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FILED
SUPERIOR COURT
COUNTY OF SAN BERNARDINO
RANCHO CUCAMONGA DISTRICT

AUG 11 2011

BY *Ana Zamudio*
DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN BERNARDINO

Citizens for Responsible Equitable
Environmental Development

Petitioners,

vs.

City of Chino

Respondent,

Case No. CIVRS 1008458

NOTICE OF TENTATIVE
RULING

The court has read and considered the briefing submitted in this matter and makes the following tentative ruling on this CEQA challenge to the adoption by the City on July 6, 2010, of Reso No. 2010-25 certifying the Program EIR and adopting the findings and a Statement of Overriding Considerations for the updated General Plan (Envision Chino 2025), new zoning map, zoning ordinance amendments and subdivision ordinance amendments. (Administrative Record (AR), Tab 57.)

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1 **Factual and/or Procedural Context**

2 Petitioner Citizens for Responsible Equitable Environmental Development
3 (CREED) through counsel presented written comments on the adequacy of the EIR in
4 the areas of agricultural resources, air quality, greenhouse gas (GHG) emissions,
5 biological resources, water supply, feasible mitigation measures, alternatives,
6 necessary findings and sufficiency of the evidence, notice of public hearing, response
7 to comments and project description, together with over 2,000 pages of attached
8 exhibits on the morning of the City Council’s public hearing on July 6, 2010. (AR, Tab
9 47, 48.) City Staff responded to most of CREED’s criticisms, except for the alternatives
10 analysis points 6.01 and 6.02. (AR, Tab 49.)
11

12
13 On August 4, 2010, CREED filed this Petition for Writ of Mandate under CEQA
14 and Other Laws, containing causes of action for (1) failure to prepare adequate EIR;
15 (2) failure to make adequate written findings regarding project’s significant impacts; (3)
16 failure to respond adequately to comments on the EIR; (4) improper reliance on
17 Program EIR; and (5) violation of Planning and Zoning Law – Gov. C. § 65090, *et seq.*
18

19 The City answered on January 26, 2011, raising among others, the affirmative
20 defenses of failure to exhaust administrative remedies and standing.

21 A briefing schedule was ultimately agreed upon and CREED filed its opening
22 brief and the 4,877-page AR on February 25, 2011, the City filed its opposition on May
23 20, 2011 and CREED filed its reply on June 30, 2011.

24 In addition, the City filed two Notices of New Cases and arguments relying
25 thereon on June 27th and July 13th to which CREED responded in Reply and then on
26 July 18th.

27 //

1 **Discussion**

2 ***CEQA Standard of Review***

3 The public policy behind CEQA is stated in Pub. Res. Code § 21002 which
4 states:

5
6 The Legislature finds and declares that it is the policy of the state that
7 public agencies should not approve projects as proposed if there are
8 feasible alternatives or feasible mitigation measures available which
9 would substantially lessen the significant environmental effects of such
10 projects, and that the procedures required by this division are intended to
11 assist public agencies in systematically identifying both the significant
12 effects of proposed projects and the feasible alternatives or feasible
13 mitigation measures which will avoid or substantially lessen such
14 significant effects. The Legislature further finds and declares that in the
15 event specific economic, social, or other conditions make infeasible such
16 project alternatives or such mitigation measures, individual projects may
17 be approved in spite of one or more significant effects thereof.

18 As stated in *Berkeley Keep Jets Over the Bay Com. v. Bd. Of Port*
19 *Comrs.* (2001) 91 Cal.App.4th 1344, 1354:

20 The statutory scheme of CEQA rests on the fundamental requirement of
21 [Pub. Res. Code] section 21151 that "all local agencies shall prepare . . .
22 an environmental impact report on any project that they intend to carry
23 out or approve which may have a significant effect on the environment."
24 The EIR serves to provide public agencies and the public in general with
25 information about the effect that a proposed project is likely to have on
26 the environment and to "identify ways that environmental damage can be
27 avoided or significantly reduced." (Cal. Code Regs., tit. 14, § 15002,
28 subd. (a)(2) (Guidelines).) [Fn omitted.] "Its purpose is to inform the
public and its responsible officials of the environmental consequences of
their decisions before they are made. Thus, the EIR 'protects not only the
environment but also informed self-government.' [Citation.]" (*Citizens of
Goleta Valley v. Board of Supervisors* (1990) 52 Cal. 3d 553, 564 [276
Cal. Rptr. 410, 801 P.2d 1161].)

CEQA provides two statutes governing the standard of judicial review, Pub.
Res. Code §§ 21168 and 21168.5. As stated by the Fourth DCA in *Gentry v. City of*
Murrieta (1995) 36 Cal.App.4th 1359, at 1374-1375 (*emphasis added*):

"In an action to set aside an agency's determination under [CEQA], the
appropriate standard of review is determined by the nature of the

1 proceeding below. . . . [S]ection 21168 'establishes the standard of
2 review in administrative mandamus proceedings' under Code of Civil
3 Procedure section 1094.5 while section 21168.5 'governs traditional
4 mandamus actions' under Code of Civil Procedure section 1085.
5 [Citation.] The former section applies to proceedings normally termed
6 'quasi-adjudicative,' 'in which by law a hearing is required to be given,
7 evidence is required to be taken and discretion in the determination of
8 facts is vested in a public agency' [Citations.] The latter section
9 applies to all other actions taken pursuant to CEQA and generally
10 encompasses 'quasi-legislative' decisions made by a public agency.
11 [Citations.]" [Citations omitted.]

12 The distinction, however, is rarely significant. **In either case, the issue
13 before the trial court is whether the agency abused its discretion.
14 Abuse of discretion is shown if (1) the agency has not proceeded in
15 a manner required by law, or (2) the determination is not supported
16 by substantial evidence.** [Citations omitted.]

17 "[I]n undertaking judicial review pursuant to Sections 21168 and 21168.5,
18 courts shall continue to follow the established principle that there is no
19 presumption that error is prejudicial." (§ 21005, subd. (b).) However,
20 "noncompliance with the information disclosure provisions of [CEQA]
21 which precludes relevant information from being presented to the public
22 agency, or noncompliance with substantive requirements of [CEQA],
23 may constitute a prejudicial abuse of discretion within the meaning of
24 Sections 21168 and 21168.5, regardless of whether a different outcome
25 would have resulted if the public agency had complied with those
26 provisions." (§ 21005, subd. (a).)

27 Neither standard of review "permit[s] the reviewing court to make its own factual
28 findings." *Burbank-Glendale-Pasadena Airport Authority v. Hensler* (1991) 233
Cal.App.3d 577, 590. As stated in *San Joaquin Raptor/Wildlife Rescue Center v.
County of Stanislaus* (1994) 27 Cal. App. 4th 713, at 721-722:

29 "[T]he ultimate decision of whether to approve a project, be that decision
30 right or wrong, is a nullity if based upon an EIR that does not provide the
31 decision-makers, and the public, with the information about the project
32 that is required by CEQA." [Citation omitted.] The error is prejudicial "if
33 the failure to include relevant information precludes informed
34 decisionmaking and informed public participation, thereby thwarting the
35 statutory goals of the EIR process." [Citation omitted.]

36 "[T]he substantial evidence test applies to the court's review of the
37 agency's factual determinations." [Citation omitted.] Substantial evidence
38 means "enough relevant information and reasonable inferences from this

1 information that a fair argument can be made to support a conclusion,
2 even though other conclusions might also be reached." (State CEQA
3 Guidelines, § 15384, subd. (a); see also *Laurel Heights Improvement*
4 *Assn. v. Regents of University of California* ("Laurel Heights I") (1988)
5 47 Cal.3d 376, 393.

6 CEQA is augmented by the State CEQA Guidelines, codified at title 14 of the
7 Cal. Code of Regulations (hereafter, Guidelines, §). The Guidelines are interpreted "in
8 such a way as to 'afford the fullest possible protection of the environment'" (*Friends of*
9 *Eel River v. Sonoma County Water Agency* (2003) 108 Cal.App.4th 859, 868) and are
10 given great weight (*Laurel Heights Improvement Assn. v. Regents of University of*
11 *California* (1993) 6 Cal.4th 1112, 1123, fn 4 ("Laurel Heights II")).

12 Guidelines, §15151 states "An EIR should be prepared with a sufficient degree
13 of analysis to provide decisionmakers with information which enables them to make a
14 decision which intelligently takes account of environmental consequences. An
15 evaluation of the environmental effects of a proposed project need not be exhaustive,
16 but the sufficiency of an EIR is to be reviewed in the light of what is reasonably
17 feasible. Disagreement among experts does not make an EIR inadequate, but the EIR
18 should summarize the main points of disagreement among the experts. The courts
19 have looked not for perfection but for adequacy, completeness, and a good faith effort
20 at full disclosure."

21
22 In applying the substantial evidence standard, "the reviewing court must resolve
23 reasonable doubts in favor of the administrative finding and decision." *Topanga*
24 *Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506,
25 514.

26
27 Pub. Res. Code § 21080(e) defines substantial evidence as including "fact, a
28 reasonable assumption predicated upon fact, or expert opinion supported by fact" and

1 excluding "argument, speculation, unsubstantiated opinion or narrative, evidence that
2 is clearly inaccurate or erroneous, or evidence of social or economic impacts that do
3 not contribute to, or are not caused by, physical impacts on the environment."

4 Finally, as stated by the Fourth DCA in *Barthelemy v. Chino Basin Municipal*
5 *Water Dist.* (1995) 38 Cal.App.4th 1609, at 1617:

7 " ' "Under CEQA, an EIR is presumed adequate [citation], and the
8 plaintiff in a CEQA action has the burden of proving otherwise." ' "

9 [Citations omitted.]
10 "CEQA requires an EIR to reflect a good faith effort at full disclosure; it
11 does not mandate perfection, nor does it require an analysis to be
12 exhaustive. . . . The absence of information in an EIR, or the failure to
13 reflect disagreement among the experts, does not per se constitute a
14 prejudicial abuse of discretion. [Citation.] A prejudicial abuse of discretion
15 occurs if the failure to include relevant information precludes informed
16 decisionmaking and informed public participation, thereby thwarting the
17 statutory goals of the EIR process. [Citation.]" (*Kings County Farm*
18 *Bureau v. City of Hanford* (1990) 221 Cal. App. 3d 692, 712 [270 Cal.
19 Rptr. 650]; see also § 21005.)

16 ***Issues Raised by the Pleadings and Briefs***

17 **Standing of CREED**

18 According to the Declaration of Richard Lawrence, President of CREED, one of
19 CREED's core functions is to ensure compliance with CEQA and other planning,
20 zoning and land use laws to protect and enhance the quality of life in Southern
21 California, including San Bernardino County. Of particular concern to CREED are
22 developments' impacts upon air quality, water quality and supply, agricultural
23 resources, traffic and global warming. Members of CREED also live and work in Chino
24 or travel to or through Chino, sharing the same water resources and air basin as Chino
25 residents per the Declarations of Tomasa Calienes and Lydia and Peter Mehit,
26 submitted in Reply.
27
28

1 Based on a statement in Lawrence's Declaration ["Another member of CREED
2 is a natural person who resides in or near the City of Chino."], the City contends that
3 CREED has not met the geographical nexus between any CREED member and the
4 City of Chino to establish standing of CREED to bring this challenge. Any defect in
5 Lawrence's Declaration as to a "phantom" member is cured by the Reply Declarations.

6
7 **The court finds that CREED has adequately demonstrated standing to sue.**

8 Exhaustion of Administrative Remedies by CREED

9 "That failure to exhaust administrative remedies is a bar to relief in a California
10 court has long been the general rule." *Sierra Club v. San Joaquin Local Agency*
11 *Formation Comm.* (1999) 21 Cal.4th 489, 495.

12
13 Pub. Res. Code § 21177 codifies the exhaustion doctrine in CEQA cases: "An
14 action or proceeding shall not be brought [under CEQA] unless the alleged grounds for
15 noncompliance with this division were presented to the public agency orally or in
16 writing by any person during the public comment period provided by this division or
17 *prior to the close of the public hearing* on the project before the issuance of the notice
18 of determination." Pub. Res. Code § 21177(a) (emphasis added.)

19
20 "To advance the exhaustion doctrine's purpose '[t]he "exact issue" must
21 have been presented to the administrative agency' [Citation.] While '
22 "less specificity is required to preserve an issue for appeal in an
23 administrative proceeding than in a judicial proceeding" because, ...
24 parties in such proceedings generally are not represented by counsel
25 ...' [citation]' [citation], 'generalized environmental comments at public
26 hearings,' 'relatively ... bland and general references to environmental
27 matters' [citation], or 'isolated and unelaborated comment[s]' [citation] will
28 not suffice. The same is true for "[g]eneral objections to project approval
... ." [Citations.] [Citation.] ' "[T]he objections must be sufficiently specific
so that the agency has the opportunity to evaluate and respond to
them."' (*Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 535–
536 [78 Cal. Rptr. 3d 1].) *CREED v. City of San Diego* (May 19, 2011)
196 Cal.App.4th 515, 527.

1 The City does not raise exhaustion in its opposition but waits until submission of
2 its Notice of New Case filed June 27th. The City relies on the opinion in *CREED v. City*
3 *of San Diego, supra*, finding that the same petitioner, CREED (represented by the
4 same attorney), had not exhausted its administrative remedies in a challenge to the
5 City of San Diego's certification of an Addendum to an FEIR instead of preparing an
6 SEIR. In particular, the *CREED v. City of San Diego* court found that letters submitted
7 to the city clerk's office on dates of CEQA hearings contained only general,
8 unelaborated objections insufficient to satisfy the exhaustion doctrine. *Id.* at p. 527.
9

10 Here, CREED's attorney, as indicated above, submitted written comments re
11 noncompliance on the morning of July 6, 2010 before the City Council hearing later
12 that evening. (AR, Tabs 47-48.) However, unlike the letters in the San Diego case,
13 which did not even mention the word "drought" which was the alleged ground requiring
14 an SEIR and which merely claimed the City did not follow the proper *procedure* in
15 adopting the water supply assessment (WSA) and raised no substantive issue with the
16 WSA (*CREED v. City of San Diego, supra*, at p. 527-528), Mr. Briggs' letters here
17 detail the exact issues raised as noncompliance under CEQA.¹ (AR, Tab 47, 48.)
18
19

20 Nonetheless, the City also likens CREED's submission of attachments here in
21 CD/DVD form to CREED's citation to documents buried among thousands of
22 documents on the DVD it submitted to the city clerk before the first CEQA hearing in
23 San Diego² as an additional ground for failure to exhaust. However, unlike in *CREED*
24

25
26 ¹ Inadequacy of the EIR in the areas of agricultural resources, air quality, greenhouse gas
27 (GHG) emissions, biological resources, water supply, feasible mitigation measures,
28 alternatives, necessary findings and sufficiency of the evidence, notice of public hearing,
response to comments and project description. (AR, Tab 47, pp. 2618-2623.)

² "CREED also submitted a digital video disk (DVD) that contained more than 4,000 pages of
documents and data. The appellate record contains hard copies of the documents on the
DVD. It appears that the DVD contained no table of contents, no particular organization, no

1 v. *San Diego*, an index to the attachments as to each substantive area was in fact
2 attached to the letter submitted here. (AR, Tab 47, pp. 2624-2626.)

3 “Evidence must be presented in a manner that gives the agency the opportunity
4 to respond with countervailing evidence. (*Coalition for Student Action v. City of*
5 *Fullerton* (1984) 153 Cal.App.3d 1194, 1196–1197 ...)” *CREED v. City of San Diego*,
6 *supra*, 196 Cal.App.4th at p. 528.

8 Granted that Mr. Briggs’ submission here contained many pages of information,
9 the City was in fact able to respond to the issues raised by CREED for presentation to
10 the City Council by staff. (AR, Tab 49; Tab 16, p. 1714; Tab 17, pp. 1727-1728.)
11 Moreover, the City’s Resolution in fact acknowledges that before taking action, it had
12 “heard, been presented with and reviewed and considered all of the information and
13 data in the administrative record, including the Final EIR and all oral and written
14 evidence presented to it during the hearing”. (AR, Tab 57, p. 4855.)

16 **On the belatedly argued ground of failure to exhaust administrative**
17 **remedies, the court finds against the City.**

18 Project Description Defect

19 An EIR’s project description per Guidelines, § 15124, and the accompanying
20 analysis must be consistent throughout the EIR. If the description is inconsistent
21 throughout the EIR, that inconsistency prevents the EIR from serving as a vehicle for
22 intelligent public participation in the decision-making process. *County of Inyo v. City of*
23 *Los Angeles* (1977) 71 Cal.App.3d 185, 197 (EIR project description improperly shifted
24 from first increased groundwater pumping for City-owned lands to increased pumping
25
26

27
28 summary of information, and no explanation of how the copious materials may pertain to the
proposed Playa del Sol project.” *CREED v. San Diego, supra*, 196 Cal.App.4th at p.521.

1 as a part of a larger operation of the Los Angeles Aqueduct system and then finally to
2 the operation of the entire aqueduct system.)

3 Referring to apparently conflicting portions of the EIR (AR, Tab 6, p. 46 and p.
4 50 with p. 58), CREED contends that the Project description is impermissibly unstable
5 and inconsistent. In the first instance, the Project is described as the Proposed
6 General Plan, *which includes* the Focused Growth Plan. (AR, Tab 6, pp. 46 and 50.)
7 Thereafter, the EIR describes in depth the “two closely related [but separate] Projects”,
8 i.e., the Proposed General Plan (Envision Chino 2025) and the Focused Growth Plan
9 (more intensive development in limited areas of Chino subject to voter approval per
10 Measure M). (AR, Tab 6, pp. 58-81.) This minor discrepancy does not demonstrate
11 the kind of unstable and ever changing Project description found impermissible in
12 *County of Inyo, supra*. Moreover, “[t]he lead agency may employ a single EIR to
13 describe more than one project, if such projects are essentially the same in terms of
14 environmental impact.” Guidelines, § 15153(a).

17 As a thorough reading of the Project Description section of the EIR makes
18 clear, the EIR evaluates both the Envision Chino 2025 Plan and the similar Focused
19 Growth Plan which would require voter approval for more intensive development in
20 certain limited areas of the City. Compare Figure 3-4 Proposed General Plan Land
21 Use Map with Figure 3-5 Focused Growth Map. (AR, Tab 6, pp. 76 and 78.) Even
22 though the Focused Growth Plan was analyzed in the EIR, it would require voter
23 approval and the City only adopted the Proposed General Plan.

26 In reply, CREED additionally argues the Project Description is misleading based
27 on the EIR’s own inability to accurately identify the number of housing units called for
28 under both plans. Compare AR, Tab 6, p. 80 (Table 3-1 Estimated Development under

1 each plan) with Tab 6, p. 535. The housing unit discrepancy is in fact a typographical
2 error, i.e., using the job increase number instead of the housing unit increase number.
3 See Table 5-1 at AR, Tab 6, p. 509.

4 **The court denies CREED's petition for writ of mandate on grounds of a**
5 **purported defective project description under CEQA.**
6

7 Reasonable Range of Alternatives

8 "An EIR shall describe a range of reasonable alternatives to the project, or to
9 the location of the project, which would feasibly attain most of the basic objectives of
10 the project but would avoid or substantially lessen any of the significant effects of the
11 project, and evaluate the comparative merits of the alternatives. An EIR need not
12 consider every conceivable alternative to a project. Rather it must consider a
13 reasonable range of potentially feasible alternatives that will foster informed
14 decisionmaking and public participation. An EIR is not required to consider alternatives
15 which are infeasible. The lead agency is responsible for selecting a range of project
16 alternatives for examination and must publicly disclose its reasoning for selecting
17 those alternatives. There is no ironclad rule governing the nature or scope of the
18 alternatives to be discussed other than the rule of reason. (*Citizens of Goleta Valley v.*
19 *Board of Supervisors* (1990) 52 Cal.3d 553 and *Laurel Heights Improvement*
20 *Association v. Regents of the University of California* (1988) 47 Cal.3d 376)."
21 Guidelines, § 15126.6³ (*Emphasis added.*)
22
23
24

25 ³ § 15126.6. Consideration and Discussion of Alternatives to the Proposed Project

26 (a) Alternatives to the Proposed Project. An EIR shall describe a range of reasonable
27 alternatives to the project, or to the location of the project, which would feasibly attain most of
28 the basic objectives of the project but would avoid or substantially lessen any of the significant
effects of the project, and evaluate the comparative merits of the alternatives. An EIR need not
consider every conceivable alternative to a project. Rather it must consider a reasonable
range of potentially feasible alternatives that will foster informed decisionmaking and public

1 The Project Objectives for both the Proposed General Plan and the Focused
2 Growth General Plan are set forth in the EIR at AR, Tab 6, p.64 and include:

- 3 • Make Chino a healthy City by increasing residents' opportunities for physical
4 activity, access to healthy food and access to health services;
- 5 • Guide future development to allow Chino to grow while maintain its small town
6 feel; and
- 7 • Encourage the development of a variety of housing types.

8 One additional objective for the Focused Growth Plan is:

- 9 • Guide development, subject to a city-wide vote, along major corridors in Chino
10 in order to increase walkability, support the use of public transportation,
11 increase opportunities for economic revitalization, and provide neighborhood
12 centers with local services and housing.

12 //

13 //

14
15 participation. An EIR is not required to consider alternatives which are infeasible. The lead
16 agency is responsible for selecting a range of project alternatives for examination and must
17 publicly disclose its reasoning for selecting those alternatives. There is no ironclad rule
18 governing the nature or scope of the alternatives to be discussed other than the rule of reason.
(Citizens of Goleta Valley v. Board of Supervisors (1990) 52 Cal.3d 553 and Laurel Heights
Improvement Association v. Regents of the University of California (1988) 47 Cal.3d 376).

19 (b) Purpose. Because an EIR must identify ways to mitigate or avoid the significant effects that
20 a project may have on the environment (Public Resources Code Section 21002.1), the
21 discussion of alternatives shall focus on alternatives to the project or its location which are
22 capable of avoiding or substantially lessening any significant effects of the project, even if
these alternatives would impede to some degree the attainment of the project objectives, or
would be more costly.

23 (c) Selection of a range of reasonable alternatives. The range of potential alternatives to the
24 proposed project shall include those that could feasibly accomplish most of the basic
25 objectives of the project and could avoid or substantially lessen one or more of the significant
26 effects. The EIR should briefly describe the rationale for selecting the alternatives to be
27 discussed. The EIR should also identify any alternatives that were considered by the lead
28 agency but were rejected as infeasible during the scoping process and briefly explain the
reasons underlying the lead agency's determination. Additional information explaining the
choice of alternatives may be included in the administrative record. Among the factors that
may be used to eliminate alternatives from detailed consideration in an EIR are: (i) failure to
meet most of the basic project objectives, (ii) infeasibility, or (iii) inability to avoid significant
environmental impacts.

1 The EIR determined that the Project (the proposed general plan update, either
2 the proposed General Plan or the Focused Growth Plan) would result in significant
3 adverse environmental impacts to agricultural resources and air quality and GHG.

4 CREED argues that the EIR improperly considered only three alternatives to the
5 Project– the required no project alternative (i.e., the then existing general plan), a
6 mixed-use corridor alternative and a neighborhoods center alternative – *none of which*
7 *would substantially lessen the significant environmental effects of the Project.* (AR,
8 Tab 6, pp. 504-533.)

9
10 The court agrees with CREED that one of the threshold criteria for identifying
11 suitable alternatives, i.e., that the alternative can substantially reduce significant
12 environmental impacts, is not evident here in the City's choice of a range of
13 alternatives. *Laurel Heights Improvement Assn. v. Regents of University of California*
14 (1988) 47 Cal.3d 376, 403; Pub. Res. C. § 21002; Guidelines, § 15126.6(a)-(b). "The
15 range of potential alternatives to the proposed project **shall include** those that could
16 feasibly accomplish most of the basic objectives of the project **and** could avoid or
17 substantially lessen one or more of the significant effects." Guidelines, § 15126.6(c)
18 (*emphasis added.*) "Since the purpose of an alternatives analysis is to allow the
19 decision maker to determine whether there is an environmentally superior alternative
20 that will meet most of the project's objectives, the key to the selection of the range of
21 alternatives is to identify alternatives that meet most of the project's objectives but
22 have a reduced level of environmental impacts." *Watsonville Pilots Assn v. City of*
23 *Watsonville* (2010) 183 Cal.App.4th 1059, 1089.

24
25 See Tables 5-2 and 5-3 comparing the three chosen alternatives to the
26 Proposed General Plan and the Focused Growth Plan. (AR, Tab 6, pp. 510-511.)
27
28

1 Specifically as to EIR-identified significant adverse environmental impacts to
2 agricultural resources and air quality and GHG, none of the alternatives avoid or
3 substantially lessen those impacts. (AR, Tab 6, p. 512 (as to existing general plan
4 alternative); p. 519 (as to mixed use corridors alternative); pp. 526-527 (as to
5 neighborhood centers alternative).)

7 The City argues in opposition that it analyzed alternatives necessary to permit a
8 reasoned choice, but fails to address the fact that none of the alternatives chosen
9 meet the threshold criteria of avoiding or substantially lessening one or more of the
10 significant effects of the Project such as a potential reduced growth alternative.
11 CREED is not required to show there are reasonable alternatives to the Project; the
12 responsibility to identify a reasonable range of alternatives lies with the City, not
13 Petitioner. *San Joaquin Raptor/Wildlife Rescue Ctr. v. County of Stanislaus* (1994) 27
14 Cal.App.4th 713, 737. That responsibility based on statutory purpose was not met
15 here.

17 Moreover, the EIR's choice of the proposed Project as the environmentally
18 superior choice is faulty under CEQA alternatives analysis in that the required choice
19 is *among the alternatives* to the Project. Guidelines, § 15126.6(e)(2) ("If the
20 environmentally superior alternative is the "no project" alternative, the EIR shall also
21 identify an environmentally superior alternative among the other alternatives.")

23 Bottom line, the EIR fails as an informational document because neither the
24 public nor the decisionmakers were afforded an opportunity to consider an alternative
25 that would result in less environmental impact than the Project.

27 **The court grants CREED's petition for writ of mandate on grounds that the**
28 **City's EIR failed to analyze a reasonable range of alternatives that could avoid or**

1 **substantially lessen one or more of the significant effects of the Project and**
2 **failed to identify the environmentally superior alternative.**

3 Water Supply Impact: Water Supply Assessment Not Done and Inadequate
4 Water Supply Impact Analysis

5 CREED argues two points –first that the City failed to have a water supply
6 assessment (WSA) done for the Project and included in the EIR, and secondly that the
7 EIR failed to independently and adequately analyze the Project's water-supply impact.

8 Under Water Code § 10910, once the City determines that a project as *defined*
9 *in* Water Code § 10912 requires an EIR or Negative Declaration, the City is obligated
10 to have a WSA performed. Under Water Code § 10912 (a), "Project" means any of the
11 following:
12

13 (1) A proposed residential development of more than 500 dwelling
14 units.

15 (2) A proposed shopping center or business establishment employing
16 more than 1,000 persons or having more than 500,000 square feet of
17 floor space.

18 (3) A proposed commercial office building employing more than 1,000
19 persons or having more than 250,000 square feet of floor space.

20 (4) A proposed hotel or motel, or both, having more than 500 rooms.

21 (5) A proposed industrial, manufacturing, or processing plant, or
22 industrial park planned to house more than 1,000 persons, occupying
23 more than 40 acres of land, or having more than 650,000 square feet of
24 floor area.

25 (6) A mixed-use project that includes one or more of the projects
26 specified in this subdivision.

27 (7) A project that would demand an amount of water equivalent to, or
28 greater than, the amount of water required by a 500 dwelling unit project.

29 Compliance with the Water Code is required under CEQA. Pub. Res. Code §
30 21151.9 ("Whenever a city or county determines that a project, as defined in Section
31 10912 of the Water Code, is subject to this division, it shall comply with Part 2.10
32 (commencing with Section 10910) of Division 6 of the Water Code.")

33 Since both the Proposed General Plan and the Focused Growth Plan envision
34 the addition of 56,103 or more residents, the addition of 15,802 or more housing units,

1 and the addition of 31,446 or more jobs (AR, Tab 6, p. 80), CREED argues that the
2 Project triggers a WSA as either a mixed use project that includes one or more of the
3 projects qualifying for a WSA for residential, commercial and industrial use or a project
4 that demands an amount of water greater than the amount of water required by a
5 project with 500 dwelling units. There are simply no facts in the AR to support this
6 conclusion. The Project is a general plan update, not an actual development project.
7

8 Although CREED is correct that nothing in Water Code exempts a general plan
9 from the definition of a project, CREED cites no authority that a general plan project
10 which is the subject of a program EIR, as here, has been determined to fall within any
11 of the actual large development project definitions in Water Code § 10912. In fact, the
12 Supreme Court has expressed an arguably contrary view regarding water supply
13 analysis in the case of first-tier program EIRs, covering, for instance, general plans:
14

15 CEQA does not mandate that a first-tier program EIR identify with
16 certainty particular sources of water for second-tier projects that will be
17 further analyzed before implementation during later stages of the
18 program. Rather, identification of specific sources is required only at the
19 second-tier stage when specific projects are considered. Similarly, at the
20 first-tier program stage, the environmental effects of obtaining water from
21 potential sources may be analyzed in general terms, without the level of
22 detail appropriate for second-tier, site-specific review. The CALFED
23 PEIS/R satisfies these requirements. *In re Bay-Delta Programmatic
24 Environmental Impact Report Coordinated Proceedings* (2008) 43
25 Cal.4th 1143, 1169.

26 Program EIR's are commonly used in conjunction with the process of
27 tiering. (See *Laurel Heights Improvement Assn. v. Regents of University
28 of California, supra*, 47 Cal.3d at p. 399, fn. 8.) Tiering is "the coverage of
general matters in broader EIRs (such as on general plans or policy
statements) with subsequent narrower EIRs" (Cal. Code Regs., tit.
14, § 15385.) Tiering is proper "when it helps a public agency to focus
upon the issues ripe for decision at each level of environmental review
and in order to exclude duplicative analysis of environmental effects
examined in previous environmental impact reports." (Pub. Resources
Code, § 21093, subd. (a); see also Cal. Code Regs., tit. 14, § 15385,
subd. (b).)

1 In addressing the appropriate amount of detail required at different
2 stages in the tiering process, the CEQA Guidelines state that “[w]here a
3 lead agency is using the tiering process in connection with an EIR for a
4 large-scale planning approval, such as a general plan or component
5 thereof ... , the development of detailed, site-specific information may not
6 be feasible but can be deferred, in many instances, until such time as the
7 lead agency prepares a future environmental document in connection
8 with a project of a more limited geographic scale, as long as deferral
9 does not prevent “adequate identification of significant effects of the
10 planning approval at hand.” (Cal. Code Regs., tit. 14, § 15152, subd. (c).)
11 This court has explained that “[t]iering is properly used to defer analysis
12 of environmental impacts and mitigation measures to later phases when
13 the impacts or mitigation measures are not determined by the first-tier
14 approval decision but are specific to the later phases.” (*Vineyard Area
15 Citizens for Responsible Growth, Inc. v. City of Rancho Cordova, supra*,
16 40 Cal.4th at p. 431.) *In re Bay-Delta, supra*, 43 Cal.4th at 1170.

17 [T]he description of potential water sources for the CALFED Program's
18 future projects and the environmental effects of obtaining water from
19 those sources must be appropriately tailored to the current first-tier stage
20 of the planning process, with the understanding that additional detail will
21 be forthcoming when specific second-tier projects are under
22 consideration. (See *Vineyard Area Citizens for Responsible Growth, Inc.
23 v. City of Rancho Cordova, supra*, 40 Cal.4th at p. 434 [“the burden of
24 identifying likely water sources for a project varies with the stage of
25 project approval involved”].) *In re Bay-Delta, supra*, 43 Cal.4th at 1172.

26 **Thus as to CREED’s first contention – that the City failed to have a water
27 supply assessment (WSA) done for the Project under Water Code § 10910 and
28 included in the EIR, the court denies the petition for writ of mandate since a
proposed general plan is not the type of large development project identified in
Water Code § 10912 triggering the WSA requirement.**

Secondarily, CREED contends that the EIR failed to independently and
adequately analyze the Project’s water-supply impacts, i.e., the environmental impacts
of supplying water to the Project and the uncertainties in supplying that water to the
Project. In the EIR, water supply is discussed in Chapter 4.14 Utilities and
Infrastructure at AR, Tab 6, pp. 466-483.

1 CREED contends the EIR is silent on the environmental impacts of supplying
2 water to the Project, particularly groundwater. The court disagrees. In response to
3 CREED's criticism in this regard (AR, Tab 47, pp. 2621-2622, items 5.05 and 5.08),
4 the City responded (AR Tab, 49, p.4837) that it adequately addressed these issues,
5 relying on projections from data in the Chino Urban Water Management Plan (UWMP)
6 for Project demand and calculations from the previous WSA for the SRG Chino project
7 as to projected supply and an acknowledgment of drought issues (AR, Tab 6, pp. 479-
8 483.)

9
10 CREED contends, however, that neither the UWMP nor SRG Chino WSA are in
11 the EIR or even part of the AR. ""[Whatever] is required to be considered in an EIR
12 must be in that formal report; what any official might have known from other writings or
13 oral presentations cannot supply what is lacking in the report." (*Santiago County*
14 *Water District v. County of Orange, supra*, 118 Cal.App.3d 818, 831 [EIR found
15 inadequate], quoting *Environmental Defense Fund, Inc. v. Coastside County Water*
16 *Dist.* (1972) 27 Cal.App.3d 695, 706 ...)” *Laurel Heights Improvement Association v.*
17 *Regents of the University of California* (1988) 47 Cal.3d 376, 405. Furthermore, on
18 appellate review, “if it is not in the record, it did not happen” *Protect Our Water v.*
19 *County of Merced* (2003) 110 Cal.App.4th 362, 364.

20
21
22 However, information from other sources may be incorporated into an EIR by
23 use of an EIR appendix (Guidelines § 15147), citation to technical information
24 (Guidelines, § 15148)⁴ and incorporation by reference (Guidelines, § 15150). Here the
25

26
27
28 ⁴ 14 CCR § 15148 states: “Preparation of EIRs is dependent upon information from many
sources, including engineering project reports and many scientific documents relating to
environmental features. These documents should be cited but not included in the EIR. The
EIR shall cite all documents used in its preparation including, where possible, the page and
section number of any technical reports which were used as the basis for any statements in
the EIR.”

1 WSA for the SRG Chino project was incorporated by citation. (AR, Tab 6, p. 478-479,
2 fn. 16 - 18.) The Chino UWMP was incorporated by citation as well. (AR, Tab 6, p.
3 475, fn. 12.)

4 **As to CREED's second contention – that the City failed to independently**
5 **and adequately analyze the Project's water-supply impacts, i.e., the**
6 **environmental impacts of supplying water to the Project and the uncertainties in**
7 **supplying that water to the Project - the court denies the petition for writ of**
8 **mandate as the City properly incorporated supporting information into the EIR**
9 **through citation.**

10 Finding of Less than Significant Air Quality Impacts on Sensitive Receptors

11
12
13 CREED contends that despite the EIR's standard of significance of exposure of
14 sensitive receptors to substantial pollutant concentrations (AR, Tab 6, p. 141), the
15 EIR's recognition that the California Air Resources Board (CARB) advisory guidelines
16 that siting new sensitive land uses within 500 feet of a freeway, urban roads with
17 100,000 vehicles per day and rural road with 50,000 vehicles per day should be
18 avoided (AR, Tab 6, p. 153; Tab 47, Ex. 2e, p. 3159)⁵, and the EIR's recognition that
19 State Routes 71 and 60 carry more than 100,000 vehicles per day and the Project
20 includes residential uses within 500 feet of State Routes 71 and 60 (AR, Tab 6, p.
21 153), the EIR concludes that air quality impacts on sensitive receptors will be reduced
22 to a level of insignificance (AR, Tab 6, p, 154.)
23
24
25

26
27 ⁵ As indicated in CREED's own evidence, the CARB guidelines are not mandatory rules, but
28 simply *advisory recommendations*, acknowledging that "[l]and use agencies have to balance
other considerations, including housing and transportation needs, economic development
priorities and other quality of life issues." (AR, Tab 47, Ex. 2e, p. 3159.)

1 CREED contends there is no substantial evidence for this conclusion in that
2 Policies P5 and P6 under Objective AQ-1.1 under Goal AQ-1 of the General Plan (AR,
3 Tab 35, pp. 2127-2128) relied upon in the EIR (AR, Tab 6, pp. 153-156) are vague and
4 unenforceable mitigation measures. These General Plan provisions state:

5
6 Goal AQ-1 Preserve and improve air quality in Chino and the region.

7 Objective AQ-1.1 Improve air quality through land use and
8 transportation planning decisions.

9 ...
10 P5. The City shall, to the extent practicable, separate
11 sensitive land uses (schools, senior centers, medical facilities, and
12 residences) from significant sources of air pollution, toxic air
13 contaminants, or odor emissions.

14 P6. The City shall require developers of projects that
15 include sensitive land uses (schools, senior centers, medical
16 facilities, and residences) in proximity to State Route 71 and State
17 Route 60 to prepare a health impact assessment (HIA) to
18 determine the significance of the impact, and to incorporate
19 project-specific mitigation measures to avoid this risk.

20 Mitigation measures may be incorporated into plans, such as general and
21 specific plans, that provide a legal or policy framework for later projects or approvals.
22 Pub. Res. Code § 21081.6(b); Guidelines, § 15126.4(a)(2); *Napa Citizens for Honest*
23 *Government v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 358. This
24 is an appropriate approach any time a procedure for tiered environmental review is
25 used, as here with the General Plan's Program EIR.

26 However the mitigation measures identified in the EIR and placed in the
27 General Plan do not sufficiently describe *enforceable performance criteria*. While
28 under P6 developers are required to prepare an HIA for project-specific development
"in proximity" of State Routes 71 and 60 and to adopt mitigation measures to avoid the
specific risks identified in the HIA, nowhere is "in proximity" defined. Moreover, there is

1 no performance criteria for the future unidentified mitigation measures⁶ other than the
2 general avoidance of identified health risks. Under P5 the City shall separate sensitive
3 land uses “to the extent practicable” from significant sources of air pollution, etc. This
4 does not set forth any criteria for separation in terms of distance or other barriers and
5 does not even specifically identify what are “significant sources”.

7 CREED’s apparent preference for a ban on the location of sensitive land uses
8 within 500 feet of the heavily traveled highways, even though such land uses already
9 exist under the existing General Plan, is not a proper basis for challenge. Still, the
10 City’s contention that its significance conclusion based on faulty mitigation measures
11 cannot be second-guessed is equally improper. Because of the uncertainty and lack
12 of enforceable performance criteria in P5 and P6, CREED is correct that there is no
13 substantial evidence in the EIR that implementation of P5 and P6 alone will actually
14

16 ⁶ “Deferral of the specifics of mitigation is permissible where the local entity commits itself to
17 mitigation and lists the alternatives to be considered, analyzed and possibly incorporated in
18 the mitigation plan. [Citation.]” *Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261,
19 1275. “[F]or [the] kinds of impacts for which mitigation is known to be feasible, but where
20 practical considerations prohibit devising such measures early in the planning process (e.g., at
21 the general plan amendment or rezone stage), the agency can commit itself to eventually
22 devising measures that will satisfy specific performance criteria articulated at the time of
23 project approval. Where future action to carry a project forward is contingent on devising
24 means to satisfy such criteria, the agency should be able to rely on its commitment as
25 evidence that significant impacts will in fact be mitigated. [Citations.]” . *Sacramento Old City
26 Assn. v. City Council* (1991) 229 Cal.App.3d 1011, 1028–1029.

27 For improper deferral, see, e.g., *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359,
28 1396 [conditioning a permit on “recommendations of a report that had yet to be performed”
constituted improper deferral of mitigation]; *Defend the Bay v. City of Irvine* (2004) 119
Cal.App.4th 1261, 1275 [deferral is impermissible when the agency “simply requires a project
applicant to obtain a biological report and then comply with any recommendations that may be
made in the report”]; *Endangered Habitats League, Inc. v. County of Orange* (2005) 131
Cal.App.4th 777, 794 [“mitigation measure [that] does no more than require a report be
prepared and followed, ... without setting any standards” found improper deferral]; *Sundstrom
v. County of Mendocino* (1988) 202 Cal.App.3d 296, 306 [future study of hydrology and sewer
disposal problems held impermissible]; *Quail Botanical Gardens Foundation, Inc. v. City of
Encinitas* (1994) 29 Cal.App.4th 1597, 1605, fn. 4 [city is prohibited from relying on
“postapproval mitigation measures adopted during the subsequent design review process”].)

1 render exposure of sensitive receptors to substantial pollutant concentrations to a less
2 than significant level.

3 **Consequently, the court grants CREED's petition for writ of mandate on**
4 **grounds that the EIR fails to support its conclusion that air quality impacts on**
5 **sensitive receptors will be reduced to less than significant levels with**
6 **substantial evidence.**
7

8 Failure of EIR to Fully Mitigate Project's Significant GHG Emissions and
9 Climate Change Impacts

10 CREED argues the EIR fails to impose any and all feasible mitigation measures
11 to minimize the acknowledged significant impacts⁷ the Project will have re GHG
12 emissions and climate change under Guidelines, § 15126.4(a)(1).

13 Guidelines, § 15126.4(a) states the following:

14 (a) Mitigation Measures in General.

15 (1) An EIR shall describe feasible measures which could minimize
16 significant adverse impacts, including where relevant, inefficient and
unnecessary consumption of energy.

17 (A) The discussion of mitigation measures shall distinguish between the
18 measures which are proposed by project proponents to be included in
19 the project and other measures proposed by the lead, responsible or
20 trustee agency or other persons which are not included but the lead
21 agency determines could reasonably be expected to reduce adverse
impacts if required as conditions of approving the project. This
discussion shall identify mitigation measures for each significant
environmental effect identified in the EIR.

22 (B) Where several measures are available to mitigate an impact, each
23 should be discussed and the basis for selecting a particular measure
24 should be identified. Formulation of mitigation measures should not be
25 deferred until some future time. However, measures may specify
performance standards which would mitigate the significant effect of the
project and which may be accomplished in more than one specified way.

26 ⁷ The City adopted a threshold of significance for GHG if the Project, either directly or
27 indirectly would generate GHG greater than 85% of those generated in 2005. (AR, Tab. 6, p.
28 166.) Based on the GHG Analysis at Appendix 2 (AR, Tab 6, pp.632-664), even with certain
identified emission reduction measures (AR, Tab 6, pp. 174-177), the Project GHG emissions
at buildout would exceed the 15% reduction threshold and therefore were deemed significant.
(AR, Tab 6, p. 186.)

1 (C) Energy conservation measures, as well as other appropriate
2 mitigation measures, shall be discussed when relevant. Examples of
energy conservation measures are provided in Appendix F.

3 (D) If a mitigation measure would cause one or more significant effects
4 in addition to those that would be caused by the project as proposed, the
effects of the mitigation measure shall be discussed but in less detail
5 than the significant effects of the project as proposed. (*Stevens v. City of
Glendale* (1981) 125 Cal.App.3d 986.)

6 (2) Mitigation measures must be fully enforceable through permit
7 conditions, agreements, or other legally-binding instruments. In the case
of the adoption of a plan, policy, regulation, or other public project,
8 mitigation measures can be incorporated into the plan, policy, regulation,
or project design.

9 (3) Mitigation measures are not required for effects which are not found
to be significant.

10 (4) Mitigation measures must be consistent with all applicable
constitutional requirements, including the following:

11 (A) There must be an essential nexus (i.e. connection) between the
12 mitigation measure and a legitimate governmental interest. *Nollan v.
California Coastal Commission*, 483 U.S. 825 (1987); and

13 (B) The mitigation measure must be "roughly proportional" to the impacts
14 of the project. *Dolan v. City of Tigard*, 512 U.S. 374 (1994). Where the
mitigation measure is an ad hoc exaction, it must be "roughly
15 proportional" to the impacts of the project. *Ehrlich v. City of Culver City*
(1996) 12 Cal.4th 854.

16 (5) If the lead agency determines that a mitigation measure cannot be
legally imposed, the measure need not be proposed or analyzed.
17 Instead, the EIR may simply reference that fact and briefly explain the
reasons underlying the lead agency's determination.

18
19 The EIR states that "[t]he Proposed General Plan and the Focused Growth Plan
20 are self mitigating with regard to environmental impacts." (AR, Tab 6, p. 50.) What this
21 means is unclear. Although the concept of a self-mitigating project appears nowhere in
22 CEQA or the Guidelines, what could be meant by that term is that there are mitigation
23 "measures which are proposed by project proponents to be included in the project."
24 Guidelines, § 15126.4(a)(1).
25

26 As to GHG emissions and climate change impacts, however, the EIR finds the
27 impacts significant and unavoidable. (AR, Tab 6, pp. 186-187.) The EIR identifies
28

1 certain General Plan policies to reduce GHG emissions directed at neighborhood
2 pedestrian and bicycle activity in lieu of car travel, compact land use patterns with
3 mixed-use and in-fill development, transportation demand management, public transit,
4 promotion of low- and zero-emission vehicles, promotion of energy efficient home
5 building and conservation of energy. (AR, Tab 6, pp. 177-182) Of those policies, the
6 only one identified in the EIR as an actual "mitigation measure" under CEQA is
7 Objective OSC-5.1, Action A1 (AR, Tab, 6, p. 187) from the Proposed General Plan,
8 which states:
9

10 Objective OSC-5.1 Take appropriate actions to reduce greenhouse gas
11 emissions and Chino's contribution to global climate change.

12 ...
13 A1. Adopt a Climate Action Plan within 18 months of adoption of
14 this General Plan that demonstrates how the City will achieve the
15 needed reductions of greenhouse gas emissions. The Climate Action
16 Plan shall be developed in coordination with SANBAG and SCAQMD.
17 (AR, Tab 35, p. 2047.)

18 The City argues that the City is not obligated to implement mitigation measures
19 if impacts are found significant. *No legal authority is presented in support of this*
20 *contention and this is in fact not the law.* The City then goes on to inexplicably justify
21 its approach in determining the significance of Project GHG emissions and climate
22 change. That is not the issue raised by CREED. Then, the City cites to its "mitigation"
23 measures in its General Plan (AR, Tab, 6, pp.177-181) and its intent to adopt a
24 Climate Action Plan. (AR, Tab 35, p. 2047.) The City in particular questions CREED's
25 motives in submitting its comments and numerous suggestions for feasible mitigation
26 (AR, Tab 47, 2618- 2621 and referenced Exhibits) at the last minute instead of in the
27 DEIR review process or public hearings. Ultimately, the City argues that CREED's
28 disagreement with its analysis and conclusions cannot render its EIR legally

1 insufficient, citing *Association of Irrigated Residents v. County of Madera* (2003) 107
2 Cal.App.4th 1383, 1398. What was at issue in that case were the differing opinions on
3 whether the subject dairy would impact the kit fox and whether the mitigation measure
4 would be effective, for which the court determined that the board was entitled to
5 choose to believe one side more than the other. *Id.* at p. 1398.
6

7 The law in California is that once the EIR determines that the impacts are
8 significant, as here, there is a legal *obligation under CEQA to analyze and adopt*
9 *feasible mitigation measures to lessen the significant impact.*

10 If, as so many courts have said, the EIR is the heart of CEQA, then to
11 continue the anatomical metaphor, mitigation is the teeth of the EIR. A
12 gloomy forecast of environmental degradation is of little or no value
13 without pragmatic, concrete means to minimize the impacts and restore
14 ecological equilibrium. Thus, CEQA requires project proponents to
15 mitigate all significant environmental impacts of their project (Pub.
Resources Code, §§ 21002, 21002.1, subds. (a), (b)⁸]; Guidelines, §§
15126.4, 15370⁹) *Environmental Council of Sacramento v. City of*
Sacramento (2006) 142 Cal.App.4th 1018, 1039.

16 "Having recognized and acknowledged that incremental increases in
17 greenhouses gases would result in significant adverse impacts to global warming, the
18

19
20 ⁸ "The Legislature finds and declares that it is the policy of the state that public agencies
21 should not approve projects as proposed if there are feasible alternatives or feasible mitigation
22 measures available which would substantially lessen the significant environmental effects of
23 such projects, and that the procedures required by this division are intended to assist public
24 agencies in systematically identifying both the significant effects of proposed projects and the
feasible alternatives or feasible mitigation measures which will avoid or substantially lessen
such significant effects." Pub. Res. Code § 21002. "Each public agency shall mitigate or avoid
the significant effects on the environment of projects that it carries out or approves whenever it
is feasible to do so." Pub. Res. Code § 21002.1(b).

⁹ Guidelines, §15370 states: "'Mitigation' includes:

- 25 (a) Avoiding the impact altogether by not taking a certain action or parts of an action.
26 (b) Minimizing impacts by limiting the degree or magnitude of the action and its
implementation.
27 (c) Rectifying the impact by repairing, rehabilitating, or restoring the impacted environment.
28 (d) Reducing or eliminating the impact over time by preservation and maintenance operations
during the life of the action.
(e) Compensating for the impact by replacing or providing substitute resources or
environments."

1 EIR was now legally required to describe, evaluate and ultimately adopt feasible
2 mitigation measures which would "mitigate or avoid" those impacts. (§ 21002.1, subd.
3 (b); see also Guidelines, §§ 15126.4, subd. (a)(1), 15091.)" *Communities for Better*
4 *Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 91.

5
6 It is CREED's contention that none of its suggested mitigation measures were
7 incorporated in the EIR or explained as to why they were not feasible. "'Feasible"
8 means capable of being accomplished in a successful manner within a reasonable
9 period of time, taking into account economic, environmental, legal, social, and
10 technological factors." Guidelines, § 15364.

11
12 In response to CREED's suggestions for feasible mitigation measures from, for
13 instance, the California Air Pollution Control Officers Association (CAPCOA), *Model*
14 *Policies for Greenhouse Gases in General Plans*, (AR, Tab 47, 2618- 2621), the City
15 responded that such specific actions might be considered within the scope of the
16 proposed Climate Action Plan, but are generally too specific for a General Plan. (AR,
17 Tab. 49, p.4835-4836.) Moreover, some of the suggested measures are already
18 employed by the City, although not specifically listed in General Plan. *Id.*

19
20 CREED argues that none of the purported "mitigation" measures here are
21 actually valid mitigation measures under CEQA. In *Communities for Better*
22 *Environment, supra*, 184 Cal.App.4th at 92, "respondents argued that the City failed in
23 not submitting a plan to mitigate greenhouse gas emissions during the environmental
24 review process, but instead proceeding by preparing a menu of potential mitigation
25 measures, with the specific measures to be selected by Chevron and approved by the
26 City Council a year after Project approval. The superior court agreed with petitioners
27 that the "City has improperly deferred formulation of greenhouse gas mitigation
28

1 measures, by simply requiring Chevron to prepare a mitigation plan and submit it to
2 City staff up to a year later after approval of conditional use permit.” The
3 *Communities* court went on to state:

4 “Formulation of mitigation measures should not be deferred until some
5 future time. (Guidelines, § 15126.4(a)(1)(B).) An EIR is inadequate if
6 “[t]he success or failure of mitigation efforts ? may largely depend upon
7 management plans that have not yet been formulated, and have not
8 been subject to analysis and review within the EIR.” (*San Joaquin*
9 *Raptor, supra*, 149 Cal.App.4th at p. 670.) “A study conducted after
10 approval of a project will inevitably have a diminished influence on
11 decisionmaking. Even if the study is subject to administrative approval,
12 it is analogous to the sort of post hoc rationalization of agency actions
13 that has been repeatedly condemned in decisions construing CEQA.
14 [Citations.]” (*Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d
15 296, 307 [248 Cal.Rptr. 352] (*Sundstrom*).) *Communities, supra*, 184
16 Cal.App.4th at 92.

17 CREED argues convincingly here that the City’s policy of adoption of “a Climate
18 Action Plan within 18 months of adoption of this General Plan that demonstrates how
19 the City will achieve the needed reductions in GHG emissions” (AR, Tab, 6, p. 187) is
20 even more vague and uncertain than the plan rejected in *Communities*. Not only is the
21 future Climate Action Plan not required to ensure that its goal is enforced, but the EIR
22 does not indicate what level of reduction is in fact needed. There is nothing in the EIR
23 or the Action Plan as to who determines what the needed reductions are and when
24 that determination will be made. The City does not even identify the potential
25 mitigation measures that will be considered or calculate how potential mitigation
26 measures will reduce GHG emissions.

27 CREED’s challenge to the EIR is not asking the City to choose between
28 differing expert opinions as to impact or effectiveness as in *Association of Irrigated*
Residents, supra, 107 Cal.App.4th at 1398. CREED’s submission of reports, such as
the CAPCOA *Model Policies for Greenhouse Gases in General Plans*, and potential

1 mitigation measures was not CREED's demand that certain measures be
2 implemented, but rather as a demonstration that the tools are available to develop a
3 mitigation plan appropriate for a general plan and legally enforceable as required
4 under CEQA.

5
6 Similarly, the EIR's discussion of other General Plan policies (AR, Tab, 6, pp.
7 177-182) fail as true mitigation measures because they only "encourage", "promote" or
8 call for "coordination" and are not fully enforceable and therefore insufficient under
9 CEQA. "A public agency shall provide that measures to mitigate or avoid significant
10 effects on the environment are fully enforceable through permit conditions,
11 agreements, or other measures. Conditions of project approval may be set forth in
12 referenced documents which address required mitigation measures or, in the case of
13 the adoption of a plan, policy, regulation, or other public project, by incorporating the
14 mitigation measures into the plan, policy, regulation, or project design." Pub. Res.
15 Code 21081.6(b). When mitigation measures are incorporated in a plan, the City must
16 take steps to ensure that they will actually be implemented as a condition of later
17 development approved under the plan, "not merely adopted and then neglected or
18 disregarded." *Federation of Hillside & Canyon Assns. v. City of Los Angeles* (2000) 83
19 Cal.App.4th 1252, 1361. There are no provisions for actual implementation here for
20 the vague and unenforceable General Plan policies cited by the City.
21
22

23 Finally, the City's belated reliance on *Creed v. City of Chula Vista* (June 10,
24 2011) 2011 Cal. App. LEXIS 895 to support its contention that the City did nothing
25 wrong in assessing the Project's GHG emissions and applying its threshold of
26 significance to that analysis is *completely irrelevant*. As noted above, the discretion of
27
28

1 the City to determine a threshold of significance is not being challenged by CREED's
2 writ petition.

3 **Bottom line, there is no dispute that the Project's GHG emissions will be**
4 **significant; however, the EIR's failure to establish required enforceable and**
5 **measurable mitigation measures constitutes a prejudicial abuse of discretion**
6 **since such failure adversely affects informed public participation and**
7 **decisionmaking. The court grants the writ on this ground.**

9 Impacts on Agricultural Resources: No Analysis of Air Quality on Agriculture, No
10 Analysis or Adoption of Mitigation Measures for Loss of Farmland, and No
11 Consideration of Alternative that would Minimize Agricultural Resource Impact

12 The City's thresholds of significance for Agricultural Resources include (1)
13 conversion of Prime or Unique Farmland or Farmland of Statewide Importance to non-
14 agricultural use; (2) conflict with existing Williamson Act contracts¹⁰; and (3) other
15 changes in existing environment which due to location or nature could result in
16 conversion set forth in (1). (AR, Tab 6, 100.)

17 According to the FEIR, the City in 2008 had a total of 4,928 acres of farmland.¹¹
18 Since 2008, the total farmland acreage had been reduced by 503 ac. and under
19 buildout of the Proposed General Plan and Focused Growth Plan, the City would lose
20 a total of an additional 1174 ac. of agriculture (67 ac. of Farmland of Statewide
21 Importance, 750 ac. of Prime Farmland, 68 ac. of Farmland of Local Importance , 22
22 ac. of Unique Farmland and 267 ac. of grazing land). (AR, Tab 8, p. 987.)

26
27 ¹⁰ Only 187 acres are in active Williamson Act contracts (10-year contracts for lower property
taxes for agricultural or open space land.) (AR, Tab 6, p. 96, 98- 99.)

28 ¹¹ By type, this included 275 ac. of Farmland of Statewide Importance, 2252 ac. Of Prime
Farmland, 335 ac. of Farmland of Local Importance , 89 ac. of Unique Farmland and 1,977 ac.
of grazing land. (AR, Tab 8, p. 987.)

1 Most of this Project loss of agricultural land was discussed in prior EIRs for the
2 College Park Specific Plan, The Preserve Specific Plan, the Edgewater Communities,
3 the Chino Sphere of Influence Sub Area 1, the Chino South Industrial Park, and the
4 East Chino Specific Plan, and already deemed an unavoidable significant impact.
5 Since the Proposed General Plan and Focused Growth Plan do not designate
6 additional urbanization of agricultural lands from those projects, there is no conversion
7 impact in this Project for those same lands. Agricultural uses at CIM and the Chino
8 Airport can continue under the Project. Only a few agricultural parcels in the northern
9 portion of the City that are identified as Prime or Unique Farmland or Farmland of
10 Statewide Importance are not included in the agricultural land just discussed. Some of
11 this area has already converted and most parcels are small and surrounded by urban
12 development. The EIR finds that with certain Open Space Objectives, Goals, Policies
13 and Actions in the General Plan, the impact on these agricultural parcels is less than
14 significant. (AR. Tab 6, pp. 100-105.)

17 As to the 187 acres of active Williamson Act contract lands, 94 acres are
18 planned for urban uses. Most of this loss has been discussed in The Preserve Specific
19 Plan EIR. There remains one active Williamson Act contract covering two parcels not
20 in The Preserve, but in the East Chino Specific Plan. Under the Project the land is
21 designated for urban uses and so there is a conflict that is potentially significant. (AR,
22 Tab 6, pp. 105-106.) The EIR concludes that despite the Right-to-Farm Ordinance
23 which stays in effect, this impact cannot be mitigated and is significant and
24 unavoidable.
25

27 Finally, under the third standard, the effect of the Project is less than significant
28 since most agricultural lands are located in the southern portion of the City where

1 agricultural designations are expansive and not surrounded by urban uses. Moreover,
2 the City's Right-to-Farm Ordinance and General Plan policies for buffer zones protect
3 farmland from incompatible surrounding uses. (AR, Tab 6, pp. 106-107.)

4 CREED first argues that the EIR improperly contains no analysis of the
5 Project's air pollution impacts on agriculture, i.e., the effect of ozone on crops. See §
6 1.01 at AR, Tab 47, p. 2618. The City responded at AR, Tab 49, p. 4834, that the
7 impact to agriculture, specifically the plants, from the Project was not a City designated
8 standard of significance, which as to agricultural resources here was limited to land
9 use conversion. See, Guidelines, Appendix G. The choice of standards of significance
10 is the City's. Guidelines, § 15064.7.

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12
13 As noted above, because of the prior EIRs, the Project's impacts on agricultural
14 resources have generally already been analyzed. Moreover, since ozone comes from
15 any number of sources in the South Coast Air Basin, the City indicated that it would be
16 speculative at best to assess this alleged additional Project impact on agricultural
17 resources. (AR, Tab 49, p. 4834.)

18
19 In a brief review of CREED's supporting material (AR, Tab 47, pp. 2627-2778),
20 it is abundantly apparent that the damage to crops from air pollution (ozone or smog)
21 is in their lost yield or loss of productivity, which is ultimately an economic impact, not
22 an environmental impact, such as an impact on rare or endangered flora. **The court**
23 **finds no violation of CEQA on the alleged ground that the City failed to discuss**
24 **the impact of Project air pollution on agricultural crops.**

25
26 Next, CREED argues that the EIR improperly contains no analysis of mitigation
27 measures for the acknowledged Project's significant impact of loss of farmland. See §
28 1.03 at AR, Tab 47, p. 2618. In response, the City responded to this criticism by

1 correctly noting that the only impact to agriculture is due to the designation of two
2 parcels of Williamson Act contract land for development. This designation for
3 residential development has existed since 1987 when the East Chino Specific Plan
4 was adopted. At that time, however, designating a Williamson Act contract land for
5 urban uses was not a standard for significance under CEQA as it is now. Hence, the
6 disclosure is made in connection with the Project EIR at this time. (AR, Tab 49, p.
7 4834.)

9 CREED argues at this time that the City was obligated to analyze mitigation
10 measures for agricultural land conversion suggested by the California Department of
11 Conservation (CDC) in response to the Notice of Preparation (AR, Tab 28, pp. 1762-
12 1763) and again in response to the DEIR (AR, Tab 8, p. 1027), i.e., agricultural
13 conservation easements. The City adequately responded in the FEIR. (AR, Tab 8, pp.
14 1030-1032.)

16 What CREED fails to acknowledge is that almost all of the agricultural
17 conversion was discussed and analyzed in prior adopted EIRs, that the General Plan
18 and Focused Growth Plan do not plan any additional conversion and thus no
19 significant impact on agricultural resources results by reason of the over 23% loss of
20 the inventoried farmland and therefore, mitigation measures are not required.
21 "Mitigation measures are not required for effects which are not found to be significant."
22 Guidelines, § 15126.4(a)(3).

24 The only significant impact to agricultural resources identified in this EIR arises
25 from the *designation since 1987 of one Williamson Act contract covering two parcels*
26 *of land in the East Chino Specific Plan for residential development. It is still under*
27 *contract.* Although conflict with existing Williamson Act contracts was not a standard
28

1 of significance at the time of the East Chino Specific Plan, agricultural conversion was.
2 Since the East Chino Specific Plan EIR did designate this property ultimately for
3 residential use, the impact of agricultural conversion has already been discussed in an
4 EIR. No specific cancellation or termination of existing Williamson Act contracts is
5 proposed by the General Plan or the Focused Growth Plan not already discussed in
6 prior EIRs. Moreover, the Plans actually promote preservation of existing agriculture
7 through the Right-to-Farm Ordinance (AR, Tab, 6, p. 94) and certain open space
8 objectives, goals and policies (AR, Tab 6, pp. 101-102.) **Given the limited actual**
9 **significant impact, the prior EIRs and measures incorporated into the General**
10 **Plan, substantial evidence supports the City's decision not to discuss the**
11 **mitigation measures suggested by the CDC. On this ground, the court denies**
12 **the writ of mandate.**

15 Finally, CREED argues that the EIR improperly contains no alternative identified
16 that would have preserved agricultural land within the Project. See § 1.02 at AR, Tab
17 47, p. 2618. In response, the City contends that an alternative that preserves
18 agricultural land is not needed because the City is not proposing to convert any more
19 agricultural land through the Proposed General Plan and Focused Growth Plan than
20 what has already been planned [and approved] to date. (AR, Tab 49, p. 4834.)
21 **Despite the Plan's "significant" impact by reason of a conflict with one**
22 **Williamson Act contract covering two parcels of land in the East Chino Specific**
23 **Plan, the court agrees with the City that consideration of an alternative based on**
24 **this limited impact is not required since the actual loss of this agricultural land**
25 **had already been analyzed in a prior EIR. The court denies the writ on this**
26 **ground.**

1 Failure to Make All Necessary Findings

2 CREED argues that the City failed to make findings for *all components of the*
3 *Project*, i.e., making findings only as to the Envision Chino 2025 General Plan and
4 none as to the Focused Growth Plan. (AR, Tab 57, pp. 4860, 4864.)

5 In response, the City argues that the Focused Growth Plan could not be and
6 was not adopted by the City Council since the residential density increases in this Plan
7 can only be approved by a city-wide vote under Measure M. (AR, Tab 6, p. 58.)
8 Nevertheless, should a developer ultimately seek residential densities per the Focused
9 Growth Plan through a city-wide vote, the City contends that the developer may still
10 rely on the findings in this EIR and not have to start from scratch.

11 CREED counters that the problem with the findings is that the City intends to
12 rely on the EIR's findings for future development under the Focused Growth Plan.
13 While the City only adopted the General Plan so far, the City's EIR certification is for
14 the entire project that includes the Focused Growth Plan. Meanwhile, the Pub. Res.
15 Code §§ 21081 and 21082.1 findings were not made for the Focused Growth Plan and
16 are fatal to the EIR's use for the Focused Growth Plan.

17 Those facts may raise a problem in the future but do not support a finding that
18 the City failed to make all necessary findings for the actual Project adopted here, the
19 Envision Chino General Plan 2025. **The court denies the writ on the basis of**
20 **alleged failure to make all necessary findings.**

21 Failure to Rely on Program EIR when Approving Ordinance (Zoning and
22 Subdivision) Amendments and Official Zoning Map

23 CREED contends that the City failed to properly rely on the Program EIR under
24 Guidelines, § 15168(e), when it noticed public hearings on the zoning and subdivision
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1 ordinances required under Gov. Code §§ 65854 and 65856 (hearings and notices
2 required for planning commission and City Council hearings).

3 Guidelines, § 15168(e) states:

4 When a law other than CEQA requires public notice when the agency
5 later proposes to carry out or approve an activity within the program and
6 to rely on the program EIR for CEQA compliance, the notice for the
7 activity shall include a statement that:

8 (1) This activity is within the scope of the program approved earlier, and

9 (2) The program EIR adequately describes the activity for the purposes
10 of CEQA.

11 CREED argues that the Notice of Public Hearing for the proposed Municipal
12 Code amendments and adoption of the Zoning Map did not comply with Guidelines, §
13 15168(e), i.e., doesn't indicate the EIR is a Program EIR or that the ordinances and
14 zoning map are within the scope of the program EIR. (AR, Tab 41, p. 2267-2268.)

15 The City argues that its Notice is sufficient in that it properly referred to the EIR
16 and the proposed Municipal Code amendments and adoption of the Zoning Map
17 encompassed thereby. (AR, Tab 41, pp. 2267-2268.)

18 Technically, the Notice does not state the General Plan EIR is a Program EIR
19 or that the Program EIR adequately describes the ordinances for the purposes of
20 CEQA. On the other hand, the proposed Municipal Code amendments and adoption
21 of the Zoning Map are not later activities, but integral parts of the Project which was
22 the subject of the subject EIR. (AR, Tab 6, p. 58; 72-74.)

23 The Notice in fact states that all of the activities - adoption of ordinances
24 amending the zoning and subdivision portions of the Municipal Code and certifying the
25 Official Zoning Map, along with the proposed Envision Chino 2020 General Plan - are
26 "projects for which a Final Environmental Impact Report (SCH # 2008091064) has
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28

1 been prepared.” (AR, Tab, 41, p. 2267.) CREED’s contention of error is not
2 supported by the facts since the ordinances amending the zoning and subdivision
3 portions of the Municipal Code and certifying the Official Zoning Map are part of the
4 General Plan EIR in the first instance and not a later project. (AR, Tab 6, p. 58.)
5 Moreover, any error in this regard is not prejudicial as it does not affect public
6 participation or informed decisionmaking. **The court denies the petition for writ of**
7 **mandate on ground of alleged failure to rely on Program EIR when approving**
8 **Ordinance (Zoning and Subdivision) Amendments and Official Zoning Map.**
9

10 11 **Summary of Rulings**

12 **Find that CREED has standing and has exhausted its administrative**
13 **remedies in order to bring this petition for writ of mandate.**

14 **Deny the writ on alleged grounds of a purported defective project**
15 **description under CEQA.**

16 **Grant the writ on grounds that the City’s EIR failed to analyze a**
17 **reasonable range of alternatives that could avoid or substantially lessen one or**
18 **more of the significant effects of the Project and failed to identify the**
19 **environmentally superior alternative, finding such to be a prejudicial abuse of**
20 **discretion in not proceeding in manner required by law as such failure adversely**
21 **affects informed public participation and decisionmaking.**

22 **Deny the writ as to the contention that the City failed to have a water**
23 **supply assessment (WSA) done for the Project under Water Code § 10910 and**
24 **included in the EIR since a proposed general plan is not the type of actual**
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1 development project identified in Water Code § 10912 triggering the WSA
2 requirement.

3 Deny writ as to contention that the City failed to independently and
4 adequately analyze the Project's water-supply impacts, on grounds that the City
5 properly incorporated supporting information in this regard into the EIR through
6 citation.
7

8 Grant the writ on grounds that the EIR fails to support its conclusion that
9 air quality impacts on sensitive receptors will be reduced to less than significant
10 levels with substantial evidence.

11 Grant the writ on grounds that the EIR's failure to establish required
12 enforceable and measurable mitigation measures for the Project's significant
13 GHG emissions and climate change impacts constitutes a prejudicial abuse of
14 discretion in not proceeding in manner required by law since such failure
15 adversely affects informed public participation and decisionmaking.
16

17 Deny the writ finding no violation of CEQA on the alleged ground that the
18 City failed to discuss the impact of Project air pollution on agricultural crops.
19

20 Deny the writ on alleged failure to consider agricultural impact mitigation
21 measures on ground that substantial evidence supports the City's decision not
22 to discuss the mitigation measures suggested by the CDC.

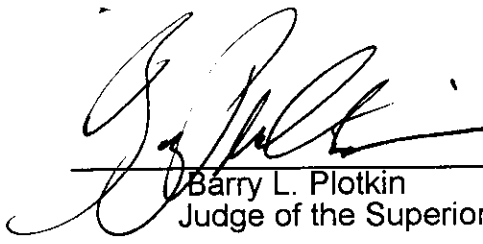
23 Deny the writ on alleged failure to consider alternative that would
24 minimize impacts to agricultural resources on ground that consideration of an
25 alternative based on the limited "significant" impact of conflict with a
26 Williamson Act contract is not required since the actual loss of this agricultural
27 land had already been analyzed in a prior EIR.
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Deny writ on the basis of alleged failure to make all necessary findings.

Deny the writ on ground of alleged failure to rely on Program EIR when approving Ordinance (Zoning and Subdivision) Amendments and Official Zoning Map.

DATED: AUG 11 2011



Barry L. Plotkin
Judge of the Superior Court

Barry Plotkin