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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

TEHACHAPI-CUMMINGS COUNTY WATER DISTRICT, a California water district,

Petitioner,

v.

CITY OF TEHACHAPI, a California municipal corporation; and DOES 1 through 20, inclusive,

Respondents.

GREENBRIAR CAPITAL CORPORATION, a British Columbia corporation; GREENBRIAR CAPITAL HOLDCO, INC., a Delaware corporation; GREENBRIAR CAPITAL (U.S.), LLC, a Delaware limited liability company; JEFFREY CIACHURSKI, an individual; and DOES 21 through 40, inclusive,

Real Parties in Interest.

Case No. 34-2022-80003892-CU-WM-GDS

RESPONDENT'S AND REAL PARTIES' JOINT MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PETITION FOR WRIT OF MANDATE

[Filed Concurrently with Request for Judicial Notice]

(1st through 3rd Causes of Action Only; 4th Cause of Action Stayed)

Writ Hearing/Trial
Date: March 22, 2024
Time: 1:30 p.m.
Dept.: 36

Assigned for All Purposes to the Hon. Stephen Acquisto, Dept. 36

[Exempt from filing fees pursuant to Govt. Code § 6103]

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I. INTRODUCTION

The California Legislature has declared with intense urgency that "California has a housing supply and affordability crisis of historic proportions," (Gov. Code § 65589.5(a)(2)(A)), and this "lack of housing . . . is a critical problem that threatens the economic, environmental, and social quality of life in California." (*Id.*, § 65589.5(a)(1)(A)). The Legislature has stated unequivocally that additional housing is needed to address "underserved demands, constrained supply, and protracted unaffordability." (*Id.*, § 65589.5(a)(2)(C).)

Respondent City of Tehachapi ("City") likewise faces a need for additional housing to support its community, including a need for housing affordable for military service members stationed at nearby Edwards Air Force Base and numerous major employers located within 45 minutes of the City. Against this backdrop, real parties in interest Greenbriar Capital Corporation, Greenbriar Holdco, Inc., Greenbriar Capital (U.S.), LLC and Jeffrey Ciachurski (collectively, "Greenbriar") proposed to build a master planned development of up to 995 single- and multi-family residential units, many of which are small and market entry-level, along with associated amenities in a project known as Sage Ranch ("Project"). The City prepared an environmental impact report ("EIR") under the California Environmental Quality Act ("CEQA") (Pub. Resources Code ("PRC") § 21000, *et seq.*) which demonstrated that the Project would not result in any significant, unmitigated impacts, and included a 58-page Water Supply Assessment ("WSA") supporting the conclusion that sufficient water exists for the Project over the required 20-year horizon. After Planning Commission and City Council hearings, the City approved the Project.

Petitioner Tehachapi-Cummings County Water District ("Petitioner") filed suit, purportedly concerned about the Project's environmental impacts. But Petitioner's arguments lack merit and a closer look shows Petitioner is only demanding a land use policymaking role the law precludes.

As shown more fully below, the WSA and EIR satisfy CEQA and Water Code requirements to disclose the Project's water demands and address the reasonably foreseeable impacts of supplying water to the Project. These documents show that the Project will require 350 acre feet ("AF") per year ("AFY") of water. Greenbriar has committed, through an enforceable condition of approval that the City imposed and which Petitioner does not mention to the Court, to provide 175

AF of pumpable water, leaving a demand of only 175 AF for the Project. To meet this demand, the City explained that it reasonably was relying on an existing contract between the City and Petitioner (the "Term M&I Agreement") under which the City, as an existing customer, is entitled and obligated to purchase water from Petitioner. At no point does Petitioner actually contend that it cannot supply the City with 175 AFY for the Project, nor could it credibly do so. Even based on Petitioner's conservative estimate (with which the City does not agree) of reliable future water supply (33.2% of 19,300 AFY of imported water), Petitioner will receive over 6,400 AFY of imported water supply on average in perpetuity. Put into context (175 AFY vs. 6,400 AFY), it is apparent why Petitioner avoids a focus on the minimal amount of water needed for the Project, despite Petitioner's purported concerns about the Project.

Instead, Petitioner's brief contains a singular focus on the WSA's cumulative water analysis. Here again, Petitioner's argument fails based on facts. As the City disclosed in the WSA and EIR, the City's cumulative water need in Year 2040 – accounting for the Project and all other reasonably-expected growth in the City – is a modest, yet conservative 1,560.3 AFY. The City calculated this figure using a projected City population growth rate supported by Petitioner's General Manager. Again, even using Petitioner's own estimates, Petitioner will receive over 6,400 AFY of imported water supply on average. Petitioner further fails to disclose that through cooperative banking agreements, it can accept volumes of water in excess of the 10,000 AFY it can physically pump, and can retrieve and sell that water if needed in future, water-short years. To that end, in 2023, Petitioner obtained a net supply of 23,731 AF of imported water and only pumped 9,895 AF into the Tehachapi region, with the remaining balance of water available to Petitioner in future years to supplement its imported water supply allocation. In fact, to date, Petitioner owns 22,494 AF of water in various water banks. By contrast, the sum of *all* water needed cumulatively for the City for 20 years is 17,994.3 AF. Stated differently, Petitioner has enough water in the bank today to service the City's needs for the next 20 years as shown in the WSA and EIR.

As a result, Petitioner's challenge is not actually about the City's analysis or whether adequate water exists for the Project, but is an objection to the land use policy decisions inherent in the Project approval. While Petitioner may disagree with municipal growth and worry that it

portends a shift away from agricultural interests – as highlighted by Petitioner's Board President who submitted a letter with concerns about Project impacts to his agricultural property – it is not entitled to use CEQA to stall needed housing projects and disavow contractual obligations.

The City complied with all of its obligations under applicable law. The Court should deny the First through Third Causes of Action.[1]

II. APPLICABLE LEGAL FRAMEWORK

A. Petitioner Has No Land Use Authority and Is Not a CEQA Responsible Agency

Petitioner is a water wholesaler that was formed in 1961 to "carry out basic groundwater and watershed studies." (AR 1783, 5389.) In 1966, groundwater adjudication proceedings were initiated "in response to the decline in groundwater levels that had been experienced in the Tehachapi Basin since 1950." (AR 5460.) "The Tehachapi Basin adjudication judgment was filed in 1971, with an amended judgment filed in 1973." (AR 5460). "The judgment created 'allowed pumping allocations' for each party which restricted total annual extractions within the Tehachapi Basin to the safe yield of 5,500 acre-feet." (AR 5460.) The City's adjudicated allocation at the time the EIR was prepared was 1,897 AFY (AR 1785). Groundwater levels have largely returned to 1950 levels and the basin is not considered to be in a state of overdraft or projected to become overdrafted. (AR 5460.)

Petitioner "serves as watermaster for three adjudicated groundwater basins: Brite Valley, Cummings Valley, and Tehachapi Valley." (AR 5390.) As watermaster, Petitioner is obligated to serve as a neutral arm of the Court and to effectuate the terms of the longstanding judgment granting water rights to various parties. (*Dow v. Lassen Irrigation Co.* (2022) 75 Cal.App.5th 482, 489 ["The watermaster's role is merely to administer and implement the decree; its role is not to champion the rights of some water users subject to the decree to the detriment of other water users subject to the decree. In other words, the watermaster's role is not to take sides or play favorites."].) Petitioner lacks independent land use powers and does not have the ability to approve or deny development projects. (See *ibid.*)

Petitioner is not a "responsible agency" under CEQA with the ability to "carry out or

[1] Pursuant to the Court's March 27, 2023 Order, the Fourth Cause of Action is stayed.

approve a project." (Cal. Code Regs. ("CCR"), tit. 14, § 15381.) The EIR did not identify Petitioner as a responsible agency because there are no discretionary approvals for Petitioner to grant. (AR 113.) Petitioner did not object to this or claim otherwise.

B. Regional Urban Water Management Plans

"In 1983, the Legislature adopted the [Urban Water Management Plan] Act to promote the active management of urban water demands and efficient water usage in order to protect the people of the state and their water resources." (*Friends of the Santa Clara River v. Castaic Lake Water Agency* (2004) 123 Cal.App.4th 1, 8.) "To achieve the goal of water conservation and efficient use, urban water suppliers are required to develop water management plans that include long-range planning to ensure adequate water supplies to serve existing customers and future demands for water." (*Ibid.*) "The plans must consider a 20-year time horizon [citation] and must be updated 'at least once every five years on or before' " July 1, in years ending in six and one. (*Ibid.*; Wat. Code §§ 10621(a), 10631(a); see also AR 5386.) The last Regional Urban Water Management Plan ("RUWMP") that Petitioner prepared was in 2015. (AR 3297, 5374.) Petitioner was required to prepare a 2020 RUWMP (Wat. Code, § 10621(a); see also Request for Judicial Notice ["RJN"], Exh. A), but still has not done so.

C. The Term M&I Agreement

In 2017, the City and Petitioner entered into a Term M&I [Municipal & Industrial] Agreement for the City's purchase of water from Petitioner. (AR 1942-1947.) The City agreed to the Term M&I Agreement to have access to water. (AR 3302.) The Agreement states Petitioner's "policy to meet the present and future needs of its Term M&I Agreement Customers from the District's State Water Project ('SWP') water supply pursuant to the District's two water supply contracts with the Kern County Water Agency ('KCWA')." (AR 1942.) The Agreement is for a minimum of 10 years but is evergreen absent termination, and contemplates lasting until the 2039 termination date of Petitioner's contracts with KCWA. (AR 1946.) Under Petitioner's operating rules, Petitioner intended for Term M&I Agreements to be renewed and relied upon: "It has been and remains [Petitioner's] policy to routinely extend Term M&I Agreements upon conclusion of their stated terms since [Petitioner's] wholesale customers and their retail customers have built

water distribution systems, homes, businesses and other public and private improvements in reliance on the long term availability of SWP water from [Petitioner]." (AR 14326.)

Petitioner's combined entitlement under the KCWA contracts is nearly 20,000 AFY. (AR 14325.) Through the Term M&I Agreement, the City is entitled to purchase from Petitioner up to 1,153 AFY of water, which is 5.97% of Petitioner's entitlement of SWP water. (AR 1942, 14325.) This is not merely an option; the City is obligated to purchase "all" of its M&I water over and above the City's groundwater allocation from Petitioner. (AR 1942-1943 [B.1].) Petitioner cannot require the City to purchase imported water from Petitioner and at the same time disclaim an obligation to sell that water to the City. And, by recognizing an upper limit on an "obligation" to sell water (i.e., 1,153 AFY), Petitioner has acknowledged that it is obligated to sell water to the City. In addition, the City is required to bank five times its average SWP demand. (AR 1943-1944 [B.3]; 3302) and can draw upon that during SWP shortages (AR 1946 [B.10]). Thus, the City could meet its demand for five years without receiving any new SWP water from Petitioner.

To address the potential that demand for Petitioner's SWP water could exceed what it receives from the State, Petitioner annually adopts an ordinance establishing water sale priorities in the event of a shortage, and did so in 2021. (AR 1936-1940.) The ordinance mandates a higher priority for existing Term M&I than any agricultural customers. (AR 1938.) Petitioner explained:

> Direct-delivery M&I customers typically have no substitute water supply. Further, it is important to the local economy and to the District's tax base that local construction projects not be delayed due to the lack of water. All municipal M&I customers operate under approved agreements with the District. These agreements require a specified amount of water banking to provide an assured supply, dedicated to the municipal provider for their exclusive use, in the event of future shortages. (AR 1936 [Item C].)

This is consistent with state law declaring that domestic use is the highest use of water resources. (Wat. Code § 1254 [domestic use is highest use in acting on surface water requests].)

III. BACKGROUND FACTS

A. The Project

The Project will construct up to 995 single- and multi-family residential units, including several small and market entry-level units, on Planned Development-zoned lots with recreational amenities on roughly 138 acres of land. (AR 2641.) The Project reflects modern planning

concepts with "an orientation toward smaller lots, less maintenance, walkable communities and access to nearby parks and community amenities." (AR 2644.) The Project's smaller lots allow for "more community interaction, less yard maintenance and lower water and energy consumption." (*Ibid.*) For the years 2015-2023, the City had a need for at least 483 residential units across various income categories. (AR 561-562.) The Project "will assist the City in meeting some of its Housing Element [statutorily-required planning] goals and requirements." (AR 562.)

B. The Environmental Review Process

Analysis of the Project began in July 2019, when the City's environmental consultant prepared an Initial Study pursuant to CEQA (AR 1963-2069), the purpose of which was to determine the Project's potential impacts in various areas and guide the scope of an EIR. (AR 1967-1969.) The Initial Study confirmed at the outset that the EIR would analyze the Project's potential impacts to water supply and that a WSA would be prepared. (AR 2042.) A Notice of Preparation ("NOP") of an EIR was prepared along with the Initial Study to solicit input from interested persons, groups, and public agencies on the scope of the EIR. (AR 664.) The NOP and Initial Study were circulated from July 3, 2019 to August 1, 2019. (*Ibid.*)

Petitioner responded to the NOP on July 8, 2019, noting that it looked forward to reviewing the WSA and EIR. (AR 775.) This followed a discussion between Petitioner and Greenbriar months earlier, in March 2019, where Petitioner's General Manager confirmed his belief that it was "possible to find a water solution for Sage Ranch." (AR 6072.)

Because Petitioner had not prepared the 2020 RUWMP when the City was preparing the Draft EIR for the Project, the City had no choice but to use the 2015 RUWMP. The City "synthesized available information to fill in the gaps left by [Petitioner] and to provide a complete analysis of available water supply through 2020 as part of its analysis of the Project." (AR 3297.)

The City released the Draft EIR in March 2020. (AR 9742; 367-663 [Draft EIR].) The EIR concluded that all impacts were either less than significant or could be mitigated to a less than significant level. (AR 2643.) The Draft EIR was circulated for public review and comment for a 45-day period from March 4, 2020 to April 17, 2020. (AR 9742.) The City received four comment letters on the Draft EIR: from the State Department of Transportation and State Department of

Toxic Substances Control, neither of which expressed concerns about the Project (AR 1644; 1646-1648); from Petitioner's Board President, who "appreciate[d] the need for housing in Tehachapi" but expressed concern about the Project's impacts on his property's agricultural uses and suggested a meeting with City staff to discuss the future of his property, including converting the property to another use (AR 1655-1656); and from Petitioner (AR 1658-1661).

In November 2020, Petitioner's General Manager met with City staff and confirmed that he supported a 2% growth rate in the City long term, agreed to provide water to this end, and agreed that how Petitioner would plan to supply water for this 2% growth was "TCCWD's [Petitioner's] problem." (AR 11543.) Following this consultation, the City prepared its water supply analysis.

The Final EIR for the Project included responses to all comments timely received on the Draft EIR. (AR 1645; 1649-1654; 1657; 1662-1673.) The Final EIR also included additional information and revisions to sections of the EIR relating to water supply and demand issues (AR 1674-1748) and an updated WSA with additional analysis (AR 1766-1962). The WSA and EIR included analysis based in part on the approximate 2% growth rate that Petitioner's General Manager had supported during the November 2020 meeting with City staff. (AR 11785-11786.)

C. City's Public Hearings and Project Approval

On July 12, 2021, the City's Planning Commission held a duly-noticed public hearing on the Project, at the conclusion of which it adopted Resolution No. 21-06 recommending that the City Council approve the Project, subject to conditions of approval. (AR 5-17.)

The Project came before the City Council on August 16, 2021. (AR 3347.) In addition to the overall presentation of the Project, City staff presented a detailed discussion of water supply issues and explained the analysis in the WSA. (AR 4102-4121.) Greenbriar noted that the Project could help address noted shortages of housing for military members stationed at Edwards Air Force Base. (AR 4123.) The only opposition to the Project came from Petitioner. (AR 4127.)

At the conclusion of the public hearing, and after asking clarifying questions of Petitioner's General Manager (AR 4134-4139) and confirming that Greenbriar's commitment to provide 175 AF of water to serve the Project was an enforceable obligation (AR 4139-4142), the City Council voted to adopt Resolution No. 42-21 approving the Project's tentative tract map with conditions of

approval (AR 18-21), and a finding that sufficient water exists and "the Applicant has committed in writing to supplying 175 acre feet of water for the Project." (AR 20 [Item N].) The City Council also adopted Resolution No. 43-21 certifying the EIR and making all required CEQA findings (AR 22-73) and introduced Ordinance No. 21-04-762, which was adopted on September 7, 2021 after a required second reading. (AR 74-90.) The Ordinance approved the Planned Development for the Project subject to conditions of approval, including a condition requiring the applicant to "convey water rights to the City equal to 1/3 acre-feet of water per equivalent dwelling unit, up to a total of 175 acre-feet of pumpable water rights" for the Project. (AR 87 [Condition 53].)

IV. STANDARD OF REVIEW

A. CEQA Claims

Judicial review of CEQA compliance "shall extend only to whether there was a prejudicial abuse of discretion. Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence." (PRC § 21168.5.) Substantial evidence is "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." (14 CCR § 15384(a).) "The substantial evidence standard is applied to conclusions, findings and determinations. It also applies to challenges to the scope of an EIR's analysis of a topic, the methodology used for studying an impact and the reliability or accuracy of the data upon which the EIR relied because these types of challenges involve factual questions." (*Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1198.) Courts accord significant deference to the agency's substantive factual conclusions. (*South of Market Community Action Network v. City and County of San Francisco* (2019) 33 Cal.App.5th 321, 330 (*South of Market*).)

A "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." (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 393 (*Laurel Heights*).) "The agency is the finder of fact and [courts] must indulge all reasonable inferences from the evidence that would support the agency's determinations and resolve all conflicts in the evidence in favor of the

agency's decision." (*Save Our Peninsula Comm. v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 117.) Thus, courts "have looked not for perfection [in an EIR] but for adequacy, completeness, and a good faith effort at full disclosure." (14 CCR § 15151.) Courts are further directed "not [to] interpret [the CEQA statutes] or the state guidelines … in a manner which imposes procedural or substantive requirements beyond those explicitly stated in [CEQA] or in the state guidelines. ([PRC] § 21083.1.)" (*Southwest Regional Council of Carpenters v. City of Los Angeles* (2022) 76 Cal.App.5th 1154, 1182; internal quotations omitted.)

An EIR "is presumed adequate ([PRC] § 21167.3), and the plaintiff in a CEQA action has the burden of proving otherwise." (*State of California v. Superior Court* (1990) 222 Cal.App.3d 1416, 1419.) A party challenging an EIR also "must lay out the evidence favorable to the other side and show why it is lacking. Failure to do so is fatal." (*Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1265-1266 (*Defend the Bay*).)

B. Water Code Claims

A WSA is intended to assist local governments in deciding whether to approve a project. (*O.W.L. Foundation v. City of Rohnert Park* (2008) 168 Cal.App.4th 568, 576.) The WSA must be included with the EIR. (Wat. Code, § 10911(b); *Citizens for Responsible Equitable Environmental Development v. City of San Diego* (2011) 196 Cal.App.4th 515, 523.) As a result, judicial review of whether a WSA complies with requirements under the Water Code is a subset of a CEQA challenge and is subject to the same substantial evidence standard of review.

V. ARGUMENT

A. The EIR Complies with CEQA

1. The Project Description is Complete and Accurate

Petitioner's first contention, that the Project description is "incomplete, inaccurate, and misleading," (Petitioner's Opening Brief ["POB"] 12-14), is not based on the Project description at all but Petitioner's disagreement with information supporting the EIR. This misdirect falls flat.

An EIR must contain a project description that includes: (a) the precise location and boundaries of the proposed project, (b) a statement of the objectives sought by the proposed project, (c) a general description of the project's technical, economic and environmental

characteristics, and (d) a statement briefly describing the intended use of the EIR. (14 CCR § 15124(a)-(d).) The EIR contains each required element and is accurate, stable, and finite.

Precise location and boundaries of the Project. The Draft EIR includes a precise definition of the Project's location and a map highlighting the exact area and boundaries of the Project site. (AR 374, 401-403.) The Draft EIR also analyzes the surrounding land use and zoning. (AR 401.)

Statement of objectives. The Draft EIR lists four Project discrete objectives. (AR 375, 410.)

General description of the Project's characteristics. The Draft EIR explains that the Project seeks to develop the vacant land with different housing types for a total of 1,000 units; includes a table listing housing types, number of units, acreage, and a site plan; and notes site circulation, infrastructure, phasing, and the anticipated construction schedule. (AR 404-409.)

Intended use of the EIR. The Draft EIR describes the document's intended uses. (AR 393.)

Petitioner does not take issue with any of this or claim that required elements are missing, nor could Petitioner do so. Instead, Petitioner's sole complaint is a disagreement with the EIR's reliance on the Term M&I Agreement to support the EIR's analysis and conclusions. (POB 12-14.) But information used in an EIR's analysis of a project is not an element of the project description. A project description serves to provide a straightforward understanding of the project; it is not an opportunity to attack an EIR's analysis under feigned confusion over what a project is.

Courts find project descriptions to be inadequate and misleading only when they give "conflicting signals to decision makers and the public about the nature and scope of the project." (*Citizens for a Sustainable Treasure Island v. City and County of San Francisco* (2014) 227 Cal.App.4th 1036, 1052.) Petitioner has not made any such allegation here, nor could it. The EIR contains an accurate, stable, and finite Project description and includes the required elements.

2. The EIR Fully Analyzes Project Impacts to Water Supply

"[T]he EIR [i]s an informational document. Its purpose is to provide public agencies, and the public, with detailed information about the effect a proposed project is likely to have on the environment; to list ways in which the significant effects of a project might be minimized; and to indicate alternatives to a project." (*California Oak Foundation v. City of Santa Clarita* (2005) 133 Cal.App.4th 1219, 1225.)

As the California Supreme Court has held, "to satisfy CEQA, an EIR for a specific plan need not demonstrate certainty regarding the project's future water supplies." (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 438 (*Vineyard*).) The question "is not whether an EIR establishes a likely source of water, but whether it adequately addresses the reasonably foreseeable *impacts* of supplying water to the project." (*Id.* at p. 434.) This is consistent with CEQA's information disclosure mandate, as stated above. Thus, the obligation under CEQA is for an EIR, and a WSA, to engage in meaningful analysis and to demonstrate how a project's water needs will be met—in other words, show your work. To this end, the California Supreme Court has identified "certain principles for analytical adequacy under CEQA." (*Id.* at p. 430.) The EIR satisfies each of these principles.

First, "[d]ecision makers must … be presented with sufficient facts to 'evaluate the pros and cons of supplying the amount of water that the [project] will need.' " (*Vineyard*, *supra*, 40 Cal.4th at pp. 430-431.) Second, for a large project to be built over a number of years, an EIR "must assume that all phases of the project will eventually be built and will need water, and must analyze, to the extent reasonably possible, the impacts of providing water to the entire proposed project." (*Ibid.*) "Third, the future water supplies identified and analyzed must bear a likelihood of actually proving available…." (*Id.* at p. 432.) "An EIR … must address the impacts of *likely* future water sources, and the EIR's discussion must include a reasoned analysis of the circumstances affecting the likelihood of the water's availability." (*Ibid.*) And fourth, "where, despite a full discussion, it is impossible to confidently determine that anticipated future water sources will be available, CEQA requires some discussion of possible replacement sources or alternatives to use of the anticipated water, and of the environmental consequences of those contingencies." (*Id.* at p. 432.)

The WSA explains in detail the water demands for the Project. (AR 1777-1781.) The calculations were based on readings from metered residential customers and census data. (AR 1777-1778.) The WSA initially calculated the Project's total water demand to be 418 AFY, but then outlined the various design features of the Project that reduce this figure to the estimated 350 AFY. (AR 1778-1781.) All of the presented estimates are conservative and do not assume a best case scenario. (See, e.g., AR 1778 ["Although some of the housing products / floor plans proposed

by the Project would likely result in fewer than 2.63 persons per residence, the figure is being used to conservatively estimate Project water demand"], AR 1780 ["Although the above-factors and reasonable estimates support the estimated reduction of 44% of GPD [gallons per day], it is conservatively estimated that the Project would use only 20% less"].)

As required, the WSA assumes that all phases of the Project will be built, includes an analysis combining the finitely-defined water needs of the Project with forecasts of the cumulative amount of water needed for the City for 20 years, and explains the sources of that water. (AR 1792.) The WSA includes a comprehensive table with detailed supporting explanations and data. Specifically, Table 4-1 accounts for how much water the City needs for its existing residents without the Project (Column D); how much water the City needs for its existing agricultural and irrigation uses (Column E); and how much water the City will need based on the Project and other anticipated population growth in the City (Columns L and M). (AR 1789-1792.) The table then lists how much water the City reasonably can expect from its contract with Petitioner (Columns H and P), as discussed further below. (AR 1790-1791.) The table also lists where the City will obtain the needed Project water and cumulative water need by year for a 20-year span. (AR 1792.)

The WSA relies on concrete sources and historical data to provide a reasoned analysis of the future water supplies available for the Project and the City's overall expected cumulative need. The WSA explains that water will be received from three primary sources: the City's adjudicated water rights (1897 AFY [AR 1789-1790]); Petitioner, pursuant to the existing and enforceable Term M&I Agreement (for at least 1,153 AFY [AR 1942]); and Greenbriar (with the analysis assuming an obligation to bring 93 AF, but the actual demonstrated commitment and condition of approval requiring 175 AF [AR 87, 3212, 3294]). (AR 1792.) Between these three sources alone, the WSA explains that the City will have enough water for the Project for the entire 20 years required under CEQA and enough water for the Project plus the anticipated cumulative growth of the City for *fifteen years*. (AR 1792.) Only from 2035 to 2040 will the City increasingly need an additional 35.9, 106.8, 179.5, 253.8, 329.8, and 407.5 AFY, respectively. (AR 1792 [difference between the amount needed from Petitioner and the 1,153 the City is allowed under the Term M&I Agreement].) The WSA notes this and states that due to "the mitigation measures identified herein,

the City would have adequate water supplies to serve the proposed Project." (AR 1793.)

Consistent with modern water conservation principles, the Project is designed to reduce water demand. The EIR also includes conservative estimates and feasible, enforceable mitigation measures. As explained to Petitioner (AR 11786), the analysis includes conservative estimates that do not account for several factors that will either increase the amount of water available or decrease the amount of water required: (1) the City could acquire additional water rights (AR 1790), *which it already had between the Draft and Final EIR* (AR 1782 [increasing from 1,847 AF to 1,897 AF]), which would increase the figures in Columns G and O (AR 1792); (2) the City can use the water it has stored in its Banked Water Reserve Account ("BWRA") that exceeds the minimum balance required (AR 1787), which would increase the figures in Column G and O and reduce those in Columns H and P (AR 1792); and (3) although the Project contains features which can reduce the average gallons per day by 44%, as supported by the data, the WSA only assumes a 20% reduction (AR 1780), which would also reduce Column M (AR 1792). Second, as part of Mitigation Measure HYD-2, outdoor public landscaping will have separate meters, and the 70 AFY required for this purpose is considered "non-critical" and can be "limited during severe drought conditions" (AR 1760-1761, 1780), which would reduce Column M (AR 1792). Third, per Mitigation Measure HYD-3, the Project applicant must provide 93 AF. (AR 1761, 1792.) But Greenbriar will provide 175 AF (AR 20, 87, 3294) which exceeds the 93 AF and reduces Columns N and P. (AR 1792.) If the applicant does not provide evidence of these acquired water rights, *the Project will not proceed.* (AR 20, 3212.) For water supply beyond the 175 AF provided by Greenbriar, fees shall be paid to the City either to purchase water rights or to import a 20-year supply. (AR 1761-1762, 1793.)

The WSA thus "adequately addresses the reasonably foreseeable impacts of supplying water to the project." (*Vineyard*, *supra*, 40 Cal.4th at p. 434.) The WSA, and the EIR in turn, meet each of the guiding principles that the Supreme Court identified in *Vineyard*.

a. The EIR Adequately Describes Available Surface Water

Petitioner's first attack ignores data to wrongly contend that the EIR overstates the amount of surface water available. (POB 16.) The WSA states, "With average SWP deliveries at 60% long-term, the City anticipates that sufficient supplies will be reasonably available for purchase

from [Petitioner] and will have been previously recharged for recovery during the average year, single dry year, and multiple dry years scenarios." (AR 1788.) This 60% figure comes directly from the 2015 RUWMP prepared by Petitioner. (AR 1811.)

Petitioner now claims that 40% represents a more accurate figure. (POB 16.) The City's August 16, 2021 staff report addressed this. The City first noted that Petitioner's 33.2% figure "ignore[s] historical precedent." (AR 3306.) As City staff explained, "California is experiencing a multiyear drought cycle which is not unprecedented. Long-term drought cycles have occurred in California as recently as the 1990's and 1970's. Therefore, using a 10-year or 15-year average without adjusting for water banking potential in wet years is prejudicial. Using a longer term average is therefore more reasonable." (AR 3306.) The City next explained that using Petitioner's figure still shows there is sufficient water to meet the Project's needs:

> Even considering the EIR's and WSA's analysis prior to the Applicant's commitment to this additional water, the Project itself is estimated to require 350 AFY in additional water supply to offset the corresponding demand. With the Applicant bringing 175 AF of pumpable water rights to the City, a remaining 175 AFY must be identified. This alone is the quantity of additional water that must be identified to satisfy applicable requirements. Accepting [Petitioner's] most conservative estimate (which the City does not accept) of reliable future water supply (33.2% of 19,300 AFY imported water), [Petitioner] will receive over 6,000 AFY of imported water supply on average going forward. The 175 AF needed for the Project is 2.7% of that supply, and the City's conclusions as to the availability of this amount of water are supported. (AR 3307-3308.)[2]

In the end, Petitioner's arguments amount to, at best, a disagreement between experts. "[D]isagreement among experts does not make an EIR inadequate." (*Laurel Heights*, *supra*, 47 Cal.3d at p. 409.) "[C]hallenges to the scope of an EIR's analysis, the methodology used, or the reliability or accuracy of the data underlying an analysis, must be rejected unless the agency's reasons for proceeding as it did are clearly inadequate or unsupported." (*Chico Advocates for a Responsible Economy v. City of Chico* (2019) 40 Cal.App.5th 839, 851.) Petitioner fails to make this required showing. Moreover, "[w]hen an agency is faced with conflicting evidence on an

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[2] Recent data from Petitioner support the City's conclusions. In 2023, Petitioner obtained a net supply of 23,731 AF of SWP water and pumped 9,895 AF into the Tehachapi region, with the balance available to Petitioner in future years to supplement its SWP allocation. (RJN, Exh. B, p. 16.) To date, Petitioner owns 22,494 AF of water in various water banks. (*Id.*, p. 17.) By contrast, the sum of all water needed cumulatively for the City for 20 years is 17,994.3 AF. (AR 1792.) Thus, Petitioner has enough water banked today to meet the City's needs for the next 20 years.

issue, it is permitted to give more weight to some of the evidence and to favor the opinions of some experts over others." (*Ibid.*) Even assuming Petitioner's arguments can be considered expert opinion, the City responded to each comment submitted by Petitioner, thoroughly explaining where the City's data comes from, why the City disagrees, and the basis for the City's conclusions. (AR 1658-1673; see also AR 3295-3315.) This is all that CEQA requires. (14 CCR § 15151 ["Disagreement among experts does not make an EIR inadequate, but the EIR should summarize the main points of disagreement among the experts"].)

Unable to pierce the factual basis for the City's conclusion, Petitioner claims that it "is a per se prejudicial violation of CEQA" to rely on the 2.7% "rationalization," but Petitioner mischaracterizes the cases it uses for this argument. (POB 6, fn. 12.) In *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 718, 720, the EIR used an impermissible "ratio" approach to trivialize the project's adverse air quality impacts. "In simple terms, the EIR reasons the air is already bad, so even though emissions from the project will make it worse, the impact is insignificant." (*Id.* at 718.) The EIR for this Project does not take this approach. The EIR does not rationalize that because the City already needs a certain amount of water, adding water for this Project would be a minor increase. The City looked at Petitioner's *own estimates of how much water it has* (which the City contends is higher), and even with that low estimate, concluded that the amount of additional water needed would not be significant because it is only 2.7% of the water that Petitioner already has. (AR 3307-3308.) That is a supply of 6,408 AFY compared to the 175 AFY that the Project requires. (AR 3307-3308.) In other words, the City was not justifying a conclusion by minimizing a problem, but rather explaining that even under the most extreme outlook proposed by Petitioner, the Project's water demand would be de minimis and could be met.

Gray v. County of Madera (2008) 167 Cal.App.4th 1099 likewise is unavailing to Petitioner. There, the EIR was faulty because it "improperly concluded that a 3-to-5 dBA threshold is required before noise impacts can be found to be significant," and there was "no single noise increase that renders the noise impact significant." (*Id.* at 1123.) Again, the EIR here did not trivialize a potential impact or contend that water demand below a certain percentage increase was

insignificant. Rather, the City used Petitioner's own purported numbers to show that the WSA's conclusions are reasonable and supported, even under Petitioner's scenario. (AR 3307-3308.)

Petitioner next asserts that neither the 2015 RUWMP nor the 2019 report on Water and Sewer Systems reflect the Project's demand. (POB 16, fn. 25.) This, too, falls flat.

With respect to the 2015 RUWMP, although the City reasonably could have relied on the 1.1% growth figure in the 2015 RUWMP – the most current version of the RUWMP available – the WSA does not do so. Instead, the analysis is based on a 2.3% growth assumption, which is the "average annualized growth rate the City has experienced beginning in 2002." (AR 1789.) The City reasonably used 2.3% based not only on historical data but also because Petitioner's General Manager concurred with this figure. Summarizing a November 2020 meeting between Petitioner's General Manager and City staff, City staff wrote that the General Manager "agreed that he supports some reasonable growth in the City," and he "placed this value at 2% year-over-year beginning in 2020." (AR 11543.) The General Manager wrote back that 2% "has been the historical growth rate in the RUWMP," and that this number will be "reviewed and verified during the 2020 RUWMP process." (AR 11543.) The initial draft of the 2020 RUWMP *that Petitioner prepared* confirmed this and included a 2.3% expected growth rate for the City. (AR 3304.)

Petitioner's citation to the Water and Sewer Systems Modeling Report is disingenuous and fails to fairly reflect the record. As the City explained when Petitioner raised this same issue in its written comments prior to the City Council hearing on the Project:

> First, [Petitioner's] statement that the Project's water demand is not "reflected" in the June 2019 memorandum prepared by Michael K. Nunley and Associates is irrelevant. This memorandum was used to support the current City average residential consumption factor of 118 gallons/day/person. The WSA uses this value as a starting place to consider what is the reasonable expected consumption rate for would-be Project residents. The 2019 Nunley memorandum goes on to estimate areas of potential future growth for the purpose of identifying issues with the water supply network that need to be addressed as development occurs; this has no specific bearing on the accuracy of the Final EIR or the WSA. (AR 3297.)

Thus, rather than relying on a favorable figure (1.1%), the WSA relies on a larger (2.3%) growth rate which leads to a more conservative estimate of water demand. This was the best data available to the City. While the City had anticipated using the 2020 RUWMP in the analysis, because Petitioner was late with its update, "the City synthesized available information to fill in the

gaps left by [Petitioner] and to provide a complete analysis of available water supply through 2020 as part of its analysis of the Project." (AR 3297.) To this day, Petitioner still has not completed a draft of the 2020 RUWMP despite being responsible for doing so. (See RJN, Exh. A.)

b. The City is an Existing Customer by the Term M&I Agreement

Petitioner next attempts to shifts its responsibilities onto the City, claiming that the EIR is flawed because it does not solve Petitioner's ability to serve its other water customers if it meets its obligations to the City under the Term M&I Agreement. (POB 17-18.) CEQA does not require this level of attenuated analysis. An EIR is tasked with analyzing a project's water demands and explaining whether and how it is reasonably foreseeable that those demands can be met given the available water supply. There is no requirement in CEQA for a lead agency to analyze the policy or political implications of a water district having to honor its contractual obligations.

Petitioner provides no applicable authority to support its position, relying again only on the misconstrued holding of a case. In *Habitat & Watershed Caretakers v. City of Santa Cruz* (2013) 213 Cal.App.4th 1277, 1291-1292 (*Habitat*), the Court found the EIR was legally sufficient because "[i]t discussed the impact of the project *on the City's water supply*, acknowledged the City's inadequate supplies, and noted that the construction of a desalination facility, the City's only feasible source of additional water supply, was uncertain. Throughout the Draft EIR, the City acknowledged that the impact of the Project's water demand would increase the ongoing imbalance *between the City's supplies and the demands of its users*." (*Ibid.*, emphasis added.)

The EIR accounts for both the Project's water demands and available supply. It addresses how much water the City needs now, how much water it would need for 20 years based on its historical growth without the Project, and how much water it would need for 20 years with the Project *and* general growth. (AR 1792.) The EIR concludes that there will not be an impact on the City's existing water users based on the factors discussed above: the amount of adjudicated water to which the City has legal rights, the amount of water Petitioner is contractually obligated to provide, the amount of water Greenbriar must provide, and applicable mitigation measures. This is all that CEQA requires for a "reasonably foreseeable" analysis. CEQA notably does *not* require that a lead agency analyze another agency's policy choices arising from its contractual obligations

– a position further supported by Petitioner's General Manager who conceded that meeting the City's water needs based on an agreed growth rate "is [Petitioner's] problem."[3] (AR 11543.)

To distance itself from its obligations under the Term M&I Agreement, Petitioner implies that Greenbriar is a new water user and lower in the hierarchy of water priorities. (POB 12-13 & fn. 21.) This is wrong. Greenbriar and future Project residents are not Petitioner's customers; the City alone is. Petitioner's General Manager confirmed this during the City Council hearing:

> Speaker: Thank you. Mr. Neisler, … You said earlier, you know, just in your comments said we have an existing we are an existing M&I customer, correct?
>
> Mr. Neisler: Correct.
>
> Speaker: So, Sage Ranch is not a new customer to you, correct?
>
> Mr. Neisler: Well, that's correct. Those are new residents that are served by an existing customer.
>
> Speaker: But that's in the M&I [Agreement]. That's through the City. So, it's the City's customers not your customers, correct?
>
> Mr. Neisler: Correct. The City is our existing customer. (AR 4138.)

This distinction is important because even in the time of a drought, the City, as an existing customer with a Term M&I Agreement, has a priority subordinate only to firefighting needs and "wheel water" users. (AR 1938.) The WSA confirms that Petitioner publicly stated this position (AR 1787) and includes both the Term M&I Agreement (AR 1942-1947) and Petitioner's adopted water priority ordinance (AR 1936-1940). The Agreement acknowledges that water supplied under this Agreement is, in part, to meet the future needs of the City – which includes new end-users. (AR 1942 [Recital A.i].) This is consistent with both Petitioner's governing rules and priority ordinance which provide that Petitioner first must meet the reasonable present and future needs of its existing M&I customers. (AR 1936, 14325.) There is no basis to subordinate the City's water purchases from Petitioner simply because of new Project end-users.

c. The EIR Mitigates All Potential Impacts

Petitioner's contention that the EIR must explain the "timing, sufficiency, quality, or sustainability" of Greenbriar's provided water, and a failure to do so violates CEQA, is misguided.

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[3] Petitioner had the opportunity to contest this statement but not only did not do so, its General Manager endorsed it. When asked how Petitioner "plans to supply the water for this 2% growth," City staff summarized that he "agreed that this is TCCWD's problem." (AR 11543.) The General Manager confirmed, "I have more thoughts on this, but your comment is accurate." (AR 11543.)

(POB 19.) First, Petitioner cites to no authority that this level of detail is required. Instead, it cites generally to various statutes without explaining what each statute requires or what more it believes is needed. This alone defeats Petitioner's argument. It also cites *Center for Biological Diversity v. County of San Bernardino* (2010) 185 Cal.App.4th 866, but there it was "*undisputed that the FEIR does not include a WSA under section 10910.*" (*Id.* at 887, emphasis added.) No such argument is or can be made here. Second, Petitioner ignores that the WSA includes a detailed analysis of how much water is needed each year, where it will come from, and the basis for the reasoning, all of which comply with the *Vineyard* guidelines as discussed above. And third, the WSA states that "[t]he Applicant will be required, as a mitigation measure, to secure/purchase an additional 93 acre feet of water rights to serve the Project" and that "[t]he Applicant has identified sufficient/available water rights for purchase to accommodate the additional 93 acre-feet." (AR 1793.)

As Petitioner well knows, prior to Project approval, Greenbriar provided a "binding and formal agreement" to provide 175 AF – thus, 82 AF more than required by the analysis in the WSA. (AR 3212, 3294.)[4] Further, ignoring its obligation to "lay out the evidence favorable to the other side" (*Defend the Bay*, *supra*, 119 Cal.App.4th at p. 1266), Petitioner neglects to inform this Court that the City imposed an enforceable condition of approval on Petitioner to obligate Petitioner to provide 175 AF, regardless of the source of those water rights. (AR 87 [Condition 53]; see also AR 20 [Item N].) In other words, while the water rights agreement that Greenbriar provided to the City was evidence of the intent, the agreement itself does not create the enforceable obligation – the condition of approval does that. The additional water rights that Greenbriar committed to acquire only further support the analysis in the WSA and EIR which already

[4] Petitioner's intimation that Greenbriar has not followed through on its obligations to purchase water under the agreement it provided (POB 10, 19, 29) is both disingenuous and at odds with Petitioner's prior claimed ambivalence to the source of the water rights. Petitioner is and has been aware of the source of the water rights Greenbriar intended to dedicate to the Project and had a copy of that purchase agreement over six months prior to the City Council hearing. (AR 3309.) On August 5, 2021, following Petitioner's demand that Greenbriar "put[] all 203 AF of water rights [they have] 'on the table' in connection with the Sage Ranch Project" (AR 14318), the City wrote to Petitioner and reiterated Greenbriar's commitment to provide 175 AF of pumping rights for the Project. (AR 14318.) Petitioner responded: "TCCWD takes no position on who owns the water right required for the project or how they are obtained." (AR 14318.) Nonetheless, Petitioner *has* known that Greenbriar and its agents obtained in-basin adjudicated water rights. (See RJN, Exh. C.)

demonstrates that the Project would have less than significant impacts on water supply.

d. The EIR Adequately Analyzes Potential Cumulative Impacts

"CEQA requires that an EIR contain an evaluation of the cumulative impacts caused by other past, present and reasonably foreseeable probable future projects...." (*City of Maywood v. Los Angeles Unified School Dist.* (2012) 208 Cal.App.4th 362, 397 (*Maywood*).) The discussion "should be guided by the standards of practicality and reasonableness.... The courts have looked not for perfection but for adequacy, completeness, and a good faith effort at full disclosure." (*Ibid.*, internal quotations and citation omitted.) But " 'where future development is unspecified and uncertain, no purpose can be served by requiring an EIR to engage in sheer speculation as to future environmental consequences.' " (*Environmental Protection Information Center v. Cal. Dept. of Forestry & Fire Protection* (2008) 44 Cal.4th 459, 503.) The EIR meets these requirements.

The EIR's discussion of the water needed for the Project is based on a 2.3% population growth rate. (AR 1789.) "The 2.3% growth rate is the average annualized growth rate the City has experienced beginning in 2002." (AR 1789.) The EIR shows this analysis in Table 4-1. (AR 1792.) The analysis "assume[s] that due to the size of the [] Project relative to other housing development projects underway in the City of Tehachapi, that the population growth for the Sage Ranch Project represents 75% of the assumed background growth of 2.3% captured in Column B. As such, 25% of the background 2.3% growth will be attributable to other development occurring in the City (that is not the subject of this analysis). The resulting adjusted growth rate is depicted in Column K Following year 2027, the population growth projections were held to the original change in numerical value captured year-to-year in Column B." (AR 1790.) Thus, all other reasonably foreseeable development is accounted for in the EIR based on the adjusted growth rate.

Petitioner's argument ignores this data and substantial evidence in the EIR, contending that the EIR was required to analyze water needs for specific, undeveloped lots. (POB 20-21.) Petitioner is incorrect. First, as explained above, the WSA and EIR do account for this growth and still demonstrate that sufficient water is available. Second, this is level of specificity is not required for a cumulative impacts analysis. Petitioner cites Water Code section 10910, but that statute requires a 20-year projection of the water demand for the planned project and "existing and planned

future uses." (Wat. Code, § 10910(c)(3).) As discussed, the EIR includes this because the 2.3% accounts for *all* anticipated future development. Third, the City addressed this exact same issue at the time of the City Council hearing on the Project in response to Petitioner's same concern. (AR 3304-3305, 3309.) The City explained that "a conceived project is far less certain than an entitled project which is, in turn, less certain than a permitted projected." (AR 3298.) The City further explained that "entitled lots do not inherently result in actual water demand," that it "has vacant entitled lots dating back to the initial town formation in 1892," and that "[v]acant 'lots', when developed, may yield widely varying water demand." (AR 3304.) The City continued:

> [W]hile other future residential developments are also likely to occur in the City, it is anticipated that the Sage Ranch Project would provide the majority of residential growth in the City as the Project is built out. Based on the City's historic growth rate of 2.3%, it is unlikely that development of the Project, in addition to non-Sage Ranch residential developments, will occur at a pace that results in a growth rate higher than 2.3%. However, the calculations shown in the WSA and EIR are based on conservative assumptions that the Project will be built out completely over the next seven years (approximately 143 units/year for a total of 1,000 units) in addition to other growth in the City. The analysis accounts for anticipated population growth in the City; existing water demands and allocations; population projections with the Project included; and future water demand needed to serve the Project as well as other future development in the City over the next 20 years. (AR 3305.)[5]

More fundamentally, Petitioner's demand that the City burden a single project's WSA with the nuances of regional water planning is neither required by CEQA nor the City's responsibility. CEQA requires that the EIR analyze potential cumulative impacts of the Project, which it did. Petitioner has never quantified a differing opinion and has shrugged off its responsibility to finalize the 2020 RUWMP. Meanwhile, Petitioner discounts the 2015 RUWMP – which *did* look at other agencies' future water needs and found that Petitioner could meet them (AR 5410) – but has not provided any evidence to suggest that those needs have changed for other agencies. In short, the

[5] It is for this reason that Petitioner's attacks on the 2019 Water Model Report fall flat. As the City explained: "Furthermore, the fact that the Nunley memorandum did not specifically account for what ultimately became the contours of the Project – which, at that time, was conceptual – actually illustrates why [Petitioner's] assumptions about immediate, imminent development of other vacant lots in town is erroneous; a conceived project is far less certain than an entitled project which is, in turn, less certain than a permitted project. Or, in the words of the California Supreme Court, 'We do not require prophecy. . . . Nor do we require discussion in the EIR of specific future action that is merely contemplated or a gleam in a planner's eye.' [(*Laurel Heights*, *supra*, 47 Cal.3d at p. 398.)]" (AR 3298.) This explanation, and the supporting information, constitute substantial evidence supporting the City's analysis of potential cumulative impacts to water supply.

2015 RUWMP considered and addressed the noted concerns, and Petitioner provided no information to suggest that this regional guidance document was insufficient today. Petitioner's disagreement with the EIR does not invalidate it or relieve Petitioner of its legal responsibilities.

3. The EIR's Mitigation Measures are Proper and Enforceable

The mitigation measures in the EIR are specific, certain, and enforceable. (POB 21-22.) The EIR includes two relevant mitigation measures: HYD-2, requiring separate meters for outdoor public landscaping, which is deemed non-critical and may be limited during drought times, and HYD-3, requiring Greenbriar to pay established fees to cover the cost of purchasing water rights or importing a 20-year supply of water. (AR 1760-1761, 1793.) Petitioner's own cited authority holds that a mitigation measure is adequate when it specifies an amount that actually represents the " 'fair share' " of the user and is "part of a reasonable, enforceable plan or program that is sufficiently tied to the actual mitigation" at issue. (*Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173, 1188-1189.) The fee in the EIR's mitigation measure complies with this requirement. The fees are to be paid pursuant to local law (Tehachapi Municipal Code, section 10.08.020.B). (AR 1793.) And the fee is not an abstract number; it is calculated precisely to each unit's estimated water consumption and the fee is specifically tethered to costs that Petitioner has calculated: "The current fee is $3,148 per single family house. A single family home in the City consumes 0.33 AF/Y on average (the Project is expected to consume less as justified in the WSA). A 20-year supply of water is therefore 6.6 AF (20 years x 0.33 AF/Y). 1 AF of water purchased from [Petitioner] is $477 (including surcharges and banking fees). This results in a fee of $3,148 per single family house ($477 x 6.6 AF)." (AR 3297; see also AR 1793.) The City can and does use the fees to purchase pumpable water rights on the open market.

In addition, Greenbriar is required, as a condition of approval, to bring 175 AF of water to the Project. (AR 20, 87, 3294.) Petitioner attempts to distract from this fact by discussing one agreement Greenbriar entered into that is in the record and speculating that Greenbriar has not satisfied its terms. (POB 9-10, 19, 28-29.) There is no support for Petitioner's conjecture. As shown above, the record establishes that Greenbriar has purchased 114 AF. (AR 3271.) Beyond that, it is irrelevant whether Greenbriar has purchased the full amount of required water from a

single agreement or not; the condition of approval is not tethered to an agreement but requires Greenbriar to provide 175 AF of water for the Project, period. (AR 87; see also AR 20.)

4. The EIR Analyzes a Range of Reasonable Alternatives

Once again, Petitioner asserts that the EIR violates CEQA without actually explaining what CEQA requires or providing any support for its conclusory statement that more was required. (POB 23.) Framed properly, the record demonstrates that the EIR complies with CEQA.

At the outset, the City notes that it had no obligation to respond to Petitioner's late comments on this issue. Under CEQA, a lead agency (here, the City) "shall respond to comments raising significant environmental issues received during the noticed comment period and any extensions and may respond to late comments." (14 CCR § 15088(a).) Responses to late comments are not required and an EIR is not inadequate if the lead agency elects not to respond to untimely comments. Petitioner submitted comments on the Draft EIR but did not raise any concerns about Project alternatives. (AR 1658-1661.) Instead, Petitioner raised this issue long after the Draft EIR was circulated and the Planning Commission hearing held, and shortly before the City Council hearing. (AR 3231-3233.) This sandbagging is improper and the City was not obligated to respond to these comments. Nonetheless, the City did respond in detail. (AR 3299.)

CEQA requires an EIR to "describe a range of reasonable alternatives to the project, or to the location of the project, which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives." (14 CCR § 15126.6(a).) "An EIR need not consider every conceivable alternative to a project," and "there is no ironclad rule governing the nature or scope of the alternatives to be discussed other than the rule of reason." (*Ibid.*) Instead, an EIR need "set forth only those alternatives necessary to permit a reasoned choice" and "examine in detail only the ones that the lead agency determines could feasibly attain most of the basic objectives of the project." (14 CCR § 15126.6(f).)

The EIR complies with these requirements: it analyzes three reasonable alternatives to the Project, explains each one's potential environmental impact, and compares it to the Project. (AR 651-658.) This analysis "contain[s] facts and analysis, not just the agency's bare conclusions or

opinions," and it also includes "detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project." (*Habitat*, *supra*, 213 Cal.App.4th at p. 1303; internal quotations omitted.)

To cite Petitioner's own authority: "The agency's discretion to choose alternatives for study will be upheld as long as there is a reasonable basis for the choices it has made. [Citation.] The selection will be upheld, unless the challenger demonstrates that the alternatives are manifestly unreasonable and that they do not contribute to a reasonable range of alternatives." (*City of Maywood*, *supra*, 208 Cal.App.4th at p. 414, internal quotations omitted.) Petitioner makes no such showing or even argument. Petitioner only opines in a conclusory fashion that the alternatives violate CEQA. (POB 23-24.) This is not enough. (*City of Maywood*, at p. 414.)

Petitioner's citation to *Watsonville Pilots Assn. v. City of Watsonville* (2010) 183 Cal.App.4th 1059 is unavailing. (POB 24.) The Court in *Watsonville* found the EIR was deficient because it did not discuss a reduced development alternative *at all* and rejected the city's argument that "no discussion of an alternative is required if that alternative would not meet a project objective." (*Id.* at p. 1087.) As Petitioner acknowledges, the EIR here does discuss a reduced development alternative, and the EIR does this even though it acknowledges that a reduced development would not meet the Project's objectives. (AR 655-658.) Petitioner's complaint is that the City did not consider a specific method of reducing development. (POB 23.) But "CEQA does not require that an agency consider specific alternatives that are proposed by members of the public or other outside agencies." (*South of Market*, *supra*, 33 Cal.App.5th at p. 345.)

5. The EIR Adequately Responds to Comments

Petitioner's next complaint (POB 24) is only a contention that because the City did not agree with Petitioner's comments, the EIR's responses are insufficient. Petitioner also mischaracterizes comments from the State Water Resources Control Board ("SWRCB") in an effort to bolster its meritless claims. These arguments fail.

CEQA requires a lead agency to "consider comments it receives" on a Draft EIR and "prepare a written response." (PRC, § 21091(d)(1), (2)(A).) The written response must include "good faith, reasoned analysis," but the level of detail "in the response, however, may correspond

to the level of detail provided in the comment...." (14 CCR § 15088(c).) CEQA expressly contemplates that a lead agency may not agree with the comments received, requiring only that the lead agency give "reasons why specific comments and suggestions were not accepted." (*Ibid.*)

The Final EIR satisfies these requirements, providing written responses to all comments timely received on the Draft EIR (AR 1643-1673), including multiple pages of responses to those comments that Petitioner timely submitted, (AR 1662-1673). In contrast to cases cited by Petitioner (POB 24), the City's responses contain detailed information, data, and explanations. (AR 1662-1673.) The EIR is adequate even when it does not adopt or concur with Petitioner's positions, as are the responses to comments.

Petitioner's contention that the City did not respond to comments from the SWRCB (POB 24), is a red herring. As Petitioner knows, the SWRCB did not submit comments on the Draft EIR (AR 1643), instead only submitting comments on the NOP to say that the EIR should demonstrate that there is sufficient water available to meet Project water demands, (AR 772-773). The EIR and WSA do that. Petitioner offers only a conclusory statement of its own opinion otherwise. (POB 24, fn. 34.) The attempted bootstrapping of a preliminary comment from SWRCB fails.

Finally, Petitioner's throwaway suggestion that the EIR should have been recirculated (POB 24, fn. 35), is meritless. Recirculation is required in very limited circumstances (14 CCR § 15088.5), none of which is present here or even claimed by Petitioner. The revisions in the Final EIR do not require recirculation because they "merely clarif[y] or amplif[y]" the information in the already-adequate EIR that was circulated for public review and comment. (14 CCR § 15088.5(b).) Nor does inclusion of the condition for Greenbriar's 175 AF, as it is not a new, adverse impact.

6. Petitioner Failed to Exhaust Its Scoping Meeting Argument

CEQA requires that to proceed with a challenge, the "alleged grounds for noncompliance with [CEQA] were presented to the public agency orally or in writing ... before the close of the public hearing." (PRC, § 21177(a).) This specific requirement is consistent with the general doctrine of exhaustion of remedies, which provides that exhaustion "of administrative remedies is generally required before resort to judicial remedies." (*McAllister v. County of Monterey* (2007) 147 Cal.App.4th 253, 284.) Thus, " 'the issues must be presented to the final decisionmaker before

they can be presented in court.' " (*Id.* at p. 285.) The doctrine "is not a matter of judicial discretion, but is a fundamental rule of procedure...binding upon all courts." (*Abelleira v. Dist. Court of Appeal* (1941) 17 Cal.2d 280, 293.)

Petitioner failed to raise this issue prior to filing its lawsuit. (See AR 1658-1661 [comments on Draft EIR]; 14164-14190 [letter from Petitioner's attorneys on Final EIR]; 14212-14215 [Petitioner's letter on Final EIR].) Petitioner does not even attempt to assert otherwise (POB 25), nor could it. As a result, Petitioner is barred from raising this issue.

Even if the Court were to consider this issue, Petitioner cannot demonstrate any prejudice. CEQA noncompliance is prejudicial only "if it deprived the public and decision makers of substantial relevant information about the project's likely adverse impacts." (*Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 463.) "[U]nder CEQA, 'there is no presumption that error is prejudicial'. . . . Insubstantial or merely technical omissions are not grounds for relief." (*Ibid.*, citation omitted.)

The purpose of a scoping meeting is to assist the lead agency in determining the scope of an EIR. (14 CCR § 15082(c).) The purpose of an NOP likewise is to solicit information about the "scope and content of the environmental information...." (14 CCR § 15082(b).) The City published and distributed an NOP. (AR 664.) Petitioner received the NOP and responded to it, acknowledging that the City already planned to analyze the Project's impacts on water supply. (AR 775.) Given that Petitioner repeatedly has professed its only concern is water (see, e.g., AR 11545), Petitioner cannot reasonably claim – nor does it attempt to do so – that it was prejudiced or that it would have raised other concerns in a scoping meeting.

7. The City Repeatedly Consulted with Petitioner in Good Faith

Petitioner's claim that the City did not consult with Petitioner in good faith rings hollow. As with Petitioner's contentions on the EIR's responses to comments, this is no more than a contention that a refusal to agree with Petitioner is a violation of the law. It is not.

The record is replete with evidence that the City repeatedly consulted with Petitioner in good faith regarding water supply issues, anticipated City growth, and the Project's water demands. For example, Petitioner's General Manager met with City staff nine months before the Project was

approved, at which time Petitioner's General Manager concurred that a 2% City growth rate was reasonable and how to supply that water was Petitioner's problem. (AR 11541-11543.) Following Petitioner's submittal of comments on the Draft EIR, Petitioner wrote to City staff and noted, "You and I have discussed these comments several times." (AR 11780.) The City proposed meetings (AR 11779) and produced an analysis for Petitioner translating the growth projection into needed water and provided that to Petitioner in January 2021 (AR 11785-11786); as of the City Council hearing on August 16, 2021, the City had not "hear[d] a single word back from the district at all since that time," (AR 4108). Thus, it was Petitioner that failed to consult in good faith.

B. The WSA Complies with the Water Code

Petitioner's contention that the WSA does not comply with the Water Code is largely a rehash of its failed CEQA arguments. The Water Code requires that a project subject to CEQA must include a WSA if certain thresholds, as occurred here due to the number of proposed residential units, are met. (Wat. Code § 10910(a).)

The City is a public water system as defined by Water Code section 10912(c). (AR 5451.) A WSA must include "a discussion with regard to whether the public water system's total projected water supplies available during normal, single dry, and multiple dry water years during a 20-year projection will meet the projected water demand associated with the proposed project, in addition to the public water system's existing and planned future uses, including agricultural and manufacturing uses." (Wat. Code § 10910(c)(3).) The WSA also must identify "any existing water supply entitlements, water rights, or water service contracts relevant to the identified water supply for the proposed project" and a description of the quantities of water received in prior years. (Wat. Code § 10910(d)(1).) This can be demonstrated by including the "[w]ritten contracts or other proof of entitlement to an identified water supply." (*Id.*, § 10910(d)(2)(A).)

If the proposed water supply will include groundwater, the WSA also must include: (1) a review of information contained in the RUWMP relevant to the water supply, (2) a description of the basin and a copy of a court order identifying adjudicated rights to pump groundwater, (3) a description of the amount and location of groundwater pumped, (4) a description of the amount and location of groundwater projected to be pumped, and (5) an analysis of the sufficiency of

groundwater. (Wat. Code § 10910(f)(1)-(5).) The WSA complies with all of these requirements.[6]

Water Code section 10910(c)(3): Table 4-1 of the WSA includes a 20-year projection that the City will have sufficient water for the Project, existing and planned future uses, and agricultural and manufacturing uses. (AR 1789-1792.) Columns A, B, and C represent the population of the City in each calendar year, increasing by 2.3% (the annualized growth rate the City has experienced since 2002) without the Project. (AR 1789, 1792.) Column D represents the estimated average daily water consumption of residential, commercial, and industrial water users. (AR 1789, 1792.) Column E is the non-potable water supplied for agricultural uses. (AR 1789, 1792.) And Columns J, K, L, and M represent the City's population and water needs with the Project included. (AR 1790, 1792.) Together, these figures represent a 20-year estimate of water supplies for the Project, in addition to existing and planned future uses and agricultural and manufacturing uses. The WSA also calculates the water available during normal, single-dry, and multiple-dry years (AR 1796-1798) and explains that because the City already has an adjudicated allocation of 1,897 AFY and maintains a BWRA balance of approximately 1,307 AFY, "[i]t is anticipated that the City can provide 100% of average supplies in dry year scenarios." (AR 1796-1798.) Those numbers were based on the 2015 RUWMP (AR 1797) because this was the best available data to the City due to Petitioner's failure to timely, or ever, prepare an updated RUWMP. (See RJN, Exh. A.)

Water Code section 10910(d)(1) and (2): The WSA discusses the adjudicated water rights the City has, explaining that the City had 1,847 AFY before 2021 and 1,897 AFY at the time of the Final EIR. (AR 1782.) The WSA also summarizes the adjudicated water rights and includes a copy of relevant judgment. (AR 1782-1785, 1827-1934.) The WSA then discusses and includes the water service contract the City has with Petitioner, discusses Petitioner's history of pumping water from 2011 to 2020, and discusses, by reference to the 2015 RUWMP, the water the City purchased from Petitioner from 2011 to 2015 that is "recharged into the groundwater basin and available for future recovery by the City's wells." (AR 1786-1787, 1811-1814, 1941-1947, 5460.)

[6] Petitioner makes a passing reference to Water Code section 10910(e) but that subdivision is inapplicable because it is only required "[*i*]*f no water has been received in prior years by the public water system.*" (Wat. Code § 10910(e), emphasis added.) As discussed below, the City has been receiving water for numerous years. (AR 1782-1785, 1787, 1827-1934, 5460.)

Water Code section 10910(f)(1) to (5): The WSA identifies and incorporates by reference the most recent RUWMP available, the 2015 RUWMP. (See, e.g., AR 1768, 1777, 1782; see also Wat. Code, § 10910(f)(1).) The WSA describes the groundwater basin, summarizes the adjudicated rights to pump groundwater, and includes the judgment. (AR 1782-1785, 1827-1934; see Wat. Code, § 10910(f)(2)(A) & (B).) The WSA describes the amount and location of groundwater pumped and to be pumped for the Project. (AR 1785-1792, 5460; see Wat. Code, § 10910(f)(3) & (4).) And the WSA also includes and analyzes the sufficiency of the ground water available to meet the projected water demand. (AR 1788-1793; see Wat. Code, § 10910(f)(5).)

Petitioner offers only one citation to a Water Code section (10910(c)(2)) that the WSA allegedly does not satisfy, and Petitioner is mistaken. (POB 26-29) This section allows a WSA to incorporate a recently-adopted RUWMP if the proposed project was accounted for it in the RUWMP. (Wat. Code, § 10910(c)(2).) The WSA incorporates the 2015 RUWMP by reference because it is the most recent RUWMP available, but the WSA analysis of the City's water needs is *not* based on the 2015 RUWMP's projections. (Wat. Code § 10910(c)(3).) Rather, it is based on an estimated 2.3% growth rate over 20 years (AR 1789, 1792), a number based on the City's historic growth rate since 2002 that is both more accurate and more conservative (assuming faster growth and thus greater water demand) than the 1.1% growth rate used in the 2015 RUWMP. (AR 1789.) As noted above, because Petitioner failed to timely produce a 2020 RUWMP, "the City synthesized available information to fill in the gaps left by [Petitioner] and to provide a complete analysis of available water supply through 2020 as part of its analysis of the Project." (AR 3297.)

Petitioner's last arguments are untethered to the Water Code and meritless. (POB 28-29.) First, the WSA's assumptions are reasonable. It is reasonable for the City to believe that Petitioner will not breach the Term M&I Agreement and will provide the City with water. (AR 1942.) It is also reasonable for the WSA to base its analysis on a 2.3% growth rate as (1) it represents the City's actual growth rate over 18 years (AR 1788-1789, 3303-3304); (2) Petitioner's General Manager agreed that 2% "has been the historical growth rate in the RUWMP" (AR 11543, see AR 3303-3304); and (3) the initial draft of the 2020 RUWMP *that Petitioner prepared* included a 2.3% growth rate for the City (AR 3304). It is also reasonable for the WSA to conclude that its analysis

was conservative, with additional factors to increase the amount of water available or decrease the amount of water required not included in the estimate (AR 1778, 1780, 1787, 1790, 1793). Finally, it was reasonable for the WSA to conclude that sufficient water was available because Petitioner's own estimates and assumptions (with which the City disagrees) show that to be the case. (AR 3307-08.) In sum, the WSA's assumptions are reasonable and supported by substantial evidence.

Second, for the reasons discussed above, the WSA contains all of the information it is required to include. Petitioner argues, *without any citation to the law*, that the WSA needed to identify the source of Greenbriar's originally-required 93 AF of water, and whether it is subject to an enforceable agreement. (POB 28-29.) This is not required by the Water Code. (See Wat. Code, § 10910.) The WSA expressly states that the Project applicant is required to secure 93 AF of water to serve the Project. (AR 1793.)

C. The City Properly Verified the Project's Water Supply

Pursuant to Government Code section 66473.7, when a city conditionally approves a tentative map, it "shall include as a condition in any tentative map that includes a subdivision a requirement that a sufficient water supply shall be available." The City included this finding in the resolution approving the tentative tract map. (AR 20.) For the reasons discussed above, the EIR and WSA explain in significant detail how much water is needed and from where the water is accounted for, and this finding was proper and supported.

VI. CONCLUSION

For all of the foregoing reasons and based on the foregoing authorities, the City and Greenbriar respectfully request that the Court deny the First through Third Causes of Action.

Dated: February 26, 2024 RICHARDS, WATSON & GERSHON, A Professional Corp.

By: _____
GINETTA L. GIOVINCO, Attorneys for Respondent, City of Tehachapi

Dated: February 26, 2024 BUCHALTER, A Professional Corp.

By: _____
CARISSA BEECHAM, Attorneys for Real Parties in Interest, Greenbriar Capital Corporation; Greenbriar Capital Holdco, Inc.; Greenbriar Capital (U.S.), LLC; and Jeffrey Ciachurski