

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

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FIRST APPELLATE DISTRICT

DIVISION FOUR

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**RESPONDENT'S OPPOSITION BRIEF**

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COMMUNITY VENTURE PARTNERS,  
Plaintiff and Respondent

vs.

MARIN COUNTY OPEN SPACE DISTRICT,  
Defendant and Appellant

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**APPELLATE CASE NO: A154867**  
Marin County Superior Court Case No. CIV 1701913  
Judge: Honorable Paul M. Haakenson

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**TO BE FILED IN THE COURT OF APPEAL**

**APP-008**

<p><b>COURT OF APPEAL,</b>      <b>First</b>      <b>APPELLATE DISTRICT, DIVISION</b>      <b>Four</b></p>	<p>Court of Appeal Case Number: <b>A154867</b></p>
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<p>APPELLANT/PETITIONER: Marin County Open Space District</p> <p>RESPONDENT/REAL PARTY IN INTEREST: Community Venture Partners</p>	<p><i>FOR COURT USE ONLY</i></p>
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1. This form is being submitted on behalf of the following party (*name*): Respondent Community Venture Partners

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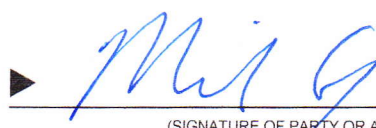
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**The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).**

Date: February 14, 2019

Michael W. Graf  
(TYPE OR PRINT NAME)

  
(SIGNATURE OF PARTY OR ATTORNEY)

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## I. INTRODUCTION AND SUMMARY

This case involves the Marin County Open Space District's ("District") approval of a project 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 that can be used as a bike connector between Mill Valley and Corte Madera (the "Project.")

The District never reviewed the environmental impacts of the Project as required under the California Environmental Quality Act ("CEQA"), Pub. Res. Code § 21000 *et. seq.* The District also refused to evaluate any alternative project that would rehabilitate the trail conditions in the Preserve without *also opening the Preserve up to biking*, contrary to the procedures required by its own Road and Trail Management Plan ("RTMP").

Respondent challenged the Project on these legal grounds in its Petition for Writ of Mandate, which was granted by the trial court in a carefully worded decision holding that the District had failed to comply with CEQA and also with the 'project selection' criteria in its own RTMP. *See Clerk's Transcript, Volume 4, pp. 714-735 ("4 CT 714-735").*

The District appeals the trial court's ruling by arguing that it proceeded lawfully and transparently in this proceeding, that it complied with CEQA by relying on the programmatic environmental impact report done for the RTMP ("RTMP EIR") and that it lawfully excluded non-biking project proposals for the Preserve as not 'consistent' with RTMP policies. The District frames this case as merely "the interests of a few local trail visitors," who have "potential fears" about allowing biking in the Preserve.

Here, the District is wrong on its facts and the law.

The Alto Bowl Preserve ("Preserve") is one of the smallest preserves in the District's system. Since its acquisition beginning in the 1970s, it has

been designated as a haven for hikers and equestrians, “treasured as [a] daily destination[] for ....those who want to be immersed in nature in their recreation pursuits.” *See* Administrative Record Index (“AR”), Row 62, page 3011 (“AR 62 3011.”) The Project will adversely affect this environment, creating wider, rutted and eroding trails in addition to other physical changes relating to safety, noise and aesthetics, all caused by adding fast moving bike traffic to the existing setting of a horse and hiker trail.

Here, in Marin County, the potential for biking to adversely affect the environment and other non-biking users *is well documented*. Mountain biking as practiced in Marin is often an aggressive, athletic endeavor – the record contains literally *hundreds of District ‘incident reports’* recording bikers causing physical accidents to hikers and horse riders, threatening public safety and damaging environmental resources through erosion and ubiquitous off-trail riding, as well as numerous citizen testimonies that allowing biking in the Preserve will have significant impacts on their recreational experience, beginning with *their well-founded concerns* that they could be *injured by speeding bikes*.

The District argues that its process has been transparent, an assertion belied again by the record. Here, following the District’s adoption of its RTMP in 2014, citizens were initially informed that any ‘new’ project proposing to allow bikes in the Preserve would undergo a CEQA review based on an initial study before being considered for approval. However in 2015, the District, after inviting the public to submit project proposals that would enhance the Preserve, chose instead only to consider a single proposal, from the Marin County Bike Coalition (“MCBC”) to open the Middagh Trail to bicycle use. *See* AR 86 3296. Following that decision, the District did *not* initiate CEQA review for the Project. Instead, it conducted

an internal feasibility study, which was presented at a public meeting in August 2016, after which the District provided a comment period, in which numerous concerned citizens raised significant issues regarding the environmental impacts of opening up the Preserve to biking, *see* AR Rows 273-566, including the submittal of a *1,088 person petition* opposed to the proposed Project without CEQA review or consideration of alternatives. *See* AR 281 4929; AR 474 5194-5195; AR 252 4729-4840 (actual petition.)

After receiving these comments from local Marin citizens, the District *still* did not initiate CEQA review, but instead, two months later, on November 29, 2016, issued an official notice on its website announcing that the Project to add bikes to the Preserve and Middagh Trail had been ‘approved’ based on the District’s assessment that significant environmental impacts could be avoided. The District then implemented the RTMP steps to obtain budget approval for the Project, still all *without CEQA review*.

Finally, on May 11, 2017, with plans, specifications, engineering and cost estimates completed and Project construction imminent, the District issued its ‘Consistency Assessment’ which found the environmental effects of adding mountain biking into the Preserve had already been “fully analyzed” under the RTMP EIR completed back in 2014. AR 8 004-007; AR 13 008-203.

The District argues that, based on this second decision, the District complied with CEQA’s provisions for modified projects. *See* Pub. Res. Code § 21166; District’s Opening Brief (“DOB”), p, 10:4-5. pp. 26-38.

The problem with this argument is two-fold. First, by the time the District completed its Consistency Assessment, the decision to allow bikes had already been made, in November 2016. Thus, the Assessment was an exercise in post hoc rationalization to confirm a decision already made.

Second, even if the Court were to consider it, the District could not

simply rely on the RTMP EIR for its CEQA analysis for this Project because here, *neither the RTMP nor RTMP EIR ever assessed the impacts of adding mountain biking to the Middagh Trail*. Instead, when the RTMP was adopted in December 2014, biking was not allowed on the Middagh Trail. Indeed, even the District acknowledges the RTMP was never intended to be a “specific trail project itself,” but instead a “framework for creating a future designated trail system.” *See* DOB, p. 8:23-24. Certainly nothing in the RTMP dictated that the Middagh Trail would in the future be changed to a biking trail nor, more importantly, did the RTMP EIR *ever consider* the effects of such a site specific project. Instead, RTMP policies *support* limited access trails in the presence of sensitive wildlife habitat or where there is history of longtime hiking and equestrian use, as is the case here. *See e.g.*, AR 62 3145 (Policies SW.16 & SW.17). For that reason, the District cannot rely on the RTMP for its CEQA analysis for *this* Project to argue that the change to allow mountain biking has been already reviewed. *See e.g.*, *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1320-1321; *Center for Sierra Nevada Conservation v. County of El Dorado* (2012) 202 Cal.App.4th 1156, 1173-1174.

In Respondent’s view, the central issue on appeal is *not* the District’s approach to tiering, but rather the validity of the District’s legal position that the impacts of the Project on existing trail users of the Middagh Trail are *not cognizable impacts under CEQA*, but instead simply ‘social effects’ unconnected to the physical effects of biking caused by the Project. Under this theory, it does not matter that neither the RTMP EIR or Consistency Assessment analyzed how changing the Trail use to allow for mountain biking would impact existing users because these are not impacts to consider in the first place. *See* DOB, pp. 11, 45-53.

The trial court correctly rejected this position. *See* 4 CT 730-733. Now, on appeal, the District argues that the ‘change in use’ to allow biking is distinct from the recontouring of the Trail, and that such change in use is not a physical impact to the environment. *See* DOB, p. 48:22-24. This position defies common sense. Bikes introduce a whole new physical element to the trail environment, contributing to erosion and trail degradation, noise, aesthetic changes and safety effects as well as the overall effect on the recreational experience of existing non-bike users.

Here, the physical changes to the environment caused by introducing hundreds of daily mountain bikers onto the Middagh Trail must be assessed not just as to the impacts to wildlife, soil, water quality *etc.*, but also as to impacts on human users who exist in this physical environment. *See* Pub. Res. Code § 21083(b)(3). The existing “environmental setting” – the physical baseline on which Project impacts are assessed – includes hiking and horse riding as current users of the trail, but not mountain biking, which is not allowed. Numerous public comments – as well as hundreds of County ‘incident reports’ – demonstrate that safety and recreational conflicts between bikers and hikers and equestrians continue on District lands and that allowing bikes to utilize the Preserve and Middagh Trail as a new regional connector route will have significant impacts to existing users. As discussed below, under case law and CEQA Guidelines, these impacts must be assessed. *See* 14 Cal. Code Regs. (hereinafter “CEQA Guidelines”) § 15064(e); Discussion, Section IV.A.1, *infra*; 4 CT 586-588, 595-603 (Petitioner’s Opening Brief); *id.*, at 651-660 (Reply Brief).

Had the District completed a proper CEQA review for the Project, it could have identified whether there were mitigation measures that might avoid the significant impacts to existing users due to conversion of the



Preserve into a bike riding connector route, and if such measures were not available, whether there were alternative approaches to achieving connectivity that would not require the conversion of the Preserve and Middagh Trail into a biking route. Here, these issues were never addressed, contrary to CEQA. *See* Pub. Res. Code § 21002.

The District argues that to uphold the trial court’s decision in this case would represent a “radical expansion of existing law.” *See* DOB, p. 49:5-6. This is incorrect. Existing CEQA decisions and Guidelines support the trial court’s ruling. Here, the District conducted *no CEQA review whatsoever* in approving a bike connector route through the middle of a County preserve along a historical hiking and horseback riding trail. The record contains considerable evidence that opening the Preserve up to biking will have significant impacts on the environment, including frequent physical *and* social impacts between bikers and hikers and horse riders. Given the facts of this specific case, upholding the trial court’s decision to require the District to consider these impacts is not an expansion of CEQA, but instead simply an affirmation of CEQA law and fundamental policy. *See* Pub. Res. Code §§ 21000 (b)-(d); *id.*, § 21001(b).

## **II. FACTUAL BACKGROUND**

### **A. DISTRICT’S 2014 APPROVAL OF RTMP.**

The District approved the RTMP and RTMP EIR on December 16, 2014. The RTMP does not prescribe specific future RTMP projects, but instead presents a general policy framework and process for making project level decisions. *See* AR 62 2999-3222. The RTMP establishes a process to evaluate project proposals into six steps, beginning with the solicitation of proposals and culminating with the inclusion of ‘successful’ projects into proposed annual budgets submitted by staff to the Board of Directors for

approval. AR 62 3155-3159.

To address user conflicts, the RTMP includes Implementing Program TRL-2.g, ‘Promote Harmony Among Trail Users,’ which was to “[p]rovide educational information, and consider special programs and events to promote trail etiquette and cooperation among trail user groups.” *Id.* at 3142. However, the District “may *prohibit certain trail uses* or apply increased trail use restrictions within certain areas to enhance safety, minimize conflicts between trail users, and protect natural resources” including areas “proximate to stables and those *traditionally heavily traveled by equestrians*, and in Sensitive Resource Areas.” *Id.* at 3145 (Policy SW.16.) (emphases added.) The District must “strive to prevent displacement of equestrians and pedestrians when accommodating trail access and trail connections for mountain bikers” and “[w]hen considering the designation of existing trails as single-use or priority-use, the MCOSD will take care to maintain connectivity between destinations for user groups historically using those trails.” *Id.* (Policy SW.17.)

**B. ENVIRONMENTAL SETTING AND IMPACTS OF BIKING.**

The Alto Bowl Preserve is one of the smallest preserves in the District’s system, a small watershed encompassing 37.1 acres, consisting of 0.77 miles of narrow trails and 0.37 miles of wide trails. *Id.* at 3035. The Preserve was formerly comprised of dairy ranches. In the 1960’s, citizens challenged developer plans to build on the surrounding ridges of Alto Bowl, leading to the incremental acquisition by the District of the Preserve area in 1974, 1985, and 1990. *See* AR 523 5271. In recent years, local volunteers have restored many acres of the Preserve’s native habitats. *Id.* at 5272.

The Bob Middagh and Gasline Trails each occur in the Alto Bowl Preserve. The RTMP identifies the Preserve as part of ‘Region One,’ and

states that 96% of the trails in the Preserve have ‘unknown’ levels of use. *Id.* at 3069. However, both trails are used on a regular basis by hikers and equestrians, as they have been for decades. Mountain bikes are not permitted, although occasional illegal riding does occur, leading to trail damage and safety incidents with hiking and equestrian users. *See e.g.*, AR 252 4736. Such damage and safety related impacts are further supported by evidence from other localities showing that bikes have the potential for significant environmental and safety impacts vis a vis sensitive natural resources and other non-bike users of the trail system, *see e.g.*, AR 523 5272-5281, and by a *wealth* of District and citizen documentation through incident reports of illegal riding, safety impacts and damage to natural resources caused by biking on trails in Marin County.<sup>1</sup>

**C. DISTRICT APPROVES PROJECT TO ALLOW BIKES ON MIDDAGH TRAIL.**

In 2015 the District considered public proposals for projects to enhance trails in the District’s system. Among these was a proposal by MCBC to open the Middagh Trail to bikes, along with other measures. *See* AR 67 3229-3237. At the same time, countervailing proposals for improvements on the Middagh Trail *without opening the trail to biking* were submitted. *See* AR 66 3223-3228; AR 70 3240-3243; AR 71 3244-3246; AR 75 3270-3276; AR 76 3277-3279. On September 22, 2015, Friends of Marin Open Space submitted a Petition containing *1,088 signatures/comments opposing the proposed change of use* from hiking and

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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.

equestrian on the Bob Middagh Trail to allow bikes. AR 252 4729-4840.

On November 10, 2015, the District released its assessment of the various project proposals for the Preserve. AR 86 3296-3297. The District chose the MCBC proposal to allow bikes on the Middagh Trail as the *only project to consider*. *Id.* at 3296. In doing so, the District rejected the competing proposals not to allow bikes but instead to improve trail and watershed conditions based on the District's conclusion that these proposals were not 'scoreable,' and thus could "not be evaluated." *Id.*

On August 25, 2016, the District presented a feasibility analysis of allowing bikes on the Middagh Trail at a community workshop. *See* AR 92 3339-3367. The District offered a 30 day comment period for the proposed project but did not prepare an initial study or conduct review under CEQA.

As part of this informal process, Respondent, along with numerous other local citizens, provided detailed comments on the District's proposal to open the Bob Middagh Trail to bikes and to reconstruct the Gasline and Middagh trails in a manner allowing for bike use. *See* AR Rows 273-566. Comments ranged from anecdotal/personal experience of biking causing substantial adverse environmental effects and safety hazards to other trail users, to scientific studies demonstrating the potential for mountain bikes to cause erosion, expansion of riding on unmarked trails, 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 already made the decision to approve biking for the Trail, even though no CEQA review had ever been conducted. *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.")

On November 29, 2016, the District announced that the “proposal to improve and open the Bob Middagh Trail to bicycle use was *approved*” based on the District’s determination that the “addition of bicycle use on the Bob Middagh Trail *could be accommodated in a safe and sustainable manner and would not have significant effects* to natural or cultural resources.” AR 93 3372 (emphases added.) On December 1, 2016, Carl Somers of the District responded to citizen concerns by stating it was “essentially correct” that the project “has now been approved,” and that “[f]unds to make the planned improvements to the Bob Middagh Trail will be included in the draft budget presented to the board in June.” AR 581 5981. On December 10, 2016, District General Manager Max Korten responded to citizens’ inquiries by stating that District staff “[had] made an administrative decision to move forward on the project.” AR 596 6012. Korten further replied that the District had “made the decision to improve and open the Bob Middagh Trail to bicycle use.” 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. The District supported its action with a ‘Consistency Assessment,’ concluding the Project was consistent with the RTMP EIR because it would not result in new or more significant impacts from changes, changed circumstances, or new information. *See* AR 8 006; 13 008-203.

#### **D. LITIGATION AND TRIAL COURT’S RULING.**

Respondent filed its Petition for Writ of Mandate challenging the District’s approval of the Project on May 26, 2017. *See* 2 CT 1-23.

The trial court granted Respondent’s Petition on April 6, 2018 in a 20 page opinion, which ruled in Respondent’s favor on three issues: (1) the District had proceeded unlawfully in approving the Project in November

2016 without any CEQA review, 4 CT 725-730; (2) even if the District's approval were considered as occurring on May 12, 2017, the Consistency Assessment did not properly consider the reasonably foreseeable social effects of the Project on existing users, *id.* at 730-733; and (3) the District did not follow the required RTMP procedure in not considering any project proposals not involving a change of use to allow mountain biking. *See id.* at 733-735. The trial court did not address Respondent's claim that the District had improperly 'tiered' the Project to the RTMP EIR. *Id.* at 735.

Judgment was entered and a writ of mandate issued on May 2, 2017. *Id.* at 713-715. The District appealed on July 18, 2017. *Id.* at 761-762.

### **III. STANDARD OF REVIEW**

#### **A. REVIEW STANDARD FOR CEQA CLAIMS.**

Respondent's CEQA claims are reviewed on an "abuse of discretion" standard, which is established if "the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence." Pub. Res. Code § 21168; *Federation of Hillside & Canyon Assns. v. City of Los Angeles* (2004) 126 Cal.App.4th 1180, 1199.

Questions concerning the interpretation or application of CEQA are matters of law subject to de novo review. *See California Building Industry Assn. v. Bay Area Air Quality Management Dist.* (2016) 2 Cal.App.5th 1067, 1081. The Court should "interpret CEQA to afford the most thorough possible protection to the environment that fits reasonably within the scope of its text." *California Building Industry Assn. v. Bay Area Air Quality Management Dist.* (2015) 62 Cal.4th 369, 381.

#### **1. Review of Agency Decision re Timing of CEQA Review is Reviewed De Novo.**

Respondent's first CEQA claim is that the District erred by not

conducting *any* CEQA review prior to its November 29, 2016 decision to approve the Project. This claim, whether CEQA applies in the first instance, is reviewed de novo. *See Save Tara v. City of West Hollywood* (“*Save Tara*”) (2008) 45 Cal. 4th 116, 131 (claim on timing of CEQA compliance “is predominantly one of improper procedure.”)

**2. Review of Agency’s Decision that a Second Tier Project is ‘Within the Scope’ of a Prior Program EIR.**

Respondent also challenges the District’s May 12, 2017 determination under CEQA Guidelines § 15162 that the “preparation of a new EIR, addendum, or negative declaration is not necessary.” AR 4 003. *See also* AR 8 006 (“2014 RTMP EIR adequately analyzes proposed project.”)

The District argues the standard of review for this determination is ‘substantial evidence’ based on *Citizens for Responsible Equitable Environmental Development v. City of San Diego Redevelopment Agency (CREED)* (2005) 134 Cal.App.4th 598, 610. *See* DOB, p. 25.

*CREED* relied on *Sierra Club v. County of Sonoma, supra*, 6 Cal.App.4th at 1318-1321, which held that Section 21166 and CEQA Guidelines § 15162 “control only when the question is whether more than one EIR must be prepared for what is *essentially the same project*.” (emphasis added.) *Sierra Club* found CEQA Guidelines § 15168(c)(2) allowed an agency to proceed under Section 21166 based on a program EIR, but only if the agency determines that the second tier project falls ‘within the scope’ of the program EIR. *See id.* at 1320-1321.

Following *CREED*, the Supreme Court in *Friends of College of San Mateo Gardens v. San Mateo County Community College Dist* (“*San Mateo Gardens*”) (2016) 1 Cal. 5th 937, overruled *Sierra Club*’s ‘same project’ framework as the proper standard for whether an agency has proceeded

lawfully in choosing to review under Section 21166, holding instead that “[a]n agency that proposes project changes [] must determine whether the previous environmental document retains *any relevance in light of the proposed changes.*” *Id.* at 944 (emphasis added.)

Importantly, *San Mateo Gardens* limited its holding to cases involving prior ‘project’ CEQA reviews, *not* those involving prior *program* EIRs:

The standard for determining whether to engage in additional CEQA review for subsequent projects under a tiered EIR is *more relaxed than the prohibition against additional review imposed by Public Resources Code section 21166 for project EIR's....when a tiered EIR has been prepared, review of a subsequent project proposal is more searching.*

*Id.* at 960.<sup>2</sup> (emphases added).

Following *San Mateo Gardens*, the question whether an agency may proceed under Section 21166 in a tiering situation is whether the second tier project falls ‘within the scope’ of the prior program EIR. Here, the District never made that determination in its environmental documents, but instead simply applied the standards of Section 21166 and CEQA Guideline § 15162.

Even if the District *had* done so, the Court is not required to ‘defer’ to District’s determination under either a legal *or* substantial evidence standard of review. For example, the District asserts that a project implemented under the RTMP proposing to allow bike use on the Middagh Trail in the Preserve is ‘within the scope’ of the RTMP and RTMP EIR, even though those documents *never considered bike use for this area*. This result undermines the entire concept of tiering, as discussed more fully below. *See* Section IV.A.3,

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<sup>2</sup> *See also Sierra Club v. County of San Diego* (2014) 231 Cal.App.4th 1152, 1164 (“[T]he question for a court reviewing an agency's decision not to use a tiered EIR for a later project is *one of law, i.e.,* the sufficiency of the evidence to support a fair argument.” (emphasis added.)



pp. 50-54, *infra*. In such situations, the Court must retain review authority over *how* the District has interpreted whether a second tier project is ‘within the scope’ of a program EIR and/or whether such a determination is supported by substantial evidence. *See* CEQA Guideline § 15168; *Center for Sierra Nevada Conservation v. County of El Dorado, supra*, 202 Cal.App.4th at 1173-1174 (court of appeal rejects agency’s proposed review for project impacts under Section 21166 and instead evaluates project as tiered pursuant to Public Resources Code § 21094.); *Sierra Club v. County of Sonoma, supra*, 6 Cal.App.4th at 1320-1321 (proposed mining not previously addressed under CEQA was not within the scope of the prior program EIR.)<sup>3</sup>

**B. REVIEW STANDARD FOR VIOLATION OF RTMP CLAIM.**

Respondent’s claim that the District did not comply with the required RTMP procedures for selecting potential trail projects is brought under Code of Civil Procedure § 1085, which inquires whether the agency’s action was arbitrary, capricious, or entirely lacking in evidentiary support, contrary to established public policy, unlawful, procedurally unfair, or whether the agency failed to follow the procedure and give the notices the law requires. *Kreeft v. City of Oakland* (1998) 68 Cal. App. 4th 46, 53.

**IV. ARGUMENT**

**A. THE DISTRICT VIOLATED CEQA.**

The Project proposes to change the hiking and equestrian Middagh Trail into a connector route for bikes through the center of the Alto Bowl Preserve

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<sup>3</sup> Remy, Thomas, Moose and Manley, *Guide to the California Environmental Quality Act (CEQA)* (2007) 11<sup>th</sup> Ed. (“Remy, *Guide to CEQA*”), pages 650-651, states that the inquiry into whether second tier project is ‘within the scope’ of a program EIR “typically involves two subsidiary issues: whether the proposed project is consistent with the approved program; and *whether the program EIR fully discussed the site specific impacts of the later project.*” (emphasis added.)

to major bike areas west of the Project in Corte Madera. *See e.g.*, AR 93 3368-3377. The foreseeable expansion of the mostly narrow trail used by hikers and equestrians into a recontoured trail for bike riding biking is likely to be significant. *See e.g.*, AR 285 4395-4396. The result is that the Project will alter the physical environment by introducing fast moving bikes that affect the physical terrain, aesthetics, noise level and safety conditions in the Preserve. Through these physical changes, the Project will cause adverse aesthetic, noise, recreational and safety impacts on current hiker/equestrian users of the trail, measured both in physical *and* social effects.

Here, the District approved the Project on November 29, 2016 without any CEQA review, *see* AR 93 3368-3377, then, on May 11, 2017, *again* assumed the Project did not require CEQA review because adequate analysis had taken place in the program RTMP EIR. AR 8 004-007; AR 13 008-203.

As discussed below, the District's actions here violate CEQA.

**1. Establishing a Biking Route Through the Preserve along the Middagh Trail Has the Potential for Significant Adverse Impacts on Existing Pedestrian and Equestrian Users Due to Changes in the Physical Environment.**

A central issue on appeal is whether the District erred in approving the Project in November 2016, then reaffirming that approval in May 2017, *without ever considering* the potentially significant impacts to existing users of changing the Middagh Trail from one used only by hikers and equestrians to one designed as a mountain biking connector route to trails in Corte Madera.

Here the District has never considered the impacts of such a project, neither in the programmatic CEQA analysis done for the RTMP or in the 'review' that took place for this Project. This lack of analysis is consistent with the District's legal position that such impacts need not be considered and the trial court erred in finding to the contrary. As set forth below, because

such impacts must be addressed, the District's procedure was unlawful.

**a. Background on How CEQA Considers Environmental Impacts.**

CEQA requires an agency to determine whether a project may have significant environmental impacts before it approves the project. *See* Pub. Res. Code § 21151(a); *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 79.

A "project" includes the whole of an action which has a potential for resulting in a physical change in the environment, directly or ultimately. Pub. Res. Code § 21065(a); CEQA Guidelines § 15378(a). "Environment" is defined as "the physical conditions which exist within the area which will be affected by a proposed project, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance." Pub. Res. Code § 21060.5. A "significant effect" is a substantial, or potentially substantial, adverse change in the environment. *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 945.

A project has a significant effect on the environment if it 1) "degrade[s] the quality of the environment;" (2) causes "possible effects" that are "cumulatively considerable"; or 3) causes "*substantial adverse effects on human beings, either directly or indirectly.*" Pub. Res. Code § 21083(b)(1)-(3) (emphasis added.) *See also* CEQA Guidelines § 15065(a)(4).

The "determination of whether a project may have a significant effect on the environment" calls for careful judgment on the part of the public agency involved" including consideration of how "the significance of an activity may vary with the setting" such as "an activity which may not be significant in an urban area [but which] may be significant in a rural area." CEQA Guidelines § 15064(b). *See also Friends of College of San Mateo Gardens v. San Mateo County Community College Dist.* (2017) 11 Cal. App. 5th 596, 610

(significance of environmental impact “is not based on its size but is instead measured in light of the context where it occurs.”) The agency “shall consider the views held by members of the public in all areas affected” including “whether environmental change itself might be substantial.” CEQA Guidelines § 15064(c).

Environmental ‘effects’ include 1) indirect or primary effects which are caused by the project; or 2) indirect or secondary effects which are caused by the project including “effects related to induced changes in the pattern of land use.” *See* CEQA Guidelines §§ 15358(a)(1-2). The agency shall consider “direct physical changes in the environment” and “foreseeable indirect physical changes in the environment.” *Id.* § 15064(d).

**(1) Relationship Between Physical and Social Impacts.**

“Effects analyzed under CEQA must be *related* to a physical change.” *Id.*, § 15358(b) (emphasis added.) Under this rule, “[e]conomic and social changes,” standing alone, “shall not be treated as significant effects on the environment.” CEQA Guidelines §§ 15064(e); § 15131(a).

However, the situation is *different* if economic and social changes are tied to physical impacts. First, CEQA requires consideration of indirect changes in the environment caused by a project’s social and economic impacts. CEQA Guidelines §§ 15064(e); 15131(a).<sup>4</sup>

Second, social effects may be considered when those impacts are themselves *caused by changes to the physical environment*. *See* CEQA

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<sup>4</sup>This category includes cases identifying foreseeable ‘urban decay’ caused by the social/economic impacts of shoppers no longer frequenting local businesses due to the construction of a ‘superstore.’ *See Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal. App. 4th 1184, 1204-1206. These type of effects are *not* at issue in this appeal.

Guidelines §§ 15064(e); 15131(b). This second category addresses the impacts at issue in this appeal. The Guidelines provide three examples:

- “[I]f the construction of a new freeway or rail line divides an existing community, the construction would be the physical change, but the social effect on the community would be the basis for determining that the effect would be significant.” *Id.* § 15064(e);
- [I]f a project would cause overcrowding of a public facility and the overcrowding causes an adverse effect on people, the overcrowding would be regarded as a significant effect.” *Id.* § 15131(b);
- “[I]f the construction of a road and the resulting increase in noise in an area disturbed existing religious practices in the area, [this] could be used to determine that the construction and use of the road and the resulting noise would be significant effects on the environment...” *Id.*

This last setting characterizes the facts in *Christward Ministry v. Superior Court* (1986) 184 Cal. App. 3d 180, 197, which held that the effects of a project caused by increased noise and traffic on petitioner’s religious retreat activities had to be reviewed under CEQA.

**b. CEQA Impacts to Existing Users Caused by Project.**

The conversion of the Preserve and Middagh trail into a bike connector route involves *three categories* of CEQA impacts. First, *direct physical changes* include 1) widening and recontouring of trails; 2) the introduction of fast moving bikes into an area historically occupied by slow moving hikers and horses; 3) changes to trail quality due to erosion/trail deterioration; 4) increases in periodic noise levels due to bike riders; and 5) changes in aesthetic qualities of the Preserve due to these and other changes.

Second, *indirect physical impacts* from the Project include 1) loss of wildlife in response to loud and fast moving bikes, including night riding allowed by the RTMP; 2) physical accidents involving fast moving bikers and slow moving hikers and horse riders; and 3) adverse noise and aesthetic effects

to existing recreational users of the Preserve and Middagh Trail.

Third, *social impacts* of the Project include 1) the fear of existing users to recreate in this area due to safety concerns; 2) loss of value of existing user recreational experience due to the physical effects of biking on safety, noise and aesthetics in the area; and 3) foreseeable displacement of many existing users of the Preserve due to the introduction of biking.

The impact to the existing trail user comes from a combination of these *direct and indirect physical impacts* as well as *social effects deriving from these physical impacts*. These impacts combine together to create a potentially significant impact on existing trail users, which should have been assessed in a CEQA review process but were not in this case.

#### **(1) Safety Impacts**

Safety impacts to hikers and equestrians due to bikers in the Preserve fall into two categories; 1) *physical impacts* to existing users due to foreseeable accidents; and 2) *social impacts* due to users' fear of having accidents with bikes. Here the evidence shows the conversion of a decades-old hiking and equestrian preserve area into a connector route to bike-friendly destination areas has the potential for accidents in the future between bikes, hikers and horse riders. *See* AR 515 5256 (“There are major safety issues here, and your agency is already understaffed to deal with the issues it currently faces.”); AR 87 3299 (“The direct effects of objectionable actions, such as speeding or failure to yield, are born by the other users..”); AR 242 4693 (“I cannot tell you how many times in the last 8 months - I have almost been hit by "racing bikers" who come around corners at break neck speeds. There are already a number of near serious accidents on file due to the mountain biking crazy to out do each other in racing up and down the trails.”) AR 84 3293 (“Mountain biking represents a radical change in use which dramatically

impacts other user groups, and exponentially increases the danger of mishaps, as we have seen all too often lately on our trails.”); AR 252 4758 (“The hill especially was designated as open space for the peaceful pasture of aging horses. We have had enough "accidents" with fast bikers in the area.”) AR 550 5894 (“In the last year, my family has been buzzed twice by bicyclists zooming down the eastern end of the Bob Middagh trail illegally, creating a dangerous situation. ...To ask hikers, equestrians...to share with bicyclists in these conditions is inviting serious accidents.)

These experiences are corroborated by the literally *hundreds of incident reports* showing bikers involved in accidents with hikers and equestrians. *See* p. 11, Note 1, *supra*.<sup>5</sup> Indeed, in a litigation initiated by biking groups

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<sup>5</sup>*See e.g.*, AR 116 3769 (“As they approached a blind corner two or possibly more juveniles came down the trail on bicycles. The horses were spooked ...[and] began to rear up and spun around away from the juveniles. ...called the Willow Tree Stable to advise of the accident.”); AR 119 4262 (“The cyclist saw me and I hailed him to stop, he stated “Fuck you, you don't have the power to stop me!” & “You need to give us more trails!” He then rode down the trail cut several switch backs and nearly hit a hiker by Pacheco Pond.”); AR 118 3978 (“As the subject approached me he started to brake, but then started to peddle directly at me...He stated the mountain biker had passed him at a good amount of speed, but somehow had not hit him.”); AR 118 4007 (“The report was of an altercation between a woman hiker and a male mountain biker that became physical. ...I then transported her to an ambulance at the Mt. Muir Gate on Lucas Valley Road. ”); AR 118 4103 (“Illegal bike activity; lots of horses out today. 2 bikes rode the illegal trail off Conifer onto Conifer trail;...they said: have a nice day and rode on. Speeding around a blind corner.”); AR 118 4104 (“[B]iker was impervious to logic and felt entitled. - Enforcement needed.”); AR 118 4106 (“Didn't slow and say hello. Just kept riding, with his head down to avoid identification. Scofflaw bicyclist.”); *Id.* (“High rate of speed, ear buds, could not hear when I spoke with him. ...enforcement needed.”); *Id.* at 4107 (“Illegal bicycling on Bob Middagh Trail....This cyclist was coming down the Middagh...corner in creek. Jumping the dips. Surprised me a lot. Glad I was not on Red, the horse I have on loan.) AR 117 3959

involved in Marin County biking, the court denied these groups' challenge based on the "[a]mple evidence...that bicycle access to all trails increases incidents of user conflict and compromises visitor safety." AR 547 5886.<sup>6</sup>

Foreseeable accidents causing adverse physical harm to existing users causes not just a social effect, but is *also an indirect physical impact* on

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("Three bicyclists, not only on the closed trail, but going fairly fast... They were belligerent."); *Id.* ("Bike Speeding, ...bikers treat the fire roads at Rush Creek as if they were highways. They ride fast, fail to slow...approaching walkers, even when coming from behind, and often fail to give any Warning."); AR 117 3961 ("[T]wo teenage boys...biking really fast...we were lucky they didn't run into a horse because they would have spooked... "); *Id.* at 3962 ("I did not see the cyclists who shook up the lady hiker..."); *Id.* ("Cyclist coming fast down Sorich trail who blew by me when I greeted him. He was not receptive."); AR 116 3804 (Two fairly fast moving bikes coming down Cary Camp Loop at first exit down. "); *Id.* at 3806 ("Bicyclists riding fast and not yielding to hikers. "); AR 115 3718 ("Hurling down trail at side of stream almost hitting me..") AR 114 3670 ("[S]ome bikes ..(7 of them) were coming around a blind corner at an unacceptable rate of speed and had to slide to a stop not to run into [her] and her horse. She had yelled: "horse" at the top of her lungs, but, she said, the bikers were talking loudly and didn't hear her. No sense of risk to anyone else on the trail.. ")

<sup>6</sup> The court denied the bike groups' legal challenge to a federal trail plan *in Marin County* in part due to "*hundreds of letters from park users recounting stories of collisions or near misses with speeding or reckless bicyclists on all kinds of trails but particularly on steep and narrow trails. Hikers and bird watchers repeatedly told how they have been forced off of trails by speeding bicycles and how they have had their peace and solitude on the trails interrupted by bicycles that--because they are quiet and fast--seemed to appear out of nowhere and be immediately upon the hikers and other users. Equestrians told how their horses have been startled by speeding or oncoming bicycles and have become restless, on several occasions even throwing and injuring experienced riders....* letters from hikers, equestrians, bird watchers, joggers, and other users also repeatedly recounted incidents of rudeness, threats, and altercations when they have complained to an offending bicyclist about dangerous conduct. Park staff also reported having received such complaints.") (emphases added.)



humans, the same way building a factory emitting air pollution would have indirect physical impacts on humans living nearby. *See e.g., Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal. App. 3d 692, 716-717 (impacts of new development creating air pollution impacts on nearby citizens)

The record also contains evidence showing the potential for critical *social effects* due to the legitimate fear of existing users of being hit by a bike. AR 87 3300 (equestrian group states they already travel on high alert “due to the possibility of hard-charging bike riders” many of which are “riding at the edge of their control.”); AR 252 4732 (“I hike Horse Hill and from the experiences I have had with cyclists on the roads I would be afraid for my safety and the safety of the horses and other wildlife on the trails.”) AR 72 3248 (“A significant sensitive resource is the serenity and safety (including a perception of safety) inherent in trails from which sport bicycling is excluded.”) In many cases the fear and anxiety caused by this social impact will likely cause many existing users not to use the trail at all. *See* AR 252 4736 (“I’m afraid to take my 6 year old son on the Bob Middagh trail in the Alto Bowl Open Space now that the mountain bikers have discovered it...it’s just too dangerous.”) AR 87 3300 (“The Middagh Trail is the *only equestrian trail connection from Horse Hill to the MCOSD and MMWD lands to the west.*”); (emphasis added); AR 78 3282 (“[I]t is most likely that others like myself will be displaced, as has happened in China Camp.”)<sup>7</sup>

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<sup>7</sup> *See also* AR 318 5011 (“Where are the MCOSD local studies indicating this will not be an issue on the Middagh? Many hikers and equestrians surely will feel endangered and their trail user experience diminished by being asked to share a narrow trail with hurtling mountain bikers, dangerous even if abiding by a 15 mph speed limit. Hikers and equestrians will then be forced to recreate elsewhere.”) AR 498 5226-5227 (“Displacement eludes measurement - until one finds that equestrians (for example) have simply deserted certain trails as

‘User displacement’ is the ultimate social impact to be considered in addressing whether the physical changes and foreseeable bodily injury causing the effect are significant. *See* CEQA Guidelines § 15131(b) (project leading to overcrowding of a public facility would be regarded as a significant effect if it “causes an adverse effect on people.”); *Id.*, § 15064(e) (“social effect on the community” of being divided due to a physical change “would be the basis for determining that the effect would be significant.”); Pub. Res. Code § 21083(b)(3) (impact significant where project causes “substantial adverse effects on human beings.”); *San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School Dist.* (2006) 139 Cal. App. 4th 1356, 1372 (CEQA values “[h]uman health.”); Pub. Res. Code § 21000(d) (CEQA policies include assessing “critical thresholds for the *health and safety* of the people of the state.”) (emphasis added.)

## (2) Noise Impacts

Adding bikes poses a significant change to the experience of current users enjoying the quiet setting of the Middagh Trail due to the increase in periodic noise disturbance in the Preserve. *See e.g.*, AR 317 5007 (“[M]ountain biking is after all an aggressive, adrenaline-fueled activity where the ‘thrills and spills’ are often accompanied by whoops and hollers from the participants.”); CEQA Guidelines § 15064(b) (the “significance of an activity may vary with the setting.”); *Los Angeles Unified School District v. City of Los Angeles* (1997) 58 Cal. App. 4th 1019, 1026 (decibel increase from 72.1 to 75.4 would not have the “same effect on a hearer trying to study in a classroom as a hearer waiting for a bus on a street corner.”)

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mountain bikes usage has increased. China Camp State Park is the classic local example of displacement: even hikers walk at considerable risk on weekends, and equestrians now avoid the Park altogether.”)

### (3) Aesthetic Impacts

Aesthetic impacts are caused by 1) conversion of the narrow hiking trail to a wider, contoured trail for bikes, with attendant and inevitable erosion, and trail rutting from bike riding; 2) groups of speeding bikers now appearing on the trail; and 3) the loss of visible bird and wildlife viewing due to noise, reaction to bikers and evening riding with lights. This introduction of bikers into the Preserve and change in trail use will have significant aesthetic impacts on hikers and equestrians who currently use the Trail. *See* AR 515 5256 (“Those of us who have hiked these trails for decades, and who have worked and paid to preserve them, see the tranquility and aesthetic value of the Middagh Trail as being in danger of being lost to its current users and to generations to come.”); AR 52 4733 (“[B]ikers on these open space lands will destroy the feeling of tranquility and closeness to nature.”)

Such aesthetic impacts based on environmental changes that adversely affect human beings using the Project area must be reviewed under CEQA. *See Quail Botanical Gardens Foundation, Inc. v. City of Encinitas* (1994) 29 Cal. App. 4th 1597, 1604 (inherent in the word “aesthetic” is that “any substantial, negative effect of a project on views and other features of beauty could constitute a significant environmental impact.”); *Friends of College of San Mateo Gardens v. San Mateo County Community College Dist., supra*, 11 Cal. App. 5th at 610-611 (“[W]idespread concern that replacing the gardens with a parking lot would remove one of the last green spaces on campus.”); *Georgetown Preservation Society v. County of El Dorado* (2018) 30 Cal. App. 5th 358, 376, n. 7 (“[A]esthetics is a nontechnical subject within the purview of lay opinion.”); Pub. Res. Code § 21000(b) (CEQA policy to “provide a high-quality environment that at all times is *healthful and pleasing to the senses* and intellect of man.”) (emphasis added.)

#### (4) Recreational Impacts

Recreation impacts are directly related to the reduction in recreational experience for hikers and equestrians as a result of change in use converting the Preserve and Middagh Trail into a connector route for bikes. Here, areas such as the Alto Bowl Preserve are “treasured as daily destinations,” including by those “immersed in nature in their recreation pursuits, right in their own communities.” AR 62 3011.<sup>8</sup> Such recreational interests are recognized under CEQA. *National Parks & Conservation Assn. v. County of Riverside* (1999) 71 Cal.App.4th 1341, 1361-1362 (loss of aesthetic recreational experience is CEQA impact); *Baldwin v. City of Los Angeles* (1999) 70 Cal. App. 4th 819, 842 (project has significant effect on the environment if it conflicts “with established recreational... uses of the area.” (citing CEQA Guidelines, App. G (w)); Pub. Res. Code § 21000(c) (CEQA policy to encourage people’s “enjoyment of the natural resources of the state.”)

**c. The Combined Impacts Due to the Conversion of the Preserve and Trail to Bike Usage Constitutes a Potentially Substantial Impact on Existing Users that Should Have Been Evaluated in a CEQA Process.**

The combination of real physical effects related to safety, noise, aesthetic and recreational values has the potential for substantial adverse impacts on existing users, leading to the possibility of accident, loss of recreational enjoyment and possible displacement of their historical use. For persons who recreate here, who have “treasured” the Preserve as a “daily

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<sup>8</sup> See e.g, AR 515 5256 (“These lands ...provide respite from modern life with all its noise and busyness. There is abundant wildlife here, deer, owls, rabbits, foxes, possums, the occasional bobcat, wild turkeys, quail, and of course skunks and raccoons too. To take this away from those who now enjoy it as it is, and those who would never have a chance to, and turn it over to mechanized users...would be a tragic loss.”)

destination,” this is a significant impact. *See* AR 62 3011; *Christward Ministry, supra*, 184 Cal. App. 3d at 197 (religious sensibilities of a local ministry affected by the adjacent siting of a waste facility, which social impact must be analyzed and considered under CEQA.); CEQA Guidelines § 15064(e) (social effects due to physical impacts must be reviewed.)

These impacts were *ignored* by the District, which instead limited its analysis to vague statements of how reduction in trail grade will “enhance visitor experience and safety,” AR 93 3368, “for younger children, the elderly, and people with disabilities,” *id.* at 3372, without considering how fast moving mountain bikers would change these ‘safety’ calculations or otherwise adversely affect the recreational experiences of these constituencies.<sup>9</sup>

**d. The District Arguments on this Issue are Unavailing.**  
**(1) Biking Has Physical Impacts on the Environment.**

The District attempts to characterize the addition of bikes to the Middagh Trail as *not* a physical change to the environment and thus there is no need to assess the impacts of adding bikes to the Preserve. *See* DOB, p. 48:22-24 (biking “change-in-use component...does not involve any physical changes. Instead, it solely involves opening up the trail to bicycle use.”)

This myopic view of what constitutes a change to the environment should be rejected. CEQA defines a ‘project’ broadly as the “whole of an action, which has a potential for resulting in a physical change in the environment, directly or ultimately.” Pub. Res. Code § 21065(a). This

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<sup>9</sup> Indeed, the District claims that the Project makes the trail “more suitable to equestrians,” *id.*, an assertion that blatantly ignores citizen comments about how adding bikes will adversely affect and ultimately displace equestrian users altogether. *See e.g.*, AR 87 3300, AR 78 3282, AR 229 4660, AR 252 4732.

interpretation “is designed to provide the fullest possible protection of the environment within the reasonable scope of CEQA's statutory language.” *Poet, LLC v. State Air Resources Bd.* (2017) 10 Cal. App. 5th 764, 787.

Respondent’s argument that although the trail recontouring is a physical change to the environment the addition of mountain biking onto the Trail is not nonsensical. Adding bikes creates physical changes related to trail erosion, water quality, wildlife, noise, aesthetics, safety, a host of physical changes to the environment. Indeed, *bikes are themselves a physical change* in that they now occupy the environment previously occupied only by slower moving hikers and horse riders. Bikes add a whole new type of *traffic* to the Middagh Trail, fast moving vehicles descending down the hillside at high speeds, creating safety hazards for non-biking users along the way. CEQA specifically recognizes this landscape level change relating to traffic patterns as a direct physical change in the environment. *See* CEQA Guidelines § 15064(d)(1) (examples of “direct physical changes in the environment are the dust, noise, and *traffic of heavy equipment* that would result from construction of a sewage treatment plant.”) This change in use is no different from a change in a facility creating potential impacts that did not occur under the prior facility operation. *See Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 76-78 (new equipment allowing refinery to process oil with higher sulfur content requires CEQA review).

Here, the *physical and social* impacts to existing users from physical changes caused by the introduction of biking on the Trail must be considered. *See* Pub. Res. Code § 21083(b)(3) (project has a significant effect on the environment if it causes “substantial adverse effects on human beings.”)

In support, the District cites to cases regarding social or economic impacts that are not caused by physical changes to the environment. *See e.g.*,

*Preserve Poway v City of Poway* (2016) 245 Cal. App 4th 560, 579-80; *Friends of Davis v City of Davis* (2000) 83 Cal. App 4th 1004, 1019.

In *Friends of Davis*, the plaintiff claimed CEQA review was necessary due to the identity of ‘Borders’ as a tenant, which “would compete with bookstores in the area,” thereby putting those stores out of business. *Id.* These facts fit the ‘social effects leading to urban decay’ model, which is *not on point* with this case, and was, at any rate, rejected as speculative in *Friends of Davis. Id.*<sup>10</sup>

Similarly, in *Preserve Poway*, the court found that residents’ loss of ‘community character’ over the proposed replacement of a local horse stable with a new housing development was nothing more than an “impact[] to the *collective psyche* of Poway’s residents.” 245 Cal. App 4th at 578 (emphasis added.) That ‘social effect’ was not caused by a physical change to the environment and thus was not eligible for CEQA review. *Id.*

Finally, the District cites *National Parks & Conserv. Ass’n v County of Riverside, supra*, 71 Cal. App. 4th 1341, a case supporting the argument that impacts to the ‘wilderness experience’ of existing park users from a proposed adjacent landfill *must be addressed under CEQA*. There, the County *had* prepared an EIR *and* statement of overriding considerations, which the Court found to be adequate. *Id.* at 1359. Here, in contrast, the District conducted *no CEQA analysis* of the impacts to existing users from the proposed Project and so *National Parks* does not support the District’s argument.

## **(2) User Impacts are Not Speculative.**

The District argues the foreseeable physical impacts and social effects

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<sup>10</sup> Similarly, *First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173, also cited by the District, concerns economic or social impacts leading to the demise of a shopping center resulting in urban decay, a framework –social effects leading to physical changes – *not at issue* in this case.

on existing users of the Middagh Trail are simply unsubstantiated fears that do not constitute evidence of impacts. *See* DOB, p. 11:24-25 (adverse effects are simply "the potential fears of other trail users about the introduction of bicycles"); DOB pp. 51-52 (Petitioner's objection "based solely on its members' psychological concerns about sharing the trail with bicyclists.")

This argument fails to acknowledge that the "environmental setting"<sup>11</sup> here includes an existing physical situation in which hiking and equestrian users *currently utilize the Project area for recreational and aesthetic enjoyment*, which setting will be substantially affected through the introduction of mountain biking with its attendant changes to the physical environment. Here, as discussed, the evidence shows that opening the Preserve to biking has the potential for significant impacts to natural resources within the Preserve as well as physical and social impacts on existing users. *See* p. 11, note 1, *supra*.

Under CEQA, 'substantial evidence' includes "facts" or "reasonable assumptions predicated upon facts that *relate to evidence of social or economic impacts caused by physical impacts on the environment.*" *See* CEQA Guidelines §§ 15384 (a)-(b) (emphasis added.) Here, as referenced above, the record contains numerous citizen testimonies raising significant issues relating to the environmental effects of introducing biking into the Preserve based on specific factual accounts and personal experiences of current users. Under CEQA, these impressions and observations constitute 'substantial evidence' of CEQA impacts that must be addressed. *See e.g. Georgetown Preservation Society, supra*, 30 Cal. App. 5th at 375 (cases involving aesthetics find "lay commentary on nontechnical matters to be admissible and probative, such that

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<sup>11</sup>Identifying the environmental setting is *the* first step to analyze the impacts of a project. *See* CEQA Guidelines § 15125(a); *Friends of the Eel v. Sonoma County Water Agency* (2003) 108 Cal. App. 4th 859, 874.



they can satisfy the fair argument test."); *Keep Our Mountains Quiet v. County of Santa Clara* (2015) 236 Cal. App. 4th 714, 730-731 & n. 9 (question is whether citizen testimony constitutes substantial, credible evidence that project may have a significant impact on the environment); *Taxpayers for Accountable School Bond Spending v. San Diego Unified School Dist.* (2013) 215 Cal.App.4th 1013, 1054 (resident testimony regarding traffic congestion and accidents at a school stadium constituted substantial evidence of potentially significant traffic impacts); *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 928 ("Relevant personal observations of area residents on nontechnical subjects may qualify as substantial evidence."); *Ocean View Estates Homeowners Assn., Inc. v. Montecito Water Dist.* (2004) 116 Cal.App.4th 396, 402 (same); *Oro Fino Gold Mining Corp. v. County of El Dorado* (1990) 225 Cal.App.3d 872, 882-883 (evidence may be established by relevant personal observations.)

The District's position that individuals' public testimony based on their experiences may be ignored is best illustrated by its dismissal of safety impacts to existing trail users due to allowing biking on the Trail. For example, the District's RTMP EIR considered 'safety' related issues "not within the purview of CEQA" because "the safety of users of the road and trail system...are social effects...derived from a *perception* of conflict and *unsubstantiated* qualitative stories." AR 62 2680. (emphasis added.) This approach, which remains the District's view, *see* DOB pp. 51-52, is contrary to CEQA. *See* CEQA Guidelines § 15064(c) (agency "shall consider the views held by members of the public in all areas affected.")

Here, the record evidence is overwhelming that trail safety issues are neither speculative or unsubstantiated, but instead actual and foreseeable, not just a psychological concern, but instead an actual, future physical impact on

existing users, no different than potential impacts caused by air pollution, excessive noise, or any other adverse environmental condition. The fact that this physical impact caused by a direct physical change in the environment *also* causes legitimate social effects does not preclude CEQA review.

**(3) The Project Will Not ‘Improve’ the Safety of Users on the Middagh Trail.**

The District argues that the social effects of the change of use *were* analyzed in the District’s Consistency Assessment, *see* DOB, pp. 49-50, and that “the physical changes would actually reduce the risk of accidents, not increase them.” *Id.*, p. 49:23-25.<sup>12</sup> However here, biking is *not* a permitted use under the RTMP and RTMP EIR. Therefore, the changes being proposed to the Middagh Trail -- “reroutes to reduce linear grades and provide increased trail sinuosity to decrease bicycle speeds,” *id.*, p. 50:2-3 -- are not changes that make a currently dangerous situation less dangerous, but instead attempts by the District – *outside the CEQA review process* - to mitigate the potential safety impacts that will be *caused by this new Project*. Such mitigation *cannot* be adopted *outside CEQA*, however, as this leads to unaccountable decision making and review. *See Salmon Protection & Watershed Network v. County of Marin* (2004) 125 Cal.App.4th 1098, 1108 (“Reliance upon mitigation

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<sup>12</sup> The District also argues the social effects of ‘user conflict’ were addressed by the Consistency Assessment findings that “the proposed project would not have significant impacts on public roads” or that “any increase in use is not likely to be significant because parking capacity in the adjacent neighborhood is limited and this trail network is not a destination that brings a significant number of visitors from outside the immediate community.” DOB, p. 50:14-28. These findings do not address the foreseeable safety and other impacts that will be caused by the conversion of the Middagh Trail into a central mountain biking connector route for the area. *See also* AR 285 4395-4396 (discussing likelihood of Middagh Trail being used as a regional destination by bikers.)

measures...involves an evaluative process of assessing those mitigation measures and weighing them against potential environmental impacts, and that process must be conducted under established CEQA standards and procedures for EIRs...or negative declarations..”)

In the absence of CEQA review, the District provides no analysis of how safety impacts will be addressed or what type of trail design will ensure that accidents in Marin County will be avoided. For example, the rebuilt Middagh Trail is proposed to be five feet in width. *See* AR 8 004. However, multi-use guidelines for mountain bike riding specify minimum trail widths of 8-10 feet. *See* AR 545 5806. Here, detailed maps of the trail construction were never provided to the public in the comment process nor was the issue discussed or analyzed. Instead, because the District simply relied on the RTMP EIR – which did not consider safety issues on the Middagh Trail – the District *never adopted any safety mitigation for the Project* such as an enforceable safety plan or monitoring program, normal mitigation required under CEQA. *See* Pub. Res. Code § 21086(b); § 21086(a)(1). Meanwhile the District’s pronouncements simply refer to the aspirational policies of the RTMP as assurance that significant safety and other user conflict issues will be avoided.<sup>13</sup> This result directly undermines CEQA's objective to avoid or substantially lessen significant impacts whenever feasible. Pub. Res. Code § 21002. Here, the District must assess environmental effects in a second tier review whenever such effects “[a]re susceptible to substantial reduction or avoidance by the choice of specific revisions in the project, by the imposition

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<sup>13</sup>*See e.g.*, 58 AR 1637 (Policy T.3: Visitor Safety. The safety of all road and trail users depends in large part on visitor conduct. The MCOSD *expects that all users will conduct themselves in a safe manner*, to protect their own safety and the safety of other users...”) (emphasis added.)

of conditions, or other means." CEQA Guidelines § 15152(d)(2).

**e. The District's Approach is Unaccountable.**

The District's approach creates an unaccountable process in which the District invites public comment then simply makes a conclusory decision that the project will not cause adverse impacts on the affected hiking and horse riding community. Here, the District never bothered to consider a 'no project alternative' in which the Preserve is *not opened up to mountain biking*, which is required under CEQA given the potentially significant impacts to existing users. *See* CEQA Guidelines § 15126.6(e)(1). For example, the District's stated grounds for opening the Preserve to biking is the lack of connectivity for bikers to bike friendly recreation areas to the west. However, the assumptions that the connection was necessary or that other connectivity options were infeasible were *never addressed* in a CEQA process. Here, the District never considered the feasibility of alternatives such as the developed bike lanes originally intended to create the very connection the District uses to justify opening the Preserve to biking. *See e.g.*, 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."); AR 72 3251-3253 (showing alternate routes providing connectivity.); AR 87 3298 ("[N]umerous alternatives exist that are both practical and require no further action or expense on the District's part.")

In the 2014 RTMP review process the *top issues* identified by the public were "[u]ser conflicts, especially those involving mountain bicyclists or off-leash dogs," and "[t]rail safety" as well as "[a]ccess to preserves and facilities for mountain bicyclists." *See* AR 58 1590. Yet here, the record shows extreme public frustration with the District's lack of transparency in approving the Project without meaningful CEQA review related to user impact

issues. In the absence of CEQA review, the public was never provided a meaningful explanation for how the Project complied with RTMP policies and objectives designed to avoid existing user impacts by restricting bikes in sensitive trail areas used by hikers and equestrians.<sup>14</sup> Here, it is not as if the District has resolved the existing user conflict in Marin between bikers and hikers and equestrians,<sup>15</sup> nor explained why potential “displacement of equestrians and pedestrians” will not occur. AR 62 3145 (Policy SW 16). To sweep the problem under the rug while opening the Preserve to biking without CEQA review is unaccountable to the public.<sup>16</sup>

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<sup>14</sup> See AR 62 3145 (Policy SW 16: “The MCOSED may *prohibit certain trail uses or apply increased trail use restrictions* within certain areas to enhance safety, minimize conflicts between trail users and protect natural resources” including in areas “proximate to stables” and “traditionally heavily traveled by equestrians.”); *Id.* (Policy SW 17: Displacement of Existing Trail Users. The MCOSED will strive to *prevent displacement of equestrians and pedestrians* when accommodating trail access and trail connections for mountain bikers.”) (emphases added.) Indeed, one of the District’s chief objectives in adopting the RTMP was to “[i]mprove the visitor experience and visitor safety.” AR 58 1558. See also *id.* at 1615 (“Safety will be maintained and conflicts among visitors will be minimized.”); at 1629 (“Policy T1d: The MCOSED will permit bicycling ...on trails designated and signed for their use, including ...(b) existing trails on newly acquired lands, when compatible with natural resource protection and the safety of trail users.”)

<sup>15</sup> See AR 62 3012 (“[T]here continues to be conflict among recreational users, *safety concerns, high speed and extreme riding*, unauthorized off-trail use, destructive trail building in fragile areas, ongoing problems of sedimentation into creeks...”); *Id.* at 3011 (“Frequent use by people of *diverse abilities*, hundreds of access points, multiple modes of travel, *different rates of speed inherent in those modes, the desire to accommodate people of diverse abilities*, and potential impacts to the native vegetation and wildlife pose real management challenges.”) (emphases added,)

<sup>16</sup> See AR 286 4940 (“The subordination of intrinsic values of solitude, quiet, scenic beauty, freedom from distraction, noise, and crowding, interaction with

**2. The District Approved the Project Allowing Biking in the Alto Bowl Preserve Prior to Undergoing Any CEQA Review.**

The District's November 29, 2016 announcement states that the District approved the Project to allow bikers into the Preserve through the Middagh trail without conducting CEQA review. *See* AR 93 3372 ("The proposal to improve and open the Bob Middagh Trail to bicycle use was approved..."); AR 581 5981; (District staff states that is "essentially correct" that the Project "has now been approved."); AR 596 6102 (General Manager states that District has "made an administrative decision to move forward on the project.") AR 598 6014 (General Manager states that District "made the decision to improve and open the Bob Middagh Trail to bicycle use.") *See also* 4 CTA 728-729.

The District argues that its November 29, 2016 approval was a preliminary but not 'final' decision. *See* DOB, pp. 37-44. The District argues "the exact date of approval of any project is a matter determined by each public agency" and that a 'project' is not 'approved' until all six steps of the RTMP process are completed. *See* DOB, pp. 42-43.

These arguments misstate the test under CEQA to determine whether action triggering CEQA review has occurred. Under *Save Tara*, CEQA review must be early enough in the process to have a "practical influence over decisionmakers," as opposed to acting as a post hoc rationalization of a decision already made. *See* 45 Cal. 4th at 130-131.<sup>17</sup> *Save Tara* adopts a

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and protection of wildlife and plant life to "access for mechanized users" is so seriously flawed it suggests inordinate influence from individuals or a body politic that is not versed in balanced wildland management concepts: the so-called "800-pound gorilla" in the room.")

<sup>17</sup>*See also No Oil, Inc. v. City of Los Angeles, supra*, 13 Cal.3d at 77, n. 5 (review must be "early enough so that whatever information is contained can practically serve as an input into the decision making process."); *Laurel*

practical approach on CEQA timing, which looks “to the surrounding circumstances to determine whether, *as a practical matter, the agency has committed itself to the project as a whole or to any particular features.*” 45 Cal. 4th at 139 (emphases added.) In particular, *Save Tara* cautions against agency decisions that “effectively preclude any alternatives or mitigation measures that CEQA would otherwise require to be considered, *including the alternative of not going forward with the project.*” *Id.* (emphasis added.)

Here, following issuance of the RTMP in December 2014, the District began an 18 month process, in which it first selected the Project from a number of potential projects for the Preserve, and then analyzed the environmental effects of the Project, including holding a meeting and taking public comment in August and September of 2016. AR 92 3339-3367; AR Rows 273-547. Following this review, the District announced that the Project – and in particular the change in use to allow mountain biking on the Middagh Trail – had been approved based on the District’s assessment there would be no significant impacts from the change. *See* AR 93 3372.

In this case the “definite course of action,” *see* CEQA Guidelines § 15352(a), to allow biking through the Preserve along the Middagh Trail, was taken by November 2016. By that time, the District had completed an internal feasibility and impact analysis, and taken public comment, all outside the CEQA process. *See e.g.*, AR 93 3369 (“The results of this feasibility analysis were presented to the public during the August 25 public meeting.”); *Id.* (“The change in use evaluation process determined that the addition of bicycle use

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*Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 390 (“[T]he later the environmental review process begins, *the more bureaucratic and financial momentum there is behind a proposed project.....*”) (emphasis added.)

on the Bob Middagh Trail could be accommodated in a safe and sustainable manner and would not have significant effects...’) As a result, the remaining ‘steps’ to final approval – adding the Project to the proposed budget and having that budget approved by the County Board of Supervisors -- offered no practical decision-making step that would evaluate the impacts of adding bikes to the Preserve, much less consider a ‘no project alternative’ of *not* permitting bikes on the Trail, as required by CEQA. CEQA Guidelines § 15126.6(e)(1).

By the November announcement, the District already had committed itself to a specific project<sup>18</sup> involving the addition of mountain biking to the Preserve as opposed to one that did not include mountain biking. The fact that project implementation required budgetary approval does not change the fact that ‘approval’ for CEQA purposes occurred when the District made the decision that biking would be allowed in the Preserve and that such change would not cause significant impacts. *See* CEQA Guidelines § 15378(c) (‘project’ refers to “the activity which is being approved and which may be subject to several discretionary approvals by governmental agencies.”)<sup>19</sup>

Given that the District had already issued its own determination that

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<sup>18</sup> Thus, this case is also distinguishable from *Concerned McCloud Citizens v. McCloud Community Services Dist.* (2007) 147 Cal.App.4th 181, which the Supreme Court in *Save Tara* characterized as having been based on the lack of project definiteness that could be subjected to review. *See* 45 Cal. 4th at 133 (*McCloud* relied on the “lack of information as to the springs that would be exploited, the site of the bottling plant, how the water would be transported, and other details essential to environmental analysis of the project.”)

<sup>19</sup> Here, ‘budget approval’ simply determines whether money is available based on funding priorities. Indeed, by the time budget decisions are being made, momentum for the project is inexorable. *See Save Tara, supra*, 45 Cal. 4th at 135 (“[P]ostponing environmental analysis can permit “bureaucratic and financial momentum” to build irresistibly behind a proposed project, “thus providing a strong incentive to ignore environmental concerns.”)



potential CEQA impacts from bike riding could be avoided, any subsequent review occurring after November 29, 2016 was bound to be an exercise in post-hoc rationalization, precisely the scenario sought to be avoided under CEQA. *See Save Tara, supra*, 45 Cal. 4th at 136.<sup>20</sup>

The District's abbreviated, non-CEQA process cannot be squared with CEQA's requirements, which require an agency either to explain how potentially significant impacts will be avoided, adopt mitigation measures that will avoid such impacts, or issue a statement of overriding considerations that as a social and policy matter, the agency is choosing the project despite its significant adverse impacts. As discussed, it is through this process that an EIR functions as a "document of accountability" to the general citizenry. *See Save Tara, supra*, 45 Cal. 4th at 136. Here, none of this occurred. The District never considered Project alternatives that would achieve bike 'connection' without harming existing users, never proposed and analyzed real safety mitigation measures and never even treated the comments received from persons concerned about user impacts due to the Project as *constituting evidence* to be evaluated in a CEQA review process.<sup>21</sup>

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<sup>20</sup> The District's entire approach to CEQA review here was a perfunctory after-the-fact of approval exercise. *See e.g.*, AR 581 5981 ("We will be working to complete the CEQA review of ..the Bob Middagh project ..this winter, after the trail logs (technical plots of the new trail segments) are completed.")

<sup>21</sup> The District argues that its November 29, 2016 decision is just an isolated staff comment, which was found not to constitute 'project approval' in *Neighbors for Fair Planning v. City and County of San Francisco* (2013) 217 Cal.App.4th 540, 557-558. *See* DOB, p. 43:5-17. This argument fails. First, the memo was not an isolated comment but instead a *public announcement* regarding the culmination of the District's decision-making that the Project would proceed to the District's budgetary process. *See e.g.*, AR 576 5954 ("The Alto Bowl memo will be posted to our website by COB Tuesday.") Second, *after* the District's official announcement in November 2016, the

### 3. The District's May 11, 2017 Reapproval Violates CEQA.

The District's main argument on appeal is that it proceeded properly in relying on the 2014 RTMP EIR for its missing CEQA analysis, as presented in the District's post-hoc Consistency Assessment. *See* DOB, pp. 26-38.

The District's argument is based on the theory that it could proceed under CEQA Guidelines § 15168(c)(2) by simply finding that the Project was 'within the scope' of the prior RTMP EIR. The District argues repeatedly that the trial court erred in ruling that the District was required to prepare an 'initial study' and that, instead, no particular environmental review document was required.<sup>22</sup> The District argues it never intended to 'tier' the Project to the RTMP EIR, though it concedes that document was a program EIR eligible for tiering under Public Resource Code §§ 21093-21094. The District argues that the District's actions are reviewed under a 'substantial evidence' standard.

These arguments fail to excuse the District's failure to conduct CEQA review. The RTMP EIR never considered the effects of allowing mountain biking into the Alto Bowl Preserve. Indeed, the RTMP never even considered biking impacts on existing users as a CEQA impact at all. *See* AR 59 2241.

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District's General Manager Max Korten confirmed the District's prior announcement. *See* AR 596 6012; 598 6014. These facts are distinguishable from *Neighbors for Fair Planning* and instead fall into *Save Tara's* category of agency officials with "apparent authority to speak" on this topic on behalf of the District. *See* 45 Cal. 4th at 142, n. 13.

<sup>22</sup>The District states that the Consistency Assessment is based on CEQA Guideline § 15168(c)(4), which recommends that "[w]here the subsequent activities involve site specific operations, the agency should use a written checklist or similar device to document the evaluation of the site and the activity to determine whether the environmental effects of the operation were covered in the program EIR." *See* DOB, p. 30:16-21. Elsewhere, however, the District claims that no documentation is necessary. *See e.g.*, DOB, p. 29:18-23.

Thus, any inferred finding<sup>23</sup> by the District that the Project was ‘within the scope’ of the RTMP or RTMP EIR must fail, either on procedural grounds or because it is not supported by substantial evidence.<sup>24</sup>

**a. The RTMP and RTMP EIR are General Programmatic Documents that Never Considered or Evaluated Adding Bikes to the Middagh Trail Through the Alto Bowl Preserve.**

The RTMP and RTMP EIR never considered or evaluated a future project in which the Middagh Trail, historically limited to hikers and equestrians, would be converted to a recontoured biking trail that would function as a bike route between Mill Valley and Corte Madera. Instead the RTMP and RTMP EIR were intended as broad planning documents:

*As proposed and assessed in the RD TPEIR, the RTMP is even less specific than a local general plan or a comprehensive zoning ordinance.....No individual road or trail actions are identified or programmed in the RTMP.*

AR 59 2734 (emphases added). *See also* AR 62 3012 (RTMP “does not prescribe lists of road and trail modification projects in specific locations.”)

The RTMP EIR did not conduct *any analysis* how the District should consider the impacts of trail conflicts due to changed physical conditions as a result of a change in allowed uses. In fact, user conflict issues were simply not considered in the RTMP EIR at all. *See e.g.*, AR 59 2241 (“Because the safety of users of the road and trail system is a social effect within the meaning of

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<sup>23</sup> The District did not in fact make a ‘finding’ that the Project was ‘within the scope’ of the RTMP EIR. *See* AR 4 010-03 (Notice of Determination); AR 8 04-07 (Project approval memo); AR 13 008-203 (Consistency Assessment.)

<sup>24</sup>It was on this basis that the trial court declined to address Respondent’s claim on this issue. *See* 4 CTA 735 (“In light of the above findings, it is not necessary or appropriate for the court to rule on Petitioner's claim that Respondent improperly 'tiered' the Middagh Trail project to the TPEIR.”)

Section 15131(a), it is not within the purview of CEQA.”)

**b. The District’s Decision to Utilize Public Resources Code § 21166 Rather than CEQA’s Tiering Provisions Led the District to Avoid Evaluating the Impacts of this Second Tier, Site-Specific Project.**

The RTMP EIR is a programmatic EIR for tiering purposes. *See* AR 59 2210 (EIR referred to as a “Tiered Programmatic EIR.”) Under CEQA, tiering is strongly encouraged in order avoid repetitious CEQA review. *See* Pub. Res. Code §§ 21093-21094. *Friends of Mammoth v. Town of Mammoth Lakes Redevelopment Agency* (2000) 82 Cal.App 4th 511, 527-528; *Sierra Club v. County of Sonoma, supra* 6 Cal. App 4th at 1318. Tiering proceeds from a programmatic EIR, “prepared on a series of actions that can be characterized as one large project and are related...in connection with the issuance of rules, regulations, plans, or other general criteria to govern the conduct of a continuing program.” CEQA Guidelines § 15168(a)(3).<sup>25</sup>

In a normal tiering procedure, the lead agency “shall examine significant effects of the later project upon the environment,” but need not “examine those effects that the lead agency determines were ... [e]xamined at a sufficient level of detail in the prior [EIR].” Pub. Res. Code § 21094(a). “[A]n *initial study shall be prepared*...and shall analyze whether the later project may cause significant effects on the environment that were not

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<sup>25</sup>Tiering allows an agency to assess the environmental consequences of planning and project approvals at each appropriate planning stage, *Stanislaus Natural Heritage Project v. County of Stanislaus* (1996) 48 Cal. App. 4th 182, 201, and to focus upon the issues ripe for decision at each level of environmental review and in order to exclude duplicative analysis of environmental effects examined in previous environmental impact reports." *Koster v. County of San Joaquin* (1996) 47 Cal. App. 4th 29, 38; Pub. Res. Code § 21093(a); CEQA Guidelines § 15152(b).

examined in the prior environmental impact report." *Id.* § 21094(c) (emphasis added.) A lead agency tiering to a Program EIR should limit discussion to effects of the subsequent project that: (1) were not examined as significant effects on the environment in the prior EIR; or (2) are susceptible to substantial reduction or avoidance by the choice of specific revisions in the project, by the imposition of conditions, or other means. *See* CEQA Guidelines § 15152(d). Importantly, a later EIR is required when the initial study finds that the later project *may cause* significant effects on the environment that were not ‘adequately addressed’ in the prior EIR. *Id.* § 15152(f).<sup>26</sup>

Here, the District took none of those steps. Instead, rather than ‘tier’ the CEQA review for the Project to the RTMP EIR, the District proceeded under Public Resources Code § 21166 and CEQA Guidelines § 15162 based on the assumption that the Project fell ‘within the scope’ of the RTMP EIR pursuant to CEQA Guidelines § 15168(c)(2). Through this process, the District adopted its ‘Consistency Assessment,’ which mostly evaluates whether the Project was ‘consistent’ with the RTMP, a *different* inquiry than the one to determine the need for further review under CEQA’s tiering provisions.<sup>27</sup>

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<sup>26</sup>Effects have been "adequately addressed" in a prior EIR if they either (i) have been mitigated or avoided as a result of the prior EIR, or (ii) have been examined at a sufficient level of detail in the prior EIR to enable those effects to be mitigated or avoided by site specific revisions, the imposition of conditions, or by other means in connection with the approval of the later project." *Id.* § 15152(f).)

<sup>27</sup>Indeed, in a tiering context, an agency *must first determine that a second tier project is consistent* with the programmatic project and EIR in order to utilize the tiering process at all. *See* Pub. Res. Code § 21094(b)(1) (tiering “applies only to a later project that the lead agency determines is ...[c]onsistent with the program, plan, policy, or ordinance for which an environmental impact report has been prepared and certified.”) (emphasis added.)

In addition to Project ‘consistency’ with the RTMP, the Consistency Assessment also reviewed the factors for modified projects based on “new information,” “changes in the project” or “changes in circumstances.” *See* AR 13 008-203; Pub. Res. Code § 21166; CEQA Guidelines §§ 15162(a)(1)-(3). As a result, the District avoided focus on the relevant CEQA issue presented, *i.e.*, whether the introduction in this second-tier Project of mountain biking and its attendant physical and social impacts to the Middagh Trail and its users were ‘adequately discussed’ at a “sufficient level of detail” in the prior program EIR. *See* Pub. Res. Code § 21094; CEQA Guidelines § 15152(f).<sup>28</sup>

Here, the District *should* have followed CEQA’s tiering provisions given that the Project does not fall within the scope of the prior RTMP EIR, which 1) never considered such a use change on the Middagh Trail; and 2) did not even consider use changes to be worthy of CEQA review in the first place. However, as discussed below, even if the Court were to assume that the District proceeded lawfully in utilizing the modified project provisions of CEQA (Section 21166 *et seq.*) rather than CEQA’s tiering provisions, the District still abused its discretion in failing to conduct further CEQA review on the substantial use change proposed by the Project.

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<sup>28</sup>The modified project criteria of Section 21166 and CEQA Guidelines § 15162 are a poor fit for analyzing whether a second tier project should undergo additional CEQA review following a program EIR. Here, under the ‘modified project’ standards, further CEQA review is only required if there is ‘new information’ or ‘new circumstances’ relating to the initial ‘project.’ In contrast, in a tiering situation, the second tier project is typically a second-phase implementation of the initial first-tier project, which has not ‘changed’ or been ‘modified’ but instead is now to be implemented at the site specific stage. In this respect the criteria for further CEQA review under CEQA Guidelines § 15152 are on point with the concept of tiering whereas the modified project criteria under Sections 21166 and 15162 are not.

**(1) The “Initial Study” Issue is a Red Herring.**

The District's brief at one point attempts to have the merits of this case turn on a side procedural issue, whether or not the trial court erred in finding that an initial study was required. See DOB, pp. 33-36. This issue is a red herring, however, given that the trial court ultimately *did consider the Consistency Assessment as a substitute initial study* and found it made no difference to its ruling. See 4 CTA 730 ("Even if the court were to consider the "approval" to have been May 12, 2017, the Consistency Assessment, or initial study if it is to be considered such, did not properly consider reasonably foreseeable social effects.") The trial court's ruling can best be interpreted as an implicit holding that CEQA's tiering provisions requiring the initial study, Pub. Res. Code § 21094(c), should have applied here. Otherwise the issue of whether an initial study is required in every program EIR tiering situation is not dispositive as to the merits of this case.

**c. The District's Implicit Determination That the Project Was ‘Within the Scope’ of the RTMP EIR is Not Supported by Substantial Evidence.**

The RTMP EIR never addressed the impacts of a major change in use to allow mountain bike riding on existing users and thus there is no substantial evidence that supports the District’s implicit determination that the Project was ‘within the scope’ of the TRMP EIR. Nor does the District’s brief provide evidence that this is the case. For example, the District argues that “substantial evidence supports the District’s determination that the Middagh Project is one of the ‘series of actions’ that is part of the RTMP,” based on the reasoning that “the RTMP explicitly contemplates projects in 34 different preserves owned and managed by the District, including the Alto Bowl, which is the location of the Middagh Project at issue.” DOB, p. 28:17-22.

This argument assumes an over broad interpretation of what it means

for a second tier project to be “within the scope” of a first tier project. The fact that a programmatic plan *envisions* future site specific projects does not itself mean that those site specific projects are *within the scope* of the programmatic plan analysis, thereby terminating the need for further CEQA review. Instead, the words ‘within the scope’ must be interpreted in a manner consistent with CEQA’s intent to promote tiering in which program EIRs may be completed on large scale plans while the impacts of subsequent second tier projects not specifically contemplated in the program EIR may be addressed in a subsequent ‘tiered’ CEQA review process. *See* Pub. Res. Code §§ 21093-21094; CEQA Guidelines § 15152. This is particularly true where the programmatic plan – and program EIR – is general and not specific in nature. *See e.g.*, AR 59 2734 (“No individual road or trail actions are identified or programmed in the RTMP.”) The District argues that “the RTMP explicitly contemplates future proposed projects” and that “the Middagh Project was... expressly proposed as part of the RTMP.” DOB, pp. 28-29. But the citations here are to proposals and discussions beginning in 2015, *after the enactment* of the RTMP and RTMP EIR. None of this has anything to do with projects that were actually presented and analyzed in the RTMP EIR.

Finally, the District argues “there was substantial evidence supporting [the District’s] ultimate determination that...the Trail Program EIR adequately analyzes the environmental effects of the Middagh Project,” based on the District’s assertion that “the project would ‘improve access and provide a range of desired user experiences ... by improving trail conditions, reducing slopes and improving drainage for year-round access.’” DOB, p. 31:9-16. The problem with these and other citations are two-fold.

First, as discussed, *see* p. 35, *supra*, the District here is not relying on RTMP standards determined in a CEQA review process to avoid adverse



impacts to non-mountain biking users whenever a hiking/equestrian trail is changed to allow for mountain biking. Here, to the extent that the District developed specific engineering solutions to mitigate the potential for significant user conflict issues on the Middagh Trail for *this* Project, such proposed mitigation should have occurred in a CEQA process, given that the RTMP EIR never addressed the issue. *See Salmon Protection & Watershed Network v. County of Marin, supra*, 125 Cal.App.4th at 1108 (analysis of mitigation “must be conducted under established CEQA standards.”)

Second, the citations provide *no* evidence that would counter the considerable evidence on the record that, for the existing hiking and equestrian users of the Trail, the Project will have significant, unmitigated impacts. Indeed, the District’s throwaway line that the Project will “address visitor conflicts by realigning the trail to have a slope of less than 10 percent” is no more than a conclusory assumption lacking evidence or CEQA analysis in the RTMP EIR, and is meanwhile contradicted by a wealth of evidence showing the potential for significant impacts to non-biking users of the Trail that is not dependent on whether or not the trail slope exceeds 10 percent.

Nothing in these AR pages or in the RTMP EIR demonstrate any analysis of how adverse impacts on existing users from an influx of mountain biking will be avoided or mitigated, nor is there any discussion of how the various inspirational policies of the RTMP will be implemented in a way that will avoid significant user conflict issues. The RTMP contains no model safety or monitoring plan for ensuring that significant impacts are avoided, nor any programmatic, CEQA-reviewed standards that would identify how introducing mountain biking onto this hiking and equestrian trail will not cause

significant impacts to existing users.<sup>29</sup> Indeed, the record shows clearly that the Trail Plan EIR never analyzed user impacts, either at a general or specific level, because it found such impacts not necessary to review under CEQA.<sup>30</sup>

The RTMP EIR claims it evaluates “[c]hanges in the intensity of activities resulting from the implementation of the [RTMP] and the environmental effects of these changes,” *see* AR 58 1668, but a close look shows this assessment does not examine possible significant impacts to existing users of a particular trail area due to a change in use to add biking. For example, noise impacts from frequent bikers have the potential to adversely affect existing users, yet the RTMP EIR finds any impacts less than significant and thus no mitigation required. AR 58 1595. Instead, the RTMP EIR states only that “[e]xcessive noise generated by recreational users of the open space preserves and special events within preserves is...prohibited under the Marin County Code and the MCOSED Code.” AR 58 1999. For cultural impacts, the RTMP EIR’s abbreviated discussion is confined to impacts on archeological or tribal resources. *See* AR 58 1813-1814. On traffic impacts, the RTMP EIR gives the introduction of biking short shrift, focusing instead on how the RTMP might affect car-vehicle traffic patterns. *See* AR 58 2022. Even on the inquiry of whether the Project would “[c]onflict with adopted policies, plans, or programs regarding ....*pedestrian facilities*, or otherwise *decrease the ....safety of such facilities*,” AR 58 2030 (emphasis added), the

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<sup>29</sup>Ironically, the RTMP incorporates trail safety in many policies. AR 58 1581 (“Policy TRL-2.3): *id.* at 1629 (“Policy T1d); *id.* at 1632 (Policy SW 16); *id.* at 1633 (Policy SW 17); *id.* at 1637 (Policy T.3: Visitor Safety.) However, none of these represent CEQA reviewed performance standards that can simply be applied to take care of potential conflicts on any similar project.

<sup>30</sup> *See* AR 59 2241 (“Because the safety of users of the road and trail system is a social effect...it is *not within the purview of CEQA.*”) (emphasis added.)

RTMP EIR finds no issue. Beyond these conclusions, the RTMP EIR does not assess potential impacts caused by bike traffic on the aesthetics of the area, or the recreational uses currently enjoyed by the existing users. *See* AR 58 2036 (topics not addressed in RTMP EIR.)

Following the RTMP EIR's lead, the Consistency Assessment also does not contain any evaluation of biking impact issues relating to safety, noise, recreation, traffic, cultural resource or aesthetic impacts. *See e.g.*, AR 13 33 (no substantial aesthetic impacts to "the existing visual character or quality of the site and its surroundings."); *id.* at 55 (bikers have same impact on wildlife as hikers); *id.* at 74 (cultural resource assessment limited to archeological, historical or paleontological resources); *id.* at 91-94 ('hazard' assessments each relate to toxic materials and not recreational safety.); *id.* at 119 (proposed trail modifications would not otherwise divide or change an established community.); *id.* at 120 (introducing biking is not a land use planning impact because General Plan land use designation will stay the same); *id.* at 125 (allowing "bicycle use may also increase noise levels" but "this impact is not significant, because any noise from bicycle use consists either of the sound of a human-powered vehicle or of unamplified voices.") *id.* at 136 ("There is no new information with respect to increased use of existing recreational facilities that is of substantial importance requiring new analysis or verification."); *id.* at 138 (project "would enhance the environment and improve the recreational resources of the Alto Bowl Preserve.")

Instead, the Consistency Assessment determines that "[t]here is no aspect of the proposed trail improvements that would result in new or substantially more severe impacts that are different from those evaluated in the [TPEIR]" and that "the proposed [Project] would not trigger the need for new mitigation measures because of new or more severe impacts." AR 13 159. The

lack of any analysis on the user conflict issue is not surprising given that the Consistency Assessment relies solely on the RTMP EIR, which, as discussed, never analyzed the conflict issue at all in its CEQA analysis.

Had the District conducted a lawful tiering exercise under Public Resources Code § 21094 and CEQA Guidelines § 15152, it would have concluded that further supplemental CEQA review was required to address the *specific user conflict issues* arising out of the Project proposal to introduce a connector route bike route through the middle of the Preserve along the Bob Middagh trail, issues never addressed in the RTMP EIR. *See* Pub. Res. Code § 21094(c) (“The initial study shall analyze whether the later project may cause significant effects on the environment that *were not examined* in the prior environmental impact report.”); CEQA Guidelines § 15152(f) (subsequent EIR required when the initial study finds that the later project may cause significant effects “that were not adequately addressed in the prior EIR”) Indeed, courts have not hesitated to overrule an agency proceeding like the District’s in this case where the prior program EIR does *not* address the new impact issues raised in the second tier project. *See Center for Sierra Nevada Conservation v. County of El Dorado, supra*, 202 Cal.App.4th at 1173-1174; *Sierra Club v. County of Sonoma, supra*, 6 Cal.App.4th at 1320-1321.

**B. DISTRICT VIOLATED THE RTMP’S REQUIRED SELECTION PROCESS FOR NEW PROJECTS.**

The RTMP establishes a procedure whereby the public may propose a ‘project’ to be considered for budgetary approval. In this case, however, in considering projects for the Alto Bowl Preserve, including the Middagh Trail, the District only considered a project from a single biking organization while meanwhile *rejecting without consideration proposals from local citizen groups* to rehabilitate and improve the condition of the trails in the Preserve that

qualified as scoreable projects under the RTMP rules. AR 86 3296

In proceeding this way, the District effectively cut off consideration of any project *not* proposing to add mountain biking to the Preserve and Trail. After reviewing the record, the trial court found in Respondent's favor that the District abused its discretion by not following its own required procedures in selecting future projects for review. 4 CTA 733-735.

**1. RTMP Process for Selecting Projects for Budget Review.**

The RTMP establishes a step by step procedure in which the District scores projects for consideration for funding and approval. Projects must involve *reconstruction*, rerouting, active decommissioning, road to trail conversion or new construction. *See* AR 62 3151 (Table 5.1.) 'Reconstruction' includes "[a]ctions taken to correct significant defects or to repair, replace, or *restore* major components of a road or trail that have been destroyed, damaged, or *significantly deteriorated during the life of the facility.*" *Id.* (emphasis added.) Under Step One the District "will accept project proposals from the public at any time" and that the "evaluation of all proposals submitted by August each year will be completed by November." AR 62 3155. Under Step two, the District evaluates proposed projects for consistency with RTMP policies. *Id.* at 3156. Under Step three, projects that are consistent are scored and screened. *Id.*<sup>31</sup> Projects yielding a net reduction in "biophysical impacts and that enhance visitor experience and safety are then

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<sup>31</sup>To score proposals, the District will use "the Road and Trail Evaluation Tool," which will evaluate the following characteristics of proposed trail projects: 1) environmental (potential for natural and cultural resource impacts); 2) physical (existing physical conditions that affect sustainability); and 3) social (potential contribution to the visitor experience). *Id.* at 3160. *See also id.* at 3161 (Table 5.2, listing scoring criteria.)

integrated into a reprioritized list of road and trail projects." *Id.*<sup>32</sup>

**2. The District Only Considers Projects that Expand Trail Usage to Bikes.**

In August 2016, a number of citizen groups submitted proposed projects for the Alto Bowl Preserve, including the Middagh Trail, including many proposals to conduct restoration and rehabilitation work within the Preserve, *without involving a change of use* to allow bikes. *See e.g.*, AR 66 3266-3268 (ABHA/Orth proposal for rehabilitation work on trails in Preserve); AR 70 3240-3243 (Mill Valley HOA proposal to widen, stabilize and add switchbacks to Gasline Trail); AR 75 3270-3275 (Marin Open Space proposal to remediate trails to avoid erosion and sediment); AR 73 3254-3261 (ABHA proposal to recontour and rehabilitate Gasline and Horse Hill trails).

Inexplicably, the District declined to score any of these and other community proposals in evaluating which projects would be chosen for budget approval. *See* AR 86 3296.<sup>33</sup> Instead the only proposed project considered for the Preserve and Middagh Trail was the MCBC's proposal to allow bikes along the Middagh Trail, along with improvements to stream crossings and

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<sup>32</sup> The remaining steps concern the budgetary process. Under Step four, the District ranks competing proposals to determine which will be included in the District budget. *Id.* at 3156-3157. Under Step five, the District presents a proposed budget at a Board of Supervisors hearing. *Id.* at 3158. Step six is the "adoption of annual budgets and commencement of work," which "is the public's last opportunity to comment on proposed expenditures." *Id.* at 3159.

<sup>33</sup> Scoring a proposed project is Step Three of the RTMP process and essential for a project to receive budgetary consideration by the District and County. *See* AR 62 3160 (District will score environmental, physical and social costs and benefits for each project, including effects on "visitor experience")

sites lines to install speed control features. *Id.*<sup>34</sup>

The District rejected the community proposals based largely on its determination that the proposals offered ‘no scoreable options.’ *See* AR 86 3296. However, these projects would all have provided restoration, new construction and rerouting of trails in the Preserve to improve environmental conditions, each of which fall squarely within the RTMP’s list of ‘scoreable’ items. *Id. Compare* AR 62 3151 (Table 5.1 listing categories of scoreable projects) to AR 66 3266-3268; AR 70 3240-3243; AR 71 3244-3246; AR 73 3254-3261; AR 75 3270-3275; 76 3277-3279. The trial court agreed, finding that at least some of the community proposals were scoreable under the RTMP criteria and thus the District’s failure to score such proposals “did not conform to its own mandatory evaluation methodology and constitute[d] an abuse of discretion.” 4 CTA 734-735.

The District’s failure to score any of these proposals effectively eliminated consideration of any non-biking option as a future alternative for the Preserve, a result mirroring the District’s failure to consider a ‘no project’ alternative to the change in use, which would be required in a CEQA review.<sup>35</sup>

Rather than evaluating the non-biking proposals for future restoration work in the Preserve, the District’s actions appear pre-ordained, thereby creating distrust among affected public users of the Preserve. *See* AR 296 4961 (“How mountain bike access improves Alto Bowl OSP terrain...user

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<sup>34</sup>Each of the four ‘Region One’ projects selected for consideration by the District involve either construction or conversion of trails to allow for bikes. *See id.* (“Region 1 Proposed TRMP Projects as of 11/10/2015.”).

<sup>35</sup> One of the community proposals rejected by the District as non-scoreable was a no-project alternative. *See* AR 72 3247-3253. This proposal refutes the need for the Project as well as the District’s assumption that the Project would provide benefits to the environmental and to visitor experience. *Id.*

experience, wildlife habitat, and scenic values is beyond my comprehension.”); 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.”)<sup>36</sup>

### **3. The District’s Arguments are Unavailing.**

The District argues that the “RTMP does not require that the District score every single proposal it receives,” and that “[o]nly those projects that successfully emerge from Step 2 may be scored using the Evaluation Tool discussed in Step 3.” DOB, pp. 54-55. However, the District only rejected a single proposal at the Step 2 stage based on RTMP policies, which was a proposed rehabilitation of the Gas Line and Horse Hill trails that the District concluded were inconsistent with RTMP design standards. AR 86 3296.<sup>37</sup> Here the record does not demonstrate that the District found any of the other

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<sup>36</sup>*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.”)

<sup>37</sup>The notice provides no explanation of which standards were inconsistent or why the District could not simply accept the trail proposal for evaluation with the assumption that the eventual engineering would have to meet whatever ‘design standards’ are in fact at issue in the RTMP. *See e.g.*, AR 73 3256 (project proposes “coordination with design and planning teams at PG&E.”)



community proposals inconsistent with RTMP policies, and thus not eligible to be scored pursuant to Step Three.

The District makes a second argument, that the Orth proposal, specifically cited by the Court as an *example* of a scoreable project that was not scored, *see* 4 CTA 735:4-7, was *inconsistent with RTMP policies* and for that reason was not scored. *See* DOB, pp. 55-56. The Orth Proposal proposed rehabilitation work on all Preserve trails, including Middagh. *See* AR 66 3266-3268. However, the District *never* made a determination that the proposal was in conflict with any policies, *see* AR 86 3296, and thus cannot argue now that it followed the required steps for trail project evaluation. *See Georgetown Preservation Society v. County of El Dorado, supra*, 30 Cal. App. 5th at 379 (“[I]t is a basic rule of administrative review that precludes a party from manufacturing after-the-fact findings that an agency never made.”)<sup>38</sup>

On a substantive level, the argument also lacks merit. For example, the District argues that a proposal for “horse friendly steps” on a trail historically used by equestrians is *contrary* to RTMP policies, or that restoration and repair of a trail historically limited to hikers and horse riders is contrary to RTMP policies *unless it also opens up the area to mountain biking*. *See* DOB, pp. 55-56. But these positions improperly override consideration of other equally important RTMP policies that strongly *support* the trail uses and improvements proposed by the local communities, including policies that specifically endorse limiting at least some trails in the County to equestrians and hikers. *See e.g.*, AR 62 3145 (Policy SW.16) (District “may *prohibit certain trail uses* or apply increased trail use restrictions [in areas] proximate to stables and those traditionally heavily traveled by equestrians.”); *Id.* (Policy SW.17) (District

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<sup>38</sup> At best these ‘policy’ arguments now made in the District’s brief are those of litigation counsel and thus entitled to no deference from this Court.

must “strive to prevent displacement of equestrians and pedestrians when accommodating trail access and trail connections for mountain bikers.”)

Here, the diverse ‘policies’ of the RTMP represent a balancing of many different resource values. *See* AR 62 3141-3148. In contrast, the District improperly takes a position that it *need not consider* any new project in the Preserve that does not include a multi-use trail that accommodates mountain biking. *See* DOB, pp. 55-56 (Orth proposal is “inconsistent with the RTMP’s goal of accommodating high levels of visitor use providing ‘varied uses and experiences.’”)<sup>39</sup> Such an approach, however, is in potential direct conflict with Policies SW.16 & SW.17, referenced above.

Here, the many RTMP policies must be appropriately evaluated together as part of the RTMP’s scoring system, including measuring the effect of a proposed trail project on ‘visitor experience.” AR 62 3160. For the District to assume that the Preserve with its long history of hiking and equestrian activities is *only eligible for bike oriented development* projects is unsupported by the RTMP. The District’s failure to follow the required steps for determining eligible projects for future funding violates the RTMP. *See*

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<sup>39</sup> The District characterizes the Alto Bowl Preserve as an ‘Impacted Area,” *see* DOB, p. 56:1-3, defined in the RTMP as an area in which “[v]isitors should expect frequent encounters with others and with staff, but *not wildlife*,” and which shall be “managed to accommodate high levels of visitor use,” including bikes. AR 62 3135. (emphasis added.) But this description does not describe the Preserve or Middagh Trail, which are exonerated in the record as a peaceful area where unusual wildlife sightings are frequent and valuable to local users. *See e.g.*, 82 AR 3290 (“The ABHA proposal form’s allusion to intangible qualities that define the region: serenity and safety: freedom from situations that provoke anxiety or hyper-vigilance - should be high on the list for those considering changes to the status quo.”); AR 515 5256 (“There is abundant wildlife here, deer, owls, rabbits, foxes, possums, the occasional bobcat, wild turkeys, quail, and of course skunks and raccoons too.”)

*Kreeft v. City of Oakland, supra*, 68 Cal. App. 4th at 53 (agency failure to follow procedure actionable under traditional mandamus.)

## V. CONCLUSION

For the reasons stated above, Respondent requests the Court to affirm the trial court's ruling setting aside the District's approval of the Project until it has complied with the RTMP and CEQA.

DATED: February 14, 2019

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

**CERTIFICATION OF WORD COUNT**  
(Cal Rules of Court, Rule 14(c)(1))

The text of Respondent's Opposition Brief consists of 17,653 words, as counted by the Corel Word Perfect word processing program used to generate this brief.

DATED: February 14, 2019

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

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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:

**RESPONDENT’S OPPOSITION 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 February 14, 2019, in Contra Costa County, California.

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

Proof - Respondent;s Opposition Brief.wpd