Filed 6/11/09

**CERTIFIED FOR PARTIAL PUBLICATION***

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**THIRD APPELLATE DISTRICT**

**(Tehama)**

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| CALIFORNIA OAK FOUNDATION,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>COUNTY OF TEHAMA et al.,<br><br>Defendants and Respondents;<br><br>DEL WEBB CALIFORNIA CORP. et al.,<br><br>Real Parties in Interest and Respondents. | C057578<br><br>(Super. Ct. No. CI58258) |

APPEAL from a judgment of the Superior Court of Tehama County, Richard Scheuler, Judge. Reversed with directions.

Lippe Gaffney Wagner LLP, Thomas N. Lippe, Jennifer L. Naegele and John H. Curran for Plaintiff and Appellant.

William James Murphy, County Counsel (Tehama), Arthur J. Wylene, Assistant County Counsel, for Defendants and Respondents.

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* Pursuant to California Rules of Court, rules 8.1110 and 8.1105(b), this opinion is certified for publication with the exception of the Factual and Procedural Background, and parts I. and II. of the Discussion.

Stowell, Zeilenga, Ruth, Vaughn & Treiger LLP, Richard S. Zeilenga, James D. Vaughn; Law Offices of Steven G. Cohen and Steven G. Cohen for Real Parties in Interest and Respondents.

California Oak Foundation (COF), a nonprofit corporation, appeals after the denial of its petition for a writ of administrative mandamus to overturn approval of a project and associated environmental impact report (EIR) by respondents County of Tehama (the County) and the Tehama County Board of Supervisors (the Board; collectively, Tehama).[1] The project approved is a "specific plan" (Gov. Code, § 65450 et seq.) for residential and commercial development on a parcel of approximately 3,320 acres adjacent to Interstate Highway 5 (I-5) between Red Bluff and Redding--namely, the Sun City Tehama Specific Plan (the Specific Plan Area).

COF contends that Tehama erred by incorrectly applying California Environmental Quality Act (CEQA) (Pub. Res. Code, § 21050 et seq.)[2] requirements for mitigation of significant effects on the environment and that the trial court erred in denying COF's motion to include in the administrative record documents the County claims are subject to attorney-client privilege. In the published portion of this opinion we reject the contention of error in upholding the claim of privilege. In

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[1] Real parties in interest Del Webb California Corp., Pulte Home Corporation, Nine Mile Hill Investment Company, Inc., and Noby Venture, LLC, join in Tehama's response.

[2] Undesignated statutory references are to the Public Resources Code.

the unpublished portion, finding partial merit as to an issue of mitigation of one impact, we shall reverse the judgment as to that issue, with directions to remand the case to Tehama for limited further consideration under Code of Civil Procedure section 1094.5, subdivision (e).[3]

## FACTUAL AND PROCEDURAL BACKGROUND

### *A. Loss of Blue Oak Woodlands*

The revised draft EIR (RevDEIR) for the project was issued in July of 2006. It asserts at the outset that even "[a]fter implementation of all feasible mitigation measures, impacts to the blue oak woodland present on the site . . . are considered unavoidable significant impacts." The RevDEIR proposes as mitigation that the developer "shall record an appropriate legal instrument on the approximately 1,398 acres of preserved oak woodland habitat within the Specific Plan Area to ensure its preservation as undisturbed oak woodland in perpetuity, and/or contribute funds to the Oak Woodlands Conservation Fund." It asserts this "would satisfy the requirements of [section] 21083.4[4] (Sen[.] Bill [No.] 1334) on Oak Woodlands Conservation

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[3] Code of Civil Procedure section 1094.5, subdivision (e) provides, in pertinent part: "Where the court finds that there is relevant evidence . . . that was improperly excluded at the hearing before respondent, it may enter judgment as provided in subdivision (f) remanding the case to be reconsidered in the light of that evidence . . . ."

[4] Section 21083.4, in pertinent part, is as follows:

"(b) As part of the determination made pursuant to Section 21080.1, a county shall determine whether a project within its jurisdiction may result in a conversion of oak woodlands that

and would reduce the magnitude of the impact to blue oak woodland by preserving oak woodland in perpetuity." However, it concedes that "there would still be a net loss of 774 acres of blue oak woodland" which it deems "unavoidably significant even after the implementation of all feasible mitigation measures."

COF submitted a comment letter addressed to this part of the RevDEIR. The letter argues that the proposed mitigation measure would not satisfy section 21083.4 because: "If project oak woodland impacts remain significant even with a mitigating

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will have a significant effect on the environment. If a county determines that there may be a significant effect to oak woodlands, the county shall require one or more of the following oak woodlands mitigation alternatives to mitigate the significant effect of the conversion of oak woodlands:

"(1) Conserve oak woodlands, through the use of conservation easements.

"(2)(A) Plant an appropriate number of trees, including maintaining plantings and replacing dead or diseased trees.

"[¶] . . . [¶]

"(3) Contribute funds to the Oak Woodlands Conservation Fund, as established under subdivision (a) of Section 1363 of the Fish and Game Code, for the purpose of purchasing oak woodlands conservation easements . . . .

"(4) Other mitigation measures developed by the county.

"[¶] . . . [¶]

"(e)(1) A lead agency that adopts, and a project that incorporates, one or more of the measures specified in this section to mitigate the significant effects to oaks and oak woodlands shall be deemed to be in compliance with this division only as it applies to effects on oaks and oak woodlands.

"(2) The Legislature does not intend this section to modify requirements of this division, other than with regard to effects on oaks and oak woodlands."

on-site oak reserve, then additional [section] 21083.4[, subdivision] (b) oak habitat mitigation is required." It notes: "The [RevDEIR] leaves open the possibility of a monetary contribution to the state Oak Woodland[s] Conservation Fund but . . . offers no specificity regarding this mitigation option." COF urged as a remedy that the developer be required to make "a monetary contribution to the state Oak Woodland[s] Conservation Fund in an amount sufficient to purchase 774 acres of local replacement [b]lue oak woodlands."

The final EIR (FEIR) responds to this criticism in essence as follows. The mitigation measure was revised to remove the alternative fee option. The revision was made because "[t]he County has determined that this measure provides adequate mitigation and . . . contribution to the state Oak Woodland[s] Conservation Fund is not proposed as mitigation." In Tehama's view: "The preservation of 1,398 acres of oak habitat within the proposed Specific Plan Area to be preserved in perpetuity, to offset impacts to 774 acres of similar habitat, adheres to the statutory requirements of [section] 21083.4, as this is one of the four defined mitigation options. [¶] However, as stated on [page] 4.4-52 of the [RevDEIR], the direct loss of 774 acres of oak woodland habitat remains a significant unavoidable impact. This is because, even with the proposed preservation of almost twice that amount of oak woodland habitat within the proposed Specific Plan Area, there will still be a net loss of oak woodland habitat. [¶] As the proposed mitigation measure

is feasible and considered proportional to the impact by the County of Tehama, additional oak habitat mitigation is not required under [section] 21083.4."

### *B. Increased Traffic on I-5*

The RevDEIR also asserts at the outset that increased traffic attributable to the project, combined with projected growth in other traffic, would result in significant impacts to the I-5 freeway and its interchanges. Tehama's target level of service thresholds[5] will be exceeded for I-5 and its interchanges for peak traffic hours without roadway improvements, intersection improvements, and freeway widening. However, these mitigation measures are not considered feasible.

Sunset Hills Drive is a freeway interchange contiguous to the project site. The project would result in a significant impact on the Sunset Hills Drive interchange and will have a cumulative long-term impact on it. The RevDEIR proposes various improvements as mitigation of the Sunset Hills Drive interchange impacts.

A possible mitigation measure for freeway congestion is to add one northbound and one southbound lane to I-5 from Red Bluff

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[5] "Levels of Service" (LOS) is a measure of congestion of traffic flow. LOS C is a stable flow with light congestion and occasional backups. LOS D approaches unstable flow, with congested but functional intersections without long standing lines forming. LOS E and below have unstable flow and severe congestion. Tehama has adopted LOS C as its target for weekday operations and LOS D for weekends.

to Redding in the deficient areas, as determined by the California Department of Transportation (Caltrans). The general estimate for widening I-5 from Red Bluff to Redding is approximately $500 million, or $1 million per lane-mile. At this time, neither Caltrans nor Tehama has prepared plans, developed a budget, or adopted a program to fund improvements to I-5 in the vicinity of the Specific Plan Area. The project applicant proposes to pay a regional traffic impact fee in an amount to be negotiated with the County. These fees would contribute toward the cost of improving regional facilities, including I-5 mainline and freeway ramp segments. Tehama is currently updating its "General Plan" and it is anticipated that a countywide traffic impact fee program would be identified as a program to implement in the General Plan.

The RevDEIR asserts that because "no adopted program to implement improvements to I-5 currently exists, no feasible mitigation for the impact of the project on the I-5 [f]reeway mainline and freeway ramp segments is available at this time." It submits this is so because under the CEQA a project's contribution to a significant cumulative impact may be considered mitigated only if (1) the project is required to fund its fair share of the cost of mitigation measures for cumulative impacts; and (2) a program is defined to ensure that the necessary mitigation is implemented in a reasonable time frame.[6]

[6] In the FEIR, issued in October 2006, Tehama suggests the source of these CEQA requirements was the definition of

It also relies on the consideration that even with the mitigation improvements, while the LOS along I-5 for both ramps and mainline segments would improve, it would remain at an unacceptable level.

Caltrans submitted a comment letter criticizing the draft EIR (DEIR) with respect to impacts on I-5 facilities and traffic impacts. Caltrans disagreed with the conclusion that the project's direct and cumulative impacts are unavoidable because there was no established funding program in place to construct the cumulative I-5 mitigation. Caltrans asserted there are many methods other than contributing to an existing fee program for the impacts to be mitigated. The draft "Development Agreement" between the County and the developer is one such way. Caltrans noted the draft Development Agreement includes traffic mitigation impact fees, including approximately $7 million for impacts to the Sunset Hills Drive interchange and up to $3 million for impacts to mainline I-5. While the former appears to meet the short-term operational impacts for the Sunset Hills Drive interchange, the $3 million identified for I-5 is just a small fraction of the $57 million identified as the "fair share" of mitigation costs, the project's proportional share of a future $500 million in additional capacity needs on I-5. In

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"feasible" in the "CEQA Guidelines" (Cal. Code. Regs., tit. 14, § 15000 et seq. [hereafter CEQA Guidelines]): "'Feasible' means capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social, and technological factors" (CEQA Guidelines, § 15364).

Caltrans's view, it was not reasonable or realistic for the project to contribute only 5 percent of its mainline impact.

The FEIR responds to the Caltrans letter as follows. Caltrans, in essence, disagrees with the amount of fees the proposed Development Agreement requires for I-5 mitigation. Tehama established the amount of fees after evaluating several financial feasibility factors, including sustainable home prices in Tehama County, the data and analysis in the "Public Facilities Finance Plan" (PFFP) prepared for the project, and other financial information collected by county staff.

The FEIR asserts the RevDEIR does not conclude that the Project's impacts are significant and unavoidable because an established funding program and implementation have not been established. Rather, it only acknowledges that, because there is no existing program, there may be impacts if the improvements needed are not funded and built. This requires Tehama to disclose that a potentially significant traffic impact may result.

Approximately $10 million of the $13 million in regional traffic impact fees that would be required by the proposed Development Agreement will be used for I-5 related improvements, and up to $3 million of this is designated for I-5 mainline improvements. Tehama finds this mitigation to be both feasible and proportional to the impacts of the project. The $57 million figure for fair share mitigation costs is based on Caltrans's "Traffic Impact Analysis Guidelines" methodology. This would

equal approximately 11 percent of the $500 million needed to add additional capacity to the impacted segments of I-5 between Red Bluff and Redding. Tehama does not agree with this methodology. In addition, the purported impacts of the project on I-5 are also based on assumptions that Caltrans requested in the traffic study. The assumptions are questionable because data shows far fewer trips are generated by age-restricted communities.

The PFFP and the project feasibility information supplied by the developer indicate mitigation of $57 million is not economically feasible. The PFFP concludes that 14 percent of estimated home sales prices is at the threshold of infeasibility. An additional $57 million would increase the total infrastructure burden substantially beyond the threshold, i.e., to approximately 19 percent. Similarly, according to the developer, an additional $57 million would render the project infeasible. CEQA does not require the imposition of financially infeasible mitigation, which would effectively terminate the proposed project. [Facts and procedural background as to the issue of failure to overrule the claim of attorney-client privilege will be related in part III. of the discussion.]

## DISCUSSION

### I. Mitigation for Loss of Blue Oak Woodlands*

COF contends that Tehama and the trial court erred in failing to apply CEQA (§ 21050) requirements for mitigation of

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* See footnote, *ante*, page 1.

significant effects on the environment, with respect to the loss of the 774 acres of blue oak woodlands. COF argues that both incorrectly relied upon section 21083.4[7] to justify failing to require that the impact of the project be fully mitigated. COF argues that section 21081[8] requires "full mitigation" that mitigates the impact to an insignificant level (with certain exceptions COF asserts are inapplicable here) and that Tehama incorrectly applied section 21083.4 to avoid this requirement.

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[7] See footnote 4, *ante*, pages 3-4.

[8] Section 21081 is as follows:

"Pursuant to the policy stated in Sections 21002 and 21002.1, no public agency shall approve or carry out a project for which an environmental impact report has been certified which identifies one or more significant effects on the environment that would occur if the project is approved or carried out unless both of the following occur:

"(a) The public agency makes one or more of the following findings with respect to each significant effect:

"(1) Changes or alterations have been required in, or incorporated into, the project which mitigate or avoid the significant effects on the environment.

"(2) Those changes or alterations are within the responsibility and jurisdiction of another public agency and have been, or can and should be, adopted by that other agency.

"(3) Specific economic, legal, social, technological, or other considerations, including considerations for the provision of employment opportunities for highly trained workers, make infeasible the mitigation measures or alternatives identified in the environmental impact report.

"(b) With respect to significant effects which were subject to a finding under paragraph (3) of subdivision (a), the public agency finds that specific overriding economic, legal, social, technological, or other benefits of the project outweigh the significant effects on the environment."

Tehama and respondent real parties in interest reply, inter alia, that COF's argument is a mischaracterization of the EIR. They submit that Tehama adopted feasible mitigation and declined to adopt additional or different mitigation (i.e., additional payment to the Oak Woodlands Conservation Fund as sought by COF) because it found specific considerations made additional mitigation infeasible, i.e., that nothing further could render the loss of the *unique* 774 acres of blue oak woodlands an insignificant impact. Tehama and real parties in interest argue that, having adopted a reasonable ratio under CEQA case law for the amount of oak woodlands to conserve through the use of conservation easements, Tehama was not compelled to require additional mitigation.

Tehama and the real parties in interest have the better argument. COF points to two items in the FEIR response to COF's letter. The first says that the proposed mitigation by creation of a conservation easement "adheres to the statutory requirements of [section] 21083.4, as this is one of the four defined mitigation options." The second says the statute "requires that the County implement one or more of the mitigation options, but does not require that the significant impact be mitigated to a less than significant level." COF asserts from this that Tehama relied on section 21083.4 as an exception to the ordinary CEQA duty to require all feasible mitigation until the impact is reduced to a less than significant level.

However, the assertion is unpersuasive. There is no compelling implication in these statements in the FEIR that Tehama was using section 21083.4 as an exception to the general duty under CEQA to mitigate. Rather, the reasoning in the FEIR is that the mitigation by creation of a conservation easement is "proportional to the impact" but the loss of habitat "remains a significant unavoidable impact" because "there will still be a net loss of oak woodland habitat." That is to say, because there was no mitigation measure that could avoid a net loss of habitat, there was no feasible mitigation that could reduce the impact to a less than significant level. For example, an additional payment to the Oak Woodlands Conservation Fund as sought by COF would only result in a conservation easement on existing habitat offsite, but could not cure the net loss.

COF does not dispute that the ratio of habitat conserved is within the bounds accepted as mitigation in CEQA case law. (See, e.g., *Environmental Council of Sacramento v. City of Sacramento* (2006) 142 Cal.App.4th 1018, 1038-1041 (*Environmental Council of Sacramento*); *Mira Mar Mobile Community v. City of Oceanside* (2004) 119 Cal.App.4th 477, 494-495.) Nonetheless, it submits that those cases are inapposite because there the agency approving the project had said that the conservation mitigation was sufficient to render the impacts less than significant. However, that is a semantic difference that is not a principled basis for legal distinction. The difference turns on whether one chooses to call a net loss of habitat "a significant

unavoidable impact" or to say that conserving sufficient other habitat renders the net loss "less than significant." If anything, Tehama's semantic approach may be more true to the spirit of CEQA that environmental impacts should be admitted. We see no reason to punish Tehama for this good deed.

## II. Mitigation of Impacts of Increased Traffic on I-5*

COF contends that Tehama erred in failing to assess adequately and to provide feasible mitigation for projected increased traffic congestion on I-5. COF argues that Tehama erred in various ways bearing on the determination that these impacts are unavoidable and that mitigation needs to be limited to the amount found financially feasible in the EIR and proposed development agreement. Tehama and the real parties in interest reply to COF's specific challenges and generally object that, as no one challenged the financial feasibility analysis methodology in the administrative process, attacks on the methodology are waived under the doctrine requiring exhaustion of administrative remedies. We turn preliminarily to the lattermost objection.

Under the doctrine of exhaustion of administrative remedies, claims must be raised in the administrative proceedings to give the agency an opportunity to respond and cure any shortcomings. Where the potential remedy is not exhausted it cannot be tendered for the first time during

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* See footnote, *ante*, page 1.

judicial review. (See § 21177, subd. (a).)[9] COF responds to the exhaustion defense with the argument that the comments of Caltrans, opposing the level of mitigation funding for I-5 impacts, suffice to warrant all of its claims about error in the economic infeasibility determination.

COF points to the following passage in the Caltrans comment letter:

"Mitigation identified in the draft Development Agreement does not adequately address the impacts to I-5. . . . [T]he $3 million identified for I-5 is just a small fraction of the $57 million in impacts identified in Sun City's revised TIAR [Transportation Impact Analysis Report (TIAR), pp. 106 & 158]. The revised TIAR identified $57 million in 'fair share' mitigation costs which was referenced as the project's proportional share of a future $500 million additional capacity needs on I-5, including an additional lane on I-5 from Red Bluff to Redding. It is not reasonable or realistic for the project to contribute to only 5 [percent] of its mainline impact. Again, we disagree with the conclusion that the project's impacts are not feasible to mitigate.

[9] Section 21177, subdivision (a) provides: "No action or proceeding may be brought pursuant to Section 21167 unless the alleged grounds for noncompliance with this division were presented to the public agency orally or in writing by any person during the public comment period provided by this division or prior to the close of the public hearing on the project before the issuance of the notice of determination."

"[Caltrans] strongly urges Tehama County to reconsider the 'infeasibility' findings. Without more substantial mitigation, this project and other planned work between Redding and Red Bluff will significantly alter the quality of life for those living in Northern California and traveling between Red Bluff and Redding. [Caltrans] will view this finding with the utmost concern if approved by Tehama County."[10]

COF submits that this comment was sufficient to permit it to litigate anything pertaining to the sufficiency of the financial infeasibility finding because case law holds that to satisfy section 21177, "issues need not be raised at the administrative level with the same precision or detail with which they are presented to the court in subsequent litigation." Nonetheless, "[t]o advance the exhaustion doctrine's purpose '[t]he "exact issue" must have been presented to the administrative agency . . . .' (*Mani Brothers Real Estate Group v. City of Los Angeles* [(2007) 153 Cal.App.4th 1385,] 1394.) . . . '"[T]he objections must be sufficiently specific so that the agency has the opportunity to evaluate and respond to them." [Citation.]' ([*Porterville Citizens for Responsible Hillside*

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[10] As Tehama and real parties in interest note, Caltrans also made the following remark at the Planning Commission hearing on the FEIR: "Given the estimates in the DEIR, the cost per house to mitigate the impacts on [I]-5 would be about 2 or 3 percent of the value of the house. [Caltrans] doesn't feel that this is an infeasible mitigation. New homes in El Dorado Hills, for instance, up near Sacramento, those houses are paying over $30,000 each for traffic impact fees. The impacts of I-5 on each Sun City home would be a lot less than that."

*Development v. City of Porterville* (2007) 157 Cal.App.4th 885,] 909.) [¶] 'The petitioner bears the burden of demonstrating that the issues raised in the judicial proceeding were first raised at the administrative level. [Citation.]' [Citation.] An appellate court employs a de novo standard of review when determining whether the exhaustion of administrative remedies doctrine applies. (*Citizens for Open Government v. City of Lodi* (2006) 144 Cal.App.4th 865, 873.)" (*Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 535-536.)

The general assertion by Caltrans urging reconsideration of the financial infeasibility findings was insufficient to present any specific issue to Tehama concerning methodology of the EIR. In context, it addresses only the exercise of discretion by Tehama in setting the level of funding, without identifying an issue concerning inadequate information or methodology of the EIR.

The assertion, in passing, that new homes in El Dorado Hills were providing $30,000 each for traffic impact fees does imply at a very general level that there is something awry in the County's financial feasibility analysis. The implication arises from the consideration that traditional single family homes (without any age restrictions) in the project were to provide only $11,500 per unit. However, the assertion does not suggest or raise any specific issue concerning the information

or methodology used in the financial analysis in the EIR.[11] With these considerations in mind we turn to COF's specific claims of error.

### *A. Substantial Evidence of Financial Infeasibility of a Higher Traffic Impact Mitigation Fee*

COF contends that there is not substantial evidence of financial infeasibility of a higher fee to mitigate traffic impacts on I-5. COF's principal argument is that the evidence that the housing component could not bear a higher fee without risking financial infeasibility is insufficient because it fails to account for the capacity or ability of the commercial component of the project to contribute to traffic mitigation. Tehama and real parties in interest reply (1) there is substantial evidence of financial infeasibility of additional mitigation fees as the commercial component was separately assessed;[12] and (2) the argument is barred under the exhaustion doctrine. COF's rejoinder is that (1) this defense of waiver by exhaustion was not raised at trial and is itself waived on that

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[11] Tehama did respond to the Caltrans assertion. It found that the impact fees in places such as El Dorado Hills were not analogous because of "substantially higher home prices in other jurisdictions [and] the substantial up-front infrastructure costs required for the Project . . . ."

[12] Tehama and real parties in interest note that the commercial component was separately assessed a traffic impact fee of $400,000 and that the economic consultant submitted a report opining that the commercial component "would bear an infrastructure burden equal to 10.92 percent of estimated market value. This . . . level of burden is probably on the high end of the range that would be considered reasonable for commercial development."

ground; and (2) that because the PFFP itself and the economic consultant's report noted that the PFFP did not include analysis of the commercial component, the exhaustion requirement was satisfied. The rejoinder is unpersuasive. The assertion that the defense was not raised at trial is false. The passing observations about the limited scope of the PFFP were not "present[ation]" to Tehama of "alleged grounds for noncompliance with [CEQA]," required for exhaustion under section 21177, subdivision (a). The argument that COF failed to show exhaustion of administrative remedies is persuasive.

No issue concerning failure to consider commercial revenues was raised in the administrative proceedings. The report of the County's economic consultant addresses the ability of the commercial component of the project to afford additional infrastructure costs and implies that it too is at the threshold of financial threat. Thus, the nature of COF's complaint can be only methodological, i.e., that it was improper to consider the two components separately. As Tehama and real parties in interest note, this variety of challenge is waived if it is not raised with specificity in the administrative proceedings. (See *Evans v. City of San Jose* (2005) 128 Cal.App.4th 1123, 1138-1140 [objections must be sufficiently specific so the agency has the opportunity to evaluate and respond to them]; *San Franciscans Upholding the Downtown Plan v. City and County of San Francisco* (2002) 102 Cal.App.4th 656, 686-687.)

### *B. Failure to Independently Assess Financial Feasibility Evidence*

COF contends that Tehama failed to comply with its duty under CEQA to make an independent review of the financial feasibility of greater traffic mitigation fees. COF argues that this shortcoming is manifest in remarks made by Tehama that its findings were based, in part, on information supplied by the developer and that county staff concurred in the developer's conclusion on financial feasibility.

COF's argument rests on language in opinions which condemn reliance on bare conclusory assertions that alternatives or mitigation measures are not feasible, in lieu of meaningful analysis and reasoning to support the agency's findings. (See, e.g., *Sierra Club v. County of Napa* (2004) 121 Cal.App.4th 1490, 1504; see also *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 404 (*Laurel Heights*).) Nothing in these cases supports the view that, if an otherwise sufficient analysis is set forth by a project applicant or concurred in by agency staff, the agency cannot accept that analysis without transgressing. (See *Sierra Club v. County of Napa*, *supra*, 121 Cal.App.4th at p. 1504 [this authority does not limit the evidence an agency can consider, it only precludes accepting assertions at face value].) Accordingly, COF's argument is unpersuasive.

### *C. The Significance of Lack of an Existing Program to Enlarge I-5*

COF argues that Tehama erred in relying on a finding that greater mitigation of I-5 impacts was legally infeasible because

there is no existing program to fund and implement I-5 improvements.[13] Tehama and the real parties in interest reply: (1) such reliance is immaterial because there were other independent bases for the core determination that greater funding mitigation is not feasible and (2) a finding of "legal infeasibility" or "other considerations infeasibility" is justified because without such a program mitigation is not feasible under the definition in section 21061.1 because it is not "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors." (§ 21061.1.)

As related, the RevDEIR asserts that because "no adopted program to implement improvements to I-5 currently exists, no feasible mitigation for the impact of the project on the I-5 [f]reeway mainline and freeway ramp segments is available at this time." However, in our view the FEIR dispels an implication that this is a finding of legal infeasibility. Rather, the FEIR says this is only an acknowledgement that, because there is no existing funding program, there may be impacts if the improvements needed are not otherwise funded and built. The FEIR rests the finding of infeasibility of higher mitigation funding on the conclusion that a greater funding

[13] This claim of error in the findings made by Tehama is not subject to an exhaustion of administrative remedies defense. Caltrans did expressly take issue with the assertion in the RevDEIR that project impacts were significant and unavoidable because there was no funding program in place.

requirement would jeopardize the economic viability of the project.

Moreover, the FEIR does impose a financial fee mitigation requirement for I-5 impacts, notwithstanding the lack of an adopted program to implement improvements to I-5. This demonstrates that the lack of an implementation program is not the cause of the limitation actually imposed on the mitigation fee. Thus, we conclude the limitation must be attributed to the finding that a higher funding requirement would jeopardize the economic viability of the project. Unless that finding is untenable, the issue whether a limitation could have been sustained on the view that mitigation is unfeasible due to uncertainty it could be accomplished in a successful manner is immaterial. As the finding that a higher funding requirement would jeopardize the economic viability of the project is not successfully impugned by COF, we have no occasion to consider whether that limitation might be justified on alternative grounds.

### *D. Failure to Disclose Information from the Residential Developer Concerning Financial Feasibility of Greater Mitigation Funding in a Timely Manner*

COF contends that Tehama failed to disclose properly an analysis from the developer of the residential component about the project's financial feasibility. The FEIR referred to "information provided by the applicant" as one of the sources supporting a finding that the full mitigation fee suggested by Caltrans was not financially feasible. However, the memorandum from the developer, dated September 27, 2006, containing the

information, was not adduced into the EIR proceedings record until the day of the final hearing on the project before the Board, October 17, 2006.[14] COF argues that this disclosure was too little, because the memo did not include associated spreadsheets, and too late. COF submits that the belated, truncated disclosure violated the basic CEQA precept that information must be available for public review and evaluation before the agency makes its decision. (See, e.g., *Environmental Protection & Information Center v. California Dept. of Forestry & Fire Protection* (2008) 44 Cal.4th 459, 486 (*EPIC*).) COF suggests that earlier public availability and disclosure of the spreadsheets would have allowed the public and the Board to ascertain that the developer's financial analysis did not include commercial revenues from the project.

Tehama and real parties in interest suggest that this claim is barred by the exhaustion of administrative remedies requirement because no person in the administrative proceedings raised any question about or objection regarding the developer's memo. They also argue that this claim is a red herring because the memo, submitted by the developer of the residential portion of the project, was properly addressed to the financial feasibility of the mitigation to be borne by the residential portion of the project and is simply not subject to criticism

[14] The memo asks that the spreadsheet information submitted with it "be sealed and held in the strictest of confidence" on the ground that it contains trade secret information.

for failing to address the commercial portion of the project. Both responses have merit.

There is no indication that anyone requested to see the "information provided by the applicant" mentioned in the FEIR. Nor is there a showing that any person in the administrative proceedings questioned the failure to disclose that information before the hearing. No one asked for a continuance to study the memo at the point when it was adduced.

Moreover, the consideration that the residential developer's memorandum does not address the financial feasibility of greater traffic mitigation in light of the commercial component of the project does not render it irrelevant, misleading, or otherwise inadmissible. As related, no one objected to the antecedent premise of the PFFP that the financial feasibility of the residential portion of the project should be assessed as a discrete unit because Tehama and the master project developer were separately negotiating the fees to be required for the commercial component. In view of these considerations, the claim that inclusion of the developer's memo was improperly belated or truncated is not cognizable under the doctrine requiring exhaustion of administrative remedies.

### *E. Failure to Include Financial Feasibility Analysis Documents in the EIR*

The PFFP, the residential developer's feasibility memo, and the analysis of Tehama's economic consultant were not included in the circulated EIR document. COF contends that Tehama erred prejudicially in failing to include the several financial

analyses in the body of the EIR itself. COF concedes that *San Franciscans Upholding the Downtown Plan v. City and County of San Francisco*, *supra*, 102 Cal.App.4th 656 and *Sierra Club v. County of Napa*, *supra*, 121 Cal.App.4th 1490, "hold that evidence of economic infeasibility need not be included in the EIR as long as it is available to the public and included elsewhere in the record before project approval." However, COF submits those cases are incorrectly decided in view of *Laurel Heights*, *supra*, 47 Cal.3d 376.

COF points to the sentence fragment that is quoted amidst the following passage in *Laurel Heights*: "If the Regents considered various alternatives and found them to be infeasible, we assume, absent evidence to the contrary, that they had good reasons for doing so. Those alternatives and the reasons they were rejected, however, must be discussed in the EIR in sufficient detail to enable meaningful participation and criticism by the public. '"[*W*]*hatever is required to be considered in an EIR must be in that formal report; what any official might have known from other writings or oral presentations cannot supply what is lacking in the report*."' (*Santiago County Water* [*Dist.*] *v. County of Orange* [(1981)] 118 Cal.App.3d 818, 831 [EIR found inadequate], quoting *Environmental Defense Fund, Inc. v. Coastside County Water Dist.* (1972) 27 Cal.App.3d 695, 706.) If the Regents previously considered alternatives in their internal processes as carefully as they now claim to have done, it seems the Regents could have

included that information in the EIR." (*Laurel Heights*, *supra*, 47 Cal.3d at p. 405, italics added.)

It is immediately apparent that the italicized sentence fragment which COF quotes in isolation, viewed in context, is not a rule that all evidence of economic infeasibility must appear in the EIR document itself. All that *Laurel Heights* requires is that the evidence "must be discussed in the EIR in sufficient detail to enable meaningful participation and criticism by the public." (*Laurel Heights*, *supra*, 47 Cal.3d at p. 405.) This is consistent with CEQA Guidelines section 15131, which provides: "Economic or social information may be included in an EIR or may be presented in whatever form the agency desires."[15] It suffices to say that COF points to no objection in the administrative proceedings to the sufficiency of the discussion of these matters in the EIR. Accordingly, any contention of error of this nature is forfeited.

### *F. Failure to Note That Tehama's Economic Consultant Expressed Skepticism About the Standard for Financial Feasibility Used in the PFFP*

COF contends that Tehama failed to proceed in the manner required by law in approving the project and the EIR because it failed to disclose that its economic consultant expressed

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[15] The CEQA Guidelines, promulgated by the state's Resources Agency, are authorized by section 21083 of the Public Resources Code. In interpreting CEQA, we are to accord the Guidelines great weight except where they are clearly unauthorized or erroneous. (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 428, fn. 5 (*Vineyard Area Citizens*).)

skepticism concerning the applicability of the standard used in the PFFP for determining economic feasibility of the project. This claim, that information was improperly withheld, is not subject to an exhaustion of administrative remedies defense, as one may not be expected to complain about absence of matter that is hidden.

Tehama and real parties in interest reply to the contention that (1) it was reasonable not to report this matter; (2) the failure to report was insignificant; and (3) the matter cannot be viewed as prejudicial in light of other substantial evidence supporting the finding that a higher mitigation funding requirement would jeopardize the financial viability of the project. These arguments are unpersuasive and COF's contention of error has merit.

As related, the core rationale in the FEIR for limiting the amount of the fees required for mitigation of the I-5 traffic impacts is that any greater amount could threaten the financial feasibility of the project. This was predicated in substantial part on the analysis in the PFFP based on the following standard of financial feasibility. "A measure of financial feasibility for residential development is if the total [infrastructure] cost burden is less than 15 to 20 percent of the finished home price, then a project is considered to be financially feasible. Typically, residential units with a cost burden percentage below 15 percent are clearly financially feasible, while units with a

cost burden percentage above 20 percent are likely to be financially infeasible."

On October 5, 2006, after the Planning Commission hearing on the project, the county chief administrator wrote to the economic consultant concerning this analysis in the PFFP:

"Would you agree with the 15 to 20 [percent] burden for financial feasibility? Would you consider the lower end of the range to be most appropriate for this type of project in an area with similar rural characteristics; i.e. 'pioneering' new development? This would recognize the higher risk of an unproven market.

"If so, please state your professional opinion in a memo to George Robson, Tehama County Planning Director.

"The project was considered by the Planning Commission today and it is scheduled for a Board hearing October 17, 2006. We would like to include your comments in the record.

"Given this analysis, the $57 million for I-5 related improvements would increase the fee burden of these units beyond the financial feasibility limit of 15 [percent]. Please include confirmation of this as well if you agree."

The consultant replied in an e-mail as follows:

"I do not think that we can opine categorically that the project cannot absorb more than a 15 [to] 20 [percent] infrastructure burden. The notion that 20 [percent] is a maximum rate for financial feasibility is nothing more than a

generally accepted level used by land use economists as a 'rule of thumb.' But there are unique aspects of the Sun City project that render the application of this rule suspect. The rule is backed up by observations across many projects. But these projects are generally in suburban locations within metropolitan areas with competitive land markets.

"We could say something like this: [¶] 'Based on observations of project infrastructure burdens and market values in suburban locations within metropolitan areas and with competitive land markets, 15 [to] 20 percent is typically the maximum infrastructure burden that can be placed on a residential project before it is financially infeasible. The Sun City development, however, faces less typical project economics being located far from the path of urban development and requiring substantial infrastructure investment given the lack of municipal services. These costs may be offset by lower land values but that is impossible to say without knowing the price paid for the land by the developer. As a result, it is difficult to know whether the 15 [to] 20 percent "rule of thumb" applies to this project.'

"Is that acceptable, or would you rather we stay silent on the matter?"

The county officials decided not to "get an official comment on this issue."

Among CEQA's basic purposes are to inform government decision makers and the public about ways that environmental

damage can be reduced or prevented when feasible and to disclose to the public the reasons why an agency approved the project in the manner chosen, if significant environmental effects are involved. (CEQA Guidelines, § 15002, subd. (a)(1)-(4).)

The basic standard for adequacy of an EIR is addressed in the CEQA Guidelines section 15151: "An EIR should be prepared with a sufficient degree of analysis to provide decisionmakers with information which enables them to make a decision which intelligently takes account of environmental consequences. An evaluation of the environmental effects of a proposed project need not be exhaustive, but the sufficiency of an EIR is to be reviewed in the light of what is reasonably feasible. Disagreement among experts does not make an EIR inadequate, but the EIR should summarize the main points of disagreement among the experts. The courts have looked not for perfection but for adequacy, completeness, and a good faith effort at full disclosure." (See also, e.g., CEQA Guidelines, §§ 15145 [a "thorough investigation" should precede a finding that an impact is too speculative] & 15144 [in forecasting, "an agency must use its best efforts to find out and disclose all that it reasonably can"].)

From this we conclude that Tehama had a duty to conduct a reasonably feasible investigation of the financial feasibility of mitigation of the project impacts on I-5 and a duty of full disclosure of all significant matters coming to light in that

investigation. This duty of disclosure extended to the main points of disagreement among the experts it consulted.

It appears, on the face of the matter, that an opinion by Tehama's economic consultant, that the rule of thumb about the financial infeasibility threshold for infrastructure burden for a residential project was "suspect," is a significant matter that should have been disclosed. The rule of thumb is a key justification for setting the mitigation funding amount at 14 percent, just outside its 15 percent threshold of potential infeasibility. If, as suggested by the consultant, relatively cheap land costs could raise that threshold, the justification would be undercut and the amount of mitigation funding required would have to be raised or a lower amount justified on other grounds.

Tehama and real parties in interest offer several arguments in support of their view that Tehama did not improperly fail to disclose this opinion of their economic expert. None of these is persuasive.

They first note that, in an earlier formal opinion memorandum, the economic consultant had said that none of the PFFP "discrepancies" (identified in the memo) "would affect the approach taken to the public facility financing strategy or the conclusions of the [community services district] feasibility analysis." However, this ambiguous remark does not diminish the significance of the later criticism of the rule of thumb used in the PFFP. The earlier remark is not addressed to the

calculation of or justification for setting a mitigation funding feasibility limit.[16]

Tehama and real parties in interest next assert that COF could have discovered the matter before the final hearing by reviewing all of the County's files. However, a duty of disclosure to inform government decision makers and the public is a duty of open, accessible disclosure. To suggest that duty is satisfied by requiring the public and public officials to sift, sua sponte, through the 28,751-page administrative record in this case for undisclosed information is entirely unpersuasive.

Tehama and real parties in interest next submit that the County's Chief Administrative Officer reasonably terminated the inquiry because he found the consultant's response "less than clear" rather than because of a "deliberate effort to suppress contrary expert opinion evidence." The record does not reflect the reasoning of the Chief Administrative Officer. There is no indication that he subjectively found the response unclear and acted for that reason. If that were the case, he could have requested clarification.

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[16] Indeed, the formal opinion memorandum notes that the PFFP "indicates that the total infrastructure and services burden would equal 1.6 percent of the projected home value for the most prevalent product type, low density, age-restricted residential. This projected burden was within the constraint of [2] percent of home value considered reasonable by most development projects in California."

The skepticism expressed by the consultant, objectively viewed, called into question an important and contested portion of the reasoning of the EIR. In our judgment, in these circumstances, the record as to the failure to report or further investigate the matter does not reflect a good faith effort at full disclosure.

Tehama and real parties in interest next argue that, in any event, the matter is governed by the substantial evidence standard of review. They submit the EIR must be upheld if there is any sufficient evidence supporting the finding that additional traffic impact fees would be financially infeasible. They note that the feasibility analysis of the residential developer did include the cost of the land, the information that their economic consultant said precluded him from stating a definitive opinion on the applicability of the 15 to 20 percent rule of thumb.

The criteria for the standard of review question are set out in *Vineyard Area Citizens*, *supra*, 40 Cal.4th 412:

"As explained earlier, an agency may abuse its discretion under CEQA either by failing to proceed in the manner CEQA provides or by reaching factual conclusions unsupported by substantial evidence. (§ 21168.5.) Judicial review of these two types of error differs significantly: While we determine de novo whether the agency has employed the correct procedures, 'scrupulously enforc[ing] all legislatively mandated CEQA requirements' (*Citizens of Goleta Valley v. Board of Supervisors*

(1990) 52 Cal.3d 553, 564), we accord greater deference to the agency's substantive factual conclusions. In reviewing for substantial evidence, the reviewing court 'may not set aside an agency's approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable,' for, on factual questions, our task 'is not to weigh conflicting evidence and determine who has the better argument.' (*Laurel Heights*[], *supra*, 47 Cal.3d at p. 393.)

"In evaluating an EIR for CEQA compliance, then, a reviewing court must adjust its scrutiny to the nature of the alleged defect, depending on whether the claim is predominantly one of improper procedure or a dispute over the facts. For example, where an agency failed to require an applicant to provide certain information mandated by CEQA and to include that information in its environmental analysis, we held the agency 'failed to proceed in the manner prescribed by CEQA.' (*Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1236; see also *Santiago County Water Dist. v. County of Orange* [(1981)] 118 Cal.App.3d [818,] 829 [EIR legally inadequate because of lack of water supply and facilities analysis].) In contrast, in a factual dispute over 'whether adverse effects have been mitigated or could be better mitigated' (*Laurel Heights*[], *supra*, 47 Cal.3d at p. 393), the agency's conclusion would be reviewed only for substantial evidence." (*Vineyard Area Citizens*, *supra*, 40 Cal.4th at p. 435.)

The question of the dividing line between these standards in CEQA review is not without controversy. (Compare, e.g., *Barthelemy v. Chino Basin Mun. Water Dist.* (1995) 38 Cal.App.4th 1609, 1616-1620 with *Association of Irritated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1392.) However, in our view, the nondisclosure question here is predominantly one of improper procedure rather than a dispute over the facts. Thus it is not tested by inquiring whether the ultimate conclusion on the financial feasibility threshold in the EIR is supported by substantial evidence. (See *Barthelemy*, *supra*, 38 Cal.App.4th at p. 1620 [substantial evidence review is inappropriate if the failure to disclose the conflicting evidence precluded informed decisionmaking or informed public participation].)

Tehama and real parties in interest assert that the contrary view is required by a passage in *Environmental Council of Sacramento*, *supra*, 142 Cal.App.4th at page 1041: EIR opponents in that case "contend[ed] the findings [of financial infeasibility of greater mitigation of habitat loss] were not supported by substantial evidence because they were predicated on outdated and incomplete information. In particular, they complain that the agencies failed to disclose that a consultant who prepared the feasibility analysis in June 2001 concluded that [greater mitigation] '"[does] not approach the level at which our firm sees problems with residential financial feasibility."'"

Tehama and real parties in interest argue that this is identical to the argument made by COF. Not so. The nondisclosure argument of COF is not framed as a lack of substantial evidence, rather it is framed as "fail[ing] to proceed in the manner required by law." The issue of whether the failure to disclose the bare conclusory opinion of a consultant was "fail[ing] to proceed in the manner required by law" was not addressed or answered by this court in *Environmental Council of Sacramento*. Moreover, our opinion in that case suggests that the claimed substantial evidence defect was cured by additional information disclosed in the City of Sacramento's final EIR. (*Environmental Council of Sacramento*, *supra*, 142 Cal.App.4th at p. 1041.)

The last claim of Tehama and real parties in interest is that the omission was not prejudicial. Where omitted material supports the agency action that was taken, the omission may not be prejudicial. (See *EPIC*, *supra*, 44 Cal.4th at p. 487.) At oral argument Tehama and real parties in interest suggested that this principle applies because the gist of the omitted information was that the 15 to 20 percent rule of thumb might not apply in a rural area and they took this into account in adopting a 14 percent threshold, below this range. However, as opposing counsel noted, this "adjustment" is in the opposite direction of that suggested by the omitted information. If land prices in this rural area were significantly lower than the comparables on which the rule of thumb is based, the threshold

of financial feasibility would be higher than 15 to 20 percent, not lower than that range.

Tehama and real parties in interest bore the burden of showing the omission was not prejudicial. (*EPIC*, *supra*, 44 Cal.4th at p. 487.) No such showing was made, and absent such, "the omission of the information must be deemed prejudicial." (*Ibid.*) The matter must be remanded to Tehama for the limited purpose of allowing the Board and the public an opportunity to consider the effect of this evidence and any further germane showing that it may engender on the issue of the financial feasibility of a greater fee to mitigate traffic impacts on I-5. [The remainder of the opinion is to be published.]

### III. Four Documents Excluded from the Administrative Record*

On May 17, 2007, COF moved in the trial court for an order compelling Tehama to include four documents, as to which Tehama claimed attorney-client privilege and work product privilege, in the administrative record. The documents were sent to Tehama by an outside law firm retained to provide advice on CEQA compliance issues. COF argued that: (1) under CEQA, section 21167.6[17] overrides such a claim of privilege; and (2) disclosure

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* See footnote, *ante*, page 1.

[17] Section 21167.6 provides, in pertinent part: "(e) The record of proceedings shall include, but is not limited to, all of the following items: [¶] . . . [¶] (7) All written evidence or correspondence submitted to, or transferred from, the respondent public agency with respect to compliance with this division or with respect to the project. [¶] . . . [¶] (10) Any other

of the documents to counsel for the developer was a waiver of the privilege. Tehama denied that section 21167.6 abrogates claims of privilege and argued that the disclosure was not a waiver under the exception for confidential disclosure reasonably necessary to accomplish the purposes for which counsel was consulted. The trial court denied COF's motion.

COF contends the trial court erred in denying its motion to include the four letters from outside counsel in the administrative record. COF makes two arguments: (1) section 21167.6, subdivision (e)[18] abrogates privilege; and (2) privilege was waived when the letters were shared with counsel for real parties in interest. Tehama and the real parties in interest deny that section 21167.6 abrogates privilege; they argue that there is no implied repeal of the privilege statutes. As to waiver, they argue this disclosure comes within the common interest exception. The contention of error is not meritorious.

Section 21167.6 is not an abrogation of the attorney-client privilege or work product privilege. A new statute is not

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written materials relevant to the respondent public agency's compliance with this division or to its decision on the merits of the project, including the initial study, any drafts of any environmental document, or portions thereof, that have been released for public review, and copies of studies or other documents relied upon in any environmental document prepared for the project and either made available to the public during the public review period or included in the respondent public agency's files on the project, and all internal agency communications, including staff notes and memoranda related to the project or to compliance with this division."

[18] See footnote 17, *ante*, pages 37-38.

construed as an "implied repeal" unless it is clear that the later enactment is intended to supersede the existing law. This requires a compelling showing of unavoidable conflict with the earlier law. (See, e.g., *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 378-379 [the Public Records Act does not "by implication" abrogate the attorney-client privilege as to the transmission of a written legal opinion from counsel to the local entity]; *California Correctional Peace Officers Assn. v. Department of Corrections* (1999) 72 Cal.App.4th 1331, 1339.) There is no such showing here. Privilege is a general background limitation to disclosure requirements. Thus, enactment of a specific disclosure requirement that makes no mention of privilege, without more, is at best, ambiguous concerning intent to override privilege. Ambiguity does not present an unavoidable conflict with the preexisting privilege law.

COF's remaining claim is that the communication by Tehama to the real parties in interest was a waiver of privilege. Both COF and Tehama and real parties in interest ground their arguments on the leading case, *OXY Resources California LLC v. Superior Court* (2004) 115 Cal.App.4th 874 (*OXY Resources*).

The court in *OXY Resources* explained that "the common interest doctrine is more appropriately characterized under California law as a nonwaiver doctrine, analyzed under standard waiver principles applicable to the attorney-client privilege and the work product doctrine." (*OXY Resources*, *supra*,

115 Cal.App.4th at p. 889.) As to attorney-client privilege: "Evidence Code section 912, provides: 'A disclosure in confidence of a communication that is protected by a privilege provided by [Evidence Code] Section 954 (lawyer-client privilege) . . . , when disclosure is reasonably necessary for the accomplishment of the purpose for which the lawyer . . . was consulted, is not a waiver of the privilege." (Evid. Code, § 912, subd. (d).) Thus, for example, the 'privilege extends to communications which are intended to be confidential, if they are made to attorneys, to family members, business associates, or agents of the party or his attorneys on matters of joint concern, when disclosure of the communication is reasonably necessary to further the interest of the litigant.' (*Insurance Co. of North America v. Superior Court* (1980) 108 Cal.App.3d 758, 767, quoting *Cooke v. Superior Court* (1978) 83 Cal.App.3d 582, 588.) 'While involvement of an *unnecessary* third person in attorney-client communications destroys confidentiality, involvement of third persons to whom disclosure is reasonably necessary to further the purpose of the legal consultation preserves confidentiality of communication.' (*Insurance Co. of North America v. Superior Court*, *supra*, 108 Cal.App.3d at p. 765.)" (*OXY Resources*, at p. 890, fn. omitted.)

COF argues that Tehama's communication to real parties in interest was not reasonably necessary for the accomplishment of the purpose for which Tehama took advice from the outside counsel. To wit: "[T]his purpose--to achieve compliance with

CEQA--differed from Real Parties' purpose, which was to defend their permits against a CEQA [lawsuit]." COF takes too crabbed a view of Tehama's purpose in considering the advice of the outside counsel.

The purpose of achieving compliance with the CEQA law, reasonably viewed, entails a further purpose. It includes producing an EIR process and product that will withstand a legal challenge for noncompliance. Thus, disclosing the advice to a codefendant in the subsequent joint endeavor to defend the EIR in litigation can reasonably be said to constitute "involvement of third persons to whom disclosure is reasonably necessary to further the purpose of the [original] legal consultation." (See *OXY Resources*, *supra*, 115 Cal.App.4th at p. 890; *id.* at pp. 893, 899 [joint defense agreement in issue endeavored to protect prelitigation communications].)

## DISPOSITION

The judgment is reversed with directions that the superior court enter judgment commanding respondents County of Tehama and Tehama County Board of Supervisors to set aside the decisions in issue and to reconsider the case in the light of this court's opinion and judgment.[19] The parties shall bear their own costs

[19] In light of this disposition, the issues raised concerning the earlier award of costs under the judgment are moot.

on appeal. (Cal. Rules of Court, rule 8.278(a)(5).) **(*CERTIFIED FOR PARTIAL PUBLICLATION*.)**

BUTZ, J.

We concur:

SIMS, Acting P. J.

HULL, J.