

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

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FIRST APPELLATE DISTRICT

DIVISION FOUR

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**APPELLANT'S OPENING BRIEF**

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COMMUNITY VENTURE PARTNERS,  
Plaintiff and Appellant

vs.

MARIN COUNTY OPEN SPACE DISTRICT,  
Defendant and Appellee

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**APPELLATE CASE NO: A161851**  
**APPELLATE CASE NO: A162374**

Marin County Superior Court Case No. CIV 1701913  
Judge: Honorable Andrew Sweet

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## I. INTRODUCTION AND SUMMARY

The key issue in this consolidated appeal is whether this Court's ruling in *Community Venture Partners v. Marin County Open Space District* ("Community Venture Partners") (January 24, 2020), App. Case No. A154867, 2020 Cal. App. Unpub. LEXIS 527\*, that the District violated its Road and Trail Management Plan ("Trail Plan") requires the District to set aside its approval allowing bikes on the Middagh Trail.

Both the final Judgment granting Petitioner's Petition for Writ of Mandate, and the Writ of Mandate, require the District to set aside its project approval "with respect to allowing bikes on the Middagh Trail." See Appellant's Appendix, Volume, Tab 1, pp. 07-08 ("AA1-1-07-08"), AA1-2-10. The language of the Judgment and Writ reflect the fact that the District's Trail Plan violation requires the District to go back to its first decision point on the future of the Alto Bowl Preserve and Middagh Trail – dating back to 2015 - following passage of the Trail Plan, a decision that hinged on which out of a number of competing proposals for the Middagh Trail and Preserve would be chosen by the District as the preferred project to be included in the County's budget for this trail and preserve area.

This Court's ruling in *Community Venture Partners* held that the District violated its Trail Plan by accepting the bike coalition's proposal to change the use on the Middagh to allow bikes without properly considering at the same time competing proposals that would not have allowed bikes even though, under the Trail Plan, all should have been considered. This failure tainted the District's decision to choose the bike coalition's proposal over the other proposals, thus requiring the District's ultimate project approval based on the initially selected bike proposal to be set aside.

This issue is relevant to Appellant's consolidated appeals as follows.

First, if this Court's ruling requires the District to set aside its project approval, then the trial court's subsequent discharge of the Writ of Mandate *without requiring the project approval be set aside* violates this Court's ruling and the final Judgment and Writ in this case. Here, the Court should reverse the trial court's discharge of the writ in Appeal No. A162374 because the District never set aside its project approval, as required by the Writ and Judgment.

Second, if this Court's ruling requires the District to set aside its project approval, this result enforces an important public right for thousands of local citizens who opposed the District's decision to allow bikes on the Middagh, which also constitutes a substantial public benefit under Code of Civil Procedure § 1021.5. Here, however, the trial court denied Appellant any fees or costs due to its incorrect assumption that Appellant's win on its Trail Plan claim conferred no substantial public benefit because it did not require the District to reconsider its project approval decision in any way.

If the District is required to set aside its project approval, then the trial court was wrong to assume that this Court's ruling had no tangible effect on the District's approval, in which case the court's ruling denying fees and costs should be reversed in Appellant's Appeal No. A161851.

Here, the trial court wrongly assumed that neither this Court's ruling, nor the final Judgment and Writ, required the District to set aside its project approval and thus the Writ could be discharged and Appellant's case found to be ineligible for any fee or cost award. These respective holdings are contrary to law and warrant reversal in this consolidated appeal.

## **II. RULE 8.204(a)(2) STATEMENT**

In this consolidated appeal, Appellant appeals two trial court rulings.

First, Appellant appeals the trial court's final Order Denying

Petitioner's Motion for Attorneys Fees and Cost filed on November 2, 2021. See AA2-13-334-342. Appellant filed its appeal on December 30, 2021, see AA5-19-504, which was assigned Appellate Case No. A161851.

Second, Appellant appeals the trial court's Order After Hearing dated March 15, 2021, which discharged the Writ of Mandate issued in this case. See AA6-23-640-645. Appellant appealed on March 23, 2021, see AA6-25-657-658, which was assigned Appellate Case No. A162374.

### **III. ISSUES PRESENTED**

1. Whether this Court's ruling in *Community Venture Partners, supra*, Case No. A154867, that the District violated the Trail Plan in selecting the bike coalition's proposed project over the competing non-biking project proposals required the District to set aside its project approval with respect to allowing bikes on the Middagh Trail.
2. Whether the trial court's ruling requiring the District to "set aside its Notice of Determination approving the Middagh Trail Improvement Project until the District has evaluated these competing proposals as required by the Trail Plan" required the District to set aside its project approval with respect to allowing bikes on the Middagh Trail.
3. Whether the language of the Judgment and Writ of Mandate issued by the trial court requiring the District to set aside its "approval of the Bob Middagh and Gasline Trail Project with respect to the District's decision to allow bikes on the Middagh trail" required the District to set aside its project approval with respect to allowing bikes on the Middagh Trail.
4. Whether the trial court erred in determining that this Court's ruling in *Community Venture Partners*, Case No. A154867 that the District violated the Trail Plan in selecting the bike coalition's proposed project over other competing non-biking project proposals did not enforce an



important public right and confer a substantial public benefit under Code of Civil Procedure § 1021.5.

5. Whether the trial court erred in determining that Appellant was not eligible for fees and costs because it did not achieve its litigation objective despite the result of the litigation that the District was required to set aside its project approval with respect to allowing bikes on the Middagh Trail, which meets the eligibility criteria for a fee award under Code of Civil Procedure § 1021.5.

#### **IV. FACTUAL BACKGROUND**

This consolidated appeal is based on the District's approval of a project in May 2017 to convert the Bob Middagh Trail, a popular hiking and equestrian trail located in the Alto Bowl Preserve in Marin County, into a mountain biking route.

##### **A. DISTRICT'S SELECTION AND APPROVAL OF PROJECT.**

The proposed project arose out of the District's new project selection system elaborated in the District's Trail Plan approved by the District in 2014. The Trail Plan does not prescribe specific future projects, but instead presents a general policy framework and process for making project level decisions. *See* Administrative Record in *Community Venture Partners*, App. Case No. A154867, Row 2, pp. 2999-3222 ("AR 62 2999-3222.") The Trail Plan's new project selection process contains six steps, beginning with the solicitation of proposals and culminating with the inclusion of 'successful' projects into proposed annual budgets. AR 62 3155-3159.

Following enactment of the Trail Plan, in 2015 the District considered a number of public project proposals to enhance the condition of trails in the Horse Hill and Alto Bowl Preserves, including several from local users advocating for reconstruction of damaged trail segments while

retaining the trails as limited to hiking and horse riding, *see* AR 66 3223-3228; AR 70 3240-3243; AR 71 3244- 3246; AR 75 3270-3276; AR 76 3277-3279, as well as one from the Marin County Bike Coalition (“MCBC”) to open the Middagh Trail to bikes. AR 67 3229-3237.

On September 22, 2015, Friends of Marin Open Space submitted a Petition containing 1,088 signatures and comments opposing the proposed change of use from hiking and equestrian on the Middagh Trail to allow bikes. *See* AA-1-127-238; AR 252 4729-4840; AA1-6-127-238. This opposition was based on the fact that mountain bikes have never been permitted on these trails, but when illegal riding did occur, it has led to trail damage and safety incidents with hiking and equestrian users. *See e.g.*, AR 252 4736. Such damage and safety related impacts were well documented by evidence showing that biking in Marin County has the potential for significant environmental and safety impacts to sensitive natural resources and to non-bike users of the trail system, *see e.g.*, AR 523 5272-5281, and by documentation through incident reports of illegal riding, safety impacts and damage to natural resources caused by biking.<sup>1</sup>

Despite this opposition, in November 2015 the District chose the MCBC proposal to allow bikes on the Middagh Trail, without considering or evaluating the other proposals to restore the trails without introducing mountain biking to the preserve. AR 86 3296-3297.

On August 25, 2016, the District presented a feasibility analysis of allowing bikes on the Middagh Trail at a community workshop. *See* AR 92

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<sup>1</sup> *See* AR 99 3381-3401; AR 100 3404-3421; AR 101 3423-3426; AR 3444-3457; AR 104 3459- 3474; AR 106 3559-3564; AR 107 3567-3570; AR 114 3522-3676; AR 115 3566-3731; AR 116 732- 3820; AR 117 3821-3794; AR 118 3975-4126; AR 119 4127-4269.

3339-3367. The District invited comments on the proposed project but did not prepare an initial study or conduct review under CEQA. As part of this informal process, Petitioner, along with numerous other local citizens, provided detailed comments on the District's proposal to open the Bob Middagh Trail to bikes. *See* AR Rows 273-566. Comments ranged from personal experiences of biking causing substantial environmental effects and safety hazards to other trail users, to scientific studies demonstrating the potential for mountain bikes to cause erosion, expansion of riding off-trail, disturbance of wildlife, noise and physical harm to non-biking hikers and equestrians. *See e.g.*, AR Rows 273, 279, 284, 285, 308, 350, 500, 515, 523-547. The comments questioned whether the District had made the decision to approve biking for the Middagh Trail before hearing from the public on the issue. *See e.g.*, AR 515 5252; AR 523 5283 (“[T]he fact that the public has not been informed of the District's procedure in this regard undermines transparent decision-making and public process.”)

Subsequently, on November 29, 2016, the District announced it had “approved” the “addition of bicycle use on the Bob Middagh Trail,” AR 93 3372, a decision that was subsequently confirmed in email by District officials. AR 581 5981; AR 596 6012; AR 598 6014.

On May 11, 2017, the District announced it had again ‘approved’ allowing biking in the Preserve and on the Middagh Trail, *see* AR 8 004-007, based on a ‘Consistency Assessment,’ which concluded that no further review was required under CEQA beyond what was done in 2014 for the Trail Plan EIR. *See* AR 8 006; 13 008-203.

**B. APPELLANT CHALLENGES DISTRICT’S PROJECT APPROVAL AS VIOLATING CEQA AND THE TRAIL PLAN.**

Appellant challenged the District’s project approval in Marin

Superior Court on May 26, 2017, arguing the District's project selection and evaluation process conflicted with the Trail Plan and CEQA. *See* Petition for Writ of Mandate ("Petition"), Clerk's Transcript for Original Appeal, App. Case No. A154867, Volume 1, pp. 1-23 ("1 CT 1-23").

Judge Paul Haakenson granted Appellant's Petition on April 6, 2018 in a 20 page opinion, which ruled in Petitioner's favor on all issues. *See* 4 CT 716-735; AA4-17-427-446 (hereinafter, "Ruling"). Judgment was entered and a writ of mandate issued on May 2, 2017. *Id.* at 713-715. The final Judgment adopted the version promoted by the District,<sup>2</sup> which set aside the District's "approval of the Bob Middagh and Gasline Trail Project with respect to the District's decision to allow bikes on the Middagh trail." AA1-1-007-008. The Writ of Mandate contained identical language, requiring the District to set aside its project approval "with respect to the District's decision to allow bikes on the Middagh trail." AA1-2-10,

The District appealed Judge Haakenson's ruling, to this Court, which affirmed the trial court's ruling that the District had violated its Trail Plan by not considering other proposals that would not allow bikes on the Middagh Trail, *see Community Venture Partners, supra*, at Lexis \* pages 49-52, but reversed the court's ruling on CEQA. *Id.* at 47.

**C. TRIAL COURT RULES THAT APPELLANT IS NOT ELIGIBLE FOR FEES OR COSTS DESPITE APPELLANT'S WIN ON ITS TRAIL PLAN CLAIM.**

Following issuance of the remittitur, Appellant filed a motion for attorneys fees under Code of Civil Procedure § 1021.5 and memorandum of

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<sup>2</sup>*See* AA1-6-125 (Letter to Judge Haakenson from Deputy County Counsel Steven Perl dated May 1, 2020, (only issue that requires inclusion is the Court's clarification "that the order setting aside the approval of the Project is limited to the District's decision to allow bikes on the Middagh Trail.")

costs as a prevailing party under Code of Civil Procedure § 1032(a)(4). *See* AA1-3-12-13; AA1-9-282-292. Appellant argued that its win on its Trail Plan claim in the Court of Appeal enforced an important public right and conferred a substantial public benefit in requiring the District to set aside its project approval with respect to allowing bikes on the Middagh Trail, which was the primary purpose of the litigation and supported by numerous local citizens who had opposed the change of use on the record. *See* A1-4-20-21. *See also* AA1-6-127-238 (petition with 1,088 signatures.)

However the trial court denied Appellant fees and costs based on the reasoning that Appellant did not achieve a significant public benefit or important public right by prevailing on its Trail Plan claim:

Where, as here, the record reveals *no more than a procedural defect*, merely achieving additional procedural considerations as the result of the mandamus relief fails to support success as to an "important public right" under Code of Civil Procedure section 1021.5...

The requirement of the District to ‘score’ those proposals that were not considered during the evaluation process *did not ‘overturn, remedy, or prompt a change in the slate of affairs’* challenged by *Petitioner*. [ ] The minor change to the District's conduct is insufficient to be considered a substantial benefit to a large class of persons.

*See* AA2-13-341-342 (emphasis added.) At the hearing, Appellant’s counsel pointed out that the ‘substantial benefit’ in this case was due to the fact that the project approval relating to allowing bikes on the Middagh trail *was set aside*, which had been Appellant’s primary litigation objective. *See* Reporter's Transcript of Proceedings from the Judgment Rendered in Marin Superior Court dated October 30, 2020 and transmitted to this Court on February 3, 2021 (“RT”):

[T]he *litigation objective from the outset was to have ....the approval allowing for bikes on the Middagh Trail set aside*, and that is shown

from the declaration, declarations that were submitted as part of this motion, it's shown by the relief sought by the petition, and in the prayer for relief it says the petitioner is looking for a decision to set aside this approval.

RT, p. 4:25-28 - p. 5:1-4 (emphasis added.) However, the trial court questioned whether the District's obligations were, "at best" to "go through some...more procedural steps?" *id.*, p. 5:22-25, agreeing with the District's position that "at the end of the day [Appellant] did not achieve any of [their] goals. There is no additional analysis required of the District on the change of use proposal at all. There is no requirement that the District go back and do any environmental analysis, any rescoring, *nothing with respect to the change of use.*" *Id.*, p. 19:8-15. (emphasis added.)

Appellant's counsel replied that the District would have to revisit its project approval decision to allow bikes on the Middagh:

[I]t certainly has to go back to square one, and I think [] the point that the District's opposition brief tried to suggest, that you don't go back to square one, you go back to square two or three, that is you go back to a square that's *after the decision to change the use that's already been made, but that's not true, the judgment requires that decision to be set aside.*

RT, p. 21:4-15 (emphasis added.)

The trial court denied these arguments when it denied Appellants fees and costs. *See id.* p. 23:22-23; AA-13-342. The Court's final Order Denying Petitioner's Motion for Attorneys Fees and Costs was filed on November 2, 2020. *See* AA2-13-334. Appellant filed its appeal on December 30, 2020. *See* AA5-19-504.

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**D. TRIAL COURT DISCHARGES WRIT OF MANDATE WITHOUT REQUIRING DISTRICT TO SET ASIDE PROJECT APPROVAL ALLOWING BIKES ON THE MIDDAGH TRAIL.**

On December 17, 2020, the District filed a return on the Writ requesting that the Judgment and Writ of Mandate be discharged, based on the District's having done a pro-forma re-scoring exercise for the old proposals that did not address the District's prior approval to allow bikes on the Middagh Trail. *See* AA2-15-356-367. Appellant opposed this Writ Return on February 5, 2021, arguing that the Judgment and Writ of Mandate in the case required the District to set aside its approval of the Project with respect to allowing bikes on the Middagh Trail, which the District refused to do. *See* AA5-20-508-510. On reply, the District argued that the trial court's ruling "clearly explains that the requirement that District 'set aside' its approval relates only to Petitioner's CEQA claims, not its traditional mandamus claim" for violation of the Trail Plan. AA6-22-632:24-25.

On March 15, 2021, the trial court granted the District's request based on the reasoning that, notwithstanding the language of the Judgment and Writ, the District was not required to set aside its approval of the Project with respect to allowing bikes on the trail. *See* AA6-23-642:6-7 ("The District Was Not Required to Set Aside Its Notice of Determination Approving the Middagh Trail Improvement Project.") The trial court reasoned that the Judgment and writ requiring that the project approval with respect to allowing bikes was limited to Appellants' CEQA claims, but not to the Trail Plan claim on which this Court had ruled in Appellant's favor. AA6-23-642:22-23 ("The court's order on the Writ required the District to set aside its Notice of Determination approving the Middagh Trail

Improvements Project *as related to the CEQA claims.*”) (emphasis added.)

The court concluded that the District was not required to set aside its project approval, despite the requirement of the Judgment and Writ:

Pursuant to the Court of Appeal opinion, the District was not in violation of CEQA and thus not required to set aside its Notice of Determination approving the Middagh Trail Improvements Project....Thus, the District is not required to do so here.

*See* AA6-23-642:28 - 643:1-3.

Appellant appealed this ruling on March 23, 2021, which was assigned Appellate Case No. A162374 on April 8, 2021. AA6-25-657-658. Appellant moved to consolidate this appeal with the fee and cost appeal (Case No. A161851), which was granted by this Court on June 7, 2021.

## V. STANDARD OF REVIEW

With respect to the trial court’s discharge of the writ, the proper standard is abuse of discretion, *i.e.*, whether the District’s actions complied with the writ. *See Poet, LLC v. State Air Resources Bd.* (2017) 10 Cal.App.5th 764, 777. “The abuse of discretion standard is not a unified standard; the deference it calls for varies according to the aspect of [the agency’s action] under review....If findings of fact (whether express, implied or both) are challenged for lack of evidentiary support, the appellate court determines whether the findings are supported by substantial evidence....In contrast, if [a] resolution of a question of law is challenged, the appellate court subjects that question of law to an independent (*i.e.*, *de novo*) review on appeal.” *Id.* (citations omitted.)

As a general matter, “the interpretation of the writ should be treated as a question of law subject to our independent review and [the agency’s] interpretation should be given no deference.” *Id.*

This Court also reviews the trial court’s denial of fees and costs



under an ‘abuse of discretion’ standard. *See e.g., Families Unafraid to Uphold Rural El Dorado County v. El Dorado County Board of Supervisors* (2000) 79 Cal. App. 4th 505, 512. In reviewing a fee ruling, a court of appeal must pay "particular attention to the trial court's stated reasons in denying or awarding fees and [see] whether it applied the proper standards of law in reaching its decision." *Id.* "The pertinent question is whether the grounds given by the court for its denial of an award are consistent with the substantive law of section 1021.5 and, if so, whether their application to the facts of th[e] case is within the range of discretion conferred upon the trial courts under section 1021.5, read in light of the purposes and policy of the statute." *Id.*

The “discretion of a trial judge is *not a whimsical, uncontrolled power*, but a legal discretion, which is subject to the limitations of legal principles governing the subject of its action, and to reversal on appeal where no reasonable basis for the action is shown.” *City of Sacramento v. Drew* (1989) 207 Cal. App. 3d 1287, 1297 (emphasis added).

## VI. ARGUMENT

### A. THE TRIAL COURT ERRED IN DISCHARGING THE WRIT WITHOUT REQUIRING THE DISTRICT TO SET ASIDE ITS PROJECT APPROVAL.

The trial court erred in discharging the Writ of Mandate without requiring the District to set aside its project approval with respect to allowing bikes on the Middagh Trail, as required by the Judgment and Writ.

The Judgment and Writ require the District to set aside its “approval of the Bob Middagh Trail and Gasline Trail Project with respect to the District's decision to allow bikes on the Middagh trail.” AA-1-07-08, AA-2-10. Yet, the trial court discharged the Writ, even though the District never set aside its project approval, based on the holding that: “Pursuant to the

Court of Appeal opinion, the District was not in violation of CEQA and thus not required to set aside its Notice of Determination approving the Middagh Trail Improvements Project.... Thus, the District is not required to do so here.” See AA6-23-642:28 - 643:1-3.

The trial court’s ruling was error for two reasons.

First, the trial court’s decision misreads Judge Haakenson’s Ruling , incorrectly concluding that the Ruling’s reference in the holding on the Trail Plan violation to the ‘Notice of Determination’ meant that the Ruling’s requirement that the District set aside its project approval applied only to Appellant’s CEQA claim but not to the Trail Plan violation that was the subject of the Ruling’s discussion. *Id.* This conclusion is not supported by the context of the Ruling’s holding, however, which applies to the Trail Plan violation, not the CEQA claim.

Second, the District’s selection of the MCBC’s proposal as *the* project to adopt for the Middagh Trail and Alto Bowl Preserve following enactment of the Trail Plan was made from a group of ‘competing’ proposals for how to restore and manage this trail system for the foreseeable future, including decisions about how trails would be used. Under the Trail Plan, such a process was to occur transparently, with each proposal being fairly evaluated vis a vis each other as well as in relation to Trail Plan policies and environmental benefits.

The result of this Court’s ruling that the District violated its Trail Plan in unlawfully selecting the MCBC proposal means the District must revisit its decision to choose that proposal over the other non-biking proposals that were never considered.

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**1. The Trial Court’s Ruling Required the District to Set Aside its Project Approval Based on Appellant’s Trail Plan Claim.**

The trial court’s Ruling by Judge Haakenson held that the District had violated the Trail Plan and:

*For these reasons*, the court grants the petition for traditional mandate under Code Civ. Proc. § 1085, and orders the District to set aside its Notice of Determination approving the Middagh Trail Improvement Project until the District has evaluated these competing proposals as required by the Trail Plan.

*See* 4 CT 735, AA4-17-446 (emphasis added,) This language was separate from the language used in the Ruling on CEQA:

The decision of the District approving the Middagh Trail Improvement Project must be set aside, and the District is ordered to conduct a proper CEQA analysis as described herein before deciding whether to approve the project as currently planned.

4 CT 730, AA4-17-441. According to these respective holdings based on CEQA *and* the Trail Plan violations, the final Judgment and Writ required the District to set aside its project approval with respect to allowing Bikes on the Middagh Trail. *See* AA1-1-07-08, AA1-2-10. This Court’s affirmance of the trial court’s holding on Appellant’s Trail Plan claim, *see Community Venture Partners., supra*, at Lexis \* pp. 49-52, further confirms the trial court’s Ruling that the District’s project approval must be set aside. *See id.* at p. 52 (“We affirm the portion of the judgment granting CVP mandamus relief under Code of Civil Procedure section 1085.”)

Despite the clear demarcation in the trial court’s Ruling between its holdings on the Trail Plan versus CEQA claims, with *each holding* clearly requiring the District to set aside its project approval, Judge Sweet held that the Ruling *only applied to the CEQA claim* but not the Trail Plan claim:

The District Was Not Required to Set Aside Its Notice of

Determination Approving the Middagh Trail Improvement Project....The court's order on the Writ required the District to set aside its Notice of Determination approving the Middagh Trail Improvements Project as related to the CEQA claims....*Pursuant to the Court of Appeal opinion, the District was not in violation of CEQA and thus not required to set aside its Notice of Determination approving the Middagh Trail Improvements Project....Thus, the District is not required to do so here.*

AA6-23-642:6-7, 642:22-23, 642:28 - 643:1-3 (emphasis added.)

The problem with this reasoning is that Judge Haakenson's use of the term 'Notice of Determination' in his Ruling setting aside the District's project approval with respect to the District's Trail Plan violation still requires the District's approval to be set aside. The court's reference to the Notice of Determination does not change this result.

First, a 'Notice of Determination' ("NOD") does not constitute the *approval* of a CEQA project, but rather the 'notice' that must be filed with the County clerk regarding the approval, which triggers the short CEQA statute of limitations. *See* Pub. Res. Code §§ 21152(a),<sup>3</sup> 21167(b). In this respect, the trial court's casual language referring to the NOD in its Trail Plan violation discussion does *not* mean the Ruling's directive that the

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<sup>3</sup> This section states: "If a local agency approves or determines to carry out a project that is subject to this division, the local agency *shall file a notice of determination* within five working days *after the approval* or determination *becomes final*, with the county clerk of each county in which the project will be located. The notice shall identify the person or persons in subdivision (b) or (c) of Section 21065, as reflected in the agency's record of proceedings, and indicate the determination of the local agency whether the project will, or will not, have a significant effect on the environment and shall indicate whether an environmental impact report has been prepared pursuant to this division." (emphasis added.) *See also* AR 1 002 (NOD states "This notice is to *advise interested parties that the MCOSD approved the project on May 11, 2017.*") (emphasis added.)

District set aside its project approval was limited to Appellant’s CEQA claim. Indeed, the Ruling specifically refers to setting aside the NOD “approving the Middagh Trail Improvement Project,” based on the “reasons” identified in the Ruling’s Trail Plan violation discussion. *See* 4 CT 735, AA4-17-446. But these ‘reasons’ are a reference to how the District choosing the bike coalition proposal over other competing proposals was unlawful. The Ruling’s remedy on the Trail Plan violation is to set aside the ‘approval’ of “the Middagh Trail Improvement Project.” The trial court’s reference to the ‘NOD’ does not change this result.

Second, the Ruling itself demonstrates that the court’s language at page 20 was not made in reference to Appellant’s CEQA claims but rather to the court’s analysis and holding on Appellant’s Trail Plan claim. *See* 4 CT 733-735, AA4-17-444-446. As discussed, the Ruling demarcates its analysis of Appellant’s CEQA and Trail Plan claims into different sections, with each analysis ending in a separate holding that the District must set aside its project approval. *Compare* 4 CT 730/AA4-17-441 to 4 CT 735/AA4-17-446. The Ruling in no way suggests that the remedy for the District’s Trail Plan violation setting aside the District’s project approval, *id.*, at 735, is not independently valid from the court’s separate ruling on the CEQA claim, *id.*, at p. 730, which was reversed by this Court.

The language of the Ruling requires the District’s project approval to be set aside based on the District’s Trail Plan violation. Judge Sweet’s ruling on the Writ Return holding to the contrary should be reversed.

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**2. The District’s Flawed Selection of the MCBC’s Project for the Future Management of the Alto Bowl Preserve Can Only Be Remedied by Setting Aside the District’s Project Approval Due to the Flawed Selection Process.**

In addition to contradicting the plain language of the Ruling, the Judgment *and* the Writ, the trial court’s decision on the Writ Return also errs in that such remedy is required as a practical matter to reimpose the status quo *prior to the District’s Trail Plan violation*, which caused a flawed project selection process that can only be remedied by overturning the approval of the project unlawfully selected.

Here, the Trail Plan specifically envisioned that the District would address future trail management for each of the six sections under the District’s jurisdiction. *See* AR 62 3154. The Trail Plan envisioned that the public would submit proposed projects to be selected by the District according to a scoring system and evaluation of the project’s overall consistency with Trail Plan policies. *See* AR 62 3149-3163. This selection process allows various proposals to “compete” for the chance to be selected, *see* AR 62 3150-3151, in a transparent, and collaborative manner, subject to the laws, policies, and goals outlined in the Trail Plan. *Id.* at 3150.

The District’s Trail Plan violation occurred when it did not conduct the project selection process in a manner consistent with the Trail Plan’s scoring system, *see* AR 62 3161-3163, but instead only considered the MCBC’s proposal for selection and not any of the competing proposals not involving opening the Middagh Trail to bikes. *See* AR 86 3296. The District never offered a fair competition for the other competing project proposals, and thus must now go back and reevaluate those proposals for the Middagh Trail in a “transparent, and collaborative manner, subject to the laws, policies, and goals outlined in [the Trail Plan.]” AR 62-3150.

This remedy requires the District to set aside its approval with respect to allowing bikes because otherwise the decision that resulted directly from the District's flawed choice of the MCBC's proposal among the competing proposals remains a direct product of the District's unlawful action.

In contrast, the trial court's Writ Return decision allows the District to retain its initial flawed selection without compliance with the Trail Plan, and to instead 'rescore' the competing proposals without competition or consequence in regards to the use change that was specifically overturned by the trial court in the Judgment and Writ. AA6-23-642-643.

The trial court's ruling discharging the Writ turns the District's failure to conduct the critical project selection process lawfully into a de minimis error, without legal effect and with no remedy for concerned citizens who believed the District's intent to put bikes on the Middagh trail was from the beginning a done deal, with nothing transparent or open about the process whatsoever.<sup>4</sup> The trial court's allowing the District to discharge the Writ while retaining its unlawful project approval should be reversed.

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<sup>4</sup> The underlying record in the merits appeal supports this point. *See e.g.*, AR 252 4736 (“[N]o backroom deals with the powerful mountain bike lobby.”); AR 85 3295 (“I’m particularly concerned that the “No Project” proposal for the Middagh Trail in Alto Bowl OSP was considered invalid. I’m requesting more detailed information on how such a proposal is not acceptable.”) *See also* AR 286 4937 (“The revelation that MCOSD rejected for consideration a proposal suggesting that trail usage and access policy on the Middagh Trail remain as is—no change—and accepted a proposal from biking advocates to open Middagh Trail to mechanized traffic left me scratching my head ...”); AR 216 4616 (“The Alto Bowl is one of the smallest of the MCOSD lands, and subjecting it to an onslaught of on and off-trail mountain bikers runs contrary to the letter and spirit of the MCOSD mission statement as it relates to preservation and conservation. Doing so would bring countless new instances of cyclist vs hiker and cyclist vs horse or equestrian conflict, and would effectively turn it into a skate park for mountain bikes.”)

**B. TRIAL COURT ERRED IN RULING THAT APPELLANT WAS NOT ELIGIBLE FOR ANY FEE OR COST AWARD DUE TO THE LACK OF SUBSTANTIAL PUBLIC BENEFIT FROM APPELLANT'S WIN ON THE TRAIL PLAN CLAIM.**

For the same reason that the trial court erred in discharging the writ, the trial court also erred in determining that Appellant was not eligible for a fee or cost award because its victory on the Trail Plan claim did not confer any significant public benefit or enforce an important public right. The court's ruling assumes that Appellant's win on the Trail Claim did not change the status quo because it did not require the District to set aside its Project Approval, although this is required by the Judgment and Writ.

The trial court's fee ruling should be reversed as not in compliance with Code of Civil Procedure § 1021.5, which awards fees to successful parties vindicating important public interests in litigation. The fundamental policy underlying Section 1021.5 is to encourage suits "enforcing important public policies by providing substantial attorneys fees to successful litigants in such cases." *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1288-89; *Woodland Hills Residents Association, Inc. v. City Council* ("Woodland Hills") (1979) 23 Cal.3d 917, 933.

The standard for whether a party is 'successful' under Code of Civil Procedure § 1021.5 is whether (1) plaintiffs' action "has resulted in the enforcement of an important right affecting the public interest," (2) "a significant benefit, whether pecuniary or non-pecuniary has been conferred on the general public or a large class of persons" and (3) "the necessity and financial burden of private enforcement are such as to make the award



appropriate." *See Woodland Hills, supra*, 23 Cal.3d at 935-936.<sup>5</sup>

In this case, the trial court never addressed the third factor, the necessity of private enforcement, but instead ruled against Appellant on the first two factors, that Appellant's litigation had not "enforced an important right" nor conferred "a significant benefit on the general public or a large class of persons." AA6-23-342. This holding was tainted by the trial court's belief, discussed above and stated in its fee ruling, that Appellant's Trail Plan victory did not in any way change the status quo, or upset the continued validity of the District's project approval based on its initial selection of the bike coalition's proposal – among competing proposals – allowing bikes on the Middagh Trail. *See e.g.*, AA6-23-342. ("The requirement of the District to 'score' those proposals that were not considered during the evaluation process *did not 'overturn, remedy, or prompt a change in the state of affairs' challenged by Petitioner.*") (emphasis added.)

This holding – as discussed above – is not supported by Judge Haakenson's Ruling, this Court's decision in *Community Venture Partners, supra*, or the language of the Judgment and Writ, which all require the District to set aside its project approval, a major change in the 'state of affairs' from the perspective of the thousands of Appellant's constituents and supporters who opposed the change of use to open up the Middagh Trail to mountain bike riding. *See* AA1-6-127-238. As discussed below, the trial court's erroneous interpretation that Appellant's Trail Plan victory in litigation had no bearing as to the District's project approval – the 'state of

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<sup>5</sup>Where there is no monetary recovery, factor "(c)" of Section 1021.5 is not applicable. *Id.* at 936.

affairs’ as the trial court characterized it – undermines its determination that Appellant was not a ‘successful party’ under Section 1021.5 and warrants reversal of the trial court’s fee ruling.

The trial court also discussed an additional reason that Appellant was not eligible for fees or costs, which was that Appellant’s Trail Plan win had not achieved an important litigation objective, which the Court characterized as requiring “the District ‘to score’ the seven other proposals determined to be ‘non-scorable.’” AA-6-340. The court opined further that Appellant’s ‘real’ litigation objective was to prevail on its CEQA claim, as evidenced by the amount of briefing spent on that claim versus the Trail Plan claim. AA-6-340 This reasoning is flawed.

Achievement of an important litigation objective is *not* one of the factors for determining successful party status under Section 1021.5. Instead, to the extent achievement of an important litigation objective has been identified in case law as a *criteria* in determining a fee award, the issue is not ‘eligibility’ but rather the degree of success and whether a full fee award for all hours reasonably spent is warranted, or whether a reduction of fees is warranted based on limited success. *See e.g., Sokolow v. County of San Mateo* (1989) 213 Cal. App. 3d 231, 249 -250.

Finally, to the extent even relevant to this Court’s review, the evidence in this proceeding is overwhelming that Appellant’s primary – indeed *only* – litigation objective in this case was to have the District’s project approval allowing bikes on the Middagh Trail be set aside, whether that be accomplished through a successful CEQA claim or one showing that the District had violated its own Trail Plan in making the project selection in the first place. Appellant alleged that for both these claims, the District had failed to proceed according to law, the remedy for each being the

setting aside of the project approval. *See* 1 CT 16-18. These facts, however, did not resonate with the trial court, which instead characterized Appellant’s litigation objective on the Trail Plan claim as simply requiring the scoring of the old proposals, without affecting the District’s project approval to open the Middagh Trail to bikes. AA6-23-340. As discussed above, however, this was not the actual ‘result’ of Appellant’s Trail Plan victory in litigation. The result that did occur was to set aside the District’s project approval. This was Appellant’s litigation objective and, to the extent relevant to determine fee eligibility, demonstrates that Appellant was a successful party in this litigation.

**1. The Trial Court Erred in Finding That Appellant’s Trail Plan Victory Did Not Change the Status Quo with Respect to the District’s Project Approval.**

The trial court’s fee ruling is based on a central but false premise that Appellant’s victory on its Trail Plan claim did not enforce an important public right or confer a substantial benefit because it did not affect the District’s unlawful approval of the Project in any way. Instead, the trial court held that the “requirement of the District to ‘score’ those proposals that were not considered during the evaluation process did not ‘overturn, remedy, or prompt a change in the slate of affairs’ challenged by Petitioner.” AA6-23-342. The court went on to note that the “minor change to the District’s conduct is insufficient to be considered a substantial benefit to a large class of persons.” *Id.*

Consistent with its ruling discharging the Writ, the trial court rejected the idea that the District was required to take any substantive action with regards to its project approval allowing bikes on the Middagh Trail, despite the relatively clear language of the Judgment and Writ. Instead, the trial court inquired whether the District’s obligations under the

Judgment were, "at best" to "go through some...more procedural steps?" RT, p. 5:22-25. The trial court agreed with the District's argument that "[t]here is no requirement that the District go back and do any environmental analysis, any rescoring, *nothing with respect to the change of use.*" *Id.*, p. 19:8-15. (emphasis added.) *See also id.* p. 23:22-23.

This reasoning, that Appellant's Trail Plan victory had no effect on the District's project approval, is the basis for the trial court's denial of fees and costs in this case, just as it was the basis for the trial court discharging the Writ. As discussed above, this reasoning does not adequately account for the fact that the Writ and Judgment require the District to set aside its project approval with respect to allowing bikes on the Middagh Trail, which, for those who have opposed the District's abbreviated procedure and decision-making, enforces an important right to the benefit of the general public. *See* Discussion, Section VI.B.2, *infra*.

In contrast, the trial court's fee order assumes that Appellant's success in setting aside the District's approval with respect to allowing bikes on the Middagh Trail is insignificant because the District's error in violating its Trail Plan by selecting the bike coalition's project without considering competing proposals is merely a technical hitch, which the District can remedy through additional 'process' that will have no effect on its decision to allow bikes on the Middagh Trail. *See* AA6-23-342. The trial court sided with the District's briefing on this issue, which argued that its 'change of use' decision to allow bikes on the Middagh Trail is not affected by the Court's Judgment, even though the Judgment sets aside the District's approval specifically with respect to the District's decision to allow bikes on the Middagh trail. *See* AA2-10-297:20-22 (CVP's Trail Plan claim "could only...require District to go back and re-evaluate seven other unrelated

proposals. *It would not require District to perform any additional evaluation of the change-in-use.*") (emphasis added.); *id.* at 298:10-18 ("The result here ...does not require any change in the ultimate outcome."); *id.* at 302:6-8 ("[T]he Section 1085 claim only required District to go back and evaluate seven other unrelated proposals and *not the change-in-use.*")

As discussed in Section VI.A, *supra*, the trial court's and District's reasoning is incorrect. Here, the Judgment *grants* Petitioner's Petition for Writ of Mandate which requested as part of its initial mandamus claim on the Trail Plan violation a writ ordering the District to set aside its project. *See* 1 CT 18, Prayer for Relief, ¶ 1:14-20 (Appellant seeks a "Writ of Mandate ordering the County to ...(b) set aside the District's decision to approve the Bob Middagh Trail until such time as the District had complied with CEQA *and the Trail Plan.*") (emphasis added.); AA1-1-07-08; AA1-2-10. Pursuant to the Judgment and Writ, in order to reinstate its project approval, the District must reconsider its decision to allow bikes on the Middagh trail in a manner that complies with the Trail Plan. That result enforces the important public right of citizens to have the District follow the law and consider non-biking proposals fairly under the Trail Plan's touted 'transparent' process.

The remedy for the District's violating the Trail Project selection process must as a practical matter include the setting aside of the District's project approval just as surely as the CEQA violation would have required that result had it been affirmed. Otherwise, the District's ultimate challenged decision remains tainted by the unlawful procedure.

In the trial court, the District argued that the 'remedy' for the District's Trail Plan violation was merely to require the District to 'score' the competing proposals and nothing more, *without any effect* on the

District’s decision to select the bike coalition’s proposal as the ‘selected’ project to ultimately approve. *See e.g.*, AA-10-309:20-22 (“CVP’s achievement involves no such importance. District needs to make no more than a procedural change to correct the defect.”) To support this view, the District’s referred repeatedly to the competing project proposals as “unrelated” to the District’s approval, *see* AA-10-297:21; AA-10-298:27; AA-10-300:13; AA-10-300:28; AA-10- 302:7; AA-10-303:24; AA-10-305:3. But this argument defies common sense. Here, the competing proposals were clearly “related” to the District’s decision to select the MCBC proposal, indeed these were precisely the proposals *that were not fairly evaluated vis a vis the bike coalition proposal that was unlawfully selected*.<sup>6</sup> The District’s failure to consider these proposals means that its selection of the bike coalition proposal - including the change of use to allow bikes – was contrary to law. The District cannot separate its decision to select the bike coalition proposal from its failure to consider the other proposals, nor can it argue that the reconsideration of the other proposals is ‘unrelated’ to the District’s choice to change the use on the Middagh Trail based on the bike coalition’s proposal that was *never evaluated in*

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<sup>6</sup>The District represented to the trial court that the Trail Plan is simply an ‘internal administrative plan, not a popularly enacted statute,’ *see* AA-10-309:21-22, as if that means the District need follow its own rules or that the Plan’s enforcement carries no legal significance. This is wrong as the Trail Plan is the Countywide plan for recreation and open space lands for all of Marin County, serving *and affecting* all County citizens according to its rules and policies. *See e.g.*, AR 3020 (“[T]he plan includes a decision-making process developed to support *trackable, systematic, and transparent decisions about which road and trail projects will be undertaken in the future....*The decision-making process will consider *...the need for, and appropriateness of, the access that the road or trail would provide.*”) (emphases added.)

*comparison to the other proposals.* As this Court ruled, “the omission of scoreable proposals... *demonstrates that the District's evaluation of proposals was arbitrary.*” *Community Venture Partners, supra*, 2020 Cal. App. Unpub. LEXIS 527) at \* page 51 (emphasis added.)

In the absence of a lawful scoring of competing proposals for how the Middagh Trail should be improved and utilized in the future, the District’s selection of the bike coalition’s project to change the use on the Middagh to mountain biking was an abuse of discretion and thus that ‘selection’ *was also set aside* by the Judgment and this Court’s and the court of appeals’ rulings on the Trail Plan violation.

**a. The District Misstates and Misinterprets How the Judgment was Entered by Judge Haakenson.**

In the proceedings below, the District also argued that the history of the parties’ correspondence with the Court demonstrates that the Judgment was not intended to set aside the District’s approval of the project with respect to its decision to allow bikes on the Middagh Trail. *See AA-10-302.*

In fact, the correspondence shows the opposite. As stated by then County Counsel in response to Appellant’s suggestions to add language to the Judgment and Writ concerning the District’s Trail Plan violation, there was no need to do so as the trial court’s Ruling was clear that the Trail Plan violation required setting aside the District’s project approval:

*The Tentative Ruling sets aside the approval of the Project until the competing proposals are scored . There is no reason to add to that ruling an additional provision noting that the proposal the District originally chose in approving the Project was from MCBC....It appears Petitioner seeks to add the additional language in the hope that its inclusion might support Petitioner's future merciless argument that the MCBC proposal should be eliminated from consideration. That, however, would be in direct contradiction to the court's ruling that includes, not excludes, competing proposals for consideration.*

Again, the only issue that requires inclusion of language in the written Order...*is the court's clarification/modification of the Tentative Ruling that the order setting aside the approval of the Project is limited to the District's decision to allow bikes on the Middagh Trail.....Petitioner's proposed additional provision serves no purpose...*

AA-6-125. Given that the trial court chose County Counsel's version of the Judgment to sign, County Counsel's letter clarifies several relevant points related to the issue of the proper remedy for the District's Trail Plan violation as set forth in the Judgment.

First, County Counsel's letter states that the trial court's Ruling on the Trail Plan claim requires the District to set aside its approval of the Project. *See id.* ("The Tentative Ruling *sets aside the approval of the Project* until the competing proposals are scored.") (emphasis added).

Second, the letter acknowledges that the remedy of setting aside the District's approval would include as a matter of course that the bike coalition (MCBC) proposal be 'considered' as one of the projects to approve among the 'competing' proposals. According to the letter, the MCBC proposal must be 'included' not 'excluded' from the District's reconsideration on this issue. *See id.* ("That, however, would be in direct contradiction to the court's ruling that *includes, not excludes, competing proposals for consideration.*") (emphasis added).<sup>7</sup>

Finally, the letter demonstrates that the 'only' real addition to the

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<sup>7</sup> County Counsel's letter wrongly characterized Appellant's proposed change as requesting that "the MCBC proposal should be eliminated from consideration." AA-6-125. However, Appellant's request was not to eliminate the biking coalition proposal from future consideration but rather to ensure that *all* competing proposals be evaluated before the District was allowed to make a new decision regarding use on the Middagh Trail. *See* AA-2-326:14-22.



Judgment from the language of the Ruling is to add the qualifier that the ‘setting aside’ of the District’s project approval is “limited to the District’s decision to allow bikes on the Middagh Trail.” *Id.* This correspondence shows that the decision to *limit the remedy to setting aside the change in use* was considered and intentional on the part of Judge Haakenson.

Here, the point of County Counsel’s letter accepted by the trial court in finalizing the Judgment was to ensure that *all competing proposals be evaluated* before the District was required to make a new decision regarding any change of use on the Middagh Trail.

**2. Appellant’s Trail Plan Victory Enforces an Important Public Right and Confers a Substantial Public Benefit.**

The trial court never seriously addressed the ‘important public right’ or ‘substantial public benefit’ factors necessary to be a successful party under Code of Civil Procedure § 1021.5, based on its mistaken assumption that Appellant’s win on its Trail Plan claim was a minor procedural error that had no bearing on the District’s ultimate project approval. Meanwhile, the District argued that “merely requiring a public entity to correct a procedural mistake cannot vindicate an important public right,” based on the theory that “[t]he result here ...does not require any change in the ultimate outcome.” AA2-10-298:10-18.

As discussed above, this line of reasoning is based on the theory that the District will not have to set aside its project approval with respect to the change of use, when in fact the Judgment and rulings make clear that the opposite is true. *See* Discussion, Section II.A.1 *supra*. Requiring the District to abide by the Trail Plan procedures and policies before the District makes an important and consequential change of use decision is an enforcement of an important public right.

Similarly, requiring the District to abide by the Trail Plan procedures and policies in making an important and consequential change of use decision confers a substantial public benefit to a large group of citizens concerned over the District's desire to open the Preserve area to mountain biking. *See* AA1-6-127-238 (petition with 1,088 signatures opposed to opening Middagh Trail and Alto Bowl Preserve to bikes.)

In the proceedings below, the District argued that there will be no 'substantial public benefit' as rescoring the other proposals will only benefit those who submitted such proposals, but by definition cannot benefit the 1,088 persons who petitioned the District not to change the use on the Middagh Trail to allow bikes. *See e.g.*, AA2-10-298:21-27 ("[CVP's attempt to re-cast the result as a victory for numerous people, including the 1,088 signers of a petition against the change-in-use, does not make it so."); AA2-10-298:7-9 ("[T]he remedy on the traditional mandate claim - *i.e.*, requiring District to re-score seven proposals - benefits only the proponents of those specific proposals, not the public.")

These arguments miss the point that the Judgment and Writ in this case require the District to set aside its project approval and reevaluate its change of use decision by reconsidering all the competing proposals. The requirement that the District must reevaluate its change of use decision in this case is not a public benefit limited only to those persons who submitted competing proposals, but rather a benefit to all citizens who opposed the District's proposal to open up the trail to bikes, as well as all citizens who benefit from the District following the rules and policies of its Trail Plan. *See e.g.*, AR 514 5249 ("When the neighborhood associations presented their proposals for the upgrade and maintenance of the trails last fall, specifically the Middagh, ours were not scored and simply tossed away. The

public meeting on August 25th was announced on the OSD website, but I, who wrote several letters on behalf of the surrounding neighborhood associations asking to be informed of any developments and any public meetings, was never contacted, nor were any of the other neighborhood leaders who had written previously...When the meeting date came, staff recommended implementation of the MCBC proposal to open the trail, but those of us who wrote letters and presented a petition with nearly 1,100 signatures (me again) were never contacted for input.”)

Case law is clear that requiring an agency to follow applicable law in a manner that may affect hundreds if not thousands of citizens confers a substantial public benefit and vindication of an important public right, warranting a fee award. *See e.g., Woodland Hills, supra*, 23 Cal.3d at 939 (“[T]he public always has a significant interest in seeing that legal strictures are properly enforced and thus, in a real sense, the public always derives a ‘benefit’ when illegal private or public conduct is rectified.”); *Cutler v. Franchise Tax Bd.* (2014) 229 Cal.App.4th 419, 430 (“Section 1021.5 on its face looks only to whether the litigation conferred a significant benefit on ‘a large class of persons’—not to whether some other class of persons might be negatively affected by the equal treatment of all persons similarly situated.”); *Center for Biological Diversity v. County of San Bernardino* (2010) 185 Cal.App.4th 866, 895 (“[I]n adjudicating a motion for attorney fees under section 1021.5, a trial court [should] determine the significance of the benefit, as well as the size of the class receiving benefit, from a realistic assessment, in light of all the pertinent circumstances, of the gains which have resulted in a particular case....Courts consider the “substantial benefit” criterion in the context of the outcome of the current litigation, and not on speculative future events.”); *RiverWatch v. County of San Diego*

*Dept. of Environmental Health* (2009) 175 Cal.App.4th 768, 781 (“[T]he ‘significant benefit’ that will justify an attorney fee award need not represent a ‘tangible’ asset or a ‘concrete’ gain but, in some cases, may be recognized simply from the effectuation of a fundamental constitutional or statutory policy....[T]he benefit may be conceptual or doctrinal and need not be actual or concrete; further, the effectuation of a statutory or constitutional purpose may be sufficient.....the extent of the public benefit need not be great to justify an attorney fee award.”)

**3. The Trial Court Erred in Holding that Appellant’s Trail Plan Victory Leading to a Judgment and Writ Setting Aside the District’s Project Approval Did Not Accomplish an Important Litigation Objective.**

The other error in the trial court’s ruling on fees and costs is the court’s holding that Appellant did not achieve any important litigation objective and therefore was not a successful party under Code of Civil Procedure § 1021.5. AA-6-340. This reasoning fails for several reasons.

First, the trial court erred by considering achievement of a litigation objective as *the* criteria for determining *whether* a party is ‘successful’ under Code of Civil Procedure, as opposed to simply *the degree of the success* obtained. *Id.* For ‘eligibility,’ the relevant factors under Section 1021.5 are whether plaintiffs' action (1) has resulted in the enforcement of an important right affecting the public interest, and (2) conferred a significant benefit...on the general public or a large class of persons. *See* Code Civ. Proc. § 1021.5; *Woodland Hills, supra*, 23 Cal.3d at 935-936.

These statutory factors do not refer to achievement of a party’s litigation objective as a listed factor for fee eligibility. Instead, some decisions refer to achievement of a litigation objective as a legitimate factor in determining the *degree* of success, *i.e.*, whether a party deserves a full

fee award or a reduced award based on limited success. *See e.g., Sokolow v. County of San Mateo, supra*, 213 Cal. App. 3d at 249 (trial court may “reduce the amount of the attorney fees to be awarded where a prevailing party plaintiff is actually unsuccessful with regard to *certain objectives of its lawsuit.*”) (emphasis added.)

Here, the trial court erred by conflating two different inquiries; first, eligibility for fees under the Section 1021.5 criteria, and second, the amount of the fee award that is reasonable. In this case, Appellant did not prevail on its CEQA claim, and thus its fees could be reduced based on a concept of ‘limited success.’ However, in response to such a proposed reduction, a plaintiff may argue correctly that achievement of a key litigation objective may justify a ‘full fee award’ even where a party did not prevail on all its litigation claims. *See Serrano v. Unruh* (1982) 32 Cal.3d 621, 639. (“[A]bsent circumstances rendering the award unjust, fees recoverable under section 1021.5 ordinarily include compensation for *all hours reasonably spent.*”) (emphasis added.)

Here, some kind of reduction of fees might be reasonable given that Appellant did not prevail on its CEQA claim. But this issue was never addressed by the trial court, which instead ruled that Appellant did not meet the Section 1021.5 criteria and thus was not eligible for a fee award.

Second, even if this Court *were* to consider the issue in the context of the trial court’s ruling on fee eligibility, the trial court erred by incorrectly characterizing Appellant’s ‘litigation objective’ on its Trail Plan claim as requiring “the District ‘to score’ the seven other proposals determined to be ‘non-scoreable.’” AA-6-340. This characterization is contrary to Appellant’s Petition filed in this case, which seeks a “Writ of Mandate ordering the County to ...(b) set aside the District's decision to

approve the Bob Middagh Trail until such time as the District had complied with ...*the Trail Plan.*”) 1 CT 18, Prayer, ¶ 1:14-20, (emphasis added.)

The trial court’s overly narrow characterization of Appellant’s litigation objective on its Trail Plan claim is a mirror of the Trial Court’s incorrect reasoning that the Ruling, Judgment and Writ do not require the District to set aside its project approval as a result of the Trail Plan violation. Both of these rationales are flawed, in that in both cases the court understates or ignores the important result achieved by Appellant in getting the District’s project approval set aside. Having the approval of bikes on the Middagh Trail set aside would logically be the preferred litigation objective in this case vis a vis simply having the old proposals rescored in a vacuum with no relation to or effect on the District’s approval of bikes on the Middagh Trail, the remedy suggested by the District.

Finally, to the extent relevant to this Court’s review, the evidence in this proceeding is overwhelming that Appellant’s primary – indeed *only* – litigation objective in this case was to have the District’s project approval allowing bikes on the Middagh Trail be set aside.

Instead, in its fee order, the trial court opined that Appellant’s ‘real’ litigation objective was to prevail on its CEQA claim, as evidenced by the amount of briefing spent on that claim versus the Trail Plan claim. AA6-23-340. However, as discussed above, pp. 34-35, *supra*, this reasoning conflates the issue of eligibility with the degree of success justifying either a full or a reduced fee award. Moreover, the trial court’s order is contrary to the record as well as common sense. From the outset of the case, Appellant challenged the District’s project approval as contrary to both CEQA and the Trail Plan, with either violation requiring the setting aside of the District’s approval of bikes on the Middagh Trail and Alto Bowl Preserve. Whether

that be accomplished through a successful CEQA claim or one showing that the District had violated its own Trail Plan in making the Project selection in the first place was not the critical factor. Appellant alleged that for both these claims, the District had failed to proceed according to law, the remedy for each being the setting aside of the project approval. *See e.g.*, 1 CT 17, ¶ 76 (“The District's failure to consider project proposals meeting the criteria for new projects as set a forth in the Trail Plan for consideration violates the Trail Plan and results in the District never considering in a public process *the option of not adding bikes to the Bob Middagh Trail* while at the same time improving the environmental impacts of that trail usage.”) (emphasis added.); *id.*, at 18, Prayer for Relief, ¶ 1:14-20. These statements set forth in the Petition were repeated in the record for the fee proceedings. *See* AA1-5-38, ¶ 5 (“CVP's primary litigation objective in filing this case was to have the court set aside MCOSD's decision to allow bikes on the Middagh Trail....Based on my conversations, local community members also had the same objective in supporting the litigation, which was to reverse MCOSD's unconsidered approval to allow biking on the Middagh Trail.”); AA1-7-271, ¶ 16 (“From my perspective, having the court set aside MCOSD's decision with regards to biking on the Middagh Trail and the Alto Bowl Preserve is a complete victory.”)

In this case, Appellant accomplished this objective by having the project approval set aside and requiring the District to comply with its Trail Plan in the selection of competing proposals for the Middagh Trail. The language of the Judgment and Writ simply memorialize the achievement of this objective to have the District's project approval to allow bikes on the Middagh Trail set aside.

Appellant's litigation objective to have the District's project approval

with respect to allowing bikes on the Middagh Trail set aside was to be achieved through the pursuit of the two legal claims based on 1) the Trail Plan violation; and/or 2) the District's failure to comply with CEQA. AA1-5-48:23-28 ("CEQA was one legal theory to get at this flawed decision-making process, but MCOSD's failure to follow its own [Trail Plan] in approving the project was more upsetting to local citizens based on my conversations with them, in that their view and ideas – based on their decades hiking and horse riding on the trail – were simply ignored.")

Such reliance on different claims to achieve a common litigation objective is common and is approved by the courts. *See e.g., Sokolow v. County of San Mateo, supra*, 213 Cal.App.3d at 249-250 (discussing achievement of litigation goals versus prevailing on every different legal theory.); *Sundance v. Municipal Court* (1987) 192 Cal.App.3d 268, 273 ("[A]s a practical matter, it is impossible for an attorney to determine before starting work on a potentially meritorious legal theory whether it will or will not be accepted by a court years later following litigation. It must be remembered that an award of attorneys' fees is not a gift. It is just compensation for expenses actually incurred in vindicating a public right. To reduce the attorneys' fees of a successful party because he did not prevail on all his arguments, makes it the attorney, and not the defendant, who pays the cost of enforcing that public right.")

The trial court and the District's final argument on this issue is that Appellant's primary litigation objective was to force the District to conduct more environmental review under CEQA, as if such a procedural goal would be preferred over setting aside the Project approval opposed by local citizens. For example, the District argues Appellant did not achieve its litigation objective because it did not force the "District to analyze the



allegedly disastrous potential environmental effects of the change-in-use before approving it.” AA2-10-297:16-18. This argument fails.

The trial court and the District ignore the evidence discussed above showing that for Appellant’s members, the core objective of the lawsuit was to force the District to reconsider their decision to approve the change in use to allow mountain biking. For these members, the introduction of biking onto the Middagh Trail would likely lead to displacement of hikers and equestrians, given the documented proclivity of local bike riders to ride aggressively, often raising significant safety concerns, particularly for the elderly, children and horse riders whose horses were likely to get spooked by fast moving bikers that is commonplace in Marin County.

The District’s suggestion that in pursuing a CEQA claim, Appellant had a limited litigation objective of better environmental review does not even make sense from the point of view of the CEQA statute, which requires an agency to consider alternatives to a proposed project that can avoid potentially significant impacts, and to choose such an alternative where it is feasible to do so. *See e.g.*, Pub. Res. Code § 21002.<sup>8</sup> From Appellant’s perspective, a win on the CEQA claim would have been a possible avenue for the District to have to revisit its decision to allow bikes

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<sup>8</sup> The record shows many citizens wanted CEQA review for the project in order to force the District to consider reasonable alternatives that would *not include a change of use* to allow biking. *See e.g.*, AR 523 5283 (“[T]he District appears not to be considering the option of maintaining the status quo for trail use in this area. *We urge the District to consider this option ...*”) (emphasis added.); AR 84 3293 (“There are three main bike routes between Mill Valley and Corte Madera - Camino Alto, the Coach Road/Sausalito Ave. fire road, and the existing multi-use path over Horse Hill near Highway 101. There is no need to destroy the serenity of the Horse Hill and Alto Bowl Preserves to promote "connectivity" when cyclists have these options.”)

on the Middagh Trail and in the Alto Bowl Preserve. That is the same objective achieved here by Appellant through its victory on the Trail Plan claim, as memorialized in the Judgement and Writ.

Even if one were to assume hypothetically that Appellant’s objective here was to require adequate environmental review of the project, forcing the District to comply with the Trail Plan certainly furthers that goal. The District argues “the only claims that could have achieved this result for CVP were its CEQA claims,” AA2-10-297:18-19, but this is not true, there are many Trail Plan policies that could apply to the District’s reconsideration on the Trail Plan issue. *See e.g.*, AA1-5-40-41, ¶ 11; AR 62 3140-3147 (Trail Plan policies).

## VII. CONCLUSION

Based on the foregoing, Appellant requests that the Court reverse the trial court’s rulings on Appellant’s motion for fees and costs and the court’s discharge of the Writ. Each of these rulings were based on the false premise that Appellant’s win on its Trail Plan claim did not require any change in the status quo with respect to the District’s project approval with respect to allowing bikes on the Middagh Trail. This reasoning is legally and factually erroneous, thereby warranting reversal of the trial court’s decisions

July 26, 2021

By: /s/ Michael W. Graf  
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**CERTIFICATION OF WORD COUNT**  
(Cal Rules of Court, Rule 14(c)(1))

The text of Appellant's Opening Brief consists of 11,218 words, as counted by the Corel WordPerfect word processing program used to generate this brief.

DATED: July 26, 2021

By: /s/ Michael W. Graf  
Michael W. Graf  
Attorney for Appellant

PROOF OF SERVICE

I am employed in the County of Contra Costa, State of California. I am over the age of 18 and not a party to the within action; my business address is 227 Behrens Street, El Cerrito California, 94530. I caused the attached:

**APPELLANT’S OPENING BRIEF**

to be served as follows:

x **By Regular Mail** On the date written below, at El Cerrito, California, I placed a true copy of the above written document in a sealed envelope(s) and placed it for collection and mailing, addressed as follows:

Marin County Superior Court P.O. Box 4988 San Rafael, California 94913
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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 July 26, 2021, in Contra Costa County, California.

By: /s/ Michael W. Graf  
Michael W. Graf  
Attorney for Plaintiff /Appellant