

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

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FIRST APPELLATE DISTRICT, DIVISION ONE

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LIVING RIVERS COUNCIL,  
Plaintiff and Appellant,

vs.

CITY OF ST. HELENA,

Defendants and Respondents.

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APPELLATE NO. A116344

NAPA COUNTY SUPERIOR COURT  
CASE NO. 26-24908

The Honorable Raymond A. Guadagni

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**APPELLANT LIVING RIVER COUNCIL'S OPENING BRIEF**

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THOMAS N. LIPPE (Bar No. 104640)  
LAW OFFICES OF THOMAS N. LIPPE, APC  
329 Bryant Street, Suite 3D  
San Francisco, California 94107  
Telephone: (415) 777-5600  
Counsel for Plaintiff and Appellant

## I. INTRODUCTION

Appellant Living River Council (“Living River”) appeals the Superior Court’s denial of its motion to enforce a settlement agreement between Living River and Respondent City of St. Helena (“City”). In the underlying action, Living River challenged the City’s certification of an Environmental Impact Report (“EIR”) prepared pursuant to the California Environmental Quality Act (“CEQA”) for its adoption of a Comprehensive Flood Protection Project (“Project”) situated on the Napa River in the City. The Superior Court ruled in Living River’s favor on one CEQA claim, against Living River on its other CEQA claims, and ordered the City to set aside its approval of the Project.

Both sides appealed. While the appeal was pending, Living River and the City settled the case and dismissed both appeals. The Superior Court approved the Settlement Agreement and, pursuant to the stipulation of the parties, dismissed the case and reserved jurisdiction to enforce the agreement pursuant to Code of Civil Procedure § 664.6. Thereafter, the City modified the Project in numerous ways that Living River has the right to prohibit under the Settlement Agreement. Living River moved to enforce the agreement, and the trial court denied the motion, leading to this appeal.

In 2004, the City adopted a version of the Flood Control Project known as the Enhanced Minimum Plan A or “EMP-A,” which, as described above, Living River successfully challenged on CEQA grounds. In the City’s most

recent administrative proceedings from which this motion to enforce and appeal arise, the EMP-A is referred to as the “2004 Plan.” Pursuant to the Settlement Agreement, the City agreed to modify the “EMP-A/2004 Plan” in certain particulars. The Project as modified by the Settlement Agreement is referred to in the City’s most recent administrative proceedings as the “2005 Plan.” The 2005 modifications authorized in the settlement agreement altered the balance of environmental risks and benefits that Living River perceived in the Project to the point where Living River agreed to dismiss the underlying action.

In its most recent administrative proceedings leading to this appeal, the City referred to the modifications that are not allowed by the Settlement Agreement as the “2006 Refinements” to the “2006 Plan.” These modifications again altered the balance of environmental risks and benefits, to a point that Living River finds unacceptable.

In its motion to enforce the agreement and prohibit the 2006 modifications, Living River relied on the text of the Settlement Agreement, supplemented with limited parol evidence regarding the circumstances surrounding its execution and testimony regarding the parties’ intent in drafting the key language in the agreement.

The City defended the motion on several grounds, including the text of the agreement, but without submitting any contradictory parol evidence. The

City also asserted defenses that its performance is legally impossible due to lack of funding and the public policy of protecting its citizens from the danger of future flooding.

The trial court ruled against Living River solely on the basis of the text of the agreement, but did not reference or rule on the admissibility of Living River's parol evidence. The trial court also did not address the City's other defenses of legal impossibility or violation of public policy. The trial court ruled against Living River based on an argument that the City never made, that "The agreement does not include a promise by the City that it would refrain from making any changes to Project components that are not addressed in the agreement." AA 9772. This ruling represents legal error for several reasons. It ignores the intent of the parties as expressed in the plain language of the agreement giving Living River the right to enforce any changes to the entire Project, not just the "modifications" made by way of the settlement agreement. It ignores the intent of the parties reflected in the circumstances under which the parties negotiated the agreement. It ignores the intent of the parties as shown by Living River's uncontroverted parol evidence. As the Supreme Court has observed, "perfect verbal expression" in contracts is impossible; therefore, the task in construing contracts is to determine the parties intent, not to look for "magic words." *Pacific Gas & Electric Co. v. G. W. Thomas Drayage & Rigging Co.* (1968) 69 Cal.2d 33, 37-38.

The legal effect of Living River's dismissal of its lawsuit pursuant to the Settlement Agreement is profound because it forever bars Living River from enforcing the CEQA claim on which it prevailed in the trial court and litigating on appeal the claims it lost at trial regarding the adequacy of the EIR certified by the City for the 2004 Project.

Also, without the enforcement rights it seeks to vindicate in this appeal, Living River is relegated to challenging any changes to the Project by challenging the City's use of an Addendum to the 2004 EIR to evaluate such changes. As discussed in more detail below, this is a materially less advantageous position than challenging the 2004 EIR on grounds that the City failed to proceed in the manner required by law.

The consideration that Living River received in exchange for this major concession was the City's agreement to limit the changes to the EMP-A/2004 Plan to those specified in the Settlement Agreement (*i.e.*, the 2005 Plan)—changes that Living River believed represented an acceptable trade-off in environmental risks and benefits of the Project. Instead of limiting itself to the specific changes authorized in the Settlement Agreement, however, the City made a number of additional changes to the Project. These additional changes (the "2006 Refinements" to the "2006 Plan") fundamentally alter the balance of environmental risks and benefits of the Project to a point that Living River finds unacceptable. Therefore, Living River has chosen to enforce the

Settlement Agreement.

The issues presented in this appeal are important, not just for the protection of the Napa River environment, but also to protect the judicial policy in favor of encouraging litigation settlements. *See, e.g., Tower Acton Holdings v. L.A. County Waterworks Dist. No. 37* (2002) 105 Cal.App.4th 590, 602 (“California’s public policy is to encourage settlement”); *accord, Kohn v. Jaymar-Ruby, Inc.* (1994) 23 Cal.App.4th 1530, 1535; *Gopal v. Yoshikawa* (1983) 147 Cal.App.3d 128, 131. Here, the City has reneged on a judicially enforceable settlement agreement, using the most hyper-technical arguments imaginable. If this conduct is allowed, parties will be unwilling to settle litigation against public agencies if they cannot enforce the agreement as written.

In addition to arguing that the trial court erred as a matter of law in its interpretation of the text of the agreement, Living River argues the City’s other defenses fail as a matter of law. Therefore, Living River requests that this Court direct the trial court to enter judgment in its favor. *Conley v. Matthes* (1997) 56 Cal.App.4th 1453, 1459 (“[W]here it appears from the record as a matter of law there is only one proper judgment on undisputed facts, we may direct the trial court to enter that judgment.”); *Continental Cas. Co. v. Phoenix Constr. Co.* (1956) 46 Cal.2d 423, 440; Code Civ. Proc. § 43.

However, if this Court rules in Living River’s favor on the text of the

agreement, but finds that any of the City's other defenses do not fail as a matter of law, Living River requests that the Court remand the matter back to the trial court to conduct an evidentiary hearing on any such defenses. *In re Zeth S.* (2003) 31 Cal.4th 396, 405 (the resolution of factual issues is within the sole province of the trial courts); Code Civ. Proc. § 43 ("In giving its decision, if a new trial be granted, the court shall pass upon and determine all the questions of law involved in the case, presented upon such appeal, and necessary to the final determination of the case").

Finally, Living River does not insist on compliance with the agreement for its own sake. Several of the 2006 Refinements will exacerbate adverse environmental effects of the Project. For example, one refinement moves the floodwall near the Vineyard Valley Mobile Home Park not just "slightly closer" to the river channel as claimed by the City, but 115 feet closer to the river channel to accommodate another 2006 Refinement that reduces the number of homes to be relocated from near the river in the Vineyard Valley Mobile Home Park from 33 to 17. AA 9429-9431; 9444.<sup>1</sup> These changes will constrict flood flows in a narrower channel than was provided by the 2004 Plan or the 2005 Plan, leading to higher flood flow velocities in different locations on the river, from approximately 6 cubic feet per second to 9 cubic

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<sup>1</sup>"AA" refers to Appellant's Appendix. "RT" refers to Reporter's Transcript.

feet per second, a 50% increase over the 2004-2005 Plan. AA 9431 (“Compared to the 2004 Plan, the 2006 Plan increases flow velocity and channel shear stress along the banks of the Napa River for the range flood events 1.5 to 10-year. AA 9521 (“Flow velocities in Area 3 begin to increase as a result of the increase in flow in the channel, the increased water surface gradient created by removing the Vineyard Valley Mobile Home Park constriction and the effect of the proposed 2006 Plan levee on the right overbank area floodplain. Here velocities increase from a little over 6 ft/s to a maximum of 8.8 feet per second.”). This will cause bank failures and incision of the river bed, resulting in greater entrainment of sediment and higher turbidity in the river. AA 9434-9435; 9525-9526; 9549-9550; 8914-8915 (acknowledging that “increasing instream sedimentation” “may adversely impact steelhead and Chinook spawning and rearing.”). Bank failures also cause loss of riparian vegetation and its associated wildlife habitat.<sup>2</sup>

## **II. NATURE OF THE CASE**

In its motion to enforce the settlement agreement, Living River

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<sup>2</sup>The City’s Response to Comments contends this change in velocity was analyzed in the 2004 EIR where it was found to not be large enough to significantly affect “channel stability” and referring to the 2004 “RDEIR Appendix G, Figure 22b.” AA 9522. But Figure 22b (at AA 9551) relates to Main Channel Distance (HEC Station) 15136, an entirely different location. Therefore, the effects of changes in velocity at Main Channel Distance 15750 were not analyzed.

requested declaratory relief (i.e., a declaration that the City’s adoption of the 2006 Plan was in violation of the agreement), injunctive relief prohibiting the City from implementing the 2006 Plan, and specific performance requiring the City to implement the 2005 Plan. AA 9244-9246.

The trial court’s Ruling on Submitted Motion to Enforce Settlement Agreement (at AA Tab 37) is appealable under Code Civ. Proc. section § 904.1(a)(2) as an order after an appealable judgement (*i.e.*, the Judgement Granting Petition for Writ of Mandate at AA Tab 13) and section 904.1(a)( 6) as an order refusing to grant an injunction.

### **III. STATEMENT OF THE CASE**

#### **A. FACTUAL BACKGROUND**

Periodic river flows that overtop the river’s bank are part of the natural history of the Napa River. AA 7493. In recognition of this fact, in 1998 the people of Napa County enacted “Measure A,” also known as the Napa County Flood Protection Sales Tax Ordinance. AA 197-210; 7554. Measure A imposes a one-half cent sales tax in Napa County to provide funds for flood management projects on the Napa River. Measure A, however, expresses a strong policy to require that all flood management projects on the river embody “Living River Principles.” Measure A implements this policy by requiring that in order to receive funds for Measure A sales tax revenue, flood management projects on the river must comply with specified “Living River

Guidelines.” AA 200.

During the administrative process for this Project, Living River submitted extensive comments to the City describing how this Project’s design does not comply with Measure A’s Living River Principles. For example, Living River wrote to the City Council that:

The fundamental problem with the Projects is they do not attempt to resolve the flood problem by working with the river in a way that simultaneously provides both flood protection for citizens and restoration of the river ecology, but instead, elevates the goal of flood protection above all the other living river considerations. In this regard, the Projects fail to utilize a multi-objective planning process aimed at maintaining a sustainable and natural river ecosystem while also providing flood protection. . . . Accordingly, when tough decisions regarding the Project have been encountered, the City has repeatedly favored flood protection over environmentally superior alternatives.

AA 4286-4287. Living River summarized Measure A’s Living River Principles as follows:

As defined by the Goals and Objectives document, “A ‘living’ Napa River and its tributaries is a river system with structure, function, and diversity. It has physical, chemical, and biological components that function together to produce complex, diverse communities of people, plants, and animals.” (Exhibit 1, page 4.) Accordingly, a living Napa River: conveys variable flows and restores habitat in the floodplain; balances sediment input with sediment transport; provides natural fish and wildlife habitat; maintains high water quality and supply; offers improved recreation opportunities; maintains its aesthetic qualities; and generally enhances the natural environment. To accomplish these goals, the Goals and Objectives document identifies four overarching goals which include: preserve or enhance the habitats, water quality and natural geomorphic

characteristics of the Napa River System; provide enhancement of the River system to the fullest extent possible, and not preclude or eliminate future restoration opportunities; and incorporate the geomorphic, water quality and habitat objectives to the fullest extent possible so that the intended functions are self-sustaining. . . . The approach of the Goals and Objectives document is based on the natural processes and characteristics of the Napa River itself, incorporating the following principles of geomorphology, all of which allow the river to meander as much as possible by maintaining: the natural slope of the river; the natural width of the river; the natural width to depth ratio of the river; the connection of the river to the floodplain; channel features and a continuous fish and riparian corridor along the river.

AA 4288.<sup>3</sup>

On February 24, 2004, the City Council certified the Final Environmental Impact Report (“EIR”) for the St. Helena Comprehensive Flood Protection Project and adopted Resolution 2004-16 by which it selected and approved the EMP-A design alternative for the Project. AA Tabs 3, 4, 5, 6, 7; p. 9258. The primary purpose of the Project is to protect the Vineyard Valley Mobile Home Park (“VVMHP”), a development built in the flood plain adjacent to the Napa River. AA 7554.

On March 26, 2004, Living River filed a petition for writ of mandate challenging the City’s approval of the Project on various grounds under CEQA (Pub. Resources Code, § 21000 *et seq.*). AA Tab 8. After briefing and hearing

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<sup>3</sup>The foregoing discussion is provided as background. This case does not challenge the City’s intent to apply for Measure A funds to build this Project.

on the merits, on December 17, 2004, the Superior Court granted Living River's petition on the basis of one claim regarding the EIR's cumulative impacts analysis. AA Tabs 10, 11, 12, 13.

On February 2, 2005, the City appealed the Superior Court's ruling (Appeal No. A109388). AA Tab 14. On February 15, 2005, Living River cross-appealed. AA Tab 15. On or about November 11, 2004, Living River and the City entered into a written Settlement Agreement (AA Tab 21, 9256-9308), which provides for the court to reserve jurisdiction to enforce the agreement (AA Tab 21, 9274-9276).

On December 1, 2005, Living River and the City submitted a "Joint Request to Dismiss Appeal" to this Court. AA Tab 16. On December 8, 2005, the Court granted this request and dismissed the City's appeal and Living River's cross-appeal. AA Tab 17. On January 30, 2005, the Superior Court entered the Stipulation and Order dismissing the case and reserving jurisdiction to enforce the agreement. AA Tab 21, 9253-9255.

The original EMP-A/2004 Plan Project includes construction of flood plain terraces (terraces A and B); relocation of a number of homes located in the VVMHP; construction of setback levees and flood walls; clearing and removal of riparian vegetation on the east bank of the Napa River at its confluence with Sulphur Creek (referred to as "Element C"); relocation and modification of various utilities including water, sewer, gas, electrical,

telephone, and cable television; installation of rock slope protection at the toe of the slope to stabilize approximately 300 feet of creek bank along Sulphur Creek at its confluence with the Napa River; construction of the Adams Street levee and extension of Adams Street east so as to intersect with Silverado Trail over a new causeway and bridge spanning the Napa River; construction of an extension of Paseo Grande northwest to connect with Adams Street; construction of a public trail through the flood plain terraces extending from the Adams Street Levee to the confluence of Sulphur Creek with the Napa River; provision of flood protection for the City's wastewater treatment plant by installing a floodwall and an embankment including a culvert with a flap gate; institution of an adaptive management, monitoring, and maintenance plan; and removal of the "rock sill" portion of the Pope Street Bridge, which currently consists of a concrete apron with embedded boulders in the bed of the Napa River. AA 7522; 7554-7584; 9529-9548.

The Settlement Agreement requires that the City modify the EMP-A/2004 Plan by adding, deleting, or changing a number of specific components of the Project while retaining all components not so modified. These changes are described at pages 4 through 11 of the Settlement Agreement at AA 9261-9268 and are discussed in more detail below.

With respect to enforcement, the Settlement Agreement provides, in relevant part, as follows:

- Recital H: “in exchange for Living River's agreement to dismiss the ongoing litigation with prejudice and not to fund, participate in, or intervene in any other future litigation regarding the Project, the City has agreed to modify the design of the Project to reflect suggestions made by Living River....” AA 9259-9260.
- Paragraph 11a: “Except for causes of action for alleged breach of duties arising under this Agreement or as described below in section 11.a(1), Living River agrees that it will not initiate, participate in, intervene in, fund, or otherwise carry out any administrative appeals or litigation against the Project including, without limitation, litigation against (1) any local, regional, state or federal permit or approval required for all or a portion of the Project or any infrastructure, services, or facilities needed for the Project; (2) any environmental review document prepared under the California Environmental Quality Act or the National Environmental Policy Act to evaluate the environmental impacts of all or any portion of the Project or any infrastructure, services, or facilities needed for the Project; or (3) any action taken by City or any other person or entity to carry out all or a portion of the Project or any infrastructure, services or facilities needed for the Project. The prohibitions set forth in this subsection (a) shall apply to Living River whether it acts independently or in concert with other persons, entities, or associations, whether under his, her, or its own name or some other name.” AA 9269-9270 (emphasis added).
- Paragraph 11a(1): “The Parties agree that the following *potential changes to the Project as modified by this Agreement*, being beyond the scope of the Agreement, are not subject to enforcement by Living River pursuant to this Agreement (except to the limited extent that this agreement requires they be subject to a separate permitting process) and that Living River may initiate new litigation with respect to these changes: sediment removal from Element C, the use of heavy equipment for routine maintenance within Element C, and extending Adams Street past Paseo Grande Avenue. **The Parties agree that any other changes to the Project as modified by this Agreement are subject to enforcement by Living River pursuant to this Agreement.** The Parties agree that after construction of the *Project as modified by this Agreement*, any new flood control

measures undertaken by the City (other than the continuing adaptive management measures that are part of this *Project as modified by this agreement*) are not subject to enforcement by Living River pursuant to this Agreement and Living River retains its right to seek judicial review of any such actions.” AA 9270 (emphasis added).

- Paragraph p: “Equitable Relief: Because the amount of damages in the event of a breach of this Agreement may be difficult or impossible to determine, the obligations of the Parties shall be enforceable by specific performance or other equitable relief, in addition to any other available remedy.” AA 9279.

In June 2006, the City held hearings on its intent to formally adopt the changes to the Project described in and authorized by the Settlement Agreement. The City prepared a “CEQA Addendum” dated June 2006, to evaluate the additional environmental effects of these changes. AA Tab 21, 9309-9433. The CEQA Addendum accurately describes the changes described in and authorized by the Settlement Agreement as follows:

- **2005 Adopted Refinement No. 1/Element C** - Element C vegetation removal will be geared towards protecting critical environmental habitat while enhancing floodwater transport.
- **2005 Adopted Refinement No. 2/Modified Terrace B** - The 2005 modifications to Terrace B are included in 2006 Refinement No. 2 as noted above.
- **2005 Adopted Refinement No. 3/Sulphur Creek/Napa River Confluence** - The floodwall at the confluence of Sulphur Creek and Napa River, and continuing west approximately 150 feet upstream on Sulphur Creek, will be designed to maintain the banks in their natural condition as feasible. The floodwall will be designed to gain FEMA certification for protection in a “100 year” flood event to the greatest degree feasible from both engineering and fiscal standpoints while avoiding biological

impacts.

■ **2005 Adopted Refinement No. 4/Levee Alignments East of Paseo Grande** - The realignment affects only the portion of the levee east of Paseo Grande Drive. The Adams Street Levee will terminate at Paseo Grande Drive. The VVMHP Levee will be turned westward to connect to the Adams Street Levee. The Adams Street Levee between Paseo Grande Drive and Starr Avenue will only be available for emergencies and as a maintenance road, but otherwise would be gated at Starr Avenue.

■ **2005 Adopted Refinement No. 5/Woody Debris in River** - The Adaptive Management Plan will include additional language to incorporate opportunities to leave woody debris in the Napa River where feasible and consistent with the overall project objectives.

■ **2005 Adopted Refinement No. 6/Change of Design Profile** - This refinement includes a change of the design profile of the project from 100-year to a 200-year water surface profile. This design change would require an increase in the levee and floodwall heights by about 0.5 feet.

■ **Adams Street Causeway/Bridge** - This project feature will be considered a separate project by the City and will only be considered after preparation of a separate CEQA evaluation.

■ **Pope Street Sill Removal** - This project feature will be considered a separate project by the City and will only be considered after appropriate compliance with CEQA and NEPA.

AA Tab 21, 9324-9325.

At the same time, the City proposed additional changes to the Project that were not described in or authorized by the Settlement Agreement. The City's June 2006 CEQA Addendum evaluates the additional environmental effects of these changes. AA Tab 21, 9352-9403. The CEQA Addendum

describes the new changes not described in or authorized by the Settlement Agreement (termed the “2006 Refinements”) as follows:

- **2006 Refinement No. 1/Delete Terrace A** - Terrace A will be eliminated from the project.
- **2006 Refinement No. 2/Modified Terrace B** - Terrace B will be narrower within the VVMHP, and wider and higher in the vineyard adjacent to the VVMHP than in the 2004 Plan. Terrace B will not include an inlet from the river channel and will minimize the removal of trees in the riparian remnant.
- **2006 Refinement No. 3/VVMHP Floodwall** - The floodwall will be slightly closer to the Napa River within the VVMHP adjacent to Terrace B.<sup>4</sup>
- **2006 Refinement No. 4/No Relocation Area** - The number of home relocations will be reduced from 33 to 17. Where these home sites are occupied, the intent is to relocate them to unoccupied pads within the VVMHP and/or for the City to purchase available VVMHP homes as replacements. Where home sites to be removed are not occupied, no relocation is proposed. This eliminates the need to construct the relocation area in the adjacent vineyard.
- **2006 Refinement No. 5/Drainage Design** - Drainage will be rerouted from an existing storm drain on Starr Avenue into a new storm drain that will be routed outside the new levee and then into a grass-lined swale that drains into and through Terrace B. The existing culverts that drain into the Napa River will be abandoned. Interior drainage will be via a detention basin with a low level culvert and lift pump facilities that will empty into the grass-lined swale on Terrace B.
- **2006 Refinement No. 6/Soil Disposal** - Four options for soil

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<sup>4</sup>In fact, as discussed below, this 2006 Refinement would move the floodwall not “slightly closer” as the City claims but a full 115 feet closer, a significant difference. AA Tab 21, 9444.

disposal are included in the 2006 Plan: (1) disposal on the Miller Parcel and the vineyard portion of the Hunter parcel; (2) disposal on the Miller Parcel, the vineyard portion of the Hunter parcel and additional areas on the Hunter parcel; (3) disposal on the Miller Parcel with off haul of excess soil; and (4) off haul of all excess soil.

■ **2006 Refinement No. 7/Defer WWTP Flood Proofing** - Flood proofing at the WWTP will be deferred until a later date when funding is available. The impacts of WWTP flood proofing are not analyzed in this Addendum as the design of this element has not been changed. The impacts of WWTP flood proofing were analyzed in the 2004 EIR.

AA Tab 21, 9324.

On June 19, 2006, Living River objected to the City's approval of the "2006 Refinements" on environmental and legal grounds, including grounds that the changes violate the Settlement Agreement. AA Tab 21, 9434. The City issued a response to Living River's and other public comments. AA Tab 21, 9436. On June 27, 2006, Living River submitted additional comments objecting to the City's approval of the "2006 Refinements." AA Tab 21, 9525.

On June 27, 2006, the City adopted Resolution No. 2006-71, by which it adopted the Project changes described in and authorized by the Settlement Agreement (*i.e.*, the 2005 Plan) as well as the Project changes not described in or authorized by the Settlement Agreement (*i.e.*, the 2006 Refinements) and the CEQA Addendum. AA Tab 21, 9527.

## **B. PROCEDURAL HISTORY**

On August 9, 2006, Living River filed its motion to enforce the

settlement agreement on the law and motion calendar of the Superior Court, setting a hearing date of October 4, 2006. AA Tabs 19-21. In its motion to enforce, Living River raised only one issue: whether the agreement allowed the City to make changes to the Project that were not described in the Settlement Agreement. Living River relied on the text of the Settlement Agreement and offered the following parol evidence in support of its interpretation of Paragraph 11(a)(1) of the agreement:

- Written testimony by its principal coordinator, Ms. Chris Malan, stating:

The City interprets the phrase “Project as modified by this Agreement” as used in paragraph 11(a)(1) of the Settlement Agreement in a way that would restrict LRC to enforcing the inclusion of the 2005 Refinements in the 2006 Plan. This is wrong. This phrase was used in the Settlement Agreement to denote the “2005 Plan” before the term “2005 Plan” had been coined. In the negotiations leading to the execution of the Settlement Agreement, both LRC and the City agreed to use this phrase to refer to the package of components that included the Project as approved by the City (*i.e.*, the currently titled “2004 Plan”) combined with components added or deleted by the terms of the Settlement Agreement.

To suggest, as the City does, that LRC settled its litigation against the 2004 Plan Environmental Impact Report (“EIR”) in a manner that would allow the City to make any number or type of changes to the “Project as modified by this Agreement” as long as the modifications specified in the Settlement Agreement were retained, is absurd. ...That was not my intent in negotiating or executing the Settlement Agreement.

AA 9726; 9714-9715.

- Evidence showing that the three Project components identified in the first sentence of Paragraph 11(a)(1) of the agreement, and the adaptive management measures identified in the third sentence of Paragraph 11(a)(1), were part of the Project before execution of the Settlement Agreement. RT 10; AA 7574; 7577-7578; 7970-7976.

On September 20, 2006, the City filed its papers in opposition to the motion to enforce. AA Tabs 22-27. The City defended the motion on several grounds, including (1) its interpretation of the text of the agreement; (2) that its performance pursuant to the agreement is legally impossible; and (3) that enforcement of the agreement is against public policy because of the danger of future flooding. AA Tab 22. The City submitted no parol evidence of its intent at the time it executed the agreement in support of its opposite interpretation. But it did submit evidence that corroborated Ms. Malan's testimony, in the form of written testimony by City Manager Bert Johansson that "the adopted project within the settlement agreement became known as the 2005 Plan." AA 9650:20.

Counsel for the City asked the Court to look beyond the terms of the agreement (RT 22), but in neither the hearing on the motion, the opposition brief, nor the supporting declarations did the City offer discrete extrinsic evidence of the City's intent regarding or understanding of the meaning of Paragraph 11(a)(1) *at the time the agreement was signed*. The City also

submitted numerous declarations containing evidence in support of its defenses of legal impossibility and excuse of performance based on public policy.

On October 4, 2006, the Superior Court heard Living River's motion to enforce. RT. At that hearing, Living River argued that if the Court were inclined to consider the City's legal impossibility and public policy defenses on their facts, then Living River has a due process right to a separate evidentiary hearing. RT 17; 22; *see also* AA 9719:7-9.

On October 10, 2006, the trial court ruled against Living River solely on the basis of the text of the agreement. The trial court did not admit or consider Living River's parol evidence regarding the meaning of the agreement. The trial court also did not rule on the City's other defenses of excuse of performance based on legal impossibility and public policy. AA Tab 37, 9771. With respect to the key language in the text of the agreement, the trial court stated:

The core controverted issue in this motion is whether or not "any other changes to the Project as modified by this Agreement" was intended to pertain to any other changes to the Project *in general* or just to any other changes to the Project *as addressed in the agreement*. The court finds that, while the particular language in question is not a model of clarity, the remainder of the sentence sufficiently clarifies its meaning.

The remainder of the sentence states that the other changes to the Project "are subject to enforcement by LRC pursuant to this agreement." It is axiomatic that one can only enforce pursuant to an agreement that which is promised within the agreement. In the agreement at issue here, the City promised to make certain

changes to the Project. Those changes are certainly enforceable pursuant to the agreement. The agreement does not include a promise by the City that it would refrain from making any changes to Project components that are not addressed in the agreement. Obviously, the contract should not be read in such a manner that would allow LRC to enforce a non-existent promise.

AA 9772 (emphasis in original).

On December 12, 2006, Living River timely filed its notice of appeal and elected to prepare an Appendix pursuant to C.R.C. 8.124. AA Tab 38.

#### **IV. ISSUES PRESENTED**

1. Whether the Superior Court erred by interpreting the Settlement Agreement as allowing the City to change the Project in any way it chooses so long as it includes the modifications described in the Settlement Agreement.
2. Whether the trial court erred by refusing to admit or consider Living River's undisputed parol evidence.
3. Whether the City's defense of legal impossibility fails as a matter of law.
4. Whether the City's defense that enforcement of the agreement is against public policy because of the danger of future flooding fails as a matter of law.
5. If this Court rules in Living River's favor on the text of the agreement, but finds that any of the City's other defenses do not fail as a matter of law, the Court must remand the matter to the trial court to conduct an evidentiary hearing on any such defenses.

## V. STANDARDS OF REVIEW

### A. THIS COURT INDEPENDENTLY REVIEWS THE TRIAL COURT'S RULING INTERPRETING THE SETTLEMENT AGREEMENT

On a motion to enforce a settlement agreement pursuant to Code Civ. Proc. § 664.6, the trial judge may hear and determine factual disputes in connection with the alleged settlement, and on appeal the trial court's factual determinations are reviewed under the substantial evidence standard. *Marriage of Assemi* (1994) 7 Cal.4th 896, 911; *Conservatorship of McElroy* (2002) 104 Cal.App.4th 536, 544; *Williams v. Saunders* (1997) 55 Cal.App.4th 1158, 1162.

Where, as here, the parties do not present conflicting parol evidence, the meaning of the disputed writing is a question of law subject to the appellate court's independent judgement. *Citizens for Goleta Valley & Goleta Valley Land Trust v. HT Santa Barbara* (2004) 117 Cal.App.4th 1073, 1076 (“because there is no conflicting extrinsic evidence, we must independently construe the settlement agreement”); *Fischer v. First Int'l Bank* (2003) 109 Cal.App.4th 1433, 1443 (“if the parol evidence is not conflicting, the appellate court will independently construe the writing”).<sup>5</sup>

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<sup>5</sup>Where the parties present conflicting extrinsic evidence, the substantial evidence standard of review applies. *Marriage of Fonstein* (1976) 17 Cal.3d 738, 746-747, but where conflicting inferences arise from uncontroverted extrinsic evidence, the appellate court must independently draw inferences and

**B. THIS COURT INDEPENDENTLY REVIEWS THE TRIAL COURT'S FAILURE TO CONSIDER LIVING RIVER'S PAROL EVIDENCE**

Under the parol evidence rule, extrinsic evidence is admissible in a dispute over the interpretation of a contract when the language is reasonably susceptible of more than one interpretation, and it is error for the trial court to refuse to consider such evidence. *Valdez v. Federal Mut. Ins. Co.* (1969) 272 Cal.App.2d 223, 232 (“In this state, however, the intention of the parties as expressed in the contract is the source of contractual rights and duties. A court must ascertain and give effect to this intention by determining what the parties meant by the words they used. Accordingly, the exclusion of relevant, extrinsic, evidence to explain the meaning of a written instrument could be justified only if it were feasible to determine the meaning the parties gave to the words from the instrument alone.”). “The threshold determination of ambiguity is subject to independent review.” *City of Chino v. Jackson* (2002) 97 Cal.App.4th 377, 383; *accord, Epa Real Estate P'ship v. Kang* (1992) 12 Cal.App.4th 171, 176 (“Whether the parol evidence rule applies in a given set of circumstances is a question of law, which we consider *de novo* to the extent that no evidentiary conflict exists.”)

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interpret the writing. *Schaefer's Ambulance Service v. County of San Bernardino* (1998) 68 Cal.App.4th 581, 586 (“to the extent the evidence is not in conflict, we construe the instrument, and we resolve any conflicting inferences, ourselves”).

Here, the trial court did not make any findings of fact regarding the Settlement Agreement, but based its decision solely on the language of Paragraph 11(a)(1). This Court should review the trial court's interpretation using its independent judgment because (1) the trial court neither admitted nor relied upon extrinsic evidence in making its determination, and (2) no conflicting extrinsic evidence was offered in support of the parties' interpretations of Paragraph 11(a)(1).

## VI. ARGUMENT

Written settlement agreements may be enforced by noticed motion pursuant to Code Civ. Proc. § 664.6<sup>6</sup> (*Gorman v Holte* (1985) 164 Cal. App. 3d 984, 989) and the Court may enter judgment on a stipulated settlement where a party refuses to comply with its terms (*Casa de Valley View Owner's Ass'n v Stevenson* (1985) 167 Cal.App.3d 1182, 1189). A motion to enforce a settlement agreement invokes the court's equity powers. *Nicholson v Barab* (1991) 233 Cal.App.3d 1671, 1681.

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<sup>6</sup>California Code of Civil Procedure § 664.6 states: "Judgment pursuant to terms of settlement. If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement."

**A. THE TRIAL COURT ERRED BY FINDING THE CITY DID NOT VIOLATE THE SETTLEMENT AGREEMENT BY ADOPTING THE 2006 REFINEMENTS**

“A settlement agreement is a contract, and the legal principles which apply to contracts generally apply to settlement contracts.” *Weddington Prods. v. Flick* (1998) 60 Cal.App.4th 793, 810, citing *Gorman v. Holte* (1985) 164 Cal.App.3d 984, 988 (“Compromise settlements are governed by the legal principles applicable to contracts generally”).

The purpose of the law of contracts is to protect the reasonable expectations of the parties. [citation] “A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful.” (Civ. Code, § 1636.) “The interpretation must be fair and reasonable, not leading to absurd conclusions.” [citation] “The court must avoid an interpretation which will make a contract extraordinary, harsh, unjust, or inequitable.” [citation] “The contract must be construed as a whole, without giving a distorting emphasis to isolated words or phrases.” [citation]

*Citizens for Goleta Valley v. HT Santa Barbara* (2004) 117 Cal.App.4th 1073, 1076-1077 (internal citations omitted).

Here, the trial court ruled that “[t]he agreement does not include a promise by the City that it would refrain from making any changes to Project components that are not addressed in the agreement.” AA 9772. This represents legal error for three reasons. First, it ignores the intent of the parties as expressed in the plain language of the agreement giving Living River the right to enforce changes to the entire Project, not just the “modifications” made

by way of the Settlement Agreement. Second, it ignores the intent of the parties reflected in the circumstances under which the parties negotiated the agreement. Third, it ignores the intent of the parties as shown by Living River's uncontroverted parol evidence. As the Supreme Court has observed, "perfect verbal expression" in contracts is impossible; therefore, the task in construing contracts is to determine the parties intent, not to look for "magic words":

Some courts have expressed the opinion that contractual obligations are created by the mere use of certain words, whether or not there was any intention to incur such obligations. Under this view, contractual obligations flow, not from the intention of the parties but from the fact that they used certain magic words. Evidence of the parties' intention therefore becomes irrelevant. In this state, however, the intention of the parties as expressed in the contract is the source of contractual rights and duties. A court must ascertain and give effect to this intention by determining what the parties meant by the words they used.

*Pacific Gas & Electric Co. v. G. W. Thomas Drayage & Rigging Co., supra*,  
69 Cal.2d at 37-38.

**1. The Plain Language of the Settlement Agreement Prohibits the City from Unilaterally Changing the Project Description.**

The Settlement Agreement provides a project description that both Living River and the City can live with. Therefore, the City cannot unilaterally change that project description. Otherwise, Living River is deprived of the benefit of its bargain, *after it has performed its obligation to*

*dismiss its action challenging the 2004 Plan EIR.*

The City contends that Living River intended to settle its litigation against the 2004 Plan EIR in a manner that would allow the City to make any number or type of changes to the “Project as modified by this Agreement” as long as the modifications specified in the Settlement Agreement were retained. But there is nothing in the agreement to support the City’s interpretation. Instead, the plain language of the agreement supports Living River’s interpretation.

Paragraph 11(a)(1) of the Settlement Agreement expresses the parties’ agreement regarding how different categories of changes to the Project will be treated for purposes of enforcement. The first sentence of Paragraph 11(a)(1) addresses three specific components of the 2004 Plan: (1) sediment removal from Element C, (2) the use of heavy equipment for routine maintenance within Element C, and (3) extending Adams Street past Paseo Grande Avenue. With respect to these components the agreement requires that the City undertake separate permit processes. Living River may enforce the agreement to the extent of ensuring that these separate permit processes occur, but with respect to the results of any of these separate permit processes, Living River has no contractual enforcement rights but may bring new litigation challenging those separate permits. AA 9270.

The third sentence of Paragraph 11(a)(1) addresses changes to the

Project that the City might undertake after construction of the Project. As to those changes, Living River cannot enforce the settlement agreement, but must rely on its other legal remedies. *Id.*

The second sentence of Paragraph 11(a)(1) addresses all other possible changes to the Project, stating: “The Parties agree that *any other changes* to the Project as modified by this Agreement are subject to enforcement by Living River pursuant to this Agreement” *Id.* (emphasis added). Living River contends this sentence gives it enforcement rights to the whole “Project as modified” not just to the “modifications.” The City argued below, and the trial court agreed, that the phrase “Project as modified by this Agreement” as used in this second sentence paragraph 11(a)(1) restricts Living River to enforcing only “modifications” added to the Project by way of the Settlement Agreement.

The City is wrong and the trial court erred. The City’s brief in the trial court reveals the illogic of its own argument. The City argued:

the key sentence states that “[t]he Parties agree that any other changes to *the Project as modified by this Agreement* are subject to *enforcement* by Living River pursuant to this Agreement.” (Emphasis supplied.) This quoted language contains two key concepts: (I) “enforcement” by Living River of any attempt by the City to change (ii) “the Project as modified by the Agreement.” In other words, the phrase “the Project as modified by the Agreement” is a single grammatical unit functioning as a single noun. Living River does not get to control any change to “the Project” but rather only gets to prevent a change to “the Project as *modified* by the Agreement.”

AA 9563:10–22.

Thus, the City initially admitted the phrase “Project as modified by this Agreement” is indivisible. Yet, immediately thereafter, the City tried to drive a wedge between the word “Project” and the remainder of the phrase. Only by this tortuous logic is the City able to assert that Living River can only enforce the “modifications” to the Project rather than “any other changes” to the “Project as modified by this Agreement.”

If the City’s view of the parties’ intent is correct, the language would have to say: “any other changes to modifications to the Project made by this Agreement are subject to enforcement,” which it obviously does not say.

The City’s reading is internally inconsistent. The phrase “Project as modified by this Agreement” occurs four times in Paragraph 11(a)(1). In all four instances it has the same meaning: *i.e.*, the Project including the new modifications, not just the “modifications.”

In the first sentence of Paragraph 11(a)(1), the phrase occurs as follows:

The Parties agree that the following potential *changes to the Project as modified by this Agreement*, being beyond the scope of the Agreement, are not subject to enforcement by LRC pursuant to this Agreement (except to the limited extent that this agreement requires they be subject to a separate permitting process) and that LRC may initiate new litigation with respect to these changes: sediment removal from Element C, the use of heavy equipment for routine maintenance within Element C, and extending Adams Street past Paseo Grande Avenue.

AA 9270 (emphasis added). In this sentence, the word “changes” can only

refer to changes to the entire Project including the new modifications, not just to the new modifications, because these “potential changes” refer to components of the Project that pre-date the modifications added by way of the Settlement Agreement. *See* RT 10; AA 7574; 7577-7976.

In the third sentence of Paragraph 11(a)(1), the phrase occurs twice:

The Parties agree that after construction of the *Project as modified by this Agreement*, any new flood control measures undertaken by the City (other than the continuing adaptive management measures that are part of this *Project as modified by this agreement*) are not subject to enforcement by Living River pursuant to this Agreement and Living River retains its right to seek judicial review of any such actions.

AA 9270 (emphasis added). In its first occurrence in this sentence, the phrase again clearly means the entire Project including the new modifications, not just the new modifications, because there is no plan to build just the new modifications without the rest of the Project. In its second occurrence in this sentence, the phrase has the same meaning because the “adaptive management measures” were always part of the entire Project, and were never restricted to the new modifications added by way of the Settlement Agreement. RT 10; AA 7574; 7577-7976.

Moreover, the repetition of the phrase “Project as modified by this Agreement” in every sentence of this paragraph demonstrates that it is a “term of art.” Therefore, it is illogical to assume that it would have one meaning in three occurrences in the first and third sentences of the paragraph and a

different meaning in the crucial second sentence of the paragraph. Hence, the word “changes” in the second sentence refers to changes to the entire Project, including the new modifications, not just to the new modifications.

The fact that Living River can “enforce” any changes to the entire Project that are not listed in the first and third sentences shows that the City agreed to a specific project description that it is not free to change at will. This is further supported by the fact that the third sentence, in addressing post-construction changes, prevents Living River from using the Settlement Agreement as a legal remedy to challenge those changes. This gives rise to an inference that Living River may use the Settlement Agreement as a legal remedy to challenge all pre-construction changes except those listed in the first sentence.

The trial court observed that: “The core controverted issue in this motion is whether or not ‘any other changes to the Project as modified by this Agreement’ was intended to pertain to any other changes to the Project *in general* or just to any other changes to the Project *as addressed in the agreement*.” AA 9772. The trial court then found that “while the particular language in question is not a model of clarity, the remainder of the sentence sufficiently clarifies its meaning.” The “remainder of the sentence” referenced by the trial court is the language stating: “are subject to enforcement by LRC pursuant to this agreement.” AA 9772.

Rather than explain how this concluding phrase of the sentence “clarifies” the meaning of the phrase “any other changes to the Project as modified by this Agreement” in a manner that supports its ruling, the trial court turned to an entirely different rationale, one not based on the language of the “core controverted” language at all. Instead, the court relied on its own rule of contract interpretation, stating: “It is axiomatic that one can only enforce pursuant to an agreement that which is promised within the agreement.... The agreement does not include a promise by the City that it would refrain from making any changes to Project components that are not addressed in the agreement.” AA 9772.

This ruling reflects the trial court’s view that the agreement could and should have been drafted to more clearly reflect an intention to obligate the City to not make any changes beyond those described in the Settlement Agreement. However, this ruling begs the question of the meaning of the plain language the parties actually drafted to address this exact issue, which the trial court recognized as the “core controverted” language in the agreement. In fact, the trial court’s rationale for its decision does not construe that language at all; it simply looks to the absence of other language, *i.e.*, other “magic words” that the trial court would have preferred or expected to see. *See Pacific Gas & Electric Co. v. G. W. Thomas Drayage & Rigging Co., supra*, 69 Cal.2d 33, 38 (“Under this [incorrect] view, contractual obligations flow,

not from the intention of the parties but from the fact that they used certain magic words.”).

This represents legal error because it ignores the plain language of the sentence giving Living River the right to enforce changes to the entire Project, not just the “modifications,” as that sentence occurs in Paragraph 11(a)(1).

**2. The Circumstances of the Settlement Agreement Show That It Prohibits the City from Unilaterally Changing the Project Description.**

“For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret.” Code Civ. Proc. § 1860. Here, the circumstances surrounding the execution of the agreement are an attempt by the parties to settle Living River’s litigation challenging a flood control project that it believed presented an unacceptably high risk of environmental harm. The purpose of filing *and settling* the litigation was to achieve a Project description that, in Living River’s view, did not present an unacceptable risk of harm. AA 9260. These circumstances support Living River’s contentions that the parties intended to address Living River’s enforcement rights as to all possible changes to the Project and to ensure that Living River could require that the City stick to the new Project description provided by the settlement.

The circumstances also include the legal consequences of Living River giving up its CEQA claims against the EIR for the project. These are significant legal rights. Living River's dismissal of its lawsuit forever bars it from enforcing the CEQA claim on which it prevailed in the trial court and from litigating on appeal the claims it lost at trial regarding the adequacy of the EIR certified by the City for the Project in 2004. *Laurel Heights Improvement Assn. v. Regents of University of California* ("Laurel Heights II") (1994) 6 Cal. 4th 1112, 1130 ("[Pub. Res. Code] section 21167.2 mandates that the EIR be conclusively presumed valid unless a lawsuit has been timely brought to contest the validity of the EIR. This presumption acts to preclude reopening of the CEQA process even if the initial EIR is discovered to have been fundamentally inaccurate and misleading in the description of a significant effect or the severity of its consequences. After certification, the interests of finality are favored over the policy of encouraging public comment.").

Also, without the enforcement rights it seeks to vindicate in this appeal, Living River is relegated to challenging any new changes to the Project by challenging the City's use of an Addendum to the 2004 EIR to evaluate such changes. Since the dismissal renders the 2004 EIR immune to challenge for all time, Living River's only legal remedy under CEQA is to challenge the City' analysis of the incremental environmental effects of additional changes to the Project after certification of the 2004 EIR. To do so, Living River must

show there is no substantial evidence to support the City's conclusion that such incremental changes will not cause new or more severe significant adverse environmental effects that were not previously assessed in the original EIR. This claim is reviewed under the "substantial evidence" standard of review, under which the courts give deference to the agency's conclusions. *See, e.g., Kostka & Zischke, Practice Under the California Environmental Quality Act*, CEB, §§ 19.2 through 19.11 at pp. 879-891; § 19.51 at pp. 929 - 931.

This is a materially less advantageous position than Living River had when challenging the 2004 EIR, for two reasons. First, the finality of the 2004 EIR establishes the 2004 Plan as the new "environmental baseline" against which the later changes are measured to determine if they will have new or more severe environmental effects. *Benton v. Board of Supervisors* (1991) 226 Cal. App. 3d 1467, 1484 ("The county properly considered only the incremental differences between the original project and the modification when evaluating whether the modifications to the original proposal would result in any significant environmental impacts"); *Temecula Band of Luiseno Mission Indians v. Rancho Cal. Water Dist.* (1996) 43 Cal. App. 4th 425, 437 ("When a lead agency is considering whether to prepare an SEIR, it is specifically authorized to limit its consideration of the later project to effects not considered in connection with the earlier project. (Guidelines, § 15162, subd. (a)(1).) Judicial review is concomitantly limited"). Obviously, it is more

difficult to challenge the City's conclusion that incremental changes to the Project will not have significant effects than it is to challenge the City's conclusion that the original Project will not have significant effects.

Second, Living River's claims against the 2004 EIR were that the City failed to proceed in the manner required by law (*see*, AA Tabs 10, 11 and 12). Courts review such CEQA claims (including claims that the EIR fails to include necessary information) *de novo*, without deference to the agency's conclusions. In contrast, as noted above, a challenge to a CEQA addendum is subject to the deferential "substantial evidence" standard of review. *See e.g., Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal. 4th 412, 435 ("While we determine *de novo* whether the agency has employed the correct procedures, 'scrupulously enforce[ing] all legislatively mandated CEQA requirements' [citation], we accord greater deference to the agency's substantive factual conclusions.... where an agency failed to require an applicant to provide certain information mandated by CEQA and to include that information in its environmental analysis, we held the agency "failed to proceed in the manner prescribed by CEQA").

**3. Living River's Parol Evidence Shows the Settlement Agreement Prohibits the City from Unilaterally Changing the Project Description.**

Under the parol evidence rule, extrinsic evidence is admissible in a dispute over the interpretation of a contract when the language is reasonably

susceptible of more than one interpretation, and it is error for the trial court to refuse to consider such evidence. *Valdez v. Federal Mut. Ins. Co.*, supra, 272 Cal. App. at 232. “The decision whether to admit parol evidence involves a two-step process. The first is to review the proffered material regarding the parties’ intent to see if the language is “reasonably susceptible” of the interpretation urged by a party. [citation] If that question is decided in the affirmative, the extrinsic evidence is then admitted to aid in the second step, which involves actually interpreting the contract.” *Appleton v. Waessil* (1994) 27 Cal.App.4th 551, 554.

Similarly, in *Pacific Gas & Electric Co. v. G. W. Thomas Drayage & Rigging Co.*, supra, the California Supreme Court explained:

The test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible. [citations omitted] [para.] A rule that would limit the determination of the meaning of a written instrument to its four-corners merely because it seems to the court to be clear and unambiguous, would either deny the relevance of the intention of the parties or presuppose a degree of verbal precision and stability our language has not attained.

69 Cal.2d at 37; accord, *S. Pac. Transp. Co. v. Santa Fe Pac. Pipelines* (1999)

74 Cal.App.4th 1232, 1241 (“Extrinsic evidence on all these circumstances and matters can be offered where it is obvious that a contract term is ambiguous, but also to expose a latent ambiguity. ‘The test of admissibility of extrinsic

evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible.””).

Here, Living River offered the following parol evidence in support of its interpretation of Paragraph 11(a)(1):

- Written testimony by its principal coordinator, Ms. Chris Malan, as described in the “Statement of Facts” above.
- Evidence showing that the three Project components identified in the first sentence of Paragraph 11(a)(1) of the agreement, and the adaptive management measures identified in the third sentence of Paragraph 11(a)(1), were part of the Project before execution of the Settlement Agreement. RT 10; AA 7574; 7577-7578; 7970-7976.

Not only is Ms. Malan’s testimony uncontradicted, it is corroborated by the testimony of City Manager Johansson, who testified that “the adopted project within the settlement agreement became known as the 2005 Plan.” AA 9650:20. This supports Living River’s contention that the phrase “Project as modified by this Agreement” is indivisible such that the changes that Living River may enforce are not restricted to changes to the “modifications” only.

The City did not offer any evidence in support of its opposite interpretation. Counsel for the City asked the Court to look beyond the terms

of the agreement,<sup>7</sup> but in neither the hearing on the motion, the opposition brief, nor the supporting declarations did the City offer discrete extrinsic evidence of the City's intent regarding or understanding of the meaning of Paragraph 11(a)(1) *at the time the agreement was signed*.

The City spent considerable time discussing the increased flood risks to the Vineyard Valley Mobile Home Park and the City's funding difficulties.<sup>8</sup> But the City offered this evidence only to show a change in circumstances supporting the City's defenses of "impossibility" and "public policy" – not to prove the intent of the parties when they signed the agreement to assist the court in interpreting the language of the agreement. While the City claimed this evidence may help the court "ascertain" or "glean" the intent of the parties under such circumstances, the circumstances presented arose *after* the Settlement Agreement had been signed. Parol evidence is admissible only to ascertain the intent of the parties *at the time they entered into the agreement*, and cannot be based on circumstances that have arisen after the fact. Code Civ. Proc. § 1860; *see Lemm v. Stillwater Land & Cattle Co.* (1933) 217 Cal. 474,

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<sup>7</sup>See RT 22 ("[R]ather than view it in isolation ... we believe the Court needs to look at it in the totality of the circumstances *as they exist today*, and try to ascertain the intent of the parties under such circumstances."), and 31 ("[W]hen the Court looks at section 11, in light of these circumstances and tries to glean the intent of the parties and what it would have been had we anticipated these situations, we are not in breach.") (emphasis added).

<sup>8</sup>See RT 22-36; AA Tab 22.

480 (“[T]he court may look to the circumstances surrounding the parties at the time they contracted.”); *S. Pac. Transp. Co. v. Santa Fe Pac. Pipelines, supra*, 74 Cal.App.4th at 1240 (“The overriding goal of contract interpretation is to give effect to the mutual intention of the parties at the time of contracting, ‘so far as the same is ascertainable and lawful.’ (Civ. Code, § 1636).”).

The City also offered pre-agreement evidence describing the history of flooding problems in St. Helena and the Vineyard Valley Mobile Home Park, which formed the basis for the Project in the first place. *See, e.g.*, AA 9651:23. But the City does not contend this evidence supports its interpretation of Paragraph 11(a)(1) (*i.e.*, that the City is authorized to make any changes it wants to the Project as long as it includes the modifications specified in the agreement.) Further, the extrinsic evidence offered by Living River does not conflict with this history of flooding.

Finally, the evidence the City offered showing it had fulfilled the other terms of the agreement (including the 2005 Refinements) is not in dispute, and the City’s evidence regarding environmental impacts is not relevant to the interpretation of the Settlement Agreement’s terms.

In sum, there was no “conflicting extrinsic evidence” admitted regarding the interpretation of the contract terms, and the key language in the agreement is reasonably susceptible of Living River’s interpretation. (Actually, this would be true even without parol evidence) Therefore, if the

trial court was inclined not to rule in Living River’s favor on the basis of the agreement’s plain language, the court was obligated to admit Living River’s parol evidence regarding the meaning of the key language. As the Court in *Appleton v. Waessil, supra*, put it:

[E]ven if the trial court personally finds the document not to be ambiguous, it should preliminarily consider all credible evidence to ascertain the intent of the parties. “The test of whether parol evidence is admissible to construe an ambiguity is not whether the language appears to the court to be unambiguous, but whether the evidence presented is relevant to prove a meaning to which the language is ‘reasonably susceptible.’” [citation]

27 Cal.App.4th at 555.

The trial court did not rely on extrinsic evidence, and did not consider whether the parol evidence offered by Living River was admissible, stating: “The court finds that, while the particular language in question is not a model of clarity, the remainder of the sentence sufficiently clarifies its meaning.” AA 9772. Under the authorities discussed above, this was error.

**4. The City’s Suggestion That Its Interpretation of Paragraph 11(a)(1) Would Avoid an Unlawful Delegation of Legislative Power Is Without Merit.**

In its brief to the trial court below, the City suggested, in passing, that Living River’s interpretation of Paragraph 11(a)(1) of the Settlement Agreement would somehow delegate the City’s legislative power to Living River. AA 9562:22-24. The City did not support this suggestion with reasoned

argument or citation to legal authority; therefore, it was waived. *Moulton Niguel Water Dist. v. Colombo* (2003) 111 Cal.App.4th 1210, 1215 (“Contentions are waived when a party fails to support them with reasoned argument and citations to authority.”).

Even if the argument is not waived, the City is equitably estopped from making the argument because at the time the settlement was executed, the City represented it had the authority to enter the settlement. AA 9276. For equitable estoppel to apply, four elements must be present: (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury. *Lentz v. McMahon* (1989) 49 Cal.3d 393, 399-400. Estoppel may be asserted against the government “where justice and right require it.” *Id.* at 399. It has also been recognized that refusing to invoke the doctrine of estoppel against the government when the necessary elements are present is contrary to the underlying principles of a democratic society. “A citizen ought to have the right to expect his government to deal fairly with him.” *Crumpler v. Board of Administration* (1973) 32 Cal.App.3d 567, 579.

Here, the City was apprised of the facts, *i.e.*, its authority to enter the agreement. The City intended that Living River act upon its conduct in

executing the agreement. Living River was ignorant of any suggestion that the City did not have such authority and relied upon the City's execution of the agreement to its injury.

Finally, even if the argument is not waived or estopped, it is without merit, as numerous decisions have upheld agreements against allegations that they contracted away municipal police power. *Morrison Homes Corp. v. City of Pleasanton* (1976) 58 Cal.App.3d 724, 729-730; *Stephens v. City of Vista* (9th Cir. 1993) 994 F.2d 650, 655-56.

**B. THE CITY'S ARGUMENTS REGARDING ENVIRONMENTAL IMPACTS ARE IRRELEVANT**

The City argued below that the 2006 Refinements will not cause any new or more severe significant adverse impacts on the environment than the 2004 or 2005 Plans. This argument is not relevant because Living River's motion does not raise a CEQA claim. Even so, the 2004 Plan, the 2005 Plan, and the 2006 Plan all have significant and less than significant adverse effects on the environment. *See* AA Tab 5, 7502-7517. Significant adverse effects include Impact AE-1 regarding aesthetics (AA 7502) and Impacts CU-1 and CU-2 regarding cultural resources (AA 7509). Most but not all adverse impacts were found to have been reduced to less than significant level, but that does not mean the impacts are non-existent, and there is always the risk they will be more severe than anticipated if mitigation measures do not function as

intended.

Living River was prepared to accept the environmental costs and benefits of the 2005 Plan. Living River is not prepared to accept the environmental costs of the 2006 Plan. Under the plain terms of the Settlement Agreement, the City is not entitled to second guess Living River's reasons for this choice. Living River bargained for the right to make that choice and for the right to enforce that choice.

Living River has explained its reasons for bringing this motion so the courts are aware that Living River is not enforcing the agreement "just because it can." Neither the motion to enforce or this appeal, however, call upon the Court to rule on whether the 2006 Refinements will cause any new or more severe significant adverse impacts on the environment than the 2004 or 2005 Plans. Therefore, the declarations of Mr. Halligan (AA Tab 26), Mr. Reinhardt (AA Tab 24), and Mr. Swanson (AA Tab 36) are irrelevant to the resolution of the motion and this appeal.

**C. THE CITY'S DEFENSE OF LEGAL IMPOSSIBILITY IS WITHOUT MERIT**

The City argues that performing its obligations under the Settlement Agreement should be excused for "impossibility" due to funding constraints. This argument fails as a matter of law for several reasons.

First, City Manager Johansson's testimony, on which the City relies,

does not demonstrate that building the 2005 Plan is even factually impossible, much less legally impossible. Mr. Johansson states:

By June 30, 2006, however, the cost estimates of the 2005 Plan had changed significantly. (See ... Exhibit C-15.) Land Acquisition costs increased by over 6.5 million, including costs to acquire the necessary land (eminent domain, legal, negotiation, title, etc.) Vineyard land costs in Napa County had steadily increased and acquiring the “Terrace A” of the 2004 and 2005 Plans had posed challenges:..... . Acquiring Terrace A may have required the use of eminent domain, which left the City vulnerable financially because the City’s appraised value and the property owner’s stated value of the property were exceedingly divergent.

AA 9650-9651 (emphasis added.). The most this sentence proves is that the City is worried that its costs may go up as a result of a dispute over the value of the land it wants to purchase. The City has not pursued the eminent domain action for Terrace A; therefore, it does not know if those costs would go up or by how much. Therefore, the figure of \$6.5 million in additional land acquisition costs is without foundation.

Mr. Johansson also testified that: “In addition, portions of the flood protection project were funded with FEMA grants that were threatened under FEMA’s restrictions regarding eminent domain acquisitions.” AA 9651 (emphasis added.) Again, this only provides evidence of potential cost increases, not actual cost increases.

The other major category of alleged cost increases to which Mr. Johansson testified is:

Increases in costs were related to the passage of time; inflation; increases in wages; higher fuel costs; higher material costs for demolition, grubbing, levee embankments and roadways; bank stabilization and environmental restoration; detention basin and stormwater treatment facilities; soil improvements and restoration at floodwall; and cultural resources work.

AA 9651. Exhibit C-15 to Mr. Johansson's declaration estimates these cost increases at 60% (or \$6.5 million), from \$10.5 million to \$16.5 million over a span of two years. AA 9685. Initially, it is difficult to believe that such substantial cost increase could occur over such a short span of time.

More importantly, even if cost increases of such magnitude could or did occur, they were foreseeable. Moreover, the City actually foresaw these cost increases because the budget for the 2005 Plan included a "Contingency" reserve of \$6 million (*see* AA 9685), which is just about enough to cover these alleged costs increases.

It is well-settled that the failure of a party to negotiate for an excuse from performance in the event it cannot raise sufficient funds to perform as required under the contract is fatal to any defense based on impossibility. *See Lloyd v. Murphy* (1944) 25 Cal.2d 48, 55 and cases cited therein ("[L]aws or other governmental acts that make performance unprofitable or more difficult or expensive do not excuse the duty to perform a contractual obligation."). This is especially true where the potential inability to raise needed funding is foreseeable. As the Court held in *McCulloch v. Liguori* (1948) 88 Cal.App.2d

366, 372:

The purpose of a contract is to place the risks of performance upon the promisor, and the relation of the parties, terms of the contract, and circumstances surrounding its formation must be examined to determine whether it can be fairly inferred that the risk of the event that has supervened to cause the alleged frustration was not reasonably foreseeable. If it was foreseeable there should have been provision for it in the contract, and the absence of such a provision gives rise to the inference that the risk was assumed.

The law regarding the relationship between foreseeability and excuse of performance was reiterated in *Selby v. Battley* (1957) 149 Cal.App.2d 659, 663, where the court stated, “[I]f the thing to be done is not naturally or necessarily impossible under all circumstances, a positive contract to do it is binding, though the performance is rendered impracticable, or even impossible, by some unforeseen cause over which the promisor has no control but against which he might have provided in his contract.”

Here, the City’s loss of funding was obviously foreseeable to the City. “A person contracting with eyes open and aware of the facts is presumed to undertake performance at the risk of interference from agencies not expressly provided against.” *McCulloch, supra*, 88 Cal.App.2d at 373, citing 6 Cal.Jur. at p. 434. Consequently, the City could have and should have negotiated for a provision in the Settlement Agreement for precisely this circumstance. Living River should not bear the burden for the City’s failure to contract for this foreseeable situation.

The absence of such a provision gives rise to the inference that the risk was assumed by the City. *Lloyd, supra*, 25 Cal.2d at 54. This is especially true here because at the time it negotiated the Settlement Agreement, the City was in the best position to know its chances of success in raising sufficient funds to build the 2005 Plan, and Living River had no access to such information.

The cases cited by the City below do not support its contention that it is excused from performance. In *Mineral Park Land Co. v. Howard* (1916) 172 Cal. 289, defendants contracted to take from plaintiff's ground all of the gravel necessary for the construction of a bridge. Defendants took all the gravel above the water level. The court found that to take the gravel below water level was impracticable because it could only have been done at a prohibitive cost. Thus, the court held that the defendants only agreed to take the gravel which was reasonably available and that because of the unavailability of the gravel defendants were excused from further performance. The decision was based upon the rule that "where performance depends upon the existence of a given thing, and such existence was assumed as the basis of the agreement, performance is excused to the extent that the thing ceases to exist or turns out to be nonexistent." *Id.* at 292. Here, unlike *Mineral Park*, there is no evidence that the success of future fund-raising by the City was "assumed as the basis of the agreement."

In *Le Cumbre Golf & Country Club v. Santa Barbara Hotel Co.* (1928) 205 Cal. 422, a hotel agreed to pay a golf club for golf privileges for hotel guests. The hotel burned down and thus there were no more guests. The court held the contract was based upon the continued existence of the hotel and that the facts came within the principle that, “[w]here from the nature of the contract it is evident that the parties contracted on the basis of the continued existence of a person or thing, condition or state of things, to which it relates, the subsequent perishing of the person or thing, or cessation of the existence of the condition will excuse the performance, a condition to such effect being implied in spite of the fact that the promise may have been unqualified.” *Id.* at 426.

Here, unlike *Le Cumbre*, neither the purpose nor the subject matter of the Settlement Agreement has perished or been destroyed. Thus, the cases on which the City relies are inapplicable and the City must bear the burden of breaching the agreement, *i.e.*, it is subject to the remedies of specific performance and injunctive relief.

**D. THE CITY’S ARGUMENT IT SHOULD BE EXCUSED FROM PERFORMING DUE TO “DANGER” IS WITHOUT MERIT**

The City argued below that performing its obligations under the Settlement Agreement should be excused because it is “dangerous” to further delay the Flood Control Project. This defense is simply another factual basis

for the defense of legal impossibility. It also fails for the same reasons discussed above in relation to the City's concerns about funding.

The City simply fails to carry its burden of proof on the issue to establish a *prima facie* factual basis for the defense. For example, the City utterly fails to quantify the risk of a catastrophic flood that would threaten life or property in the VVMHP. The City repeatedly refers to the December 31, 2005 flood as the basis for its fears but never provides the recurrence interval of that flood. AA Tab 22. If it was a 100-year storm, a storm of that magnitude has a 1% chance of occurring in any given year. AA 9755.

In addition, the City points to no evidence suggesting that the risk of flooding has changed since it executed the Settlement Agreement. Thus, as with the City's funding concerns discussed above, the current risk of flooding was entirely foreseeable at the time the City executed the agreement. Therefore, the City assumed this risk when it entered the agreement.

Indeed, for the same reasons discussed above regarding funding, the City is estopped from arguing against enforcement of a settlement agreement based on the risk of future flooding when it entered the agreement with full knowledge of that same risk. *See, e.g.*, AA 7554.

It is ironic that the City failed to address the actual risk of injury, despite its submission of voluminous declarations from its engineers and hydrologists regarding the risk of significant environmental impacts. In the

absence of such information, the City's defensive tactic is sheer speculation. Indeed, the City should be ashamed of itself for invoking images of New Orleans as a point of reference to support its scare tactics. *See*, AA 9570.

Moreover, the cases cited by the City below do not support this defense. The decision in *Spangenburg v. Spangenburg* (1912) 19 Cal.App. 439 has nothing to do with a contract posing a danger to life and health. In discussing contracts void as against public policy, the *Spangenburg* court stated:

It is to the interest of the public generally that the right to make contracts should not be unduly restricted, and no agreement will be pronounced void as being against public policy unless it clearly contravenes that which has been declared by statutory enactment or by judicial decisions to be public policy, or unless the agreement manifestly tends in some way to injure the public. *Whether or not a contract in any given case is contrary to public policy is a question of law to be determined from the circumstances of each particular case.*

*Id.* at 466 (citations omitted; emphasis added).

Notably, the City had to go outside the jurisdiction of California and cite a 1918 case to find any support for its position. However, this case, *Hanford v. Connecticut Fair Ass'n* (1918) 92 Conn. 621, presents a significantly different procedural posture. In *Hanford*, the plaintiff (promoters of a baby show) appealed the decision of the Court of Common Pleas, which overruled their demurrer to the breach of contract action against defendant, the host of a baby show. Thus, the court was considering the sufficiency of an allegation, not whether the allegation was true. *Id.* at 624.

The circumstances here demonstrate that any alleged danger is speculative at best. Moreover, any alleged danger does not rise to the level of providing support as a matter of law for declaring the Settlement Agreement void as against public policy. Therefore, if the Court believes the City's evidence is sufficient to make out a *prima facie* factual basis for this defense, it should remand the matter for an evidentiary hearing.

Living River submitted a number of declarations from residents of the City (*i.e.*, Durrance (AA Tab 32), Tiedemann (AA Tab 29), and Brown (AA Tab 31), and from hydrologist Robert Curry (AA Tab 33), showing that the City's myopic focus on risk to the residents of the VVMHP ignores flood risks that the Project presents to other residents of the area. The VVMHP development is in the middle of the lowest part of the floodplain, which is why Living River has always supported the "relocation" alternative discussed in the Project EIR. Otherwise, the entire community is forced to bear the environmental and financial costs of protecting the VVMHP homes, despite the fact they were knowingly built in harm's way. AA 9736-9737.

Moreover, the VVMHP itself, especially the construction of its floodwall in 1986, has contributed to flooding of properties upstream on Fulton Lane, and moving the floodwall closer to the channel as proposed in the 2006 Plan will further exacerbate flooding in the Fulton Lane area. AA 9728-9729;

9745.<sup>9</sup> Thus, if the Court is inclined to balance the equities here, the Court should remand to the trial court for a factual inquiry that does not focus, as the City has done, solely on possible harm to the residents of the VVMHP. Instead, it must consider possible harm to all affected residents.

## VII. CONCLUSION

For the forgoing reasons, the Court should reverse the trial court ruling and order the trial court to enter judgment for Living River on its motion to enforce the Settlement Agreement.

DATED: May 22, 2006      LAW OFFICES OF THOMAS N. LIPPE, APC

By: \_\_\_\_\_

Thomas N. Lippe  
Attorney for Appellant  
Living River Council

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<sup>9</sup>AA 9745 (“In my professional opinion, construction of the existing floodwall adjacent to the Vineyard Valley Mobile Home Park has contributed to increased flooding of properties across the river located on Silverado Trail and properties located upstream in the Fulton Lane area. It is also my professional opinion that moving this floodwall 115 feet closer to the river channel, as the 2006 Plan proposes, will exacerbate this effect. The mechanism of this effect is simple: the floodwall decreases the river channel’s capacity to transport water downstream, causing water to “back up” and overtop the banks of the river upstream and across the river from the floodwall.”).

## WORD COUNT CERTIFICATION

I certify that:

The attached brief is proportionately spaced, has a type-face of 13 points or more, and contains 13,522 words according to the word count of the WordPerfect word processing system used to prepare this brief. Hence, the brief complies with California Rules of Court 8.204(c)(1) and does not exceed the 14,000 word limit.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration is executed this May 22, 2007 at San Francisco County, California.

LAW OFFICES OF THOMAS N. LIPPE, APC

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Thomas N. Lippe, Esq.

TABLE OF CONTENTS

Page

I. INTRODUCTION ..... 1

II. NATURE OF THE CASE ..... 8

III. STATEMENT OF THE CASE ..... 8

    A. FACTUAL BACKGROUND ..... 8

    B. PROCEDURAL HISTORY ..... 18

IV. ISSUES PRESENTED ..... 22

V. STANDARDS OF REVIEW ..... 23

    A. THIS COURT INDEPENDENTLY REVIEWS  
    THE TRIAL COURT’S RULING INTERPRETING  
    THE SETTLEMENT AGREEMENT ..... 23

    B. THIS COURT INDEPENDENTLY REVIEWS  
    THE TRIAL COURT’S FAILURE TO CONSIDER  
    LIVING RIVER’S PAROL EVIDENCE ..... 24

VI. ARGUMENT ..... 25

    A. THE TRIAL COURT ERRED BY FINDING  
    THE CITY DID NOT VIOLATE THE  
    SETTLEMENT AGREEMENT BY  
    ADOPTING THE 2006 REFINEMENTS ..... 26

        1. The Plain Language of the Settlement  
        Agreement Prohibits the City from  
        Unilaterally Changing the Project Description ..... 27

        2. The Circumstances of the Settlement  
        Agreement Show That It Prohibits  
        the City from Unilaterally Changing  
        the Project Description ..... 34

TABLE OF CONTENTS (con't)		Page
3.	Living River’s Parol Evidence Shows the Settlement Agreement Prohibits the City from Unilaterally Changing the Project Description .....	38
4.	The City’s Suggestion That Its Interpretation of Paragraph 11(a)(1) Would Avoid an Unlawful Delegation of Legislative Power Is Without Merit .....	43
B.	THE CITY’S ARGUMENTS REGARDING ENVIRONMENTAL IMPACTS ARE IRRELEVANT .....	45
C.	THE CITY’S DEFENSE OF LEGAL IMPOSSIBILITY IS WITHOUT MERIT .....	46
D.	THE CITY’S ARGUMENT IT SHOULD BE EXCUSED FROM PERFORMING DUE TO “DANGER” IS WITHOUT MERIT .....	51
VII.	CONCLUSION .....	55
	WORD COUNT CERTIFICATION .....	a

TABLE OF AUTHORITIES

Page

Cases:

Appleton v. Waessil  
 (1994) 27 Cal.App.4th 551 ..... 38, 42

Benton v. Board of Supervisors  
 (1991) 226 Cal. App. 3d 1467 ..... 37

Casa de Valley View Owner's Ass'n v Stevenson  
 (1985) 167 Cal.App.3d 1182 ..... 25

Citizens for Goleta Valley & Goleta Valley Land Trust v. HT Santa  
 Barbara (2004) 117 Cal.App.4th 1073 ..... 23, 26

City of Chino v. Jackson  
 (2002) 97 Cal.App.4th 377 ..... 24

Conley v. Matthes  
 (1997) 56 Cal.App.4th 1453 ..... 5

Conservatorship of McElroy  
 (2002) 104 Cal.App.4th 536 ..... 23

Continental Cas. Co. v. Phoenix Constr. Co.  
 (1956) 46 Cal.2d 423 ..... 6

Crumpler v. Board of Administration  
 (1973) 32 Cal.App.3d 567 ..... 44

Epa Real Estate P'ship v. Kang  
 (1992) 12 Cal.App.4th 171 ..... 24

Fischer v. First Int'l Bank  
 (2003) 109 Cal.App.4th 1433 ..... 23

Gopal v. Yoshikawa  
 (1983) 147 Cal.App.3d 128 ..... 5

TABLE OF AUTHORITIES (con't)

Page

Cases (con't):

Gorman v. Holte  
 (1985) 164 Cal.App.3d 984 ..... 25, 26

Hanford v. Connecticut Fair Ass'n  
 (1918) 92 Conn. 621 ..... 53

In re Zeth S.  
 (2003) 31 Cal.4th 396 ..... 6

Kohn v. Jaymar-Ruby, Inc.  
 (1994) 23 Cal.App.4th 1530 ..... 5

Laurel Heights Improvement Assn. v. Regents of University of  
 California (“Laurel Heights II”) (1994) 6 Cal. 4th 1112 ..... 35

Le Cumbre Golf & Country Club v. Santa Barbara Hotel Co.  
 (1928) 205 Cal. 422 ..... 51

Lemm v. Stillwater Land & Cattle Co.  
 (1933) 217 Cal. 474 ..... 41

Lentz v. McMahon  
 (1989) 49 Cal.3d 393 ..... 44

Lloyd v. Murphy  
 (1944) 25 Cal.2d 48 ..... 48, 50

Marriage of Assemi  
 (1994) 7 Cal.4th 896 ..... 23

Marriage of Fonstein  
 (1976) 17 Cal.3d 738 ..... 23

McCulloch v. Liguori  
 (1948) 88 Cal.App.2d 366 ..... 48, 49

TABLE OF AUTHORITIES (con't)

Page

Cases (con't):

Mineral Park Land Co. v. Howard  
 (1916) 172 Cal. 289 ..... 50

Morrison Homes Corp. v. City of Pleasanton  
 (1976) 58 Cal.App.3d 724 ..... 45

Moulton Niguel Water Dist. v. Colombo  
 (2003) 111 Cal.App.4th 1210 ..... 43

Nicholson v Barab  
 (1991) 233 Cal.App.3d 1671 ..... 25

Pacific Gas & Electric Co. v. G. W. Thomas Drayage &  
 Rigging Co. (1968) 69 Cal.2d 33 ..... 4, 27, 34, 39

S. Pac. Transp. Co. v. Santa Fe Pac. Pipelines  
 (1999) 74 Cal.App.4th 1232 ..... 39, 41

Schaefer's Ambulance Service v. County of San Bernardino  
 (1998) 68 Cal.App.4th 581 ..... 24

Selby v. Battley  
 (1957) 149 Cal.App.2d 659 ..... 49

Spangenburg v. Spangenburg  
 (1912) 19 Cal.App. 439 ..... 53

Stephens v. City of Vista  
 (9th Cir. 1993) 994 F.2d 650 ..... 45

Temecula Band of Luiseno Mission Indians v. Rancho Cal.  
 Water Dist. (1996) 43 Cal. App. 4th 425 ..... 37

Tower Acton Holdings v. L.A. County Waterworks Dist. No. 37  
 (2002) 105 Cal.App.4th 590 ..... 5

TABLE OF AUTHORITIES (con't)

Page

Cases (con't):

Valdez v. Federal Mut. Ins. Co.  
 (1969) 272 Cal.App.2d 223 ..... 24, 38

Vineyard Area Citizens for Responsible Growth, Inc. v. City of  
 Rancho Cordova (2007) 40 Cal. 4th 412 ..... 37

Weddington Prods. v. Flick  
 (1998) 60 Cal.App.4th 793 ..... 26

Williams v. Saunders  
 (1997) 55 Cal.App.4th 1158 ..... 23

Statutes and Regulations:

Code of Civil Procedure -

    § 43 ..... 6

    § 664.6 ..... 1, 23, 25

    § 904.1(a)(2) ..... 8

    § 904.1(a)( 6) ..... 8

    § 1636 ..... 41

    § 1860 ..... 34

Public Resources Code -

    § 21167.2 ..... 35

Title 14, CEQA Guidelines

    § 15162(a)(1) ..... 37

California Rules of Court -

    § 8.124 ..... 22

    § 8.204(c)(1) ..... a

TABLE OF AUTHORITIES (con't)

Page

Miscellaneous:

Kostka & Zischke, Practice Under the California Environmental  
Quality Act, CEB,  
§§ 19.2 through 19.11 at pp 879 ..... 36