NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

HILLS FOR EVERYONE et al., Plaintiffs and Respondents, v. OSLIC HOLDINGS LLC, Real Party in Interest and Appellant.	G053160 (Super. Ct. No. 30-2014-00731930) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Robert J. Moss, Judge. Affirmed as modified.

Nossaman, John J. Flynn III, John P. Erskine and Benjamin Z. Rubin for Real Party in Interest and Appellant.

Shute, Mihaly & Weinberger, Gabriel M.B. Ross, Sara A. Clark and Catherine Malina for Plaintiffs and Respondents.

* * *

INTRODUCTION

The Madrona Project is a proposed development of 162 "executive" homes on the hillsides above Carbon Canyon in the City of Brea (the City). The Madrona Project was proposed by OSLIC Holdings, LLC (OSLIC), the appellant in this appeal, and opposed by, among others, Hills for Everyone, Friends of Harbors, Beaches and Parks, the California Native Plant Society, and the Sierra Club (collectively, HFE), the respondents in this appeal. In 2014, the Brea City Council approved the Madrona Project by enacting resolutions certifying a final environmental impact report prepared pursuant to the California Environmental Quality Act, Public Resources Code section 21000 et seq. (CEQA), approving a tentative tract map, making CEQA findings, and adopting a statement of overriding considerations.

HFE challenged the City's decision by bringing a petition for writ of mandate in the superior court. OSLIC and the City opposed the writ petition. The superior court agreed with HFE, granted the petition in nearly every respect, and issued a writ of mandate directing the City to vacate its resolutions approving the Madrona Project. OSLIC appealed from the judgment; the City did not.

We affirm as modified. The City's general plan—its "'"constitution" for future development'" (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 773)—includes a woodlands policy that makes the management, protection, and preservation of oak and walnut trees and woodlands a policy goal and describes large oak trees as a unique natural and visual resource. The City erred in approving the Madrona Project because it is in conflict with this woodlands policy and with a specific plan covering the area in which the Madrona Project would be built. The Madrona Plan would result in the destruction of over 10 acres of oak and oak woodland, damage to another 15.16 acres of walnut and walnut woodland, and removal of over 1,400 native specimen trees. The City

recognized this conflict and found that, even with mitigation, the environmental impacts to woodlands "remain significant."

In addition, the final EIR certified by the City was inadequate because it did not make the necessary and critical analysis of whether the Madrona Project is in compliance with slope grading requirements of the specific plan.

FACTS

I.

Carbon Canyon Specific Plan

Carbon Canyon lies in the northeastern corner of the City, just to the south of the point at which Orange, Los Angeles, and San Bernardino Counties connect. Carbon Canyon abuts Chino Hills State Park and is predominately undeveloped open hillsides with oak and walnut woodlands and important biological resources. By the 1970's, Carbon Canyon had been developed with the 132-home Olinda Village, a mobilehome park, and a mineral spa that included a small hotel, restaurant, and mineral baths.

In June 1986, the City adopted a general plan (the General Plan) that included a specific plan for the Carbon Canyon area. This Carbon Canyon Specific Plan (the CCSP) was intended as "a body of land use regulations, having the effect of zoning law," and "establishing criteria and regulations which permit the City to anticipate fully land uses and other issues affecting the Carbon Canyon project area." The stated goals of the CCSP included:

— "Provide for a community with a balance of land uses, and a range of residential housing types";

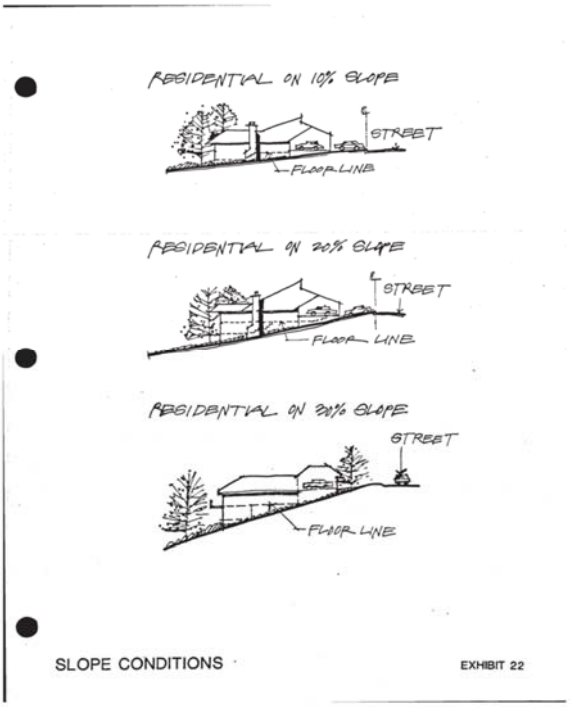
— "Provide for a balance of environmental preservation, safety and economic considerations";

— "Provide for an environmental balance between development and identified natural resources"; and

— "Preserve the significant natural resources of the canyon area, and protect visually sensitive areas."

As to the last goal, the CCSP states: "Stands of oak trees are identified as important biological and aesthetic resources to the canyon area, and are identified, along with stands of other trees, in the [CCSP] EIR."

The CCSP permits up to 2,364 dwelling units on 1,758 acres and 350 acres of undeveloped open space. The CCSP included grading design guidelines applicable to development on ridgelines and development in canyon and hillside areas. The primary objective of the grading design guidelines was to preserve the form of the hillsides and reduce the "'presence'" of development. An exhibit to the CCSP depicts the grading guidelines for 10 percent, 20 percent, and 30 percent slopes:



II.

Hillside Management Ordinance

In 1994, the City adopted the Hillside Management Ordinance (the Hillside Ordinance) to "expand and update the City of Brea Zoning Ordinance to reflect current planning philosophy and to provide clarification as it pertains to hillside management techniques in order to implement the goals and policies of the General Plan." A stated purpose of the Hillside Ordinance was to "[p]rovide guidelines and standards for development in hillside areas to minimize the adverse impacts of grading and to promote the goals and objectives of the City General Plan." The Hillside Ordinance prohibits grading on slopes exceeding 30 percent "where such land areas exceed 1 acre in size and have a minimum dimension exceeding 50′ in all directions." Exempted from this standard are "Projects processed by a Specific Plan."

Under the section entitled "Applicability," the Hillside Ordinance states: "The development standards, guidelines and provisions of the Hillside Management Ordinance shall be applied to parcels of land which currently exist within or are annexed into the City of Brea and having slopes of 10% or more." The Hillside Ordinance states that its provisions "apply to all projects relating to Grading Permits, Building Permits, Tentative Parcel Maps, Tentative Tract Maps, Conditional Use Permits, Specific Plans, Planned Unit Developments, Precise Development plans, and associated Plan Review."

III.

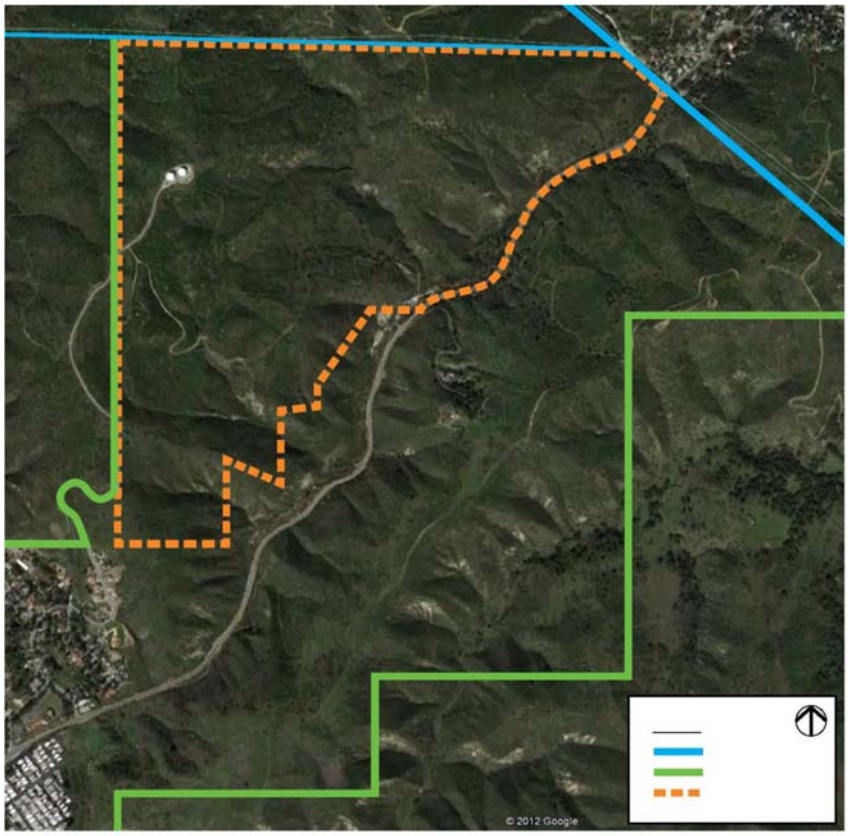
Canyon Crest

In 1999, MRF Carbon Canyon L.P. (MRF) submitted a subdivision map application for 732 acres north of Carbon Canyon Road and within the CCSP area. This original proposal, called Canyon Crest, sought approval for the construction of 400 to 450 homes.

The City initiated an environmental review process for Canyon Crest. In 2000, MRF withdrew its application and submitted a revised application proposing to develop 367.5 acres with up to 250 single family homes. In August 2000, the City deemed MRF's vesting tentative tract map application complete, thereby locking into place the City's ordinances, policies, and standards, including the CCSP, that were in effect as of that date.[1]

The following aerial photograph depicts the project site bounded by a dashed line. The City limits are bounded by a thick solid lines. San Bernardino County is the triangle at the top right corner, Los Angeles County is the strip at the top center and left, and the rest is Orange County. Carbon Canyon Road is the solid, waving line running diagonally from the lower left corner to upper right corner.

[1] A subdivider may obtain protection against changes in applicable local ordinances, policies, and standards by filing a "vesting tentative map" under Government Code sections 66498.1 through 66498.9. "By designating the map as a vesting tentative map, the subdivider gains the vested right to proceed with development (including obtaining building permits) under the law in effect when the map application is considered to be complete." (Curtin et al., Cal. Subdivision Map Act and the Development Process (Cont.Ed.Bar 2d ed. 2017) Map Approvals and Denials, § 9.14.)



In addition to grading standards, the Hillside Ordinance included standards for protecting "ridgelines and prominent landforms." The CCSP did not have such protections. In February 2001, the Brea City Council adopted Ordinance No. 1043 to amend the CCSP to incorporate into it the ridgeline and prominent landform standards of the Hillside Ordinance. MRF sued the City to challenge the legality of Ordinance No. 1043 and to enjoin its application to Canyon Crest. This litigation ultimately ended in settlement in 2002 with the City agreeing to be prohibited from applying Ordinance No. 1043, or any similar future ordinance, to the CCSP area. As a consequence, the ridgeline and prominent landform standards and protections of the Hillside Ordinance do not apply to the Madrona Project, the successor project to Canyon Crest.

Environmental review continued with the City circulating a draft Environmental Impact Report (the DEIR) for the 216-lot project in June 2002. The DEIR

identified significant environmental impacts and found that Canyon Crest as proposed was inconsistent with the City's general plan, the CCSP, and the Hillside Ordinance.

Over the next several years, MRF made several changes to Canyon Crest that brought the number of proposed homes down to 165. In 2007, the City prepared and distributed for public review a Recirculated Draft EIR (the 2007 DEIR) to assess the environmental impacts of the proposed development of 165 homes on 367.5 acres. Comments from HFE and others were received. HFE asserted, among other things, the Hillside Ordinance's prohibition on grading slopes exceeding 30 percent and mandatory use of landform grading barred the project as proposed.

In April 2008, the City released a Final EIR (the 2008 FEIR). In response to comments regarding the Hillside Ordinance, the 2008 FEIR explained the grading standards had exemptions including "consideration of projects processed under a Specific Plan (e.g. [the CCSP])." In June 2008, the City planning commission certified the 2008 FEIR, adopted a CEQA mitigation monitoring and reporting program and statement of overriding considerations, and approved Canyon Crest. In an exhibit to the planning commission resolution, the planning commission found that Canyon Crest would be consistent with "the land use element of the Brea General Plan" and with the CCSP. An appeal from the planning commission decision was filed in July 2008.

In November 2008, while the appeal was pending, the Freeway Complex Fire burned about 29,000 acres and destroyed 155 homes in Yorba Linda, Chino Hills, and Brea. The fire burned the Canyon Crest site. After the fire, the Brea City Council postponed further consideration of the appeal to allow preparation of an analysis of the fire's environmental implications.

IV.

Madrona Project

The project went dormant until 2011. Sometime between 2008 and 2011, OSLIC assumed development responsibility for the project, prepared revised project plans (including a revised tentative tract map), reduced the number of proposed homes to 162, and changed the project name to Madrona.

The Madrona Project plans made changes to grading, circulation, lot layout, drainage, and open spaces. Among other things, the Madrona Project (1) reduced the developed area footprint from 211.30 acres to 131.9 acres, (2) increased the natural open space area from 156.2 acres to 236.31 acres, (3) decreased the manufactured slope area from 124.4 acres to 53.06 acres, (4) reduced the street area from 23.7 acres to 17.59 acres, and (5) reduced the total amount of earthwork from about 9.74 million cubic yards to about 4.92 million cubic yards.

Yet, according to a biotechnical report, the Madrona Project still would eliminate about 10.23 acres of coast live oak woodland and coast live oak woodland/coastal sage and would call for the removal of nearly 1,400 oak and walnut trees. The CEQA findings and mitigation measures ultimately approved by the City state the Madrona Project would result in the removal of 17.54 acres of oak and walnut woodland. A proposed mitigation measure includes a tree management plan providing for the planting of oak and walnut trees at replacement ratio of about 2:1.[2]

In November 2012, the City circulated EIR Update No. 02-01 (2012 EIR Update) for public review and comment. The 2012 EIR Update contained "the updated environmental analysis requested by the Brea City Council after the Freeway Complex

[2] The record is not clear whether the ratio is replacement trees to removed tree or vice-versa. We assume the ratio is two replacement trees to every tree removed. As we explain in part II of the Discussion section, these replacement trees may end up being planted "off-site" elsewhere in the Puente/Chino Hills area.

Fire, including updates to the environmental setting as of 2011-2012, along with a complete assessment of the environmental impacts of the Madrona Plan, compared to the impacts of the previous Canyon Crest Plan." The 2012 EIR Update "buil[t] upon and expand[ed]" the 2008 FEIR's environmental analysis and was "the latest version of the same environmental impact report."

Following a 60-day review period, the City responded to comments it received, including a lengthy comment from Hills for Everyone, and, in October 2013, circulated the "2013 Update of Final EIR 02-01 for the Madrona Residential Development Plan" (the 2013 FEIR Update). In November 2013, the City resumed its consideration of the 2008 appeal of the planning commission approval and for that purpose held five public hearings over the next seven months.

On June 3, 2014, the Brea City Council adopted Resolution No. 2014-039 certifying a final environmental impact report (the Final EIR) consisting of the 2013 Final EIR Update, the 2012 EIR Update, the 2008 FEIR, the 2007 Draft EIR, and the appendices attached to all of them. Resolution No. 2014-039 approved the Madrona Project and adopted CEQA findings. The Brea City Council also adopted Resolution No. 2014-040 which approved the vesting tentative tract map for the Madrona Project and adopted a statement of overriding considerations and mitigation and monitoring program.

The Brea City Council found that the Madrona project would not cause "any significant environmental impacts after mitigation except in the areas of Air Quality (NOx Emissions during Construction), Land Use and Planning (conflict with preservation policies), and Transportation/Traffic (Near-Term and Long-Term Traffic on Carbon Canyon Road)." Attached to the resolution approving the Final EIR were CEQA findings.

The CEQA findings explain that feasible mitigation measures were incorporated to reduce environmental impacts, "but that even after mitigation the impacts

remain significant." The CEQA findings include a finding that the Madrona Project would eliminate about "10.23 acres of coast live oak woodland and coast live oak woodland/coastal sage – chaparral scrub ecotone" and the loss of oak woodlands would be "a significant impact." According to the mitigation measures, the Madrona Project would result in removal of 17.54 acres of oak and walnut woodlands. As to traffic, the CEQA findings included a finding that "[i]mpact to Carbon Canyon Road would be significant and unavoidable" and there were no feasible mitigation measures. The statement of overriding considerations, attached as an exhibit to Resolution No. 2014-040, found nine overriding benefits and concluded "the economic, legal, social, technological and other benefits of the Project, as conditioned, outweigh the significant and unavoidable environmental effects identified in the Final EIR and in the record, some of which have been reduced in severity to the degree feasible through mitigation measures."

PROCEDURAL HISTORY

In July 2014, Hills for Everyone and Friends of Harbors, Beaches and Parks filed a verified petition for writ of mandate to challenge the Resolution No. 2014-039 and Resolution No. 2014-040. A first amended petition filed a few months later added the California Native Plant Society and the Sierra Club as petitioners.

After extensive briefing and a hearing in October 2015, the trial court granted the petition in most respects. The court's decision was based on six findings: (1) The Hillside Ordinance applies to the Madrona Project and "precludes project approval"; (2) the issue whether the Hillside Ordinance and CCSP are in conflict was not before the court, and "in any event, there is no inconsistency"; (3) the Madrona Project "as admitted by the City" is inconsistent with the CCSP and the City General Plan; (4) the Madrona Project "as admitted by the City" is inconsistent with the City's woodland preservation policies; (5) the Madrona project is not exempt from CEQA

review under Government Code section 65457; and (6) "the [Final EIR] is otherwise inadequate, as it fails to analyze the consistency with the [CCSP]'s grading standards; it fails to analyze climate change impacts adequately; and it uses an improper baseline for impacts on recreation."

The judgment included the issuance of a peremptory writ of mandate directing the City to repeal Resolution No. 2014-039 and Resolution No. 2014-040 and directing the City to take no further actions unless and until it completed certain actions relating to the EIR and project application. OSLIC timely appealed from the judgment. The City did not appeal. We modify the judgment to affirm the writ directing the City to repeal the resolutions and we order the City to take no action regarding the project inconsistent this opinion.

STANDARDS OF REVIEW

This matter came to the trial court on a petition for a writ of mandate under Code of Civil Procedure section 1094.5. The trial court's inquiry under section 1094.5 "shall extend to the questions whether the respondent has proceeded without, or in excess of, jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." (Code Civ. Proc., § 1094.5, subd. (b).)

If no fundamental vested right is involved, the trial court's review is limited to examining the administrative record to determine whether the adjudicatory decision and its findings are supported by substantial evidence in light of the whole record. (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 144; *JKH Enterprises, Inc. v. Department of Industrial Relations* (2006) 142 Cal.App.4th 1046, 1057 (*JHK*).) When a case involves a restriction on a purely economic interest, such as a restriction on a property's owner return on

property, a court is far less likely to find a fundamental vested right. (*JKH*, *supra*, 142 Cal.App.4th at pp. 1060-1061.)

"Regardless of the nature of the right involved or the standard of judicial review applied in the trial court, an appellate court reviewing the superior court's administrative mandamus decision always applies a substantial evidence standard." (*JKH*, *supra*, 142 Cal.App.4th at p. 1058, citing *Fukada v. City of Angels* (1999) 20 Cal.4th 805, 824 and *Bixby v. Pierno, supra*, 4 Cal.3d at pp. 143-144.) Issues of law, including the interpretation of ordinances, are subject to independent appellate review. (*JKH*, *supra*, 142 Cal.App.4th at p. 1058, fn. 11.) "If the administrative findings are supported by substantial evidence, the next question is one of law—whether those findings support the agency's legal conclusions or its ultimate determination." (*Id*. at pp. 1058-1059.)

"In reviewing an agency's compliance with CEQA in the course of its legislative or quasi-legislative actions, the court's inquiry 'shall extend only to whether there was a prejudicial abuse of discretion.' [Citation.] Such an abuse is established 'if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence.'" (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 426, fn. omitted. (*Vineyard*)) "An appellate court's review of the administrative record for legal error and substantial evidence in a CEQA case, as in other mandamus cases, is the same as the trial court's: The appellate court reviews the agency's action, not the trial court's decision; in that sense appellate judicial review under CEQA is de novo." (*Id.* at p. 427.)

DISCUSSION

I.

The Hillside Ordinance Did Not Amend the CCSP.

The Hillside Ordinance prohibits grading on slopes exceeding 30 percent "where such land areas exceed 1 acre in size and have a minimum dimension exceeding 50′ in all directions." The CCSP allows for a single family use designation which is "typically located on slopes of over 30 percent as well as in canyon areas." The Madrona Project includes such single family use designation homes. In Resolution No. 2014-040, the City found that the Hillside Ordinance did not apply to land within the CCSP.[3]

If the Hillside Ordinance were applicable to the area subject to the CCSP, the issue would arise whether the Hillside Ordinance and the CCSP are inconsistent. The Madrona Project would violate the Hillside Ordinance, if applicable, in at least three ways: (1) Madrona Project would require grading of slopes in excess of 30 percent; (2) the Madrona Project includes "[n]umerous large manufactured slopes" not all of which

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[3] Resolution No. 2014-040 includes this finding: "The City adopted a Hillside Management Ordinance in 1994, approximately eight years after adoption of the CCSP. The Hillside Management Ordinance was not made applicable to the CCSP area at the time of its adoption, but instead was an implementation measure from the City's 1992 Sphere of Influence Vision Document, a study that revealed hillside issues within Brea's Sphere of Influence outside of its jurisdictional boundaries. The Hillside Management Ordinance approval documentation provides no reference applying it to the CCSP and does not provide recitals regarding, or ordain modifications Jto, the CCSP while the Ordinance was made specifically applicable to other specific zoning districts. Lack of reference to the CCSP when other specific zones are mentioned supports the conclusion that the Hillside Management Ordinance was not made applicable to the CCSP area. Further, amendment of the CCSP was proposed in 2000 in order to incorporate protections enacted in the Hillside Management Ordinance into the CCSP. The 2002 amendment to the CCSP was approved by the Brea City Council in March 2001, approximately five months after the Project was deemed complete. In response to litigation filed by the Applicant's predecessor in interest challenging the validity of applying the 2002 amendment to the CCSP, the 2002 amendment was deemed inapplicable to the Project. Thus the Hillside Management Ordinance is inapplicable to the Project."

will meet the Hillside Ordinance's requirement that all slopes greater than 10 feet be "landform graded . . . so that their ultimate appearance will resemble a natural slope" (Brea City Code, § 20.56.060(E)(4)); and (3) the developer did not obtain a hillside development permit for the project, as the Hillside Ordinance requires (*id.*, § 20.56.030).

OSLIC contends the Hillside Ordinance does not apply to the area subject to the CCSP because the City intended the ordinance to apply only to areas within the City's "sphere of influence" (future annexation areas), and not to areas within the city limits. The Hillside Ordinance plainly states it applies "to parcels of land which *currently exist within* or are annexed into the City of Brea and having slopes of 10% or more." (Italics added.) This language is unambiguous. The plain meaning controls and we have no reason to resort to extrinsic sources of interpretation. (*Tract 19051 Homeowners Assn. v. Kemp* (2015) 60 Cal.4th 1135, 1143.)

The Hillside Ordinance was not enacted, however, in compliance with statutory procedures for amending a specific plan. California law requires each county and city to prepare and "adopt a comprehensive, long-term general plan for the physical development of the county or city, and of any land outside its boundaries which in the planning agency's judgment bears relation to its planning." (Gov. Code, § 65300; see *Lesher Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 535 (*Lesher*).) The general plan becomes "a '"constitution" for future development' [citation] located at the top of 'the hierarchy of local government law regulating land use.'" (*DeVita v. County of Napa*, *supra*, 9 Cal.4th at p. 773.)

A specific plan is the step below the general plan in the land use approval hierarchy and is used to systematically implement the general plan in particular geographical areas. (Gov. Code, § 65450.) A specific plan typically provides for every aspect of development. (Gov. Code, §§ 65451, 65452.) When an area is covered by a specific plan, no zoning ordinance may be adopted, amended, or applied to a project

within that area unless it is consistent with the specific plan. (Gov. Code, §§ 65455, 65867.5, subd. (b); see *Lesher*, *supra*, 52 Cal.3d at p. 544.)

State planning and zoning law provides that, when a land use or zoning ordinance is proposed, a city's planning commission must make a written recommendation as to whether the ordinance should be adopted. This recommendation must include "the reasons for the recommendation, the relationship of the proposed ordinance or amendment to applicable general and specific plans, and shall be transmitted to the legislative body in such form and manner as may be specified by the legislative body." (Gov. Code, § 65855.)

Adoption of a specific plan is a legislative act. (*Yost v. Thomas* (1984) 36 Cal.3d 561, 570-571.) Thus, in order to amend a specific plan, such as the CCSP, the city or county must follow certain procedures set forth in the Government Code. Section 65453, subdivision (a), of the Government Code provides that "[a] specific plan shall be prepared, adopted, and amended in the same manner as a general plan, except that a specific plan may be adopted by resolution or by ordinance and may be amended as often as deemed necessary by the legislative body." The necessary procedures to adopt or amend a general plan, and therefore the procedures for amending a specific plan, are set forth in Government Code section 65350 et seq.

The amendment process begins with a requirement that the city or county provide the opportunity for citizens, public agencies, community groups, and others to become involved in the process through public hearings. (*Id.*, § 65351.) The planning agency of the city or county should refer the proposed action to other entities and agencies for input. (*Id.*, § 65352, subd. (a).) The city or county then must hold a public hearing before its planning agency (*id.*, § 65353, subd. (a)), and, if the proposed action would affect the permitted uses or intensity of uses of real property, must give notice to the real property owner at least 10 days prior to the hearing (*id.*, §§ 65091, subd. (a)(1),

65353, subd. (b).) The required notice must include the date, time, and place of the hearing, the identity of the hearing body, and a general description of the real property that is the subject of the hearing. (*Id.*, §§ 65090, subd. (b), 65094.) Following the duly noticed public hearing, the planning agency must provide a recommendation on the proposed action to the city council by a required vote of a majority of the entire planning commission. (See *id.*, § 65354.) The city or county legislative body must conduct another public hearing on the proposed action, which must be noticed in the same manner as the planning commission hearing. (See *id.*, § 65355.) The legislative body must act by resolution or ordinance. (*Id.*, § 65356.)

In addition, Government Code section 65853 provides: "A zoning ordinance or an amendment to a zoning ordinance, which amendment changes any property from one zone to another or imposes any regulation listed in Section 65850 not theretofore imposed or removes or modifies any such regulation theretofore imposed shall be adopted in the manner set forth in Sections 65854 through 65857, inclusive." These procedures include a noticed public hearing before the city or county planning agency (*id.*, § 65854), a written recommendation by the planning agency to the legislative body (*id.*, § 65855), and approval by the legislative body (*id.*, § 65857).

There is no evidence in the appellate or administrative record that the City complied with all of the requirements for amending a specific plan or for amending a zoning ordinance when the City enacted the Hillside Ordinance in 1994. In Resolution No. 2014-040, the City found that it did not intend the Hillside Ordinance to apply to the CCSP: "The Hillside Management Ordinance approval documentation provides no reference applying it to the CCSP and does not provide recitals regarding, or ordain modifications to, the CCSP while the Ordinance was made specifically applicable to other specific zoning districts. Lack of reference to the CCSP when other specific zones are mentioned supports the conclusion that the Hillside Ordinance was not made

applicable to the CCSP area." When, in 2001, the Brea City Council decided to apply certain provisions of the Hillside Management Ordinance to the CCSP, the City went through the process for amending the CCSP.

HFE does not address OSLIC's argument that the City did not comply with the requirements for amending the CCSP or amending a zoning ordinance when enacting the Hillside Ordinance. HFE does not contend the City satisfied those requirements. Instead, HFE argues that, from the time of the developer's initial application in 1994 until 2008, the City took the position the Hillside Ordinance applied to the Canyon Crest and the Madrona Project. It was only when HFE pointed out in 2008 that the Hillside Ordinance would bar the entire Madrona Project that the City decided the project was not subject to the Hillside Ordinance. HFE argues that, as a consequence of the City's inconsistency, we should not give any deference to the City's interpretation of the Hillside Ordinance.

An agency's interpretation of its own regulations is usually entitled to deference, the amount of which depends on the situation. (*Butts v. Board of Trustees of California State University* (2014) 225 Cal.App.4th 825, 840.) Whether the agency has consistently followed a particular interpretation and the length of time it has done so is a consideration in determining the amount of deference to be given to that interpretation. (*Tower Lane Properties v. City of Los Angeles* (2014) 224 Cal.App.4th 262, 276.) The agency's interpretation is not binding "and ultimate responsibility for interpretation of an ordinance rests with the court." (*Ibid.*)

On the issue of statutory interpretation, we agree with HFE that the Hillside Ordinance applies to all areas within the City limits. We are not, however, interpreting or parsing the language of the Hillside Ordinance by analyzing whether the City complied with statutory requirements for amending a specific plan or zoning regulation when it enacted that ordinance. Instead, we are examining the record to determine whether there

is evidence the City complied with requirements imposed by specific provisions of the Government Code. Because the City did not comply with those requirements, the Hillside Ordinance does not amend the CCSP and does not change any zoning regulations for land subject to the CCSP. As a consequence, we need not reach the issue whether the Hillside Ordinance is inconsistent with the CCSP. Nor need we reach the issue whether the City's decision to approve the Madrona Project was based on such inconsistency.

II.

The Madrona Project is Inconsistent with the General Plan's Woodland Preservation Policy

As we have explained, Government Code section 65300 requires each county or city to prepare and "adopt a comprehensive, long-term general plan for the physical development of the county or city, and of any land outside its boundaries which in the planning agency's judgment bears relation to its planning." The general plan becomes "a '"constitution" for future development' [citation] located at the top of 'the hierarchy of local government law regulating land use.'" (*DeVita v. County of Napa, supra,* 9 Cal.4th at p. 773.)

The General Plan makes the management, protection, and preservation of oak and walnut trees and woodlands a policy goal and objective. In a section of the General Plan called "Issues and Opportunities" an issue identified for the CCSP area is "establishing criteria for the *continued protection* of important natural resources such as oak groves." (Italics added.) In a section describing the CCSP, the General Plan states: "Carbon Canyon features many diverse resources. The area is a well-defined canyon system characterized by prominent ridgelines, steeply sloping terrain and drainage courses, the two primary of which are Carbon Canyon and Soquel Canyon creeks. Several plant communities exist within the area and include oak groves, walnut groves,

coastal sage scrub, chaparral, limited riparian and disturbed areas where non-native plants are found."

In the section called "Open Space and Conservation Elements", the General Plan states: "Major vegetation in the riparian and oak-woodland associations and the California native walnut woodlands represent significant vegetation over six feet (primarily trees). These areas offer visual and recreational activities as well as shelter and food for wildlife habitat." The Open Space and Conservation Elements section also include this finding: "Diversity of wildlife is related to the vegetation located in the planning area. The most diverse wildlife habitat is associated with riparian vegetation which is found along stream courses. The next most diverse wildlife habitat is that associated with the vegetation over six feet, primarily of the oak-woodland association. According to previously completed studies, there are rare or endangered species' habitats in the area." Objective 19 of the Open Space and Conservation Elements is, "[i]dentify unique stands of oak and significant wildlife habitats during the environmental impact review process." Objective 20 of the Open Space and Conservation Elements is, "[i]ncorporate into specific plan areas of walnut and oak-woodland vegetation over six feet in height and vegetation with any recreational of flood easements." Policy 8 of the Open Space and Conservation Elements section is, "[m]anage stands of large oak trees as a *unique* natural and visual resource." (Italics added.)

Thus, management and protection of walnut and large oak trees as "important natural resources" and as "a unique natural and visual resource" is written into the City's constitution. This constitutional mandate is incorporated into the CCSP, the next level in the land use regulation hierarchy. Under a section called "Oak Tree Protection" the CCSP states: "Stands of oak trees are identified as important biological and aesthetic resources to the canyon area, and are identified, along with stands of other trees, in the Specific Plan EIR." The CCSP provides that "[p]rocedures are established,

as part of Land Divisions and Development Review Plan, which provide for the locations of roadways and other improvements which seek the least amount of impact to oak trees" and recognizes that "[c]onsideration of the oaks is necessary in the design phase, implementation (construction) phase and post-construction/maintenance phase if preservation is to be successful."

"'[T]he propriety of virtually any local decision affecting land use and development depends upon consistency with the applicable general plan and its elements.'" (*Citizen of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 570.) The requirement of consistency between the general plan and land use decision is the "'"linchpin of California's land use and development laws."'" (*Families Unafraid to Uphold Rural etc. County v. Board of Supervisors* (1998) 62 Cal.App.4th 1332, 1336 (*Families Unafraid*).) "A project is consistent with the general plan '"if, considering all its aspects, it will further the objectives and policies of the general plan and not obstruct their attainment."'" (*Ibid.*) Although a "project need not be in perfect conformity with each and every general plan policy," the project must be "'compatible with' the objectives, policies, general land uses and programs specified in the general plan." (*Ibid.*)

The CEQA findings approved by the City confirm that the Madrona Project would eliminate about 10.23 acres of coast live oak and woodland and call for the removal of nearly 1,400 oak and walnut trees. Another 15.16 acres of walnut and walnut woodlands would be affected. The Madrona Project has 16.97 acres of oak and oak woodland and 32.28 acres of walnut and walnut woodland. The Madrona Project therefore would eliminate over 60 percent of the oak and oak woodlands within the project area. According to a mitigation measure adopted by the City (mitigation measure 5.3-2), the Madrona Project will result in the removal of 17.54 acres of oak and walnut woodlands and 30.43 acres of oak and walnut woodland ecotones.

The City recognized such massive destruction of woodland and oak and walnut trees, even with the proposed mitigation measures, would be inconsistent with the General Plan because replacement trees are not the same as the native ones. The 2012 EIR Update states: "A conflict with the Brea General Plan [Open Space and Conservation Elements] policies for oak and walnut woodland preservation would remain, however, and that impact is considered to be significant and unavoidable" and "both the Madrona and Canyon Crest Plans would result in a significant conflict with Brea General Plan Open Space and Conservation Element . . . policies that specify a *preference* for preservation of oaks and walnut woodlands in place." (Italics added.) The 2007 DEIR likewise recognized the proposed mitigation "is not sufficient to mitigate the significant conflict with [Open Space and Conservation Elements] Objective 20 and Policy 8, which indicate a preference for preservation, rather than replacement of these declining native tree species."

Resolution No. 2014-039 recognizes that "[s]pecimen trees (e.g., oak, sycamore, walnut, riparian, or other trees) with a diameter of 5 inches or greater measured at 12 inches above ground level are protected under the [CCSP]," the Madrona Project would remove about 446 oak trees and 917 walnut trees, and "the loss of these numbers of oaks and walnut trees is considered a significant impact." Mitigation measure 5.3-2 includes a tree management plan providing for the planting of oak and walnut trees at replacement ratio of about 2:1 and preserving as designated open space "[w]oodland not impacted by the Proposed Project." Nonetheless, Resolution No. 2014-040, certifying the Final EIR for the Madrona Project, includes a resolution that the Madrona Project conflicts with the General Plan's woodland preservation policies and, even with mitigation, "the impacts remain significant."

There are other reasons why impacts would remain significant even with the mitigation measures. Mitigation measure 5.3-2 gives the landowner a full year after

initial vegetation removal to commence planting replacement trees and requires the landowner to "monitor" woodland vegetation for at least five years. The requirement that the landowner monitor the woodland revegetation for at least five years is an indication of the extent of destruction created by the Madrona Project. Moreover, the landowner is only required to monitor mitigation and is not required to guaranty any degree of success. Mitigation measure 5.3-2 permits tree mitigation to be carried out "off-site" elsewhere in the Puente/Chino Hills area "if the Project site does not provide sufficiently biologically appropriate areas to achieve the entire amount of required mitigation." This means it is possible the mitigation measures will not actually mitigate the loss of woodlands in the Madrona Project area or even within the CCSP area.

The City's CEQA findings also concluded the Madrona Project's conflicts with General Plan policies for oak and walnut tree preservation are "significant and unavoidable." The CEQA findings state: "The Madrona [Project] would result in a conflict with Brea General Plan Open Space and Conservation Element . . . policies that specify a preference for preservation of oaks and walnut woodlands in place, as part of the land use plan. However, revisions to the Canyon Crest project that resulted in the current Madrona Project substantially reduced the amount of impacted oak and walnut woodlands and would replace those with a higher quantity of woodlands in accordance with a Tree Management Plan." The CEQA findings state that mitigation measure 5.3-2 and the smaller area of the Madrona Project, as compared with Canyon Crest, "will reduce the impacts, but do not eliminate the conflict with the Brea General Plan [Open Space and Conservation Elements] policies for Oak and Walnut preservation." Yet, despite finding a conflict that "would not be avoided," the City found the Madrona Project "to be consistent with the City of Brea General Plan and the [CCSP]" because "[s]uccessful implementation of the tree management program proposed by the Applicant, with Mitigation Measure 5.3-2, would more than offset the number of

specimen trees impacted by this Project." However, as we have explained, mitigation measure 5.3-2 at best requires OSLIC only to "monitor" mitigation efforts for five years, offers no guarantee of success or recourse in the case of lack of success, and permits replacement trees to be planted off-site.

In reviewing an agency's decision for consistency with its general plan, we accord great deference to the agency's determination. (*East Sacramento Partnerships for a Livable City v. City of Sacramento* (2016) 5 Cal.App.5th 281, 305.) A general plan reflects a range of competing interests, and the governmental agency is allowed to weigh and balance the plan's policies when applying them. (*Ibid.*) It has been said that the reviewing court's role "'"is simply to decide whether the city officials considered the applicable policies and the extent to which the proposed project conforms with those policies."'" (*Ibid.*)

Yet this deferential standard does not mean our role as a reviewing court is merely to uncritically accept and defer to whatever the governmental entity decides. Destruction of over 17 acres of oak and walnut woodlands, removal of some 1,400 specimen trees, and significant damage to over half the woodland acreage is, as the City itself recognized, in conflict with the General Plan's policy of managing, protecting, and preserving California native coast live oak and walnut woodlands "as a unique natural and visual resource." The proposed mitigation measures do not resolve the conflict because, as the 2007 DEIR concluded, the General Plan's preference is "for preservation, rather than replacement of these declining native tree species." Destruction is inconsistent with management, and replacement is inconsistent with preservation. The Madrona Project is not "'compatible with' the objectives, policies, general land uses and programs specified in the general plan." (*Families Unafraid, supra,* 62 Cal.App.4th at p. 1336.)

OSLIC argues (1) the City found the Madrona Project was consistent with all but two out of 197 specific policies, goals, objectives, and guidelines of the City's General Plan, (2) the tree preservation policies are not mandatory, and (3) the tree preservation policies are not fundamental to the General Plan. As to the first argument, it is true the City included as an attachment to Resolution No. 2014-040 a matrix identifying goals, policies, and programs from the City's General Plan and commenting whether the Madrona Project is consistent with each of those goals, policies, and programs. Many if not most of the goals, policies, and programs are broad and are not particularly related to the Madrona Project. For example, the identified goals, policies, and programs include "minimize the potential for loss of life and property in the event of a seismic event," "minimize noise impacts to the people who live and work in Brea," and "encourage alternate modes of transportation."

Although many of the identified goals, policies, and programs are connected with the effects of the Madrona Project, merely totaling up the number of identified goals, policies, and programs with which the project is deemed consistent does not give an accurate or meaningful assessment of whether the project is consistent with the General Plan. A project may be deemed inconsistent with a general plan if the project conflicts with but one policy. (*San Bernardino Valley Audubon Society, Inc. v. County of San Bernardino* (1984) 155 Cal.App.3d 738, 753.) "[T]he nature of the policy and the nature of the inconsistency are critical factors to consider." (*Families Unafraid, supra,* 62 Cal.App.4th at p. 1341.)

OSLIC's second point discounts the importance of the policy identifying protection, preservation, and management of oak and walnut woodland. Though not phrased in mandatory language (e.g., the City "must preserve" all native woodlands), the policy means the City has committed itself in its own General Plan to advance the protection, preservation, and management of oak and walnut woodland. Policies mean

something. The City has never taken the position that these policies are just suggestions that can be ignored when convenient.

As to its third point, OSLIC quotes passages from Resolution No. 2014-040 that the General Plan does not require tree preservation, only management, and the CCSP envisions a balance between reasonable development and natural resources. Resolution No. 2014-040 is part of the agency decision we are reviewing, not proof that decision was within the agency's discretion. Tree preservation is an important component of the General Plan, as demonstrated by the plan's description of oak and walnut trees as "important natural resources" and "a unique natural and visual resource." The CCSP makes consideration of the oaks necessary for any development plan.

The nature of the inconsistency between the Madrona Project and the General Plan is critical. The Madrona Project does not call for destruction of just some of the native oak and walnut woodland. Destruction of over 10 acres of woodland and 1,400 trees is neither "management" of native trees nor a "balance" between reasonable development and natural resources. The City's decision to approve the Madrona Project in the face of the inconsistency between the Madrona Project and the General Plan constituted an abuse of discretion and is sufficient ground for affirming the trial court's decision.

III.

The Final EIR Is Adequate Except as to Consistency with CCSP Grading Standards.

The trial court found the Final EIR to be inadequate in many ways, including: (1) the City erred by using a threshold of 3,500 metric tons of carbon dioxide equivalent ($MTCO_2e$) to assess greenhouse gas emissions; (2) the City failed to determine whether the Madrona Project was consistent with a sustainability plan adopted by City; (3) the Final EIR's greenhouse gas emissions calculations were based on an inappropriate

residential trip generation rate; (4) the Final EIR does not address whether the Madrona Project is consistent with the CCSP's grading standards; and (5) the Final EIR included unauthorized trail use by third parties in establishing a baseline for impacts to recreation.

A. *The City's Selection of Greenhouse Gas Threshold*

"In California's landmark legislation addressing global climate change, the California Global Warming Solutions Act of 2006 [citations], our Legislature emphatically established as state policy the achievement of a substantial reduction in the emission of gases contributing to global warming." (*Center for Biological Diversity v. Department of Fish & Wildlife* (2015) 62 Cal.4th 204, 215.) As a consequence, climate-change impacts are "significant environmental impacts requiring analysis under CEQA." (*Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 90.) Such impacts include analysis of a project's greenhouse gas emissions. (*Center for Biological Diversity v. Department of Fish & Wildlife, supra,* 62 Cal.4th at pp. 216-217.)

CEQA guidelines provide that a lead agency should try to "describe, calculate or estimate" the amount of greenhouse gases a project will emit and that when assessing the significance of greenhouse gas emissions the lead agency should consider whether "the project emissions exceed a threshold of significance that the lead agency determines applies to the project." (Cal. Code Regs., tit. 14, § 15064.4, subds. (a), (b).) (All references to the CEQA Guidelines are to the CEQA guidelines, California Code of Regulations, title 14, section 15000 et seq.)

The City determined that a threshold of significance of 3,500 $MTCO_2e$ per year for greenhouse gas emissions was appropriate for the Madrona Project. HFE argues the City abused its description by using that threshold because the City had used a threshold of 3,000 $MTCO_2e$ per year for a residential project approved in 2010 and therefore is "switching thresholds, apparently project-by-project."

CEQA does not require the use of absolute numerical thresholds to measure the significance of greenhouse gas emissions. (*Center for Biological Diversity v. Department of Fish & Wildlife, supra,* 62 Cal.4th at p. 221.) A lead agency has discretion to develop its own thresholds of significance. (*Save Cuyama Valley v. County of Santa Barbara* (2013) 213 Cal.App.4th 1059, 1068.)

In 2008, the South Coast Air Quality Management District (SCAQMD) adopted three "bright line" thresholds for greenhouse gas emissions rates. The first threshold, for purely residential developments, was 3,500 $MTCO_2e$ per year. The second threshold, for commercial development, was 1,400 $MTCO_2e$ per year. The third threshold, for mixed-use developments or all land use types, was 3,000 $MTCO_2e$ per year. SCAMQD recommended the lead agency decide which threshold is most appropriate for a project.

The Madrona Project is a purely residential development; therefore, the City's decision to use the 3,500 $MTCO_2e$ per year threshold was appropriate. In July 2010, the City did use a 3,000 $MTCO_2e$ per year threshold when approving a different residential development. However, the requirement that a lead agency consistently use one threshold for all developments of a particular category does not appear until September 2010 in minutes of a meeting of an SCAQMD working group.

B. *Consistency with Sustainability Plan*

On November 15, 2012, the City circulated the 2012 EIR Update. Later that month, the City completed the "2012 City of Brea Sustainability Plan: Leadership in Energy Efficiency" (the Sustainability Plan).[4] The trial court found, and HFE argues, the

[4] The Sustainability Plan describes itself as follows: "This Sustainability Plan is part of a suite of sustainability services. It is based in part on the City' s 2012 Greenhouse Gas Inventory, with a baseline year of 2010, and the City's 2012 Energy Action Plan developed by The Energy Coalition. Together, these three documents help chart a course for Brea to continue to serve residents and businesses and prepare for anticipated regulation. [¶] This Plan presents resource efficiency goals, matched with policies and

City failed to consider whether the EIR for the Madrona Project was consistent with the Sustainability Plan.

Section 15064.4, subdivision (b)(3) of the CEQA Guidelines states that a lead agency should consider "[t]he extent to which the project complies with regulations or requirements adopted to implement a statewide, regional, or local plan for the reduction of greenhouse gas emissions." OSLIC contends the City had no obligation to consider the Sustainability Plan because it is not a regulation or requirement within the meaning of section 15064.4, subdivision (b)(3). The Sustainability Plan was adopted to implement Assembly Bill 32, the Global Warming Solutions Act of 2006, which set a statewide goal for reduction of greenhouse gas emissions. (*Center for Biological Diversity v. Department of Fish & Wildlife, supra,* 62 Cal.4th at pp. 215, 221.) Under Assembly Bill 32, the State Air Resources Board was required to prepare and approve a "'scoping plan' for achieving 'the maximum technologically feasible and cost-effective' reductions in greenhouse gases by 2020." (*Id.* at p. 216.) The scoping plan encouraged local governments to establish similar goals for reduction of local greenhouse emissions. The City adopted the Sustainability Plan in accordance with Assembly Bill 32.

"The Scoping Plan adopted pursuant to Assembly Bill 32 is a plan for reducing greenhouse gas emissions, but does not itself establish the regulations by which it is to be implemented; rather, it sets out how existing regulations, and new ones yet to be adopted at the time of the Scoping Plan, will be used to reach Assembly Bill 32's emission reduction goal. At the time the Natural Resources Agency promulgated Guidelines section 15064.4, the agency explained that the Scoping Plan 'may not be appropriate for use in determining the significance of individual projects . . . because it is conceptual at this stage and relies on the future development of regulations to implement

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implementation steps to save energy, water, and other resources, while aligning Brea for AB 32 compliance." (Fn. omitted.)

the strategies identified in the Scoping Plan.'" (*Center for Biological Diversity v. Department of Fish & Wildlife, supra,* 62 Cal.4th at p. 222.) "In short, neither Assembly Bill 32 nor the Scoping Plan establishes regulations implementing, for specific projects, the Legislature's statewide goals for reducing greenhouse gas emissions. Neither constitutes a set of 'regulations or requirements adopted to implement' a statewide reduction plan within the meaning of Guidelines section 15064.4, subdivision (b)(3)." (*Id*. at p. 223.)

The Sustainability Plan, as the scoping plan, does not establish regulations or requirements to implement the Legislature's statewide goals for reducing greenhouse gas emissions. A purpose of the Sustainability Plan is to "steer[] the City of Brea and its leaders and stakeholders to a reasoned approach to sustainability, quality of life, and regulatory compliance related to greenhouse gas mitigation." The Sustainability Plan has three phases. Phase I sets forth broad goals and policies to be achieved primarily through "ordinances, public education, utility programs, regional financing, and public/private partnerships to achieve the goals." Phase I activities were to be completed in 2013 and 2014. Phase II and Phase III "expand the base of measures implemented in Phase I." Those "measures and phases will be refined in years to come" and "will be based on economic conditions, additional regulation, advances in technology and financing."

The Sustainability Plan is not a regulation or requirement within the meaning of section 15064.4, subdivision (b)(3) of the CEQA Guidelines and, therefore, the City was not required to consider whether the Madrona Project complies with that plan. However, as HFE points out, the City, in the 2012 EIR Update, states, "[i]mpacts involving greenhouse gas emissions would be considered to be significant if they would [¶] . . . [¶] . . . [c]onflict with an applicable plan, policy, or regulation adopted for the purpose of reducing the emissions of greenhouse gases." In other words, the City

itself set compliance with the Sustainability Plan as a threshold of significance for emission of greenhouse gases.

Local governments may use "greenhouse gas emission reduction plans to provide a basis for the tiering or streamlining of project-level CEQA analysis." (*Center for Biological Diversity v. Department of Fish & Wildlife, supra,* 62 Cal.4th at p. 230.) "'[A] general plan, a long range development plan, or a separate plan to reduce greenhouse gas emissions' [citation] may, if sufficiently detailed and adequately supported, be used in later project-specific CEQA documents to simplify the evaluation of the project's cumulative contribution to the effects of greenhouse gas emissions." (*Ibid.*) The Sustainability Plan is not sufficiently detailed, however, to serve as the threshold to measure the significance of greenhouse gas emissions.

Having undertaken the effort to establish the Sustainability Plan, it would have made sense for the City to assess whether the Madrona Project—a massive construction project with significant environment impacts—complied with that plan.[5] The question before us, however, is only whether the Final EIR for the Madrona Project was inadequate for not addressing the Sustainability Plan. For the reasons we have explained, the Sustainability Plan is not a regulation or requirement within the meaning of section 15064.4, subdivision (b)(3) of the CEQA Guidelines and is not sufficiently detailed to act as a basis for evaluating the Madrona Project's effects on greenhouse gas emissions.

[5] The City could have considered the Sustainability Plan even though it was completed just two weeks after the circulation of the 2012 EIR Update because the Sustainability Plan existed, as least in draft form, while the 2012 EIR Update was being completed. Moreover, the Sustainability Plan was approved over a year before the Final EIR was released and nearly 20 months before the Madrona Project was approved.

C. *Use of 9.57 Trip Generation Rate*

To assess greenhouse gas emission rates, the Final EIR uses a residential trip generation rate of 9.57 average daily trips (ADT). The 2013 FEIR Update explains: "The traffic study performed in July 2012 for the Madrona project uses the Institute of Transportation Engineers' (ITE) trip rate for Single Family Detached homes from the 8th Edition Trip Generation Manual. This housing category includes all single-family detached homes on individual lots that are typically located in a suburban subdivision. The rate is continuously updated with each subsequent release of the ITE manual as additional survey data is incorporated into the manual."

HFE argues it was inappropriate to use the ITE trip generation rate of 9.57 ADT and, instead, the Final FEIR should have used the hypothetical trip rate of 12 ADT from the San Diego Association of Governments (SANDAG) Traffic Generators Manual. According to HFE, use of a 12 ADT trip rate would yield a greenhouse gas emission rate for the Madrona Project greater than 3,500 $MTCO_2e$ per year.

Substantial evidence supported the City's decision to use the ITE trip generation rate of 9.57 ADT. The City's traffic engineer explained that "[u]se of ITE trip generation factors is the standard of practice in traffic impact analysis and transportation planning throughout California and in other parts of the country" and that "Caltrans and Orange County [congestion management program] guidelines require use of ITE trip factors, and the models that calculate noise, air pollutant emissions and [greenhouse gases] also apply ITE trip factors, per the industry standard." At the March 2014 Brea City Council hearing, an OSLIC traffic engineer testified that, in his professional opinion, the ITE trip generation rate of 9.57 ADT is "the most appropriate" rate for the Madrona Project. (Pub. Resources Code, § 21080, subd. (e)(1) ["substantial evidence includes . . . expert opinion supported by fact"]; CEQA Guidelines, § 15384, subd. (b) [same].)

HFE contends the City conducted an analysis using the SANDAG trip generation rate, which is more appropriate to the City, yet "failed to update its [greenhouse gas emission rate] analysis in light of this new evidence." In response to written comments and demands from HFE, the City conducted a supplemental analysis using a hypothetical rate of 12 ADT. The City concluded the supplemental analysis did produce a higher daily trip count, but did not produce new project impacts. The City also concluded the ITE trip generation rate remained appropriate.[6] The 2013 FEIR Update also explains that the 12 ADT generation rate is for very large lots for "estate" size single family units (lot sizes three times those of the Madrona Project) and was based on surveys of four residential neighborhoods in San Diego performed in 1994. "Because of the age of the data, the small sample size and the absence of peak hour data, the SANDAG rate is not typically used in Orange County for traffic impact studies for residential single family subdivisions."

D. *Consistency With CCSP's Grading Standards*

HFE contends the Final EIR is inadequate because it does not include an analysis of whether the Madrona Project is consistent with the grading standards of the CCSP. We agree the Final EIR is inadequate in this respect. CEQA requires a lead

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[6] A City staff report stated: "This supplemental work was provided to demonstrate that such a modeling change would not affect the findings of the study. In its background and scope section, that supplementary work clearly states that . . . . 'A *hypothetically* (emphasis added) higher trip rate is used here to verify that the impact analysis findings would not be changed by the use of the higher rate.' The supplementary work did not replace the EIRs core analysis or its findings. Within the supplementary modeling, the higher trip generation rate used of 12 trips per home, of course, resulted in higher daily trip counts for the project. However, no new project impacts were found based on this rate. It should additionally be noted (as is stated within the supplementary analysis) that the 12 trips per unit generation rate used for this comparison is speculative and not derived from large sampling over time. Staff maintains that use of the ITE established trip generation rates for the project's traffic analysis, noise analysis, and air quality/GHG analysis remains appropriate."

agency to determine whether a project conflicts with any applicable land use plan, policy, or regulation. (*Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 929.) Neither the Final EIR, nor any of the earlier EIR's, address whether the Madrona Project is consistent with the CCSP's grading standards.

The Final EIR, as certified by the City, includes the 2007 DEIR for Canyon Crest, the 2008 FEIR incorporating the City planning commission's resolution approving the 2008 FEIR for Canyon Crest, and the 2012 EIR Update. Attachment A to the planning commission's resolution is a detailed analysis of Canyon Crest's consistency with the CCSP's grading and landscaping design guidelines. The 2008 FEIR incorporates attachment A in full by reference, and, in turn, the Final EIR incorporates the 2008 FEIR.

An EIR may incorporate documents and analysis by reference if doing so adequately informs the public and decisionmakers of information necessary to evaluate the project's environmental impact. (*Habitat & Watershed Caretakers v. City of Santa Cruz* (2013) 213 Cal.App.4th 1277, 1293.) But attachment A to the planning commission's resolution and the 2008 FEIR address only whether Canyon Crest was consistent with the CCSP's grading standards. They do not address the Madrona Project.

OSLIC contends the Final EIR addresses the Madrona Project's consistency with the CCSP grading standards because 2012 EIR Update concludes that "the Madrona Plan would also be consistent with the land use policies of the CCSP." The full explanation for this conclusion is: "While the Madrona Plan comprises a smaller grading and development envelope than the Canyon Crest Plan, the home sites and landform alterations would generally occur in the same areas, at similar elevations, and with similar visual effects from off-site viewing locations. The Madrona Plan, like the Canyon Crest Plan, would generally be consistent with the design guidelines set forth in the [CCSP] that pertain to landform alteration and related effects on visual character and

quality of a subdivision project. Impacts to the visual quality and character of the Site and surroundings would be less than significant." The 2012 EIR Update also states that, under the Madrona Project, total grading requirements will be reduced by 4.85 million cubic yards. This is but a conclusion; it is not evidence to support the Final EIR.

OSLIC had its own expert prepare a report analyzing the Madrona Project's consistency with the CCSP's grading standards and in March 2014 submitted this report to the City. OSLIC contends this report supplies the necessary consistency analysis for the Madrona Project. The report was not part of the Final EIR or any of the EIR documents. The City could not rely on this report because reliance on information not incorporated into or described and referenced in the EIR itself is error. (*Vineyard, supra*, 40 Cal.4th at p. 442.)

OSLIC entreats us to accept its conclusion that the Madrona Project is consistent with the CCSP's grading standards. The fact the Madrona Project covers less area and requires less total grading than Canyon Crest does not necessarily mean the project complies with the CCSP's grading standards. The fix might be simple, but a fix is necessary because the Final EIR is inadequate.

E. *Analysis of Recreational Use*

The trial court found, and HFE argues, the Final EIR is inadequate because it failed to consider, in assessing the Madrona Project's impact on recreation, recreational trails used by the public. In this regard the 2013 EIR Update states: "There are no existing public recreational trails or other public recreational uses on this property; therefore, there are no legally established existing public recreation uses for the EIR Update to discuss."

"To decide whether a given project's environmental effects are likely to be significant, the agency must use some measure of the environment's state absent the project, a measure sometimes referred to as the 'baseline' for environmental analysis.

According to an administrative guideline for CEQA's application, the baseline 'normally' consists of 'the physical environmental conditions in the vicinity of the project, as they exist at the time . . . environmental analysis is commenced.'" (*Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 315.) In determining the impact of the Madrona Project on public recreational uses, did the City err by not including unauthorized use of informal trails on the property in the baseline measure?

Public Resources Code section 5780.1, subdivision (h) defines "recreation facility" as "an area, place, structure, or other facility under the jurisdiction of a public agency that is used either permanently or temporarily for community recreation, even though it may be used for other purposes." Although this definition is from the chapter of the Public Resources Code entitled "Recreation and Park Districts," we find it useful here. (See *Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 716 ["words should be given the same meaning throughout a code unless the Legislature has indicated otherwise"].) The property on which the Madrona Project would be built is privately owned and maintained, and there is no evidence the owner ever granted permission to anyone to hike on it.

We do not appreciate OSLIC's accusations of "illegal trespassing" and "illegal activities by third parties." Such descriptions of people seeking nothing more than to enjoy the open spaces of Orange County is unwarranted, unhelpful, and unnecessary. Nonetheless, OSLIC has a valid point that public ownership, maintenance, or control is an essential element of the definition of a recreation facility.

HFE relies on a series of cases in which a baseline for environmental review included allegedly illegal conduct by the project applicant. (*Center for Biological Diversity v. Department of Fish & Wildlife* (2015) 234 Cal.App.4th 214, 248-252 [baseline for continuing project properly took into account owner's fish hatchery and

stocking enterprise]; *Eureka Citizens for Responsible Government v. City of Eureka* (2007) 147 Cal.App.4th 357, 370 [baseline properly took into account existing playground built contrary to code]; *Fat v. County of Sacramento* (2002) 97 Cal.App.4th 1270, 1278-1280 [baseline properly included airport's prior unauthorized expansion]; but see *Riverwatch v. County of San Diego* (1999) 76 Cal.App.4th 1428, 1452 [EIR was not required to develop environmental baseline accounting for prior conduct of project applicant].) It is one thing to develop a baseline accounting for the owner/applicant's prior use of the property; it is quite another to develop a baseline accounting for the unauthorized use by third parties. The Final EIR was not required to account for unauthorized use of informal trails in setting a baseline for assessing the Madrona Project's impact on recreational uses.

DISPOSITION

We affirm the judgment with respect to the writ ordering the City to repeal Resolution Nos. 2014-039 and 2014-040. We modify the judgment to order the City to take no action regarding the project that is inconsistent with this opinion. As so modified, the judgment is affirmed. Respondents shall recover their costs on appeal.

FYBEL, J.

WE CONCUR:

O'LEARY, P. J.

IKOLA, J.