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FILED  
SANTA BARBARA  
SUPERIOR COURT

DEC 06 2007

GARY M. BLAIR, EXEC. OFFICER  
By *[Signature]*  
ROBERT A. VILLEGAS, CLERK

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF SANTA BARBARA

CITIZENS PLANNING ASSOCIATION

Vs

CITY OF SANTA BARBARA

Case No. 1243174

STATEMENT OF DECISION

This matter came on for hearing on my Civil Law and Motion calendar. Counsel requested a Statement of Decision. Although I do not think one is either required or necessary because counsel believed it was important I told them I would do it.

November 13, 2007 - CEQA petition for writ of mandamus.

Ruling: Granted. The Court will issue a writ of mandate directing that the City Council rescind certification of the EIR and all approvals associated with the Project, and remand the matter to them for further consideration in conformance with CEQA.

Analysis

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### Evidentiary Objections

By Real party in interest to the declaration of Edward C. Harris. The Court will deny the objections to the Harris declaration and will consider the declarations of Allison DeBusk, Russell Barker and Robin L. Lewis in response. However, the "supplemental declaration" of Mr. Harris filed on November 8, 2007 is struck. It was filed after the Response and the Court considers that too late.

### Statute of Limitations

The court finds that the petition is not barred by the statute of limitations, even without consideration of the extra-record evidence submitted by the parties, but particularly in light of such evidence.

The City created the problem by issuing 2 substantially identical NODs, only days apart. Real parties cannot be held to complain that a petition timely filed with respect to the second is barred by the statute of limitations, and that only the first NOD "counted" for statute of limitations purposes. If city intended only the first NOD to be the "real" one, and the only NOD to trigger the statute of limitations, it had only to refrain from issuing a second almost identical one. The confusion it created by issuing two NODs, and by forwarding only the latter to petitioners' representative in response for a request for "the" NOD on the project, is more than sufficient to render the petition timely filed.

### Exhaustion of Administrative Remedies

The court finds that the petition is not barred by the failure to exhaust administrative remedies. Real Parties characterize the petition as a challenge to the Planning Commission's certification of the EIR, which they contend must be appealed to the City Council. Since this was not done, Real Parties contend that petitioners failed to exhaust their administrative remedies, and that the petition is therefore barred. However, the petition challenges the actions of the City Council in approving the project, and making the

1 findings it made in support of the approval. The Planning Commission may have certified  
2 the EIR, but it was the City Council which was the decision-making body on the project.  
3 The Court agrees with Petitioners that they were not required to appeal the certification of  
4 the EIR, as a procedural prerequisite to maintaining this action.

#### 5 6 Merits of the Petition

7 The City cannot adopt a statement of overriding considerations and approve a project  
8 with significant impacts. It must first adopt feasible alternatives and mitigation measures.  
9 City of Marina v. Board of Trustees of the California State University (2006) 39 Cal.4th  
10 341. If significant impacts still remain after adoption of mitigations and alternatives, only  
11 then may the project be approved with a stating of overriding considerations, which must  
12 in turn be supported by substantial evidence in the record of the agency proceedings.  
13 Woodward Park Homeowners' Assn v. City of Fresno (2007) 149 Cal.App.4th 892.

14 The City's findings must be supported by substantial evidence. A finding that an  
15 alternative is infeasible must describe the specific reasons for its rejection. Guideline  
16 15091(c). Preservation Action Council v. City of San Jose (2006) 141 Cal.App.4th 1336.  
17 Real Parties preference against an alternative doesn't make it infeasible. Uphold Our  
18 Heritage v. Town of Woodside (2007) 147 Cal.App.4th 587.

#### 19 20 The Alan Road Access Alternative

21 The EIR stated that the Alan Road Alternative was feasible. Accordingly, Real Parties'  
22 assertion that the City Council can simply make a statement of overriding considerations is  
23 contrary to law. The Alan Road access alternative would not require a bridge, and avoids  
24 the significant and unavoidable impacts to the creek caused by the project. The EIR  
25 concludes it is feasible. Alternatives and mitigation sections are the core of an EIR. The  
26 agency cannot proceed with a project that will have significant unmitigated effects on the  
27 environment, based simply on a weighing of those effects against project benefits, unless  
28 measures necessary to mitigate those effects are truly infeasible. However, that "weighing"

1 is what the City did here. Its findings included that the Alan Road access alternative would  
2 avoid the significant, unavoidable biological impact of the bridge, but would forego the  
3 benefit of providing new pedestrian and bicycle coastal access from Las Positas Road and  
4 Ellings Park, and that the benefit outweighed the impact to biological resources. Use of an  
5 erroneous standard constitutes a failure to proceed in a manner required by law.

#### 6 Creek Setback

7  
8 This Court rejects the Petitioner's analysis of the creek setback. Petitioners contend the  
9 City should have adopted an alternative with 100-foot setback from the creek. The  
10 contention is not supported by the record, and the rejection was proper and based on  
11 substantial evidence. The EIR found the proposed houses would not create any Class I  
12 environmental impacts, and would only create significant but mitigatable (Class II)  
13 impacts, and that appropriate mitigation measures were imposed. The setback alternative  
14 would only reduce Class II impacts, which facts are fatal to Petitioners' claims, since  
15 CEQA does not prohibit the City from approving a project with Class II impacts, even if  
16 there is an available alternative that would further reduce or eliminate those impacts. PRC  
17 §§ 21002, 21002.1(c); Guideline §§ 15043, 15092(b).

18 There was extensive expert testimony from Mitchell Swanson that alternative creek  
19 setbacks would not significantly improve the environmental impacts of the project, and  
20 were not needed to mitigate the project's impacts. (S AR 2430-2436). He opined the  
21 proposed setback was adequate to protect, creek, wildlife, and water quality. His opinion  
22 constitutes substantial evidence to support the City's findings.

23  
24 The EIR concluded the alternatives were technically feasible, but that economic  
25 infeasibility was unknown. The City concluded that the economic impact could  
26 substantially reduce applicant's financial ability to implement the creek corridor  
27 restoration measures. (1 AR 15). Petitioners overlook that each alternative also includes  
28 the bridge, which is the sole element of the project which causes Class I impacts. They will

1 not reduce the Class I impacts, because the bridge would remain. The City was therefore  
2 under no obligation to adopt them.

### 3 4 Avoid Landslides Alternative

5 This Court rejects the Petitioner's analysis of the avoid landslides alternative.

6  
7 Petitioners argue substantial evidence does not support the City's conclusion that  
8 this alternative was infeasible. The EIR concluded the alternative may be potentially  
9 infeasible because the reduction in residential units would be substantial and could make  
10 the project economically infeasible. Since landslide stabilization would not be required,  
11 however, the development costs would be reduced, rendering it possibly feasible. This  
12 alternative does not eliminate the bridge, which is the reason there are Class I impacts on  
13 the project. Even if this alternative were selected, the impacts would remain.

14 Further, the finding of economic infeasibility, while unnecessary to rejection, is  
15 credible and based on substantial evidence. There were periodic discussions of lower  
16 density development with estate-sized homes. Planning staff concluded there would not be  
17 a market for them immediately adjacent to a middle-class neighborhood with smaller and  
18 older homes and lots. They also opined that lower density would not provide sufficient  
19 funds to do creek restoration as part of the project. At the 12/12 hearing, staff stated that  
20 lower density alternatives had been considered, but that they mostly did not meet project  
21 objectives—in terms of creek restoration. Therefore, staff opinion provided substantial  
22 evidence to support findings that the alternative was not economically feasible.

### 23 Request for Judicial Notice

24  
25 The Court will take Judicial Notice of Resolution 94-064, which adopted City Guidelines  
26 for implementation of CEQA.  
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1                    December 4, 2007 - Hearing regarding proper remedy re CEQA writ.

2                    Ruling: The Court will retain the ruling as made in previous tentative

3                    Analysis: Real parties also caution the court against making any order that would require  
4                    the City to approve the Alan Road access alternative, but also curiously state that the only  
5                    mandate necessary or justified is an order directed specifically at the Alan Road  
6                    Alternative finding. Let there be no mistake: The court has not entered any order which  
7                    would require the City to approve the Alan Road access alternative. Indeed, the court has  
8                    not entered any order which would require the City to approve *any* project. The court's  
9                    only concern is that the mandates of CEQA are complied with. It has therefore rescinded  
10                   the approvals for the project as proposed, and sent the matter back to the City for  
11                   proceedings (if any) in compliance with CEQA.

12                   Contrary to real parties' claim, although disclosure and consideration of environmental  
13                   information is an important aspect of CEQA, it is much more than a disclosure statute.  
14                   CEQA contains powerful substantive mandates which *require* public agencies to adopt  
15                   feasible alternatives or mitigation measures for projects that may otherwise cause  
16                   significant and unavoidable (Class I) environmental effects. It *prohibits* approval of  
17                   projects as proposed if there are feasible alternatives or feasible mitigation measures  
18                   available that would avoid or mitigate the Class I environmental effects of such projects.  
19                   *PRC* § 21002. If such feasible alternatives or mitigation measures exist, CEQA *prohibits* the  
20                   public agency from adopting a Statement of Overriding Considerations, and *prohibits* the  
21                   public agency from approving the project as proposed by a weighing of the benefits of the  
22                   project as approved against the significant and unavoidable impacts.

23                   Unfortunately, that is precisely what happened here. The EIR found that there were  
24                   feasible alternative which would avoid the Class I impacts of the project as proposed by  
25                   real parties. As a result, the City acted contrary to CEQA when it approved the Veronica  
26                   Meadows project as proposed, despite the existence of significant and unavoidable (Class I)  
27                   environmental impacts. The City acted contrary to CEQA when it approved any project  
28                   other than one including feasible alternatives or feasible mitigation measures. Because

1 feasible alternatives and/or mitigation measures existed, it violated CEQA for the City to  
2 adopt any Statement of Overriding Considerations for any project which did not include  
3 feasible alternatives or mitigation measures.

4 Real parties appear to argue that the project can be saved, if only the City can go back  
5 and better articulate its reasons—presumably in the Statement of Overriding  
6 Considerations. What real parties appear not to grasp is that, because feasible alternatives  
7 have already been found to exist, there can be no Statement of Overriding Considerations.  
8 A Statement of Overriding Considerations can only be adopted when no feasible  
9 alternatives or mitigation measures exist.

10 The parties also spend considerable effort disputing whether the court can order that  
11 certification of the EIR be rescinded. Real parties argue that that it cannot, largely based  
12 on an argument that the EIR was certified by the Planning Commission, and not by the  
13 City Council, and that the certification decision is beyond any attack since no appeal from  
14 that decision was taken. Petitioners argue that because the Planning Commission was not  
15 the decision-making body with respect to the project, its certification "decision" was  
16 nothing more than an advisory opinion, which the City Council could consider, but that  
17 certification could only be accomplished by the City Council as the decision-making body.

18 The court agrees with petitioners that the certification must be by the decision making  
19 body, that in this case the decision-making body was the City Council, and that challenge to  
20 the EIR was not precluded by failure to appeal the planning commission's certification  
21 decision. Part of the "certification" itself is that the decision-making body reviewed and  
22 considered the information prior to approving the project (Guideline 15090(a)). If the City  
23 Council is the decision-making body for the project, it is difficult to see how the Planning  
24 Commission could pre-certify that the City Council had reviewed and considered the  
25 information prior to approving the project. Further, Guideline 1520Z(b) requires that any  
26 public hearing for approval of a project should include the environmental review as a  
27 subject for the hearing (Guideline 15202(b)). See also *Bakersfield Citizens for Local Control*  
28 *v. City of Bakersfield* (2004) 124 Cal.App.4<sup>th</sup> 1184. The Court is familiar with *Tahoe Vista*

1 *Concerned Citizens v. County of Placer* which appears not to apply, because in that case the  
2 planning commission was the decision-making body—it decided to issue the CUP.

3 Therefore, it appropriately certified the EIR.

4 No challenge to the sufficiency of the EIR was made in this proceeding, and the action  
5 was decided based upon findings made in the existing EIR. No argument has been made  
6 that the EIR was inadequate as an informational document. However, given these  
7 authorities, and given that the court has no authority or desire to restrict the actions of the  
8 City in terms of what future project (if any) or alternatives it may approve, except to  
9 require that they conform to the mandates of CEQA, the court does not think it has any  
10 option but to rescind certification of the EIR, so as to allow the City the fullest possible  
11 discretion to proceed in whatever manner it sees fit. In rescinding the certification, the  
12 court is not prohibiting the City from proceeding with the existing EIR, but is giving it the  
13 discretion to reopen environmental review if it deems it necessary.

14 Whether or not certification is rescinded would not be determinative of whether  
15 further environmental review may be required or may occur in any event. On this record  
16 the project as proposed could not be approved, and real parties appear resistant to  
17 acceptance of the feasible alternatives set forth in the EIR. To the extent that further  
18 alternatives can be devised which were not discussed in the current EIR, and are both  
19 feasible and avoid or mitigate the proposed project's significant and unavoidable Class I  
20 impacts, CEQA would require additional formal environmental review. To the extent the  
21 EIR remains intact, that could be accomplished by addendum to the existing EIR, or by  
22 supplemental EIR, as appropriate.

23 Judgment

24 Mr. Parkin shall prepare the Writ/Order/Judgment and it shall be submitted to Mr.  
25 Amerikaner and Mr. Wiley for signature in accordance with the local rules of Court. If the  
26 signature cannot be obtained, counsel shall follow the protocol set out in the local rules.  
27 (See Local Rules, Rule 1414.)  
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Dated: December 5, 2007



Thomas P. Anderle  
Judge