fire data or likely near future acquisitions stands in stark relief. Without the necessary context, it is impossible to gage the effectiveness of this proposal.

The District next proposes to consult with 'appropriate' agencies about mutual aid agreements. (Mitigation HAZ 2c.) (AR:1:000044, IKON 64). Mitigation measures consisting only of further studies, or consultation with regulatory agencies that are not tied to a specific action plan, may not be adequate. *Sundstrom v. County of Mendocino* (1998) 202 Cal.App.3d 296, 306.

Next, the District proposes to limit the uses to low fire risk activities, and to institute rules to prohibit fire related activities. (Mitigation HAZ 2e.) (AR:1:000044, IKON 64).

However, the District ignores the possibility that all persons do not follow the rules. Whether it is teenagers "partying" (AR:3:634, IKON 655), or the presence of methamphetamine labs which are a fire as well as a toxic risk, (AR:3:581, IKON 602) much fire-risk activity is against the rules.

The District's proposed actions in designing trial heads (Mitigation HAZ 2f) AR:1:000044, IKON 64) are only the start of what should have been a far more comprehensive plan for mitigating fire risk.

All of the proposed mitigation measures suffer from the lack of any discussion of how they would be implemented on the short list discussed above which contains parcels almost certain to be acquired by the District immediately after acquisition. The record contains no analysis of the fuel load, the trial characteristics, emergency access, or emergency water supply for these parcels. The District should also have analyzed whether and to what extent Rangers could be stationed on the lands.

Without a historical perspective, there is no basis in the record to determine if these proposed mitigation measures will be effective. The District has failed to discuss whether and to what extent these or similar measures have been utilized or implemented in existing District lands during the more than thirty years that the district has been in existence, and whether and to what extent the measures work to reduce fire risk. Without such a baseline, it is impossible to analyze their effectiveness now or in the future.

The Fiscal Analysis relied upon by the District contains no provision or discussion about the cost of mitigation measures. This makes it impossible to evaluate whether any specific measure is feasible. Of course, in the absence of a CEQA review process for future acquisitions for which the District hopes to keep from judicial review, there is no way

the public can feel confident that it will be able to enforce even the flawed mitigation measures proposed by the District. The District fails to meet the standards for definite, specific, enforceable mitigation measures under CEQA, which should have been applied to parcels certain to be acquired by the District in the near future.

2. The EIR Ignores the Requests for Mitigation Suggested by Local Fire Protection Agencies.

Petitioners challenge the inadequacy of the District's responses to public comments and the inadequate discussion of mitigation measures in the EIR and the record. The EIR states that Fire protection is to be provided by local agencies, but fails to mention that local fire agencies are opposed to the annexation.

The EIR acknowledges that San Mateo County Environmental Services Agency and the La Honda Fire Brigade voiced opposition to the annexation (AR:3:000637, IKON:658), and, in a response lifted nearly verbatim from the Firewise Report, states that the County and La Honda suggested mitigation measures but that the proposed mitigation measures did not take into account certain financial resources available to the District. In a thorough, well reasoned report that considered local fire protection needs, the La Honda Fire Brigade suggested reasonable and feasible mitigation measures such as providing public telephones and the positioning of two fire engines in the annexation area. (AR:340-347, IKON 360-7). These measures were summarily and wrongly rejected by the District.

The EIR should have included and discussed the proposed mitigation measures in detail unless the mitigation measures were infeasible on their face. *Los Angeles Unified School Dist. v. City of Los Angeles* (1997) 58 Cal.App.4th 1019. The mitigation measures were not infeasible on their face and should have been discussed fully in the EIR.

III. CONCLUSION

The District annexation is nothing more than a an extension of the policies of the 1994 Coastal Protection Initiative, one of the purposes of which is to reduce essential

services such as fire, police and emergency medical response to the San Mateo County Coast. (AR:5:1202, IKON 225). The result of this withholding of essential public resources to coastal residents creates an environmental hazard in the form of a potentially catastrophic wildfire. This significant environmental threat runs counter to CEQA principles.

This matter concerns a significant public interest in wildfire safety. As the events of Fall 2003 showed, the destination, and damage in human, property and financial terms caused by uncontrolled wildfire disaster is of utmost public concern. As a result of this action, the public stands to gain the significant public benefit of safety from such a disaster.

Petitioners sought voluntary compliance with CEQA before filing this action, and properly notified the Attorney General at the outset of the case. Accordingly, Petitioners request an award of attorney's fees per CCP§1021.5.

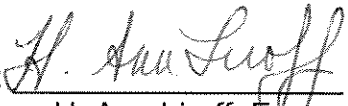
The EIR is insufficient and is not supported by substantial evidence in the record.[14]

For the foregoing reasons, the petition for writ of mandate should be granted.

Respectfully Submitted,

Dated: February 11, 2004

HANNIG LAW FIRM LLP

By: 

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[14] In addition to the concerns set forth in this Brief, Petitioners also object to the District's failure to adequately assess and discuss the impacts of invasive species in the CAA. (AR:1207-9, IKON 1230-2).

PROOF OF SERVICE

I am employed in the County of San Mateo, State of California. I am over eighteen years of age and not a party to the within action; my business address is: 2991 El Camino Real, Ste. 100, Redwood City, CA 94061

On February 17, 2004, I served the foregoing document(s) described as:

Petitioners' Trial Brief in Support of Petition for Writ of Mandate

and further placed said document and served the same in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

(BY MAIL) I am readily familiar with this business' practices for collection and Processing of correspondence for mailing with the United States Postal Service. This document will be deposited with the United States Postal Service on the same day as the execution of this document at the address given for deposit in the United States Postal Service and following ordinary business practices.

☒ (BY FACSIMILE) by transmitting the same via telecopier to the parties listed using the fax numbers listed beside each name. I caused the machine to print out a transmission report of the transmission(s) confirming that the fax was sent and received without error to each of the listed parties

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I declare under penalty of perjury, under the laws of the State of California, that the above is true and correct. Executed on February 17, 2004 at Redwood City, California.

Mary H. Bernstein