RACHEL B. HOOPER (State Bar No. 98569)
GABRIEL M.B. ROSS (State Bar No. 224528)
AMANDA R. GARCIA (State Bar No. 248462)
SHUTE, MIHALY & WEINBERGER LLP
396 Hayes Street
San Francisco, CA 94102
Telephone: (415) 552-7272
Facsimile: (415) 552-5816
Hooper@smwlaw.com
Ross@smwlaw.com

DANIEL P. SELMI (State Bar No. 67481)
919 South Albany Street
Los Angeles, CA 90015
Telephone: (213) 736-1098
Facsimile: (949) 675-9861

Attorneys for Petitioners MOUNTAIN MEADOWS CONSERVANCY, SIERRA CLUB, and SIERRA WATCH

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LASSEN

MOUNTAIN MEADOWS CONSERVANCY, SIERRA CLUB, and SIERRA WATCH,

Petitioners,

v.

COUNTY OF LASSEN, LASSEN COUNTY BOARD OF SUPERVISORS, and DOES 1-19,

Respondents.

DYER MANAGEMENT LLC and DOES 20-40,

Real Parties in Interest.

Case No. 45938

PETITIONERS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF MANDATE

Date: December 15, 2010
Time: 8:30 a.m.

TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

STATE CASES

STATE STATUTES & REGULATIONS

PRELIMINARY STATEMENT

Petitioners Mountain Meadows Conservancy ("MMC"), Sierra Watch, and Sierra Club bring this action to challenge the County of Lassen's approval in 2007 of a massive new resort development on the flanks of Dyer Mountain ("Project"). Petitioners seek a writ of mandate directing the County to vacate its approvals of a Development Agreement and subdivision map, and its certification of an environmental impact report ("EIR") for the Project. As Petitioners demonstrate, the County's approvals violate the California Environmental Quality Act, Public Resources Code section 21000 et seq.[1] ("CEQA"), and California elections law.

The Project at issue – a four-season destination resort of nearly 7,000 acres – would radically transform a rural, sparsely populated area of southwestern Lassen County. The Project site encompasses thousands of acres of forest land adjacent to scenic Mountain Meadows, including lands sacred to the Honey Lake Maidu tribe. At full build-out, the development would house at least 17,000 people and include 600,000 square feet of commercial/retail development. Even by the County's low estimates, the Project would increase the local population over eight times, dwarfing the nearby Westwood community of 2,000. The resort would generate over 12,000 new car trips each day, tying up local intersections and overwhelming regional and State highways. It would dramatically worsen air quality in a region that already experiences substantial pollution levels. And, as Petitioners repeatedly warned, the Project would inflict serious and irreversible harm to the natural, cultural, and scenic resources of the area.

State law provides the County and the public with one crucial tool for examining the implications of land use transformations like this Project: the environmental impact report prepared pursuant to CEQA. The EIR must "demonstrate to an apprehensive citizenry that the [government] agency has, in fact, analyzed and considered the ecological implications of its action." *Laurel Heights Improvement Assn. v. Regents of the Univ. of Cal.* (1988) 47 Cal.3d

---

[1] Except as otherwise noted, all further statutory references are to the Public Resources Code.

376, 392 ("*Laurel Heights I*") (citations omitted). The document must not only provide a detailed analysis of a proposed project's potentially significant environmental impacts, but also identify feasible measures to avoid or mitigate those impacts. § 21002. CEQA further mandates that public agencies actually *adopt* such mitigation "whenever it is feasible." § 21002.1(b).

The EIR for the Project fails utterly to satisfy CEQA's central objectives of public disclosure and agency accountability. Although the development is among the largest ever proposed in the region, the County's document does not begin to meet the statute's standards of adequacy.

The EIR's gravest deficiency is its failure to meet CEQA's core demand: to provide a "detailed statement setting forth '[a]ll significant effects on the environment'" of the Project. *See Stanislaus Natural Heritage Project v. County of Stanislaus* (1996) 48 Cal.App.4th 182, 186. Instead, the County examined the impacts of this major development in the most general and cursory manner. Styling its document as a "first-tier" EIR, the agency expressly stated that it was deferring concrete, detailed analysis to the future, as the development would require subsequent County approvals. AR 13:4335-36.[2] Apparently, the County's plan was to conduct rigorous, "project-level" review when the developer applied for grading permits and other entitlements—well into the future. *Id.*

This approach violates black-letter CEQA law for two reasons. First, comprehensive environmental review must occur in connection with an agency's *first* approval of a project—it may not be delayed until subsequent approvals. *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 134. Second, the County erred in relying upon a first-tier EIR for the approvals here. Under CEQA, public agencies may use this type of EIR to analyze the impacts of "a policy, plan, program or ordinance" on a broad, general level. § 21068.5. A first-tier EIR *cannot* be used to defer analysis of a specific development project such as the Project. *Stanislaus Natural Heritage,* 48 Cal.App.4th at 197-206. Importantly, here the County granted

[2] In this brief citations to the Administrative Record are provided in the following format: "AR [volume number]: [page number]".

a permanent subdivision map for the Project and entered a detailed Development Agreement that is effective for 30 years.

The EIR's second fundamental flaw was its consistent underestimation of the Project's impacts. CEQA requires that the County provide an accurate assessment of the population growth directly or indirectly caused by the Project, and analyze the environmental impacts of serving that new population. Guidelines Appx. G § XII(a)[3]; *Napa Citizens for Honest Government v. Napa County Board of Supervisors* (2001) 91 Cal.App.4th 342, 370-73. The EIR fails on both counts. In calculating population growth, the County simply overlooked key elements of the development's workforce, such as its construction workers. Then, the agency proceeded to ignore the new population the Project would *indirectly* draw. The result is anomalous: County decision-makers touted the economic activity that the Project promised for the region, but the EIR declines to calculate the population increase resulting from that activity. The EIR then compounds these problems by failing to provide a proper analysis of the environmental impacts of the new population.

The EIR's pattern of understating the Project's effects persists throughout the remainder of its analysis. For example, in its analysis of climate change impacts, the EIR neglects to disclose the major stationary sources of greenhouse gas emissions resulting from the Project, such as emissions from the power plant serving the development. Worse yet, the County did not release its climate change analysis until the end of the environmental review process, after all public comment periods had closed. This timing flatly violated CEQA. The statute mandates recirculation of an EIR if it adds significant new information after the close of public comment. § 21092.1. Because the County conceded that the Project's cumulative contribution to climate change would be significant, its failure to provide an opportunity for public comment was unlawful.

---

[3] The CEQA Guidelines, Cal. Code Regs., tit. 14 § 15000 *et seq.*, are referred to herein as "Guidelines."

The County also failed to identify, or adopt, feasible measures that would reduce or avoid the Project's most serious effects. For example, while the EIR recognizes that the Project's woodburning stoves would be a major source of pollution in the region, it does not propose a ban on such devices. Instead, the County labeled such mitigation as "infeasible", based on a vague statement by the developer's consultant regarding the "expectations" of potential buyers. AR 29:10415-16. Similarly, although the Project would cause major impacts to State and regional highways, the County flatly refused to craft mitigation that might involve the California Department of Transportation ("CalTrans") and neighboring Plumas County. While the County reasoned that it "cannot mandate the participation of outside agencies" (AR 9:2985), that excuse was nonsensical: both Caltrans and Plumas repeatedly expressed their willingness to enter a mitigation agreement with the County. *E.g.,* AR 8:2711; AR 9:3102.

In short, the County approached the required environmental review with blinders on. The agency systematically downplayed the severity of the Project's impacts, or overlooked key issues altogether. It repeatedly failed to identify mitigation for serious impacts, or rejected as "infeasible" reasonable measures that had been identified. It refused to permit meaningful public comment on the most alarming environmental issue of our time, global warming. And finally, it rejected each of the EIR's environmentally superior alternatives, based on specious "evidence" offered by the developer at the end of the process. Accordingly, the County's approval of the Project must be set aside as a prejudicial abuse of discretion.

The County's approval of the Project not only violated CEQA, but also ran afoul of California election law. In 2000, County voters passed an initiative that established planning and zoning designations for the Project site, allowing for its development ("Initiative"). Importantly, the voters included a very specific limitation: if construction did not commence within seven years of the measure's effective date, the Board of Supervisors could freely modify the Initiative's planning and zoning. However, even though the developer never commenced construction, the County later approved the Development Agreement, which granted the developer vested rights for *thirty years.* By doing so, the Agreement explicitly prohibited the County from altering the planning and zoning set by the Initiative. Because the Development

Agreement thus stripped the County of legislative authority expressly reserved by the voters, the Agreement improperly "amended" the Initiative. State law provides that County initiatives may not be amended or repealed except by vote of the people. Elect. Code § 9125. Because the County never obtained voter approval of the Development Agreement, the Agreement is unlawful and must be set aside.

FACTUAL AND PROCEDURAL BACKGROUND

I. Dyer Mountain and the Proposed Project.

Dyer Mountain is a long, forested ridge of the Sierra Nevada, rising from the southern shore of Mountain Meadows Reservoir (sometimes known as Walker Lake.) AR 13:4345-47; AR 10:4716. Mountain Meadows Reservoir is a small lake impounded by a dam owned by Pacific Gas & Electric; it is popular with anglers and hunters. AR 13:4348, 4351. The lake's margin is mainly wooded, although the eastern shore is home to broad, grassy areas threaded with wetlands. AR 14:4869. Directly across the reservoir lies the unincorporated community of Westwood, with a population of approximately 2,000, and beyond that, the Cascade Range and Lassen Volcanic National Park. AR 13:4350, 4346; AR 10:4716. The land at the higher elevations of Dyer Mountain is a part of the Lassen National Forest, whereas the lower slopes are privately owned. AR 13:4350.

Dyer Mountain offers no above-treeline terrain (*id.*), and even its highest reaches are unlikely to receive the large snowfall necessary to maintain a ski resort in the near future (AR 30:11063-65, 11077-83). It is, moreover, located farther from Northern California's population centers than the large resorts around Lake Tahoe. AR 30:10993. Despite these significant drawbacks, Lassen County has approved plans to build a major four-season resort. The Project would center on skiing in the winter and would include three 18-hole golf courses as a summer draw. AR 13:4355-59.

The Project would bring over 4,000 year-round residential units, including large (5,000 square foot) single-family lots, along with town houses and condominiums arranged in a "village core." AR 13:4360-61. The development could accommodate up to 17,382 people (AR 13:4359) and increase the area's year-round population by at least 4,500 people. AR 13:4532.

It would also encompass over 600,000 square feet of additional developed areas, including retail and restaurant areas, ski lodges, and common areas. AR 13:4361.

II. The 2000 Initiative.

In November, 2000, the voters of Lassen County approved an initiative giving the Project several of its key approvals. AR 16:5456, 19:6529. The Initiative amended the Lassen County General Plan to provide land-use designations consistent with the Project. AR 4:1129-32. It also rezoned the Project site from Agriculture-Forest , a restrictive designation that would maintain the site in timber production, to Mountain Resort ("MR"), an expansive designation that allows the proposed Project. AR 4:1136, AR 30:10890.

The Initiative conferred no vested right authorizing the Project; rather, it provided at least two "veto points" where the Board could deny the Project. First, the Initiative recognized that future subdivisions of the Project site, requiring discretionary approval, would need to comply with CEQA. AR 4:1139. Second, the Initiative explicitly authorized the Board to modify the new zoning and general plan designations for the Project "if, after seven (7) years construction has not been initiated with respect to the ski facilities." AR 4:1140.

III. Environmental Review.

After adoption of the Initiative, the Project's developer, Dyer Mountain Associates, applied to the County for a subdivision map, dividing the Project site into 13 large parcels. It also proposed a Development Agreement to establish binding entitlements and guidelines for the Project. AR 17:5842. The Initiative provided that, "[c]onsistent with state law, the County shall comply with the California Environmental Quality Act prior to the County's approval of subdivision maps or other implementation of this measure." AR 4:1139. Accordingly, the County issued a draft environmental impact report ("DEIR") for the Project in April, 2005. AR 2:241. This DEIR announced that it was using a specialized approach to environmental review called "tiering," which, the DEIR claimed, allowed for broad-scale, general analysis of the Project's impacts.

The DEIR confirmed that the Project would have numerous significant, adverse environmental impacts. For example, the DEIR disclosed that the Project would degrade traffic

conditions to unacceptable levels at several intersections and road segments. AR 2:461-522. Similarly, the Project would emit several types of air pollution well above regulatory thresholds. AR 3:554-67. The DEIR, however, identified no mitigation measures that would reduce these and other impacts to a less-than-significant level.

The DEIR did identify road improvements that could ameliorate traffic impacts, but it accepted responsibility only for improvements within Lassen County. For the impacted intersections in Plumas County, the DEIR proposed that the Project's developer fund improvements but never identified any mechanism for implementing them. AR 2:527-29. Similarly, the DEIR recognized the major contribution of woodburning stoves and fireplaces to the Project's air pollution but identified measures that were insufficient to reduce pollution to a less-than-significant level. AR 3:560. Accordingly, the DEIR was forced to conclude that the Project's impacts were significant and unavoidable. AR 2:323-27, 333, 331.

During the public comment period for the DEIR, numerous members of the public, government agencies, and organizations, submitted comments objecting to the DEIR's many inadequacies. AR 8:2410-13; AR 10:3152, 3256; AR 11:3705-06. For example, CalTrans and Plumas County warned that the DEIR provided insufficient mitigation measures for the Project's serious traffic impacts outside of Lassen County. AR 8:2776-77; AR 9:2975-76. The Northern Sierra Air Quality Management District ("Air District") similarly noted the DEIR's failure to propose sufficient limitations on woodburning stoves and fireplaces used within the Project. AR 9:2998. The Air District also proposed a shuttle system to reduce pollution from private vehicles. *Id.*

Petitioners MMC and Sierra Watch also alerted the County to a wide variety of inadequacies in the DEIR. For example, MMC explained that the DEIR's description of the Project was so vague as to render impossible effective analysis of its land use plans and its scenic impacts. AR 10:3258-60. MMC also challenged the DEIR's persistent underestimation of the new population that the Project would attract to the Westwood area. AR 10:3206-68.

In July 2006, the County released a recirculated draft EIR ("RDEIR") in an apparent attempt to correct the flaws in the original DEIR. AR 6:1718. Petitioners MMC and Sierra

Watch again commented, citing the RDEIR's failure to correct many of the serious flaws highlighted in previous comments. AR 11:3612, 3465. MMC noted that revisions to the traffic and air quality analyses did not correct the DEIR's failure to identify mitigation sufficient to reduce these impacts to a less-than-significant level. AR 11:3470-71, 3474-75. Moreover, the RDEIR's analysis of air pollution continued to ignore the Project's contribution to carbon emissions and global warming. AR 11:3475.

In June 2007, the County released the Final EIR ("FEIR"), which generally reaffirmed the flawed analyses of the DEIR and RDEIR. AR 8:2408. The FEIR still provided only vague descriptions of the Project, as the County apparently believed that the use of "tiering" justified that approach. Despite the many comments from public agencies, the FEIR continued the earlier documents' refusal to identify any means to ensure improvements to Plumas County roads and intersections. *E.g.*, AR 8:2808. Next, the FEIR proclaimed that reducing the Project's significant level of air pollution was simply impossible. Citing no concrete evidence, the document relied solely on a bald statement from the developer's consultant that if the numbers of woodburning stoves and fireplaces were reduced to the necessary level, the proposed resort would fail. AR 9:3002-04. The FEIR also concluded that, despite the profit that the Project's developers would derive from visitors driving to the resort, the developers should bear no responsibility for a shuttle system to mitigate the impacts of those visitors' vehicles. AR 11:3574. Finally, the FEIR added a brief, perfunctory analysis of the Project's greenhouse gas emissions, concluding that its contribution to cumulative impacts would be significant but proposing no mitigation measures. AR 11:3575-82; AR 13:4703-04; AR 18:6106.

IV. The County's Approvals of the Project.

On July 11 and 24, 2007, the Lassen County Planning Commission considered the Project. AR 19:6722, 6725. The Commission recommended that the Board of Supervisors certify the EIR as adequate and approve the requested subdivision and Development Agreement. AR 1:3-11.

Prior to the Board of Supervisors' meeting on the Project, all three Petitioners submitted comments on the FEIR, the proposed subdivision, and the Development Agreement. AR

29:10417, 10427. In addition to identifying the numerous flaws that the County had refused to correct, MMC noted that the EIR's approach was improper in light of the commitments that the Development Agreement would make. AR 29:10429-32. MMC explained that, because the Development Agreement conferred very specific property rights relating to the Project, the FEIR must consider the Agreement's impacts in detail and could not employ a broad, generalized analysis. *Id.* MMC also pointed out the incompleteness of the FEIR's analysis of greenhouse gas emissions, which failed to analyze several categories of activities that would contribute to climate change. AR 29:10445-47. Equally importantly, that discussion could not appear for the first time in an FEIR. AR 29:10444.

The Board met on July 31, 2007, and directed its staff to prepare the findings necessary to approve the Project at a later meeting. AR 20:6986-88, 7073-75. Prior to the Board's September 25, 2007 meeting, the County circulated draft findings approving the Project and certifying the EIR as adequate. MMC submitted comments pointing out the flaws in the proposed findings, particularly those purporting to justify the County's rejection of Project alternatives and mitigation measures as "infeasible." AR 30:10985.

MMC's final comment letter also identified a potential conflict between the Development Agreement and the Initiative. AR 30:10988. The Initiative, which can only be amended by a vote of the people, authorized the Board to revise the Project site's zoning and general plan designation if construction had not begun within seven years. *Id.* The Development Agreement, however, removed that authority by freezing the Initiative's land use regulations for thirty years.

On September 25, 2010, the Board certified the EIR, approved the subdivision and had a first reading of the Development Agreement. AR 1:12-13. On October 9, 2007, the Board gave final approval to the Development Agreement. AR 1:124-25. As required by CEQA, the County filed its Notices of Determination for the Project on September 28. AR 1:1-2.

V. The Litigation.

On October 25, 2007, MMC, Sierra Watch, and the Sierra Club timely filed a Petition for Writ of Mandate. As of December 12, 2007, seven years had passed since the Initiative became effective, and construction on the Project had not begun. Accordingly, on January 8, 2008,

Petitioners filed a First Amended and Supplemental Petition for Writ of Mandate that added a second cause of action alleging that the Development Agreement invalidly amended the Initiative by locking in the planning and zoning for an additional thirty years.

On March 27, 2008, the original developer of the Project filed a petition initiating bankruptcy proceedings in federal Bankruptcy Court. Pursuant to 11 U.S.C. section 362, the filing of the bankruptcy petition automatically stayed this action.

During the bankruptcy proceeding, a new entity, Dyer Management LLC, acquired the real property at the Project site. On December 16, 2009, Petitioners filed in this Court written notice that the Bankruptcy Court had lifted the automatic stay, and proceedings in the case were reinitiated. The parties then stipulated to the filing of a Second Amended and Supplemental Petition, substituting Dyer Management LLC as the sole real party in interest.

STANDARD OF REVIEW

This action challenges the adequacy of the EIR for the Project. As the Supreme Court has explained, the EIR is "the heart of CEQA" and an "environmental 'alarm bell' whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return." *Laurel Heights I*, 47 Cal. 3d at 392 (citations omitted). The EIR is the "primary means" of ensuring that public agencies "take all action necessary to protect, rehabilitate, and enhance the environmental quality of the state." *Id.* (quoting § 21001(a)). It must provide objective analysis, not just "call for blind faith in vague subjective characterizations." *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 85.

The central purpose of an EIR is to identify the significant environmental effects of a proposed project and evaluate ways of avoiding or minimizing those effects. §§ 21002, 21002.1(a), 21061. CEQA also requires the lead agency to adopt any feasible mitigation measures or alternatives that can substantially lessen the project's significant environmental impacts. § 21002; Guidelines § 15002(a)(3).

In reviewing the EIR for the Project, this Court must determine whether the County prejudicially abused its discretion by either: (1) failing to proceed in the manner required by law,

or (2) reaching a decision that is not supported by substantial evidence. § 21168.5; *Laurel Heights I*, 47 Cal. 3d at 392. "Certification of an EIR which is legally deficient because it fails to adequately address an issue constitutes a prejudicial abuse of discretion. . . ." *Citizens to Preserve the Ojai v. County of Ventura* (1985) 176 Cal.App.3d 421, 428. A prejudicial abuse of discretion also occurs if an agency certifies an EIR that omits relevant information and thus precludes informed decision-making. *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 712. "[T]he ultimate decision of whether to approve a project, be that decision right or wrong, is a nullity if based upon an EIR that does not provide the decision-makers, and the public, with the information about the project that is required by CEQA." *Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 829.

The County also made a series of findings rejecting proposed alternatives and determining that specific benefits of the proposed project outweighed its significant and unavoidable environmental impacts. These findings must be supported by substantial evidence in the record. *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1198.

Finally, this action challenges the County's adoption of the Development Agreement on the ground that it illegally amended the Initiative. This question involves the interpretation of the Development Agreement and the Initiative, and is therefore a matter of law to be determined in the first instance by this Court. *See Knight v. Superior Court* (2005) 128 Cal.App.4th 14, 22.

ARGUMENT

I. The EIR's Purported "Tiering" Approach Failed to Provide the Legally Required Analysis of Specific Environmental Impacts.

A. The EIR Provided Only Broad, Generalized Environmental Analysis Even Though the County Approved a Specifically Delineated Development.

The County approved a subdivision map and Development Agreement that entitled the applicant to develop a specifically defined ski and golf resort on the shores of Mountain Meadows Reservoir. Nonetheless, the County declined to conduct detailed environmental review in connection with these two approvals; instead, it deferred that review to a later time on the grounds that the Project would require further approvals. The County's approach violates

CEQA: an agency may not delay complete, detailed environmental review to a late point in a series of project approvals. *See Save Tara,* 45 Cal.4th at 134; *see also*, *e.g, County of Amador v. City of Plymouth* (2001) 149 Cal.App.4th 1089, 1103-1110 (municipal service agreement between tribe and city subject to CEQA review even though all details were not finalized and further approvals were required).

The County's choice to defer thorough, concrete environmental review of the Project was deliberate. The EIR expressly disclaims detailed review, repeatedly admitting that it "has been written to analyze environmental impacts of [the Project] on a broad scale," and that "later project-level review would be required for components of ongoing development." AR 13:4335-36; *see also* AR 13:4333 (stating that EIR "does not provide an exhaustive discussion of specific impacts related to the proposed development"). Thus, for example, the EIR concedes that the Project may fill wetlands but fails to determine whether the impact will actually occur; it does not disclose the locations or acreage of the impacts, as a thorough analysis would require. AR 14:4895, 4911. Instead, the County postponed such an analysis until the resort is actually built. *Id.* Similarly, the EIR notes that the Project would require a wastewater treatment plant, but does not analyze the impacts of constructing such a facility. AR 10:3352.

These are just two examples—the EIR is riddled with statements deferring the analysis and mitigation of impacts. *E.g.*, AR 10:3352 (deferring description and analysis of trail-building), AR 14:4919 (deferring disclosure of whether, where, and how much Project would impact little willow flycatcher and yellow warbler), AR 14:4983 (stating that County will, sometime in the future, determine whether sufficient water supplies are available for the Project). Thus, the EIR does not provide the public or decision makers with sufficient information to understand the true nature and magnitude of the Project's impacts on the environment. Instead, the EIR for the most part simply settles for describing the *types* of impacts that the Project *might* have, while promising that the County will get around to describing the Project's actual impacts in conjunction with later approvals. These deferrals, moreover, were considered and intentional. The EIR affirmatively adopted an approach "defer[ing] [specific] analysis to a future environmental document." AR 13:4335.

The County's decision to postpone specific environmental analysis violates CEQA. The statutory mandate is precise, requiring a "detailed statement setting forth 'all significant effects on the environment of the proposed project.'" *Stanislaus Natural Heritage,* 48 Cal.App.4th at 186. Because CEQA requires this analysis, but the EIR expressly admits that it was not included, the County's approval of the Project was a prejudicial abuse of discretion.

B. The EIR's "Tiering" Approach Cannot Excuse Its Abbreviated Analysis.

The EIR tries to justify its admitted lack of detail by arguing that the County opted for a "first-tier" EIR, rather than a "project-specific" EIR. AR 13:4332-36. However, this excuse is unavailing. Under CEQA, only large-scale programs involving broad plans or policies, such as general plans, are proper subjects for tiered analysis. By contrast, specific, clearly delineated development projects—like this Project—require a detailed analysis.

The CEQA Guidelines provide for several methods for environmental review depending on the circumstances. "The most common type of EIR" is the "project EIR," which "examines the environmental impacts of a specific development project." Guidelines § 15161. In contrast, for "programs" that require complex sequences of subsequent approvals, CEQA provides for "tiering," the method of environmental review that the County tried to use here. Under the tiering methodology, an agency prepares an initial "first-tier" EIR that analyzes the impacts of "a policy, plan, program or ordinance" on a broad, general level. § 21068.5; *see also* Guidelines § 15152; *Friends of Mammoth v. Town of Mammoth Lakes Redevelopment Agency* (2000) 82 Cal.App.4th 511, 528.

Tiering, however, may be used only in narrow circumstances. CEQA explicitly limits tiering to situations in which the first-tier EIR considers the impacts of a "policy, plan, program or ordinance." § 21068.5. Tiering is properly used only for environmental review of actions that will eventually "encompass[] a wide spectrum." *Chaparral Greens v. City of Chula Vista* (1996) 50 Cal.App.4th 1134, 1143. It is allowed, for example, in situations that start with the adoption of a plan "which is by its nature tentative and subject to change" and later progress "to activities with a more immediate site-specific impact." *Id.* (quoting *Al Larsen Boat Shop v. Board of Harbor Comrs*. (1993) 18 Cal.App.4th 729, 740). Thus, tiering is appropriate for

analyzing projects such as a statewide water management plan (*In re Bay Delta Programmatic Environmental Impact Report Consolidated Proceedings* (2008) 43 Cal.4th 1143), a redevelopment plan (*Friends of Mammoth*, 82 Cal.App.4th 511), or a port's master plan (*Al Larsen Boat Shop*, 18 Cal.App.4th 729).[4]

By contrast, under CEQA public agencies may *not* use the broad, general analysis in a first-tier EIR to support the approval of a particularized development project. Specific construction projects—like the ski resort at issue here—require the kind of detailed environmental review that a first-tier document does not provide.

Thus, in *Stanislaus Natural Heritage*, 48 Cal.App.4th 182, the Court of Appeal found that an agency could not use tiering to avoid detailed environmental review of a specific development project remarkably like the Dyer Mountain project. In that case, Stanislaus County approved a private developer's proposal to build a "destination resort and residential community" that featured golf courses, sports facilities, and 5,000 residential units. *Id.* at 186. The project "designate[d] the specific sites for future development, and describe[d] what structures the future development would consist of." *Id.* at 204. For this approval the county prepared a "first-tier EIR" that, like the EIR here, explicitly deferred important aspects of its environmental review to a later date. *Id.* at 197-98.

The Court of Appeal held that, given the specificity of the approved project, this approach violated CEQA. It warned that "tiering is not a device for deferring the identification of significant environmental impacts that the adoption of a specific plan can be expected to cause." *Id.* at 199. According to the court, tiering may have been legally appropriate if the

---

[4] In this case, the County also referred to its "first tier" EIR as a "program" EIR. *E.g.*, AR 13:4332. A program EIR is "designed for analyzing program-wide effects, broad policy alternatives and mitigation measures, cumulative impacts and basic policy considerations, as opposed to specific projects within the program." *Friends of Mammoth*, 82 Cal.App.4th at 533-34; *see also* Guidelines § 15168(a) (allowing use of program EIR for "series of actions"). Because program EIRs are well-suited for analyzing the impacts of "a policy, plan, program or ordinance," they frequently serve as the "first-tier" document when an agency employs tiering.

county had "simply adopt[ed] or amend[ed] a general plan so as to permit the building of homes and golf courses." *Id.* at 203. But because "[t]he County adopted a specific plan calling for construction of those facilities and of other particularly described facets of the [proposed resort]" (*id.*), the EIR could not defer analysis of the project's environmental impacts.

The decision in *Stanislaus Natural Heritage* is precisely on point here. Like the EIR in that case, the County's EIR explicitly deferred analysis of many environmental impacts, claiming that complete analysis would be provided in later tiers of review. *See*, *e.g.*, AR 10:3352 (deferring analysis of impacts of wastewater treatment plant). The details of the Project here are at least as concrete and specific as those in *Stanislaus Natural Heritage*. The Development Agreement approved by the Board gives the developer a specific, vested right to build 3,259 "equivalent dwelling units" (a measure that includes hotel rooms) and 333,800 square footage of commercial space. AR: 1:138. Those entitlements *alone* are far too specific to allow general, first-tier analysis. But the Development Agreement is similarly specific in other areas as well. For example, it precisely establishes the acreage of ski terrain included in the Project, the square feet of commercial space to be developed, and the number of golf courses allowed on the site. AR 1:168-69.

Moreover, the Development Agreement does not merely plan for these facilities and uses; it gives the developer vested rights to build them. *See Citizens for Responsible Government v. City of Albany* (1997) 56 Cal.App.4th 1199, 1215 (development agreement creates vested rights in the form of an "entitlement for use"). Thus, under the Development Agreement, the County "agrees to grant and implement" all necessary approvals for the Project throughout the thirty-year term of the Agreement. AR 1:137, 150. Critically, the County's discretion over such later approvals is severely limited: it can exercise discretion only to the extent that its decisions "conform with" the standards set out in the Agreement, which include the specifics of the Project. AR 1:140.

Thus, the County has made a binding commitment to allow a specifically delineated development. As a result, it must analyze that specific development and cannot legally employ

an approach to environmental review that CEQA reserves for a broader "policy, plan, program or ordinance."

II. The EIR Provides an Incomplete and Flawed Analysis of the Impacts Related to Population Growth Induced by the Project.

The County asserts that the Project would "expand the economic base" of Lassen County and bring an "increase in employment." AR 1:107-08. Indeed, the County cited these effects among the reasons for approving the Project despite its significant and unavoidable impacts. *Id.* Yet the Project also would draw new people to the area; they would inevitably require housing and public services, such as law enforcement and schools. Providing such housing and services would have impacts, and CEQA requires their analysis. The EIR, however, fails even to accurately estimate the new population growth, much less adequately analyze its environmental consequences.

A. CEQA Requires That a Public Agency Accurately Estimate Population Growth and Then Analyze the Consequences of That Growth.

In *Napa Citizens for Honest Government*, 91 Cal.App.4th 342, the Court of Appeal set out the general framework for considering population-related impacts. An EIR:

> should, at a minimum, identify the number and type of housing units that persons working within the [p]roject area can be anticipated to require, and identify the probable location of those units. The [EIR] also should consider whether the identified communities have sufficient housing units and sufficient services to accommodate the anticipated increase in population. If it is concluded that the communities lack sufficient units and/or services, the [EIR] should identify that fact and explain that action will need to be taken . . . .

Id. at 370. Once the EIR determines the action needed to provide sufficient housing and/or services, CEQA then requires it to examine the environmental consequences of such action. For example, in *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 438-47, the California Supreme Court held that where a new development would need an increased water supply, CEQA requires the agency to analyze the environmental impacts of providing that water supply.

A complete analysis of population growth thus requires two distinct, logical steps. First, an EIR must accurately estimate the population growth that a project would cause, both directly

and indirectly. Specifically, the EIR must estimate the number of employees that the project would require and whether those employees are likely to be new to the region. Guidelines Appx. G § XII(a) (directing analysis of whether project would induce substantial population growth). The EIR also must consider the growth that a project will *indirectly* induce, whether through stimulating the local economy so that new employment opportunities draw new population, or by providing infrastructure that allows new construction. Guidelines § 15126.2(d) ("Discuss the ways in which the proposed project could foster economic or population growth . . . ."); *See also City of Davis v. Coleman* (9th Cir. 1975) 521 F.2d 661, 676 (where induced development is "raison d'etre" of project, EIR must analyze impacts of that development).

The second step in analyzing the impacts of population growth is to consider the environmental impacts of serving that estimated new population. Thus, the EIR must not only evaluate whether a project would "[i]nduce substantial population growth," but also whether such growth would require construction of new housing. Guidelines, Appx. G § XII(a), (c). If new construction will occur, then the EIR must analyze the environmental impacts of that construction. *See Napa Citizens*, 91 Cal.App.4th at 373 (EIR must disclose "environmental consequences of tapping" water resources needed to serve growing population). The EIR must also consider whether the new population would place demands on public services, such as fire protection, law enforcement services, or schools to the extent that "new or physically altered governmental facilities" are required. Guidelines, Appx. G § XIII(a). The EIR then must consider the environmental impacts of providing such facilities. *See Napa Citizens*, 91 Cal.App.4th at 373.

In the present case, the EIR failed both steps of this analytic process. It underestimated the new population that the Project would bring to the region, and it failed to thoroughly analyze the environmental impacts of that new population.

///

///

///

B. The EIR Underestimated the Population Growth Associated with the Project.

1. The EIR Ignores Large Portions of the Project's Potential Employees.

The first step in assessing the Project's population growth is to calculate the number of new jobs that the Project would create. While the EIR attempts to estimate the employment associated with the Project, it includes only those workers employed in the *operations* of the resort itself. AR 13:4533. As Petitioners pointed out on several occasions, this approach simply ignores large numbers of other workers on and off the Project site. *E.g.*, AR 29:10437. The EIR reflects four separate errors in this analysis, each of which is sufficient to invalidate the Project approval.

First, and most egregiously, the EIR's estimates do not account for any construction workers, even though construction on this large development would continue for up to 35 years. AR 13:4354. Given the decades-long time frame of the Project, these construction jobs are, for planning purposes, effectively permanent jobs. Indeed, the County's approval of the Project specifically cited construction jobs as one of its benefits. AR 1:108. However, the County then proceeded to ignore these jobs in calculating the Project's environmental costs. CEQA does not allow this sort of skewed environmental accounting. *See Citizens to Preserve the Ojai*, 176 Cal.App.3d at 431-32 (finding an "absolute failure to comply [with CEQA]" where EIR omits information relevant to Project's impacts).

Second, the EIR fails to account for any of the workforce required by various non-resort, onsite facilities. For example, the EIR ignores the emergency response and medical staff who would be employed at the on-site medical center, and the staff required to operate the on-site wastewater treatment plant (AR 13:4367). Similarly, although the EIR acknowledges that the Project would create the need for new law enforcement personnel (AR 14:5019-20), the EIR's estimates omit these employees.

Third, the EIR compounds its first two errors by underestimating the employees in those categories that it does include. For example, the EIR counts employees associated with hotel operations and "vacation rental support." AR 13:4533. It does not, however, count the employees associated with other types of housing and lodging, such as single-owner second

homes and time-share units. As Petitioners pointed out, the analytically appropriate approach for a ski resort is to calculate that each such unit would require some fraction of a resort employee. AR 29:10437.

Fourth and finally, the EIR's evaluation accounts for only 55 percent of the Project's development area. The EIR's employment estimates include the workers needed to "support approximately 333,800 square feet of commercial and resort support uses" (AR 13:4533), but the Project includes almost *twice* that area of development—607,900 square feet. AR 13:4333. The EIR completely fails to account for the employment generated by the remaining 274,100 square feet (about 45%). Because this area is designated for "common area land uses" (*id.*) and thus requires employees (AR 29:10437), the omission is inexcusable.

In response to Petitioners' comments, the FEIR offers no explanation for these omissions. Nor does it attempt to correct its employment estimates. Instead, it simply cites the first-tier, program-level nature of the analysis to excuse its failure. AR 10:3362. But this excuse is unavailing.

As discussed above, this Project is not an appropriate subject of a first-tier or program EIR. *See supra* Part I.B. Furthermore, even if a "first-tier," "program-level" document were proper, the County would fare no better. Broad-scale impacts attributable to an entire Project, like the impacts that follow from population growth, are precisely the type of impacts that such a document must analyze. *See Friends of Mammoth*, 82 Cal.App.4th at 534 ("[A] program EIR is designed for analyzing program-wide effects . . ."). Piecemeal analysis of these impacts in later, project-level environmental documents will necessarily provide an incomplete view of their magnitude. An evaluation focused on the population growth of any single segment of the Project will mask the full impacts of the entire Project.

2. The EIR Does Not Analyze the Population Growth That the Project Will Indirectly Induce.

Just as the FEIR did not fully analyze the environmental effects from the population directly attributable to the Project, it also ignored the additional population growth that the Project would indirectly cause. In approving the Project, the County predicted that the new ski

resort would "expand[s] the economic base" of the area. AR 1:107. That expansion would inevitably lead to more economic activity than just the resort itself. *See* AR 23:8308 (Westwood/Clear Creek Area Plan DEIR, stating that "[i]t is expected that the [P]roject will provide a significant stimulus for commercial development in the Planning Area"). New shops and restaurants would open to serve visitors. Resort employees would have more money to spend, and local businesses would grow. All of this economic activity would cause environmental effects, but the EIR overlooks them entirely.

CEQA requires that the EIR "discuss the characteristic of [the] project[] which may encourage and facilitate other activities." Guidelines § 15126.2(d). Rather than undertake that discussion, however, the EIR states only that "development of a winter sports area" has been included in the Westwood/Clear Creek Area Plan and, after the Initiative, in the Lassen County General Plan. AR 10:3363; AR 8:2575. This statement does not provide the analysis that CEQA specifically mandates. The EIR must estimate the growth that the Project would induce, and merely mentioning the Project in other plans does not provide that estimate.

Moreover, the County plans referenced by the EIR do not examine the Project's induced growth. The EIR for the Lassen County General Plan analyzes the impacts of a 8,300-person population increase between 2000 and 2020. AR 22:7514. This increase, however, is far smaller than the population at the resort itself and captures none of the Project's induced growth. As for the Westwood-Clear Creek Area Plan, the EIR for the plan acknowledges the potential growth-inducing impacts of the Project and states that the Project's EIR should evaluate them. AR 23:8308. The Project EIR, however, failed to include this evaluation.

Thus, neither the Project EIR nor any prior document supplies the analysis that CEQA demands. This omission alone renders the EIR inadequate and demonstrates that the County failed to proceed according to law. *See Napa Citizens*, 91 Cal.App.4th at 370.

///

///

///

///

C. The EIR Fails to Analyze the Environmental Impacts of Population Growth.

1. The EIR Ignores the Environmental Impacts of Constructing Housing for New Residents.

The flaws in the EIR's projections of employment and population growth have a ripple effect, inevitably undermining the EIR's analysis of the housing-related impacts of that growth. The EIR determined that workers already living in Lassen County would fill most new jobs, and that sufficient vacant land is available to build housing for any workers who move to the area. AR 13:4534-36. To reach these conclusions, however, the EIR relied on the employment and population estimates that, as demonstrated above, ignore construction workers and other key elements of the Project's workforce. These estimates also ignore the population indirectly induced by the Project's economic influence on the area. Accordingly, no substantial evidence supports the EIR's determinations that the Project would not have a significant impact on the area's jobs/housing balance or its affordable housing. AR 13:4533-38.

Moreover, even those analyses that the EIR did attempt are incomplete. Using the figures that underestimate employment and population growth, the EIR found that meeting the housing needs of the new population would require some construction. AR 13:4534. The EIR, however, never examines the environmental impacts of that construction, such as the air pollution and traffic that building new homes would cause. This omission violates CEQA. *See City of Antioch v. City Council* (1986) 187 Cal.App.3d 1325, 1336.

2. The EIR Ignores the Environmental Impacts of Providing New Fire, Police and School Facilities.

The same generic failings in the EIR's methodology regarding growth also infect the EIR's discussion of the Project's impacts on various public services in the area. The EIR's analysis of future demand for fire protection examines only the fire-protection needs on the Project site. AR 14:5018-19. It completely overlooks the new population that would live off-site. Nor does it explain what agency would provide firefighting services for this new population, or whether that agency currently has the capacity to provide such expanded services. Without this omitted analysis, no substantial evidence supports the EIR's conclusion that the Project would have a less than significant impact related to fire protection. *Id.*

The EIR considers population growth in analyzing impacts related to law enforcement and schools, but these projections also fail to meet CEQA's standards. In each case, the EIR recognizes that current facilities fall short of future needs. Regarding the Sheriff's Department, the EIR notes that "[e]xisting facilities in Westwood are inadequate to accommodate the expected need for increased [Sheriff's Department] staffing." AR 14:5020. The situation in the schools would be worse. Even by the EIR's underestimates, the Project could add up to 1,402 children to a district that currently enrolls 2,156. AR 14:5023. The school district could absorb only 150 new students without expanding facilities. *Id.* Thus, new construction of some sort—either building new schools or expanding existing ones—is inevitable if the Project goes forward.

But, after recognizing that both law enforcement and school facilities would need to expand, the EIR's analysis simply stops, when CEQA requires more. The EIR must proceed to analyze the environmental impacts of constructing the needed new faculties. "When there is evidence . . . that economic and social effects caused by a project . . . could result in a reasonably foreseeable indirect environmental impact . . . then the CEQA lead agency is obligated to assess this indirect environmental impact." *Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173, 1182.

Here, the "economic and social effects" are the increased need for law enforcement and the increased enrollment in local schools, while the "reasonably foreseeable indirect environmental impact" is the effect of constructing new facilities. CEQA unquestionably requires the EIR to include this analysis. Guidelines § 15126.2(d) ("Increases in the population may tax existing community service facilities, requiring construction of new facilities that could cause significant environmental impacts"); *see also, e.g.*, *Bakersfield Citizens for Local Control,* 124 Cal.App.4th at 1205 ("[I]f the forecasted economic or social effects of a proposed project directly or indirectly will lead to adverse physical changes in the environment, then CEQA requires disclosure and analysis of these resulting physical impacts."); *Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151, 170 ("[T]he

lead agency *shall* consider the secondary or indirect environmental consequences of economic and social changes . . . .") (emphasis in original).

In completely ignoring these impacts, the present EIR closely resembles the EIR that the Court of Appeal found inadequate in *El Dorado Union High School Dist. v. City of Placerville* (1983) 144 Cal.App.3d 123. There, after acknowledging that the local school district was already over-capacity and that the proposed project would add to enrollment, the EIR did not consider any of the environmental consequences of over-enrollment. *Id.* at 132-33. The court held that where, as in the present case, the need for new construction is obvious, CEQA requires more than a simple statement of how many new students would enroll. *Id.* at 131. It also requires an accurate analysis of the environmental impacts of that population growth. The County's failure to provide such analysis here was a prejudicial abuse of discretion.

III. The County Failed to Adopt Feasible Mitigation Measures That Would Have Reduced the Project's Significant Air Pollution Impacts.

The EIR's analysis of air quality impacts reveals that the Northeast Plateau Air Basin, which includes Lassen County and Dyer Mountain, exceeds state clean air standards for several pollutants, without the Project's contribution. AR 13:4674-76. Nonetheless, the County approved a Project that would add further, significant emissions of at least three air pollutants: carbon monoxide, reactive organic compounds and gases ("ROC/ROG"), and large particulate matter ("PM10"). AR 13:4697-4702. The Project would exceed the local air district's thresholds for each of these pollutants; in fact, the Project's emissions of ROC/ROG and PM10 would exceed emissions from the nearby Mount Lassen Power Plant. AR 13:4687, 4700. In short, the EIR confirms that the Project would be a major source of air pollution in an area already suffering from substantial pollution levels.

One of the County's findings precisely identifies the causes of the Project's air pollution impacts: "The majority of significant [air pollution] impacts are related to the provision of woodstoves and fireplaces throughout the resort development as well as the number of vehicle trips and vehicle miles traveled by visitors to the resort." AR 1:43. The County then declared impacts related to air pollution "significant and unavoidable." AR 1:41-44. The record makes

clear, however, that these impacts were hardly unavoidable—in fact, measures were available to reduce the impacts below the level of significance. The County's failure to adopt these measures violates CEQA.

A. The Record Contains No Evidence to Support the County's Finding That a Ban on Woodstoves and Fireplaces Is Infeasible.

The EIR identifies the source of most of the Project's air pollution impacts: the wintertime burning of wood in fireplaces and stoves. AR 13:4702. The EIR also identified, and the County adopted, a measure placing modest limits on such woodburning devices. AR 1:42; AR 13:4710 (allowing up to 297 fireplaces and 1,974 woodstoves). The EIR admits, however, that this measure cannot reduce the impact to a less-than-significant level. AR 13:4702. In fact, it allows what one air quality expert called an "extremely large number" of woodburning devices. AR 29:10604. Banning such devices altogether, as suggested by MMC (AR 29:10460, 10602-03), would eliminate the significant impact, but the County refused to adopt this measure (AR 1:44).

An EIR must first "describe feasible mitigation measures which could minimize significant adverse impacts . . . ." Guidelines § 15126.4(a)(1)(A); *see also* § 21002.1. Then, to ensure mitigation occurs, CEQA provides that a public agency may not approve a project that will cause significant environmental impacts if "there are feasible alternatives or mitigation measures that can substantially lessen or avoid those effects." *County of San Diego v. Grossmont-Cuyamaca Community College Dist.* (2006) 141 Cal.App.4th 86, 98; *see also* § 21002 ("[I]t is the policy of the state that public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects").

Accordingly, the County could justify its refusal to adopt a proposed mitigation measure only by determining that the measure was infeasible. Here, the County purported to make such a determination, but its finding lacks the required supporting evidence and fails to meet CEQA's legal standard.

The County found that "a ban on woodburning appliances may be harmful to the economic success of the resort." AR 1:43. However, the only basis for this alleged "harmfulness" is the notion that the fireplaces are an "expected feature" in a resort, and that eliminating them from single family homes at the resort would "negatively impact the sales success [*sic*]." *Id.* On its face, this explanation is insufficient to establish that the proposed mitigation measure is infeasible. Its central conclusion—that banning woodstoves and fireplaces "may be harmful to the economic success of the resort"—cannot legally establish infeasibility even if fully supported (which it is not).

Under CEQA, a mitigation measure is feasible if it is "capable of being accomplished in a successful manner." § 21061.1. The mere fact that a measure would reduce a project's profitability does *not* establish that the measure is infeasible; the measure may still be "capable of being accomplished" even if the developer might not fully meet its "economic objectives." *Save Round Valley Alliance v. County of Inyo* (2007) 157 Cal.App.4th 1437, 1461.[5] In this context, a measure is infeasible only if the reduction in profitability is "sufficiently severe as to render it impractical to proceed with the project." *Preservation Action Council v. City of San Jose* (2006) 141 Cal.App.4th 1336, 1357 (citation omitted).

Here, the County found only that a ban on woodstoves and fireplaces "may be harmful to the economic success of the resort."[6] This vague finding does not come close to establishing that the proposed mitigation measure is actually infeasible. First, the County nowhere explains

---

[5] *Save Round Valley*, like many of the cases referenced in this discussion, considers CEQA's requirements related to alternatives, rather than mitigation measures. However, the holdings of these cases dealing with feasibility apply equally to agency findings relating to alternatives and those concerning mitigation measures. An effective alternative, like a mitigation measure, may be rejected only upon agency findings of infeasibility. *Kings County Farm Bureau*, 221 Cal.App.3d at 731. Similarly, the term "infeasible" carries the same meaning in both contexts: section 21061.1 defines "feasible" for all of CEQA and does not distinguish between alternatives and mitigation measures.

[6] The County's findings do not suggest that there is anything *physically* infeasible about a measure that would ban woodstoves and fireplaces.

what it means to "harm" a project's "economic success." Second, it concludes only that the ban "may" be harmful.

Even if the finding were sufficient on its face, the evidence underlying the finding is insufficient to support a determination of infeasibility. The County relies on a single report prepared by Economics Research Associates on behalf of the Project's then-developer, Dyer Mountain Associates ("ERA Letter"). AR 29:10413. But the County cannot rely solely on a developer's hired consultant. Under CEQA, an agency considering feasibility must "*independently* participate, review, analyze and discuss" the proposed mitigation. *Save Round Valley*, 157 Cal.App.4th at 1460 (emphasis in original), quoting *Kings County Farm Bureau*, 221 Cal.App.3d at 736. The agency may not "simply accept the project proponent's assertions" about the measure. *Save Round Valley*, 157 Cal.App.4th at 1460. Yet the County did exactly that. It simply took the opinion of the developer's consultant and immediately recycled it as a County "finding." Nothing in the record, much less the findings, documents the County's independent consideration of this information.

Furthermore, the ERA Letter itself does not contain sufficient evidence to support the County's finding of infeasibility. To support a finding that a mitigation measure would destroy the economic viability of a project, evidence must provide a concrete, quantitative comparison between the project as proposed and the project with the mitigation incorporated. *See*, *e.g.*, *Citizens of Goleta Valley v. Board of Supervisors* (1988) 197 Cal.App.3d 1167, 1180-81. The Court of Appeal explained this requirement at length in *Uphold Our Heritage v. Town of Woodside* (2007) 147 Cal.App.4th 587. There, the court considered whether a town council had evidentiary support for its finding that renovating a historic structure was an infeasible alternative to demolishing it. The court wrote that "[the question is] whether the marginal costs of the alternative as compared to the cost of the proposed project are so great that a reasonably prudent property owner would not proceed with the rehabilitation." *Id.* at 600.

Here, the ERA Letter provides nothing like this required comparison. Instead, it offers a series of vague generalizations about what is "typical" in a ski resort and about potential buyers' "strong emotional ties" to fireplaces and their "expectations." AR 29:10415-16. It contains no

facts to support the overall economic conclusions, such as how many potential buyers might choose not to purchase property at the resort because of the lack of fireplaces.

Expert opinion must be supported by facts and may not be "an irrelevant generalization, too vague and nonspecific to amount to substantial evidence of anything." *Center For Biological Diversity v. County of San Bernardino* (2010) 185 Cal.App.4th 866, 885, quoting *Lucas Valley Homeowners Assn. v. County of Marin* (1991) 233 Cal.App.3d 130, 157. The ERA Letter not only lacks details, it fails to answer the question that case law requires the County to address: whether the resort could be successfully built and operated without woodstoves and fireplaces. Again, the question is not whether a resort with the proposed measure in place would generate as much profit for its developer as the proposed Project; the question is whether the fireplace ban would reduce its profitability so much that the resort would be unachievable. *See Preservation Action Council*, 141 Cal. App. 4th at 1357. In lieu of addressing this issue, the ERA Letter takes refuge in generalities: "In our opinion, not having any [fireplaces] might make Dyer Mountain sterile and contrived, and, more importantly, will place it at a competitive disadvantage." AR 29:10416. A "competitive disadvantage" does not make the resort infeasible, but that is all that ERA Letter even purports to demonstrate.

The Court of Appeal's recent decision in *Center for Biological Diversity v. County of San Bernardino,* 185 Cal.App.4th 866, demonstrates the distance between what the ERA Letter offers and what CEQA requires. In that case, San Bernardino County approved an open-air, uncovered compost facility, finding that an alternative, covered version of the facility would be infeasible. *Id.* at 876-879. The evidence supporting this finding was a memorandum reporting the costs of a completed closed facility. *Id.* The memorandum reasoned that, because the closed facility was approximately 62% more expensive than the proposed project, such a facility would not be competitive with other, open compost sites. *Id.* at 876-77.

This memorandum provided significantly more information than the ERA Letter provides. Still, the Court of Appeal found that evidence insufficient. Because the memorandum considered only one enclosed facility, it did not establish that the added expense of this facility

actually resulted from the enclosure. *Id.* at 884. To demonstrate that an enclosed facility was infeasible, the court held, the EIR must include more "comparative data." *Id.*

The EIR in *Center for Biological Diversity* provided much more concrete data than the ERA Letter, which provides no real data at all, yet it was insufficient to demonstrate infeasibility. By analogy, the ERA Letter also must be insufficient. And because that Letter is the sole support for the County's finding that a mitigation measure barring fireplaces would be infeasible, that finding is unsupported and invalid. In the absence of a valid finding of infeasibility, the County was required to adopt the measure, and its failure to do so violates CEQA. *County of San Diego*, 141 Cal.App.4th at 98; *Berkeley Keep Jets Over the Bay Com. v. Board of Port Comrs.* (2001) 91 Cal.App.4th 1344, 1354 ("[A]gencies should not approve projects as proposed if there are . . . feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects.") (quoting § 21002).

B. No Record Evidence Supports the County's Finding That a Shuttle Service Is Infeasible.

After woodsmoke, vehicle exhaust is the second major contributor to the Project's air pollution impacts. AR 1:43. Curbing the VMT (vehicle-miles travelled) associated with the Project would reduce emissions of the so-called "criteria" pollutants that regulatory agencies track and that directly affect human health. It would also reduce the Project's emissions of greenhouse gases, as discussed further in Part IV.C *infra*.

Once again, however, the County failed to adopt mitigation measures that would reduce VMT, finding that "no mitigation measures are identified to substantially reduce the number of trips or miles traveled." AR 1:43. The County's finding is flatly incorrect. Several commenters, including the Air District, suggested an obvious mitigation measure: expand the Project's on-site shuttle system to encompass off-site stops, including the airport serving the area. AR 9:2998. Because no evidence indicates that such a measure could not be accomplished, the County could not legally reject it. *County of San Diego*, 141 Cal.App.4th at 98; *see also* § 21002.

The County's only justification for not adopting the proposed shuttle measure appears in its responses to public comments, a section of the FEIR. There, the County first discusses various local transportation planning efforts, concluding that a transit program "could possibly be implemented to serve the area around Dyer Mountain and Lake Almanor." AR 11:3574. However, the FEIR goes on to state that "a regional shuttle program is not the responsibility of a private development project." *Id.*

This statement does not suffice to establish that a shuttle program cannot be accomplished. The County offered no legal or other reason why the Project's developer should not be responsible for reducing the pollution that it causes, nor could it. Furthermore, the County has provided no evidence explaining why a regional shuttle system is infeasible. In the absence of supporting substantial evidence, the County's failure to adopt the shuttle program was an abuse of discretion. *County of San Diego*, 141 Cal.App.4th at 108.

IV. The EIR's Analysis of the Project's Impact on Climate Change Was Never Circulated for Public Comment and, in Any Event, Is Legally Inadequate.

Unquestionably, the Project would dramatically increase VMT in the Project area. *E.g.*, AR 2:462-64, 489-97 (DEIR); AR 6:1899 (RDEIR). Nor can anyone dispute the direct connection between VMT and increased levels of greenhouse gas ("GHG") emissions. Nonetheless, neither the DEIR nor the RDEIR addresses the Project's potential to affect climate change. *See* AR 11:3475. At the end of the long administrative process, the County's FEIR finally included a perfunctory analysis of climate change impacts, concluding that its cumulative impacts would be significant and unavoidable. AR 11:3575-82, 13:4703-04, 18:6106. However, because the County did not recirculate that analysis for public comment, it did not fulfill CEQA's core purpose: ensuring meaningful public participation.

The County's climate change analysis also fails on substantive grounds, for it grossly underestimates the severity of the impacts. First, the EIR plainly miscalculated the GHG emissions resulting from Project-related traffic. Second, it failed to quantify GHG emissions from the Project's major stationary sources. Finally, the County erred when, by rote, it found no feasible measures to mitigate the admittedly significant cumulative impacts on climate change.

Because the County ignored a host of measures that could readily have been implemented, its conclusion finds no support in the record.

A. CEQA Requires the County to Recirculate the EIR Because It Revealed Significant Cumulative Impacts on Climate Change.

The FEIR revealed—for the first time—that the Project would significantly contribute to the cumulative problem of global climate change. AR 18:6106 (staff report explaining that Project's cumulative climate change impacts are significant and unavoidable even though Project-specific impacts are less-than-significant). Under CEQA, a public agency must recirculate an EIR for public comment if it adds significant new information after the public comment period has closed. § 21092.1. New information is "significant" if it deprives the public of "a meaningful opportunity to comment upon a substantial adverse environmental effect of the project." Guidelines § 15088.5. Significant new information includes "a disclosure showing that . . . [a] new significant impact would result from the project." *Id.* § 15088.5 (a)(1). If an agency determines that a new impact is not sufficiently substantial to warrant recirculation, it must support that determination with substantial evidence. *Id.* § 15088.5(e); *Laurel Heights Improvement Assn. v. Regents of the Univ. of Cal.* (1993) 6 Cal. 4th 1112, 1134-35 ("*Laurel Heights II*").

Here, by disclosing new information that the Project's cumulative impacts on climate change would be "significant and unavoidable" (AR 18:6106), the FEIR triggered the recirculation requirement. Specifically, the FEIR states:

> The proposed Project would develop significant recreation facilities and more than 4,000 new residential units, supported by retail and other uses that are expected to be in operation for many years, and *would be contribute incrementally to global concentrations of greenhouse gasses throughout construction and operation.*

AR11:3581 (emphasis added).

The County flatly violated CEQA by refusing to recirculate the EIR so that the public could comment on this newly-revealed significant effect. § 21092.1; Guidelines § 15088.5. Indeed, the County's error is particularly inexcusable, for Petitioners had alerted the County throughout the administrative process that it must address this compelling issue. *E.g.*, AR

11:3475. Later, after the County added its climate change analysis to the FEIR, MMC requested that the County recirculate the EIR for public comment (AR 29:10444) and submitted comments on the inadequacy of new analysis (AR 29:10445-49). MMC's comments went entirely unheeded.

In *Vineyard*, 40 Cal.4th 412, the California Supreme Court rejected a similar attempt by a public agency to add significant new information to an EIR after the public comment period had closed. In that case, the DEIR for a large development project had not analyzed potentially significant impacts on river flows and habitats. *Id.* at 448. After receiving several public comments on this omission, the agency added a discussion of the issue to FEIR. *Id.* The Court rejected the agency's approach. Because the agency's analysis suggested that the newly-identified impact was potentially significant, CEQA required the agency to recirculate the EIR. *Id*. at 448-49.

As in *Vineyard*, here the County's eleventh-hour addition of a climate change analysis to the FEIR "deprived the public of meaningful participation in the CEQA discussion." *Id.* at 449 (internal quotation omitted). Because the County admitted the significance of this newly-disclosed impact, CEQA mandated recirculation. *Id*.; *see also Mira Monte Homeowners Assn. v. County of Ventura* (1985) 165 Cal.App.3d 357, 364-65.[7] The Court must order the County to rescind the Project approvals and allow further public review of this critical issue.

B. The EIR's Analysis of Climate Change Impacts Is Defective.

In calculating the Project's GHG emissions, the EIR purports to quantify the Project's emissions resulting from VMT. However, this calculation grossly underestimates emissions

---

[7] Even if the County had not conceded the significance of the Project's climate change impacts, CEQA would require recirculation of the new analysis. *See Vineyard*, 40 Cal.4th at 448 fn.17 (recirculation required when FEIR includes new "*potentially substantial* adverse environmental effect") (emphasis in original); *see also* Guidelines § 15088.5(d) (recirculation required where DEIR is "so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded"); *Mountain Lion Coalition v. Cal. Fish & Game Com.* (1989) 214 Cal.App.3d 1043, 1052 (refusing to consider analysis presented for first time in final EIR because that would insulate analysis from public review).

because it includes only trips directly attributable to resort visitors, and not miles driven by new people drawn to the region by increased economic activity. *See* Part II.B.2 *supra*; *see also* AR 13:4703; AR 29:10445-46. It also does not include employee trips or other trips related to the resort's operation, such as deliveries and waste hauling, or VMT indirectly induced by the Project. *See* AR 13:4703; AR 29:10445-46.

Even more disturbingly, the EIR never quantifies the Project's non-transportation sources of GHG emissions, such as the power plant serving the Project. *See* AR 11:3580-81. In lieu of that analysis, the EIR simply assumes that the Project's share of emissions from stationary (as opposed to mobile) sources would be identical to the statewide average in 2004: 59.3 percent. AR 11:3580.

As Petitioners advised the County, this simplistic approach cannot suffice under CEQA. Well-accepted methods exist to calculate the Project's stationary source emissions. AR 29:10446. For example, the EIR states that the Project would require up to 20 megawatts of electricity. AR 14:4987. The amount of carbon emissions resulting from this demand is easily quantified: according to the Energy Star Program, a joint program of the U.S. Environmental Protection Agency and the U.S. Department of Energy, one kilowatt hour consumed equates to 1.55 pounds of CO_2 emissions. AR 29:10446. The EIR should have included this calculation, especially given electricity generation's major contribution to GHG emissions in California. *Id.* Likewise, the EIR provides no reason for failing to calculate carbon emissions from natural gas burned by the Project. *Id.*

The County's failure to catalogue the Project's potential sources of GHG emissions violates CEQA. In *Berkeley Keep Jets*, the court held that an agency's failure to perform a health risk assessment cataloguing risks from various toxic air pollutants "fell far short of the 'good faith reasoned analysis' mandated by CEQA." 91 Cal.App.4th at 1371. Rejecting the agency's argument that there was no universally-accepted method for performing the analysis, the court held that CEQA obligated the agency to "use its best efforts to find out and disclose all that it reasonably can." *Id.* at 1370 (quoting Guidelines § 15144). Similarly, here the County must disclose all the sources of GHG emissions related to the Project. Moreover, unless the EIR

breaks down its estimate of the various stationary sources and correctly calculates the emissions from Project-related VMT, the County cannot possibly design effective mitigation for these impacts.

C. No Substantial Evidence Supports the County's Findings Regarding Climate Change.

In approving the Project, the County found that the cumulative climate change impacts had been mitigated to the extent feasible, but that the impacts remain significant. AR 1:43. This finding is untenable. The County did not even analyze, let alone adopt, several key measures that could have feasibly reduced or offset the Project's GHG emissions.

When the County belatedly added a discussion of climate change impacts to the FEIR, it did not address mitigation for these impacts. Instead, the agency simply relied upon measures that it had previously identified to reduce criteria pollutants from the Project's ongoing operations. *See id.* Yet, these few measures do not begin to reflect the full panoply of mitigation that experts recommend to address climate change impacts. Petitioners provided the County with the California Environmental Protection Agency's *Climate Action Team Report*, which identified numerous measures for reducing projects' contributions to climate change. AR 29:10521-56. For example, this report recommends that public agencies consider:

- reducing the energy consumption of buildings by requiring compliance with the U.S. Green Building Council's LEED (Leadership in Energy and Environmental Design) standards;
- adopting policies encouraging a balance of jobs-housing in development projects;
- requiring projects to use sustainable energy sources, such as solar or wind, for all or a portion of their energy needs; and
- reducing VMT through encouragement of public transit.

AR 29: 10551-55. Similarly, the Air District had twice recommended that the County require an airport shuttle to mitigate the Project's large increase in VMT. AR 9:2998, 3094. For its part, the County had even raised the possibility that the developer enter an agreement with the Lassen Rural Bus Service to mitigate air quality impacts. AR 9:2960.

Remarkably, the FEIR does not discuss any of these measures as a way to reduce the significant cumulative impacts on climate change. *See* AR 11: 3579-81; AR 1:43. Nor did the County consider related measures to offset these impacts, such as requiring the developer to purchase carbon credits or contribute to the financing of sustainable energy projects. *See id.*; AR 29:10449.

As explained above, CEQA prohibits the approval of proposed projects if feasible mitigation measures are available that would substantially lessen their significant effects. § 21002; *see also* Guidelines § 15002(a)(3) ("basic purpose[] of CEQA . . .[is] to [p]revent significant, avoidable damage to the environment by requiring changes in projects through the use of alternative or mitigation measures when the government agency finds the changes to be feasible"). Here, the County failed to fulfill CEQA's central purpose by ignoring feasible mitigation measures suggested by Petitioners and others.

Because the County did not even address these measures, substantial evidence does not support its finding that the Project's cumulative climate change impacts were "mitigated to the extent feasible" (AR 18:6106; *see also* AR 1:43). *See County of San Diego*, 141 Cal.App.4th at 108 (agency's finding that traffic mitigation was infeasible violated CEQA, where record contained no evidence of a cost estimate for the mitigation).

V. The EIR Fails to Identify Effective Mitigation for the Project's Impacts on Local Traffic, and the County Improperly Rejected Feasible Mitigation for Its Regional Impacts.

The Project would cause significant traffic congestion in both Lassen and Plumas counties, but the EIR failed to identify measures to reduce that congestion. To fulfill CEQA's mitigation requirements, an EIR must describe feasible mitigation measures at the time of project approval: "[f]ormulation of mitigation measures should not be deferred until some future time." Guidelines § 15126.4(a)(1)(B). Deferral is permitted only in narrow circumstances where the agency provides "specific and mandatory performance standards to ensure that the measures, as implemented, will be effective." *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 94 ("*Richmond*") (citing *Sacramento Old City Assn. v.*

City of Sacramento (1991) 229 Cal.App.3d 1011, 1028-29). Furthermore, public agencies must actually *adopt* the identified mitigation measures, unless it is infeasible to do so. § 21002.1(b).

Here, the County failed to comply with these requirements. First, the EIR defers formulation of mitigation for the Project's local traffic impacts until after Project approval, yet it adopts no specific performance standards to ensure the effectiveness of that future mitigation. Second, the County rejected mitigation identified for the Project's significant regional traffic impacts, but it provided no substantial evidence that the mitigation was infeasible.

A. The EIR Improperly Defers Mitigation of Project Impacts on Local Traffic.

The EIR concedes that the Project would worsen local traffic conditions, and it identifies many intersections and roadway segments that would be significantly affected. AR 6:1846-98. The County then proposes Mitigation Measure 6.1a as a means of mitigating these effects. This measure requires that, at each phase of development or every two years, the developer must: (1) monitor traffic in specified locations, and (2) submit a report identifying mitigation measures needed to maintain acceptable levels of service. AR 6:1899. At each phase, the County will determine the scope of the impact analysis that the developer's report needs to address. *Id.* Upon receiving these reports, the County will determine specific improvements to be constructed. *Id.*[8]

Mitigation Measure 6.1a's process for deferring mitigation of the Project's traffic impacts violates CEQA. Indeed, the measure is remarkably similar to the mitigation measure found inadequate in *Richmond*. In that case, the City of Richmond proposed to mitigate an oil refinery project's impacts on climate change by requiring the applicant to submit a mitigation plan to the city for approval. *Richmond*, 184 Cal.App.4th at 91-92. While the Richmond mitigation adopted "no net increase in greenhouse gas emissions" as a generalized goal and identified some potential emissions reduction measures, the measure contained no specific performance

---

[8] Several of the County's other traffic mitigation measures incorporate the same defective process established by Mitigation Measure 6.1a. *See, e.g.,* AR 6:1900 (Mitigation Measure ("MM") 6.1b), AR 6:1903 (MM 6.2a), AR 6:1905 (MM 6.3a); AR 6:1908 (MM 6.4a).

standards. *Id.* The court found the mitigation was deficient because, without any objective standards, the City Council could only determine if the mitigation had been implemented by applying its own "subjective judgment." *Id.*

Here, the County's measure similarly fails to provide any objective standard to assure that the Project's traffic impacts will be mitigated effectively. AR 10:3208. Like the "no net emissions" goal identified by the city in *Richmond*, Mitigation Measure 6.1a merely articulates the general goal of maintaining "acceptable LOS [levels of service]." AR 6:1899. Then, like the mitigation plan invalidated in *Richmond*, the County's measure requires the applicant to prepare a plan for submittal to the County for later approval. *Id.* Because Mitigation Measure 6.1a includes no specific standards for assessing the efficacy of the future mitigation plan, the "only criteria for 'success'"—just as in *Richmond*—will be the subjective judgment of County officials. *See Richmond*, 184 Cal.App.4th at 93; *see also San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 670 (rejecting mitigation measure that adopts generalized goal of protecting vernal pool habitat but lacks performance standards). The County's illusory mitigation cannot pass muster under CEQA.

B. The County's Unilateral Refusal to Mitigate Regional Traffic Impacts Does Not Render Such Mitigation Infeasible.

In addressing the Project's significant impacts on regional traffic, the County did identify mitigation but then simply refused to adopt it. CalTrans alerted the County that the Project would have major impacts on State highways, emphasizing "the potential for accelerated need for highway improvements." AR 27:9713. Plumas County noted that "Plumas County serves the proposed resort by state and local thoroughfares 36, 89, 147 and A-13," and expressed alarm that the "[p]roposed build-out numbers will increase congestion, maintenance." AR 27:9731.

Mitigation Measure 6.1b addresses this issue. It proposed to mitigate the Project's regional traffic impacts in Plumas County and on State highways by contributing money into a fund that would be held by the Lassen County Transportation Commission ("LCTC"). AR 6:1900. LCTC would transfer these funds to the appropriate jurisdiction when that jurisdiction adopted a plan to make specific traffic improvements. *Id.*

After identifying this mitigation, however, the County concluded that the Project's regional traffic impacts are "significant and unavoidable" because the County "cannot mandate the participation of outside agencies." AR 9:2985. The County reasoned that it could not assure the mitigation would occur because "there is no existing mechanism or agreement by which Lassen County can ensure that the necessary improvements will be constructed in areas outside of Lassen County's jurisdiction." AR 10:3393-94; *see also* AR 1:33. The County's basis for rejecting the mitigation is unsupported in the record.

The County could easily have implemented Mitigation Measure 6.1b by entering into voluntary agreements with Plumas County and CalTrans. Indeed, those agencies repeatedly encouraged the County to do *exactly* that. Responding to the DEIR, Plumas County indicated that it was willing to work with the County to ensure implementation of mitigation through a "cooperative agreement." AR 9:3102; *see also id.* ("Unless every affected transportation agency has commented that they do not wish to allow implementation of the recommended mitigation measures to the project's impacts to their respective facilities, there should be no impediment to doing so."); AR 9:2976 (Plumas suggesting several types of voluntary agreements available to ensure mitigation). Similarly, CalTrans commented that "on several occasions, the Department has informed Lassen County that the Department has the authority and is willing and able to enter into the agreements necessary to allow implementation of mitigation on State facilities outside of Lassen County." AR 8:2711. CalTrans even "provided Lassen County with sample documents, including the draft 'Traffic Mitigation Agreements with Local Development Project Proponents.'" AR 8:2711-12; *see also* AR 8:2778-2807.

Despite the obvious eagerness of Plumas County and CalTrans to adopt a mitigation agreement, the County never explained why it refused to entertain such an agreement. In fact, the County's response to comments even admitted that the "EIR does not preclude adoption of an agreement among the affected agencies." AR 8:2757. Yet, rather than explain why it rejected negotiations with Plumas County and CalTrans, the County woodenly reiterated that it "cannot mandate the participation of outside agencies." AR 8:2808.

The County's unilateral refusal to mitigate regional traffic impacts violates CEQA. The statute expressly provides that "[e]ach public agency shall mitigate or avoid the significant effects on the environment of projects that it carries out or approves whenever it is feasible to do so." § 21002.1(b). Mitigation is "feasible" if it is "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors." § 21061.1; Guidelines § 15364. Here, the County identified no factors that precluded it from entering into voluntary agreements with Plumas County and CalTrans to ensure effective mitigation. Where both agencies have expressly indicated their willingness to participate, the County's statement that it cannot "mandate" such participation by those agencies is simply nonsense.

The Supreme Court's decision in *City of Marina,* (2006) 39 Cal. 4th 341, clarifies that the County's approach contravenes CEQA. *Id.* at 362-62. There, the Court held that a voluntary agreement to pay a "fair share" to a regional agency for traffic mitigation constituted a feasible mitigation measure. The Court expressly rejected the argument that mitigation for regional traffic impacts is infeasible because the ultimate implementation is under the control of another agency, not the agency approving the project. *Id.* at 364; *see also County of San Diego*, 141 Cal.App.4th at 108 (finding no substantial evidence supported agency's determination that regional traffic mitigation is infeasible).

As the court explained in *Uphold Our Heritage*, 147 Cal.App.4th at 601-03, an applicant's unwillingness to undertake an alternative does not create infeasibility. Nor does a public agency's. The County "cannot acknowledge a significant impact, refuse to do or find anything else about it, and approve the project anyway." *Woodward Park Homeowners Assn., Inc. v. City of Fresno* (2007) 150 Cal.App.4th 683, 724. The County's attempt to evade responsibility for mitigating its significant regional traffic impacts was a prejudicial abuse of discretion.

VI. The EIR Fails to Provide an Adequate Analysis of Cumulative Impacts.

The EIR includes a section titled "Cumulative Impacts of the Proposed Project" (AR 14:5030), but it does not meet CEQA's analytic requirements. In addition to considering the

impacts of a project standing alone, an EIR must analyze the project's contribution to cumulative effects–impacts "created as a result of the combination of the project evaluated in the EIR together with other projects causing related impacts." Guidelines § 15130(a)(1). "Cumulative impacts can result from individually minor but collectively significant projects." Guidelines § 15355. Analysis of these impacts is crucial, as it is the only means of disclosing the significance of impacts that might seem small when a project is considered in isolation, but which become significant when viewed together with other projects. *See Kings County Farm Bureau*, 221 Cal.App.3d at 720-21; *San Franciscans for Reasonable Growth v. City and County of San Francisco* (1984) 151 Cal.App.3d 61, 79 ("[I]t is vitally important that an EIR avoid minimizing the cumulative impacts."). Ignoring such impacts "would effectively defeat CEQA's mandate to review the actual effect of [] projects upon the environment." *Las Virgenes Homeowners Federation Inc. v. County of Los Angeles* (1986) 177 Cal.App.3d 300, 306.

CEQA requires a simple approach: an EIR must "consider whether the cumulative effect is significant and whether the proposed project's incremental effects are cumulatively considerable." *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 120. The EIR here completely disregards both steps. Instead, it first very briefly discusses the cumulative impacts analyzed in a different EIR. AR 14:5031-32. It then lists the Project's significant and unavoidable impacts, reasoning that only these impacts contribute to cumulative effects. AR 14:5032-33.

This approach is fatally flawed for two reasons. First, the EIR never describes the actual cumulative impacts to which the Project would contribute, let alone determine whether they would be significant. Second, the Court of Appeal has long since rejected the EIR's theory that a project can only make a considerable contribution to cumulative impacts if its own impact, standing alone, would be significant.

A. The EIR Includes No Description of Cumulative Impacts.

The EIR's cumulative impact analysis contains no discussion of the cumulative effects of this Project combined with other projects. Instead, the analysis begins with four vague paragraphs discussing cumulative impacts related to the 1999 Lassen County General Plan EIR.

AR 14:5031. The Project, however, was not a part of that Plan. *See* Part II.B.2 *supra*. The General Plan EIR's analyses of cumulative impacts therefore could not have included the Project's contribution. The Project's EIR must consider the Project's contribution to overall cumulative impacts. *See, e.g.*, *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 739 ("*San Joaquin Raptor I*") (CEQA requires an EIR to discuss the cumulative effect on the environment *of the subject project* in conjunction with other . . . projects.") (emphasis added). Describing cumulative impacts that do not include the Project's contribution is thus insufficient.

Moreover, the EIR's summaries of General Plan-related cumulative impacts are utterly generic. Each merely recites that development under the General Plan "could" affect the resources in question. AR 14:5031-32. For example, the discussion of Biological Resources states, in its entirety, "the General Plan could allow for development that may affect wildlife and habitat. Through implementation of mitigation measures, this impact was reduced to a less than significant level." AR 14:5032. The other paragraphs follow this pattern. AR 14:5031-32.

CEQA case law could not be more clear that this approach is insufficient: an EIR must discuss cumulative impacts "with sufficient detail to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project." *Concerned Citizens of South Central Los Angeles v. Los Angeles Unified School Dist.* (1994) 24 Cal.App.4th 826, 839 (internal quotation marks omitted); *see also San Franciscans for Reasonable Growth*, 151 Cal.App.3d at 79 (EIR "must reflect a conscientious effort to provide . . . adequate and relevant detailed information about [cumulative impacts]"). Because the EIR here includes no detail whatsoever, it does not meet this standard. This failure deprived the public and decisionmakers of the information that CEQA mandates.

B. The EIR Does Not Analyze the Project's Contribution to Cumulative Impacts.

After failing to describe overall cumulative impacts, the EIR goes on to ignore CEQA's mandate that it discuss the Project's contribution to those impacts. Under CEQA, an EIR must determine whether a project's contribution to a given cumulative impact will be "cumulatively

considerable." Guidelines § 15130(a). This analysis may not simply focus on the relative size of the project's contribution to the cumulative effect. *Communities for a Better Environment*, 103 Cal.App.4th at 121; *Kings County Farm Bureau*, 221 Cal.App.3d at 719-21. Instead, it should focus on the "combined effect" of the contributing impacts. *Communities for a Better Environment*, 103 Cal.App.3d 98, 121.

The EIR here, however, disregards this guidance. It states that "[w]here a project-specific impact could be mitigated to a less than significant level and was not expected to significantly affect off-site resources, it was determined that the project would make a less than considerable contribution to the cumulative impact." AR 14:5032. In other words, the County's cumulative analysis is exactly the same as its project-level analysis. If the Project has a less-than-significant impact in a given area, such as air quality or traffic, then the EIR determines, with absolutely no supporting analysis, that it will not make a considerable contribution to the corresponding cumulative impact. *Id.* With the single sentence quoted above, and with no analysis or consideration, the EIR determined that the Project would not contribute to cumulative impacts in dozens of impact areas. The EIR's entire "analysis" of the Project's contribution to cumulative impacts is a list of the Project's significant and unavoidable impacts. AR 14:5033.

The Court of Appeal rejected this same illogical approach twenty years ago in *Kings County Farm Bureau*, 221 Cal.App.3d 692. There, the agency preparing the EIR claimed that when "impacts specific to a particular project are not significant, corresponding cumulative impacts cannot be considered significant because the 'incremental effects' of the individual project cannot be 'considerable.'" *Id.* at 720. The County employed the same method in the present case. Like the agency in *Kings County Farm Bureau*, the County determined that any less-than-significant impact *automatically* made no considerable contribution to the corresponding cumulative impact. The Court of Appeal held that this approach violates CEQA:

> We find the analysis used in the EIR . . . avoids analyzing the severity of the problem and allows the approval of projects which, when taken in isolation appear insignificant, but when viewed together, appear startling. . . . The EIR improperly focused upon the individual project's relative effects and omitted facts relevant to an analysis of the collective effect this and other sources will have . . . .

Id. at 721.

In light of this clear holding, the EIR's approach in the present case is inadequate as a matter of law. Each of its determinations that the Project would make "less than considerable" contributions to cumulative impacts is an abuse of discretion.

VII. The County's Findings Rejecting Alternatives to the Project Lack Supporting Evidence.

The Project would cause sixteen significant environmental impacts that, the County found, cannot be avoided through mitigation. AR 1:104-05. These include numerous impacts related to traffic and air quality, as well as impacts to cultural resources and the area's scenic vistas. *Id.* Because the Project would cause such significant and unavoidable impacts, the County could approve it only by finding infeasible those alternatives that would reduce or avoid those impacts. Guidelines § 15091(a)(3); *see also* § 21002. "[U]nless and until it is properly established that the alternatives to [the Project] are not feasible . . . the [County] is prohibited from authorizing the [Project.]" *Uphold Our Heritage,* 147 Cal.App. 4th at 605. To establish infeasibility, the agency must make findings supported by substantial evidence. *San Joaquin Raptor*, 27 Cal. App. 4th at 735-38. Here, because the County's findings do not actually establish the infeasibility of several alternatives to the Project, its approval was invalid.

In addition to the statutorily-required "No Project Alternative," the County considered and rejected four alternatives to the Project. Alternatives 2A, 2B, and 3 would each eliminate some of the "estate" style single-family homes on large lots within the resort development. AR 1:98-101. Alternatives 2A and 2B would replace those homes with units in denser multi-family dwellings, thus maintaining the same number of overall units; Alternative 2B would also eliminate day parking at the ski area. Alternative 3 would reduce the total number of dwelling units, primarily by reducing single-family units and slopeside units, and it would reduce the number of holes of golf available at the resort. *Id.* Alternative 4 would substantially reduce the size of the resort across the board. AR 1:101-02. In sum, each of these alternatives would reduce or avoid some of the proposed Project's significant and unavoidable impacts. AR 1:98-102.

For each alternative, the County found that the proposed changes to the Project would render it economically infeasible.[9] For example, the County found that the single-family unit reductions would render the Project unviable because "the single-family product is especially important in the early development of a resort because it drives revenue to project for the construction of important infrastructure." AR 1:100. The County further found that if areas originally proposed for ski terrain were protected under Alternative 2B, "the Resort could fail because it would not be able to attract skiers (and in turn, real estate buyers) due to the failure to provide adequate intermediate-level ski opportunities." *Id.* at 99. The County made similar findings regarding the effects of reducing the size of the Project, eliminating the slope side units, providing fewer holes of golf, and eliminating day-use parking. In each instance, the County found that the Project would fail without the feature in question. AR 1:99-02.

None of these findings is supported by substantial evidence. The County's infeasibility findings concerning the alternatives are similar to the findings regarding mitigation measures discussed in Part III.A, *supra*: they rely entirely on a letter from Douglas Clyde, a consultant to the developer who had been its former Chief Executive Officer (AR 32:11398; AR 18:6480, 6493) ("Clyde Letter"). The County's findings lift portions from the Clyde Letter almost verbatim. *Compare, e.g.,* AR 18:6490 (Clyde Letter: "The ski slope development represents the bulk of the high density development, which provides the bed base to support the resort as it matures and grows to its ultimate capacity.") *with* AR 1:101 (County findings: "Ski slope development represents the bulk of high-density development and provides a bed base as it matures and grows to its ultimate capacity."). The County simply accepted as fact all of Clyde's assertions about the Project's prospects.

State law, however, requires considerably more effort by the agency:

---

[9] The County also found that each alternative was infeasible because the failure of the Project would deprive the County of revenue and "would not fulfill the intent of the citizens of the County as expressed by [the Initiative]." AR 1:99-102. Neither of these factors is relevant to whether the alternative "is capable of being accomplished." *See* § 21061.1 (defining feasibility).

> Since CEQA charges the agency, not the applicant, with the task of determining whether alternatives are feasible, the circumstances that led the applicant in the planning stage to select the project for which approval is sought and to reject alternatives cannot be determinative of their feasibility. The lead agency must *independently* participate, review, analyze and discuss the alternatives in good faith.

Kings County Farm Bureau, 221 Cal. App. 3d at 736; *see also Save Round Valley*, 157 Cal.App.4th at 1958 (agency may not "simply accept at face value the project proponent's assertion's regarding feasibility"). The "applicant's feeling about an alternative cannot substitute for the required facts and independent reasoning." *Preservation Action Council*, 141 Cal.App.4th at 1356. The County's wholesale reliance on the Clyde Letter for its finding violates this rule and, by itself, invalidates the findings.

In any event, the Clyde Letter does not include evidence sufficient to support the County's conclusions. To support its findings, the County would need actual evidence, not simply opinions and conclusory assertions, showing that the alternatives would leave the Project at such a competitive disadvantage that it could not compete. *See Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 928-29; *see also Center for Biological Diversity*, 185 Cal.App.4th at 884 (rejecting expert's opinion as "an irrelevant generalization, too vague and nonspecific to amount to substantial evidence of anything") (citation omitted); Guidelines §15384(b) ("Substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion *supported by facts*.") (emphasis added).

While the Clyde Letter is replete with opinions, actual facts are scarce. Clyde does purport to address facts regarding existing Lake Tahoe-area ski resorts, but these "facts" are largely incorrect. Clyde claims that "[t]he early years at Northstar [a North Lake Tahoe resort] were dominated by single family and townhome sales." AR 18:6484. Clyde is apparently attempting to use this example to support his claim that large-lot "estate" homes are necessary for the Project's survival. AR 18:6486, 6490. The early sales at Northstar, however, were of condominiums and single family homes on small lots, not the "estate" lots that Clyde discusses. *See* AR 30:11001 (email from Northstar real estate broker stating that "first development at Northstar was a development of 39 single family one-quarter acre lots (not homes) along with

180 condominiums"). The Northstar example therefore does nothing to support Clyde's theory that any alternative not beginning with "estate" homes would doom the Project.

The Clyde Letter also discusses the Squaw Valley resort. Squaw Valley, the letter claims, is "progressing slow[ly]" because it lacks single-family homes and has only "limited availability of golf." AR 18:6484. The letter implies that Squaw Valley's alleged "slow progress" demonstrates the necessity of golf and estate homes. In fact, however, Squaw Valley proves the opposite. Without these supposedly essential features, Squaw Valley is, according to the New York Times, "one of the world's finest year-round resorts." AR 30:10999. The history of Squaw Valley demonstrates that a ski resort with limited golf and no large-lot homes is perfectly feasible.

Without facts to establish the actual economics of the alternatives, the Clyde Letter amounts to nothing more than an unsupported opinion. The *Center for Biological Diversity* case, discussed in Part III.A, *supra*, is again instructive. There, a finding of infeasibility was supported in part by an expert's statement in a memorandum that private financing would not be available for the alternative. 185 Cal. App.4th at 884. The Court held that this statement was not substantial evidence, because the memorandum "contains no facts or information to support the statement." *Id.* The Court went on to identify the types of questions that could produce the information needed to provide such support:

> Were any lenders contacted, would government funded low interest financing be available, or was any federal grant money available? Additionally, there is no analysis of the total cost of doing business and the prices a competitor can charge. What impact do the savings [from aspects of the alternative] have on the economic viability of the Project?

Id. at 884-85.

The Clyde Letter cannot answer the analogous questions here. For example, were there any market surveys, or even careful empirical analysis, of the features of other resorts? Without such data, the Clyde Letter provides no support for the County's findings of economic infeasibility, and without the Letter, no evidence underlies these findings. Because the record does not establish that the alternatives were infeasible, the County's approval of the Project was invalid. *See Uphold Our Heritage*, 147 Cal.App.4th at 598-99.

VIII. The Development Agreement Contravenes the Initiative's Clear Grant of Legislative Authority to the Board of Supervisors and Therefore Constitutes an Invalid Amendment of the Initiative.

Even as the Initiative amended the Lassen County Zoning Code and General Plan designation with respect to the Project site, the voters of Lassen County adopted two important checks on the headlong development of the proposed ski resort. First, through Section XI.1 of the Initiative, they required environmental review of the Project. AR 4:1139. Second, they reserved important legislative authority to the Board of Supervisors. Thus, the Initiative explicitly authorized the Board to freely modify those amendments to the Zoning Code and General Plan if construction did not begin within seven years after the measure's enactment. AR 4:1140. The Development Agreement, however, purports to rescind that explicit grant of authority. AR 1:145 ("The County agrees not to amend the Mountain Resort designation or zoning for the term of this Agreement . . . ."). As explained below, the Board of Supervisors may not amend the Initiative in this manner, and the Development Agreement is therefore invalid.

A. The Board of Supervisors Lacks Authority to Amend the Initiative.

It is black-letter law that a county Board of Supervisors may not amend a legislation adopted by initiative unless the initiative itself allows such amendment. Elect. Code § 9125. This rule "has its roots in the constitutional right of the electorate to initiative, ensuring that successful initiatives will not be undone by subsequent hostile boards of supervisors." *DeVita v. County of Napa* (1995) 9 Cal.4th 763, 788; *see also People v. Kelly* (2010) 47 Cal.4th 1008, 1025 (purpose of parallel provision concerning amendment of statewide initiatives is "to protect the people's initiative powers by precluding the Legislature from undoing what the people have done, without the electorate's consent") (quotation marks omitted). Thus, "[o]ne not inconsequential impact of the enactment of a[n] . . . initiative is the statutory requirement that any future amendment . . . be submitted to the voters for approval." *Mobilepark West Homeowners Assoc. v. Escondido Mobilepark West* (1995) 35 Cal.App.4th 32, 41 (citation omitted). A legislative enactment that would have the effect of amending an initiative is unconstitutional and invalid. *See Mobilepark West*, 35 Cal.App.4th at 43 (holding that

ordinance "must be considered invalid . . . as an improper legislative amendment of an initiative measure").

B. The Plain Language of the Initiative Grants the Board of Supervisors the Authority to Revise the General Plan and Zoning Code.

The key issue is therefore whether the Development Agreement amends the Initiative. The first step in this analysis is to examine the language of the Initiative. *Knight v. Superior Court* (2005) 128 Cal.App.4th 14, 23. "If the terms of the statute are unambiguous, [the Court] presume[s] the lawmakers meant what they said, and the plain meaning of the language governs." *Id.*

Here, the Initiative contains five provisions under the heading "Amendment and Repeal." Section XIII.1 restates the rule that the General Plan and Zoning Code amendments adopted by the Initiative "may be amended or repealed only by a majority of the voters voting in an election thereon." AR 4:1140. The next four provisions provide limited exceptions to the general prohibition, as allowed by Elections Code section 9125. Under Section XIII.2, for example, the Board of Supervisors is empowered to "adopt refinements and minor adjustments" to the Initiative's General Plan and Zoning Code amendments, and "may add additional permitted or conditionally permitted land uses" to land use designations adopted by the Initiative. AR 4:1140.

Under Section XIII.3, the key provision here, the Board "may otherwise modify" the General Plan and Zoning Code amendments if, "after seven (7) years, construction has not been initiated with respect to the ski facilities." *Id.* Next, Section XIII.4 lists sections of the Initiative that may be amended pursuant to a development agreement. *Id.* at 1141. Importantly, this list does not include Section XIII. Finally, Section XIII.5 allows the Board of Supervisors to alter certain land-use designations upon a property owner's request. *Id.*

The application of these provisions to the Project is clear. Indisputably, no construction has begun on the Project, and more than seven years have passed since the Initiative became effective. *See* Second Amended and Supplemental Petition for Writ of Mandate [verified], filed January 21, 2010, ¶¶ 54, 55. Thus, the Initiative vests in the Board full authority to change any

part of the Initiative's General Plan and Zoning Code amendments. The Initiative does not authorize later modifications to this grant of authority. Pursuant to the Initiative, then, the Board of Supervisors has, and must retain, the discretion to revise the General Plan and Zoning Code amendments.

C. The Development Agreement Invalidly Attempts to Amend the Initiative by Stripping the Board of Its Authority to Make Zoning and General Plan Changes.

In reading the Development Agreement to determine whether it attempts to amend or undercut the Initiative, the Court must favor an interpretation that gives full force to the voters' intent. "[I]t is the duty of the courts to jealously guard this right of the people." *DeVita*, 9 Cal. 4th at 776 (quotation marks and citations omitted). Therefore, "[a]ny doubts should be resolved in favor of the initiative . . . power, and amendments which may conflict with the subject matter of initiative measures must be accomplished by popular vote." *Proposition 103 Enforcement Project v. Quackenbush* (1998) 64 Cal.App.4th 1473, 1486.

Weighting the inquiry in this manner is necessary to protect the right to initiative. If courts too quickly uphold later enactments touching upon initiatives, the scope of those initiatives could be slowly chipped away, ultimately negating the voters' original purpose. To avoid this result, "[i]n determining whether a particular action constitutes an amendment, . . . [courts] apply a liberal construction to [the people's initiative] power wherever it is challenged in order that the right to local initiative or referendum be not improperly annulled." *Id.* at 1485-86 (citations omitted).

Here, the Initiative includes a grant of authority to the Board, allowing it to alter the General Plan and Zoning Code amendments. The voters wanted the General Plan and Zoning Code amendments to be set in stone at first. However, they installed a safety valve: if construction of the ski resort was not started before the seven-year deadline, then the voters intended the Board to have the flexibility and authority to alter those amendments at any time. There is no other way to interpret the plain meaning of Section XIII.

By its own plain language, the Development Agreement deprives the Board of the authority that the Initiative grants, eliminating the voters' safety valve throughout the

Agreement's thirty-year term. Instead of the Board retaining the power to amend at all times, the Development Agreement locks in the land uses for an additional thirty years. In Section 2.19, the Development Agreement states that "[t]he County agrees not to amend the Mountain Resort [General Plan] designation or zoning for the term of the Agreement." AR 1:145.

A recent Supreme Court decision addresses the question of "amendments" to initiatives. In *People v. Kelly*, that Court held that the definition of an "amendment" includes an enactment that "effectuates a change in the [initiative] by taking away from the rights granted by the initiative statute." *Kelly*, 47 Cal.4th at 1043; *see also id.* at 1027 ("[A]n amendment includes a legislative act that changes an existing initiative statute by taking away from it."). The *Kelly* decision concerned the Compassionate Use Act ("CUA"), which was enacted by statewide initiative. The CUA offered certain immunities to patients who possess amounts of cannabis "reasonably related to the patient's current medical needs." *Id.* at 1027. A later enactment from the Legislature offered such protections only to patients possessing specific amounts. *Id.* at 1015-16. Under the initiative, patients effectively had the right to possess a medically reasonable amount; under the later statute, that right was limited. Thus, the State, the defendant, and the Court all agreed that the later enactment unconstitutionally amended the initiative. *Id.* at 1043, fn.60.

Similarly, in *Proposition 103 Enforcement Project*, the Court of Appeal considered Proposition 103, an initiative that granted the State's Insurance Commissioner the authority to require insurers to reduce their rates, and the accompanying authority to determine the proper ratemaking formula for implementing such "rollbacks." 64 Cal. App. 4th at 1478-79. The Legislature then enacted a statute that required a specific ratemaking formula, removing the Commissioner's discretion. *Id.* at 1481. This, the Court determined, was "an attempted amendment" of the initiative: the Legislature's action "'takes away' from the provisions of Proposition 103, which vest ratemaking determinations with the Commissioner." *Id.* at 1486; *see also Franchise Tax Board v. Cory* (1978) 80 Cal.App.3d 772, 776 (invalidating Legislative action that limited state agency's initiative-granted authority to audit electoral campaigns).

This is precisely what the Development Agreement would do in the present case. After seven years, the Initiative vested the Board of Supervisors with the unfettered authority and discretion to modify the General Plan and Zoning Code amendments set by the Initiative. In contrast, the Development Agreement prohibits the Board from exercising that authority for thirty years. Because, the Development Agreement "takes away" from the Board's rights, it amends the Initiative's grant of those rights. The Board could adopt such an amendment only by submitting it to the voters for a ratifying vote. The Development Agreement, however, was never subject to a vote of the people; it is therefore invalid under Elections Code section 9125 and the California Constitution.

CONCLUSION

For all of the foregoing reasons, Petitioners Mountain Meadows Conservancy, Sierra Club, and Sierra Watch respectfully request that the Court issue a writ of mandate directing that the County to set aside (1) its approval of the Project, including the subdivision and the Development Agreement, and (2) its certification of the EIR.

DATED: August 26, 2010

SHUTE, MIHALY & WEINBERGER LLP

By: _____
GABRIEL M.B. ROSS

Attorneys for Petitioners MOUNTAIN MEADOWS CONSERVANCY, SIERRA CLUB, and SIERRA WATCH