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NZO #11

February 26, 2018

VIA EMAIL AND UPS

Ms. Anne Wells, Advance Planning Manager
Mr. Andy Newkirk, Senior Planner
City of Goleta
130 Cremona, Suite B
Goleta, CA 93117

Re: City of Goleta New Zoning Ordinance
The Ritz-Carlton Bacara – Building Issues

Dear Anne and Andy:

I am writing on behalf of CWI Santa Barbara Hotel, LP and CWI 2 Santa Barbara Hotel, LP, the owners of The Ritz-Carlton Bacara (the "Bacara"), with respect to the proposed new Zoning Ordinance and its potential effect on the Bacara. I have reviewed the January 2019 Revised Draft Zoning Ordinance (the "Draft Ordinance"), and I am basing my comments on that document. My primary purpose in reviewing and commenting on the Draft Zoning Ordinance is to ensure that the present buildings and operations at the Bacara will not be detrimentally affected by the new Zoning Ordinance.

Background. The Bacara consists of 358 guest rooms located in 14 separate buildings, together with restaurants, bars and lounges, a spa and fitness center, pools, tennis courts and other recreational facilities, a wine tasting room and space for meetings, conferences, weddings and other events.

The Bacara was originally reviewed and approved through an extensive process by the County of Santa Barbara and the California Coastal Commission, prior to the incorporation of the City of Goleta (the "City"). The Bacara was designed and constructed in compliance with the requirements set forth in the Santa Barbara County Zoning Ordinance and the County's conditions of approval as well as the Coastal Commission's requirements. Upon its incorporation, the City adopted the County's Zoning Ordinance, which is in effect today and is referred to as the Coastal Zoning Ordinance. Therefore, the existing buildings comply with the current requirements as set forth in the Coastal Zoning Ordinance.

The Bacara is located within the Coastal Zone and is zoned C-V Resort/Visitor Serving Commercial ("C-V"). In Goleta's General Plan, the Bacara has a land use designation of Visitor Serving. The Bacara is constructed on two parcels, one of which has the hotel and resort buildings and a parking lot. The other parcel is generally undeveloped, other than tennis courts, an accessory building and a publicly accessible parking lot. The developed parcel with the hotel and resort is partially flat and the remainder slopes down toward Tecolote Creek, with an approximately 85 foot change in elevation. All of the buildings are designed in a single, unified Spanish colonial architectural style.

The following is a brief summary of the major concerns regarding how the Draft Ordinance may affect the Bacara:

1. Height. The Bacara is located in the C-V Resort/Visitor Serving Commercial ("C-V") zone. The height limit for structures in the C-V zone is presently 35 feet, and certain features and structures, including chimneys, elevator and stair housings, spires, and similar architectural features and structures, may be up to 50 feet in height. (Coastal Zoning Ordinance Section 35-127(1).) Under the Draft Ordinance, the C-V zone is renamed the Visitor Serving Commercial ("VS") zone and the height limit for structures in the Coastal Zone will remain at 35 feet. However, the permissible height of structures such as chimneys, elevator and stair housings, and architectural features will be reduced or eliminated. For example, chimneys and decorative features will be limited to 20% of the structure height, elevator and stair towers will be limited to 10 feet, and architectural features and projections have been eliminated. (Draft Ordinance Section 17.24.080) As a result, the maximum height of the Bacara buildings under the Draft Ordinance will be less than the currently allowed 50-foot limit and many of the Bacara buildings may exceed the new height limit.

2. Measurement of Height. Further, the Draft Ordinance changes the method of measuring building height. Under the current Coastal Zoning Ordinance, the height is measured from the building's average finished grade to the mean height of the highest gable of a pitched roof. (Coastal Zoning Ordinance Section 35-58, definition of Building Height.) The Draft Ordinance changes the method to an absolute height limit measured from grade to the top of the building. For buildings on lots sloped less than 10 percent, the height will be measured from the average elevation of the highest and lowest point where exterior walls touch the existing grade of the site prior to development to the topmost point of the roof. For buildings on lots with an average slope of 10 percent or more, building height will be measured as the greatest vertical distance from a line established between the highest and lowest points where the exterior walls touch the existing or finished grade, whichever is lower. (Draft Ordinance Section 17.03.100(B)(1) and (2).) As a result of this change, many of the Bacara's buildings may be rendered legal nonconforming as to height.

In addition, the Draft Ordinance's measurement method will be difficult to implement at the Bacara, which has numerous buildings located on a single parcel that ranges from flat to slopes of more 10 percent. The Draft Ordinance does not explain how to determine the "average slope" for a parcel as large and varied in terrain as the Bacara. For any individual building, compliance with the height restrictions will vary considerably depending on whether the building is on flat or sloped ground.

3. Legal Nonconforming Buildings. If the Bacara buildings are rendered legal nonconforming, the Bacara is very concerned about its ability to reconstruct any building that is substantially damaged or destroyed. The Bacara will wish to restore any damaged building to its original condition as quickly as possible in order to return the building to use and to minimize disruption of its operations. Under the Draft Zoning Ordinance, if the cost of repair or reconstruction exceeds 75% of the replacement cost of the damaged building, it may not be restored unless the Planning Commission approves a Conditional Use Permit and the building satisfies all of the standards in effect at the time of the damage. (Draft Ordinance Section 17.36.050(D).) The requirement of the Conditional Use Permit and the application of new standards will be time consuming and burdensome.

4. Parking. The Draft Ordinance proposes to significantly increase parking requirements for hotels from the current requirement of one space per guest room and one space per five employees (Coastal Zoning Ordinance Section 35-110), to one space per guest room and one space per employee (Draft Ordinance Section 17.38.040(A)(2). The Draft Ordinance would result in a five-fold increase in the number of parking spaces for employees. Because the peak employee count can be high at certain times, the new parking requirement will likely render the Bacara legal nonconforming as to parking. The Bacara's current parking capacity has adequately served the property's parking demands during the entire period of its operation, and there is no basis for increasing the amount of parking required for the hotel. Rather, the increasing use of ridesharing services such as Uber and Lyft, and availability of other alternatives to cars, such as shuttles, indicates that the parking requirements could actually be reduced, since not every guest room or employee uses a car that requires parking upon the premises.

5. Permitted Uses. Finally, all of the current uses at the Bacara should continue to be permitted uses in the new Zoning Ordinance. As presently written, the Draft Ordinance allows "Hotels and Motels" as a permitted use in the VS zone and it lists most of the current uses at the Bacara. However, certain present uses such as weddings, wine tasting rooms, spas, swimming pools and fitness centers are not specifically mentioned and we would want those uses to be included in the definition.

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In conclusion, the Bacara was designed to fit on a challenging site and to create a unique experience with the highest architectural standards. Because of the Bacara's uniqueness, we feel it is appropriate to protect it from certain new rules that are intended to apply on a general basis across the City and that could have negative consequences to the Bacara. There are a number of different ways to address the issues noted above, and we would like the opportunity to meet with you to discuss possible solutions to these issues in the near future. We appreciate your consideration of Bacara's concerns and this request and we would like to discuss this with you further. Please let me know when would be convenient for you.

Sincerely yours,

Mitch Menzer

Mitchell B. Menzer
Of Paul Hastings LLP

cc: Mr. Lorcan Drew

NZO #12

From: Andy Newkirk
To: Andy Newkirk (anewkirk@cityofgoleta.org)
Subject: FW: For Goleta Zoning code Consideration - definition of feasibility
Date: Monday, March 04, 2019 8:06:00 AM
Attachments: definition of feasibility and considerations of profit.docx
Legal Analysis of Coastal Act - Feasibility Definition.pdf

From: George Relles <grelles@cox.net>
Sent: Thursday, February 28, 2019 10:15 AM
To: Katie Maynard <kmaynard@cityofgoleta.org>
Cc: Anne Wells <awells@cityofgoleta.org>; Jennifer Smith <jsmith@cityofgoleta.org>
Subject: For Goleta Zoning code Consideration - definition of feasibility

Katie,

At a zoning workshop I requested a better definition of infeasibility and a hearing where a proponent would have the burden of proof if requesting an exception based on potential infeasibility. I also mentioned that there is CA caselaw expressing the tenet that even proof that a project would be less profitable without certain exceptions being made does not by itself result in a declaration of infeasibility. You requested information about my understanding.

I'm attaching 2 documents, one a Coastal Commission Opinion and the second, a link to the primary case cited in the Opinion that includes this tenet.

I do not have access to Shephards Citation Service to update this research but I believe it is still good law and good policy. And even if over-ruled since then, I question whether municipalities such as Goleta would be prohibited by including in our zoning code standards and definitions for infeasibility. I believe Goleta should require project proponents to have the burden of proof when requesting a variance or exception based on infeasibility, and that mere reduced profitability should not by itself suffice.

I hope you find this useful. Best wishes.

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"The fact that an alternative may be more expensive or less profitable is not sufficient to show that the alternative is financially infeasible. What is required is evidence that the additional costs or lost profitability are sufficiently severe as to render it impractical to proceed with the project. The scant figures contained in the administrative record are not sufficient to support such a conclusion."

CITIZENS OF GOLETA VALLEY, et al., Appellants,

v.

BOARD OF SUPERVISORS of the County of Santa Barbara, Respondent.

WALLOVER, INC., and Hyatt Corporation, Real Parties in Interest.

197 Cal.App.3d 1167

Civ. No. B026619.

Court of Appeal, Second District, Division 6, California.

Jan. 22, 1988.

http://resources.ca.gov/ceqa/cases/1988/goleta_012288.html

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October 31, 2013

Susan Jordan, Director
California Coastal Protection Network
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Surfrider Foundation
Water Programs Manager
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Long Beach, California 90853

California Coastal Act Feasibility Analysis
Huntington Beach Desalination Project

Dear Susan and Joe:

You asked us to undertake an assessment of how the California Coastal Act addresses approval of coastal-dependent industrial facilities that are inconsistent with other core statutory policies and, in particular, what role feasibility claims play in the process. Our preliminary analysis is attached. This letter summarizes our conclusions to date.

As a threshold matter, it is important to note that coastal facilities which use seawater for industrial purposes also are subject to regulation under the Porter-Cologne Water Quality Control Act. The relevant statutory provision provides that new industrial installations using seawater for industrial processing, such as desalination, must use "the best available site, design, technology, and mitigation measures feasible . . . to minimize the intake and mortality of all forms of marine life." Cal. Water Code § 13142.5(b). As you know, the State Water Resources Control Board is currently contemplating adoption of a statewide policy under section 13142.5(b) to address performance standards for new desalination projects. Although that policy is not yet completed, the State Board's 2010 "Statewide Water Quality Control Policy on the Use of Coastal and Estuarine Waters for Power Plant Cooling," which have the same entrainment and impingement impacts as the proposed Poseidon facility, defines "best available site, design, technology, and mitigation measures feasible" to exclude consideration of costs. Policy at 17 (defining "not feasible" to mean "cannot be accomplished because of space constrains, or the inability to obtain necessary permits due to public safety considerations, unacceptable environmental impacts, local ordinances, regulations, etc. Cost is not a factor to be considered when determining feasibility"), *available at* http://www.swrcb.ca.gov/water_issues/programs/ocean/cwa316/policy.shtml#amendments. Logic dictates that the State Board, in the forthcoming desalination policy, will – indeed, must – similarly apply section 13142.5(b) to exclude cost considerations when determining the feasibility of best available design, location, technology and mitigation for new desalination facilities. There is a strong public policy argument that the Coastal Commission should not permit an environmentally destructive project, based on the developer's claim of financial infeasiblity, which will not satisfy the requirements of the Porter-Cologne Act.

But even if the Commission believes it must consider economic feasibility in evaluating a coastal development permit under the Coastal Act, Commissioners may not simply accept a proponent's claims that technologically feasible mitigation measures, like subsurface intake wells and brine spray diffusers, are "too costly" or would adversely affect financing opportunities. As the case law in the attached feasibility analysis indicates, when it becomes clear that a proposed project is inconsistent with other coastal policies (*e.g.*, protection and enhancement of marine life and coastal ecosystems), the Commission may only grant a coastal development permit for the project if the proponent demonstrates that environmentally superior options or technologies are infeasible. As the court explained in the seminal *Citizens of Goleta Valley v. Board of Supervisors*, 197 Cal. App. 3d 1167, 1183 (1988), the Coastal Act first requires the Commission to evaluate the feasible options and then "expressly require[s] adoption of the feasible [project] with the least substantial environmental impacts."

The burden of demonstrating economic (or other) infeasibility falls squarely on the project proponent, and the Commission may not merely accept the infeasibility claims of the project developers. Rather, the Commission must actually study and analyze any claim of infeasibility. *Goleta Valley*, 197 Cal. App. 3d at 1187. Moreover, to pass legal muster, the feasibility analysis may not simply conclude that more environmentally protective options are infeasible because they will place the proponent at a competitive disadvantage or make project financing more expensive or difficult. Rather, to constitute substantial evidence in the record, the feasibility analysis must contain and assess "meaningful comparative data" and concrete information about lender positions. *Center for Biological Diversity v. County of San Bernardino*, 185 Cal. App. 4th 866, 884-85 (2010).

Significantly, "[t]he fact that an alternative may be more expensive or less profitable is not sufficient to show that the alternative is financially infeasible. What is required is evidence that the additional costs or lost profitability are sufficiently severe as to render it impractical to proceed with the project." *Goleta Valley*, 197 Cal. App. 3d at 1181. That is, an environmentally superior technology or mitigation must be "truly infeasible," not just undesirable from the proponent's perspective. *City of Marina v. Board of Trustees of the California State University,* 39 Cal. 4th 341, 269 (2006).

Recent case law makes it clear that the courts will demand a robust, credible, and well-documented analysis to support any claim of economic infeasibility, even under the comparatively less stringent and more procedural California Environmental Quality Act. *Center for Biological Diversity*, 185 Cal. App. 4th at 885; *Save Round Valley Alliance v. County of Inyo*, 157 Cal. App. 4th 1437, 1461-62 (2007); *Sierra Club v. Friends of the West Shore*, 916 F. Supp. 2d 1098, 1124-29 (E.D. Cal. 2012). Given the more protective substantive standards embedded in the Coastal Act, the Coastal Commission must at least as closely scrutinize any infeasibility claims in connection with a coastal development permit.

Sincerely yours,

Deb Sivas

Deborah A. Sivas

Feasibility Analysis under California Coastal Act

New coastal-dependent industrial facilities, like Poseidon's proposed 50-MGD desalination facility in Huntington Beach, that "cannot feasibly be accommodated consistent with other [Coastal Act] policies" *may* nonetheless be permitted, but only where "(1) alternative locations are infeasible or more environmentally damaging; (2) to do otherwise would adversely affect the public welfare; *and* (3) adverse environmental effects are mitigated to the maximum extent feasible." Cal. Pub. Res. Code § 30260 (emphasis added). Under the plain language of the statute, the Commission must undertake a two-step inquiry. First, it must determine whether the project can be feasibly accommodated consistent with other competing policies. If not, the Commission must then evaluate feasible methods to mitigate adverse impacts and, in order to approve the project, must adopt the one that maximizes reduction in adverse environmental effects.

The project at issue here is a new desalination facility in Huntington Beach. As proposed, the project will (1) use an intake technology that entrains substantial amounts of marine organisms and reduces biological productivity of the coastal ecosystem and (2) discharge a brine stream that potentially degrades coastal water quality. As such, the proposed project is not consistent with several other Coastal Act policies. *See, e.g.*, Cal. Pub. Res. Code §§ 30230 (maintain, enhance, and restore marine resources; sustain biological productivity of coastal waters; maintain long-term healthy populations of all species of marine organisms) and 30231 (maintain and restore biological productivity and quality of coastal waters to maintain optimum populations of marine organisms by minimizing adverse effects of entrainment). Accordingly, the project may not be approved unless and until the Commission engages in the further analysis and determination required by section 30260.[1]

In the circumstances here, that further analysis must be focused on methods by which adverse environmental effects on marine species and coastal ecosystems can mitigated "to the maximum extent feasible." The statute defines the term "feasible" to mean "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors." Cal. Pub. Res. Code § 30108. Thus, under the language of the statute, the Commission must evaluate and determine what intake and discharge methods are capable, from a technical, environmental, social, and economic

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[1] The desalination project *might* be feasibly accommodated consistent with these other policies of the Coastal Act if Poseidon agreed (1) to use a different intake technology, such as subsurface wells, to minimize entrainment impacts (*see, e.g.*, Thomas M. Missimer, et al., *Subsurface intake for seawater reverse osmosis facilities: Capacity limitation, water improvement, and economics*, Desalination 322 (2013) 37-51) and (2) to further mitigate brine discharge impacts via a pressurized brine spray diffuser or similar technology (*see, e.g.*, Southern California Coastal Water Research Project, *Management of Brine Discharges to Coastal Waters Recommendations of a Science Advisory Panel*, California Water Resources Control Board Technical Report 694 (Mar. 2012)). Poseidon has not, however, agreed to modify the project in these ways. Thus, the Commission may grant a coastal development permit only if the requirements of section 30260 are satisfied.

perspective, of successfully mitigating adverse environmental impacts. Among these feasible methods, the Commission may then only approve the one that maximizes protection of coastal resources.

There is little in the way of Coastal Act case law to guide the Commission's feasibility analysis under section 30260, but the leading case, *Citizens of Goleta Valley v. Board of Supervisors*, 197 Cal. App. 3d 1167, 1183 (1988), is consistent with the foregoing interpretation. There, the court briefly examined the concept of economic feasibility in connection with a Local Coastal Program which, like section 30260 itself, provided that any development "shall be approved only if 'adverse impacts are mitigated to the maximum extent feasible." In implementing its LCP, the local board of supervisors rejected as "economically infeasible" a development plan that was smaller than the proposed project. The court of appeals reversed, finding that the board's approval of the project violated the LCP and Coastal Act.

More specifically, the accompanying EIR in *Goleta Valley* concluded that archeological resources would be adversely affected by the proposed development and, therefore, the county imposed conditions of approval to mitigate some of these adverse impacts, including a requirement that the project proponent develop a cultural resources plan and avoid culturally significant burial sites. The project proponent argued that the project was, for this reason, "designed . . . to minimize impact on the sites, particularly the important and sensitive ones, to the maximum extent consistent with the development." 197 Cal. App. 3d at 1186. The challengers, on the other hand, argued that the LCP required "avoidance of such sites, if possible, not just mitigation, and that only if such avoidance is infeasible is 'mitigation' permitted." *Id.*

The *Goleta Valley* court concluded that the board of supervisors erred, explaining that "[i]mposition of conditions to partially ameliorate adverse environmental impacts of the proposed project does not excuse failure to evaluate the alternative scaled-down alternative." *Id.* at 1187. The LCP, with language virtually identical to section 30260 of the Coastal Act, "requires that project design avoid such impacts, if possible." *Id.* "Inasmuch as there was no substantial evidence to support respondent's finding that the alternate design was economically infeasible, further consideration at the administrative level is required. . . . The economic feasibility of such a design should have been studied. Without such a study the preliminary plans for the development run afoul of the Local Coastal Program." *Id.*

As applied to the Huntington Beach desalination proposal, *Goleta Valley* suggests that the Commission may permit a facility with unmitigated adverse intake and discharge impacts on the coastal ecosystem – even where Poseidon proposes to partially mitigate those impacts – only if it has studied methods to avoid such impacts and there is substantial evidence in the record to support a finding that those methods are economically infeasible. Put differently, the Commission must evaluate mitigation options and "expressly require adoption of the feasible [option] with the least substantial environmental impacts." *Goleta Valley*, 197 Cal. App. 3d at 1183 (contrasting the clear directive of the Coastal Act and LCP with the more ambiguous requirement of CEQA).

Because no study of economic feasibility had been conducted in *Goleta Valley*, the court concluded that the county's approval violated the LCP requirement to mitigate adverse impacts to the maximum extent feasible and reversed the decision without reaching the question of what was necessary to support the finding. Case law under the California Environmental Quality Act, however, sheds some further light on the issue of economic feasibility. Where a project will have unavoidable significant impacts on the environment, the lead agency may still approve the project under CEQA if it finds that (1) specific economic, legal, social, technological, or other considerations "make infeasible" mitigation measures or alternatives that can mitigate those impacts and (2) the benefits of the project outweigh its significant impacts on the environment. Cal. Pub. Res. Code § 21081. That is, CEQA allows for approval of a project with unavoidable significant impacts where there are no feasible alternatives or mitigation measures to reduce those impacts *and* where the agency finds that benefits outweigh impacts.

The CEQA regime is different from the Coastal Act regime in that it allows an agency to approve a project based on overriding benefits (while the Coastal Act only allows approval of the project when it is designed to reduce adverse impacts to the maximum extent possible).[2] But the threshold requirement that the lead agency must evaluate the feasibility of mitigating alternatives is the same. In particular, CEQA's definition of "feasible" is identical to the definition in the Coastal Act: "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors." *Id.* § 21061.1. Accordingly, CEQA cases reviewing a proponent's or lead agency's claims of economic infeasibility provide useful guidance here.

In interpreting the feasibility concept under CEQA, the courts have repeatedly held that the decision record must show that an alternative or mitigation measures is "truly infeasible," not merely undesirable from the proponent's perspective. *City of Marina v. Board of Trustees of the California State University*, 39 Cal. 4th 341, 269 (2006) (finding that mitigation is not infeasible merely because funding for the measure is uncertain). The appropriate question for the feasibility analysis is whether the project as mitigated can be "economically successful" – that is, whether the mitigated project "cannot operate at a profit so as to render it impractical." *Maintain Our Desert Environment v. Town of Apple Valley*, 120 Cal. App. 4th 396, 449 (2004).

For instance, in *Center for Biological Diversity v. County of San Bernardino*, 185 Cal. App. 4th 866 (2010), the EIR concluded that enclosure of a proposed open-air compost facility, while providing state-of-the-art air emissions control, was expensive and thus economically

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[2] In *Goleta Valley*, the court recognized this difference between the two statutes, explaining that it need not reach the question of whether CEQA prohibits approval of a plan that has mitigating features when a feasible plan with less environmental impact is available as an alternative because the language of the LCP, which parallels the language of section 30260, "does expressly require adoption of the feasible plan with the least substantial environmental impacts" and "this requirement is free from any ambiguity present in CEQA." 197 Cal. App. 3d at 1183-84, n.4. Subsequent CEQA cases continue to be less than perfectly clear on this issue, but no case has suggested that the Coastal Act is ambiguous in requiring adoption of the least harmful feasible alternative.

infeasible. To support this infeasibility conclusion, the EIR and associated documents explained that capital costs for an enclosed facility are 28 to 41 percent greater than capital costs for an open-air facility, that operating costs are 62.5 percent greater, and that the project in question would compete against other open-air facilities, requiring it to have capital costs "roughly equivalent" to those competitors in order to be "economically viable." *Id.* at 876-77. The environmental review documents further discussed the availability of private financing for an enclosed facility: "The Inland Empire Regional Composting Facility is a first of its kind facility and requires sophisticated systems to properly operate and ensure it does not adversely impact neighbors. Frankly this is the type of risk that a private composting firm typically can not [sic] accept. Private financing for such a risky proposition would not be available. . . . New technology not only poses a technology risk, but it also poses a capital cost escalation risk." *Id.* at 877.

In affirming the trial court's rejection of this infeasibility analysis, the court of appeals noted that the EIR's discussion of infeasibility must be sufficient to support informed decisionmaking. *Center for Biological Diversity*, *supra*, 185 Cal. App. 4th at 884. In particular, the EIR at issue did not evaluate whether "a reasonable profit can be made despite increased capital costs" and provided "no meaningful comparative data pertaining to a range of economic issues." *Id.* As to financing issues, the court noted that there was no information to support the statement that private financing would be unavailable for an enclosed facility. *Id.* For instance, the court asked, "Were any lenders contacted, would government funded low interest financing be available, or was any federal grant money available?" *Id.* "Additionally, there is no analysis of the total cost of doing business and the prices a competitor can charge. What impact do the savings on the transportation costs have on the economic viability of the Project?" *Id.* at 885.

Other courts have reached similar conclusions. In *Uphold Our Heritage v. Town of Woodside*, 147 Cal. App. 4th 587 (2007), the court rejected the agency's economic infeasibility conclusion with respect to possible remodeling of a structure rather than replacement construction, noting that "the [economic] feasibility of the alternatives must be evaluated within the context of the proposed project. 'The fact that an alternative may be more expensive or less profitable is not sufficient to show that the alternative is financially infeasible. What is required is evidence that the additional costs or lost profitability are sufficiently severe as to render it impractical to proceed with the project.'" *Id.* at 599 (quoting *Citizens of Goleta Valley v. Board of Supervisors*, 197 Cal. App. 3d 1167, 1181 (1988)). "The fact that [the alternative in question] may cost between $4.9 and $10 million is insufficient to support a reasonable inference that this alternative is not economically feasible. Without some information concerning the cost of constructing a new residence on the property, it is not possible to determine whether the cost of renovating the existing historic structure is reasonable or feasible." *Id.*

Most of the CEQA cases that have rejected a lead agency's economic infeasibility determination have done so on the basis of insufficient evidence in the record to support such a finding; in these cases, the agency generally adopts the proponents' conclusions with little in the way of data or analysis to support it. The courts have repeatedly held that mere statements that the mitigation or alternative approach is too costly or would put the project proponent at a market disadvantage are not sufficient to support a finding of economic infeasibility. *Preservation Action Council v. City of San Jose*, 141 Cal. App. 4th 1336, 1355-57 (2006) (record does not contain sufficient information or analysis to support EIR's claim that a reduced-size alternative was financially infeasible because it would put project proponent at a "competitive disadvantage"); *County of San Diego v. Grossmont-Cuyamaca Community College Dist.*, 141 Cal. App. 4th 86, 108 (2006) ("Here, the administrative record contains no estimate of the cost of the District's proportional share of the off-campus traffic mitigation measures identified in the final EIR. Without evidence of the amount of any such cost, we must conclude there is no substantial evidence to support the District's claim that mitigation of the adverse project-related off-campus traffic impacts is economically infeasible."); *Village Laguna of Laguna Beach, Inc. v. Board of Supervisors*, 134 Cal. App. 3d 1022, 1 (1982) (rejecting agency's finding of economic infeasibility because it was not supported by explanatory facts).

Recent cases are especially clear the Commission cannot abdicate its responsibility for an adequate economic feasibility analysis to the project proponent; it has an independent obligation to evaluate any infeasibility claim and base its finding on supporting factual analysis. For instance, in *Save Round Valley Alliance v. County of Inyo*, 157 Cal. App. 4th 1437 (2007), the court reviewed the agency's finding of economic infeasibility with respect to an alternative location for the proposed development that could be obtained via a land exchange with the Bureau of Land Management. In finding the agency's approval decision to be unlawful, the court focused on the need for independent evaluation:

> The third reason for rejecting the BLM parcel alternative—that Walters could not expect to achieve the same economic objectives—is also unsupported. First, the statement reflects a misunderstanding regarding the economic feasibility of an alternative. Although the "economic viability" of an alternative is a relevant consideration in evaluating the feasibility of the alternative . . . , the fact that Walters cannot achieve the same economic objective from developing the BLM property is not determinative. The issue is not whether the alternative is less profitable than the project as proposed, but whether the reduced profitability of the alternative is " 'sufficiently severe as to render it impractical to proceed with the project.'" The bare conclusion that Walters would not achieve the same economic objectives under a land exchange with the BLM does not address this issue.
>
> Second, even if the County's statement could be construed as a finding of economic infeasibility under the proper test, there is no evidence or analysis whatsoever of the comparative costs or profitability of developing the two parcels. Although the County responded to Dunkelberger's comments by stating that the BLM did not have available land that was "comparable in ... price," there is nothing in the EIR that informs the public or decision makers of the "price" or comparative value of the BLM parcel. To the extent that the County's statements regarding Walters's economic objectives and price of alternative parcels are based on Walters's own statements, we again remind the parties that it is the lead agency's responsibility to independently review and analyze the alternatives.

Id. at 1461-62 (citations omitted).

Even where the record contains an actual feasibility analysis, courts closely scrutnize the basis for the conclusion. In a recent CEQA case before the U.S. District Court for the Eastern District of California, the court reviewed a feasibility analysis prepared by the project proponent and found it wanting. The court first summarized the CEQA case law on economic feasibility:

> As to a project's economic feasibility, "'[t]he fact that an alternative may be more expensive or less profitable is not sufficient to show that the alternative is financially infeasible. What is required is evidence that the additional costs or lost profitability are sufficiently severe as to render it impractical to proceed with the project.'" The agency's feasibility findings must be "based on substantial evidence set forth anywhere 'in the record.'" Substantial evidence is not "[a]rgument, speculation, unsubstantiated opinion or narrative, evidence which is clearly erroneous or inaccurate ...." Although the agency may rely on expert opinion, it must be supported by facts. The agency cannot simply rely on evidence proffered by the project's proponent regarding infeasibility; instead, the agency "'must *independently* participate, review, analyze and discuss the alternatives in good faith.'" Although a reviewing court should not decide whether studies are irrefutable or could have been better, it cannot "'uncritically rely on every study or analysis presented by a project proponent in support of its position. A clearly inadequate or unsupported study is entitled to no judicial deference.'"

Sierra Club v. Friends of the West Shore, 916 F. Supp. 2d 1098, 1124-25 (E.D. Cal. 2012) (citations omitted; emphasis in original).

The *Friends of the West Shore* court then used these principles to review the agency's economic analysis, which was comparatively substance. In particular, the agency "did not just rely on the financial documentation submitted by [the project proponent] to reach the determination that Alternative 6 or any other reduced alternative is financially infeasible. They also considered economic analyses by an independent third-party expert, BAW Urban Economics. BAE prepared an initial memorandum and, later, a follow-up memorandum after [plaintiffs] submitted a letter commenting on the initial analysis." *Id.* at 1125.

After reviewing these analyses in some detail, the *Friends of the West Shore* court nevertheless found them legally wanting. The court's lengthy discussion of economic feasibility makes it clear, even in the more purely procedural context of a CEQA case, that courts demand a robust and internally consistent analysis to support an economic infeasibility determination:

> The BAE memoranda fail to provide substantial evidence that Alternative 6 is economically infeasible. At best, BAE's analyses show that a reduced-size alternative would be less profitable. Fatal to BAE's flawed conclusion of infeasibility is its failure to consider the Resort's other revenue streams besides lift tickets, to what extent the real estate component of the project could support the reduced project's economic feasibility, and whether the capital investment a reduced project could attract is sufficient.
>
> First, the memoranda fail to provide a factual basis for the conclusion that the reduction in profits from ticket sales in the reduced project is so severe as to render "it impractical to proceed with the project." *Pres. Action Council*, 141 Cal.App.4th at 1352, 46

Cal.Rptr.3d 902. Although revenues from various other departments are cited as *critical* to the financial viability of the proposed project and comprise forty-eight percent of the resort's revenues, they are not given the same importance in the memoranda's review of Alternative 6. Indeed, BAE's analyses show that even the proposed project cannot make up the deficit at which it is currently operating on profits from additional lift tickets alone. BAE estimates the revenues from the proposed project's increased sale of lift tickets to be $670,000 per year; thus, the proposed project's other operations must produce at least $330,000 in profits just to prevent the Resort from losing money each year. BAE appears to assume that with the proposed project, the Resort's other operations can make up the deficit from increased lift ticket sales to ensure long-term profitability of the resort, but does not show that the reduced project cannot also do so.

The only explanation given for the different treatment of these revenues streams in BAE's analyses of the feasibility of the proposed project and the reduced project is that the latter's reduced ticket sales will result in less revenue from those other departments because fewer skiers will use the Resort's services and those departments carry offsetting costs. But this distinction only shows lower profitability; it does not rise, without more, to a showing of infeasibility. BAE makes no attempt to estimate the potential revenue the Resort's other operations could provide under Alternative 6 or the proposed project and thus fails to provide evidence in this regard for its conclusion that Alternative 6 is economically infeasible while the proposed project is feasible.

Next, BAE asserts that revenue from sales of residential/lodging units is “necessary to support resort viability,” but also that “the reduced project alternative would only erode this ability.” (*Id.* at 40485.) If real estate income is necessary to the long-term economic feasibility of the proposed project because it helps to meet immediate capital needs, it is also necessary to the reduced alternative's feasibility, even if the income from it is proportionally less. But BAE's analyses do not take the next step and show that the reduced project's reduction in profit is too much. Indeed, BAE's conclusion from this portion of its analysis begs the question: Is the lesser income from the reduced project's real estate sales insufficient to support the Resort's long-term feasibility?

The memoranda also fail to consider whether the real estate component could provide an ongoing subsidy for the resort, explaining that it is intended only to provide a one-time subsidy for the resort's capital costs and that mitigation costs are unknown. (*Id.* at 18969.) Despite JMA's intention that the real estate component only provide a one-time surge of capital, BAE explains that a mechanism to create an operating subsidy from that component “might be created,” but this is not likely because of the unknown mitigation costs. However, the record shows that mitigation costs are fixed at $20–25 million, even if the units are reduced. (*Id.* at 9376.) Because BAE did not estimate the possible revenue from any such subsidy, another potential source of support for the economic feasibility of the reduced project went unconsidered.

Finally, BAE concluded that a smaller alternative’s reduced profitability would decrease its ability to attract investment capital, which in turn would increase Homewood’s difficulty in financing the necessary capital improvements. Even the proposed project, however, will not attract enough capital financing to completely fund the improvements. (*Id.* at 40478, 40483.) Furthermore, although BAE acknowledges that the developer can invest profits from the project's real estate development into supporting the ski resort's immediate capital investment needs, it does not indicate whether the sales from the reduced project's real estate component could make up the difference between the investment it would attract and the Resort's capital needs. Aain, even though the reduced alternative will bring in less capital, BAE provides no facts to show that the lesser amount is not enough.

These flaws are exacerbated by the lack of relevant financial data. Except for listing what appears to be the average revenue for departments, excluding lift ticket sales, at ski resorts similar to Homewood in size, (*id.* at 18970), BAE never estimates the projected revenues for such departments at Homewood for either the proposed project or its reduced variation. Nor does it provide any data on the potential income from the real estate component of the project. In *Center for Biological Diversity v. County of San Bernardino,* 185 Cal.App.4th 866, 111 Cal.Rptr.3d 374 (2010), the EIR relied exclusively on a memorandum from an environmental consulting firm to establish the financial infeasibility of an enclosed composting facility as an alternative to an open-air facility. *Id.* at 876, 111 Cal.Rptr.3d 374. The memorandum based its estimate of costs for the proposed private composting facility only on the costs associated with the development of one public enclosed facility, even though there were other entities operating within the state, as well as nationally, which suggested that enclosed facilities might be economically feasible. *Id.* at 884, 111 Cal.Rptr.3d 374.

The court in that case noted various omissions in the report, including its assumptions that the costs of that one facility were reasonable and illustrative of the general costs of composting facilities, as well its failure to explain why the costs of the public project more than doubled from the initial estimate or why the project took longer to develop than anticipated. *Id.* Overall, the court found that the memorandum lacked "meaningful comparative data pertaining to a range of economic issues." *Id.* It court held that substantial evidence did not support the final EIR's position that an enclosed facility was infeasible. *Id.* at 885, 111 Cal.Rptr.3d 374.

This court does not question BAE's expertise or dispute the accuracy of the information it did rely on, but notes, like the court in *Center for Biological Diversity,* that significant gaps in BAE's memoranda information render meaningful comparison between the proposed project and the reduced alternative impossible. As explained above, while the information provided by JMA and BAE includes the projected profits from increased lift ticket sales, the BAE memoranda are bereft of projections of the profits that the Resort's other departments will contribute under either version of the project, although they do estimate the potential capital investment each would attract. Without such comparative data, the economic feasibility of the reduced alternative is unknown beyond the obvious conclusion that it would be less profitable. *See Uphold Our Heritage v. Town of Woodside,* 147 Cal.App.4th 587, 599, 54 Cal.Rptr.3d 366 (2007) (finding conclusion that alternatives were financially infeasible was not supported by substantial evidence when EIR included cost of the proposed alternatives, which would restore the home, but not the

> cost of the proposed project, which would build a new home); *Goleta II*, 197 Cal.App.3d at 1172–74, 243 Cal.Rptr. 339 (invalidating the county's finding of economic infeasibility because the record contained no financial data, such as "estimated costs, projected income, or expenses" for reduced-size alternative). Accordingly, the County's finding that Alternative 6 is economically infeasible is not supported by substantial evidence.

Id. at 1127-29.

In sum, even in the context of CEQA, which arguably does not impose the same level of substantive obligation on agencies as does the Coastal Act, the courts have strictly interpreted the concept of "economic feasibility" to require a real, independent analysis by the agency and substantial supporting evidence in the record. The case law is clear that reduced profitability does not constitute economic infeasibility; rather, the project must be "truly infeasible" in the sense that lost profitability is sufficiently severe to render the project impractical.