GENERAL PLAN UPDATES AND AMENDMENTS: "KEEPING CONSISTENCY" AND CEQA CONSIDERATIONS

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February 2002

I. "Horizontal" and "Vertical" Consistency Requirements

1. Horizontal Consistency

1. The General Statutory Requirement for "Internal Consistency"

- "[T]he Legislature intends that the general plan and elements and parts thereof comprise an integrated, *internally consistent and compatible statement of policies* for the adopting agency." (Gov. Code, § 65300.5 (emphasis added).)

- "[T]he general plan is required to be consistent within itself." (*Sierra Club v. Kern County Board of Supervisors* (1981) 126 Cal.App.3d 698, 703.) All elements within a general plan have equal status; a plan cannot contain a provision stating that, in the event of a conflict between elements, one element will govern over the other. (*Id.* at p. 708.)

- "If a general plan is to fulfill its function as a 'constitution' guiding 'an effective planning process,' a general plan must be reasonably consistent and integrated on its face. A document that, on its face, displays substantial contradictions and inconsistencies cannot serve as an effective plan because those subject to the plan cannot tell what it says should happen or not happen." (*Concerned Citizens of Calaveras County v. Board of Supervisors* (1985) 166 Cal.App.3d 90, 97.)

- "It is the *policies* which must be integrated, internally consistent and compatible, not the maps which simply depict policies applied to specific land areas, not the data and statistics, and not even the objectives within the various elements." (*Garat v. City of Riverside* (1991) 2 Cal.App.4th 259, 300 (emphasis in original).)

2. Correlation Between Land Use and Circulation Elements

- A general plan "shall include . . . [a] circulation element consisting of the general location and extent of existing and proposed major thoroughfares, transportation routes, terminals, and other local public utilities and facilities, *all correlated with the land use element* of the plan." (Gov. Code, § 65302, subd. (b) (emphasis added).)

- Land use and circulation elements are adequately "correlated" if: (1) they are "closely, systematically, and reciprocally related"; (2) the circulation element "describe[s], discuss[es] and set[s] forth 'standards' and 'proposals' respecting any change in demands on the various roadways or transportation facilities of a county [or city] as a result of changes in uses of land contemplated by the plan"; and (3) the circulation element provides "'proposals' for how the transportation needs of the increased population will be met." (*Concerned Citizens of Calaveras County*, *supra*, 166 Cal.App.3d at pp. 99-100.)

- *Inadequate* correlation existed where a rural county's land use element anticipated significant population growth but its circulation element provided no means for building the expanded roads necessary to handle such growth.

  In *Concerned Citizens of Calaveras County*, the respondent county's circulation element, after identifying problems with various state highways, included a "plan proposal" that "the county should ask various higher levels of government for money for state highways. The circulation element does not suggest that the county's lobbying efforts have any reasonable prospect for success." (166 Cal.App.3d at pp. 102-103.) "Nor does the circulation element contain any proposal limiting population growth or managing increased traffic in the event that necessary state highway funding is not forthcoming." (*Id.* at p. 103.)

  "What made these elements legally objectionable as being internally inconsistent and insufficiently correlated with each other was not the discrete pieces of information they contained, i.e., that the roads were adequate, or that there would be substantial population increases, or that problems would surface with the roads as homes and businesses were built, but was instead the failure of the county to adopt objectives, standards or proposals as part of a consistent policy to make sure that population growth did not overwhelm the existing circulation infrastructure, and that the circulation infrastructure would be increased to keep up with population growth." (*Garat*, *supra*, 2 Cal.App.4th at p. 300, fn. 31 (characterizing the holding in *Concerned Citizens of Calaveras County*).)

3. Traditional Forgiving Approach to Judicial Review of Claims of Internal Inconsistency

- General plans, by their very nature, tend to have policies with differing emphases:

  > "The broad objectives of general plans may well be expected to encompass competing interests . . ., and an informed resolution of the tension between such competing interests requires that the information related to each objective be provided with an eye towards defining the scope of the conflict, not towards providing information which has been homogenized so that the same subject, i.e., floodplains, is dealt with as a factor unconnected with the objectives related to the general plan element to which the subject relates."
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  > (*Garat*, *supra*, 2 Cal.App.4th at p. 300.)
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  > "A general plan must try to accommodate a wide range of competing interests – including those of developers, neighboring homeowners, prospective homebuyers, environmentalists, current and prospective business owners, jobseekers, taxpayers, and providers and recipients of all types of city-provided services – and to present a clear and comprehensive set of principles to guide development decisions."
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  > (*Sequoyah Hills Homeowners Assn. v. City of Oakland* (1993) 23 Cal.App.4th 704, 719.)

- "As with the interpretation of statutes in general, portions of a general plan should be reconciled if reasonably possible." (*No Oil, Inc. v. City of Los Angeles* (1987) 196 Cal.App.3d 223, 244.)

- Examples of judicial deference:

  In *Hernandez v. City of Encinitas* (1994) 28 Cal.App.4th 1048, 1070-1071, the Court of Appeal found no internal inconsistency between a city's housing and land use elements, even though the housing element encouraged a "*wide range of housing* by location, type of unit, and price" and land use element stated that "'[t]he residential character of the City shall be substantially single-family detached housing.'" (Emphasis added.)

- In *Cadiz Land Company v. Rail Cycle* (2000) 83 Cal.App.4th 74, 113-116, the Court found that no internal inconsistency had been created where general plan was

amended to allow a landfill on property designated for "resource conservation" ("RC") uses. The petitioner argued that a landfill was inconsistent with the general purposes of the RC designation, which were "'[t]o encourage limited rural development that maximizes the preservation of open space, watershed and wildlife habitat areas' and '[t]o establish areas where open space and nonagricultural activities are the primary use of the land, but where agriculture and compatible uses may coexist.'" (*Id.* at p. 113.) The court explained that, with mitigation, the proposed landfill was not incompatible with adjacent agricultural uses. (*Id.* at p. 114.) Moreover, "[t]he general plan expressly allows landfills to be classified as open space land uses, and the general plan states that a resource conservation designation allows such land to be used for those uses which are considered in the general plan to be appropriate open space uses." (*Id.* at pp. 115-116.)

4. The Internal Consistency Requirement Applies to Charter Cities.

- The internal consistency requirement applies to charter cities. (*Garat*, *supra*, 2 Cal.App.4th at pp. 285-287.)

2. Vertical Consistency

1. The Statutory Basis for Vertical Consistency

- By statute, specific plans, zoning actions, development agreements, and tentative maps all must be consistent with the general plan. (Gov. Code, §§ 65454 (specific plans), 65680 (zoning), 65867.5 (development agreements), and 66473.5 (tentative maps); see also *Lesher Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 536 (zoning).) Case law has extended the consistency requirement to conditional use permits and public works projects. (*Neighborhood Action Group v. County of Calaveras* (1984) 156 Cal.App.3d 1176, 1183-1184 (use permits); *Friends of "B" Street v. City of Hayward* (1980) 106 Cal.App.3d 988, 998 (public works projects).) But see *Elysian Heights Residents Association v. City of Los Angeles* (1986) 182 Cal.App.3d 21, 29 (nothing in state law prohibits a city from issuing building permits that are consistent with zoning but inconsistent with general plan).

- In *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 570, the California Supreme Court stated that "the propriety of virtually *any local decision* affecting land use and development depends upon consistency with the application general plan and its elements." (Emphasis added.)

This is actually an overstatement, as some local agencies other than cities and counties need not comply with local general plans. (See, e.g., Gov. Code, §§ 53091 ("[z]oning ordinances of a county or city shall not apply to the location or construction of facilities for the production, generation, storage, or transmission of water"), 53094 (a school district board, by a two-thirds vote, may "render a city or county zoning ordinance inapplicable to a proposed use of property by a school district"); *Lawler v. City of Redding* (1992) 7 Cal.App.4th 778, 783 (the immunity created by Government Code section 53091 et seq. applies to general plan, as well as zoning, requirements).)

- One court, invoking the California Environmental Quality Act ("CEQA") (Pub. Resources Code, § 21000 et seq.), has created what amounts to a requirement that water supplies acquired by water providers be consistent with general plan growth projections. (*County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 950-951.) This decision has been criticized for having no basis in statute or prior case law.

2. The Vertical Consistency Requirement For *Zoning Ordinances* Does *Not* Apply to Charter Cities (Except Los Angeles).

- "[L]egislative zoning enactments . . . of a charter city do not have to be consistent with that city's general plan." (*Garat*, *supra*, 2 Cal.App.4th at p. 281; *Verdugo Woodlands Homeowners etc. Association v. City of Glendale* (1986) 179 Cal.App.3d 696, 703-704; Gov. Code, § 65803 (exempts charter cities from Chapter 4 of the Planning and Zoning Law).) But see Gov. Code, § 65860, subd. (d) (zoning consistency requirement does apply to "a charter city of 2,000,000 or more population"); *City of Irvine v. Irvine Citizens Against Overdevelopment* (1994) 25 Cal.App.4th 868, 874-876 (court enforces a charter city's ordinance requiring zoning actions to be consistent with the city's general plan).

- Despite the lack of a statutory requirement that charter cities' zoning must be consistent with general plan policies, courts may determine that charter cities' zoning actions contrary to their general plans do "not reasonably relate to the community's general welfare, and therefore constitute[] an abuse of the city's police power." (*City of Del Mar v. City of San Diego* (1982) 133 Cal.App.3d 401, 414-415.)

3. Traditional Parameters of the Vertical Consistency Requirement

a. Zoning Ordinances

- For a general law city's zoning ordinance to be consistent with its general plan, "[t]he various land uses authorized by the ordinance [must be] compatible with the objectives, policies, general land uses, and programs specified in the plan." (Gov. Code, § 65860, subd. (a)(2).)

b. Tentative Subdivision Maps

- For tentative subdivision maps, the standard may be a bit looser. In *Sequoyah Hills*, *supra*, 23 Cal.App.4th at pp. 717, 719, the Court of Appeal described the applicable standards as follows:

> "[S]tate law does not require an exact match between a proposed subdivision and the applicable general plan. [Citation.] Rather, to be 'consistent,' the subdivision map must be 'compatible with the objectives, policies, general land uses, and programs specified in' the applicable plan. (Gov. Code, § 66473.5.) As interpreted, this provision means that a subdivision map must be 'in agreement or harmony with' the applicable plan.
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> "[I]t is beyond cavil that no project could completely satisfy every policy stated in [the Oakland Comprehensive Plan], and that state law does not impose such a requirement. [Citations.] * * * Once a general plan is in place, it is the province of elected city officials to examine the specifics of a proposed project to determine whether it would be 'in harmony' with the policies stated in the plan. (Citation.) It is, emphatically, *not* the role of the courts to micromanage these development decisions. Our function is simply to decide whether the city officials considered the applicable policies and the extent to which the proposed project conforms with those policies, whether the city officials made appropriate findings on this issue, and whether those findings are supported by substantial evidence."
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> (Emphasis in original; footnote omitted.)

c. The Need to Comply with General Plan Policies that are Fundamental, Mandatory, and Specific

- In *Families Unafraid to Uphold Rural El Dorado County v. Board of Supervisors* ("*FUTURE*") (1998) 62 Cal.App.4th 1332, 1341, 1342, the court cited *Sequoyah* approvingly, but invalidated a respondent agency's action that was inconsistent with one particular general plan policy that was "fundamental, mandatory and specific." The policy at issue prohibited "low density residential" uses in areas not physically contiguous to either "community regions" or "rural centers," as designated in the draft El Dorado County General Plan, which, pursuant to an "extension" granted by the Governor's Office of Planning and Research ("OPR"), functioned as the equivalent of an official general plan. (*Id.* at pp. 1336, 1340; see also Gov. Code, § 65361.)

4. Standard of Review

- Courts have employed a "reasonableness" standard of review in considering a local agency's decision that a project is consistent with its general plan. "This finding will be reversed only if, based on the evidence before the City Council, a reasonable person could not have reached the same conclusion." (*No Oil*, *supra*, 196 Cal.App.3d at p. 243; see also *FUTURE*, *supra*, 62 Cal.App.4th at p. 1338.)

5. New Consistency Standard from *Napa Citizens* Decision

- In *Napa Citizens for Honest Government v. Napa County Board of Supervisors* (2001) 91 Cal.App.4th 342, 378-381, the Court of Appeal held that Napa County had acted contrary to its general plan in amending an existing specific plan for an industrial area near its airport. The County had traffic problems and a housing shortage, which would be worsened by industrial development pursuant to the specific plan.

  The court announced a new test for general plan consistency: "whether development . . . is compatible with *and will not frustrate* the General Plan's goals and policies." If a project "will frustrate the General Plan's goals and policies, it is inconsistent with the County's General Plan unless it also includes definite *affirmative commitments to mitigate the adverse effect or effects*." (*Id.* at p. 379 (emphasis added).)

- The court, in effect, said that *mitigation* may be required to ensure that development *consistent with an existing general plan designation* does not "frustrate" the goals and policies of the general plan. It did not matter that the County was simply approving an industrial land use in an area slated in the General Plan for industrial land uses.

- Notably, in suggesting that some kind of mitigation for impacts on housing might be appropriate, the court pushed the respondent county into a kind of mitigation – on housing demand – beyond the reach of CEQA, which deals with environmental, rather than social, impacts. (See *San Franciscans for Reasonable Growth v. City and County of San Francisco* (1989) 209 Cal.App.3d 1502, 1521-1522 ("project-specific demands for additional downtown housing implicate social and economic, not environmental, concerns and, thus, are outside the CEQA purview").)

- The new factor in consistency analysis – whether a project will "frustrate" the implementation of general plan goals and policies – has no basis in statute, but finds its original source in the purely *advisory* General Plan Guidelines published by the Governor's Office of Planning and Research ("OPR").

This origin is evident from a careful reading of the authorities the court cited before announcing the new "frustration" test. The court cited the *FUTURE* case for the proposition that general plan consistency is in part a function of whether a project will "obstruct" the attainment of general plan objectives and policies. (91 Cal.App.4th at p. 378, citing 62 Cal.App.4th at p. 1336.) The *FUTURE* decision, in turn, had quoted *Corona-Norco Unified School District v. City of Corona* (1993) 17 Cal.App.4th 985, 994, in which the court had pulled the word "obstruct" straight out of the 1990 General Plan Guidelines. As the *Corona* court noted, "[t]he General Plan Guidelines are *advisory* only[.]" (*Id.* at p. 994, fn. 6; see also Gov. Code, § 65040.2, subd. (c) (OPR general plan guidelines "shall be advisory"); *FUTURE*, *supra*, 62 Cal.App.4th at p. 1336 (referring to "advisory general plan guideline" cited in *Corona*).) In *Napa Citizens*, the verb "obstruct" became "frustrate," presumably because the two verbs are roughly synonymous. (91 Cal.App.4th at p. 387.)

- The *Napa Citizens* court cited the *Concerned Citizens of Calaveras County* case – a case dealing with *horizontal* inconsistency – to support its reasoning:

> "We find support for this conclusion in *Concerned Citizens of Calaveras County v. Board of Supervisors* (1985) 166 Cal. App. 3d 90, 212 Cal. Rptr. 273. The court in that case considered a possible conflict between the circulation and land use elements of a general plan. The land use element recognized the likelihood that the area's population would grow, and stated a goal of encouraging commercial development to support that growth. The circulation element, like the circulation element in the County's General Plan here, recognized the limitations of the area's roadways, finding that the roadways would not be able to handle a substantial increase in traffic. The circulation element included no specific means of increasing the circulation of traffic should growth occur, reciting that there were no funds available for any major projects on the highways. The circulation element stated a 'goal' of encouraging the improvement of the highways, a 'policy' of supporting the State in any plans to improve State highways traversing the county, and an 'implementation measure' of lobbying for increased State funding for State highway improvements. (*Id.* at pp. 100-102.) The court found that the circulation and land use elements were internally inconsistent and contradictory. It also held that 'the general plan cannot identify substantial problems that will emerge with its state highway system, further report that no known funding sources are available for improvements necessary to remedy the problems, and achieve statutorily mandated correlation with its land use element (which provides for substantial population increases) simply by stating that the county will solve its problems by asking other agencies of government for money.' (*Id.* at p. 103.) "The question in *Concerned Citizens* was whether the general plan itself was flawed because it included inconsistent provisions, while the question here is whether the County's

General Plan and the Updated Specific Plan contain inconsistent provisions. Nonetheless, the essential holding of the court in *Concerned Citizens* was that an inconsistency was created if the implementation of one provision will frustrate a policy stated in a second provision and there is no affirmative commitment to mitigate that adverse effect. The same principle applies here. The County cannot state a policy of reducing traffic congestion, recognize that an increase in traffic will cause unacceptable congestion and at the same time approve a project that will increase traffic congestion without taking affirmative steps to handle that increase. It also cannot state goals of providing adequate housing to meet the needs of persons living in the area, and at the same time approve a project that will increase the need for housing without taking affirmative steps to handle that increase."
(91 Cal.App.4th at pp. 379-380.)

- In *Napa Citizens*, the court:

  (1) created a new test for general plan consistency – whether a project will "frustrate" the goals and policies of a general plan;
  (2) imported the CEQA concept of "mitigation" into general plan consistency determinations by implying that consistency for an updated specific plan permitting industrial uses could be achieved through steps to develop more housing and to better mitigate traffic impacts; and

  (3) blurred the distinction between horizontal and vertical inconsistencies.

- The *Napa Citizens* case has created legal danger whenever a city or county with a housing shortage approves a significant job-generating project – even one fully consistent with a general plan land use diagram – without simultaneously somehow attempting to mitigate impacts on existing housing stock.

  By analogy, a city or county with a surplus of residential stock might create a problem by approving still more housing without attempting to simultaneously pursue efforts to increase commercial or industrial development.

II. The Application of CEQA Principles to a General Plan Update

A. General Plan Amendments and Updates are Subject to CEQA.

- The definition of "project" (i.e., an activity subject to CEQA) includes "the adoption and amendment of local General Plans or elements thereof pursuant to Government Code Sections 65100-65700." (Cal. Code Regs., tit. 14, div. 6, ch. 3 ("CEQA Guidelines"), § 15378, subd. (a)(1).) Case law clearly treats general plan updates as subject to CEQA. (See,

e.g., *Twain Harte Homeowners Association, Inc. v. County of Tuolumne* (1982) 128 Cal.App.3d 644; *Koster v. County of San Joaquin* (1996) 47 Cal.App.4th 29.)

- Environmental impact reports ("EIRs") for general plans are frequently "first tier" documents that can focus on broad, regional issues (e.g., cumulative impacts and growth-inducement) rather than site-specific considerations. (See Pub. Resources Code, §§ 21068.5, 21093, 21094; CEQA Guidelines, §§ 15152, 15385.) Still, such documents must nevertheless deal adequately with fundamental planning issues such as long-term water supply. (See CEQA Guidelines, § 15152, subd. (b) ("[t]iering does not excuse the lead agency from adequately analyzing reasonably foreseeable significant environmental effects of the project and does not justify deferring such analysis to a later tier EIR or negative declaration"); *Stanislaus Natural Heritage Project v. County of Stanislaus* (1996) 48 Cal.App.4th 182, 199 ("the environmental consequences of supplying water to [a] project would appear to be one of the most fundamental and general 'general matters' to be addressed in a first-tier EIR").)
- All projects subject to CEQA are subject to the "substantive mandate" of CEQA by which public agencies must mitigate or otherwise avoid significant environmental effects to the extent feasible. (Pub. Resources Code, § 21002; CEQA Guidelines, §§ 15002, subd. (a)(3), 15021, subds. (a)(2), (c), 15041, subd. (a); *Mountain Lion Foundation v. Fish & Game Commission* (1997) 16 Cal.4th 105, 134; *Sierra Club v. State Board of Forestry* (1994) 7 Cal.4th 1215, 1233; *Sierra Club v. Gilroy City Council* (1990) 222 Cal.App.3d 30, 41.)

- Where the "project" subject to CEQA is a "plan, policy, regulation, or other public project," the obligation to mitigate impacts can be effectuated "by incorporating the mitigation measures into the plan, policy, regulation, or project design." (Pub. Resources Code, § 21081.6, subd. (b); CEQA Guidelines, § 15126.4, subd. (a)(2).)

B. General Plans have Traditionally Contained "General" Policies.

- Some early court cases treated general plans as documents containing vague and tentative policy pronouncements that might not be mandatory in character. (See, e.g., *Greenebaum v. City of Los Angeles* (1984) 153 Cal.App.3d 391, 406-407, citing *Bounds v. City of Glendale* (1980) 113 Cal.App.3d 875, 881, 885-886; *Karlson v. City of Camarillo* (1980) 100 Cal.App.3d 789, 799, citing *Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110, 117-118.)

- In the past, many consultants and agencies have written general plans with vague policy language. This approach, in part, reflects a desire to maintain flexibility for city and county decisionmakers. More specific commitments were saved for specific plans, zoning ordinances, and lower-level policy- or project-documents.

C. More Recent General Plans Tend to Include More Specific Policies.

- OPR's most recent General Plan Guidelines advocate clear and specific policies:

> "For a policy to be useful as a guide to action it must be clear and unambiguous. Adopting broadly drawn and vague policies is poor practice. Clear policies are particularly important when it comes to judging whether or not zoning decisions, subdivisions, public works projects, etc., are consistent with the general plan.
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> "When writing policies, be aware of the difference between 'shall' and 'should.' 'Shall' indicates an unequivocal directive. 'Should' signifies a less rigid directive, to be honored in the absence of compelling or contravening circumstances. Use of the word 'should' to give the impression of more commitment than actually intended is a common, but unacceptable practice. It is better to adopt no policy than to adopt a policy with no backbone."
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> (OPR, *General Plan Guidelines*, pp. 15-16 (1998).)

- OPR's recent advocacy of clear, mandatory language is consistent with the Supreme Court's characterization of the general plan "as a 'constitution,' or perhaps more accurately a charter for future development." (*Lesher Communications*, *supra*, 52 Cal.3d at p. 540.)

D. The Pressures of CEQA Compliance Tend to Lead To the Formulation of More Specific and Stringent – and Inflexible – General Plan Policies.

1. General Plan Updates Result in Significant Environmental Effects that Must be Mitigated if "Feasible."

- Because long-term development plans for any jurisdiction are likely to result in several significant environmental effects (e.g., on air quality, biological resources, historical resources, and transportation facilities), EIRs for general plan updates will typically identify the need for policy language (mitigation) to address such impacts. The stronger and less flexible such language is, the easier it is for cities and counties to conclude that the language, as applied to future projects, will mitigate impacts to less than significant levels.

  (On the subject of the standards that govern the formulation of mitigation measures, see *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 306-308 (deferral of mitigation measures should generally be avoided); *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 727-728 (a "mitigation agreement" to supply money for the purchase of replacement water was not a sufficient basis for finding a power plant's impacts on groundwater to be mitigated to a less than significant level); *Sacramento Old City Association v. City Council of Sacramento* (1991) 229 Cal.App.3d 1011, 1028-1030 (reliance

on performance standards, to be effectuated through some combination of the options set forth in a menu of possible measures, is an acceptable form of mitigation); CEQA Guidelines, § 15126.4, subd. (a)(1)(B) ("measures may specify performance standards which would mitigate the significant effect of the project and which may be accomplished in more than one specified way").)

2. Development "Phasing" is an Appropriate Means of Mitigating the Effects of Growth.

- The *phasing* of development to keep growth from outpacing infrastructure is an obvious means of mitigating the potential impacts of general plan buildout. (See *Napa Citizens*, *supra*, 91 Cal.App.4th at p. 374 (one possible mitigation measure to prevent development outpacing water availability is to "prevent development if the identified [future water] sources fail to materialize"); *Mira Development Corp. v. City of San Diego* (1988) 205 Cal.App.3d 1201, 1215-1216 (agencies can deny development requests – even those consistent with applicable plans – in the absence of adequate public facilities to serve the development that would result). Compare *Federation of Hillside & Canyon Associations v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1260-1262 (city's reliance on state and federal agencies to fund key transportation improvements did not constitute adequate mitigation of traffic impacts of general plan buildout; "CEQA requires the [lead] agency to find, based on substantial evidence, that the mitigation measures are 'required in, or incorporated into, the project'"); *Concerned Citizens of Calaveras County*, *supra*, 166 Cal.App.3d at p. 103 ("[n]or does the circulation element contain any proposal limiting population growth or managing increased traffic in the event that necessary state highway funding is not forthcoming").)

3. In General Plan Updates, as in Other Planning Processes Subject to CEQA, Agencies Cannot Reject Proposed Mitigation Measures Addressing Significant Effects Without First Determining that Such Measures are "Infeasible."

- Where a city or county legislative body wants to reject proposed mitigation language as infeasible, the body must offer reasons, in its "CEQA Findings," why the proposed policy is "infeasible." (Pub. Resources Code, § 21081, subd. (a)(3); CEQA Guidelines, § 15091, subd. (a)(3).) In rejecting such language, an agency, at least in some instances, may invoke policy considerations: proposed mitigation measures may be rejected based on "a reasonable balancing of the relevant economic, environmental, social, and technological factors." (*City of Del Mar*, *supra*, 133 Cal.App.3d at p. 417; see also *Sequoyah Hills*, *supra*, 23 Cal.App.4th at p. 715 (court upholds rejection of project alternative that did not fully satisfy "project objective[s]"); CEQA Guidelines,

§§ 15364 (definition of "feasible"), 15124, subd. (b) ("[a] clearly written statement of objectives will help the lead agency develop a reasonable range of alternatives to evaluate in the EIR and will aid the decision makers in preparing findings or a statement of overriding considerations, if necessary").)

4. By Adopting Stringent General Plan Policy Language as a Means of "Mitigating" the Significant Effects of Growth, Cities and Counties may Create Future Problems for Themselves.

- Fashioning stringent, inflexible general plan language to function as mitigation measures can lead to future problems. Examples include the following:

(1) inflexible commitments to avoid causing impacts to endangered, threatened, or rare species of plants or animals (see CEQA Guidelines, § 15065, subd. (a));

(2) inflexible commitments to avoid causing significant impacts to "historical resources" (see Pub. Resources Code, § 21084.1; CEQA Guidelines, § 15064.5, subd. (a));

(3) inflexible commitments to ensure that noise does not exceed certain levels in residential or other areas; and

(4) inflexible guarantees to maintain certain "levels of service" as a means of preventing congestion on federal or state highways or major local roads.

- Cities and counties face a challenge in attempting to simultaneously fully satisfy CEQA while at the same time avoiding the creation of general plan policy language that either (a) sets unrealistic expectations about future levels of environmental protection or (b) denies decisionmakers the ability to deal with changing or unanticipated future conditions. To walk this fine line, the CEQA findings required for general plan updates should include detailed discussions regarding why inflexible proposed language was rejected as being unworkable or undesirable. Such discussion should attempt to reflect "a reasonable balancing of the relevant economic, environmental, social, and technological factors." It should also be supported by substantial evidence. (Pub. Resources Code, § 21081.5; CEQA Guidelines, § 15091, subd. (b).)

E. The Adoption of Stringent General Plan Language Does Provide Some Future Advantages: It Can Help to Streamline Future, Project-Specific Environmental Review.

- Although stringent, inflexible general plan language may create difficulties for local decisionmakers, such language does create legal benefits that may be worthwhile.

Specifically, such language may function as jurisdiction-level mitigation that, when applied to future projects consistent with the general plan, might help avoid the need to prepare EIRs rather than negative declarations.

- *Public Resources Code section 21083.3* and *CEQA Guidelines section 15183* allow cities and counties to narrow the focus of environmental review for projects that are consistent with a general plan, community plan, or zoning action for which an EIR has been prepared. For such projects, CEQA analysis shall focus on impacts that are "*peculiar to the parcel or to the project* and which were not addressed as significant effects in the prior [EIR], or which substantial new information shows will be more significant than described in the prior [EIR]." (Pub. Resources Code, § 21083.3, subds. (a), (b) (emphasis added); see also CEQA Guidelines, § 15183, subds. (a), (b).)

  "If an impact is not peculiar to the parcel or to the project, has been addressed as a significant effect in the prior EIR, or can be substantially mitigated by the imposition of uniformly applied development policies or standards, . . . then *an additional EIR need not be prepared for the project solely on the basis of that impact*." (CEQA Guidelines, § 15183, subd. (c) (emphasis added).)

- "An effect of a project on the environment shall *not* be considered peculiar to the project or the parcel for the purposes of this section [21083.3] if *uniformly applied development policies or standards* have been previously adopted by the city or county with a finding that the development policies or standards will substantially mitigate that environmental effect when applied to future projects, unless substantial new information shows that the policies or standards will not substantially mitigate the environmental effect. The finding shall be based on substantial evidence which need not include an EIR." (Pub. Resources Code, § 21083.3, subd. (d) (emphasis added).)

  The above-quoted language explains that, where an agency has certified an EIR for its general plan, community plan, or zoning action, any future negative declaration or EIR for a project consistent with the plan can dispense with the analysis of environmental impacts that will be "substantially mitigated" by the uniform application of "development policies or standards" adopted as part of, or in connection with, previous plan-level or zoning-level decisions, or otherwise – unless "substantial new information" shows that the standards or policies will not be effective in "substantially mitigating" the effects in question. In other words, agencies prescient enough to adopt effective policies and standards as part of plan or zoning approvals, or otherwise, will be able to reduce the extent of later project-specific CEQA review.

- These "uniformly applied development policies or standards" need not apply throughout the entire city or county at issue; and where an agency failed, when originally adopting such standards or policies, to make an express finding that they would "substantially mitigate" the

environmental effects of future projects, the agency, in approving a later project, can make a finding to that effect after holding a public hearing on the issue:

> "Such development policies or standards need not apply throughout the entire city or county, but can apply only within the zoning district in which the project is located, or within the area subject to the community plan on which the lead agency is relying. Moreover, such policies or standards need not be part of the general plan or any community plan, but can be found within another pertinent planning document such as a zoning ordinance. Where a city or county, in previously adopting uniformly applied development policies or standards for imposition on future projects, failed to make a finding as to whether such policies or standards would substantially mitigate the effects of future projects, the decisionmaking body of the city or county, prior to approving such a future project pursuant to this section, may hold a public hearing for the purpose of considering whether, as applied to the project, such standards or policies would substantially mitigate the effects of the project. Such a public hearing need only be held if the city or county decides to apply the standards or policies as permitted in this section."
>
> (CEQA Guidelines, § 15183, subd. (f).)

- In short, a general plan update, and its accompanying EIR, can be a vehicle for formulating what will be "uniformly applied development policies or standards for imposition on future projects." Such policies can also function as mitigation for the impacts of general plan buildout. Cities and counties, then, are directly rewarded for putting environmental "teeth" into their general plans. The desirability of this reward must be balanced against the practical problems that can be created by policies that are so stringent and inflexible as to deprive decisionmakers of the discretion they need to react to unanticipated future circumstances.

F. Minimizing the Possibility of Having to Recirculate the Draft EIR

1. Legal Trigger for Recirculation

- If, subsequent to the commencement of public review and interagency consultation but prior to final EIR certification, the lead agency adds "significant new information" to an EIR, the agency must issue new notice and must "recirculate" the revised EIR, or portions thereof, for additional commentary and consultation. (Pub. Resources Code, § 21092.1; CEQA Guidelines, § 15088.5.)

- "'Significant new information' requiring recirculation include[s] . . . a disclosure showing that:

(1) A new significant environmental impact would result from the project or from a new mitigation measure proposed to be implemented.

(2) A substantial increase in the severity of an environmental impact would result unless mitigation measures are adopted that reduce the impact to a level of insignificance.

(3) A feasible project alternative or mitigation measure considerably different from others previously analyzed would clearly lessen the environmental impacts of the project, but the project's proponents decline to adopt it.

(4) The draft EIR was so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded. (*Mountain Lion Coalition v. Fish and Game Com.* (1989) 214 Cal.App.3d 1043)."

(CEQA Guidelines, § 15088.5.)

- But compare *Kings County Farm Bureau*, *supra*, 221 Cal.App.3d at pp. 736-737 ("'[t]he CEQA reporting process is not designed to freeze the ultimate proposal in the precise mold of the initial project; indeed, new and unforeseen insights may emerge during investigation, evoking revision of the original proposal'").)

2. Strategies for Avoiding Recirculation

- Where a city or county, in response to public input on a draft EIR, proposes to modify its draft general plan, there is a danger that the changes will involve a "new significant environmental impact" or a "substantial increase in the severity of an environmental impact," and thus will trigger the need to recirculate part or all of the revised draft EIR.

  Such a scenario will create a dilemma for the city or county: either the suggestions from the public must be rejected or the general plan update must be delayed to permit another round of public review.

- This dilemma can be avoided, or the odds of the dilemma arising can be minimized, by seeking substantial amounts of public input prior to the formulation of the "project description" (i.e., the draft general plan) that will be included in the draft EIR. (See CEQA Guidelines, § 15124.) In other words, such extensive input can occur *before* the CEQA process for the update is officially commenced.

  Case law allows agencies to spend considerable time and effort formulating a "project description," so long as CEQA review is completed before irrevocable decisions are made. (See *Uhler v. City of Encinitas* (1991) 227 Cal.App.3d 795, 799-804 (agency conducts several studies and public input sessions in developing a traffic control plan to be subjected

to environmental review); *Stand Tall on Principles v. Shasta Union High School District* (1991) 235 Cal.App.3d 772 (court upholds a school district's decision to defer environmental review until after it conditionally chose a preferred school site based on committee hearings, consultants' advice, and public input); *City of Vernon v. Board of Harbor Commissioners* (1998) 63 Cal.App.4th 677, 688 ("[t]he agency commits to a definite course of action not simply by being a proponent or advocate of the project, but by agreeing to be legally bound to take that course of action").)

- Another means of minimizing the chance that recirculation will be necessary is to include in the general plan update EIR an alternative that represents a level of impact *greater than* what the community is likely to accept. This "high impact" alternative may provide analysis that will be useful in assessing options that might arise during public review.

  Unfortunately, such an alternative will probably not satisfy CEQA requirements for alternatives, which should be environmentally more benign, at least in some respects, than the project description. (CEQA Guidelines, § 15126.6, subd. (a).) Still, a high impact alternative can provide information that may allow the city or county, in analyzing an option that emerged during public review, to say "we've already studied something similar, and thus don't have to recirculate." (See *Village Laguna of Laguna Beach v. Board of Supervisors* (1982) 134 Cal.App.3d 1022, 1028-1029 (a lead agency can discern the impacts of hybrid alternatives whose levels of impact fall somewhere between the alternatives formally studied in a draft EIR).)

G. A General Plan EIR Should Include Considerable Amounts of Information on the Water Supplies that will be Needed for Development During the Life of the General Plan.

1. The Obligation for Cities and Counties to Consult with Water Providers

- When a city or county is considering whether to "adopt or substantially amend a general plan," the agency must first refer its proposal to any "public water system" with 3,000 or more service connections to customers within the area affected. After receiving the proposal, the latter entity has 45 days in which to respond. (Gov. Code, § 65352, subd. (a)(6).)

- The information ultimately supplied to the city or county must include the following, where "appropriate and relevant":

  (i) the most recent urban water management plan (see Wat. Code, §§ 10620, 10631);

(ii) the water supplier's most recent capital improvement program or plan;

(iii) "[a] description of the source or sources of the total water supply currently available to the water supplier by water right or contract, taking into account historical data concerning wet, normal, and dry runoff years";

(4) "[a] description of the quantity of surface water that was purveyed by the water supplier in each of the previous five years";

(v) "[a] description of the quantity of groundwater that was purveyed by the water supplier in each of the previous five years";

(vi) "[a] description of all proposed additional sources of water supplies for the water supplier, including the estimated dates by which these additional sources should be available and the quantities of additional water supplies that are being proposed";

(vii) "[a] description of the total number of customers currently served by the water supplier, as identified by the following categories and by the amount of water served to each category": (A) "[a]gricultural users"; (B) "[c]ommercial users"; (C) "[i]ndustrial users"; (D) "[r]esidential users";

(viii) "[q]uantification of the expected reduction in total water demand, identified by each customer category . . . associated with future implementation of water use reduction measures identified in the water supplier's urban water management plan"; and

(ix) "[a]ny additional information that is relevant to determining the adequacy of existing and planned future water supplies to meet existing and planned future demands on these water supplies."

(Gov. Code, § 65352.5, subd. (c).)

- After receiving this information, the city or county preparing its general plan update should include, within the conservation element, a "discussion and evaluation of any water supply and demand information" provided by the supplier. (Gov. Code, § 65302, subd. (d).) In addition to such information, the conservation element should generally address, among other things, "water and its hydraulic force, . . . rivers and other waters, [and] . . . fisheries[.]" (*Ibid.*)

- The information exchange described above should ensure that, as a city or county updates its general plan, it has the benefit of very detailed information from the water suppliers operating within the city or county boundaries. Notably, however, this information need not, according to the statutory language, include information on the

environmental impacts associated with developing any new supply source. Still, the information presumably should influence city and county officials as they determine what levels of growth to propose and plan for in their updated general plans.

2. The *Stanislaus Natural Heritage* Decision May Apply to General Plan EIRs.

- In *Stanislaus Natural Heritage*, *supra*, the Court of Appeal invalidated an EIR for a *specific plan* because the document had not adequately dealt with the environmental consequences associated with acquiring a long-term water supply for the proposed 5,000-unit residential development. (48 Cal.App.4th at p. 187.) The EIR had evaluated the effects related to providing water during the first five years of the fifteen-year first phase, but did not address impacts that would occur beyond that initial time period. (*Id.* at pp. 194-195.) Instead, the EIR had treated the potential long-term water supply shortfall as a significant and unavoidable impact, and had identified as "mitigation" a commitment that further construction, beyond the first increment, could not occur unless adequate water supplies could be found. (*Id.* at p. 195.)
- In finding the EIR deficient, the court rejected the respondent agency's argument that, because the EIR was only a "first tier" document, to be augmented in the future with additional negative declarations or EIRs, the county was not required to analyze long-term water supply impacts to the degree advocated by the petitioners. (*Id.* at p. 197.)

- Even though the respondent and applicant recognized, in effect, that large portions of the project might not be built out should water supplies not be forthcoming, the willingness to bear that risk was no substitute for proper CEQA compliance. The approval of a specific plan embodies a decision to encourage or permit the full complement of development contemplated by the plan. The EIR for such a specific plan should therefore look at water issues assuming full build-out:

> "No matter what subsequent environmental review might take place, and no matter what additional mitigation measures might be adopted to ameliorate adverse environmental impacts on each of the four 'phases' of planned development, the project was going to need water from some source or sources. To defer any analysis whatsoever of the impacts of supplying water to this project until after the adoption of the specific plan calling for the project to be built would appear to be putting the cart before the horse."

(*Id.* at pp. 199-200.)

- The court made the following statements regarding what steps the respondent would have to take to comply with CEQA:

> "We are not concluding respondent must first find a source of water for the 'project' before an EIR will be adequate. We are concluding that an EIR for this project must address the impact of supplying water for the project. It is not mitigation of a significant environmental impact on a project to say that if the impact is not addressed then the project will not be built. The decision not to build may well rest upon the absence of a suitable or adequate water source. However, the decision to approve the EIR of this project does require recognition that water must be supplied, that it will come from a specific source or one of several possible sources, *of what the impact will be if supplied from a particular source or possible sources and if that impact is adverse how it will be addressed*. While it might be argued that not building a portion of the project is the ultimate mitigation, it must be borne in mind that the EIR must address the project and assumes the project will be built."

(*Id.* at pp. 205-206 (emphasis added).)

- It is not clear whether the logic of *Stanislaus Natural Heritage* should be applied to an EIR for a *general plan*, as opposed to a specific plan. Notably, general plan EIRs are frequently "first tier" documents, similar to the EIR at issue in the case. (See CEQA Guidelines, § 15152, subd. (b).) Regardless of how that question is ultimately answered, however, *County of Amador*, discussed below, makes a general plan EIR with a detailed discussion of water issues a very valuable document, which can liberate water supply agencies to be able to do their jobs.

3. The *County of Amador* Decision Implies that the General Plan EIR is the Logical Vehicle for Addressing the Relationship Between Growth and Water Supplies.

- In *County of Amador*, *supra*, the Court of Appeal invalidated decisions by the El Dorado County Water Agency (see Wat. Code App., Ch. 96.) certifying an EIR and approving a water supply project designed to serve future population growth. The project at issue was a "water program" that included, among other things, a plan to

obtain new water rights sufficient to obtain an additional annual supply of 17,000 acre feet of water ("af/yr") from the American River watershed. (**76 Cal.App.4th at p. 940.**)

- According to the court, "[t]he need for new water supplies was predicated on projections contained in a *draft, unadopted* general plan." (*Ibid.* (emphasis added.).) Because of this fact, "the EIR [was] fundamentally flawed." **(*Id.* at p. 941.)** The court reasoned as follows:

> "Had a general plan reflecting population and development policies been adopted, a water project to meet those needs would certainly have been appropriate. Here, however, the new general plan had *not* been adopted. The proposed water project was not designed to be compatible with the existing general plan, but with the new draft plan. This sequence of events – approving a water program before adopting a general plan – precludes any proper review of significant growth issues.
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> "By proceeding without the benefit of the general plan in place, and by developing projects predicated on needs described in an unadopted plan, the CEQA process is stood on its head. Instead of proceeding from a more general project to more specific ones, as is commonplace in tiering (see Guidelines, § 15152), the exact opposite occurs: a specific water project drives the general plan process. The issues become circular: water supply projects are adopted to meet growth plans outlined in a draft general plan, and the general plan is then adopted because an adequate water supply exists for the outlined development plans."
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> (*Id.* at p. 950 (emphasis in original).)

- The *County of Amador* decision suggests that CEQA implicitly prohibits water suppliers from taking concrete steps to obtain greater levels of water supply than is contemplated by current valid local planning documents. "[A]pproving a water program before enacting a general plan places the proverbial cart before the horse." (*Id.* at p. 949.)

- The court reasoned that a water supplier simply cannot achieve proper CEQA compliance when it undertakes a supply project that, if approved, could serve more

growth than the local board of supervisors might deem desirable in adopting its general plan:

> "In determining whether and where to permit development, a county must necessarily consider the availability of consumptive water supplies. If additional water supplies are available, growth and development are feasible. Conversely, if that water is not available, growth is necessarily limited.
>
> "If a general plan calls for increased development and population, a water plan designed to meet that need makes sense. But here, no such determination was made. The County had not yet adopted a general plan or made final decisions on growth issues, and there was no final expression of county policy on these matters. By proposing a water project to meet the needs of the draft general plan, the analysis of certain issues was circumvented. That is, once the project made an additional 17,000 af/yr of water available, one of the natural barriers to growth was removed, and one of the major issues related to development no longer had to be considered.
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> "Under the present scenario, *no entity has contemplated the interrelationship of growth and water sources*. Making 17,000 af/yr of water available for consumptive purposes removes a major barrier to growth and *can virtually ensure development*. [Citation.] By predicating a project on a draft general plan, without the benefit of a final expression of County policy, *there is no guarantee that the inextricably linked issues of water supply and population growth will ever receive the appropriate environmental review*."
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> (*Id.* at pp. 950-951 (emphasis added; footnote deleted).)

- *County of Amador* gives rise to two important conclusions relevant to general plan updates. First, cities and counties, rather than water suppliers, should take the lead in making growth decisions. Such decisions should not be driven solely by the availability of water previously obtained by a water provider that was looking beyond growth levels anticipated in the operative general plan. Second, because "issues of water supply and population growth" are "inextricably linked," some planning agency *other than a water supplier* – in other words, a city or county – should address the two

issues together within a single environmental document. A general plan EIR seems like the logical place for such analysis.

- Reading *Stanislaus Natural Heritage* and *County of Amador* together with Government Code section 65352, one can conclude that, to be certain that a general plan update EIR adequately addresses water supply issues, the EIR should (i) identify in detail the water sources needed for development contemplated by the plan, and (ii) address the environmental impacts associated with making those water sources available for development.

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