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LABOR, AGRICULTURE, AND BUSINESS

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF VENTURA

VENTURA COUNTY COALITION OF LABOR, AGRICULTURE, AND BUSINESS, a non-profit membership organization,

Petitioner,

v.

COUNTY OF VENTURA, a political subdivision of the State of California, and DOES 1-25, inclusive,

Respondents.

Case No. 56-2019-00527815-CU-WM-VTA

PETITIONER VENTURA COUNTY COALITION OF LABOR, AGRICULTURE, AND BUSINESS' OPENING BRIEF

Trial Date: October 13, 2021
Time: 10:00 a.m.
Dept.: 40
Judge: Hon. Mark Borrell

Action filed: April 25, 2019

[Case related to Case No. 56-2019-00527805-CU-WM-VTA]

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I. INTRODUCTION

The Ventura County Coalition of Labor, Agriculture, and Business ("CoLAB"), is a non-profit membership organization that identifies issues that impact businesses, and works to propose solutions to problems that impact Ventura County ("County"). Through this case, CoLAB seeks to hold the County accountable for completely evading environmental review on a massive project that imposes sweeping regulations on over 163,000 acres of land: a wildlife corridor ordinance ("Ordinance")[1] that theoretically allows for better movement of wildlife between natural habitats. CoLAB is not opposed to wildlife corridors. It is opposed to the regulation of hundreds of thousands of acres of property in a way that potentially exacerbates fire risks, in a heavily fire prone area, with no environmental review whatsoever. CoLAB does not ask the Court to prevent the County from instituting a wildlife corridor, but that it be instituted wisely, and with a full analysis of the potential risks and benefits.

During the administrative process, CoLAB uncovered documents showing that the Ordinance will likely do little to achieve its stated purpose. In the words of the staff/consultants who drafted the Ordinance: "it's obvious the biggest obstacle to movement are the freeways which the County has no control over. But, I'm hopeful that by showing that animal movement is happening in [Ventura County,] that we can convince the Board that small increases in regulations on fencing, lighting, buffers from streams and roadway crossings and the clustering of development in certain critical areas are justified." [AR 6477-6480.] The Ordinance's main proponents are thus the same ones who acknowledge that its sweeping regulations relating to fencing, lighting, buffers, and clustered development are ineffective in solving the real problem of animal movement: freeways. That did not stop the County from imposing its (admittedly ineffectual) regulations on thousands of acres of County land, and in the process, claiming inapplicable exemptions in order to evade CEQA review.

The Ordinance was originally part of the County's General Plan Update and subject to CEQA. However, it was plucked out of that process specifically to evade CEQA review. As part its attempt

[1] Entitled "County-Initiated Proposal to Amend the General Plan and Articles 2, 3, 4, 5, 9 and 18 of the Non-Coastal Zoning Ordinance (PL16-0127) to Establish a Habitat Connectivity and Wildlife Corridors Overlay Zone and a Critical Wildlife Passage Areas Overlay Zone, and to Adopt Regulations for These Areas."

to illegally piecemeal the project to evade CEQA, the County posits three exemptions, none of which are applicable.

The first is known as the "common sense exemption," set forth at 14 California Code of Regulations ("CEQA Guidelines") § 15061(b)(3). Under the exemption, evidence must support an agency determination that "it can be seen with a ***certainty*** that there is ***no possibility*** that the activity in question may have a significant effect on the environment." (*Id*., *emphases added*.) Here, evidence in the record (including detailed reports from expert environmental consultants) shows the opposite: potential environmental impacts of the Ordinance relating to fire hazards, agricultural and mineral resources, vehicle traffic, air quality, greenhouse gases, and community character. To determine whether an impact is significant, the County established guidelines specifying thresholds in over 35 categories. ("Assessment Guidelines.") Despite the thresholds being unequivocally surpassed in several different areas, the County stubbornly opted to stand by its purported common sense exemption – a decision that itself defies common sense.

The County also claims that the Ordinance is exempt under two categorical exemptions, which are similar in nature, and are often analyzed concurrently in the case law: Class 7 (CEQA Guidelines § 15307, Actions by Regulatory Agencies for Protection of Natural Resources) and Class 8 (CEQA Guidelines § 15308, Actions by Regulatory Agencies for Protection of the Environment). However, the Class 7-8 exemptions are inapplicable for three independent reasons, any one of which is sufficient to knock the Ordinance out of these classes. First, the County has chosen the wrong categorical exemption for the Ordinance, as there is another class – Class 33 (CEQA Guidelines § 15333, Small Habitat Restoration Projects) – that is directly on point for wildlife corridors, but due to the massive size of the Ordinance, it fails to qualify under Class 33, which limits the exemption to projects less than 5 acres in size. Second, Class 7-8 exemptions may only be employed in respect to projects that ***assure*** the protection of the environment and do not apply to projects that may themselves cause environmental harm. Here, because the Ordinance also increases the potential for impacts such as fire hazards, Classes 7-8 are inapplicable on their face. Third, a "categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances." Here, there are two

unusual circumstances that the County has ignored: 1) size/magnitude of 163,000 acres of regulations, and 2) regulations of vast swaths of land located in high fire risk zones, and exacerbation of fire risks.

Aside from the CEQA violations, the Ordinance fails for two additional reasons: 1) the fencing regulations of the Ordinance constitute an unconstitutional taking of property without just compensation, because property owners are deprived of the right to exclude; and 2) the failure to comply with Government Code § 65855 *et. seq.*, when the Board of Supervisors ("Board") modified the Ordinance's overlay zone map to remove hundreds of thousands of acres of land without first referring the matter to the Planning Commission for recommendation.

This Court should reject the County's various attempts to avoid CEQA review, and separately, should hold the County accountable for its failure to comply with the Government Code's requirements relating to the Planning Commission, and the violation of the takings clause of the constitution. The petition should be granted.

II. FACTUAL BACKGROUND

A. Origins of the Wildlife Corridor Ordinance: The General Plan Update

The Ordinance was originally part of the County's comprehensive update to the General Plan, which was directed by the Board in September 2015. [AR 53329-53332.] The General Plan Update included items such as modifications to the Non-Coastal Zoning Ordinance relating to building standards and zoning maps. As of January 24, 2017, the County had budgeted over $171,000 "to complete the habitat connectivity and wildlife movement corridors task," and used the same consultant for the wildlife corridor as it did for the General Plan Update analysis. [AR 1469, 1082.] In 2017, the Board directed the Planning Division to prepare draft amendments to the General Plan and the Non-Coastal Zoning Ordinance (NCZO) to improve and preserve habitat connectivity throughout the County's wildlife corridors by developing regulations to achieve four primary objectives: 1) minimize habitat fragmentation; 2) maintain corridor widths or enhance corridor "chokepoints" to facilitate species movement; 3) minimize physical barriers to wildlife movement (buildings, roads, fences, etc.); and 4) minimize indirect barriers to wildlife movement (nighttime lighting, domestic animals, human presence, vegetation degradation, etc.). [AR 1082.]

The Board later "elected to complete this project ahead of the GPU schedule." [AR 53331.]

When the Board voted to take the Ordinance out of the General Plan process (claiming several CEQA exemptions), it abandoned the original plan for the project to undergo CEQA review, which was explained to the public as follows: "After obtaining comments from all groups…staff will finalize the draft documents, **complete environmental review** and conduct adoption hearings." [AR 53332, *emphasis added*.] This procedural maneuvering to remove the wildlife corridors project from the General Plan Update process was a direct effort to avoid CEQA review as to an Ordinance that plainly has potentially significant environmental impacts.

B. Summary of the Key Provisions and Regulations of the Ordinance

The ostensible purpose of the Ordinance is to establish a wildlife corridor throughout the County by imposing Habitat Connectivity and Wildlife Corridor ("HCWC") and Critical Wildlife Passage Area ("CWPA") overlay zones over broad swaths of the County. [AR 1080-1139.] HCWC is the larger of the two zones; it purports to preserve functional connectivity of regional habitats by minimizing barriers, habitat fragmentation, and corridor chokepoints. The HCWC imposes five major regulatory conditions on land, unless the parcel is subject to a specific exemption:

- Limits impermeable fencing to allow wildlife to travel into and through certain areas. [AR 1084.] Wildlife impermeable fencing (including fences over 60 inches from ground level, electrified fences, plastic mesh, and chain link fencing) is severely restricted. [AR 497-525.] Unless subject to an exemption, property owners are prohibited from fencing the perimeter of their properties, which deprives them of the "right to exclude," an important constitutional protection in the traditional bundle of property rights.
- Expands surface water feature buffer requirements significantly by 1) defining a water feature to include the vast "riparian habitat area associated with the feature"; and 2) doubling the buffer around water features from 100 to 200 feet. [AR 498.] Development of new structures, uses of existing structures, or vegetation removal, within 200 feet of a surface water feature (river, lake, pond, or creek), is prohibited without a discretionary Planned Development Permit, triggering CEQA compliance. [AR 497-525.] These restrictions make it more difficult for property owners to clear their property of brush and vegetation, which in turn, increases the threat of wildfires.
- Expands the buffers around wildlife crossing structures, meant to "minimize vegetation loss and

habitat fragmentation." [AR 1084.] Vegetation removal within 200 feet of a wildlife crossing is prohibited without a Planned Development Permit, triggering CEQA compliance. [AR 1201-1202.] These restrictions also make it more difficult for property owners to clear their property of brush and vegetation, which in turn, increases the threat of wildfires, while concurrently decreasing property owners' ability to use significant portions of property for any use.

- Imposes outdoor lighting limitations (type of lights, maximum heights, and timing and brightness restrictions) meant to "minimize indirect barriers" to wildlife. [AR 1084. 497-525.]
- Prohibits non-commercial planting of invasive plant species to minimize vegetation loss and habitat fragmentation." [AR 1084, 497-525.]

In addition to the HCWC Overlay Zones, the County has proposed an even more restrictive overlay zone in certain areas that it has deemed to be particularly "critical." The purpose of the CWPA Zones is to address habitat fragmentation by requiring that structures be sited in "compact development" patterns within individual lots, thereby preserving more space for species movement. [AR 1084, 497-525.] As explained by the March 12, 2019 staff report:

> [T]he owner of an undeveloped parcel is allowed to site an initial principal structure/use anywhere on the parcel with a ministerial Zoning Clearance…All subsequent development on the parcel would thereafter be subject to the CWPA compact siting standard [in which] the owner of a developed parcel is allowed to engage in [] site development within 100 feet of an existing structure, public road, trail or internal agricultural access road with a ministerial Zoning Clearance, or [] with a discretionary Planned Development permit [AR 1092.]

The three CWPA zones total 9,311 acres within the HCWCs, and were selected because they purport to have these characteristics: intact and high value habitat areas; near water sources, ridgelines, or road crossings; at risk from future projects; or within corridors linking habitat areas. [AR 1122-1129.]

Overall, the Ordinance rezones over 163,000 acres of County land [AR 1475] without undertaking any environmental review under CEQA. There was thus no review of the methodology or adequacy of the scientific assumptions that the County made in drafting the Ordinance. Put differently, although the Ordinance is meant to protect wildlife corridors and movement, there is no evidence in the record that the County's proposal will actually do so. Indeed, an analysis by ECorp,

an environmental consultant retained by CoLAB [AR 1844-1877], highlights several problems with the County's methodology and analysis, demonstrating the need either for major modifications to the Ordinance, or for a proper analysis of those issues by the County (which CEQA necessitates).

C. The County Received Hundreds of Comments Regarding the Potential Environmental Impacts of the Ordinance, Including Fire Risks

To determine whether an environmental impact is potentially significant, the County has established Assessment Guidelines that identify specific impact thresholds in over 35 categories. [AR 14202-14425.] The stated purpose of the Assessment Guidelines "is to inform the public, project applicants, consultants and County staff of the threshold criteria and standard methodology used in determining whether or not a project (individually or cumulatively with other projects) could have a significant effect on the environment." [AR 14203.] Despite these thresholds being unequivocally surpassed in multiple different areas of concern (such as fire hazards and mineral resources), and despite the fact that the Ordinance's environmental impacts were repeatedly raised during the public comment period by hundreds of commenters, and despite having in its possession a formal report from a CEQA environmental expert (ECorp) [AR 1839-1843] establishing that the Ordinance is subject to CEQA review, the County stubbornly opted to stand by its purported CEQA exemptions, ignoring all evidence to the contrary.

Comments to the Ordinance included impacts related to mineral and agricultural resources, along with indirect impacts from trucking in aggregate from outside of the region, including transportation impacts from increased vehicle miles traveled, increased air emissions, greenhouse gas emissions, and noise from truck travel. [AR 6467-6470, 1839-43.] The impacts of the Ordinance exceed the Assessment Guidelines thresholds in many of these categories, as set forth in the ECorp analysis. [AR 6467-6470, 1839-43.]

However, the most important potentially significant environmental impact that arises from the Ordinance's regulations (especially as it relates to its potential to wreak havoc on human and animal lives and habitats) is the increased fire risks created by the Ordinance's restrictions on the ability of property owners to clear brush on their land. The County itself acknowledges that it received "hundreds of public comments" including "concerns related to potential fire risk" related to the

"regulation of certain fuel modification within mapped surface water features." [AR 1085.] The entire region has been devastated by recent fires that have affected homes, businesses, communities, and even the very wildlife that the Ordinance is designed to protect. [AR 1107-1108; 53095.] As explained in the Planning Commission staff report:

> Close to 100,000 acres (23 percent) of land within the proposed HCWC overlay zone are within the burn area of the Thomas, Hill, and Woolsey fires. The 2017 Thomas Fire burned approximately 76,500 acres and impacted areas in the hills around Santa Paula, Ventura, Ojai, and into the Los Padres National Forest. The Hill Fire (2018) burned approximately 4,500 acres, mostly in the area around Mountclef Ridge, and the Woolsey Fire (2018) burned approximately 97,000 acres from the Simi Hills south of Simi Valley extending to the cities of Thousand Oaks, Westlake Village, Agoura Hills, Calabasas, Malibu, and West Hills. [AR 1107-1108.]

Yet, the County failed to account for the fact that the Ordinance's provisions may lead to even more severe fires in the future. It is not subject to reasonable dispute that the Ordinance makes it more difficult, not easier, to manage brush-fires, by converting certain brush-clearing activities (including the ability to clear brush that serves as fuel for wildfires on one's own property) from by-right activities to activities that would now require a discretionary Planning Director-approved Planned Development permit. [AR 512-515; 1116; 1087-1089; 639.] Importantly, before the passage of the Ordinance, these types of brush clearing activities required no permit. It is obvious that imposing barriers like these will make it less likely that such vegetation will actually be cleared, due to the added time, money, and effort it would take to obtain a permit. [AR 797-798.] This, in turn, increases the fuel available for wildfires, thereby increasing the risk.

The Ordinance increases the buffers surrounding water features[2] from 100 to 200 feet, such that brush clearing within 200 feet of the edge of the riparian area surrounding any mapped water features is prohibited without a permit (this can get several hundred feet wide in areas with large riparian surroundings). [AR 498, 512-515, 1087-1089, 639 (in addition to these County buffers, "where a property owner wants to clear vegetation in or around a stream or wetland, other federal and state regulations may also apply"); 52521.] This issue was debated internally among County staff,

[2] Brush clearance within 200 feet of wildlife crossing structures is also prohibited without a permit. [AR 1201-1202.] As such, all arguments relating to water features equally apply to wildlife crossing structures.

with some questioning whether this regulation was necessary at all: "We are encountering a huge issue concerning our proposed surface water feature regulations limiting veg removal because it is being conflated with fire hazard and limiting prophylactic fuel clearance. As a result the veg removal regulations are in jeopardy of being pulled from the ordinance." [AR 54286.] Internal emails show that County Counsel openly asked "whether indiscriminate veg mod in surface water features is an existing problem to the point that we need to regulate it at all?" [AR 54286; 52795-52798.]

The Ordinance also prohibits the use of machinery to conduct brush clearing in certain areas without a permit, limiting brush clearing activities to only hand-tools when within 200 feet of a water feature. [AR 512-515, 1087-1089, 639; 4490 ("Restrictions on brush clearance required in stream buffers throughout the corridors are a threat to fuel management efforts that are critical to protect adjacent cities from devastating wildfires like the recent Thomas, Hill and Woolsey Fires.").] These regulations thus make it more difficult, time consuming, and costly to clear brush and invasive plants, which in turn, increases the available fuel for wildfires. [*See, e.g.*, AR 4784-4785.] Although the regulated zones have been devastated by wildfires time and time again throughout recent history, no analysis was conducted by the County regarding how those prior fires would impact the ways that the regulations could exacerbate fire risks. [AR 1827-1829.]

The County's own Assessment Guidelines recognize that projects located in High and Very High Fire Hazard Areas/Fire Hazard Severity Zones or Hazardous Watershed Fire Areas are likely a significant fire hazard impact. [AR 14311.] Over 135,000 acres of the proposed corridors are within these areas. [AR 1840.] The Assessment Guidelines also note that a project is even more likely to have a "potentially significant impact" on fire hazards when there are "site specific constraints such as: endangered plants and species, terrain/topography, or located adjacent to lands not subject to local regulations (i.e.: Federal or State property)." [AR 14311.] Thousands of acres of the HCWC zones are "adjacent to lands not subject to local regulations." [AR 1475.]

For this reason alone – that the project spans such a large area of the high fire hazard areas, and would restrict vegetation clearing activities – the Ordinance is subject to CEQA review. To allow for vast areas of high fire hazard areas to be regulated without environmental review, would not only be irresponsible, it would be outright dangerous. As explained by ECorp:

> The Ordinance would change the way vegetation is removed or managed and could result in an increase in fire hazard. Although the County Guidelines focus on brush clearing within 100 feet of structures, limitations on brush clearing in 172,056 unincorporated acres (except for within 100 feet of structures) could change the potential fire regime in this area, causing fire hazard for both humans and wildlife. An uncontrolled wildfire, exacerbated by limitations in brush clearing, would have significant effects on wildlife habitat, even if the 100-foot buffer around structures caused no effects to structures or buildings. It is the County's obligation to model the potential changes to wildfire behavior resulting from the proposed changes to vegetation management proposed in the Ordinance. [AR 1840.]

The fire profile experienced in the Thomas, Hill, and Woolsey fires show a new pattern of erratic winds that drove flames and embers into housing subdivisions throughout the County and surrounding areas. [AR 1827-1828.] These three fires ultimately scorched over 383,000 acres and burned 3,190 structures in 3 counties. [*Id*.] The fires devastated oak trees, orchards, wildlife habitat, stream courses, and landscapes on unincorporated lands across the County. [*Id*.] Aside from the impacts to homeowners and business owners, the recent fires devastated wildlife populations and their habitat, which rarely survive injuries from fire in the wild. [*Id*.] An uncontrolled wildfire, exacerbated by more stringent and widespread limitations on brush clearing, could have significant effects on wildlife habitat and protected species, as well as the community at large.

In 2018 (well before the Board considered the Ordinance), the State Office of Administrative Law made revisions to CEQA Guidelines Appendix G, Environmental Checklist. These revisions added 'Wildfire' as a discrete Checklist item. [AR 1840, 1827-28.] The new CEQA Guidelines state that projects located in or near lands classified as very high fire hazard severity zones have to be analyzed by the lead agency to determine if the project would, among other things:

a) Exacerbate wildfire risks due to slope, prevailing winds, and other factors, and thereby expose project occupants to pollutant concentrations from a wildfire or the uncontrolled spread of a wildfire;
b) Expose people or structures to significant risks, including downslope or downstream flooding or landslides, as a result of runoff, post-fire slope instability, or drainage changes. [*Id*.]

The County ignored these regulations entirely, even though it was put on notice countless times throughout the comment period that it should evaluate the potential effects of increased wildfire risk from the Ordinance's changes in vegetation management. [*See, e.g.,* AR 724 ("It is a simple equation: more brush, more fire, more damage."); 738-739 ("We have a problem with easily ignitable

vegetation. We have a four-to-one fire index. That means for every foot of vegetation, we have four foot of flame. It's imperative that we be able to clear brush."); 739-740 ("Requiring property owners to leave extremely flammable brush within 200 feet of the streams increases the likelihood of fires"); 741; 762 ("Your guidelines are confusing and difficult for large areas near dry creeks using only handheld equipment. We have no cellphone service in our area. Fire department response time is very long. Your regulations put property owners at high financial risk with no recourse for compensation where fire insurance is hard to obtain."); 797-798 (heavy burden of seeking permit to clear vegetation); 816-817; 832-833; 837 ("You're building a wild fire corridor here, you're not protecting the animals. It's -- we've already acknowledged it's the freeways."); 839 ("I fought wild land fires 50 years ago, and I submit that the new wild fire corridors that you are preparing to create will guarantee larger, more destructive fires with the probability of more homes lost, lives destroyed and more animal and human death resulting from higher turpine content and higher flammability…Your prohibitions on rebuilding will have ruinous effects on families losing their homes to larger fires that this ordinance will help create."); 724, 749, 762-64, 843-844, 896-898 (difficulty in obtaining fire insurance as a result of the Ordinance regulations); 843-844; 916-917; 4478-4481; 4717-4718; 4784-4785 ("brush clearance that saved the [college buildings] from the Thomas Fire would not be possible under" the Ordinance); 4531-4545.]

Several representatives of the Ventura County Fire Safe Council also spoke up to address the Ordinance's impacts on fire hazards. [AR 816-817 (asking the Board to take additional "time to make sure that the ordinance language was right so we could strike a balance between animal safety and human and life safety and property protection" related to fires); 840-841.] The Ventura County Fire Safe Council[3] representatives asked the Board to dispense with the "prohibitions and permit requirements" relating to brush clearance and urged the Board not to "increase any financial burden

[3] The County Fire Chief submitted a 1-sentence comment letter during the comment period that raises more questions than answers. It states: "there are sufficient accommodations and exemptions in the ordinance to allow the Ventura County Fire Department the ability to maintain vegetation management and fuel treatments in the proposed wildlife corridors." [AR 1487.] What about the property owners who do not enjoy these "accommodations and exemptions"? This also does not address whether there is an increase to wildfire risks due to the Ordinance, or the potential for the Ordinance to exacerbate the scope and reach of future fires.

on the landowners to maintain a reasonable level of safety from wild fires. We work closely with government officials and the fire protection district and we feel that there is a safe separation distance for our citizens that we can put into place. And we would like to have a decision postponed for 120 days so that we can work out some of the fuel and vegetation modification issues. The property owners [] should be able to clear flammable vegetation using acceptable, good management practices to the outer parameter of their lands." [AR 840-841.]

The impacts of climate change will also exacerbate wildfire risks in the coming years, which only makes the abandonment of a CEQA analysis more dangerous in this context. Commenters noted that CEQA analysis is needed to address the fire hazard for two independent reasons: 1) the potential for increased fire hazards from changes in vegetation management; and 2) the fact that recent fires that devastated the entire region were not taken into account when adopting the Ordinance (over 115,000 acres of the corridor burned in the Thomas, Hill and Woolsey fires). [AR 6439.]

CEQA review of the Ordinance is absolutely necessary to analyze or mitigate the fire hazards that are posed by the Ordinance. Each of the issues raised in the CEQA Guidelines and the Assessment Guidelines is there for a reason. Yet, those questions were not posed, and therefore not reviewed, analyzed, or addressed, so that the fire hazards would be properly mitigated, as necessary.

D. Procedural History of the Ordinance

On January 31, 2019, the Ordinance was brought before the Planning Commission, which gave 11 recommendations for how to improve the Ordinance for the Board's consideration. [AR 8147-8155.] The initial Board hearing on the Ordinance took place on March 12, 2019, when the Board adopted components of the Ordinance, but also, directed staff to revise the HCWC overlay zone map to remove all property located within the Los Padres National Forest (consisting of hundreds of thousands of acres of land). [AR 291-292.] The Board continued its consideration of the Ordinance to March 19, 2019, to allow staff to make the changes to the overlay maps. [AR 290-294.]

In the interim, on March 18, 2019, a comment letter was submitted by an established law firm representing a large landowner in the County – Newhall Land and Farming. [AR 579-581.] The letter explained that to comply with the Government Code, the Ordinance must be sent back to the Planning Commission for recommendation, because "any modification of the proposed ordinance or

amendment by the legislative body not previously considered by the planning commission during its hearing, shall first be referred to the planning commission for report and recommendation." [AR 579-581, *citing* Government Code § 65857.] The County ignored this legal requirement relating to the Planning Commission's required report and recommendation, and the Board went on to adopt the Ordinance on March 19, 2019. [AR 267.] Also, in lieu of conducting environmental review as required by CEQA, the Board instead found that the Ordinance is "exempt from environmental review." [*Id*.] CoLAB timely filed its Petition on April 25, 2019.

III. ARGUMENT

A. The County Failed to Comply with CEQA

1. Legal Standard under CEQA

A court must set aside a local agency's actions under CEQA if the agency committed a prejudicial abuse of discretion, which is established if either (1) the agency fails to proceed in the manner required by law; or (2) if the agency's findings are not supported by substantial evidence. (PRC § 21168, 21168.5; *Vineyard Area Citizens for Resp. Growth v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 427; *Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 392, n. 5.) CEQA must be interpreted "to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." (*Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 259; CEQA Guidelines § 15003(f).) Failure to either comply with the substantive requirements of CEQA or carry procedures so that complete information as to a project's impacts is developed and publicly disclosed, constitutes a prejudicial abuse of discretion requiring invalidation of the public agency action, "regardless of whether a different outcome would have resulted if the public agency had complied with those provisions." (PRC § 21005(a).) Agencies may not take actions that potentially have a significant adverse effect on the environment, or limit the choice of alternatives or mitigation measures, before complying with CEQA. (CEQA Guidelines § 15004(b)(2).)

2. The Common Sense Exemption Is Inapplicable Because the County Failed to Satisfy Its Burden of Proving That It Is "Certain" the Ordinance Has "No Possibility" of Having a Significant Effect on the Environment

To establish that the Ordinance is exempt from CEQA under the common sense exemption, the County must satisfy an extremely high burden of proof: that it is a "***certainty***" there is "***no***

possibility" of any adverse environmental impact. The County's invocation of the so-called common sense exemption itself defies common sense given that the Ordinance 1) imposes regulations on over 163,000 acres, and 2) surpasses the County's thresholds of significance for numerous categories of environmental impacts. The County plainly cannot and has not established that there is ***no possibility*** of a significant environmental impact.

Before an agency may elect to dispense with CEQA review under the common sense exemption, it must first establish, based on substantial record evidence, that "***it can be seen with a certainty that there is no possibility that the activity in question may have a significant effect on the environment***." (CEQA Guidelines § 15061(b)(3), *emphasis added*.) The County failed to meet its burden here. As a result, potentially significant impacts arising from the Ordinance were not adequately identified, analyzed or mitigated. Case law establishes that 1) the exemption must be supported by substantial record evidence, and 2) the agency relying upon the exemption bears the burden of proving its applicability. (*Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th at 114; *Muzzy Ranch Co. v. Solano County Airport Land Use Com.* (2007) 41 Cal. 4th 372, 385-86.) To satisfy its burden of proof, "***it is incumbent upon the agency, in the course of a preliminary review under CEQA, to consider possible environmental effects*** and to base its decision upon substantial evidence in the record. An agency abuses its discretion if there is no basis in the record for its determination that the project was exempt from CEQA." (*Id*., *emphasis added; citing McQueen* v. *Board of Directors* (1988) 202 Cal.App.3d 1136, 1149; *No Oil, Inc.* v. *City of Los Angeles* 13 Cal.3d 68, 81 (1974)].) *Davidon* discusses the burden of proof issue in detail, contrasting the legal burden under the categorical exemption with that of the common sense exemption. (*Davidon*, 54 Cal.App.4th at 116.) Significant thought and consideration went into the identification of each of the categorical exemptions that are identified in the CEQA Guidelines; in contrast, because the common sense exemption is simply a proclamation by a public entity that a project will have no environmental impacts, this necessarily dictates a much higher burden:

> In the case of the common sense exemption, however, the agency's exemption determination is not supported by an implied finding by the Resources Agency that the project will not have a significant environmental impact. Without the benefit of such an implied finding, the agency must itself provide the support for its decision before the burden shifts to the challenger. Imposing the burden on members of the

> public in the first instance to prove a possibility for substantial adverse environmental impact would frustrate CEQA's fundamental purpose of ensuring that government officials "make decisions with environmental consequences in mind." (*Id., citing Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 283.)

Moreover, as the Supreme Court confirmed in *Muzzy Ranch*, the County's "duty to provide such factual support 'is all the more important where the record shows, as it does here, that opponents of the project have raised arguments regarding possible significant environmental impacts.'" (*Id*., *citing Davidon*, 54 Cal.App.4th at 117; *Dunn-Edwards Corp. v. Bay Area Air Quality Mgmt. Dist.* (1992) 9 Cal.App.4th 644 [agency cannot rely on absence of supporting data, because it cannot say with certainty that there is no possibility of significant environmental effect].) "***If legitimate questions can be raised about whether the project might have a significant impact and there is any dispute about the possibility of such an impact, the agency cannot find with certainty that a project is exempt***." (*Myers* v. *Board of Supervisors* (1976) 58 Cal.App.3d 413, 425, *emphasis added* [common sense exemption "reserved for those 'obviously exempt' projects, 'where its absolute and precise language clearly applies.'"].) In this case, the County attempts to articulate its rationale for why the common sense exemption would permit it to dispense with CEQA as follows:

> Planning Division staff has determined that the adoption of the proposed project is exempt from CEQA pursuant to CEQA Guidelines section 15061(b)(3) because it can be seen with certainty that there is no possibility the project may cause a significant effect on the environment. Importantly, "significant effect on the environment" is expressly defined by the California Public Resources Code as that which effects "a substantial, potentially substantial, ***adverse*** change in the environment." (Cal. Pub. Resources Code, § 21068 [emphasis added].) Here, to the extent the project affects the environment, the effect is expected to be beneficial since the proposed project is intended to protect biological resources, by including limits on vegetation removal, buffers created for surface water features and wildlife crossing structures, limits on the intentional planting of invasive plants, and the requirement for compact development in critical areas within the habitat linkages. In addition, staff has determined that the project does not result in the direct or indirect loss of agricultural soils or create any land use incompatibility issues with agricultural operations, as this project does not include any structures or uses, and agricultural operations are generally excluded from the proposed regulations. [AR 1131-1132; 1094.]

This explanation of the applicability of the common sense exemption is legally and factually flawed, and does not satisfy the County's burden "to consider possible environmental effects and to base its decision upon substantial evidence in the record." (*Davidon*, 54 Cal.App.4th at 114.) The

County's analysis focuses only on the Ordinance's "beneficial" effects on the environment, completely ignoring the adverse impacts raised by members of the public during the comment period (relating principally to fire hazards, agricultural and mineral resources, and the secondary effects to traffic, air quality, and greenhouse gases that stem from the mineral resources impacts).

How does the County arrive at the conclusion that ***all*** of the effects from the Ordinance will be purely "beneficial" given the abundant evidence in the record (*see* Section II.C above), including a report from an environmental expert [AR 1839-1843] that leads to the opposite conclusion—*i.e.*, that the Ordinance may result in significant direct and indirect adverse physical impacts upon the environment? How does the County meet its burden of proof that it is a certainty that there will be no adverse environmental impacts if it ignores and fails to address those adverse environmental impacts entirely? Answer: the County cannot arrive at these conclusions, and cannot meet its burden of proof. The County simply ignored this evidence and never even addressed it. [AR 267 (minutes); AR 276-289 (transcript).]

It stands to reason that a project that legally falls under the common sense exemption cannot surpass any of the thresholds of significance the County itself established in its Assessment Guidelines, which set forth thresholds of significance in dozens of different categories. [AR 14202-14425.] However, the County failed to consider its own Assessment Guidelines, which are not even addressed in any of the three staff reports relevant to the Ordinance (one before the Planning Commission, and two before the Board). [AR 290-294, 1080-1141.] Even though the relevant thresholds from the Assessment Guidelines have been exceeded in numerous areas [AR 1812-2202; 1839-1843 (expert report setting forth the Assessment Guidelines standards, and how the Ordinance surpasses them for fire, mineral resources, and others); 2837-2838; 4679-4725; 6433-6480], the County has neglected its responsibility to conduct CEQA review, when "common sense" dictates the opposite result.

In these circumstances, the County cannot negate the possibility that the impacts raised during the comment period are potentially significant, let alone allow the decision-makers to find with a ***certainty*** that there will be no environmental impacts. (*See Davidon,* 54 Cal.App.4th at 114.) Just as in *Davidon,* the County "has not attempted to determine whether there will be any adverse impacts"

from the regulations imposed by the Ordinance, relying instead on a blanket assertion (contradicted by substantial evidence in the record) that all impacts of the Ordinance will be beneficial. (*Davidon*, 54 Cal.App.4th at 114.)

In spite of abundant evidence in the record regarding potential impacts relating to fire hazards (and others), the County unlawfully claims the common sense exemption – ignoring the legal standard, which requires a CEQA analysis so long as there is a ***possibility*** of significant effect on the environment. (*Davidon*, 54 Cal.App.4th at 118 ["if a reasonable argument is made to suggest a possibility that a project will cause a significant environmental impact, the agency must refute that claim *to a certainty* before finding that the exemption applies."] [*emphasis in original*].)

The County fails to acknowledge the environmental impacts that will arise from the Ordinance, and cannot meet its burden of proving that there is ***no possibility*** of significant environmental impacts here. Indeed, the County failed to even conduct the necessary studies that would have analyzed whether or not such environmental impacts exist, such that there is no substantial record evidence supporting the Notice of Exemption based upon CEQA Guidelines § 15061(b)(3). The County's disregard of its responsibilities under CEQA cannot stand.

3. The Class 7-8 Categorical Exemptions Are Inapplicable to the Ordinance, Because Wildlife Corridors Are Directly Covered by Class 33

The County also relies on two categorical exemptions, relating to protection of natural resources and the environment, in order to avoid CEQA review. The staff report states:

> Because the project consists of regulations intended to benefit the environment, it is also exempt pursuant to CEQA Guidelines Sections 15307 and 15308, Actions by Regulatory Agencies for Protection of Natural Resources, and Actions by Regulatory Agencies for Protection of the Environment, respectively. These two classes of exemptions consist of actions taken by regulatory agencies to assure the maintenance, restoration, or enhancement of a natural resource or the environment. As described above, this project is intended to fully meet these criteria. [AR 1132; *see also*, AR 1094-1095.]

"A categorical exemption can be relied on only if a factual evaluation of the agency's proposed activity reveals that it applies. The agency invoking the categorical exemption has the burden of demonstrating that substantial evidence supports its factual finding that the project fell within the exemption." (*Save Our Big Trees v. City of Santa Cruz* (2015) 241 Cal.App.4th 694, 705,

internal marks and cites removed; citing, Muzzy Ranch Co. v. Solano County Airport Land Use Com. (2007) 41 Cal.4th 372, 386.) However, the question of which class of exemption is applicable to the Ordinance is a pure question of law, and as such, it is reviewed de novo by the court. (PRC § 21168.5.) Entirely absent from the County's analysis of applicable CEQA exemptions is any discussion of the Class 33 exemption, which provides as follows:

> **§ 15333. Small Habitat Restoration Projects.**
>
> Class 33 consists of **projects not to exceed five acres in size to assure the maintenance, restoration, enhancement, or protection of habitat for fish, plants, or wildlife…**
>
> (d) Examples of small restoration projects may include, but are not limited to:
>
> (1) revegetation of disturbed areas with native plant species;
>
> (2) wetland restoration, the primary purpose of which is to improve conditions for waterfowl or other species that rely on wetland habitat;
>
> (3) stream or river bank revegetation, the primary purpose of which is to improve habitat for amphibians or native fish;
>
> (4) projects to restore or enhance habitat that are carried out principally with hand labor and not mechanized equipment.
>
> (5) stream or river bank stabilization with native vegetation or other bioengineering techniques, the primary purpose of which is to reduce or eliminate erosion and sedimentation… (CEQA Guidelines § 15333.)

The Class 33 categorical exemption is thus directly on point for an Ordinance that purports to "maintain, restore, enhance, or protect" "habitats" for "wildlife." (*Id*.) The Ordinance's plain terms and main purpose fall most directly under the purview of Class 33, in the sense that the exemption itself directly discusses protection of wildlife habitats, and addresses issues that are dealt with head-on in the Ordinance, such as: 1) promotion of native plant species over invasive species [AR 309, 498, 500], 2) restoration of wetlands, streams, and rivers [AR 498, 512, 517, 309], and 3) use of hand tools and mechanized equipment for vegetation modification. [AR 512, 634, 639, 1088-1092.] Indeed, the stated "purposes" of the HCWC zones include items that fall squarely under a Class 33 exemption, including: 1) "Preserve the functional connectivity and habitat quality of surface water features, due to the vital role they play in providing refuge and resources for wildlife," and 2) "Minimize the introduction of invasive plants, which can increase fire risk, reduce water availability, accelerate erosion and flooding, and diminish biodiversity within an ecosystem." [AR 500.]

However, there is a reason that such an exemption was designed by the Resources Agency to be limited to projects of "five acres" or less. When the Resources Agency contemplated this exemption for wildlife corridors, it established a five acre limit, presumably because it cannot make similar assumptions regarding environmental impacts for larger projects. The court in *Davidon* went to great lengths to explain that significant thought and consideration went into the identification of each of the categorical exemptions that are identified in the CEQA Guidelines. (*Davidon*, 54 Cal.App.4th at 116.) The definition of "categorical exemption" in CEQA Guidelines confirms this precise finding from the *Davidon* court. The term "means an exemption from CEQA for a class of projects based on a finding by the Secretary for Resources that the class of projects does not have a significant effect on the environment." (CEQA Guidelines § 15354.) Put differently, when the Resources Agency decided that this "class of projects" specifically relating to protection of wildlife was a class that is exempt from CEQA, it did so with the precise caveat that such projects must be limited to less than five acres. (CEQA Guidelines § 15333.) There is an implied finding within the Class 33 exemption that similar, but larger, projects are not automatically categorically exempt from CEQA, precisely because the Secretary for Resources is unable make a finding that such projects do "not have a significant effect on the environment." (CEQA Guidelines § 15333, 15354.)

In contrast to the Class 33 exemption, the Class 7-8 exemptions lack the specificity and direct applicability to wildlife corridors. Classes 7-8 cover regulatory actions to ***assure*** the maintenance, restoration, or enhancement of a natural resource (Class 7) and/or the maintenance, restoration, enhancement, or protection of the environment (Class 8). (CEQA Guidelines §§15307, 15308.)

"In interpreting a statute, the court should ascertain the intent of the Legislature so as to effect the purpose of the law." (*City of Berkeley v. Cukierman* (1993) 14 Cal.App.4th 1331, 1338-39.) This includes various provisions within a comprehensive regulatory scheme. (*O'Brien v. Dudenhoeffer* (1993) 16 Cal.App.4th 327, 332 ["A statute must be construed in the context of the entire statutory scheme of which it is a part, in order to achieve harmony among its parts."] [*internal marks removed*].) "It is a settled axiom of statutory construction that significance should be attributed to every word and phrase of a statute, and a construction making some words surplusage should be avoided. (*People v. Woodhead* (1987) 43 Cal.3d 1002, 1010, *citing Moyer v. Workmen's Comp.*

Appeals Bd. (1973) 10 Cal.3d 222, 230.) A statute is to be taken and considered as a whole, so that seeming inconsistencies are reconciled and that it is construed to give force and effect to all its provisions. (*Neuwald v. Brock* (1939) 12 Cal.2d 662, 668-69; Code of Civil Procedure § 1858.) In addition, "particular intent will control a general one." (Code of Civil Procedure § 1859; *In Re Haines* (1925) 195 Cal. 605, 613.) In light of these canons of statutory interpretation, the three CEQA exemptions discussed above should all be interpreted in a way that gives effect to each of them, and the specific provisions should control over the general ones. If Classes 7 and 8 were meant to cover projects related to wildlife protection and habitat preservation, then there would be no need for the Class 33 exemption – it would be surplusage. Put differently, the Class 33 exemption would be rendered entirely meaningless and superfluous if any habitat enhancement project over 5 acres could be deemed exempt under Class 7 or 8. If that was a possibility, then why did the Resources Agency adopt Class 33 at all?

In short, Class 33 is the applicable exemption to the Ordinance. The County cannot try to squeeze itself into other more broad exemptions when it determined that it is unable to comply with the applicable Class 33 exemption – namely because the Ordinance covers over 163,000 acres of land, which is many orders of magnitude greater than five.

4. <u>The Adverse Environmental Impacts of the Ordinance Render the Class 7-8 Exemptions Inapplicable</u>

The Class 7-8 categorical exemptions apply only if the project in question unequivocally "assure[s] the maintenance, restoration, or enhancement" of the environment or natural resources; projects that "diminish existing environmental protections" cannot qualify under the exemptions. (*Save Our Big Trees v. City of Santa Cruz* (2015) 241 Cal.App.4th 694, 707; CEQA Guidelines § 15308 ["relaxation of standards allowing environmental degradation are not included in this exemption."]; *Calif. Bldg. Industry Assn. v. Bay Area Air Quality Mgmt. Dist.* (2015) 62 Cal.4th 369, 377 ["limits on exemptions extend to projects located on sites that will expose future occupants to certain hazards and risks—including…sites subject to wildland fire"].) In order for the categorical exemptions to apply, it "necessarily mean[s] that the adoption of [the project] would '***assure*** the maintenance, restoration, enhancement, or protection of the environment....' [cite] The [public entity]

has the burden of proof—there must be substantial evidence to support this categorical exemption finding. In the absence of evidence that the negative environmental effects of [the project] would not be significant, the exemption finding cannot be sustained." (*California Unions for Reliable Energy v. Mojave Desert Air Quality Management Dist.* (2009) 178 Cal.App.4th 1225, 1245.)

The court in *Save our Big Trees* surveyed the existing case law relating to the Class 7-8 exemptions, and determined that a tree ordinance that was passed by the local government did not fall under the exemptions because it could be interpreted to diminish existing environmental protections. (*Id*. at pp. 705-713; *see also*, *Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 125 [action that removes rather than secures protections of animal species does not fall within Class 7-8 exemption]; *International Longshoremen's & Warehousemen's Union v. Board of Supervisors* (1981) 116 Cal.App.3d 265, 276 [amendment increasing allowable emissions of dangerous gases did not fall within Class 7-8 exemption].) In *Save our Big Trees*, the city argued that the court "must look at the Project 'as a whole' to determine whether it will strengthen or weaken existing heritage tree protections." On the other hand, the plaintiff in the case argued that "if the Project will have any 'unfavorable' impact on a natural resource or the environment then it is not exempt, regardless of whether it will also have other, 'favorable' impacts." (*Id*. at 707.) Ultimately, the court did not decide which approach is correct, because it found that the project as a whole did not fall under the exemptions anyway. (*Id*. at 708.)

When an Ordinance that is a mixed bag in terms of its environmental impacts (meaning that it has potentially beneficial impacts as well as potentially adverse impacts) it cannot qualify for a Class 7-8 categorical exemption.[4] The Supreme Court in *Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 206, addresses this issue unequivocally: the Class 7 exemption does not apply to an action with "***the potential for a significant environmental impact, both favorable and unfavorable***." "***When the impact may be either adverse or beneficial, it is particularly appropriate to apply CEQA which is carefully conceived for the purpose of increasing the likelihood that the environmental effects will be beneficial rather than adverse***. …we have consistently held that CEQA must be

[4] This is a pure question of law, and as such, it is reviewed de novo by the court. (PRC § 21168.5.)

interpreted so as to afford the 'fullest possible protection' to the environment." (*Id., empahsis added, citing Bozung v. Local Agency Formation Com*. (1975) 13 Cal. 3d 263, 274.)

Here, the Ordinance does not even "***assure***" positive impacts on wildlife movement, let alone the environment or natural resources. Indeed, staff who drafted the Ordinance has already expressly acknowledged that the Ordinance will do little to protect wildlife given that the real barriers to movement are freeways that the Ordinance does nothing about. [AR 6477-6480; 7889.] (*Save Our Big Trees,* 241 Cal.App.4th at 707.) County staff held certain preconceived ideas relating to the wildlife corridor, and only sought evidentiary support for the regulations after completion of the drafting and just prior to the public hearings. [AR 6435-6443; 6477-6480; 1836-1877.] Rather than gathering the scientific evidence first, and developing the overlay zones on that basis, the County did the precise opposite: it identified the protection zones first, and then only later tried to find scientific evidence to fit those zones retroactively. [*Id*.] This is anathema to any scientifically or factually rigorous method, and led to significant mapping problems in the HCWC and CWPA zones, and for surface water features, as acknowledged by the County itself: "the proposed HCWC overlay zone map does not precisely align with neighborhood boundaries. Moreover, the HCWC map does not account for development that has occurred since the publication of the SCML report in 2008. Since the Planning Commission hearing, staff has carefully reviewed and revised the proposed HCWC overlay zone map to remove areas where the map contains overlay zone boundary anomalies within a given neighborhood, community, or street." [AR 1085.] The multitude of mapping errors in the Ordinance allowed wealthy and influential constituents within the County to lobby certain County Supervisors (particularly, District 2's Supervisor Parks) to have their properties removed from within the Ordinance's boundaries, an opportunity that those without those political connections were deprived of. [*See, e.g.*, AR 811-812 (constituent explaining that after meeting with Supervisor Parks, "Several 10-acre parcels have already been excluded, such as Andalusia Estates" and seeking removal of her parcels also; 808-809 (constituent complaining of being treated differently than others whose properties were excluded from the overlay zones); 7078-7079; 7331-7332; 8035; 8128 (noting that several "parcels have already been excluded" and seeking removal of more); 39503-39504 (Supervisor Parks lobbying senior planners regarding correction of a mapped water feature for 8

properties in a very wealthy area within her district).] In other words, rather than conducting the required CEQA review in this case – a process that would have properly identified boundaries and water features, according to science, and applied equally to all County citizens across the board – the County instead implemented a process that allowed certain supervisors to pick winners and losers,[5] in a way that does not "assure the maintenance, restoration, or enhancement" of the environment or natural resources. (*Save Our Big Trees,* 241 Cal.App.4th at 707; CEQA Guidelines §§ 15307-308.)

Instead, the Ordinance has several potentially significant adverse impacts such as increased fire hazard risk, adverse effects to mineral resources, and the related impacts to traffic, air quality, and greenhouse gases. [AR 6467-6470, 1839-43.] Under *Wildlife Alive v. Chickering,* CEQA's command to protect the environment to the fullest extent means that the potential adverse effects of the Ordinance render Class 7-8 exemptions inapplicable.

5. The Class 7-8 Exemptions are Inapplicable Because there is a Reasonable Possibility of Adverse Impacts Due to Unusual Circumstances

CEQA Guidelines § 15300.2 provides: "A categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances." The standard of review for categorical exemptions and the unusual circumstances exception is articulated in *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086. A court must analyze whether 1) there are unusual circumstances (which the court reviews under the substantial evidence standard), and 2) there is a reasonable possibility of a significant impact because of those circumstances. (*Id.* at 1109-1117.) Although the Berkeley Hillside court goes into great detail regarding the standard of review, the bottom line is that "when unusual circumstances are established, the Secretary's findings as to the typical environmental effects of projects in an exempt category no longer control. Because there has been no prior review of the effects of unusual circumstances, [an] agency must evaluate potential environmental effects

[5] Notably, to the extent that property owners later discover that their properties have been improperly included within the Ordinance's scope (due to incorrectly mapped surface water features, for example), the burden would be on the property owner to pay for the correction, but for the first hour of staff time. [AR 515.]

under the fair argument standard[6], and judicial review is limited to determining whether the agency applied the standard in the manner required by law." (*Berkeley Hillside,* 60 Cal.4th at 1116, *internal marks removed*.)

Here, there are at least two distinct unusual circumstances[7] that negate the applicability of the categorical exemptions: 1) the increased risks relating to fire hazards, and 2) the sheer size and scope of the Ordinance, which covers over 163,000 acres of land.

The first unusual circumstance is the recent and ongoing problem of devastating fires throughout the region, described in detail in Section II.C above. Fires have ravaged the entire region and have changed the landscape of thousands of acres that are within the overlay zones. With climate change promising to exacerbate the conditions that give rise to even more wildfire damage in the coming years, it was not only irresponsible, but dangerous, for the County to adopt the Ordinance using categorical exemptions to avoid CEQA, while utterly ignoring the potential effects of 1) the Ordinance on future fires, and 2) past fires on the Ordinance. "When a proposed project risks exacerbating those environmental hazards or conditions that already exist, an agency ***must*** analyze the potential impact of such hazards on future residents or users." (*Calif. Bldg. Industry Assn. v. Bay Area Air Quality Mgmt. Dist.* (2015) 62 Cal.4th 369, 377, *emphasis added*.) Here, the County failed even to consider the degree to which the Ordinance may exacerbate more severe fire conditions. A CEQA analysis would allow the County to have at its disposal a scientifically based review of the regions devastated by the fires, and the fire risks that will be imposed by the Ordinance.

The second unusual circumstance is the Ordinance's sheer size and scope. An Ordinance that covers over 163,000 acres of land is no ordinary Ordinance. "Whether a circumstance is '*unusual'* is judged relative to the *typical* circumstances related to an otherwise typically-exempt project." (*Santa Monica Chamber of Commerce v. City of Santa Monica* (2002) 101 Cal.App.4th 786, 801, *emphasis*

[6] The fair argument standard: "if a lead agency is presented with a fair argument that a project may have a significant effect on the environment, the lead agency shall prepare an EIR" (*Berkeley Hillside,* 60 Cal.4th at 1111.)

[7] This brief focuses on these two unusual circumstances. CoLAB joins in CalCIMA's arguments in connection with unusual circumstances related to mineral resources, and the related additional indirect environmental impacts arising from the lack of availability of mineral resources.

in original.) In this regard, a useful basis for comparison is the Class 33 exemption, which limits exemptions for these exact types of habitat restoration projects to five acres or less. (CEQA Guidelines § 15333.) An Ordinance whose regulations cover 10 times that amount of ground (50 acres), or even 100 times that amount of ground (500 acres) could perhaps be considered as a candidate for a categorical exemption by a particularly audacious local entity. Here, ***this Ordinance is too big by a factor of 32,600*** (not a typo). For the County to attempt to squeeze such a robust regulatory scheme, covering massive swaths of land throughout the County, into a categorical exemption, is utterly ridiculous.

As such, the first element of the *Berkeley Hillside* analysis is easily satisfied, as there are clearly unusual circumstances present here. (*Berkeley Hillside,* 60 Cal.4th at 1105 ["A party invoking the exception may establish an unusual circumstance without evidence of an environmental effect, by showing that the project has some feature that distinguishes it from others in the exempt class, such as its size or location."].) Notably, "size" is specifically mentioned in Berkeley Hillside as a prototypical example of an unusual circumstance. (*Id*.) The second element is also easily satisfied, under *Berkeley Hillside*: "In such a case, to render the exception applicable, the party need only show a ***reasonable possibility of a significant effect*** due to that unusual circumstance." (*Id*.)

Here, there can be no doubt that the fire hazards described in Section II.C above present a reasonable possibility of a significant effect on the environment. Objectively speaking, there is no legitimate dispute regarding the fact that the Ordinance makes it ***more difficult and burdensome*** to manage wildfires. The imposition of permit requirements for brush clearance, the restrictions that allow only hand-tools to clear brush under many circumstances, and the inability to clear vegetation within 200 feet of water features, all serve to increase the risk of potential wildfires. [AR 512-515.] When combined with the fact that these regulations cover a whopping 163,000 acres of land, many thousands of which have already been burned in previous tragic fires, there can be no doubt that these circumstances present a "reasonable possibility of a significant effect" on the environment. (*Berkeley Hillside,* 60 Cal.4th at 1105.)

6. Because the County Segmented the Ordinance from the Comprehensive General Plan Update Scheme, it has Engaged in Illegal Piecemealing[8]

CEQA prohibits one part of a larger project to be reviewed in isolation. Instead, the analysis must focus on the "whole of the action," so the project's true effects may be analyzed in a public process and environmental impacts avoided or reduced. (CEQA Guidelines § 15060; *Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora* (2007) 155 Cal. App.4th 1214, 1222.) "This big picture approach to the definition of a project (*i.e.*, including 'the whole of an action') prevents a public agency from avoiding CEQA requirements by dividing a project into smaller components which, when considered separately, may not have a significant environmental effect." (*Nelson v. County of Kern* (2010) 190 Cal.App.4th 252, 271.) CEQA mandates "that environmental considerations do not become submerged by chopping a large project into many little ones – each with a minimal potential impact on the environment – which cumulatively may have disastrous consequences." (*Bozung v. Local Agency Formation Comm'n* (1975) 13 Cal. 3d 263, 283-84.) "An accurate, stable and finite project description is the sine qua non of an informative and legally sufficient EIR." (*County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 192-93.) A project is "given a broad interpretation in order to maximize protection of the environment." (*McQueen v. Bd. of Dirs.* (1988) 202 Cal.App.3d 1136, 1143.) Thus, the broad scope of the term "project" prevents "the fallacy of division," which entails "overlooking [a project's] cumulative impact by separately focusing on isolated parts of the whole." (*Id.* at 1144.) Because the issue of project splitting is "one of improper procedure rather than a dispute over the facts," the court reviews "the agency's action de novo." (*Oakland Heritage Alliance v. City of Oakland* (2011) 195 Cal.App.4th 884, 898.)

Here, the Ordinance was originally part of the County's General Plan Update, and the County had used a single consultant to analyze both the wildlife corridor and the General Plan Update. [AR 1469, 1082; 9215-9216.] In 2017, the Board directed the Planning Division to prepare regulations to improve habitat connectivity throughout the County. [AR 1082.] Things did not go according to plan, as the Board then "elected to complete this project ahead of the GPU schedule," and claimed several CEQA exemptions in order to avoid environmental review for the Ordinance, which the County had

[8] Issue exhausted at AR 1825-1826.

expressly promised to perform in 2017. [AR 53332 ("staff will finalize the draft documents [and] complete environmental review" before the public hearings.)]

Case law dictates a finding of project splitting in this case. *Tuolumne* held that the development of a home improvement store and realignment of an adjacent road were part of single CEQA project given the close connection between the proposed activities, which were related in time, physical location and entity undertaking them. (*Tuolumne*, 155 Cal.App.4th at 1223). Similarly, the Ordinance and the General Plan update are related in time (they began as part of the same analysis before separation), physical location, and the County is the entity that undertook both projects.

In *Association for a Cleaner Environment v. Yosemite Community College Dist.*, the court determined that the closure, dismantling and transfer of a shooting range constituted a single project under CEQA because they were a "group of interrelated actions" and part of a "single, coordinated endeavor." ((2004) 116 Cal.App.4th 629, 639.) Also, in *Nelson*, a mining reclamation plan and mining operations were part of a single CEQA project because they were "integrally related" to one another. (190 Cal.App.4th at 272.) The present case is analogous to both situations. Here, implementation of the Ordinance required amending the General Plan—the same process of which the Ordinance was originally a part, and which remained ongoing during the entire process of drafting and considering the Ordinance. [AR 239–250 (Resolutions 19-15 and 19-16, amending the General Plan to incorporate the Ordinance); RJN Exh. A (Resolution No. 20-106, adopting the 2040 General Plan Update on September 15, 2020).] These originally unified processes were intended to provide a comprehensive system of policy and regulatory controls for land use, open space, wildlife conservation, and safety, among other concerns. [AR 2854-2883; 53108.] The 2040 General Plan Update was structured to address several categories of these resources—including resources encompassed by the Ordinance—in multiple elements of the General Plan, demonstrating their interrelated nature. [*Id*.] County staff recognized the close relationship of the subject matter and goals of the Ordinance with the General Plan Update, programmed that subject matter as part of an integrated whole, and anticipated a series of coordinated changes to implement those goals. [AR 9557–9558: "amendments include modifications to the General Plan, to General Plan Technical Appendices (Section 1.5 Biological Resources)," and other documents, and would be "coordinated

with the [2040 General Plan Update] team."] Further, the County retained the same consultant to complete the analysis under the same contract. [AR 1469, 1082.] This record leaves no room for doubt that the Ordinance and the General Plan Update were part of a "single, coordinated endeavor" and "integrally related" because the two programs were literally part of the same scheme, were meant to be considered together before the Ordinance was removed, and continued to be coordinated even after segmentation. [AR 9558, 53329-53332.]

The County's attempted procedural machinations to avoid CEQA review fail for two reasons: 1) the County's purported reliance on CEQA exemptions fail anyway, because the Ordinance does not legally qualify for any of the exemptions cited; and 2) the County's project splitting is an independent grounds for setting aside the Ordinance until the County complies with CEQA.

B. <u>The Ordinance's Fencing Regulations Constitute a Taking</u>

The United States Supreme Court has clearly and unequivocally stated that the "right to exclude" is a fundamental element of the constitutionally-protected right to private property, and that physical intrusion, whether by government or by private parties acting under government permission, violates that right, and that individuals given a permanent and continuous right to pass over private property amounts to such physical occupation. (*See Nollan v. California Coastal Comm'n* (1987) 483 U.S. 825, 831-32.) In *Nollan*, the US Supreme Court sets forth the state of the law, and the importance of the right to exclude, as compared to other property rights:

> We have repeatedly held that, as to property reserved by its owner for private use, "the right to exclude [others is] *one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" Loretto v. Teleprompter Manhattan CATV Corp., 458 U. S. 419, 433 (1982), quoting Kaiser Aetna v. United States, 444 U. S. 164, 176 (1979). In Loretto, we observed that, where governmental action results in "[a] permanent physical occupation" of the property, by the government itself or by others, see 458 U.S. at 432-433, n. 9,* "our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner," id. at 458 U. S. 434-435. [*Emphasis in original*.]

Thus, not only is the right to exclude an important property right, it is among the "most essential" property rights recognized under the law. (*Id.*) In *Kaiser Aetna*, the Supreme Court held "that the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation." (444

U.S. at 180.) The Ordinance clearly prohibits property owners from erecting impermeable fences on the perimeter of private property, or to enclose an area on a lot, unless the landowner happens to fall under one of the exceptions to the law:

> Section 8109-4.8.3.3- Prohibitions
> Unless otherwise exempt pursuant to Sec. 8109-4.8.3.2, the **following are prohibited** in the Habitat Connectivity and Wildlife Corridors overlay zone:
> …b. The ***installation of new wildlife impermeable fencing that forms an enclosed area on a lot*** that has no existing, lawfully established principal use.
> c. ***The installation of new wildlife impermeable fencing around the perimeter of a lot that forms an enclosed area***, unless exempt pursuant to Sec. 8109-4.8.3.7. [AR 513.]

Staff explained the reasoning behind these regulatory features:

> Limiting impermeable fencing is another regulatory feature of the ordnance. The intent is to minimize the direct barriers that impermeable fences can create. Animals need to move through a landscape to access food, water, shelter, and just to survive. The regulations apply to new or replacement impermeable fencing on lots zoned open space or agricultural-exclusive. …An impermeable fence is one that generally prevents various species of wildlife from freely passing through with little or no interference. [AR 640.]

By definition, fencing that is permeable to wildlife would also be permeable to human beings. In other words, the Ordinance prohibits property owners from erecting fencing that would secure the entire property from intruders (animal or human), and in fact, is specifically designed to "minimize the direct barriers" to wildlife, so that they can "freely pass through" private property "with little or no interference." [AR 640.] There is no doubt that, under the relevant case law, if the County regulated property in such a way so as to allow for human beings to pass through private property, or if other physical objects were allowed to be placed on private property, the Court would be required to find a taking under the above binding authority. (*See, e.g.*, *Nollan*, 483 U.S. at 831-32.) [AR 4480 ("The ordinance is more akin to a "conservation easement" than to an overlay zone. The forced conservation easement provides no compensation").]

The fencing provisions of the Ordinance are therefore unconstitutional on their face (in all circumstances that are not subject to a specific exemption from its regulations), and constitute a compensable taking under binding case law. (*Nollan*, 483 U.S. at 831-32; *Kaiser Aetna v. United States*, 444 U. S. at 180.)

C. The County Failed to Comply with Government Code § 65855 *et. seq.*

Planning commissions—the local agency planning experts responsible for the creation and implementation of land use planning policies—are key to the process by which local legislative bodies enact zoning ordinances. Government Code § 65855 requires that the planning commission "shall render its decision in the form of a written recommendation to the legislative body." This is not a mere procedural technicality, but is crucial to maintaining an open process that allows the public to participate at each stage of the legislation. (*Env. Defense Project v. County of Sierra* (2008) 158 Cal.App.4th 877 [rejecting argument that sending matter back to planning commission was unnecessary; the Board must await the planning commission recommendation].) On March 12, 2019, the Board directed staff to revise the HCWC overlay zone to remove all property located within the Los Padres National Forest. [AR 290-294.] However, the Board did not comply with the requirements of Government Code § 65857: that "***any modification of the proposed ordinance or amendment by the legislative body not previously considered by the planning commission during its hearing, shall first be referred to the planning commission for report and recommendation***." [*Emphasis added*.]

Here, CoLAB must show that 1) the Planning Commission never considered removing the Los Padres National Forest from the HCWC overlay zone, and 2) that the Board did not refer the modification to the Planning Commission. The latter point is undisputed, as the Board made a final decision approving the Ordinance on March 19, 2020 without referring the matter back to the Board. [AR 579-581; 277-293; 606; 934-935.] Thus, CoLAB must simply show that removal of the Los Padres National Forest is a modification not considered by the Planning Commission.

The Ordinance considered by the Planning Commission on January 31, 2020 included in the HCWC overlay zone hundreds of thousands of acres located within the Los Padres National Forest. [AR 1142.] At the hearing, the Commission considered requests from Lockwood Valley residents to remove their property from the HCWC overlay zone, and recommended its removal. [AR 1090-1091.] The Planning Commission did not consider, much less recommend, the far more drastic step of removing the entire Los Padres National Forest from the application of the Ordinance. [AR 8156-8698 (transcript, where no discussion of its removal takes place).] Accordingly, planning staff removed only the Lockwood Valley area, leaving the Los Padres National Forest intact, and

specifically seeking to retain as much of the Los Padres National Forest as possible because the areas are "important components of the regional wildlife linkages and thus should be retained" [AR 1091.]

At its March 12, 2019 hearing, the Board directed staff to prepare a revised HCWC overlay map excluding all property within the Los Padres National Forest. [AR 290-294.] To put this into perspective, the number of acres removed from the Ordinance's scope is actually bigger than what remained within the HCWC zone, representing a massive modification to the Ordinance. [AR 290-294, AR 437-438, AR 1107.] The overlay zone map removes hundreds of thousands of acres – a modification not considered by the Planning Commission. Therefore, a writ must issue to void the adoption of the Ordinance and return the matter to the Planning Commission for proceedings consistent with Govt. Code § 65855-65857.

IV. CONCLUSION

For the foregoing reasons, the Petition should be granted.

DATED: June 1, 2021

JEFFER MANGELS BUTLER & MITCHELL LLP

By: _____

MATTHEW D. HINKS
Attorneys for Petitioner Ventura County Coalition of Labor, Agriculture, and Business

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

Ventura County Coalition of Labor v. County of Ventura
Case No.: 56-2019-00527815-CU-WM-VTA

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 1900 Avenue of the Stars, 7th Floor, Los Angeles, CA 90067-4308.

On June 1, 2021, I served true copies of the following document(s) described as **PETITIONER VENTURA COUNTY COALITION OF LABOR, AGRICULTURE, AND BUSINESS' OPENING BRIEF** as follows:

SEE ATTACHED SERVICE LIST

BY E-MAIL: I caused a copy of the document(s) to be sent from e-mail address sj2@jmbm.com to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the practice of Jeffer Mangels Butler & Mitchell LLP for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. I am a resident or employed in the county where the mailing occurred. The envelope was placed in the mail at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on June 1, 2021, at Los Angeles, California.

Sheila Jimenez

JMBM | Jeffer Mangels Butler & Mitchell LLP

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