



Los Angeles County  
Department of Regional Planning

*Planning for the Challenges Ahead*



Amy J. Bodek, AICP  
Director

February 27, 2018

The Honorable Board of Supervisors  
County of Los Angeles  
383 Kenneth Hahn Hall of Administration  
500 West Temple Street  
Los Angeles, CA 90012

Dear Supervisors:

**PROJECT NO. R2014-02411-(5)  
MINOR CONDITIONAL USE PERMIT NO. 2014-00014  
OAK TREE PERMIT NO. 2014-00035  
ENVIRONMENTAL ASSESSMENT NO. 2014-00194  
APPLICANT: STEPHEN KUHN  
ALTADENA ZONED DISTRICT  
FIFTH SUPERVISORIAL DISTRICT (3-VOTES)**

**SUBJECT**

On March 21, 2017, the Board of Supervisors (Board) approved Minor Conditional Use Permit (CUP) No. 2014-00014 and Oak Tree Permit (OTP) No. 2014-00035, and adopted the related Negative Declaration (ND) for the construction of a 1,436 square-foot single-family residence in the unincorporated community of Altadena (Home Project). The Home Project included the removal of one oak tree, and encroachment into the protected zone of nine other oak trees.

Following the Board's approval, Canyon Crest Conservancy (Petitioner), the administrative appellant, brought a petition for writ of mandate against the County as Defendants and Stephen Kuhn (Applicant) as Real Party in Interest alleging violation of the California Environmental Quality Act (CEQA), among other claims; Canyon Crest Conservancy v. County of Los Angeles, et al., Los Angeles County Superior Court Case No. BS167311. Petitioner sought to set aside the County's approval of the ND and the associated entitlements for construction of the Home Project and perform a comprehensive Environmental Impact Report (EIR).

**IT IS RECOMMENDED THAT THE BOARD AFTER THE PUBLIC HEARING,**

Adopt the enclosed resolution vacating and setting aside the approval of Minor CUP No. 2014-00014, and approval of OTP No. 2014-00035, and adoption of the related ND by the Board March 21, 2017.

**PURPOSE/JUSTIFICATION OF RECOMMENDED ACTION**

On December 14, 2017, the County received a letter from the Applicant requesting the County vacate and set aside the permit entitlements in order to stop the present litigation. That letter is included as Attachment 2. While the Applicant expressed certainty in ultimately prevailing on the merits at trial, ultimately, the costs to him of defending the litigation would make the Home Project not economically feasible.

Based on the Applicant's request, the Department of Regional Planning (Department) is recommending that the Board vacate the permit entitlements. The Department's staff agrees with the Applicant that a comprehensive EIR is not normally required for a single-family residence on a vacant lot; and none of the extenuating circumstances for an exception to exemptions exists here. In the rare instances where other jurisdictions have required an EIR for a single-family residence, those EIRs have a "focused" scope, and have been used for projects that are readily distinguishable for their greater impacts and presence of statutory exceptions pursuant to State CEQA Guidelines Section 15300.2.

The Applicant's permit application will remain on file with the Department. If the Applicant seeks to pursue the project further, it will be processed in compliance with all applicable laws and regulations.

**FISCAL IMPACT/FINANCING**

Vacating the approval of the Minor CUP, OTP and ND would not result in any new significant costs to the County or to the Department as the proposed project is a private development. Any related costs will be borne by the Applicant.

**FACTS AND PROVISIONS/LEGAL REQUIREMENTS**

A duly noticed public hearing was held by the Board on December 6, 2016.

Pursuant to subsection A of Section 22.60.230 of the County Code, John Patrick Lynch on behalf of the Canyon Crest Conservancy appealed the Regional Planning Commission's approval to the Board on September 19, 2016. A public hearing is required pursuant to Section 22.60.240 of the County Code and Sections 65335 and 65856 of the

The Honorable Board of Supervisors  
February 27, 2018  
Page 3

Government Code. Notice of the hearing must be given pursuant to the procedures set forth in Section 22.60.174 of the County Code. These procedures exceed the minimum standards of Government Code Sections 6061, 65090, 65355, and 65856 relating to notice of public hearing.

**ENVIRONMENTAL DOCUMENTATION**

The request is to vacate the previous adoption of the ND.

**IMPACT ON CURRENT SERVICES (OR PROJECTS)**

Action on the Minor CUP, OTP and ND is not anticipated to have a negative impact on current services.

For further information, please contact Maria Masis at (213) 974-6435 or at [mmasis@planning.lacounty.gov](mailto:mmasis@planning.lacounty.gov).

Respectfully submitted,



Amy J. Bodek, AICP  
Director

AJB:SA:MM:lm

Attachments: Resolution  
Letter from Applicant Stephen Kuhn

c: Executive Office, Board of Supervisors  
Chief Executive Office  
County Counsel  
Public Works

LOS ANGELES COUNTY BOARD OF SUPERVISORS

AGENDA ENTRY

DATE OF MEETING:	FEBRUARY 27, 2018
DEPARTMENT NAME:	REGIONAL PLANNING
BOARD LETTERHEAD:	DEPARTMENT
SUPERVISORIAL DISTRICT AFFECTED	DISTRICT 5
VOTES REQUIRED	[3]-VOTE
CHIEF INFORMATION OFFICER'S RECOMMENDATION	NONE

**\*\*\*\* ENTRY MUST BE IN MICROSOFT WORD \*\*\*\***

Instructions: To comply with the Brown Act requirement the reader should fully understand what the department is asking the Board to approve. The recommendation must describe what the action is for; with whom the action is being taken; fiscal impact, including money amounts, funding sources, and effective dates. Also, include an instruction for the Chair(man) or Director to sign when such signature is required on a document.

PROJECT NO.: R2014-02411-(5)

PUBLIC HEARING

BOARD AGENDA TEXT:

This is a request by the applicant to vacate and set aside the Board's approval of his Project on March 17, 2017, and adoption of Minor Conditional Use Permit No. 2014-00014, Oak Tree Permit No. 2014-00035, and related Negative Declaration which authorized the construction of a single family residence on a hillside property within the Altadena Community Standards District. The project is located on Canyon Crest Road (APN 5830-003-016) in the Altadena Zoned District. Assessment No. 2014-00194,

**RESOLUTION OF THE BOARD OF SUPERVISORS OF THE COUNTY OF LOS ANGELES VACATING APPROVAL OF MINOR CONDITIONAL USE PERMIT NO. 201400014, OAK TREE PERMIT NO. 201400035, AND RELATED NEGATIVE DECLARATION**

**WHEREAS**, on December 6, 2016, the Board of Supervisors held a public hearing regarding an appeal of the Regional Planning Commission's decision to approve Minor Conditional Use Permit No. 201400014, Oak Tree Permit No. 201400035, and adopt the related Negative Declaration, for construction of a single-family residence in Altadena ("Home Project"); and

**WHEREAS**, public testimony was received from the applicant Stephen Kuhn and a representative of the administrative appellant Canyon Crest Conservancy, and exhibits were submitted to this Board; and

**WHEREAS**, at the conclusion of the public hearing on December 6, 2016, the Board voted to indicate its intent to deny the appeal and its intent to adopt the Negative Declaration for the single-family residence under the California Environmental Quality Act (CEQA), and to approve Minor Conditional Use Permit No. 201400014, and approve the Oak Tree Permit No. 201400035, subject to certain conditions, and directed County Counsel to prepare the findings for the Home Project; and

**WHEREAS**, on March 21, 2017, the Board voted to adopt the Negative Declaration for the single-family residence under CEQA, and to approve Minor Conditional Use Permit No. 201400014, and to approve Oak Tree Permit No. 201400035; and

**WHEREAS**, petitioner Canyon Crest Conservancy filed a writ petition on April 16, 2017, challenging the Board's decision; the matter proceeded to a hearing on the grant of administrative stay of the Home Project's entitlements on May 9, 2017, and the superior court issued a judgment and order staying the Home Project's entitlements based only on the single CEQA cause of action; and

**WHEREAS**, the applicant Stephen Kuhn thereafter formally requested that the County voluntarily set aside and vacate the March 21, 2017 decision to adopt the Negative Declaration for the single-family residence under CEQA, and to approve Minor Conditional Use Permit No. 201400014, and to approve Oak Tree Permit No. 201400035;

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**NOW, THEREFORE, BE IT RESOLVED** that the Board of Supervisors hereby vacates and sets aside its March 21, 2017 adoption of the Negative Declaration for the single-family residence under CEQA, and approval of Minor Conditional Use Permit No. 201400014, and approval of Oak Tree Permit No. 201400035.

The foregoing resolution was adopted on the \_\_\_\_\_ day of \_\_\_\_\_, 2018, by the BOARD OF SUPERVISORS OF THE COUNTY OF LOS ANGELES.

LORI GLASGOW, Executive Officer  
Clerk of the Board of Supervisors

By \_\_\_\_\_  
Deputy

APPROVED AS TO FORM:

MARY WICKHAM, County Counsel

By \_\_\_\_\_  
Deputy

To the County of Los Angeles and its Department of Regional Planning:

12/14/17

It is in great conflict that I write to you today to request that the County voluntarily vacate and set aside the approvals of my permit entitlements at present, to end the litigation under Los Angeles Superior Court case BS167311, brought against the County for approving my permits without performing a “full” Environmental Impact Report (“EIR”) addressing all 17 areas of analysis. If the County had assented to this demand, **my sensitively designed, net-zero home of less than 1,500 square feet would have become the first ever single-family residence in the 47-year history of the California Environmental Quality Act (“CEQA”) to undergo this highest and most costly possible process under CEQA**, during which time more than 5 million homes were built in California. This is the level of review to which the 2035 County General Plan Update was subjected. Not even the recent 10-acre City Market mega-development downtown was subjected to a “full” EIR. Closer to home, the wide-reaching Altadena Community Standards update was recently approved with the same Negative Declaration as my project. The anomaly and perfidy of this claim can hardly be over-stated. To make this demand is to clearly exhibit bad faith, incompetence, or both.

I have written much about my home here: <http://bit.ly/2yVU2dj>, in an attempt to share information and address concerns. My home complied with all current development standards and was granted its minor entitlements by the County Board of Supervisors on March 21, 2017 after administrative appeals during which approval was overwhelmingly granted at each level, including by the Altadena Town Council, together comprising eight public venues over 18 months for review and consideration.

Historically, this long a process is not characteristic of such a small project for a “by right” use, requiring only a Minor Conditional Use Permit (“Minor CUP”) and Oak Tree Permit. These minor entitlements barely exceed the bounds of “ministerial” permit approvals, which don’t even require a CEQA exemption determination, and would be in nearly every other authority having jurisdiction in California. This Minor CUP would be unneeded anywhere else in the County today except in Altadena, for merely building on a slope greater than 25%, as many existing homes in the vicinity did. My home complied with all other provisions of the Altadena Community Standards, and would have been the only home on its side of the block to do so. The Oak Tree Permit had a level of impact that is shared by nearly every such permit, requiring one removal associated with a single-family residence. Every other home in the vicinity would also have required that same permit, likely with a far greater number of removals given the oak trees common in this residential environment and the lesser sensitivity of design of the existing homes. The County’s Hillside Management Area (HMA) Ordinance and Sensitive Design Guidelines exempt my project as it requires an amount of grading nearly 1,000x lower than the threshold declared for a use permit. Even still, my home meets the stated success criteria of these design guidelines, an indicator of a sound and sensitive design.<sup>1</sup> It also complies with all current development standards under the 2035 General Plan and impending technical update to Title 22.

I spent this lengthy interval of review creating a website to share details about the project and address concerns, mailing hundreds of letters to current and future neighbors, civilly responding to everyone who wrote about the project no matter the tone or quality of the content, meeting with neighbors in person on site multiple times in an attempt to address their concerns, and voluntarily making iterations of reduction in the volume of the already inherently compromised and code-compliant design to further accommodate these neighbors, at the expense of significant utility of

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<sup>1</sup> This is attributed in Attachment 17 of this document:  
<http://file.lacounty.gov/SDSInter/bos/supdocs/109406.pdf>.

my home. This was after having designed the home in such a way as to preserve as many of the 20 beautiful oak trees on the site as possible, be screened to a significant extent by oak trees to remain and to leave space open as a possibility for neighbors to continue to park in the protected zone of oak trees on my property. I tried my best, and I don't know what more I could reasonably have done. These changes reduced many parameters (e.g. garage size, ceiling heights) to the code minimums. The storage above the garage overhang, which had always been an integral part of the design as a direct consequence of the sunken nature of the garage, was also pared to a greatly reduced volume. These changes also removed any hardscape outside the small footprint of the home and decreased the amount of cut required to an extremely modest 15 cubic yards, balanced under the footprint of the home, comprising no more than 20% of the protected zone of any oak tree, and more than 100x lower than is required for a use permit in Altadena.

While I was fortunate to meet some truly kind people who welcomed me into the neighborhood, a few others were intent on denying any home at all, and willing to say or do anything to make that come to pass. I have been told by neighbors that this included canvassing door to door throughout the surrounding neighborhoods and in the media spreading propaganda that had people asking us whether we were going to carve a four-unit apartment complex into the canyon, and if our home really was going to be pink (it's an under-stated green), and if traffic really was going to be choked for years.

I have been verbally abused and felt physically threatened both on and off my property by the immediate neighbor to the north; seen these people display their cruelty by publicly calling me a "rapist" for choosing to build anything at all on this residentially zoned, infill lot; seen my property vandalized and the camera placed to ascertain the identity of the vandal stolen; been accused along with Regional Planning of unethical personal bias as some unattributed explanation for repeated approvals by independent reviewers; seen them argue with a straight face that it was alright for them to "take advantage" of the existing homes in the area but that it was unthinkable that the County would not effect a "taking" of the rights of this residentially zoned lot despite clearly meeting all burdens of proof for the issuance of its permits; seen them indict my home for a different form than theirs when their homes were built by destructive grading of flat pads that the Hillside Management Area Sensitive Design Guidelines strongly discourages; seen them indulge in all manner of poorly researched technical or legal speculation; seen them without any basis accuse me of lying about substantial changes to my project that the administrative record confirms were only ever minor and everywhere reduced volume in an attempt to compromise with them; and been the subject of intimidation from the attorney Mitchell Tsai who stated that he intends to exploit statements made in good faith expressing an intent to work with these neighbors to let them continue to use parts of my property, including parking in the protected zone of oak trees.

As one of my immediate neighbors put it, whose unflagging kindness and support has been touching and offered despite the inconvenience construction would cause them, the "tactics used by those opposing the building of their home are unfair, disingenuous, and borderline harassment." In the time since, this behavior has become very real harassment and a threat to my way of life.

My conflict stems from the fact that my project complied with every applicable law, rule and regulation, including CEQA. I know this because I have spent the past several months researching the false evidence and false statements of Mitchell Tsai, as well as the applicable case law surrounding a decision of a Los Angeles Superior Court judge to stay my home's entitlements on a single cause of action, pending a trial on the merits to determine whether a "full" EIR was warranted. **It is only this one claim that further analysis should have been done to determine**

**whether my home would have a significant effect** that they thought they had some chance of winning on and actually argued at the stay hearing. **In other words, they did not have the confidence to argue any claim that my home violated any development standard**, because it incontrovertibly does not, as the County's own technical guidance and expert references in the record established, including explicit diagrams from the Uniform and International Building Codes where the County's technical guidance lacked such visual qualification. **Furthermore, they argued that an EIR was required for only a single reason, because my home was sited in the "sphere of influence" out to 10/3 of the canopy dripline of at least two oak trees 5" in trunk diameter or greater.** Only six partial EIRs, each addressing at most a few of the 17 areas of analysis, have ever been performed for a new single-family home on vacant land in the 47-year history of CEQA, for projects that are readily distinguishable from my home for their greater impacts and the presence of statutory exceptions. One of these was a 7,000+ square foot mansion on an officially designated scenic ridgeline. Another obstructed ocean views from a public park. In every case, it appeared the decision anticipated litigation and the ease with which the law is abused. **Every one of these six EIRs found that the home would not have a significant effect on the environment.** This outcome would be a foregone conclusion for my far smaller and more sensitively designed home as well, an enormously wasteful rehash of the Initial Study's findings. Of all the homes requiring use permits the County has ever approved, many with far greater impacts, it has never had to perform an EIR.

The thesis of the stay was that "[according to the Oak Woodlands Management Plan ("Plan") Guide ("Guide")] a significant impact to a moderately degraded woodland includes: "regeneration potential is being marginalized; developed areas expand into previously undeveloped areas." [Citation.] There is some foundation [that these] impacts would be a "moderate impact"...and therefore significant." [Citation.]," requiring an EIR. **Out of the context of a properly considered spatial scale, this applies to literally anything at all and is decidedly contrary to the intent, as the Regional Planning staff who helped create the Guide will declare. The Guide was just never crafted to be defended against the "fair argument" standard.** It would be absurd to describe such an interpretation as being supported by substantial evidence as CEQA requires, **which is why this document was never crafted to contain thresholds of significance!** Rather than providing thresholds for preparation of an EIR, it was authored with the implicit understanding that Regional Planning would use it as a guide to be applied with *reasonable judgment* on a case-by-case basis to make a discretionary decision as to when to trigger the type of mitigation that CEQA says is sufficient to reduce a significant effect to less than significance, and with which my project was effectively conditioned in good faith. **It is this falsehood that was the quicksand upon which Mitchell Tsai built his case and undermined the stay hearing decision.**

**Furthermore, every other claim in the writ petition fails and was decisively rebutted by substantial expert evidence in the record.** The entirety of the development of these claims as well as the replies attributing substantial, professional, factual evidence in the very brief amount of time available, can also be found in Attachments 1-7 of this document: <http://file.lacounty.gov/SDSInter/bos/supdocs/109406.pdf>. Mitchell Tsai sat in a hearing and with a straight face said that it was "creative and unprecedented" to measure height vertically. He thought a judge could give credence to his writ petition claim that the amount of greenhouse gas emissions of my net-zero home should have been studied in greater detail. He thought it was acceptable to argue that because runoff from my home's two downspouts (which are conditioned by rain gardens pursuant to Low Impact Development standards) eventually made its way into a Waters of the United States (the Los Angeles River, more than 9 miles distant) a "fair argument" existed that my home would have a significant effect on hydrology and water quality. The list of bizarre and cargo-cultish claims goes on.

I believe that his behavior is actually a mix of incompetence and bad faith, but I have come to learn its purpose. Most of his abusive tactics are out of the well-reported playbook of other CEQA abusers, and his particular method of operation is the “mercenary smuggle.” The trick is to be as unbelievable as he can be in most of his claims, to destroy his credibility with the lead agency in the hopes that they stop listening to him. The lead agency is never his audience, and he doesn’t actually want it to take any steps to weaken his argument by responding as he requests. Instead, he is always playing for the judge, as it is by suing that he expects to be paid. He buries the kernel he actually intends to pursue during litigation in these distractions (as mid-way through a 456-page letter), and submits it the morning of the hearing at which the project is approved, a well-known tactic of CEQA abuse called the “late hit.” That kernel apparently requires only the patina of credibility that the mercenary be credentialed in some way, and need not be concerned with the quality of input, the lack of factual evidence, or the obvious bias of being paid to parrot text. The “fair argument” standard can simply be made to be that easy.

The venue where such evidence is properly and conventionally examined in detail is at the first and sometimes second level of review, with the hearing officer and/or planning commission. They have the time and means to examine the evidence. Their decision is the one being appealed, and appeals in a court of law do not introduce new evidence. The County hearing process follows a similar model, as a practical matter, but is not legally constrained in this way, because the decision is based on the entire record, and it’s not closed until the final adoption. CEQA abusers exploit this. There is also of course a public comment period for an Initial Study, which in this case received no objection from anybody. This, too, is right out of the playbook of CEQA abusers. It was at this point that a Negative Declaration could easily have been converted to a mitigated Negative Declaration, if members of the public or responsible agencies had believed additional mitigation beyond the extensive Oak Tree Permit requirements was necessary, or merely wanted to see these conditions called out as mitigating for a potentially significant effect. According to settled case law, minor updates after this point only require re-distribution if they constitute a “fundamental reorganization” of the Negative Declaration. This case law knowingly anticipated tactics that are very much like what my opponents attempted in requesting continuations and re-distribution of negligible changes to the description of the Initial Study. While many of these requests were actually honored in good faith, to do so in every instance would only “arm persons dead set against a project with a paralyzing weapon -- hired experts who can always “discover” flaws in mitigation measures.” CEQA abusers don’t submit their claims of significance at the “proper” time, because they don’t actually want to see them considered by the lead agency, or any rebuttal able to be placed in the administrative record. Opponents effectively withheld the one cause of “significance” they actually argued at the stay until the Board level of review, a body that has much more important things to do than wade into thousands of pages of documentation in which this cause was buried in a few paragraphs. This cause, which was otherwise easily rebutted, was also refined from an even greater state of insubstantiality only on the final date of approval, when there was no chance for any consideration at all.

The foundational ridiculousness of these circumstances is that as a matter of law, my home is categorically exempt from CEQA, as part of a class of projects that the legislature believes *do not* have a significant effect on the environment, by their very nature. Categorically exempt projects don’t have to be defended against the “fair argument” standard and don’t require any environmental analysis whatsoever. They are outside the scope of this law. No exceptions to my project’s categorical exemption exist, when considering the scope of comparison to the surrounding neighborhood, as the California Supreme Court held to be proper in *Berkeley Hillside*. That case found that on a hillside being stripped of woodland, a 6,438 square foot mansion with an attached 10-car garage that also required road-widening in order to be built was

properly exempt as a project that *does not* have a significant effect on the environment. Neither does the presence of two or more oak trees meet all of the requirements of any exception. Contrary to Mitchell Tsai's characteristic cherry-picking and ellipsis editing of the record at the stay hearing, it was good faith, not any requirement of the law, that needlessly stripped my project of this exemption. Whether a single-family residence is categorically exempt as a small structure is a matter of law, requiring only that the factual determination of the lack of exceptions be supported by substantial evidence. The County will indeed assert this in explicit findings of any future approval, eminently defensibly. The record indicated in her own words that the assigned planner chose to do an Initial Study to enlist the help of local and state agencies and of the public to review and contribute whether they believed any mitigation measures were indicated, given the presence of a stream at a substantial remove from the footprint of the project, and because neighbors who opposed might wish to contribute at the proper juncture as the law intends, thus handing them a deadly weapon: "I've decided that it is probably best to do an initial study for this project since there is a stream on the site. I keep going back and forth on the issue and feel it is best to cover our bases with such a vocal community and town council." There is so much to be sad about in this statement, especially when no reviewing party or member of the public provided any feedback during the period of public review expressing a belief that any mitigations were indicated.

These reasons for doing an Initial Study do not have any legal foundation, the clarification of which shortly post-dated the distribution of the completed Initial Study. **The California Supreme Court in *Berkeley Hillside* ruled that there would be no point to a categorical exemption if a "fair argument" of a significant effect or a fair argument of an exception could strip such a project of its rightful protections.** The "fair argument" standard of review is just too difficult to calibrate and too easy to abuse, a problem that is endemic and upon which much has been written (cf. [http://issuu.com/hollandknight/docs/ceqa\\_litigation\\_abuseissuu?e=16627326/14197714](http://issuu.com/hollandknight/docs/ceqa_litigation_abuseissuu?e=16627326/14197714), [https://www.swlaw.com/assets/pdf/news/2013/01/16/ASensibleProposalForCEQAREform\\_011613.pdf](https://www.swlaw.com/assets/pdf/news/2013/01/16/ASensibleProposalForCEQAREform_011613.pdf), <https://northbayleadership.org/ceqa-modernization/>, <http://ceqaworkinggroup.com/category/case-studies>). It has been said that a claim evaluated under the "fair argument" standard will not fail unless a non-expert can be persuaded that the argument isn't laughably implausible. It is a standard without precedent anywhere else in jurisprudence, and so ill-defined that it is apparently impossible to predict until a judge applies their own calibration of it, which appears to vary widely. As such, it introduces stochasticity into the process, which is why calls for CEQA reform includes replacing this ridiculously deferential standard with the more level playing field characteristic of every other field of jurisprudence, at the very least the more sensible "substantial evidence" standard of review.

Furthermore, the California Supreme Court has noted that "if a project opponent's opinion that unapproved activities may have a significant environmental effect constitutes fair argument, then it is doubtful that *any* project could survive challenge." This caution was very much at issue in my case given the input from an arborist an immediate neighbor paid to speculate to an egregious extent, whose input was disproven as wildly inaccurate by the most factual evidence possible, a model derived from billions of LiDAR points, as documented in detail in Attachments 15, 7 and 19 of <http://file.lacounty.gov/SDSInter/bos/supdocs/109406.pdf>. The expert County Biologist evaluated and agreed with this assessment, as attributed in the sections to follow. However, as I came to find out, the input of this arborist wasn't even needed, nor was the County's correct and factually supported finding that this arborist's input was insubstantial and incredible even at issue, as the bar would be calibrated to be even lower still, in tragic error.

As it relates to impacts on a “sensitive environment...of particularly hazardous or critical concern,” *Hines v California Coastal Commission* upheld the rightful categorical exemption for a single-family home that was fifty feet from a blue-line stream, in a mapped sensitive area, even applying a more reasonable calibration of the “fair argument” test to the conformance of these circumstances to the “sensitive environment” exception, rather than the far more deferential “substantial evidence” standard the California Supreme Court determined the law required in *Berkeley Hillside*. There is no question that substantial evidence and this precedent upholds that my home, at a similar offset to the (unaffected) stream as many others in the neighborhood, and far greater than that in *Hines*, lacks any exception for this reason. **Oak woodland, which is to say two oak trees 5” in diameter or greater, is explicitly designated by the County as NOT being a sensitive resource of particularly hazardous or critical concern.** The Guide states that where a significant effect is not found to be present, a categorically exempt project affecting oak woodland requires no analysis. If oak woodland was a sensitive resource of particularly hazardous or critical concern, despite its prevalence throughout suburban environments in the County, this guidance could not be possible, as an exception to a categorical exemption would exist and an Initial Study would be required. CEQA also requires that the boundaries of such a resource be precisely mapped and that this outline be officially adopted, neither of which have occurred for any oak woodland in the County. And of course, the proximity to a stream and oak trees is characteristic of every other home in the vicinity to the same extents, and so is not an unusual circumstance. **In short, the only possible reasons for arguing an exception to my home’s rightful categorical exemption have no chance AT ALL of succeeding, let alone a reasonable probability.**

That there was opposition meant that strengthening the legal defensibility of the project became *more* important, not less. **But a Negative Declaration is the most difficult and unpredictable of CEQA documents to defend, and CEQA abusers can all too easily claim to be unsatisfied with this reasonable level of analysis.** It is counterintuitive, as a reasonable person would expect that doing the already significant amount of analysis in an Initial Study would be more responsible than doing no analysis, and put the project on firmer ground as such. However, the law is not written this way, and it does exactly the opposite, because it opens the door to the infamous “fair argument” standard. Essentially, this puts out a welcome mat to a bounty hunter lawyer willing to rack up a bill without making his clients pay, when he would not have been willing to attack a categorical exemption without being paid the going, prohibitively high rate. The choice to do an Initial Study therefore effectively subsidizes obstructionist neighbors. As I’ve been told by those with the scars to prove it, **no lesson bears learning more deeply than that good faith under CEQA is thoroughly punished.**

Under the CEQA “fair argument” and administrative stay “reasonable probability” standards of review, almost unfathomable deference is heaped on the opposition in support of their single claim, a statement Mitchell Tsai made explicitly at the stay hearing as he was having difficulty arguing the merits, repeatedly stating that “it’s a low burden” and “there’s a low threshold to require an environmental impact report” and that “...ultimately, this is simply a stay and...Mr. Kuhn’s points, while well taken,... would be best considered ultimately if the case, if the court were to consider this court [sic] on the merits at a trial hearing.” Like poor Moe of Moe’s Gas Station (<http://ceqaworkinggroup.com/moes>), who was forced to do an EIR for adding three gas pumps to his corner station when his competition across the street saw an opening to sue the same Negative Declaration that the rule of reason requires of any innocuous project without the protection of an exemption, I have been the victim of neighbors with ulterior motives who are all too willing to abuse. Nevertheless, even accepting this “fair argument” standard, **their case could not succeed without falsehoods that were intrinsic to their argument.** The Guide was never crafted to contain CEQA thresholds of significance, which a “fair argument” must support

exceeding in a way that is not clearly mitigated in order to warrant an EIR. It is in fact, as I came to find out, pathologically incapable of being defended as such. When so construed and evaluated under the “fair argument” standard of review, no discretionary permit can affect two oak saplings of 5” in diameter out to 10/3 their dripline’s diameter without writing an EIR. This does not meet any one of CEQA’s three legally required criteria to interpret the guidance as a legally actionable threshold of significance. **Contrary to a declaration made under penalty of perjury by Mitchell Tsai, it has never been adopted by the Board**, as all parties are aware would be required of any threshold of significance in the County. It was never subjected to a public review process. And it most definitely cannot be supported by substantial evidence.

Hence, my conflict, because I am certain that the proper explanation of these facts would forestall any chance of their eventual success at trial. There is literally no way to win on the claim that an EIR was required with proper explanation of the Guide, given the lack of substantiality of any other CEQA claim made. Furthermore, in only one place does CEQA say exactly what is required to mitigate to less than significance even an actually significant effect – the removal of oak trees. **This is the central enabling confusion of this case, which remains unaddressed by any party.** Given the particular circumstances of the site, the project already effectively implemented the County’s fixed complement of mitigation pursuant to this law, which CEQA says is sufficient to ensure that a significant net conversion of oak woodlands does not take place. Only a net expansion was possible under these conditions, into an area with greater ecological value. In addition to the insubstantiality of opposing input, this is why the County believed and was justified in believing that the project could not have a significant effect.

**As it was impossible to confront this truth directly, Mitchell Tsai was forced into conjuring the falsehoods that the project wasn’t actually compelled to comply with any of its conditions, and that these conditions were not standard and characteristic of other (exempt) projects.** Contrary to his statement at hearing that “the County simply...found that the project irrespective of any – without any mitigation measures would not have an impact,” as the Initial Study notes, the Oak Tree Permit process has evolved into an extensive set of standard conditions that overlap to a large extent with mitigations remedying a conversion of oak woodland, providing all of the needed replacement value where the oak woodland is severely degraded and the only resources are the trees themselves. This degradation is in large part because of the very neighbors who sued, who have no apparent problem alleging impacts despite parking in the critical root zone within feet of the trunks of trees on my property, and who also had a 5 feet diameter and 35 feet deep seepage pit drilled on their property within 6 feet of oak tree #1, which they further significantly encroach with a slab on grade foundation and paved driveway up to the trunk of this tree, which has also seen significant past pruning and physical damage. However, the tree survives in excellent health to this day, receiving highest marks for both health and aesthetic quality.

That two trees would be planted and forever protected for any tree removed or which declined in the next seven years, resulting in what could only be a net expansion of oak woodland, was the central fallback of our Oppositions and was not rebutted by anybody with an explanation supported by accurate facts, a truly demoralizing and confusing outcome. Often the sufficiency of mitigation is a matter for analysis, and an EIR is the vehicle for analysis of an effect that is qualitatively significant and has not been clearly mitigated. This is likely why the section of CEQA governing woodlands mitigations explicitly says that “[t]he Legislature...intend[s] this section to modify requirements of [CEQA]...with regard to effects on oaks and oak woodlands.” There would be little point to a law declaring what is *sufficient* or indeed to a Negative Declaration if the requirements could only be rendered in an EIR. **Even the principal author of CEQA Section 21083.4 stated in an informational document from the California Oak**

**Foundation that its mitigations were intended to be rendered in a Negative Declaration, as for my project.** The County's own Guide echoes this in its decisional flowchart. Regional Planning's decision-making process is also justifiably influenced by CEQA's guidance that "[w]here... a project... would mitigate the significant effect to a point where clearly no significant effect on the environment would occur, a lead agency need not prepare an environmental impact report solely because, without mitigation, the environmental effects at issue would have been significant."

**The County's standard conditions require monitored 2:1 habitat replacement for any oak tree that is removed or declines from encroachment,** along with (1) compliance with the County's Low Impact Development standards designed to mimic the natural hydrology and limit erosion of the site, including filtering runoff with rain gardens and eliminating impervious surfaces, mitigations noted as satisfying in part CEQA's "other mitigation" designation by a leading reference; (2) compliance with the requirements of the County's guide entitled "Oak Trees: Care and Maintenance," which specifies the permitted composition of oak tree understory, as well as mulching, irrigation, pruning and monitoring practices, also noted as satisfying in part CEQA's "other mitigation" designation by a leading reference; (3) compliance with the County's Drought-Tolerant Landscaping Ordinance requiring the planting of native species that provide woodland habitat; (4) preparation of seedling/receptor sites and planting of acorns, also noted as satisfying in part CEQA's "other mitigation" requirements by a leading reference; and (5) other mitigations to limit construction impacts, including a layer of mulch and plywood to limit compaction; irrigation before, during and after construction; excavation with only hand implements; clean, sterilized cuts of any roots or branches under the supervision of a consulting arborist; and construction fencing to protect the critical root zone within three diameters and the entire protected zone of any tree not approved for encroachment and therefore monitored. It is absurd to argue that these conditions are insufficient to mitigate for even a notionally significant effect.

Mitchell Tsai continued his pattern of categorically false, meaningfully misleading statements in claiming that monitoring and replacement of encroached trees that decline or die was "developed specific [sic] for the project" and not as a standard part of the Oak Tree Permit process. Simple inspection of *any other* Oak Tree Permit would show that this is a *standard* condition. This condition #10 of the Oak Tree Permit is part of a fixed complement of 15 identical conditions, always numbered #1-15. It is settled case law that standard developmental conditions are not "improper" mitigation measures, as though a project condition could only be granted "credit" if it was called out explicitly as mitigating for a significant effect. With characteristic inaccuracy, Mitchell Tsai further claimed that "a mitigating negative declaration... would have been required in order to make these mitigation measures binding." This is clearly ridiculous. There would be no point to a permit condition if it was not binding. Every permit condition is enforceable through required inspections and provisions for additional inspections on a complaint basis. The conditions are officially recorded against the grant deed as a legal contract with the County. CEQA explicitly states that mitigation measures may be rendered as "permit conditions." The County issued a Negative Declaration because we were most decidedly not having a significant effect, but then conditioned us in good faith with binding, enforceable conditions as though we were, in a way that the public was given a chance to review. This was reasonable, and other case law has upheld the use of permit conditions to forestall claims of significance even when not called out explicitly as mitigating for a significant effect. To assume otherwise would be to require every permit condition to be promoted to a mitigation measure, which is clearly ridiculous.

Case law has upheld adherence to the Los Angeles County Oak Tree Permit process, and specifically the subset of it requiring 2:1 replacement and permanent protection, as sufficient to mitigate for a loss of woodland habitat. Separately, **the California Supreme Court has upheld 2:1 habitat replacement as an eminently sufficient ratio where existing (sensitive) habitat is degraded.** Without any requirement to do so, and as I have noted since before hearings for my home began, I was already planning to do even more of what the law says is sufficient, planting additional oak trees and dedicating a conservation easement for the riparian part of the property.

In addition, **the slightest of clarifications in the findings to reflect the analysis that actually occurred in the precise terminology of the Guide would have forestalled even a “fair argument” of significance if the Guide was actually construed to contain legally actionable thresholds.** If the Guide had actually been used before at the time my home’s Initial Study was created, it would doubtless have taken the form of another project’s recent unmitigated Negative Declaration,<sup>2</sup> for a 28-unit apartment complex with 26,000 cubic yards of grading. That project’s Initial Study made the factual determinations of existing condition and impact severity of the Guide, stating that removal of one mature oak tree and two immature oak trees, encroachment of 24 other mature oak trees, and removal of 20 mature non-oak trees in the construction of an apartment complex would have a low impact on a moderately degraded woodland and therefore be less than significant, after consideration of the standard mitigations provided by the Oak Tree Ordinance. If the Guide had been used before at the time of my home’s Initial Study, it would have concluded that a low impact on a severely degraded oak woodland had occurred.

Even up against dually oppressive standards of review, we would still have been able to win on paper and not just in fact at the stay hearing, if we had had the more customary several weeks to oppose. Instead, we had a mere seven working days to compose a defense. With that benefit, we would have been able to coordinate with the points of contact in Regional Planning that had created the Guide, but were unavailable at the time. We would have had time to go over his declarations and exhibits carefully and object where appropriate. The County Biologist would have had time to compose his own declaration, assembled in the sections to follow, attributing why the opposing arborist’s input was rejected as incredible and insubstantial, and how the project conditions applied by statute and convention actually meet the County’s intent for mitigation of oak woodlands on this site. Instead, we did our best, fought honorably, and, as it turns out, were the victims of dishonorable deception.

The County unfortunately does not have the resources to provide more than a typical level of detail in its findings or Initial Studies with the fees charged for such small projects, nor is it able to respond to last-minute submissions on the date of approval, the infamous “late hit” of CEQA abusers. Had this documentation enumerated the analysis in the sections to follow, it is indisputable that we would have prevailed on the stay motion. However, the Initial Study fee covers a few days of work at most, a far cry from the efforts of the professional companies that analyze projects that can afford hundreds of pages of intricate defense. Unfortunately, though, given the history of abuse of CEQA, it really is necessary whenever the lead agency chooses to deny a categorically exempt project its rightful exemption, an error the County is not likely to make again in similar circumstances. Regardless of whether additional study is performed in good faith, the County must find any categorically exempt project to be so exempt, in explicit findings attributing the lack of exceptions, in particular as compared to existing development in that vicinity. Whether a project is categorically exempt is a matter of law, requiring only that substantial evidence support these findings. Furthermore, the law gives any opponents the notice

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2 Available at: [http://planning.lacounty.gov/assets/upl/case/r2013-03493\\_initial-study.pdf](http://planning.lacounty.gov/assets/upl/case/r2013-03493_initial-study.pdf).

they need to develop an opposing record on the presence of exceptions. This may be the only benefit these people and their paid consultants will achieve with their actions.

While it was clear that the bias of our opposition's arborist was to see the project denied and nothing built at all, it would have been possible to effect changes, where there was some degree of freedom in this permit process. It is somewhat embarrassing for a professional's input to be found to be incredible and insubstantial for having so clearly failed to understand the project actually approved, as the County properly asserted in its findings. Regional Planning's Biologist considered what this arborist wrote, and they considered what we and our registered consulting arborist (who was also certified in tree risk assessment) wrote in response, and they indicated to us that we had clearly addressed every point, a conclusion the Hearing Officer also echoed. This arborist was biased, ill-informed and unpersuasive in letters and in hearing testimony riddled with unsupported speculation. It appears they did not take kindly to being so regarded, and things degraded from there.

Always civilly, if surprised and disappointed at the degradation of professional integrity, we and our registered consulting arborist described the places in which this arborist speculated, misunderstood and then outright fabricated. They must have realized that it was ridiculous to rest claims of significance on the introduction of "invasive weeds...transported on truck tires", if reviewing my project's conditions without prejudice, which require mulching, inspected fuel modification, and control for understory composition, any one of which would preclude this blatant speculation. They must have realized that standard construction Best Management Practices are in place on hillside lots that control for debris flows, like that hillside home for which this arborist consulted and wrote a report at 9 Hidden Valley Road in Monrovia, which cut many more protected oak trees without an EIR, and which had two orders of magnitude more grading. They must have realized after reviewing the LiDAR scans that they had been called out for inexcusably divergent encroachment estimates. And yet they reflexively doubled down not with independent judgment, factual evidence, and constructive suggestions (which I would have listened to and taken where not contra-indicated by our arborist, as occurred more than once), but with progressively more brazen attempts to manufacture significance and defend the many earlier missteps that had already effectively compromised their credibility.

From investigation of their past work, which was discussed in Attachment 19 of this document: <http://file.lacounty.gov/SDSInter/bos/supdocs/109406.pdf> this arborist is willing to bias encroachment estimates by at least an absolute 25% in the direction the client requests. 50% encroachment becomes 20-30% and perfectly acceptable if paid to support, as for oak tree #2 of the oak tree report for 411 La Loma Rd in Glendale, included as Attachment 27 of this document: <http://file.lacounty.gov/SDSInter/bos/supdocs/109407.pdf>. 30% becomes 45-55% if paid to oppose, as for my home. In the Oak Tree Report in Attachment 27, impacts include significant pruning (the branches of which were not attributed) of tree #2 and a rigorous, factual evaluation of the approved site plan indicates removal of the roots in more than 50% of the protected zone, at distances as close as 5' from the trunk, even before accounting for any over-excavation and without attributing the use of blind-side formwork, as I intend. Together, this impact permitted with less analysis than was present in our initial materials, let alone what ended up in the record, was more severe than that to any tree my project encroached. They asked for an enormous amount of information not included in their own reports in identical circumstances, which we and our consulting arborist provided.

I have been legally advised that the insubstantiality of this arborist's input, together with this evidence of unprofessional bias and the tactics used in cynically submitting claims last minute to forestall consideration clearly constitutes a violation of the International Society of Arborists

ethical code of conduct. Regardless of whether the ISA finds fault or shows extraordinary deference, I hope this arborist will think twice about behaving in such a manner to any other family just trying to build a sensitively designed home on a residentially zoned lot that complies with all the rules. At the very least, I hope they will engage to actually understand the project, rather than rebuffing repeated requests to do so. *Credible* expert opinion is needed under CEQA to change projects, and the burden is on the professional to be exactly that. The way in which this arborist has behaved has only reinforced that when the County does finish creating generally applicable, legally actionable thresholds of significance for oak woodlands significance, they must incorporate some quantitative criteria, in line with the impending Oak Woodlands Protection Act before the State legislature, which declares a threshold of 10 trees 10" in diameter or greater, a far cry from the single tree I was removing, or even the three additional trees it was claimed might succumb based on the incompetent impact assessment. Furthermore, whatever qualitative criteria remain must be much more carefully crafted for defense against the "fair argument" standard.

It remains my duty to demonstrate that these people have pursued a wasteful and abusive case, every part of which would fail, as that is the only outcome that would have been consistent with the lack of any breach of the formally adopted significance thresholds that actually govern the project, and with the lack of success on their other claims. However, continuing this litigation was rendered impossible by the judge's grant of a risibly inadequate bond for a young family with significant financial costs inuring from delay. It is only because of this and the enormous and asymmetrically borne cost of this litigation that I must abandon it. If I had been granted the bond requested, which was just compensation for the marginal costs of delay, I would have continued with the litigation, and I should have argued for far more than I had asked for. Under case law, I should have claimed the attorneys' fees necessary to obtain a successful final decision procuring a dissolution of the injunction on the claims argued, an amount that would have added tens of thousands of dollars to the bond. I should also have asked for compensation for the building program incentives for this net-zero home, which exceeded \$12,000 but will now expire unused, with these programs being phased out. I am not a tech billionaire who can afford to hire a bevy of lawyers to fight their case all the way to the California Supreme Court, as the Kapors did in their ground-breaking victory in *Berkeley Hillside*. I truly thank them for the badly needed justice and clarity it injected into the CEQA state of the practice around small projects, though, and regret that its outcome came too late to inform the decision to do an Initial Study for my home. Every cent I devote to this project and its defense I had to earn.

This contrasts starkly with my neighbors, who benefit from the unique position in which Mitchell Tsai has insinuated himself. Lawyers of his ilk typically work on partial contingency, with the large majority of his compensation expected to be paid by those he sues. This ecology is predicated on the reasonable assumption that a defense of environmental law is an important public interest, and work that is in the public interest should be compensated by those who are violating it. However, under CEQA, their alleged "violation" of the law can be "manufactured" by them out of whole cloth.

Still, I hope that with sane and clear explanation, justice will prevail. It is settled law that one who seeks equity must do equity and the doors of a court of equity are closed to one tainted with inequity or bad faith relative to the matter in which he seeks relief. Mitchell Tsai erred when he thought he could base a case in the Superior Court of the County of Los Angeles on so many falsehoods and get away with not being called out for it. Such behavior is not characteristic of an attorney general, and effectively reveals a purported "private attorney general" to be counterfeit. The evidence that the most foundational of his instances of misinformation was proffered in bad faith is compelling, and becomes conclusive when appended to the litany of

intentional misrepresentations and corruptions he repeatedly made throughout the administrative proceedings:

(1) In his Petition at ¶33, Mitchell Tsai correctly notes the date of the stamp of adoption of the Board on the Oak Woodlands Management Plan Part I (August 23, 2011), which is different than the date of the document (May 1, 2011). Clearly, he established that he knows that the date of “adoption” is the date on which the Board makes a resolution and stamps a document as approved, not the date on which the draft document was completed. (2) Despite accurately describing in the immediately preceding line of his declaration that another document had been “adopted by the County of Los Angeles Board of Supervisors,” consistent with its stamp, he provided no adopting entity in his statement that the Guide was “adopted” on the date of the document. He just characterized it as “adopted,” full stop. It is common knowledge that the adopting agency, which in the County is the Board, would have to adopt a threshold of significance, as the law explicitly requires this. **Therefore, he was clearly attempting to mislead the court, with some degree of deniability if ever called out for the deception.**

I have highlighted in red in the analysis that follows those falsehoods that directly affected the stay decision. Mitchell Tsai, whose CEQA forays appear to have been harassing failures to obstruct and the purported “success” of delaying for technical reasons two valid projects that will not be changed by the action, may choose to attempt victory by trying to swindle an undeserved fee award, but he will have to demonstrate a reasonable probability of succeeding on *something* with *accurate* evidence. He got 1/10<sup>th</sup> of his fee request in the only award ever made to him, and the judge stated that he was strongly conflicted as to whether to award any fees at all. The only three deficiencies in that project were exactly on point with the one notional deficiency argued in this case – insufficient (or at least confusing) attribution of substantial evidence to support the required conclusion. The stakes and potential impacts were far higher in that case as well.

This whole case was a pincer that is straight out of the playbook. On the one side these neighbors have placed the rock of prohibitively costly litigation, for which I am expected to pay the going rate for professional representation and my neighbors pay next to nothing, with their attorney hoping to be awarded his fee out of my pocket if they win, and little if he does not. On the other side is the hard place of their demand to perform a “full” EIR to forestall future litigation, a prohibitively costly and intricate document that is completely inappropriate for a modest single-family home. **The output of this dynamic has been called “greenmailing,”** in which people extort design concessions or money in exchange for settling a CEQA case, the attempted application of which I have also come to be victim. *Nobody* could credibly think that the voluntary accommodations I offered these people would survive these abuses, and I withdraw my informal offer to try to work out a long-term arrangement with them for any use of my land if a home is built, including for parking. These are not the type of people that respond to good faith, as I have learned the hard way. Their lawyer told us that they intended to take advantage of the kindness embodied in these statements in whatever way they could, as a part of his campaign of intimidation.

For my friends and family, who can’t fathom how this is possible, and thinking of any family who may find themselves the victim of similar abuse, I felt it was my duty to assemble a detailed account of what is going on here. **The sections of this letter attributed in the Table of Contents are entirely derived from discussion with the County experts who were involved in the case and review of its record, who will declare to these facts. Together, these fully address every claim in the writ.** Sadly, the time it took to assemble this was not available in the mere seven days to compose our Oppositions from scratch. This analysis would support as adequate under CEQA the issuance of a categorical exemption, the re-issuance of the same

Negative Declaration, or a mitigated Negative Declaration that merely formalized the exact same conditions already applied by statute and convention. All would be defensible under the law against the claim that an EIR was required, and it is tragic that apparent confusion as to the analysis that actually occurred, much of which post-dated the Initial Study in the rebuttal of opposing claims as CEQA permits, and which was not yet assembled into an administrative record for the court to inspect, has resulted in this situation.

I hope that anybody with interest in what happened here carefully reads the County's analysis of it that follows. I want to thank them for all of their work on a difficult case and an absurd situation. I did my best to navigate this process and learn what I could in the few months I had after things took a litigious turn, and I certainly would do several things differently if I had it to do over. But I do not regret the simple pursuit of a simple dream that was mine *by right*, to build a beautiful home in compliance with all rules and regulations on a beautiful acre of land that is zoned for that purpose, in an existing residential neighborhood a short walk from work. The neighbors who wastefully abuse a law that is anomalous in its encouragement of abuse, and who attempt to financially intimidate a young family into abandoning that dream do a public nuisance, not a public benefit. No amount of prevarication will ever overcome that fundamental truth of this ordeal.

Regards,

Stephen Kuhn

## Table of Contents

Table of Contents .....	14
Oak Woodlands Conservation Management Plan .....	14
Oak Woodlands Conservation Management Plan Guide.....	14
Distinction Between the Plan and Guide .....	17
Oak Woodlands Conservation Act.....	18
Analysis of Home Project Impacts to Oak Woodlands .....	19
Insubstantiality of Petitioner’s Arborist’s Evidence .....	24
Specific Allegations of Significance.....	27
Oak Woodlands Report.....	28
Heritage Oak Tree Impacts .....	29
Oak Tree Permit Writ Allegations .....	29
County Code Writ Allegations.....	32
Other CEQA Writ Allegations.....	35
Applicability of a Categorical Exemption .....	38

## Oak Woodlands Conservation Management Plan

The County Oak Woodlands Conservation Management Plan (“Plan”) has two parts. Part I (“Voluntary Oak Woodlands Conservation Strategy for Los Angeles County”) was dated May 1, 2011 but adopted by the Board of Supervisors (“Board”) on August 23, 2011<sup>3</sup> (as Petitioner correctly noted in its Petition at paragraph 45), and fulfills all of the stated scope and intent of the Oak Woodlands Conservation Act (“Act”). Part II (“Planning and Implementation Elements of the Oak Woodlands Conservation Management Plan”) has not been adopted and contains recommendations for additional updates to County processes and the zoning code. These extend far beyond the scope of the Act, and most of the recommendations in Part II have not been implemented. The Act governs a completely voluntary process for remunerated dedication of oak woodlands conservation easements, as it intends an Oak Woodlands Conservation Management Plan be adopted by resolution, rather than the public review or General Plan update process required of a code update. This is explained by the Plan and in the Act’s Program Application and Guidelines.<sup>4</sup> By its own terms, the Plan cannot compel any action of a landowner until that landowner agrees to dedicate a conservation easement. Generally, the Plan is intended to help identify and prioritize oak woodlands resources and foster their preservation or restoration through *voluntarily* claimed incentives, which include both State Wildlife Conservation Board and local funding.

## Oak Woodlands Conservation Management Plan Guide

Subsequent to the adoption of Part I of the Plan, Regional Planning drafted the Guide, which includes several suggested updates to Regional Planning processes relating to oak woodlands.

<sup>3</sup> Available at: <http://file.lacounty.gov/SDSInter/bos/supdocs/62919.pdf>.

<sup>4</sup> Available at: <https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=18730>.

The main purpose of the Guide was to help Regional Planning decide on a case-by-case basis when to trigger application of the mitigation described in CEQA Section 21083.4, which states what will mitigate a significant conversion of oak woodlands to less than significance. As such, the Guide is largely unrelated to the Act and the Plan, which explicitly states that CEQA thresholds of significance are outside of its scope, as the law requires a public review process and additional requirements to which the Plan was not subjected. However, it was perceived as a part of the planning updates recommended by the Plan and therefore shared its nomenclature.

Regional Planning is obligated to adhere to its officially adopted thresholds of significance, and to the State CEQA Guidelines Appendix G criteria, where not over-ridden with locally adopted, generally applicable thresholds, or with explicitly identified project-specific thresholds. At its discretion, Regional Planning has also identified additional criteria that are included in the County's implementation of an Initial Study, which otherwise follows the Appendix G criteria exclusively. For example, the Recreation section asks whether the project would interfere with regional open space connectivity, though Appendix G does not. There are no officially adopted criteria to answer this question, and Regional Planning uses its discretion to declare an effect less than significant. So too, in the Biological Resources section, the County asks whether a project would convert oak woodlands. Here as well, there are no officially adopted thresholds of significance to answer this question. Regional Planning uses its discretion and interprets the Guide on a case-by-case basis. Generally applicable thresholds of significance in the County must be adopted by the Board. When the Board adopts a document, it is stamped "ADOPTED" with an accompanying resolution. This was done for Part I of the Plan, and Petitioner in its writ petition correctly distinguished between the date in which Part I was drafted (May 1, 2011) and the date it was stamped as adopted (August 23, 2011). cursory reference to the Guide was made in the 2035 General Plan and in its EIR. However, to the present date, the "mitigation triggers" proposed in the Guide have not been adopted as thresholds of significance for preparation of an EIR by the Board. As such, the Guide has not met any of the requirements of California Code of Regulations Section 15064.7(b) for legally actionable CEQA thresholds of significance.

The intent of the Guide was to serve as a *discretionary* document for Regional Planning to use internally on a case-by-case basis to determine when to condition a project affecting oak woodlands with mitigation. The intent was not to dictate the level of CEQA documentation. This document has not been adopted by the Board or subjected to a public review process, nor was there any effort to provide "substantial evidence" to support the determination of "significance." The decisional flowchart in Table 3 of the Guide indicates that where a significant effect to an oak woodland is found, either a NegDec or EIR is a possible vehicle for the mitigations. It also states that where a significant effect is not found, a categorical exemption may be used. Regional Planning decides which determination is appropriate based on the scale of the project, not any entries in the Guide tables. The designations "significant," "potentially significant," and "less than significant" in Table 3 were not intended to map to "EIR" "Mitigated NegDec" and "NegDec," respectively. It was not the intent of Regional Planning to require an EIR when Table 3 in the Guide indicated a significant effect is present, but rather to ensure that the mitigations specified in CEQA Section 21083.4 are implemented, which that law states will "mitigate [to less than significance] the significant effect of the conversion of oak woodlands." It appears this intent was not well-communicated in the language of the Guide. However, it was based in part on the understanding that CEQA is clear on what conditions are sufficient to mitigate even a significant effect on oak woodlands to less than significance. With this understanding, these triggers were conceived much more liberally than CEQA thresholds of significance for an EIR would have been.

It appears that they provide no avenue to rebut a “fair argument” of a “significant” effect, even where no tree removal is required, unless the existing condition is “severely degraded.” In its decision, the court incorporated these criteria, stating that “a significant impact to a moderately degraded woodland includes: “regeneration potential is being marginalized; developed areas expand into previously undeveloped areas.” [Citation.] There is some foundation [that these] impacts would be a “moderate impact”...and therefore significant.” [Citation.]” requiring preparation of an EIR. Where the determination of the existing condition is also subject to the “fair argument” standard, there would be no avenue to rebut the claim that an EIR must be performed for any project affecting two oak trees greater than 5” in diameter in any way, even if no Oak Tree Permit is required and no encroachment of an oak tree’s protected zone occurs. This underscores the intent that the Guide was not intended to serve as thresholds of significance, as there is no reasonable, substantial evidence to support the conclusion that an EIR should be performed under these circumstances.

The County’s adopted thresholds of significance date from 1987. No thresholds of significance for a conversion of oak woodlands presently exist in the currently adopted Appendix D “Significant Effects” of the County’s CEQA Environmental Document Reporting Procedures and Guidelines. However, the County’s Guidelines do declare the removal of two non-heritage trees of any kind to be within the scope of a Class 4 categorical exemption, implying an effect that cannot be significant. The removal of one or even several non-heritage trees from a severely degraded oak woodland should not be considered a significant effect on the environment requiring an EIR. Regional Planning had not expected the language in the Guide to be parsed as formally applicable thresholds of significance, but rather to be applied on a case-by-case basis with reasonable judgment.

The processes outlined in the Guide are not yet mature. In part, this reflects the implementation timeframe of 1-2 years outlined in the 2035 General Plan (adopted on October 6, 2015, more than a year after the Home Project application was submitted) goal C/NR-4 (“Oak Woodland Conservation Management Plan Implementation”), and the limited number of residential projects affecting oak woodland that were not given a Class 3 or Class 4 Categorical Exemption from CEQA. No oak woodland report of the format proposed in the Guide has ever yet been created or required by Regional Planning. Such a report contains information that has been incorporated into the CEQA analysis for projects, as there is substantial overlap. The Guide also references new Application Procedures with an updated Environmental Assessment Information Form with additional site plan requirements, including a requirement to label all oak trees with a diameter of 5” or greater and draw the corresponding “sphere of influence.” Regional Planning has yet to implement this. Neither the Environmental Assessment Information Form filled out for the Home Project in 2014, nor the present form have been updated as the Guide suggests.

The County is in the process of updating its formally adopted thresholds of significance, which supplement the State CEQA Guidelines Appendix G criteria, from those in use today, dating from the 1987 public hearing process and Board adoption. While oak woodlands significance is not addressed in the current formulation of Appendix D of the County’s Guidelines, the intent is that the update will provide all officially adopted generally applicable thresholds of significance in the County, including those for impacts to oak woodlands. These criteria, developed as CEQA requires through a public review process with the attribution of substantial evidence, will replace those criteria currently evaluated solely at Regional Planning’s discretion, which presently include the Guide and any other question included in the County’s formulation of its Initial Study checklist but not in State CEQA Guidelines Appendix G. The project is not expected to exceed the thresholds that will be formulated as a part of this process, which will be formulated with the intent and expectation that they may be legally actionable under the “fair argument” standard.

Unfortunately, in the very limited time available, the County was unable to coordinate with the points of contact in Regional Planning that were familiar with the Guide and with the framework for thresholds of significance in use by Regional Planning. In reviewing the history of the Guide, it was noted that Part I of the Oak Woodlands Conservation Management Plan states that “[t]he purpose of the Los Angeles County Oak Woodlands Conservation Management Plan (OWCMP) is to meet the requirements of the California Oak Woodlands Conservation Act (AB 242) and provide input into the Los Angeles County General Plan update.” Looking to that 2035 General Plan update, the EIR for which incorporated the Guide by reference, it was stated that, “the County has recently finished an Oak Woodlands Conversation Management Plan Guide, which details the process by which the County will determine the extent of oak woodland habitat, the requirement for the preparation of an oak woodland report, an analysis of impacts to the extant oak woodland and the need for mitigation for impacts to the oak woodland habitat. This discretionary review by the County will be in compliance with CEQA.” Because the 2035 General Plan does not apply to the project, and because the Initial Study used the 1980 General Plan throughout its analysis and citations, and was completed prior to the date of adoption of the 2035 General Plan, it was believed that this was sufficient to indicate that the Guide was not formally applicable to the Home Project, as there was no venue for any public review at all prior to the 2035 General Plan update process, and there was insufficient time for further investigation.

#### **Distinction Between the Plan and Guide**

In his Motion, Petitioner’s attorney claimed that “[t]he County’s Oak Woodlands Conservation Plan sets CEQA thresholds of significance for determining whether a Project may have significant impacts on Oak Woodlands based upon the current state of an oak woodland and the impact that a project may have on the existing oak woodlands on the Project Site.” This is categorically false, as it conflates the Oak Woodlands Conservation Management Plan, adopted August 23, 2011 (again, as Petitioner correctly noted in its Petition at paragraph 45) as the Oak Woodlands Conservation Management Plan Guide, dated March 18, 2014, which was never intended to be adopted and has not been to this day.

In its Opposition, the County stated, “Part I of the Plan was adopted by resolution of the Board on August 23, 2011 [Citation], in accordance with the Oak Woodlands Conservation Act, but governs an inapposite and **voluntary** process of remunerated dedication of oak woodlands conservation easements [Citations]. The Plan notes that “specific thresholds of significance are not developed in Part I” because it would be improper to adopt these without a public review process. [Citation]. Part II of the Plan established recommendations for a variety of further actions subject to evaluation by Regional Planning and “normal public review and/or hearing processes.”” (emphasis in original). In his Opposition, the Applicant stated that the Guide “mitigation triggers” were not mentioned in the 2035 General Plan EIR, nor was the Guide analyzed with more than a single sentence: “In addition, the County has recently finished an Oak Woodlands Conversation Management Plan Guide, which details the process by which the County will determine the extent of oak woodland habitat, the requirement for the preparation of an oak woodland report, an analysis of impacts to the extant oak woodland and the need for mitigation for impacts to the oak woodland habitat. This **discretionary review by the County** will be in compliance with CEQA.” (emphasis in original).

Unfortunately, the respectively voluntary and discretionary nature of the Plan and Guide were not developed in the Oppositions beyond these statements, and they were apparently insufficient explanation of these facts. In his declaration, Petitioner’s attorney alleged that the Guide had been “adopted” on March 18, 2014, though no adopting entity was provided in this statement. This is

categorically false. An immediately preceding statement correctly noted that another document had been “adopted by the County of Los Angeles Board of Supervisors.” correctly attributing the date the document was stamped as “ADOPTED.” In great haste and given this abbreviated language, the County failed to submit an evidentiary objection to that statement. The court therefore chose to assume that the Guide had in fact been adopted, impliedly by the Board, on March 18, 2014, and that the Guide was the Plan and contained thresholds of significance that had undergone the processes required in State CEQA Guidelines Section 15064.7(b). Again, neither of these assumptions are true.

As previously attributed, Part I (“Voluntary Oak Woodlands Conservation Strategy for Los Angeles County”) completely fulfills the intent of the Oak Woodlands Conservation Act and cannot compel any action of a landowner until that landowner agrees to dedicate a conservation easement, as a “voluntary” program for which “elements of the required plan should not be overly restrictive to discourage landowners, or local jurisdictions from participating.” Part II (“Planning and Implementation Elements of the Oak Woodlands Conservation Management Plan”) piggybacks on this effort to make suggestions for additional discretionary planning processes and “case-by-case” CEQA assessment that extend far beyond the scope of the Oak Woodlands Conservation Act, most of which have not yet been implemented, and which must be subject to public review. The Guide was a supplementary effort to the Plan Part I and Part II, referenced in Regional Planning’s evaluation of the suggestions of Part II in a letter from Regional Planning Director Richard Bruckner dated November 27, 2012<sup>5</sup>: “Using the Plan as a foundation, DRP will create a guidance document [to] consider[] the best and most feasible mitigation alternatives on a case-by-case basis when reviewing a development project requiring discretionary approval, but it does not have a formal documented process for the prioritization of mitigation strategies.” Its main purpose is to serve as a discretionary document to decide when to trigger the mitigations outlined in CEQA Section 21083.4. Regional Planning has a fixed complement of such mitigations for use in projects where on-site replacement is viable, with which the Home Project was already effectively conditioned, despite Regional Planning finding a less than significant effect using reasonable judgment.

### **Oak Woodlands Conservation Act**

As described in the County’s Oak Woodlands Management Plan Part I (“Voluntary Oak Woodlands Conservation Strategy for Los Angeles County”), “The Oak Woodlands Conservation Act (2001) created the Oak Woodlands Conservation Program administered by the Wildlife Conservation Board. The specific legislation focuses these efforts on the following:

1. Support and encourage voluntary, long-term private stewardship and conservation of California oak woodlands by offering landowners financial incentives to protect and promote biologically functional oak woodlands;
2. Provide incentives to protect and encourage farming and ranching operations that are operated in a manner that protect and promotes healthy oak woodlands;
3. Provide incentives for protection of oak trees providing superior wildlife values on private land, and;
4. Encourage planning that is consistent with oak woodland preservation.”

The court stated in its stay decision that “[i]n 2001, the Governor approved the California Oak Woodlands Conservation Act, which requires counties to develop an Oak Woodlands Conservation Management Plan to qualify for funding to preserve oak woodlands through the state’s Oak Woodlands Conservation Fund. [Citations.] With the moving papers, Petitioner’s

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<sup>5</sup> Available at: [http://planning.lacounty.gov/assets/upl/sea/Final\\_Report\\_with\\_Signatures.pdf](http://planning.lacounty.gov/assets/upl/sea/Final_Report_with_Signatures.pdf).

attorney submits a copy of the Los Angeles County Oak Woodlands Conservation Management Plan, adopted March 18, 2014.” However, the Plan was adopted on August 23, 2011, and this statement conflated the Guide as the Plan.

In its Petition at ¶69.a, Petitioner alleges that the Home Project violates the Oak Woodlands Conservation Act because the “County approved the Project without preparing an oak woodlands report, despite finding that the Project Site had oak woodlands and substantial evidence indicating that the Project will significant impact the oak woodlands on site.” Petitioner cited to no section of the County Code requiring the preparation of an oak woodland report. The Plan is not meant to compel an action of any landowner and governs a completely voluntary process intended to make landowners eligible for compensation if they choose to dedicate conservation easements. The Guide, which is a supplementary effort to Parts I and II of the Plan, suggests such a report where a significant effect is found, but the content of it has much overlap with the CEQA analysis that occurs for a project, and the processes in the Guide are still being implemented, in accordance with the 2035 General Plan goal C/NR-4 (“Oak Woodland Conservation Management Plan Implementation.”). No oak woodland report of the form suggested by the Guide has yet ever been created. Regional Planning did not abuse its discretion in not requiring an oak woodland report for the project, when no statute requires it, when no significant effect was analyzed to be present, and when much of this information was already a part of the CEQA analysis and/or administrative record for the Home Project accompanying it.

#### **Analysis of Home Project Impacts to Oak Woodlands**

Regional Planning has established processes for identifying impacts to oak woodlands and mitigating them pursuant to CEQA Section 21083.4 where they are significant. The County patterns its Initial Study analysis on State CEQA Guidelines Appendix G, which contains six questions relating to Biological Resources. The Plan discusses the applicability of each of these thresholds to oak woodlands in its own Appendix 11, entitled “CEQA Evaluation of Oak Woodlands Conversion.”

With regard to their particular relevance to oak trees and woodlands, the State CEQA Guidelines Appendix G, Biological Resources thresholds are evaluated as follows.

Addressing threshold #1, only *Quercus dumosa* is considered a special-status species. However, *Quercus dumosa* does not exist in the County or on the Home Project site. Among oak species extant within the project region, San Gabriel oak (*Quercus durata* var. *gabrielensis*) and Engelmann oak (*Quercus engelmannii*) also have rare plant designations. However, neither of these species exist on the Home Project site.

Addressing threshold #2, of oak woodland types previously reported in the region, Southern Coast Live Oak Riparian Forest and Open Engelmann Oak Woodland are considered sensitive plant communities by the California Department of Fish and Game. The riparian forest within the canyon below the Home Project site contains oak trees but would not be impacted by the project. Planting of replacement oaks within this community would benefit the oak resources of the riparian forest, resulting in a net positive effect. Furthermore, no form of Engelmann oak woodland is present on the Home Project site.

Addressing threshold #3, impacts to oak woodlands can be significant if the woodland affected is part of a riparian ecosystem providing habitat for riparian obligate species within a declining community type or by providing water quality benefits by preventing erosion and cleansing

runoff and percolated water. However, the oak trees encroached by the Home Project are not part of a riparian community.

Addressing threshold #4, impacts to oak woodlands can be significant if the woodland is part of a wildlife corridor. While the oak woodlands on the Home Project site at the bottom of Millard Canyon do provide cover to a wildlife corridor, these trees are nearly 200 feet distant from the Home Project and are therefore not appreciably affected by it.

Addressing threshold #5, the Home Project complies with the many requirements the County Fire Department Forestry Division imposes as part of the Oak Tree Permit process, which includes statutory mitigations and standard permit conditions to minimize impacts to oak trees.

Addressing threshold #6, the oak woodlands affected by the Home Project are not part of a Significant Ecological Area. They are sited at street level and heavily degraded by a history of several types of impacts.

Together, the answers to these questions indicate that no potentially significant impact to oak woodlands was possible according to the CEQA Guidelines Appendix G thresholds.

The County's officially adopted CEQA thresholds of significance in Appendix D of the County's CEQA Guidelines<sup>6</sup> do not address oak woodlands explicitly and therefore do not tighten or supplement these thresholds. Therefore, under the legally actionable thresholds of significance in the County, no calibration of the "fair argument" standard can support a finding of significance. Furthermore, the County's CEQA Guidelines do permit a Class 4 exemption for removal of two or fewer non-heritage trees of any kind. Oak tree permits commonly use this exemption, and it is common for such oak tree permits to entail encroachment of many additional trees, technically impacting "oak woodlands" as defined by the Guide.

The County's Initial Study checklist has another question which Regional Planning added at its discretion, addressing whether a project would "convert oak woodlands...or otherwise contain oak or other unique native trees." The County's CEQA guidelines, including the aforementioned Class 4 exemption criteria, as well as industry practice, do not typically treat removal of one or two non-heritage oak trees as significant, much less when they exist in a severely degraded state. Table 3 of the Guide notes that removal of "individual heritage trees" is significant, a qualification that would be unnecessary if removal of a single non-heritage tree was expected to be significant. Even when a small number of small trees are being removed, if the only resources in the oak woodlands are the trees themselves, compliance with the Oak Tree Permit process ensures that no net conversion takes place. Regional Planning thus looks for deficiencies left over after application of the many standard permit conditions applied as part of the Oak Tree Permit process by the County Fire Department Forestry Division. Where impacts are more significant than removal of a small number of small trees, or where the woodland is more intact and the standard permit conditions of the Oak Tree Permit are insufficient to compensate for the loss of woodland ecological values, additional mitigation measures are formalized.

The standard conditions imposed as a part of the Oak Tree Permit process are uniformly applied to all projects, including those receiving categorical exemptions, and are not intended to be "mitigation measures" for a significant effect on the environment. Rather, the County seeks to responsibly constrain development even where effects are less than significant and to minimize impacts to these valuable resources in accordance with the Oak Tree Ordinance. Most Oak Tree

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<sup>6</sup> Available at: [http://planning.lacounty.gov/assets/upl/general/LAC\\_CEQA\\_Guidelines\\_3.pdf](http://planning.lacounty.gov/assets/upl/general/LAC_CEQA_Guidelines_3.pdf).

Permits involve encroachment or removal of more than one tree, which may be construed as “oak woodland” according to the Guide, which uses any two trees greater than 5” in diameter at breast height that are close enough to each other that overlap occurs when the areas of the driplines are expanded by a factor of 10. The presence of oak trees comprising this definition of oak woodland is not an unusual circumstance, either in the County or in the vicinity, as nearly every one of the more than 40 residences within 500 feet is a part of oak woodland, many individual oak trees of which exist in very close proximity to these residences.

In performing the CEQA analysis for the Home Project, Regional Planning believed that compliance with standard permit conditions and existing laws including the County Oak Tree Ordinance along with the many standard conditions applied to an Oak Tree Permit, state and federal laws protecting special status species, and County Low Impact Development Standards was sufficient to mitigate any potentially significant effect, given the particular conditions of the Home Project site and the severely degraded state of oak woodlands affected by the Home Project, which were assessed with site visits.

Where a significant effect is found to exist, the County’s processes for mitigating a significant conversion of oak woodlands to less than significant are well-established and in accordance with CEQA Section 21083.4. Where suitable habitat exists on-site, a significant conversion of oak woodland is mitigated by replacement in a 2:1 ratio, with seven years of monitoring of both replacement trees and any encroached trees, pursuant to CEQA Section 21083.4(b)(2)(A). The location of replacement trees for the Home Project adjacent to relatively intact riparian oak woodland with greater ecological value provides just such a suitable habitat. The County’s Oak Tree Permit process and the Home Project’s conditions require monitoring not only of the replacement trees but also all encroached trees, which must also be replaced if they decline or die. There is ample room on the approximately one acre Home Project site for many additional replacement trees in an ecologically superior environment, in the event any encroached trees were to decline or die during the seven year monitoring interval, which event would also trigger replacement in a 2:1 ratio with a subsequent seven years of monitoring for those replacement trees, and protection in perpetuity.

The County’s Oak Tree Permit process provides nearly all of the mitigation for even a significant conversion of oak woodland where impacted oak woodland is degraded, and the only ecological services are being provided by the trees themselves, as for the Home Project. Where on-site replacement is possible, the County routinely rounds out the requirements of CEQA Section 21083.4 with a fixed complement of mitigation comprised of the following conditions: 1.) Non-native species control to foster a suitable understory for oak trees; 2.) Long-term maintenance of the replacement planting sites with a “no-build” annotation on the approved Site Plan (which is reviewed as a part of any further permit application) – substantially equivalent to a conservation easement; 3.) Seven year monitoring to ensure the vigor of replacement trees and continued health of any encroached trees.

The Home Project’s conditions effectively fulfill these requirements, even though no significant effect was anticipated. There is little to no understory in the woodland affected by the Home Project, as it is mulched or grassy, non-native species are present, and much of it has been used for parking by neighboring residences. Furthermore, the Oak Tree Permit process requires that oak tree understory be maintained in accordance with the County’s Oak Tree Care and Maintenance Guide, which appropriately controls the composition of oak tree understory and other associated care and maintenance activities. The landscape plan for the Home Project, created in accordance with the County’s Drought Tolerant Landscaping Ordinance, was examined and properly removes those non-native species that are present, replacing them with native

species that provide suitable woodland habitat at the periphery of the protected zones of the oak trees to remain. Due to the topography of the site, construction is not possible on most of it, including the riparian environment in which replacement plantings were to be situated, and so this area was already being preserved from future development. The Home Project was conditioned with seven years of monitoring, and adherence to Low Impact Development standards are required of every residential development in the County.

The Guide was meant as a discretionary document to help Regional Planning decide when to apply the mitigations outlined in CEQA Section 21083.4. The terms “potentially significant” and “significant” in the Guide were not meant to correspond to CEQA thresholds for a Mitigated NegDec and EIR, respectively. Instead, the term “significant” was intended as a liberal trigger to apply those mitigations, with the enabling assumption that CEQA says what conditions are sufficient, and so complying projects should not be challenged. If the term “significant” were to have been intended by the Guide working group as a formal CEQA threshold of significance for preparation of an EIR, a different set of criteria would have resulted, and the Home Project would not have had a “significant” impact under those thresholds. Regional Planning has used either a categorical exemption, NegDec or Mitigated NegDec for every single-family residential or otherwise small project affecting oak woodland, with some examples entailing removal of a dozen or more trees. The process flowchart of the Guide underscores this by acknowledging that a Mitigated NegDec is still an appropriate vehicle where a “significant” effect occurs, stating that the response to “significance” is that “mitigation is required.” The criteria for the existing condition and impact severity contain some descriptions that were never intended to be simultaneously applicable. An example is the presence of “non-native landscaping” and “pavement,” which cannot both describe a given area. Thus, it is not expected that every description is satisfied. Regional Planning assesses which criteria are best satisfied.

Criteria for a “severely degraded” oak woodland as proposed in the Guide include: “drastic [alteration] to accommodate residential uses,” “natural regeneration is not possible,” “soil is compacted...or paved,” “wildlife habitat is limited” and “non-native landscaping” is present. The existing condition has been significantly altered by a history of dumping and regrading by previous owners to augment available parking and storage space; significant pruning for parking, roadway, residence and power line clearance; signs of mechanical damage; and construction of concrete drainage devices impinging on the collars of several trees. The use of much of the protected zones of affected trees for parking and storage by the residents of 3589 Canyon Crest Road prevents natural regeneration. Soil has been compacted by this parking and by encroachment of the pavement of Canyon Crest Road and the driveway, patio, slab-on-grade foundation and seepage pit at this adjacent residence. This manner of encroachment is more severe, introducing impermeable surfaces in addition to compaction. Together, the protected zones of all but two trees encroached by the Home Project were significantly affected in this way. There is little to no native understory and non-native species are present, which the Applicant was to remove per the landscape plan. For these reasons, and given the highly trafficked adjacent road and other residences, wildlife habitat in these trees is similar to that of suburban woodlands throughout the Altadena region and would not be appreciably altered by the Home Project.

Criteria for a “moderately degraded” oak woodland in the Guide are less clearly defined and could be interpreted to overlap to a large extent with the description of a “severely degraded” oak woodland, underscoring that they were never intended as thresholds of significance to be evaluated under the “fair argument” standard. Regardless of the state of degradation, any oak woodlands will “retain some of their functions,” including potential habitat for wildlife. A key distinction is whether “natural regeneration is possible.” If much of the understory of a stand of oak woodland is being used for parking, roadway, driveway and residential structures, has seen

significant dumping and re-grading, and has non-native landscaping present, regeneration potential is limited. Regional Planning commonly associates moderately degraded oak woodland as fragmented by development, such that ecosystem services have been compromised. However, regeneration and support of an understory within a periphery of encroachment is viable. The existing impacts to the oak woodland at the scale affected by the Home Project are more severe than is typical of a moderately degraded oak woodland.

Regional Planning's Biologist believed that the existing condition of the oak woodland at the scale affected by the Home Project best conforms to the criteria of "severely degraded," if choosing only one of the three discrete conditions represented in the Guide, or nearly so, if using a more continuous spectrum. This highly degraded existing condition was represented by a County biologist at hearings for the Home Project. Table 3 of the Guide considers all qualitative impacts in a severely degraded oak woodland to be less than significant, excepting the removal of heritage trees. Apart from this, the Guide distinguishes significance for a severely degraded oak woodland (which would require mitigation defined in CEQA Section 21083.4, and not necessarily an EIR) as entailing removal of a majority of affected trees. Removal of one mature tree from the site does not meet this burden, nor would removal of four mature trees, as Petitioner alleged would eventually be necessary. Of the six other encroached mature trees to remain, the *marginal* impact of the Home Project compared to the existing condition is not significant. No pruning of these trees is required, nor are they impacted within their protected zones by the grading for the Home Project. The Home Project's staging area, permeable gravel driveway and utility laterals are proposed for an area already in use for parking that has been compacted, and compensating provisions in the Oak Tree Permit process and at the direction of the Applicant's consulting arborist limit these impacts.

As the Plan suggests, Regional Planning also considers significance at different spatial scales. While the condition of the oak woodland at the scale affected by the Home Project is best described as "severely degraded," at a landscape scale, encompassing thousands of feet in all directions, the condition is best described as moderately degraded. At this scale, woodland is fragmented by existing development but capable of regeneration within pockets over much of the area, with individual trees and portions of the woodland that range from intact to highly degraded. However, at this scale, comprised of hundreds or thousands of individual trees, the effect of removal of one or even several mature but non-heritage trees is not significant. Regional Planning commonly considers impacts at this scale for larger-scale development such as subdivisions or specific plans.

Without appropriately considering spatial scale, the language of the Guide describing the expansion of "developed areas into previously undeveloped areas" as "significant" could be used to characterize *any* development whatsoever. As the Guide defines oak woodland to include any two trees at least 5 inches in diameter, and grows the canopy radius far beyond that protected by the Oak Tree Ordinance to define the extent of oak woodland, a "fair" argument could be constructed in the way Petitioner has attempted that a "significant" effect exists if any development occurs outside the protected zone but within the sphere of influence of two immature and moderately degraded oak trees. However, an EIR should not be required for such a level of impact. The Guide's criteria were not crafted to be defended under the "fair argument" standard.

Regional Planning believes the language proposed in the Guide is more inclusive of mitigation than other counties in the state. Many counties declare thresholds in terms of number of trees or spatial area removed, regardless of the existing condition, with thresholds in use throughout the state between ¼ and 3 acres, which is much greater than the extent affected by the Home Project,

even assuming Petitioner's claim that additional removals are required. The Oak Woodlands Protection Act presently before the state legislature<sup>7</sup> intends to strengthen regulation of oak woodlands by expanding the scope of woodlands regulation, creating thresholds that are tighter than are currently in use in many counties, and shifting administration to the California Department of Fish and Game to enforce a consistent application. It would repeal CEQA Section 21083.4, and apply to coast live oaks only when removing more than 10 trees greater than 10 inches in diameter, regardless of the quality of their existing condition. This is another indication of the extent to which removal of one or even several non-heritage coast live oak trees is generally considered to be an insignificant effect on the environment, especially when the existing condition is severely degraded. Regional Planning's tighter and more qualitative guidelines are meant to ensure that the intent of CEQA Section 21083.4 is fulfilled in a greater number of projects, not to require EIRs for small and sensitively designed homes. The County effectively fulfilled these requirements for the Home Project despite it being a threshold case in which one small and lower quality tree was being removed, and three other mature trees were being pruned or encroached by excavation, to an extent that was highly probable of being sustainable, as witnessed by the many other trees in the area encroached to similar or greater extents.

### **Insubstantiality of Petitioner's Arborist's Evidence**

The County considered the letter asserting claims of significance from Rebecca Latta ("Petitioner's arborist"), submitted with many other materials from the Petitioner shortly before the Board considered the Home Project. Critically, most of the analysis and consideration of claims had occurred earlier, during the Hearing Officer hearings. Regional Planning reviewed these responses and determined that Petitioner exhibited misunderstandings that were effectively revealed by the Applicant and his consulting arborist as rendering this input insubstantial. Some of these affected Petitioner's arborist's encroachment estimates. For example, at the hearing for the Home Project on April 5, 2016, Petitioner's arborist alleged that the Fire Department conditions of approval "say that they need 13 feet 7 inches around the structure and 20 feet clear and that would take off some very large limbs." However, this requirement referred to roadway clearance for fire truck access, not clearance around or over the structure itself, a requirement fulfilled for the Home Project by Canyon Crest Road itself. Petitioner's arborist also incorrectly posited that significant over-excavation and grading for clearance around the structure would occur, assumptions that must have affected the quantified encroachment estimates, though these were not attributed with any factual evidence, such as even a simple diagram, and conflicted with the detailed, factually evaluable models and diagrams the Applicant and his consulting arborist provided, as well as their attribution of the actual construction impacts and techniques. The Applicant and his consulting arborist also attributed other examples in which impact severity estimates were corrupted by misunderstandings relating to construction requirements, methods and equipment. Petitioner's confusion as to the Home Project's impacts and conditions was persistent and fatally compromised Petitioner's credibility, pursuant to the County's finding.

In a letter dated September 5, 2016, Petitioner's arborist alleged that the Home Project would have a significant effect because of a "net loss of Oak Woodland Acreage (with the loss of 5 trees, by my estimates)" and a "net loss of nesting, burrowing, roosting habitat for wildlife." In other text, only four mature trees are referenced (#6, the removal of which is not in dispute, and #4, #5, #7). According to Table 3 of the Guide, these are less than significant effects in a severely degraded oak woodland.

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7 Available at: [https://leginfo.ca.gov/faces/billNavClient.xhtml?bill\\_id=201520160AB2162](https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201520160AB2162).

First, Petitioner rightly observes that a significant conversion of oak woodland requires a *net* loss, meaning that replacement does not occur. Petitioner did not address in any of its letters how the replacement with which the project is statutorily conditioned is insufficient to prevent this loss, even if additional trees decline or die. Replacement in a 2:1 ratio with perpetual protection thereafter is an industry standard threshold to prevent the net loss of any habitat. This applies not only to removals, but also to any encroached trees, as a *standard* condition of the County Fire Department Forestry Division's application of the Oak Tree Permit process. This ratio is preferred to 1:1 in order to help compensate for the temporal lag in replacement value and to provide a buffer against a requirement of complete long-term success. Monitoring of encroachment and replacement trees for seven years is also becoming the standard practice pursuant to modern arboricultural research and has been incorporated in recent oak tree permits in the County for projects granted categorical exemptions.

Second, in support of the claim that additional trees required removal, Petitioner's arborist provided encroachment estimates that did not include measurements, photographic or diagrammatic attribution, or other factual evidence of any kind to evaluate their veracity. Some of these estimates were blatantly exaggerated. As one example, Petitioner's arborist estimated root zone impacts to oak tree #1 of 46%, even though the Applicant's consulting arborist's Oak Tree Report Exhibit Map portraying the protected zone of oak tree #1 shows it overlapping with any part of the subject property by only slightly more than 20%. This area had already been compacted, and so the marginal effects of construction were modest, given the permit condition of a layer of mulch and plywood to reduce further compaction and the lack of any trenching or excavation. The Applicant and his consulting arborist also indicated an intent to provide some remediation post-construction through vertical aeration, as well as cautious interrogation of the fill previous owners had dumped and which Petitioner's arborist claimed was "choking" the roots of the affected trees, to see if root infill had occurred. As another example, in quantifying estimates, Petitioner's arborist attempted to translate the annotated branch removals the Applicant's consulting arborist provided into percent canopy removal. These appeared to be inaccurate by an absolute 15-25%. For instance, Petitioner's arborist estimated that 45-55% of the canopy of oak tree #7 would require removal, whereas the Regional Planning Biologist concurred with the Applicant's consulting arborist that removal of these branches corresponds to 30-35% of the canopy of this tree, consistent with the extent of pruning evident in many of the trees in the area for residential or roadway clearance. This was clearly portrayed in LiDAR models of the trees before and after encroachment, corresponding to the annotated branch removals provided by the Applicant's consulting arborist, which pre-dated a further reduction in height. Petitioner's arborist also aggregated root zone impacts of highly varying severity to arrive at single figures that are misleading. For instance, the effects of root removal and compaction in an area already used for parking were summed to arrive at a figure of 65% for oak tree #4. Although inflated compared to accurate, factually derived figures attributed in diagrams by the Applicant and his consulting arborist, the marginal impact was less than half of the figure Petitioner's arborist quoted.

The Applicant and his consulting arborist provided estimates that were supported by factual evidence, including photographic documentation of those branches that required removal and annotations of excavation extent. These were subsequently rendered in detail using LiDAR scans. This level of documentation was much greater than in any other Oak Tree Permit approved in the County.

The likelihood of the decline of encroached trees was considered as a part of the analysis for the Home Project. The principal basis for Petitioner's claims was that the percentage of canopy requiring removal was far in excess of that actually required. While it is true that removing 55%

of the canopy of a tree would likely trigger treatment of it as a removal (though even some relocated trees sustain this), 30-35% does not, especially when the Applicant and his consulting arborist expressed an intent to space this pruning over the course of a year or more, and some balancing root removal would also occur. Regional Planning's Biologist concurred with the opinion of the Applicant's consulting arborist that these trees did not require removal, when also considering the standard mitigating Home Project conditions intended to reduce impacts to these trees before, during and after construction. The continued health of a tree cannot be guaranteed in the presence of encroachment of *any* kind. Therefore, the need for removal is estimated as a probability. As the Applicant's consulting arborist stated, any non-zero probability of decline *could* conceivably be taken as grounds for removal, but such an all-or-nothing determination is contrary to the goal of preservation, and not consistent with County or industry practice. Furthermore, County Code Section 22.56.2100 explicitly acknowledges that "relocation is not prohibited [by the Oak Tree Ordinance]," and the effect of relocation is far more severe, entailing 90-95% root removal, typically with 50 percent or more balancing canopy removal. The Oak Tree Ordinance does not intend to set any arbitrary threshold for encroachment, beyond which a tree must be removed "for safety reasons."

During oral arguments on May 9, 2017, Petitioner's Mitchell Tsai claimed that "follow-up monitoring to ensure that the remaining trees survive, or if they do not survive that they are replaced...were developed specific for the project based upon a review of the project specific conditions." This is categorically false. The County Fire Department Forestry Division incorporates many standard mitigating provisions as a part of its application of the Oak Tree Ordinance. Oak Tree Permit condition #10 is an identical condition to other oak tree permits approved in the County.<sup>8,9</sup> The Oak Tree Permit process acknowledges that trees may be encroached without rendering a modest effect more severe by pre-emptive removal of a tree that has a good probability of surviving encroachment. This is why the standard permit condition from the Forestry Division requires a monitoring process to ensure that if these trees decline or die, they shall be replaced in a 2:1 ratio, with the monitoring interval for the replacement trees restarted anew. Since the Oak Tree Ordinance was created, the arboricultural community has come to understand that the successful establishment of replacement trees and continued health of encroached trees can take longer to confirm than the two years of monitoring required by the Oak Tree Ordinance. Conditioning the Home Project with seven years of monitoring is consistent with this understanding and with the Plan and has been applied to recent projects in the County, including ones granted categorical exemptions from CEQA. Contrary to Mitchell Tsai's falsehood that "a mitigating negative declaration...would have been required in order to make these mitigation measures binding," every mitigating permit condition is enforceable through required inspections and provisions for additional inspections on a complaint basis. The conditions are officially recorded on the deed as a legal contract with the County, and County Code compels the replacement of these trees as a matter of law. California Public Resources Code Section 21081.6 states, in relevant part, that "a public agency shall provide that measures to mitigate or avoid significant effects on the environment are fully enforceable through *permit conditions*, agreements, or other measures." (emphasis added). The permit conditions were binding, and their effect should have been considered when evaluating the question of whether a significant net conversion of oak woodland would take place, just as compliance with the building code or a geotechnical report's recommendations is credited. When two trees are replaced and forevermore protected for every tree that could possibly have been impacted by the Home Project over the next seven years, a net conversion of oak woodland is quite literally impossible. Only a long-term net expansion of oak woodland of a given quality was possible.

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<sup>8</sup> See, e.g. [http://planning.lacounty.gov/assets/upl/case/r2013-02211\\_approval-package.pdf](http://planning.lacounty.gov/assets/upl/case/r2013-02211_approval-package.pdf) at p. 17.

<sup>9</sup> See, e.g. [http://planning.lacounty.gov/assets/upl/case/2016-001534\\_approval-package.pdf](http://planning.lacounty.gov/assets/upl/case/2016-001534_approval-package.pdf) at p. 12.

CEQA Section 21083.4 asks lead agencies to consider whether a significant *conversion* of oak woodlands will take place. There can be no dispute that the project as conditioned by statute and convention would not result in a significant conversion of oak woodlands.

### **Specific Allegations of Significance**

Petitioner alleged that the Home Project would have a significant effect because of a “conversion of oak woodland to other uses.” According to Table 3 of the Guide, this is a less than significant effect in a severely degraded oak woodland. Petitioner cites to no authority in the Plan, Guide, or elsewhere for the premise that any effect on oak woodland is significant. The Home Project’s site is zoned for residential use, and the surrounding oak woodland along Canyon Crest is dominated by residential uses. The existence of oak woodland does not preclude the owner from sensitively developing their lot for its zoned purpose.

Petitioner alleged that the Home Project would have a significant effect because “grading and trenching will increase potential for sedimentation and constitute a change in hydrology that could negatively affect existing oak trees.” According to Table 3 of the Guide, this is a less than significant effect in a severely degraded oak woodland. The County’s Low Impact Development standards and grading and drainage plan check conditions requiring Best Management Practices designed to control for erosion and sedimentation during the brief rough grading phase preclude any significant effect. There is no grading outside the footprint of the Home Project, and the amount of grading is very modest at 15 cubic yards of cut, to be balanced under the footprint of the Home Project. Performing this grading by hand further increases the degree of control for any potential adverse effects. Trenching for utility laterals is also carefully done by hand, with pipes threaded under tree roots, and backfill occurring within a matter of days. There are no impervious surfaces outside the footprint of the Home Project. There are no downslope trees with any part of their protected zones encroached by the Home Project. The County’s Low Impact Development standards require that the Home Project’s downspouts are routed through rain gardens and thereafter back into the open drainage swale that presently collects any sheet runoff that exceeds the capacity of percolation in the footprint of the Home Project.

Petitioner alleged that the Home Project would have a significant effect because “it is probable that invasive plants will be introduced into the environment through soil disturbance and weed seed either being mechanically transported on truck tires or blown in from adjacent invasive weed sources. These invasive weeds tend to be more flammable than the native vegetation and are considered ‘flashy fuels’ by the local firehouses.” According to Table 3 of the Guide, this is a less than significant effect in a severely degraded oak woodland. The Home Project is conditioned to have a layer of mulch placed before and after construction that would preclude the establishment of such weeds. The Home Project is also subject to fuel modification requirements and annual inspections by the County Fire Department that require removal of weeds, dry grass and any other “flashy fuels” that do not comply with fuel maintenance zone protection requirements. The Home Project is conditioned as a part of the Oak Tree Permit process to comply with the requirements of the County’s Oak Tree: Care and Maintenance Guide, which controls the composition of the understory of oak trees on the Home Project site, including a list of suitable understory plants. The inspections by the Fire Department Forestry Division, required by project conditions for seven years, confirm this compliance.

Petitioner alleged that the Home Project would have a significant effect because of a “loss of view-shed for the neighborhood.” According to Table 3 of the Guide, this is a less than significant effect in a severely degraded oak woodland. Views across the sightlines of the home were already largely obscured by oak tree canopy, much of which was to remain to screen the home.

Petitioner alleged that the Home Project would have a significant effect because of a “loss of ecosystem services which include pollution filtration, rainfall interception and erosion control.” According to Table 3 of the Guide, this is a less than significant effect in a severely degraded oak woodland. The Home Project is conditioned pursuant to Low Impact Development requirements to route its downspouts through rain gardens that provide superior pollution filtration to the oak tree canopy itself. The structure of the Home Project itself provides superior erosion control to the hillside than the trees themselves, and the introduction of native species portrayed on the Applicant’s landscape plan that are suited to erosion control, further enhancing this function. This claim is also linked to the scale of oak tree removal and whether a net loss actually occurs.

Petitioner’s arborist’s misunderstandings, inflated encroachment estimates and speculation undermined their credibility, which is why the County made the finding that their claims and those of other Home Project opponents who offered similarly speculative evidence were “unsupported by credible, substantial evidence.” The Applicant also volunteered significant height reductions after Petitioner submitted its quantified estimates. Contrary to Petitioner’s arborist’s assertion in a letter dated March 20, 2017, the height reduction occurred not only along the (eastern) frontage of the Project (reducing impacts to oak trees #4 and #5), but also along the entire northern edge (the height of which was reduced by at least 6 feet over all of its length), which further reduced impacts to oak trees #4 and #7. This is portrayed on the elevations for the project dated November 2, 2016, updated from those dated April 25, 2016. Based on this erroneous assertion, it appears clear that Petitioner’s arborist did not examine the final approved plans for the Home Project.

### **Oak Woodlands Report**

As it relates to the content requested in an oak woodland report, the information proposed for this report has been subsumed into one or both of the CEQA analysis and Oak Tree Report requirements, and other materials in the record.

The oak woodland report requires “description of the baseline condition of the oak woodland, including the species of oak trees present, the density of trees (number/acre), a demographic assessment of the trees (e.g. size or age range and the proportion of trees in young, mature, and declining classes), the vegetation type of the understory (e.g. scrub, grass/herb, barren, ornamental, etc.), the presence or potential use of the site by special-status species, and the spatial relationship to other woodland stands in the vicinity (e.g., immediately adjacent and fully integrated, isolated by urban development, etc.)” The baseline description is as described in the Oak Tree Report, which portrays the species, size and density of trees present. The Initial Study notes that no native understory exists, and non-native species are present. No special-status species were observed on site visits by the County Biologist, and the woodland stand is right at the boundary of the substantial encroachment of existing residential uses.

“A determination of the habitat value/integrity of the woodland (i.e. Table 1).” As previously attributed, the existing condition at the scale affected by the Home Project is best described as severely degraded.

“An analysis of impacts to the oak woodland and their severity. (i.e. Tables 2 and 3).” As previously attributed, the impacts to the oak woodland even accepting Petitioner’s inflated estimates of additional tree removal are low/less than significant, using the criteria of these tables.

“An analysis of recreational or aesthetic value of the woodland based on the presence of trails, location within a viewshed visible from parks or scenic highways, etc.” As the Initial Study analyzed, the Home Project was not visible from any trail, park, scenic highway or other public scenic resource.

“Impact of introduced pests and disease on the oak woodland.” No pests or disease were expected to be introduced, and standard Oak Tree Permit conditions require that pests such as shothole borer be reported to the County Forester.

“A summary of ecosystem services provided by oak woodlands as described by the Plan and how those services may change with development of the proposed home.” As previously attributed, the ecosystem services at the scale of oak woodland affected by the Home Project are limited.

### **Heritage Oak Tree Impacts**

In his Motion, Petitioner’s Mitchell Tsai claimed that the Initial Study authorized the removal of “one heritage sized oak tree and two less than heritage sized oaks” and that “the loss of even one heritage sized oak can be considered a significant impact” according to Table 3 of the Guide. However, as the County stated in its Opposition, “Petitioner’s argument that “the loss of even one heritage sized oak can be considered a significant impact” (Motion, p. 9) is a red herring because it is undisputed that the Home Project will not remove, or encroach on the protected zone of, any heritage-sized oak tree. Petitioner improperly conflates “heritage” size with the threshold of protection under the Oak Tree Ordinance, which is defined in County Code § 2256.2060 as “eight inches in diameter” for a tree with one trunk or “12 inches in diameter” for a tree with two trunks. A “heritage” sized oak tree without cultural significance must be greater than 36 inches in diameter. (County Code § 22.56.2090). The Home Project requires removal of one mature oak with a single trunk diameter of 14 inches and two immature oak trees with single trunks that are both below the threshold of protection under the Oak Tree Ordinance.” This explanation was effective, as the court stated in its decision that “[i]t appears undisputed that none of the affected oak trees would be considered “heritage” under this definition.”

The qualification that removal of *even one* heritage-sized oak tree may be significant would be superfluous if the removal of one non-heritage tree were meant to be considered a significant effect. The County’s Environmental Document Reporting Procedures and Guidelines Appendix G sets a threshold of two or fewer otherwise protected, non-heritage sized trees of any genus as eligible for a Class 4 categorical exemption from CEQA as a minor land use alteration which cannot have a significant effect. This exemption is commonly used for Oak Tree Permits in what the Guide would consider to be oak woodlands.<sup>10</sup>

### **Oak Tree Permit Writ Allegations**

In its Petition at ¶66.a, Petitioner claimed that “the Project’s Application does not contain evidence the Project has permission from nearby owners whose oak trees would be encroached upon by the project.” In its letters, Petitioner cited to County Code Section 22.56.2090(B), which states that an oak tree permit application must include “[e]vidence that the Applicant: . . . is the owner of the premises involved. . . or has written permission of the owner or owners to make such application.” “Premises” is not defined in County Code, but Merriam-Webster defines it in the

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<sup>10</sup> See, e.g.: [http://planning.lacounty.gov/assets/upl/case/r2013-02211\\_approval-package.pdf](http://planning.lacounty.gov/assets/upl/case/r2013-02211_approval-package.pdf), a categorically exempt County project removing two mature trees and encroaching on 21 additional in an oak woodland.

singular as “a building and the area of land it is on.” Other requirements of Section 22.56.2090 also refer to the “subject property,” in the singular. The code states that an Applicant must be either the owner of the property requesting the entitlement, or else the owner must have provided written permission to an agent, such as a project manager, to make such application. This is a common requirement for all permit applications. The County’s Ownership and Consent Affidavit, which all owners of record for the subject property must sign in requesting an entitlement, provides that “I/we consent to the filing of the public hearing application(s) on our property for processing by the Los Angeles County Department of Regional Planning” and includes “the legal description of the property involved,” pursuant to County Code Section 22.56.2090(D). One tree encroached by the Home Project – oak tree #1 – does not belong to the Applicant. No pruning of this tree or grading in its protected zone is required to implement the project. The protected zone of this tree on the project site is used for parking by the neighbors at 3589 Canyon Crest Road and is already compacted, and any marginal impacts from the construction of the Home Project are further reduced by permit conditions to spread mulch and a layer of plywood in this area. An oak tree permit encroaching on this tree is required to develop any conceivable design on this residentially zoned lot. The County evaluates all oak tree encroachments required to implement a project, not just those on the project site, as a part of the public hearing process. The County regularly approves oak tree permits that include reasonable encroachments of trees owned by neighbors or the County, with proper mitigations to limit impacts, and does not require the consent of those neighbors to approve the entitlement.<sup>11</sup> To operate otherwise would be to unlawfully transfer control in the form of veto authority over substantial property rights to often hostile neighbors. Approval of the oak tree permit for this project was consistent with County policy, and the County did not abuse its discretion in approving the Home Project’s Oak Tree Permit without such consent.

In its Petition at ¶66.b, Petitioner claimed that “the Project’s Application does not identify or analyze impacts to all oak trees within 200 feet of the Project’s activities.” County Code Section 22.56.2090(E)(1) requires “a site plan...indicating the location...of the following...features *on the subject property*:...[t]he location of all oak trees...within 200 feet of proposed construction.” (emphasis added). The oak tree report dated August 2, 2014 and supplementary comment letter from the Applicant’s arborist dated April 18, 2016 include detailed description and analysis of every tree that is encroached to any extent by the Home Project, its utility laterals or permeable gravel driveway. The site plan is not required to document trees on other properties, only the subject property for which the entitlement is being requested. There can be no legal requirement to do more. Pursuant to Penal Code 602.8(c), adjacent property owners cannot be compelled to make their private property available to an arborist or submit to having their trees tagged. The whole area along lower Canyon Crest Road is dense with oak trees. Many of these trees are behind fences or on property with “No Trespassing” signs (as on the adjacent lot to the south of the Home Project site). The County regularly approves oak tree reports for which off-site trees within 200 feet are not included.<sup>12</sup> The Oak Tree Report Exhibit Map includes the surveyed location of the trunks of all of these other trees on the subject property, as well as trees on the adjacent parcel to the south. The locations of all such trees on these two lots within 200 feet of the Home Project is therefore included on the site plan. The Oak Tree Report also analyzes in a general way those other trees on the Home Project site, which are at least 190 feet (170 feet horizontally and 80 feet vertically) from the edge of the Home Project, and their canopy extents

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<sup>11</sup> See, e.g.: [http://planning.lacounty.gov/assets/upl/case/r2013-01846\\_otr-20130930.pdf](http://planning.lacounty.gov/assets/upl/case/r2013-01846_otr-20130930.pdf) at pp. 4-5, describing significant excavation, as deep as six feet, within protected zones of five neighboring oak trees, as close as three feet from the trunk.

<sup>12</sup> Three such examples are attributed in the record in Attachment 19 of this document: <http://file.lacounty.gov/SDSInter/bos/supdocs/109406.pdf>.

are clearly portrayed in versions of site plans submitted as a part of the hearing process for the Home Project. The intent of this provision of the code is to provide adequate context of the oak tree resources in the vicinity, and these site plans meet that intent. As the Applicant's consulting arborist documented in his letter dated April 18, 2016, the Assistant Chief Forester who reviewed the oak tree report indicated that it is common and acceptable to make general mention of trees at this far remove when they are completely unaffected, and the report notes that these trees are not even downslope of the project footprint and have not even a tenuous hydrological connection to the Home Project. The County did not abuse its discretion in approving an Oak Tree Permit that contained all requested information.

In its Petition at ¶66.c, Petitioner claimed that the "Project's Application does not project the change in grade within the protected zone of each plotted tree." County Code Section 22.56.2090(E)(1) requires "a site plan...indicating the location...of the following...features on the subject property:...Proposed construction, excavation, grading and/or landfill. Where a change in grade is proposed, the change in grade within the protected zone of each plotted tree shall be specified." As all grading for the Home Project is within the footprint of the Home Project itself, with no cut or fill outside this footprint, the grade is the existing surface of the ground. The Home Project's footprint is portrayed on the site plan and in the Oak Tree Permit Exhibit Map, and a grading detail in the plans also portrays this. The Applicant's consulting arborist documented the percent encroachment from grading in the protected zone of the three trees encroached to any extent by grading - #4, #5 and #7 in the oak tree report. They also submitted pictures of models derived from LiDAR scans of the project site<sup>13</sup>, which both visually portray and quantify the extent of the impact. This level of detail is far greater than is typical of Oak Tree Reports. The County did not abuse its discretion in approving an Oak Tree Permit that contained all requested information, to a level of detail far beyond what is typical.

In its Petition at ¶66.d, Petitioner claimed that the "Project does not meet the burden of proof required by the County's Oak Tree Ordinance for issuance of an Oak Tree Permit." In its letters, Petitioner alleged that the Home Project does not meet two of the burdens of proof outlined in County Code Section 22.56.2100. An overriding consideration is that County Code Section 22.56.2100(A) states that the burden of proof must be "substantiate[d] to the satisfaction of the director [of Regional Planning]." It is undisputed that the director, through the agency of the Regional Planning personnel administering the Home Project and adjudicating its hearings, was satisfied that the burden of proof had been met. Thus, the Home Project complied with this section of County Code.

The first claim under Section 22.56.2100(A) was that "the project will endanger the health of additional trees protected by the oak tree ordinance," pursuant to County Code Section 22.56.2100(A)(1). The County's findings address this, using language that is standard to all such oak tree permits. The Oak Tree Ordinance permits trees to be encroached by pruning or excavation with certain standard mitigating conditions that are outlined by the Fire Department Forestry Division. Petitioner's claims in this respect appear to be based on assertions that the extent of encroachment would be far greater than is actually required. Many of these misunderstandings were addressed during the hearing process. As the Applicant's registered consulting arborist documented and the County Biologist reviewed and concurred as a part of the hearing process, all encroached trees have a high probability of surviving the required impacts. No more than approximately 1/3 of the canopy of any tree and 1/5 of the root zone of any tree required removal to implement the project, effects that the consulting arborist noted do not further

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<sup>13</sup> These are included in Attachment 15 of this document:  
<http://file.lacounty.gov/SDSInter/bos/supdocs/109406.pdf>.

imbalance or significantly alter the root to crown ratio. As impacts to the health of trees cannot be known with absolute precision it is typical to express them as probabilities. As a result, one might construe *any* encroachment at all as endangering the health of a tree *to some extent*. However, the Oak Tree Ordinance is not written to preclude encroachment, and also states that it does not preclude relocation, which creates impacts far more severe than those required to implement the Home Project. The Applicant also noted that the neighbors at 3589 Canyon Crest Road had built a seepage pit which was 35 feet deep and 5 feet in diameter less than six feet from the trunk of oak tree #1, which sustained this impact in fine health despite other significant encroachments from the driveway, slab-on-grade foundation and laterals of 3589 Canyon Crest Road, as well as Canyon Crest Road. The County regularly approves permits that require significant, sustainable pruning, as well as grading in the protected zone of an oak tree, at distances less than five times the trunk diameter where necessary, with appropriate arboricultural analysis, mitigating conditions and monitoring.<sup>14</sup> The standard condition to replace in a 2:1 ratio any encroached tree that declines or dies is further indication that the Oak Tree Ordinance contemplates the possibility that a tree may succumb from encroachment, and seeks to ensure replacement. The County did not abuse its discretion in approving an Oak Tree Permit that allowed encroachment.

The second claim is that “the project does not account for or consider soil erosion through the diversion or increased flow of surface waters,” pursuant to County Code Section 22.56.2100(A)(2). Petitioner’s arborist speculated that rocks and debris will roll down slope and claimed that the landscape plan calls for disturbance downslope in areas with existing vegetation, as well as marginal impacts from brush clearance. Petitioner does not specifically mention “diversion or increased flow of surface waters” in any of its letters. First, as noted in the findings, the Home Project is subject to Department of Public Works Best Management Practices (BMPs) to control for erosion and debris flow, as a part of the Grading and Drainage Plan Check review process. Such engineering review is not within the scope of the Regional Planning review process. Second, the Home Project’s landscape plan portrays native vegetation suitable for hillside slope stabilization pursuant to the County’s Drought Tolerant Landscape Ordinance and the County Biologist’s review. Planting small, containerized native plants suitable to slope stabilization is not a credible source of soil erosion. Third, the fuel modification requirements of the hillside below the Home Project footprint are essentially unaltered from existing requirements, as the 200-foot protection zone of 3589 Canyon Crest Road already overlaps to the canyon bottom with that of the Home Project.

### **County Code Writ Allegations**

In its Petition at ¶72.a, Petitioner claimed that the Home Project violates County Code Section 22.44.127(D)(1)(A)(vi), part of the Altadena Community Standards limiting the number of “stories above grade” to two, noting four distinct levels (Pet., ¶46) in the Home Project design. The Home Project findings address these claims, stating that the Home Project is “at most two stories above grade”, “with a portion of the main level under the loft space classified as a cellar.” As attributed at the first hearing for the Home Project in Staff Analysis, the number of stories above grade is measured vertically. In a terraced or split-level design, which is encouraged in the County’s Hillside Management Area Sensitive Design Guidelines<sup>15</sup>, each building segment is therefore assessed separately, where a building segment is defined by some change in floor levels.

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<sup>14</sup> See for example: Oak Tree Report for <http://planning.lacounty.gov/case/view/r2012-01865> at p. 4, describing oak tree #11 of diameter 24” approved for two 8” cuts and one 12” cut, a greater extent of pruning than required of any tree encroached by the Home Project.

<sup>15</sup> Available at: [http://planning.lacounty.gov/assets/upl/apps/hma\\_sensitive-design-guidelines.pdf](http://planning.lacounty.gov/assets/upl/apps/hma_sensitive-design-guidelines.pdf).

None of the four building segments for the Home Project exceed two stories above grade.<sup>16</sup> While County Code does not contain figures portraying terraced, stepped, or split-level buildings, this conforms with the International Building Code practice and with Uniform Building Code practice before it, a code body referenced by CEQA (see, e.g. State CEQA Guidelines Section 15369; Appendix G Geology and Soils Section, question (d)). These portray this assessment for terraced buildings, consistently with the County's practice. Specifically, the figures portray a stepped building in which each building segment in a design with a total of five levels is annotated as either two or three stories. As part of the hearing process, the Applicant also provided a statement from the author of the International Building Code Handbook attributing the rationale for this and describing it as a "time-honored" approach. The County Hearing Officer, an experienced code enforcer, also stated that he "believe[d] that the right assessment has been made in regards to the number of stories and the height that is allowed."

Petitioner provided letters from a Jared Ikeda disputing this standard practice. In his letter dated September 6, 2016, Petitioner's Ikeda misunderstood the extent of the Home Project being classified as a cellar and alleged that constraining the number of "stories above grade" rather than the number of "levels" might allow buildings with unlimited levels. However, just as on a flat lot, the size of any hillside structure is constrained by the yard setbacks, maximum height, number of stories above grade, and floor area ratio allowed in the code. County Code does not constrain the number of levels, and the Applicant's design is modest (1,436 square feet and 30 cubic yards of total grading, balanced on site) in relation to what is permitted without a use permit or variance under the Altadena Community Standards on the Home Project's lot (9,000 square feet and 2,500 cubic yards of grading).

In a letter received during the hearing process, Petitioner's Ikeda retracted his earlier claim that "a review of the architectural drawings...show a total of 4 stories" but still misinterpreted the difference between a "level" and a "story." In only one portion of the home – the building segment containing the storage loft – are more than two levels stacked. However, in this building segment, the lowest of the levels – a portion of the main living level – is more below grade than above, and so does not qualify as a story above grade. The County applies the term "cellar" to any portion of a building that is more below grade than above. Pursuant to County Code Section 22.44.127(D)(1)(A)(vi), a cellar is not a story. This portion of the main level contains no windows and only non-habitable closet, bathroom and hallway space. Regional Planning did not abuse its discretion in accepting a design that met the requirements of the Altadena Community Standards constraining the number of stories above grade to two. As a matter of record, elsewhere in the County residential structures are limited to three stories above grade, not two as in Altadena, and so a Conditional Use Permit – not a variance – given the constraints of this lot would also have been acceptable under County Code. Regional Planning did not abuse its discretion in accepting a design that met the requirements of the Altadena Community Standards constraining the number of stories above grade to two.

In its Petition at ¶72.b, Petitioner claimed that the Home Project does not meet the County's "minimum habitable space requirements." County Code Section 22.20.105(A)(4) constrains the floor area of a residential structure to 800 square feet, and County Code Section 22.56.2660 clarifies that "floor area" means the "gross structural area." The County does not have a "minimum habitable space requirement." The Home Project's findings address this claim, stating that the habitable area for the Home Project is 1,436 square feet (exclusive of the portion of the

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<sup>16</sup> The four distinct levels of the Home Project are portrayed in the form of figures from the Uniform Building Code and International Building Code, in Attachment 16 of this document: <http://file.lacounty.gov/SDSInter/bos/supdocs/109406.pdf>.

Home Project classified as a cellar). It appears that Petitioner misunderstands which portions of the Home Project are classified as a cellar, also incorrectly claiming that the Home Project envelope had changed. As Regional Planning wrote to the Petitioner, the only changes the Applicant made were to rework the entryway, removing a driveway apron so that no impervious surfaces existed outside the footprint of the Home Project, and to significantly lower the roofline to reduce impacts to encroached oak trees and neighbors' views. These changes only everywhere reduced the volume of the Home Project. In its letter dated March 20, 2017, Petitioner stated that "the Project's latest building plans appear to show that the vast majority of the Project's Main Living Space as above grade," implying that all of the main level of the Home Project was being classified as a cellar. However, only the portion of the main level in the building segment containing the loft was classified as a cellar. This was addressed in the Hearing Officer Package at the first hearing for the Home Project on April 5, 2016 and multiple times thereafter, including in Regional Planning's letter to the Petitioner. Regional Planning did not abuse its discretion in accepting a design that exceeds the minimum gross structural area requirement of 800 square feet.

In its Petition at ¶72.c, Petitioner claimed that the Home Project does not meet the County's average setback requirements. The Home Project's findings address this claim, stating that "the front yard setback shall not be less than the average depth of all of the front yards on the same side of the same street on the same block, which in this case was calculated by Regional Planning to be 22.4 feet. The front yard setback for the Project is 23 feet..." The Staff Analysis included in the Hearing Officer Package posted prior to the first hearing for the Home Project on April 5, 2016 notes that Regional Planning used a standard method for computing this – averaging distance measurements between building and parcel outlines in Regional Planning's Geographic Information System tool. Petitioner alleges that a survey shows an actual average front yard depth of 23 feet 1.2 inches. However, Petitioner apparently misunderstood the statement in Staff Analysis and alleged that 22.4 feet was the actual setback, not the calculated minimum required setback. That Staff Analysis clearly stated an actual setback of 23 feet. The Applicant subsequently noted that he had never provided a figure precise to the fractional inch, and that an over-precise measurement in the model for the Home Project exceeded even this figure of 23 feet 1.2 inches. The difference of 1.2 inches between 23 feet and 23 feet 1.2 inches is also within the degree of precision attributed in the survey, which was 0.1 feet (1.2 inches). The actual setback increases from 23 feet at the north-east corner to nearly 30 feet at the south-east corner of the frontage. Thus, the area in question is vanishingly small. Regional Planning did not abuse its discretion to accept a minimum setback requirement that was calculated with an acceptable level of accuracy using its standard processes, especially when the project meets the marginally greater distance Home Project opponents allege is accurate.

In addition to the violations of County Code Petitioner claimed in its writ petition, it had earlier claimed during the hearing process that the Home Project violates the maximum height requirement in the Altadena Community Standards of 35 feet. Petitioner's claim in its letter dated April 4, 2016 appears to misunderstand that height is measured vertically. According to standard planning practice, height is measured vertically, and the County uses the most accurate "plumb-line" method in which height is referenced to grade continuously as both the building envelope and the surveyed grade beneath it vary over the footprint of a project.

In addition to the violations of County Code Petitioner claimed in its writ petition, it had earlier claimed during the hearing process that the Home Project failed to meet the burden of proof required for conditional use permits under County Code Section 22.56.090(A)(2)(b) that a Project not "[b]e materially detrimental to the use, enjoyment or valuation of property of other persons located in the vicinity of the site." The Home Project findings address this claim. Petitioner alleged that the Home Project "will significantly undermine the use, enjoyment, and valuation of

property of other persons as the Project will block scenic views from Canyon Crest Road and for surrounding neighbors.” However, the Home Project was designed to be screened to a significant extent by and blend in with oak tree canopy to remain, and the Home Project complies with all development standards. In addition, County Code Section 22.56.085(C), which governs the grant of a Minor Conditional Use Permit, establishes that the County “shall approve” a minor conditional use permit where criteria including the burden of proof are satisfied. The County Code reserves the assessment of the burden of proof “to the satisfaction of the hearing officer.” The hearing officer, Regional Planning Commission, and Board of Supervisors found the burden of proof to be satisfied. The County did not abuse its discretion in granting a Minor Conditional Use Permit.

In addition to the violations of County Code Petitioner claimed in its writ petition, it had earlier claimed during the hearing process that the Home Project violates the burden of proof required for permits issued in Significant Ecological Areas (SEA) pursuant to County Code Section 22.56.215(E). However, County Code Section 22.56.215(A) states that a permit is necessary only where all of the following are satisfied (1) the SEA was designated in the General Plan (2) development on the parcel occurs within the SEA (3) the project is not already applying for some type of Conditional Use Permit (4) and only where not exempted under 22.56.215(C), which includes single-family residences. None of these conditions hold for the Home Project, and the conceptual SEA on the riparian portion of the Home Project site has yet to be officially adopted and is unaffected by construction of the Home Project.

In addition to the violations of County Code Petitioner claimed in its writ petition, it had earlier claimed during the hearing process that the Home Project violated the Fire Department Conditions of Approval. Petitioner misinterpreted a clearly stated fire truck access specification requiring that a fire truck 13 feet tall be able to park within 150 feet of the entire perimeter of the Home Project as instead requiring 13’6” of oak tree canopy pruning around and above the volume of the Home. As Petitioner alludes in that letter, Petitioner’s arborist’s encroachment estimates were also corrupted by the misinterpretation of fuel modification clearance requirements.

In addition to the violations of County Code Petitioner claimed in its writ petition, it had earlier claimed during the hearing process that the Home Project was conditioned such that removing more than 20% of any tree’s canopy or any branch thicker than 2 inches was precluded. However, this preclusion states that it applies only to trees that are not permitted for encroachment by the permit. It is typical for the Forestry Division to consider such level of impacts to be sustainable by simple inspection, with no input, analysis or monitoring of the health of the tree.

### **Other CEQA Writ Allegations**

Regional Planning considered Petitioner’s claims of additional types of significant effects and/or CEQA process improprieties, based on letters and testimony from the Petitioner’s attorney Mitchell Tsai. Petitioner employed only two alleged professionals in support of any of its arguments: (1) Rebecca Latta, a certified arborist, who provided evidence related to oak trees and oak woodlands and (2) Jared Ikeda, a retired landscape architect, who provided evidence related to aesthetics, which is however a subjective area of analysis that does not require expert testimony.

In several letters including one dated March 20, 2017, Petitioner claimed significance from effects on aesthetics. Petitioner based this allegation principally on claims that neighboring views would be impacted by the volume of the structure and removal of oak tree canopy. As the initial study for the Home Project analyzes, the Home Project is not visible from any scenic highway,

scenic ridgeline, public riding or hiking trail, public park or garden, or any other public scenic resource. The Home Project complies with all development standards. As required by County Code Section 22.20.105, any shiny or reflective cladding is prohibited, and the Home Project's cladding was to be a matte, painted green to blend with the oak tree canopy. Furthermore, the Home Project meets the stated success criteria of the County's Hillside Management Area (HMA) Sensitive Design Guidelines. However, it should be noted that the Home Project application predates the HMA into the 2035 General Plan, which does not apply to the Home Project, and therefore the Home Project had no formal requirement to do so. Furthermore, even if the Home Project were permitted today, it would not require a HMA Conditional Use Permit, fitting squarely within the exception in County Code Section 22.56.217(C)(1), as a single lot with grading not exceeding 15,000 cubic yards. Nevertheless, compliance with the stated success criteria of these Sensitive Design Guidelines is an indicator of the fitness of the design. A home that complies with all code provisions and design guidelines in an urbanized area and that is not visible from any public scenic resource cannot have a significant effect on aesthetics requiring an EIR. Otherwise, every residential project would require one.

In a letter dated March 24, 2016, Petitioner claimed significance from effects on traffic, based on the contention that the Home Project had only 1-2 parking spaces available for staging. This in turn was based on a neighbor's letter, who had misunderstood the boundaries of the Home Project site. The Home Project has a parking and staging area of more than 1,000 square feet that is more than 30 feet deep, as well as two additional parking spaces, permitting larger construction vehicles to park without encroaching into the road. The Applicant has also noted that once the garage floor is cast, the 451 square-foot garage area is suitable for staging and off-loading of materials. Petitioner also testified at a hearing for the Home Project that a formalized condition for a construction and Traffic Management Plan would be sufficient to address its concerns. The Department of Public Works Land Development Division subsequently approved this. As the Department of Public Works has noted, a lane has been closed on Canyon Crest Road immediately adjacent to the Home Project site every 60 days to service the sewer siphon that spans Millard Canyon, without incident. The temporary closing of a single lane of traffic for connection of utilities always requires a Traffic Management Plan, and the Department of Public Works has analyzed the activities required to confirm compliance with the Manual on Uniform Traffic Control Devices (MUTCD). Petitioner also provided no substantial evidence for this technical cause of action from a qualified traffic expert.

In several letters including one dated March 20, 2017, Petitioner claimed significance from effects on water quality/hydrology. Petitioner appeared to argue that because the downspout runoff for the Home Project eventually makes its way into the Los Angeles River, a Waters of the United States, the Home Project will significantly affect water quality. The runoff from the entire Los Angeles River basin eventually makes its way to the Los Angeles River, and Petitioner presented no evidence that rainfall intercepted by the Home Project would be contaminated. The County's Low Impact Development Standards required the Home Project's downspouts to be conditioned by rain gardens and routed back into the same open drainage swale that collected whatever sheet runoff exceeded the capacity of percolation in the footprint of the Home Project. The footprint of the Home Project is the only impervious surface added, less than 3% of the site. Petitioner also appeared to argue that any alteration to the existing drainage pattern is significant. However, under the latest guidance from the Environmental Protection Agency (EPA) and United States Army Corps of Engineers (USACE) following the Supreme Court decision in *Rapanos v. the United States and Carabell v. the United States* (2006) 547 U.S. 715, this "small wash...characterized by low volume, infrequent, or short duration flow...draining only uplands...that [does] not carry a relatively permanent flow of water" is non-jurisdictional and did not require an Army Corps of Engineers Section 404 Permit. The Army Corps of Engineers

reviewed the Initial Study as a Responsible Agency and confirmed that no jurisdictional waters were impacted. This swale drains a small residential area uphill of the Home Project site and is completely dry except when it channels stormwater runoff. It drains into what the United States Geological Service topographical maps for the area portray as an intermittent stream, which in turn is tributary to what the same maps portray as the intermittent Arroyo Seco, which in turn drains into the Los Angeles River, which is the conventionally navigable Waters of the United States. This drainage swale is therefore not a “significant nexus” to a navigable waters, and it supports no aquatic life or riparian vegetation. The Home Project re-routed only a small portion of it by a few feet. The Petitioner also provided no substantial evidence for this technical cause of action from a qualified civil engineer or other expert in hydrology.

In a letter dated March 24, 2016, Petitioner claimed significance from effects on biological resources other than oak woodlands, specifically wildlife. This claim was based on the contention that the canyon bottom is a wildlife corridor, and that some neighbors have seen various animals near the Home Project site. However, the Home Project, sited nearly 200 feet from the canyon bottom, does not affect this corridor. Petitioner also alleged that compliance with state and federal laws protecting nesting and non-game mammals was an unenforceable mitigation measure, without attributing this claim. Petitioner did not submit any report, site survey or other evidence in the administrative record from a qualified biologist for this technical cause of action.

Petitioner claimed that the Project’s Initial Study improperly relied on mitigation measures that were inappropriate to a NegDec. However, every provision relied upon in the Initial Study was rendered in a pre-existing, enforceable statute or standard permit condition. These include the Oak Tree Ordinance (County Code Section 22.56.2050, *et seq.*) with its accompanying standard permit conditions, Low Impact Development standards (County Code Section 12.84), state regulations protecting nesting/roosting animals (California Fish and Game Code Sections 1600-1603, 3503 and 3505.5, 3511, 4700, 5050, 5515, 4150 and 4152), Very High Fire Severity Zone building code and fuel modification provisions (County Code Section 32.4908.1), Development Standards for Single Family Residences (County Code Section 22.20.105) and noise control (County Code Section 12.08). As a project cannot be analyzed in the absence of the mandatory regulations that already govern it, it would be inappropriate to describe these pre-existing regulations as mitigation measures. Petitioner claimed that these regulations were unenforceable and/or deferred mitigation measures. However, every statute has a means of enforcement. The Home Project was also conditioned with inspections from Regional Planning and the Fire Department Forestry Division, and inspections are also made during project implementation on a complaint basis.

Petitioner claimed that the Home Project’s Initial Study was improperly amended without redistribution. As noted in the findings (Ex. A, p. 6, ¶20); the amendment corrected a minor inconsistency in the Home Project’s title sheet and elevations, which did not occur in the protected zone of any oak tree. It changed no analysis in the Initial Study, and pursuant to State CEQA Guidelines Section 15307.5, did not need to be re-distributed. After the Initial Study was amended, the Applicant reduced the height of the Home Project, which had the effect of rendering both the original and revised figure accurate.

In several of its letters, Petitioner claimed or made statements assuming that the project design had changed significantly over the course of the application and/or design development process, as a means of justifying revisited analysis. The Oak Tree Report Exhibit Map for the project, dating from 2014, portrays a footprint that is unchanged from the final approved plans, save that a driveway apron was removed. The letter from project arborist Scott McAllaster dated April 18, 2016 states that “the project entryway has changed, and the portion of concrete driveway outside

the footprint of the home has been removed. However, these changes did not affect the footprint or elevations for the home, and do not lead to any increased impacts.” The change in the plans between those dated April 25, 2016 and November 2, 2016 only significantly reduced the height of the ridgelines of the home and did not add any volume to it, or change the grading extent compared to the original plans.

Regional Planning is unaware of statements from the Petitioner in the AR specifically addressing any of the significance criteria for the other CEQA categories alleged in the writ, which include failure to adequately analyze the project’s environmental baseline and impact; cumulative impacts; air quality; cultural resources; geology and soils; greenhouse gas emissions; hazards and hazardous materials; land use and planning (except as this relates to the alleged County Code violations); noise; population, housing and employment; public services; transportation; and utilities. As Petitioner failed to raise these allegations during the administrative proceedings, it was improper to do so in the writ petition.

### **Applicability of a Categorical Exemption**

Regional Planning made the decision to perform an Initial Study for the project before being made aware of the implications of the California Supreme Court’s clarification of the nature of exceptions to a categorical exemption. The decision to perform an Initial Study was made in good faith as a means of addressing community concerns and based on a belief that a fair argument of a significant effect *might* exist in the absence of further analysis due to circumstances that are however not unusual compared to existing residential development in the neighborhood, and that this was sufficient to perform an Initial Study, allowing state and local agencies and the public to comment as to whether any mitigation measures were indicated. Specifically, these circumstances were the existence of a stream on the project site at a substantial remove from the project footprint with an associated “conceptual” Significant Ecological Area outside the footprint of development, and the presence of oak trees on the project site. However, no comment was received from any agency or member of the public during the period of public review of the Initial Study.

The minor Conditional Use Permit is categorically exempt from CEQA as permitting a “new, small...structure,” pursuant to State CEQA Guidelines Section 15303. The Oak Tree Permit is categorically exempt from CEQA as permitting “minor...private alterations in the condition of land,” that do not remove any mature tree from any setting designated by federal, state or local authorities as “scenic,” pursuant to State CEQA Guidelines Section 15304 and the County’s own CEQA Environmental Reporting and Documentation Procedures, which make use of this exemption when permitting removal of up to two non-heritage trees of any genus. Neither exemption meets all of the criteria for any of the exceptions in State CEQA Guidelines Section 15300.2. The California Supreme Court in *Berkeley Hillside Preservation v City of Berkeley* (2015) 60 Cal.4th 1086 has enumerated the operative two-part test for determination of the defensibility of a categorical exemption.

Applying the first part of the test, “[w]hether a particular project presents circumstances that are unusual for projects in an exempt class is an essentially factual inquiry...[A]s to this question, the agency serves as “the finder of fact” [Citation], and a reviewing court should apply the traditional substantial evidence standard that section 21168.5 incorporates. [Citation.] Under that relatively deferential standard of review...reviewing courts, after resolving all evidentiary conflicts in the agency’s favor and indulging in all legitimate and reasonable inferences to uphold the agency’s finding, must affirm that finding if there is any substantial evidence, contradicted or uncontradicted, to support it. [Citation] [reviewing court’s “task is not to weigh conflicting

evidence and determine who has the better argument” or whether “an opposite conclusion would have been equally or more reasonable”].)” *Id.*

Only where substantial evidence does not support the conclusion that no unusual circumstance is present is the second part of the test of the defensibility of a categorical exemption operative. “When there are “unusual circumstances,” it is appropriate for agencies to apply the fair argument standard in determining whether “there is a reasonable possibility [of] a significant effect on the environment due to unusual circumstances.” (Guidelines, § 15300.2, subd. (c).) As to this question, the reviewing court's function “is to determine whether substantial evidence support[s] the agency's conclusion as to whether the prescribed ‘fair argument’ could be made.” [Citation.]” *Id.* Where such a determination hinges on factual determinations, the Lead Agency is still afforded deference as the “finder of fact.” See *Fat v. County of Sacramento* (2002) 97 Cal.App.4th 1270, 1277: “The agency is the finder of fact and we must indulge all reasonable inferences from the evidence that would support the agency’s determinations and resolve all conflicts in the evidence in favor of the agency’s decision. [Citation.]’ [Citation.] ‘[A]lthough the agency’s factual determinations are subject to deferential review, questions of interpretation or application of the requirements of CEQA are matters of law.’ [Citation.]”; *Center for Biological Diversity v. Department of Fish & Wildlife* (2015) 62 Cal.4th 204, 215 (“[O]n factual questions, our task ‘is not to weigh conflicting evidence and determine who has the better argument.’ [Citation.]”)

If a public agency properly finds that a project is exempt from CEQA, no further environmental review is necessary. *No Oil, Inc. v. City of Los Angeles*, (1974) 13 Cal.3d 68, 74. However, CEQA does not preclude further environmental review of a categorically exempt project. Where such review occurs, the Lead Agency may make explicit findings that the project is categorically exempt as a matter of law and that no exceptions exist. As that determination is upheld, no aspect of the additional analysis may be challenged, as CEQA does not apply to the project.

Mitigation measures are only improper in a categorically exempt project when an exception is found to exist, as the intent is that mitigation measures be subjected to CEQA’s public review process. Where the exemption is upheld, the mitigations are beside the point, as the project is not subject to CEQA. Consistent with the finding of a Negative Declaration, compliance with existing laws and regulations is sufficient to prevent or otherwise mitigate any potentially significant impact of the project. This contrasts with a project that *will* cause a significant effect without consideration of tailored mitigation measures. “[E]vidence that the project *will* have a significant effect *does* tend to prove that some circumstance of the project is unusual. An agency presented with such evidence must determine, based on the entire record before it - including contrary evidence regarding significant environmental effects - whether there is an unusual circumstance that justifies removing the project from the exempt class.” (emphasis in original). *Berkeley Hillside Preservation v City of Berkeley* (2015) 60 Cal.4th 1086. However, “[t]he Secretary, in complying with the Legislature's command to determine the “classes of projects” that “do not have a significant effect on the environment” (§ 21084, subd. (a)), necessarily resolved any number of “fair arguments” as to the possible environmental effects of projects in those classes. Allowing project opponents to negate those determinations based on nothing more than “a fair argument that the project will have significant environmental effects” [Citation] would be fundamentally inconsistent with the Legislature's intent in establishing the categorical exemptions.” *Id.* Substantial evidence supports the conclusion that the project will not have a significant effect on the environment, and is therefore not unusual for this reason. Pursuant to the bifurcated standard of *Berkeley Hillside*, a “fair argument” of a significant effect is not sufficient to negate this determination.

The Lead Agency is not estopped nor does it waive its prerogative to assert the applicability of categorical exemptions for the project, as a matter of law, regardless of any additional analysis. The law affords any project opponent sufficient notice of their burden to develop an opposing record on the presence of those exceptions. Pursuant to *Rominger v. County of Colusa* (2014) 229 Cal.App.4th 690, *Del Cerro Mobile Estates v. City of Placentia* (2011) 197 Cal.App.4th 173, and *Santa Barbara County Flower & Nursery Growers Ass'n v. County of Santa Barbara* (2004) 121 Cal.App.4th 864, if an agency prepares an EIR or other CEQA document for an exempt project, the exemption is not waived, and the agency can defend a challenge to the adequacy of the CEQA document on the basis that the action was exempt. This principle has been upheld not only for statutory exemptions but for exemptions requiring some analytical determination as well. *Muzzy Ranch Co. v. Solano County Airport Land Use Commission* (2007) 41 Cal.4th 372, 382 (“commonsense” exemption applied even where the lead agency did not rely on it when approving the project and in fact erroneously determined that there was no project). Substantial evidence supports that the project is categorically exempt and explicit findings created pursuant to the analysis below would be sufficient to defend the project against the claim that any CEQA review was required.

### Sensitive Resources

Pursuant to State CEQA Guidelines Section 15300.2(a), “a project that is ordinarily insignificant in its impact on the environment may in a particularly sensitive environment be significant. Therefore, these classes are considered to apply all instances, except where the project may impact on an environmental resource of hazardous or critical concern where designated, precisely mapped, and officially adopted pursuant to law by federal, state, or local agencies.”

The project is sited at the edge of a stand of ten mature coast live oak trees that has been severely degraded by a history of compaction from residential usage for parking and storage; re-grading/dumping to expand this usable area; pavement encroachment from Canyon Crest Road and the driveway, patio, slab-on-grade foundation and seepage pit at the adjacent residence; significant pruning for parking, roadway, residence and power line clearance; signs of mechanical damage; and construction of concrete drainage devices impinging on the collars of several trees. The project is sited in a neighborhood in which oak woodlands extends for some distance throughout the residential development in all directions. Appendix 11 of the Plan discusses the species and locations of oak woodlands that are considered as “sensitive,” or which may be significant if impacted, according to the State CEQA Guidelines Appendix G criteria. The oak woodlands at the scale affected by the project does not conform to any of these criteria.

As a preliminary matter, oak woodland in the County is not precisely mapped, and therefore, oak woodlands do not meet all of the criteria for this exception. The Plan has as a goal to “comprehensively map all oak woodlands.” However, existing approximations of the extent of oak woodlands referenced in the Plan are not precise and are based only on the “potential” for existence. Setting aside that oak woodland exists on the project site, the lack of precise mapping makes it impossible to evaluate the presence of oak woodland without introducing site-specific reporting requirements. As aerial imagery is insufficient to determine whether visible canopy is oak or some other genus, a site survey and qualified measurement of the extent of oak tree canopy both on and off-site is required in order to grow the “sphere of influence” of oak woodland as described by the Guide. Because a categorically exempt project is not intended to require such analysis in order to determine whether an exception is present, a bright line must be drawn between something that is “precisely map-able” and something that has been “precisely mapped.” This determinism is also needed for project Applicants to make informed decisions about the constraints of their land.

Furthermore, the County designates a “particularly sensitive environment” as a “Significant Ecological Area.” Specifically, County Code Section 22.56.215(B) states that the intent of the Significant Ecological Area (SEA) Ordinance is “to protect resources contained in significant ecological areas as specified in the General Plan from incompatible development, which may result in or have the potential for environmental degradation. In extending protection to these *environmentally sensitive areas*, it is intended further to provide a process whereby the reconciliation of potential conflict within these areas may equitably occur. It is not the purpose to preclude development within these areas but to ensure, to the extent possible, that such development maintains and where possible enhances the remaining biotic resources of the significant ecological areas, while allowing for limited controlled development therein.” (emphasis added).

There is no officially adopted Significant Ecological Area on or near the project site. A “conceptual” Significant Ecological Area exists for the riparian portion of the project site. However, this is outside the footprint of the project and unaffected by it. Furthermore, this designation indicates that the boundaries are subject to change after examination of the consistency of the proposal with the Community Plan, and this conceptual Significance Ecological Area is therefore not “formally adopted.”

The Guide provides the decisional flowchart for assessing impacts to oak woodlands. This decisional flowchart acknowledges that where the answer to the question, “[c]ould the project have a significant impact on an oak woodland?” is “no,” one asks, “[i]s the project categorically exempt?” If the answer is yes, such a categorically exempt project does not require an Initial Study and has no further requirements. Thus, the presence of oak woodlands does not preclude a categorical exemption, as this question would be without meaning or purpose if it could. Only if a project has a significant effect on oak woodlands is a categorical exemption improper. The removal of one oak tree from a severely degraded oak woodland is not a significant effect, and substantial evidence supports this conclusion.

CEQA Section 21083.4 provides mitigations that are sufficient to reduce a significant effect on oak woodlands to a less than significant level. However, it does not designate oak woodlands as an environmental resource of “hazardous or critical concern,” and this designation would be inconsistent with the pervasiveness of oak woodlands in the area, or its severely degraded existing condition. CEQA Section 21083.4(b) states that “a county shall determine whether a project within its jurisdiction may result in a conversion of oak woodlands that will have a significant effect on the environment,” “[a]s part of the determination made pursuant to Section 21080.1.” CEQA Section 21080.1 states that “[t]he lead agency shall be responsible for determining whether an environmental impact report, a negative declaration, or a mitigated negative declaration shall be required for *any project which is subject to [CEQA]*.” (emphasis added). A categorically exempt project is not subject to CEQA, and so this determination does not need to be made. Nowhere does CEQA Section 21083.4 state that the existence of oak woodlands is a sufficient condition to make a categorically exempt project subject to CEQA. Numerous examples of categorically exempt projects impacting oak woodlands exist in the County’s jurisdiction<sup>17</sup>, and in cities in the County.<sup>18</sup> This determination is therefore subject to consideration of the exceptions to a categorical exemption, pursuant to State CEQA Guidelines Section 15300.2. The Guide specifically acknowledges that a categorically exempt project that

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17 See, e.g. [http://planning.lacounty.gov/assets/upl/case/r2013-02211\\_approval-package.pdf](http://planning.lacounty.gov/assets/upl/case/r2013-02211_approval-package.pdf).

18 Several such examples, for projects in which Petitioner’s arborist served as reviewer for a city located in the County, are attributed in Attachment 19 of <http://file.lacounty.gov/SDSInter/bos/supdocs/109406.pdf>.

will not have a significant effect after application of statutorily or conventionally applied mitigation, as the County so determined in issuing a Negative Declaration, should be granted a categorical exemption, where no other exceptions are present. As previously attributed, the decision to perform an Initial Study was predicated on the belief that a fair argument of a significant effect *might* exist in the absence of further study and comment, due to circumstances that are however not unusual in the surrounding neighborhood. However, this determination of whether a categorically exempt project *will* have a significant effect on the environment is subject to the “substantial evidence” standard of review. Substantial evidence supports the County’s determination that the removal of one non-heritage tree of lower quality from a severely degraded oak woodland will not have a significant effect on the environment.

Accordingly, no exception that meets all of the requirements of State CEQA Guidelines Section 15300.2(a) exists for the project.

#### Cumulative Impacts

Pursuant to State CEQA Guidelines Section 15300.2(b), an exception exists when the “cumulative impact of successive projects of the same type in the same place, over time is significant.”

The project site’s zoning of R1-10000 permits only one single-family residence. The project is one of the last undeveloped lots in a residential neighborhood in which all but a few vacant, residentially zoned lots are either developed or effectively annexed and owned by adjacent residences. Furthermore, speculation that many others will seek to build certain designs or in certain areas and that the County would permit them to do so does not provide substantial evidence of significant cumulative impacts.

#### Unusual Circumstances

Pursuant to State CEQA Guidelines Section 15300.2(c), “[a] categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.”

All of the 19 residences within 300 feet of the project site overlap with oak woodlands, as defined by the Guide, for which the extent is defined by growing the radius of the dripline of oak trees by 10/3. Most of these lots are entirely covered in oak woodland. Oak trees trunks, branches and canopy exist in proximity to these residences at offsets that are as close as proposed for the project. Therefore, substantial evidence exists that the presence of oak woodlands and the proximity of oak trees is not an unusual circumstance in the neighborhood.

More than 40 nearby residences are located at similar horizontal offsets (less than 250 feet) from the riparian canyon bottom. At least eight residences are located at closer horizontal offsets to the riparian canyon bottom than the project. At least two residences are located at closer vertical offsets to the riparian canyon bottom than the most downslope part of the project. Therefore, the siting of the project with respect to the riparian canyon bottom is not an unusual circumstance in the area.

The floor area of the project is smaller than 14 of the 19 other residences within 300 feet and also less than the average floor area these residences. The maximum height of the project is less than one other residence within 300 feet. The maximum height of the project above the street grade plane is less than four other residences within 300 feet; including the three residences

immediately to the east of the project site across Canyon Crest Road. One other residence within 300 feet contains four levels. The project is set back a greater distance from the street than all but one residence on the canyon side of the block. Homes in the area exhibit a range of architectural styles and colorations that defy any characterization of a unifying theme. Therefore, substantial evidence exists that the project's size and nature are not unusual circumstances in the area.

Accordingly, no exception that meets all of the requirements of State CEQA Guidelines Section 15300.2(c) exists for the project.

#### Scenic Highways

Pursuant to State CEQA Guidelines Section 15300.2(d), “[a] categorical exemption shall not be used for a project which may result in damage to scenic resources, including but not limited to, trees, historic buildings, rock outcroppings, or similar resources, within a highway officially designated as a state scenic highway.”

The Home Project is not visible from any state scenic highway. There are also no County-designated scenic highways near the Home Project site.

#### Hazardous Waste Sites

Pursuant to State CEQA Guidelines Section 15300.2(e), “[a] categorical exemption shall not be used for a project located on a site which is included on any list compiled pursuant to Section 65962.5 of the Government Code.”

The project is not located on a site which is included in any of the databases or lists that exist pursuant to Section 65962.5.

#### Historical Resources

Pursuant to State CEQA Guidelines Section 15300.2(f), “[a] categorical exemption shall not be used for a project which may cause a substantial change in the significance of a historical resource.”

The project is not sited on or near any historical resource described in State CEQA Guidelines Section 15064.5.

