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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

NJD, LTD., Plaintiff and Appellant, v. THE CITY OF SAN DIMAS et al., Defendants and Respondents.	B160784 (Los Angeles County Super. Ct. No. BC213996)

APPEAL from a judgment of the Superior Court of Los Angeles County, Judith M. Ashmann-Gerst and David P. Yaffe, Judges. Affirmed.

Newmeyer & Dillion, Karen J. Lee, and Paul L. Starita for Plaintiff and Appellant.

Brown, Winfield & Canzoneri, Inc., Vickie E. Land, Mark W. Steres, and Tracy M. Noonan for Defendants and Respondents.

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of part III (B).

I. INTRODUCTION

NJD, Ltd., plaintiff, appeals from a judgment in favor of the defendants, the City of San Dimas (the city) and its city council. On appeal, plaintiff contends Judge Judith M. Ashmann-Gerst erroneously denied an in limine motion in connection with a facial regulatory takings challenge to amendments to the city's municipal code which restricted construction in a hillside area. Plaintiff further argues that Judge David P. Yaffe incorrectly denied its mandate petition alleging violations of the California Environmental Quality Act (Pub. Resources Code[1], § 21000 et seq.). In the published portion of this opinion, we will discuss the issue resolved by Judge Ashmann-Gerst—the evidence she could consider in resolving plaintiff's facial takings challenge to the constitutionality of the city's hillside zoning restrictions. We find no prejudicial error or abuse of discretion. Accordingly, we affirm the judgment.

II. BACKGROUND

Plaintiff owns approximately 200 acres of land in the city's northern foothills. The foothills area consists of nearly 3,000 acres of land, more than 900 of which are undeveloped and privately owned. The foothills are a sparsely populated area of steep terrain. The fire risk in the area is high. Roughly one-half the foothills area is occupied by the Angeles National Forest, parkland, an equestrian center, and a golf course.

On July 22, 1997, the city instituted a moratorium on development in the northern foothills area. The moratorium was in effect through July 22, 1999. During that time, a consultant under contract with the city studied development of the area and produced a report. An environmental impact report was subsequently prepared. Following public

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1 Unless otherwise indicated all future statutory references are to the Public Resources Code.

hearings, the city council approved a general plan amendment.[2] The city council also adopted the Northern Foothills Specific Plan, which was included in the San Dimas

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[2] The Land Use Element of the San Dimas General Plan was amended by Resolution No. 99-43 to add the following: "The steepness and visual prominence of the Northern Foothills area create a unique challenge to the management of future development and the protection of the area's sensitive environment. The steep slopes are exposed to the south, southwest, and southeast, and are highly visible through the City of San Dimas and beyond. Of the 33 undeveloped properties within the Northern Foothills area, only two had average slopes less than 30 percent. Even at low, rural densities, significant grading would be required for residences and access roads. Grading at a 2:1 densities or even 1.5:1 slope ratio will result in extended benches before a daylight line can be reached. [¶] In the past, the adopted objectives for hillside residential areas spoke to preservation of the natural landscape, while providing for rural residential development. The problem is that a policy of preserving the natural landscape could not be literally applied to the Northern Foothills area because any development within the rugged Northern Foothills would result in loss of the natural landscape and habitat. In addition, policies that are appropriate to other hillside areas within San Dimas cannot adequately address the unique needs and challenges of the Northern Foothills planning area. Thus, the General Plan should provide for a specific and separate policy direction for the Northern Foothills. [¶] The guiding principle for managing environmental values and future development within the Northern Foothills area is to protect the area's natural environmental and existing resources, and to ensure that the design/layout of future hillside developments (1) preserve sensitive resources in place, (2) adapt to the natural hillside topography and maximizes view opportunities to, as well as from the development. Overall, the strategy emphasizes fitting projects into their hillside setting rather than altering the hillside to fit the project. Thus, although individual property rights within the Northern Foothills Area must be recognized, the priority between development and natural resource values should be given to protecting the resource." The Land Use Standards were amended to set forth development feasibility zones and maximum allowable densities. Maximum allowable densities were set forth depending upon location within or outside a development feasibility zone and actual slope, followed by a statement that, "Achievement of the maximum development intensity cited above is not guaranteed; the actual yield of any development is to be determined based upon: [¶] ♦ site-specific physical characteristics; [¶] ♦ the need for mitigation or avoidance of impacts to biological habitats; [¶] ♦ the environmental sensitivity of proposed site design, grading, and type of construction; [¶] ♦ available on-site and off-site access; and [¶] ♦ the ability of the proposed project to avoid impacts on other properties."

Municipal Code as Chapter 18.542.[3] The city's actions are referred to collectively as "Amendment 99-1." It is undisputed plaintiff purchased its foothills property while the moratorium was in effect and the development study was ongoing, but before the development restrictions were enacted.

Plaintiff filed a mandate petition alleging California Environmental Quality Act violations. Judge Yaffe denied the petition. The matter was later tried on plaintiff's first amended complaint alleging inverse condemnation, due process and equal protection violations, and seeking declaratory relief. Judge Ashmann-Gerst found plaintiff had not established the elements of its claims. As noted above, plaintiff appeals from the judgment denying its writ petition and finding against it on its first amended complaint.

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[3] The Northern Foothills Specific Plan, San Dimas Municipal Code Chapter 18.542, established "the type, location, intensity and character of development to take place" in the area. The statement of its purpose and intent is as follows: "A. Responsible development of the Northern Foothills of the City can be ensured through the adoption of a development control mechanism that reflects thorough and comprehensive land use planning. The most suitable development control mechanism is the specific plan, which when adopted, serves both a planning function and a regulatory function. [¶] B. The purpose of Specific Plan No. 25 is to provide for managing environmental values and future development within the northern foothills area in order to protect the area's natural environment and existing resources and to ensure that the design of future hillside developments preserves sensitive resources in place, adapts to the natural hillside topography and maximizes view opportunities to, as well as from, the developments. Overall, the strategy emphasizes fitting projects into their hillside setting rather than altering the hillside to fit the project. Thus, although individual property rights within the Northern Foothills Area must be recognized, the priority between development and natural resource values should be given to protecting the natural resource. [¶] C. Specific Plan No. 25 establishes the type, location, intensity and character of development to take place. It functions as a general blueprint of future development, focusing on the physical characteristics of the site and integration of the same with surrounding uses." The Specific Plan sets forth maximum allowable single-family dwelling unit densities consistent with the General Plan.

III. DISCUSSION

A. Inverse Condemnation

1. General principles of takings jurisprudence

a. The two constitutional provisions

The federal and state Constitutions guarantee real property owners "just compensation" when their land is "taken for public use . . . ." (U.S. Const., 5th Amend.; Cal. Const., art. I, § 19.) The federal takings clause is made applicable to the states through the Fourteenth Amendment. (*Palazzolo v. Rhode Island* (2001) 533 U.S. 606, 617; *Kavanau v. Santa Monica Rent Control Bd.* (1997) 16 Cal.4th 761, 773.) California's takings clause is somewhat broader in its application than its federal counterpart. Article I, section 19 of the California Constitution provides in part, "Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner." Unlike the Fifth Amendment federal takings clause which provides "nor shall private property be taken for public use, without just compensation," article I, section 19 of the California Constitution provides coverage for "damage[] for public use . . . ." As a result, article I, section 19 of the California Constitution protects what the California Supreme Court has characterized as "'a somewhat broader range of property values'" than does the corresponding federal constitutional provision. (*San Remo Hotel v. City and County of San Francisco* (2002) 27 Cal.4th 643, 664; *Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 9, fn. 4.) Aside from that difference, the California Supreme Court has construed the state and federal clauses congruently. (*San Remo Hotel v. City and County of San Francisco*, *supra*, 27 Cal.4th at p. 664; see *Santa Monica Beach, Ltd. v. Superior Court* (1999) 19 Cal.4th 952, 957, 962-975.)

b. The two types of takings—categorical and regulatory

i. The United States Supreme Court's analysis

The United States Supreme Court has identified two types of takings liability; categorical and regulatory takings. In *Brown v. Legal Foundation of Wash.* (2003) ___ U.S. __, __ [123 S.Ct. 1406, 1417-1418], the United States Supreme Court synthesized its prior decisions concerning the two types of takings: "'Our jurisprudence involving condemnations and physical takings is as old as the Republic and, for the most part, involves the straightforward application of *per se* rules. Our regulatory takings jurisprudence, in contrast, is of more recent vintage and is characterized by "essentially ad hoc, factual inquiries," *Penn Central* [*Transp. Co. v. City of New York* (1978)] 438 U.S. [104], 124 [] designed to allow "careful examination and weighing of all the relevant circumstances." *Palazzolo* [*v. Rhode Island, supra,*] 533 U.S. [at p.] 636 (O'CONNOR, J., concurring).'" (See *San Remo Hotel v. City and County of San Francisco, supra,* 27 Cal.4th at p. 664.)

As to the first type, categorical takings, which are subject to per se rules, in *Brown*, citing its decision last year in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* (2002) 535 U.S. 302, 321-323, the United States Supreme Court held: '"When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner, [citation], regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof. Thus, compensation is mandated when a leasehold is taken and the government occupies the property for its own purposes, even though that use is temporary. [Citations.] Similarly, when the government appropriates part of a rooftop in order to provide cable TV access for apartment tenants [citation]; or when its planes use private airspace to approach a government airport [citation], it is required to pay for that share no matter how small.'" (*Brown v. Legal Foundation of Wash.*, *supra*, 123 S.Ct. at p. 1418; see *Loewenstein v. City of Lafayette* (2002) 103 Cal.App.4th 718, 728.)

In *Brown*, again citing to its analysis in *Tahoe-Sierra Preservation Council*, the United States Supreme Court contrasted the categorical duty to compensate, which is subject to the straightforward application of per se rules, with regulatory takings as follows: "'But a government regulation that merely prohibits landlords from evicting tenants unwilling to pay a higher rent, [citation]; that bans certain private uses of a portion of an owner's property, [citations]; or that forbids the private use of certain airspace, [citation], does not constitute a categorical taking.'" (*Brown v. Legal Foundation of Wash.*, *supra*, 123 S.Ct. at p. 1418, citing *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, *supra*, 535 U.S. at pp. 321-323.) The United States Supreme Court in *Brown* characterized the differences between the categorical and regulatory takings as follows: "'"'The first category of cases requires courts to apply a clear rule; the second necessarily entails complex factual assessments of the purposes and economic effects of government actions." [Citations.]'" (*Brown v. Legal Foundation of Wash.*, *supra*, 123 S.Ct. at p. 1418, citing *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, *supra*, 535 U.S. at pp. 321-323.)

In *Palazzolo v. Rhode Island*, *supra*, 533 U.S. at pages 617-618, the United States Supreme Court identified two regulatory taking situations. The first is where a regulation denies a landowner all economically viable use of the property. The second compensable regulatory taking scenario occurs when a regulation places limitations on land use that fall short of a complete deprivation of all economically beneficial use of the property. In *Palazzolo*, the United States Supreme Court held: "[W]e have given some, but not too specific, guidance to courts confronted with deciding whether a particular government action goes too far and effects a regulatory taking. First, we have observed, with certain qualifications . . . that a regulation which 'denies all economically beneficial or productive use of land' will require compensation under the Takings Clause. *Lucas* [*v. South Carolina Coastal Council* (1992)] 505 U.S. [1003,] 1015 []; see also *id*., at 1035 (KENNEDY, J., concurring); *Agins v. City of Tiburon* [(1980)] 447 U.S. 255, 261 [].

Where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action. *Penn Central* [*Transp. Co. v. City of New York*,] *supra*, 438 U.S. at p. 124 []. These inquiries are informed by the purpose of the Takings Clause, which is to prevent the government from 'forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' *Armstrong v. United States* [(1960)] 364 U.S. 40, 49 []." *(Palazzolo v. Rhode Island*, *supra*, 533 U.S. at pp. 617-618; accord *San Remo Hotel v. City and County of San Francisco*, *supra*, 27 Cal. 4th at p. 664.)

The California Supreme Court has described the applicable test for a compensable regulatory taking in a similar vein in *Hensler v. City of Glendale, supra,* 8 Cal.4th at page 10, a case involving an ordinance restricting hillside construction, as follows: '"But where the government merely regulates the use of property, compensation is required only if considerations such as the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole.' (*Yee v. City of Escondido* (1992) 503 U.S. 519 [].) An individualized assessment of the impact of the regulation on a particular parcel of property and its relation to a legitimate state interest is necessary in determining whether a regulatory restriction on property use constitutes a compensable taking. (See, e.g., *Dolan v. Tigard, Ore.* (1994) [512] U.S. [374, 386-391].)"

ii. The two caveats to the United States Supreme Court analysis

We use the United States Supreme Court categorical-regulatory taking dichotomy with prudence in two respects. First, the categorical duty to compensate arises when, for

example, government seizes private property. (*Brown v. Legal Foundation of Wash.*, *supra*, 123 S.Ct. at p. 1418; *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, *supra*, 535 U.S. 322.) But in *Lucas v. South Carolina Coastal Council*, *supra*, 505 U.S. at page 1015, the United States Supreme Court used the term "categorical treatment" to describe a regulation that denied an owner "all economically beneficial or productive use of land." Also, in *Lucas*, the majority noted that the "categorical rule" applied to a "total regulatory taking[]." (*Id*. at p. 1026.) Plaintiff argues that a regulatory taking occurred and relies in large part on *Lucas* in support of its admissibility of evidence contentions. Our analysis assumes a regulatory taking claim has been posited and does so utilizing the dichotomy identified in *Palazzolo v. Rhode Island*, *supra*, 533 U.S. at page 617, which treats *Lucas* as a regulatory as distinguished from a categorical takings case.

Second, we recognize that there is some decisional inconsistency in the first type of regulatory taking identified in *Palazzolo*. According to *Palazzolo*, the first type of regulatory taking occurs when an enactment '"denies *all* economically beneficial or productive use of the land . . . ."' (*Palazzolo v. Rhode Island*, *supra*, 533 U.S. at p. 617, italics added; see *ante*, at p. 9.) In *Palazzolo*, as authority for this type of regulatory taking, the majority relied in part on and cited to Associate Justice Lewis Powell's opinion in *Agins v. City of Tiburon, supra,* 447 U.S. at pages 260-261, a facial takings case, where the Supreme Court articulated as the test for a taking in a zoning case the following: "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, see *Nectow v. Cambridge* [(1928)] 277 U.S. 183, 188 [], or *denies an owner economically viable use of his land*, see *Penn Central Transp. Co. v. New York City*, [*supra*,] 438 U.S. [at p. 138, fn. 36]." (Italics added.) In *Palazzolo*, the majority also relied on its prior decision in *Lucas v. South Carolina Coastal Council*, *supra*, 505 U.S. at pages 1015-1016. In *Lucas*, Associate Justice Antonin Scalia referred in a single paragraph to a regulatory takings claim as "where regulation denies all economically beneficial or

productive use of land" and later, citing *Agins v. City of Tiburon*, *supra*, 447 U.S. at page 261, as when an enactment "'*denies an owner economically viable use of his land*.'" (*Lucas v. South Carolina Coastal Council*, *supra*, 505 U.S. at pp. 1015-1016, original italics.[4]) Quite obviously, in *Agins*, Associate Justice Powell did not state that the loss of "all" "economically viable use of [the] land" was a prerequisite to a regulatory takings claim. (*Agins v. City of Tiburon*, *supra*, 447 U.S. at p. 261.) But in *Lucas*, the other relevant decision cited in *Palazzolo,* in one sentence, Associate Justice Scalia used the modifier "all" to refer to the required economic deprivation. But, in another sentence in the same paragraph, Associate Justice Scalia did not use the modifier "all." (*Lucas v. South Carolina Coastal Council*, *supra*, 505 U.S. at pp. 1015-1016, italics deleted.) We will apply the modifier "all" to the requisite economic deprivation because it is used in *Palazzolo,* which represents a determination by the United States Supreme Court to bring greater definitional certitude to its takings jurisprudence. Finally, in this case the presence or absence of the modifier "all" is immaterial to the outcome given the circumstances of plaintiff's regulatory facial takings claim.

c. The two relevant types of challenges to a zoning statute—facial and as applied

A landowner may allege a taking based on an inverse condemnation cause of action on either a facial or an as-applied basis. The clearest description of a facial takings

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4 The complete paragraph is as follows: "The second situation in which we have found categorical treatment appropriate is where regulation denies all economically beneficial or productive use of land. See *Agins* [*v. City of Tiburon*, *supra*, 447 U.S. at p.] 260 []; see also *Nollan v. California Coastal Comm'n* [(1987)] 483 U.S. 825, 834 []; *Keystone Bituminous Coal Assn. v. DeBenedictis* [(1987)] 480 U.S. 470, 495 []; *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.* [(1981)] 452 U.S. 264, 295-296 []. As we have said on numerous occasions, the Fifth Amendment is violated when land-use regulation 'does not substantially advance legitimate state interests or *denies an owner economically viable use of his land*.' *Agins* [*v. City of Tiburon*, *supra*, 447 U.S. at p.] 260 (citations omitted) (emphasis added)." (*Lucas v. South Carolina Coastal Council*, *supra*, 505 U.S. at pp. 1015-1016, fns. omitted.)

challenge by the United States Supreme Court is in *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., supra,* 452 U.S. at pages 295-296: "Because appellees' taking claim arose in the context of a facial challenge, it presented no concrete controversy concerning either application of the [Surface Mining Control and Reclamation] Act to particular surface mining operations or its effect on specific parcels of land. Thus, the only issue properly before the District Court and, in turn, this Court, is whether the 'mere enactment' of the Surface Mining Act constitutes a taking. [Citation.] The test to be applied in considering this facial challenge is fairly straightforward. A statute regulating the uses that can be made of property effects a taking if it 'denies an owner economically viable use of his land . . . .' [Citations.]" (See *Keystone Bituminous Coal Ass'n v. DeBenedictis, supra,* 480 U.S. at p. 495.) The "mere enactment" test was described in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, *supra*, 535 U.S. at page 318 like this, "[B]ecause petitioners brought only a facial challenge, the narrow inquiry before the Court of Appeals was whether the mere enactment of the regulations constituted a taking." The United States Supreme Court has observed that a litigant pursuing a facial challenge in a takings case faces an "'uphill battle.'" (*Suitum v. Tahoe Regional Planning Agency* (1997) 520 U.S. 725, 736, fn. 10; *Keystone Bituminous Coal Ass'n v. DeBenedictis*, *supra*, 480 U.S. at p. 495.) The Supreme Court has noted, "[I]t is difficult to demonstrate that "'mere enactment"' of a piece of legislation 'deprived [the owner] of economically viable use of [his] property.' *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, [*supra*,] 452 U.S. at p. 264, 297 []." (*Suitum v. Tahoe Regional Planning Agency*, *supra*, 520 U.S. at p. 736, fn. 10.)

The California Supreme Court has more succinctly differentiated between facial and as-applied challenges as follows: "Generally, '[a] facial challenge to the constitutional validity of a statute or ordinance considers only the text of the measure itself, not its application to the particular circumstances of an individual.' (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084 [].) On the other hand, '[a]n as applied challenge may seek . . . relief from a specific application of a facially valid statute or

ordinance to an individual or class of individuals who are under allegedly impermissible present restraint or disability as a result of the manner or circumstances in which the statute or ordinance has been applied . . . .' (*Ibid*.)" (*Santa Monica Beach, Ltd. v. Superior Court, supra,* 19 Cal. 4th at p. 961.)

2. Plaintiff's precise contention

The first cause of action in the first amended complaint is entitled, "INVERSE CONDEMNATION - FACIAL TAKING." The first cause of action in the amended complaint alleges: a regulatory taking occurs when a regulation fails to substantially advance a legitimate public purpose or denies a property owner economically viable use of land; Amendment 99-1 failed to advance a legitimate public purpose; the express purpose of Amendment 99-1 was to prevent development; a provision of Amendment 99-1 required property owners to provide access for horse trails without adequate compensation; and the actions of the city amounted to an inequitable precondemnation activity. The first amended complaint alleges that the following provisions of Amendment 99-1 rendered development "economically unfeasible": the "maximum densities" allowable under Amendment 99-1 reduced the number of permissible units that could be developed to "an uneconomic level"; the development standards were such that even that "uneconomic level" could not be attained; the lot size standards rendered "development economically unfeasible"; the clustering of units on less than one acre lots and the construction of sufficiently wide roadways to meet fire department standards prevented the servicing of "homes with sewers and [spreading] the costs of roads and other proper municipal services over sufficient units to create an economic development"; the requirement that homes be one story in height increased the need for grading; the grading requirements and other standards assured that the homes would be of low square footage thereby rendering development of marketable residences uneconomic; there was no variance procedure to escape application of the standards

because they are part of the city's general and specific plan; and there is no economically viable agricultural or other use. Plaintiff alleges that Amendment 99-1 thereby denied it "all economically viable use of the[] property," which constituted a de facto taking without just compensation.

Prior to the trial before Judge Ashmann-Gerst, defendants filed an in limine motion which sought the following, "[D]efendants . . . hereby move . . . for an order in limine excluding any and all evidence, reference to evidence, testimony or argument other than Amendment 99-1 itself, relevant evidence in the administrative record of that legislation, and judicially noticeable facts regarding the physical condition of the properties . . . in support of plaintiff['s] claim contained within its First Cause of Action for Facial Taking that Amendment 99-1 deprives it of economically viable use of its property." Judge Ashmann-Gerst granted the in limine motion.

On appeal, plaintiff contends that Judge Ashmann-Gerst erroneously granted the in limine motion. Plaintiff argues that economic impact evidence is an essential component of a facial challenge in a takings case. Plaintiff's principal authority consists of two quotations in the United States Supreme Court decision in *Lucas v. South Carolina Coastal Council*, *supra*, 505 U.S. at pages 1016, footnote 6, and 1018. The first quotation relied upon by plaintiff from *Lucas* is as follows, "[R]egulations that leave the owner of land without economically beneficial or productive options for its use -- typically, as here, by requiring land to be left substantially in its natural state -- carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious harm." (*Id*. at p. 1018.)

Additionally, plaintiff relies upon a footnote in *Lucas* which is a response by the majority to analysis appearing in a footnote in a dissenting opinion of Associate Justice Harry Blackmun.[5] In response to Associate Justice Blackmun's analysis, the majority

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[5] The footnote in Associate Justice Blackmun's dissenting opinion which prompted the majority analysis discussed in the body of this opinion was as follows: "The Court's suggestion that *Agins v. City of Tiburon*, [*supra*,] 447 U.S. 255 [], a unanimous opinion,

argued in its own footnote, the following italicized portions upon which plaintiff relies: "We will not attempt to respond to all of Justice BLACKMUN's mistaken citation of case precedent. Characteristic of its nature is his assertion that the cases we discuss here stand merely for the proposition 'that proof that a regulation does *not* deny an owner economic use of his property is sufficient to defeat a facial takings challenge' and not for the point that '*denial* of such use is sufficient to establish a takings claim regardless of any other consideration.' *Post*, at 2911, n. 11. [¶] The cases say, repeatedly and unmistakably, that "'[t]he test to be applied in considering [a] facial [takings] challenge is fairly straightforward. *A statute regulating the uses that can be made of property effects a taking if it 'denies an owner economically viable use of his land*.'"" *Keystone* [*Bituminous Coal Assn. v. DeBenedictis*[, *supra,*] 480 U.S. 470*,*] 495*,* quoting *Hodel* [*v. Virginia Surface Mining & Reclamation Assn., Inc.*, [*supra*, 452 U.S. at pp.] 295- 296 [] (quoting *Agins* [*v. City of Tiburon, supra,*] 447 U.S. at 261 [] (emphasis added). [¶] Justice BLACKMUN describes that rule (which we do not invent but merely apply

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created a new *per se* rule, only now discovered, is unpersuasive. In *Agins*, the Court stated that 'no precise rule determines when property has been taken' but instead that 'the question necessarily requires a weighing of public and private interest.' *Id*., at 260-262 []. The other cases cited by the Court, *ante*, at 2893, repeat the *Agins* sentence, but in no way suggest that the public interest is irrelevant if total value has been taken. The Court has indicated that proof that a regulation does *not* deny an owner economic use of his property is sufficient to defeat a facial takings challenge. See *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, [*supra*,] 452 U.S. [at pp. 295-297]. But the conclusion that a regulation is not on its face a taking because it allows the landowner some economic use of property is a far cry from the proposition that *denial* of such use is sufficient to establish a takings claim regardless of any other consideration. The Court never has accepted the latter proposition. [¶] The Court relies today on dicta in *Agins*, *Hodel*, *Nollan v. California Coastal Comm'n*, [*supra,*] 483 U.S. 825 [], and *Keystone Bituminous Coal Assn. v. DeBenedictis*, [*supra*,], 480 U.S. 470, for its new categorical rule. *Ante*, at 2893. I prefer to rely on the directly contrary holdings in cases such as [*Hadacheck*] *v. Sebastian*, 239 U.S. 394 [] (1915), and [*Mugler*] *v. Kansas*, 123 U.S. 623 [] (1887), not to mention contrary statements in the very cases on which the Court relies. See *Agins*, 447 U.S., at 260-262 []; *Keystone Bituminous Coal* [*Assn. v. DeBenedictis, supra*], 480 U.S., at 489, n. 18. []" (*Lucas v. South Carolina Coastal Council*, *supra*, 505 U.S. at pp. 1049-1050, fn. 11 (dis. opn. of Blackmun, J.).)

today) as 'alter[ing] the long-settled rules of review' by foisting on the State 'the burden of showing [its] regulation is not a taking.' *Post*, at 2909. This is of course wrong. Lucas had to do more than simply file a lawsuit to establish his constitutional entitlement; *he had to show that the Beachfront Management Act denied him economically beneficial use of his land*. Our analysis presumes the unconstitutionality of state land-use regulation only in the sense that *any* rule with exceptions presumes the invalidity of a law that violates it--for example, the rule generally prohibiting content-based restrictions on speech. See, e.g., *Simon & Schuster, Inc. v. N.Y. Members of State Crime Victims Bd.*, 502 U.S. 105, 115 [] (1991) ('A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech'). Justice BLACKMUN's real quarrel is with the substantive standard of liability we apply in this case, a long-established standard we see no need to repudiate." (*Lucas v. South Carolina Coastal Council*, *supra*, 505 U.S. at p. 1016, fn. 6, orig. italics.) Based on the foregoing dictum, a portion of it arising in the context of an inter-court debate in footnotes in *Lucas*, plaintiff argues that as part of its facial challenge to Amendment 99-1 it had a duty and the corresponding right to present evidence as to the lack of any economically viable use of its hillside property.

On appeal, plaintiff argues it should have been permitted to present evidence that as a consequence of the adoption of Amendment 99-1, its hillside property lost "all economic viability under private ownership . . . ." Plaintiff asserts the reasons its hillside property had lost all economic viability because of the adoption of Amendment 99-1 were as follows: the diminution in the number of residential units that could be built; a reduction in the potential revenue that would be derived from the sale of "single family homes"; an increase in the land development expenditures expressed on a cost per unit basis; the permitted densities of either 20 or 5 dwelling units resulted in insufficient cash flow to compensate the developer for investment and risks associated with development; and the permitted densities of either 20 or 5 dwelling units failed to provide for an adequate "return on the initial land investment."

3. The takings issue posited by plaintiff and the standard of review

It is crucial to identify the two components of the precise challenge before us. Plaintiff is making a *facial* challenge to Amendment 99-1. As such, the legal issue plaintiff presents is what the United States Supreme Court characterized as '"whether the 'mere enactment'" of Amendment 99-1 constitutes a taking, i.e., denies the '"owner economically viable use"' of the hillside property. (*Keystone Bituminous Coal Assn. v. DeBenedictis*, *supra*, 480 U.S. at p. 495; *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, *supra*, 452 U.S. at , 295-296.) Plaintiff is further contending that a regulatory rather than a categorical taking has occurred. The regulatory taking is of the first type identified in *Palazzolo*; Amendment 99-1 has deprived plaintiff of "all economically beneficial or productive use" of its hillside property. (*Palazzolo v. Rhode Island*, *supra*, 533 U.S. at p. 617.) Therefore, the issue before Judge Ashmann-Gerst was whether the facial challenge warranted the presentation of the aforementioned evidence to prove that Amendment 99-1 deprived plaintiff of all '"economically beneficial or productive use'" of its hillside property. (*Ibid.*) In assessing plaintiff's evidentiary admissibility contentions on appeal, we apply the deferential abuse of discretion standard of review. (*Dart Industries, Inc. v. Commercial Union Ins. Co.* (2002) 28 Cal.4th 1059, 1078; *People v. Alvarez* (1996) 14 Cal.4th 155, 203.)

4. Judge Ashmann-Gerst did not abuse her discretion in denying plaintiff's motion to present the proffered evidence in support of its facial challenge to Amendment 99-1

We agree with defendants that Amendment 99-1 provided economically beneficial uses as well as discretionary procedures to mitigate any unfairness in its application. Among other things, Amendment 99-1 permits: single-family residences; equestrian uses; and commercial communications facilities (San Dimas Mun. Code, [6] § 18.542.120); public utility facilities (Mun. Code, § 18.542.140),[7] the construction of one residential structure on every 5 to 80 acres depending on the status of the natural slope of the hillside

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[6] All citations to the municipal code are to the San Dimas Municipal Code as found at http://municipalcodes.lexisnexis.com/ codes/sandimas/.

Municipal Code section 18.542.120 refers to "Permitted land uses" and states, "Primary uses in Specific Plan No. 25 are as follows: [¶] A. Detached single-family residential; [¶] B. Grazing; [¶] C. Public parks and open space; [¶] D. Public and private trails; [¶] E. Public and/or quasi-public utility transmission, communication and/or service facilities, provided that the proposed facility shall be located a minimum of three hundred feet from the nearest residence and not exceed twenty-five feet in height."

Municipal Code section 18.542.130 provides for conditional uses as follows: "A. Wireless communications facilities, in accordance with Section 18.150.070(B). [¶] B. Equestrian facilities, including horse boarding." (See also San Dimas Mun. Code, § 18.542.380 [horses may be quartered and maintained]; § 18.542.390 [equestrian trails].)

Municipal Code section 18.150.010 states, "It is the desire of the city to encourage an aesthetically pleasing local environment. It is also the intent of the city to encourage the expansion of wireless technology because it provides a valuable service to residents and business persons in the city. It is the city's goal to encourage wireless providers to construct new facilities disguised as public art pieces or to mount antennae on buildings in a way that blends architecturally with the built environment."

[7] Municipal Code section 18.542.140 states in part, "Accessory uses in Specific Plan No. 25 are as follows: [¶] . . . [¶] E. Public utility facilities, as approved by the director of planning; . . . ."

(Mun. Code, § 18.542.110);[8] and the construction of at least one dwelling unit on each existing lot regardless of the density limitations established under the slope analysis (Mun. Code, § 18.542.110(D)).[9]

Further, the variance procedures set forth in the city's municipal code were available to ameliorate any harshness imposed by the hillside property development limitations. Municipal Code section 18.204.010 states: "When practical difficulties, unnecessary hardships, or results inconsistent with the general intent and purpose of this title occur by reason of the strict interpretation of any of its provisions, any property owner may initiate proceedings for consideration of a variance from the provisions of this title. [¶] A variance will not be granted to permit a land use expressly prohibited in the zone in which the property is located." No doubt, as plaintiff argues, the variance procedure cannot be utilized to modify requirements imposed by the city's general plan. (See *deBottari v. City Council* (1985) 171 Cal.App.3d 1204, 1211-1212; Gov. Code, § 65860, subd. (a) ["[C]ity zoning ordinances shall be consistent with the general plan of

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8 Municipal Code section 18.542.110 sets the maximum allowable density for new development at one dwelling unit per 5 to 80 acres depending on the natural slope of the land. Pursuant to Municipal Code section 18.542.050(B), "'Natural slope' means the vertical change in elevation over a given horizontal distance prior to grading or any alteration." "'Average slope,'" on the other hand, "means the average slope in a given geographical area as determined according to [a specified formula]." (San Dimas Mun. Code, § 18.542.050(A).) Municipal Code section 18.542.110(B) states, "Achievement of the maximum development intensity cited above is not guaranteed; the actual yield of any development is to be determined based upon: [¶] 1. Site-specific physical characteristics; [¶] 2. The need for mitigation or avoidance of impacts to biological habitats; [¶] 3. The environmental sensitivity of proposed site design, grading and type of construction; [¶] 4. Available on-site and off-site access and circulation; and [¶] 5. The ability of the proposed project to avoid impacts on other properties."

9 Municipal Code section 18.542.110(D) provides, "Within the Specific Plan No. 25 area, there are existing lots of record that exceed the maximum development densities cited above. For these parcels, one single-family dwelling unit may be permitted without compliance with maximum allowable density and minimum lot size but subject to all other regulations and requirements of this specific plan."

the . . . city . . ."].) But because Amendment 99-1 is part of the city's municipal code, the variance provisions of chapter 18.204 set forth above allow for amelioration of any of its unduly harsh provisions. Moreover, Amendment 99-1 allows for some very limited discretion in connection with: grading (Mun. Code, § 18.542.230(D);[10] setbacks (Mun. Code, § 18.542.260);[11] lot and site design (Mun. Code, § 18.542.270);[12] adjustment of

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[10] Municipal Code section 18.542.230(D) provides, "Grading is permitted under the following guidelines: [¶] . . . [¶] 3. The extent of visible exposed cut or fill banks shall be limited to twelve feet except where the use of a specific grading technique minimizes the visual impact or aids in visual screening. [¶] 4. Significant landmark features as determined by the planning division, such as prominent trees and areas of special natural beauty, shall be preserved. . . ."

[11] Setbacks are governed by Municipal Code section 18.542.260, which provides as follows: "A. Front Yard Setbacks. Front yard setbacks shall be a minimum of fifty feet but a lesser minimum setback may be reviewed and approved by the development plan review board if warranted by topographic conditions or to otherwise comply with the intent of standards set forth in this specific plan. [¶] B. Side Yard Setbacks. Side yard setbacks shall be a minimum of forty feet but a lesser minimum setback may be reviewed and approved by the development plan review board if warranted by topographic conditions or to otherwise comply with the intent of standards set forth in this specific plan. [¶] C. Setbacks for Accessory Structures. Setbacks for accessory structures shall be as established by the development plan review board, but no less than forty feet to the side or rear yard property line but a lesser minimum setback may be reviewed and approved by the development plan review board if warranted by topographic conditions or to otherwise comply with the intent of standards set forth in this specific plan."

[12] Municipal Code section 18.542.270 governs lot and site design. It states, "All site plans shall be in compliance with the following standards: [¶] A. New development shall be designed to fit into the natural character of the area rather than relying on substantial landform modification to create artificial building pads. [¶] B. The visual intrusiveness of new development shall be minimized. [¶] C. Site design shall utilize varying setbacks, structure heights, innovative building techniques, and retaining walls to blend structures into the terrain. [¶] D. Lot and site design shall consider building separation to maintain a rural character and to facilitate privacy between residential structures. [¶] E. Site design shall allow for different lot shapes and sizes, as well as the provision of split development pads, with the prime determinant being the natural terrain. [¶] F. Houses shall not be excessively tall so as to dominate their surroundings. Structures shall be a maximum of one story in height, but may be constructed on split, flat pads contained within a limited envelope parallel to the finished grade, rather than

driveways and roadways (Mun. Code, §§ 18.542.280, 18.542.290);[13] placement of utilities (Mun. Code, § 18.542.320);[14] and the like. Additionally, Amendment 99-1 vests

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'jutting out' over natural slopes. [¶] G. Flag lots shall be allowed in areas where it is demonstrated that the end result is the preservation of natural topography by minimizing grading. [¶] H. Structures shall be sited in a manner that will fit into the hillside's contour and relate to the form of the terrain; retain outward views while maintaining the natural character of the hillside; preserve vistas of natural hillside areas and ridgelines from public places and streets; preserve existing views; and, allow new dwellings access to views similar to those enjoyed from existing dwellings . . . ."

[13] Municipal Code section 18.542.280 provides, "In addition to the standards established by Chapter 18.156 [vehicle parking and storage], the following standards will apply: [¶] A. General. Driveways and drives shall be designed to a grade and alignment that will provide the maximum of safety and convenience for vehicular, emergency and pedestrian use and in a manner which will not interfere with drainage or public use of the street areas. Driveways shall be located and designed to minimize disturbance to natural terrain. [¶] B. A minimum of two off-street parking spaces within a fully enclosed garage shall be provided for each dwelling unit. In addition, four off-street parking spaces for guests shall be provided for each dwelling unit. Off-street guest parking may be reduced where it is found that sufficient on-street parking is available or excessive grading would be necessary to create the off-street guest parking. [¶] C. Driveways shall have a minimum width of sixteen feet, unless modified to preserve natural terrain pursuant to the plan disposition procedure. [¶] D. The occasional use of common driveways serving two or more residences can drastically reduce the potential monotonous repetition of driveways as well as reduce grading and the on-site costs of development. Driveways which serve more than one lot, as well as diagonal driveways running along contour lines, are encouraged as a means of reducing unnecessary grading, paving and site disturbance. These arrangements shall be encouraged . . . ."

Pursuant to Municipal Code section 18.542.290, governing access and circulation, "Plans delineating access to the subject site and area[]wide circulation shall be required and shall be in compliance with the following standards: [¶] A. Street Design Standards. Street designs shall comply with the following standards: [¶] 1. Roadways within Specific Plan No. 25 shall provide for minimum safe passage of two cars along a paved road section, except in limited circumstances and as approved by the planning director and city engineer. [¶] 2. Street widths shall conform to the following minimum street sections. On-street parking shall be prohibited unless deemed safe or unless parking turn-outs are provided. [¶] 3. Streets shall follow the natural contours of the hillside to minimize cut and fill . . . . [¶] 4. Streets may be split into two, parallel one-way streets, thereby effectively

functioning as a two-way street with a median, in steeper areas to minimize grading and blend with the terrain . . . . [¶] 5. Cul-de-sacs or loop roads are encouraged where necessary to fit the terrain. [¶] 6. On-street parking and sidewalks may be eliminated, subject to city approval, to reduce required grading. [¶] B. Roadway Curve and Grade Standards. Roadway grades and curves should accommodate safety and emergency vehicles. [¶] 1. Existing roadway grade standards shall be applied to all proposed subdivisions and parcel maps. However, the planning director and city engineer may grant exceptions to existing roadway standards for grades and curves where, in their judgment, existing or future access cannot reasonably meet such standards. These exceptions are to be limited to providing access to a single-family dwelling on an existing lot of record along roadways which will ultimately serve a maximum of four dwellings, based on the maximum allowable density in the General Plan, and where not providing such an exception would effectively preclude access to an existing lot of record. [¶] 2. Where the planning director and city engineer grant an exception to roadway grade standards, owners whose land is served by such a roadway will be required to provide adequate assurance that the roadway will be kept properly maintained at all times. In addition, such landowners will be required to record a deed restriction which prohibits further subdivision of the property without meeting roadway grade standards and provides an acknowledgment of this special circumstance. Such owners will also be required to indemnify the city or any other service provider against any liability regarding emergency or nonemergency vehicle access. [¶] C. Circulation Standards. Roadway improvements to provide access to parcels shall not adversely affect other properties through extensive grading, flood control facilities, or any other type of construction and/or requisite support infrastructure. [¶] D. Reductions in Minimum Roadway Standards. In conjunction with the review of a development proposal, consideration may be given to reducing certain specified roadway standards pursuant to the following: [¶] 1. Within the upper elevations of the northern foothills area, a further reduction in required roadway width may be permitted for private roadways which will ultimately serve a maximum of four dwellings, based on the maximum allowable density permitted by the General Plan, and where not providing such a reduction would effectively preclude access to an existing lot of record. For such roadways, roadway standards may permit a curb-to-curb width which does not allow for passage of two vehicles (minimum sixteen feet, measured edge-to-edge) for a distance of up to one hundred fifty feet in any one segment. [¶] a. Where such a reduction in roadway width is permitted, owners whose land is served by such a roadway shall be required to provide adequate assurance that the roadway will be kept properly maintained at all times. In addition, such landowners will be required to record a deed restriction

the city's planning director with authority to make minor modifications to the specific plan.[15] Hence, defendants argue that, *on its face,* Amendment 99-1 does not constitute a

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which prohibits further subdivision of the property without meeting roadway width requirements, and provides an acknowledgment of this special circumstance. Such owners will also be required to indemnify the city or any other service provider against any liability regarding emergency or nonemergency vehicle access. [¶] 2. An exception to current city roadway requirements for street paving may be permitted along private roadways which will ultimately serve a maximum of four dwellings, based on the maximum density allowable in the General Plan. Such limited use roadways should be permitted to be hard packed (e.g., decomposed granite) as approved by the planning director and city engineer, provided that adequate maintenance is guaranteed to ensure that the roadway will be regularly graded and kept clear of ruts and debris. [¶] a. Where such an unpaved roadway is permitted, owners whose land is served by such a roadway shall be required to provide adequate assurance that the roadway will be kept properly maintained at all times. In addition, such landowners will be required to record a deed restriction which prohibits further subdivision of the property without providing required paving, and provides an acknowledgment of this special circumstance. Such owners will also be required to indemnify the city or any other service provider against any liability regarding emergency or nonemergency vehicle access."

14 Placement of overhead utilities is governed by Municipal Code section 18.542.320, which provides, "Overhead utilities may be permitted and shall comply with the following standards. [¶] A. Overhead utilities (e.g., electrical, telephone, etc.) should only be permitted within the right-of-way of roadways connecting development areas; to serve development of a single dwelling unit on an existing lot of record; and within the rights-of-way of roadways where all lots are five acres in size or greater. [¶] B. In cases where aboveground utilities are permitted within the right-of-way of a roadway, connections to individual dwellings shall be underground. Utilities shall continue to be underground within subdivisions and parcel maps along roadways serving parcels smaller than five acres, as currently required. Where overhead utilities are permitted, their adverse visual impact on surrounding properties is to be mitigated through sensitive placement. [¶] C. Clear cutting of vegetation for an overhead utility corridor shall not be permitted. [¶] D. Plans shall indicate location of utilities and utility easements serving or intending to serve the proposed structures. The approvals may require or otherwise facilitate the appropriate sizing of utilities to serve other parcels in the area and the provision of access to those utilities by the same parcels."

15 Municipal Code section 18.542.040(E), which is part of Amendment 99-1 and the city's municipal code, states, "Minor modifications to the specific plan, which do not

regulatory taking depriving plaintiff of all economically viable use of its hillside property.

In response to defendants' foregoing analysis, the only controlling authority cited by plaintiff is *Lucas v. South Carolina Coastal Council*, *supra*, 505 U.S. at page 1016, footnote 6, discussed above. (See *ante* at pp.14-15.) Initially, it should be noted that the language relied upon by plaintiff does not discuss the issue of admissibility of evidence in a facial challenge to regulatory taking. The United States Supreme Court has repeatedly emphasized that its decisions are not controlling authority for propositions not considered by it in the case. (*Landgraf v. USI Film Products* (1994) 511 U.S. 244, 265 ["[T]he 'maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used'"]; *R.A.V. v. City of St. Paul, Minn.* (1992) 505 U.S. 377, 386-387, fn. 5 [it is "contrary to all traditions of our jurisprudence to consider the law on this point conclusively resolved by broad language in cases where the issue was not presented or even envisioned"]; *U. S. v. Stanley* (1987) 483 U.S. 669, 680 ["no holding can be broader than the facts before the court"].) The issue before us was not before the United States Supreme Court in *Lucas*—hence, it is not the controlling authority plaintiff claims it is.

Most importantly though, *Lucas* is materially factually different from the present case. In *Lucas*, the regulation at issue prohibited the building of any inhabitable structure on the property. Associate Justice Scalia described the factual and legal issue in *Lucas* as follows: "In 1986, petitioner David H. Lucas paid $975,000 for two residential lots on the Isle of Palms in Charleston County, South Carolina, on which he intended to build single-family homes. In 1988, however, the South Carolina Legislature enacted the Beachfront Management Act . . . which had the direct effect of barring petitioner from erecting any permanent habitable structures on his two parcels. [] A state trial court

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give rise to a conflict with the intent of the specific plan as approved, may be approved by the director of planning at his discretion."

found that this prohibition rendered Lucas's parcels 'valueless.'" (*Lucas v. South Carolina*, *supra*, 505 U.S. at pp. 1006-1007.) Later, Associate Justice Scalia described the effect of the land use regulation at issue like this: "[U]nder the [Beachfront Management] Act construction of occupiable improvements was flatly prohibited [on Mr. Lucas's property]. The [Beachfront Management] Act provided no exceptions." (*Id*. at pp. 1008-1009.) The South Carolina Beachfront Management Act, which on its face accomplished a regulatory taking, is materially different from San Dimas's Amendment 99-1 with its exceptions and the availability of the safeguard of the variance procedure.

Further, Judge Ashmann-Gerst, without abusing her discretion, could find the evidence plaintiff proffered irrelevant to a facial challenge. In *Keystone Bituminous Coal Assn. v. DeBenedictis*, *supra*, 480 U.S. at page 494, Associate Justice John Paul Stevens explained the precise nature of a takings challenge, a facial as distinguished from an as-applied claim, is critical to assessing takings litigation. Associate Justice Stevens wrote: "The posture of the case is critical because we have recognized an important distinction between a claim that the mere enactment of a statute constitutes a taking and a claim that the particular impact of government action on a specific piece of property requires the payment of just compensation." (*Ibid*.) As already noted, in both *Hodel* and *Keystone*, the United States Supreme Court explained that: there is no set formula for assessing a regulatory taking; in the regulatory taking context, "'These "ad hoc, factual inquiries" must be conducted'" by a court; in a facial challenge in the regulatory takings context, the issue is whether the "mere enactment" of the statute is at issue; and a facial challenge presents no "'concrete controversy'" as to the application of the statute to the property at issue. (*Id.* at pp. 494-495; *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, *supra*, 452 U.S. at p. 295-296.) The "mere enactment" language which defines the nature of a facial challenge also appears in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, *supra*, 535 U.S. at page 318. All of plaintiff's proffered evidence related to the application of Amendment 99-1 to the profitable development of

its hillside property. Thus, without abusing her discretion, Judge Ashmann-Gerst could conclude that plaintiff's proffered evidence was irrelevant to its facial challenge.

Three other points are pertinent to plaintiff's takings claim. First, we are not holding that no evidence may be received in a facial regulatory takings case. In this case, Judge Ashmann-Gerst had an extensive array of evidence before her concerning Amendment 99-1 including the administrative record. There was no issue as to the extent of Amendment 99-1 and its exceptions. There was no dispute as to plaintiff's standing to bring suit. By contrast for example, in *Lucas*, the plaintiff had a duty to demonstrate his parcel was subject to the South Carolina's Beachfront Management Act. Certainly, a party has a right to present relevant evidence. But the amount and type of admissible evidence depends on the type of takings challenge; be it categorical or regulatory, facial or as-applied. Of course on appeal, these matters are reviewed for an abuse of discretion. Second, plaintiff does not assert the second type of regulatory taking described in *Palazzolo* has occurred; viz. when the regulatory action has not eliminated all economically beneficial uses but a taking depends on a "complex of factors" including the economic effect, the extent of interference with the owner's reasonable investment-backed expectations, and the character of the government action. (*Palazzolo v. Rhode Island*, *supra*, 533 U.S. at pp. 617-618, citing *Penn Central Transp. Co. v. City of New York*, *supra*, 438 U.S. at p. 124; see *Kavanau v. Santa Monica Rent Control Bd., supra,* 16 Cal.4th at p. 775.) We need not resolve whether a facial claim can be pursued in the context of this second type of regulatory takings case. Given our discussion, we need not address the other contentions posited by the parties.

Third, plaintiff contends the only way to make development economically feasible would be to substantially increase allowable density; moreover, because both the general and specific plans set forth maximum density, a legislative amendment of the general plan and adoption of a new specific plan would be required. Therefore, plaintiff reasons, the availability of variance procedures applicable to the specific plan but not to the general plan (Mun. Code, § 18.204.010 et seq.) is immaterial. As discussed above,

whether there is no economically viable use of plaintiff's property absent a change in the allowable density is a question that exceeds the reach of a facial challenge to Amendment 99-1. It presents a concrete controversy as to the application of the zoning restrictions to plaintiff's particular property. Plaintiff's argument with respect to the restrictions set forth in the general plan does not render its facial challenge viable.

[Part III B is deleted from publication. See *post* at p. 48 where publication is to resume.]

B. California Environmental Quality Act Claims

Plaintiff argues the trial court erred in finding the city had complied with the procedural and information disclosure requirements of the California Environmental Quality Act. (§ 21000 et seq.) Specifically, plaintiff asserts the city failed to: make available during the scoping period the November 1998 version of a study that was incorporated by reference into the initial study; make available for public review the general plan amendment, zone change, and specific plan, which were incorporated by reference into the environmental impact report; and subject the determination of development feasibility zones to environmental review. We find no prejudicial abuse of discretion.

1. Background

The city issued a notice of preparation of a draft environmental impact report on December 18, 1998. The notice of preparation described the project as follows: "The project study area is an area of primarily undeveloped land consisting of approximately 3,000 acres in the portion of San Dimas north of Foothill Boulevard. Under the existing General Plan, the maximum development permitted is one dwelling unit per five acres (1 du/5 ac), which would permit a total of 195 dwelling units on the 972 vacant acres in the

project area. The development strategy proposed in the *Northern Foothills Development and Infrastructure Study* (November 1998) would permit a maximum of 127 dwelling units on the 972 vacant acres. The project entails a General Plan Amendment and a Zone Change/Specific Plan. The General Plan Amendment is a request to amend the San Dimas General Plan text to create a 'Northern Foothills' land use designation and to outline development policies and requirements specific to the Northern Foothills area consistent with the 'Northern Foothills Development Strategy.' The Zone Change/Specific Plan is a request to create a new zone or specific plan to implement the policies and requirements of the General Plan and the adopted Development Strategy." A program environmental impact report was selected because no specific development proposals were included as part of the project. The city acknowledged that specific development proposals submitted after termination of the existing moratorium could potentially be subject to further environmental review.

An initial study, dated December 17, 1998, was attached to the notice of preparation. The initial study incorporated by reference the *Northern Foothills Development and Infrastructure Study* (the northern foothills study), and stated that it was available for review. [16] References to the northern foothills study in the initial study were to the November 1998 version thereof, as opposed to earlier drafts. Further, discussion in the initial study reflected development restrictions as set forth in the November 1998 draft of the northern foothills study. The initial study discussed the

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[16] The initial study stated in relevant part, "Pertinent documents relating to this Initial Study have been cited and incorporated, in accordance with Sections 15148 and 15150 of the [California Environmental Quality Act] Guidelines, to eliminate the need for inclusion of voluminous engineering and technical reports within the [environmental impact report]. . . . This Initial Study incorporates the *City of San Dimas General Plan, General Plan Environmental Impact Report . . . ,* and the *Northern Foothills Development and Infrastructure Study* by reference. These planning documents include numerous mitigation measures and policies related to the proposed project. These documents were utilized throughout this Initial Study/Environmental Checklist and are available for review at the City of San Dimas."

project's location, characteristics, and objectives. In addition, the initial study contained a lengthy analysis of environmental factors potentially affected by development in the northern foothills area of the city.

As discussed below, plaintiff asserts the final environmental impact report should have discussed potential connection to the City of Glendora sewer system. With that argument in mind, we note that the initial study contained a discussion of whether the proposed project would result in a need for new or substantial alterations to wastewater service systems. It stated as follows: "*Sewer or septic tanks?* **Potentially Significant Impact.** [¶] Existing development within the Northern Foothills areas is currently being served with sewer service. Because this development is limited to the lower portions of the project area, sewer services have not been extended into the higher elevations of the foothills. Due to the high costs associated with sewer extension and the low likelihood that the development densities proposed in the area's steep hillside could support the required costs, it is anticipated that individual homes would utilize septic tanks. The Program [environmental impact report] will discuss potential constraints associated with placement of septic tank leach fields. In addition, the Program [environmental impact report] will discuss the potential opportunity for a portion of the project area to connect to the public sewer system in Glendora." (Second italics added.)

In a letter to the city dated January 14, 1999, one month after the notice of preparation issued, plaintiff's counsel, Karen J. Lee, complained that her client had been denied a copy of the northern foothills study between early November 1998 (*before* the notice of preparation issued) and mid-January 1999.[17] Moreover, Ms. Lee, on behalf of

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[17] On January 14, 1999, Ms. Lee wrote: "We wrote to the Mayor and City Council Members on November 10, 1998[, prior to issuance of the notice of preparation,] requesting a copy of the [study]. Neither this office nor any other representative of our client was provided a copy of the document. Rather we were repeatedly told by [the city planning director] that the document was not available, and we were told by [the city's consultant] that they had been instructed not to release the document. On January 12, 1999, [after the notice of preparation was issued,] [the city planning director] again stated

plaintiff, stated the study she ultimately received was *not* the November 1998 version. She related date tracers on the pages of chapter 5 of the northern foothills study—which set forth the development strategy and proposed restrictions—reflected a May 1998 revision date.[18] Plaintiff's counsel's comments on the initial study, which were attached to her January 14, 1999, letter, included the following: "The incorporated and utilized [northern foothills study] was still represented to be incomplete and in draft as of January 12, 1999, and the opportunity to review even a draft of [that] document was denied to [plaintiff] until January 12, 1999. Although we were at last provided with a copy of the [northern foothills study], the copy provided is not the November 1998 draft referred to and incorporated within the Initial Study. As the date tracers at the bottom of each page of the document reveal, the document is current at its most recent sections as of June 3, 1998, with other sections being no more recent than April 1997. The essential chapter 5 on the Development Strategy for the Area dates from May 1998. Therefore, it is difficult (and perhaps impossible) to make meaningful comments on this dis-information."

Chapter 5 of the November 1998 northern foothills study set forth a development strategy and recommended revisions to the city's general plan and zoning provisions. Development feasibility zones, minimum lot sizes, maximum building heights, and

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that the document was not finished. Only after I stated that the document was referred to in the Notice of Hearing received by us did he agree that we could obtain a copy of the document. [The city planning director] further stated that he had given lots of copies of the document to various property owners. Despite that claim, [our client] was affirmatively denied access to this document for over two months."

[18] Ms. Lee, on plaintiff's behalf, in her January 14, 1999, letter wrote: "Finally, although we were at last provided with a copy of the [study], the copy provided is not the November 1998 draft referred to and incorporated within the Initial Study. As the date tracers at the bottom of each page of the document reveal, the document is current at its most recent sections as of June 3, 1998, with other sections being no more recent than April 1997. The essential chapter 5 on the Development Strategy for the Area dates from May 1998. Where is the mythical November 1998 draft supposedly available for review by the public?"

allowable density were among the specific recommendations. The development feasibility zones were defined prior to the preparation of the draft environmental impact report. The development feasibility zones were defined in the November 1998 northern foothills study by reference to several factors including topography and water availability.[19] An earlier version of the northern foothills study, dated June 3, 1998, had recommended a greater allowable density, larger minimum lot sizes, and higher maximum building heights.[20] But at the city council meeting held on July 28, 1998, it was determined that the June 1998 version of what would ultimately become the November 1998 northern foothills study should be revised in certain respects. Other differences between the June 1998 draft and the November 1998 northern foothills study included in the later document increased restrictions on development along primary ridgelines and a recommendation to preserve open space through a purchase of development rights program rather than a transfer of development rights program.

A public scoping meeting was held on January 20, 1999. "Scoping" refers to early consultation, prior to completing a draft environmental impact report, with any person the lead agency believes will be concerned with the environmental effects of the project. (Guidelines, § 15083.)[21] As described by the California Supreme Court, "scoping" refers

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[19] The manner in which the development feasibility zones were defined is discussed in the northern foothills study. The considerations outlined include slope steepness, physical access alternatives, visual intrusiveness of the new development, and grading options.

[20] The earlier version, dated June 3, 1998, had been mailed by the city, on June 9, 1998, to property owners. The city described the document as "the latest, most complete copy of the [s]tudy."

[21] All references to a Guideline are to the California Environmental Quality Act Guidelines in the California Code of Regulations, Title 14.

Guidelines section 15083 provides: "Prior to completing the draft EIR, the lead agency may also consult directly with any person or organization it believes will be concerned with the environmental effects of the project. Many public agencies have

to the screening process before a draft environmental impact report is released whereby a local agency initially determines feasible and infeasible alternatives. (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 569; see *Sierra Club v. Contra Costa County* (1992) 10 Cal.App.4th 1212, 1219-1220.) The Notice of Public Hearing—Scoping Meeting specifically referred to the November 1998 northern foothills study.

In a letter dated January 22, 1999, Ms. Lee raised a number of issues arising out of the scoping meeting, which plaintiff's representatives had attended. Ms. Lee did not mention the November 1998 northern foothills study. Ms. Lee did comment on the possibility of connecting to the Glendora sewer system, an issue raised in the initial study. Ms. Lee's January 22, 1999, letter stated, "[W]hatever restraints the City imposes on the property must still allow economically feasible development," followed by a footnote: "For instance, were the City to determine that primary utilities (such as water and sewers) to [plaintiff's property] must come through San Dimas, the cost of that would be well in excess of $1,000,000 over and above what it would cost to go through Glendora—a standard that would require higher densities for economic development. (Obviously, however, the environmental damage of such a requirement would also be significant.) [Plaintiff] is aware that it would be its responsibility to negotiate access and water service with the City of Glendora."

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found that early consultation solves many potential problems that would arise in more serious forms later in the review process. This early consultation may be called scoping. Scoping will be necessary when preparing and EIR/EIS jointly with a federal agency. [¶] (a) Scoping has been helpful to agencies in identifying the range of actions, alternatives, mitigation measures, and significant effects to be analyzed in depth in an EIR and in eliminating from detailed study issues found not to be important. [¶] (b) Scoping has been found to be an effective way to bring together and resolve the concerns of affected federal, state, and local agencies, the proponent of the action, and other interested persons including those who might not be in accord with the action on environmental grounds. [¶] (c) Where scoping is used, it should be combined to the extent possible with consultation under Section 15082."

In a response to Ms. Lee's letters, the city planning director, Lawrence Stevens, on February 2, 1999, wrote in part: "As I have previously indicated, copies of the Final [northern foothills study] are not available due to the need to resolve minor changes with the consultant. It is expected that copies will be available shortly and you will be notified personally at that time. References in the Initial Study to a December 18 version [*sic*] relate to [the] latest working draft of the 'final' which was provided to [the city's consultant] to facilitate work on related environmental documents. It was my understanding, as I explained to you on January 12, that you were requesting the Final Study and not the Draft which I believed was provided to your consulting team."

The city received comments regarding possible sewer system connection in response to its December 17, 1998, notice of preparation from the County Sanitation Districts of Los Angeles County and the County of Los Angeles Department of Public Works. The city also received comments from the Los Angeles County Department of Health Services, Bureau of Environmental Protection, concerning the installation of septic systems. A geotechnical report prepared by a consultant and dated January 15, 1999, discussed the feasibility of on-site sewage disposal systems and concluded, "[T]he near surface conditions beneath the various [potential development areas] [appeared to be] conducive to the use of trench leach fields for sewage disposal . . . [and] the use of seepage pits also appears to be a reasonable alternative." The report further observed, however, that there were "major constraints" to the use of such systems. The Southern California Water Company responded to a request for information from the environmental impact report drafters concerning the proposed project's impact on groundwater quality stating: "No impact is anticipated if sanitary sew[a]ge collection systems are installed. Degradation of groundwater could result if septic tank disposal systems are permitted in the project area."

A draft environmental impact report was completed on March 1, 1999. The final environmental impact report was completed on June 9, 1999. Both the draft and final environmental impact reports discussed the increased demand for wastewater services

that would result from development of future projects in the northern foothills area. The draft and final environmental impact reports both noted: "[I]n many areas of the project area, extension of sewer lines may not be economically and/or physically feasible. Therefore, on-site sewage disposal systems (i.e., septic tanks/seepage ponds) would be required." Both the draft and final environmental impact reports went on to discuss at length the feasibility and impact of both sewer lines and septic tanks. Further, in both the draft and final environmental impact reports there was a specific analysis of the potential constraints associated with the use of septic systems.[22]

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[22] The discussion is as follows: "Sewage Systems [¶] A portion of the project area is located outside the jurisdictional boundaries of the County Sanitation District of Los Angeles (Districts) and would require annexation into District No. 22 prior to establishing sewer service to future developments within this area. Due to the project area's location, sewage flow originating for the project area would be transported to the local sewers, which are not maintained by the Districts. [¶] The Districts are empowered by the California Health and Safety Code to charge a fee for the privilege of connecting (directly or indirectly) to the Districts' Sewage System or increasing the existing strength and/or quantity of wastewater attributable to a particular parcel or operation already connected. The connection fee is required to construct an incremental expansion of the Sewage System to accommodate the proposed project, which would mitigate the impact of this project on the present sewage system. Payment of a connection fee would be required before a permit to connect to the sewer would be issued. [¶] It should be noted that if there ar[e] no local sewer lines existing within an area suitable for development, it would be the responsibility of the developer(s) to convey any wastewater generated by individual projects to the nearest local sewer and/or Districts trunk sewer. However, in many areas of the project area, extension of sewer lines may not be economically and/or physically feasible. Therefore, on-site sewage disposal systems (i.e., septic tanks/seepage ponds) would be required. [¶] Septic Systems [¶] In general, it is not cost effective to provide sewer lines and provide municipal sewage treatment for lots greater than .05 to 1 acre in size. This is because of the high per unit cost of constructing sewage lines, along with the increased potential of providing on-site private waste disposal via septic tanks. However, the feasibility of using septic tanks is reduced on slopes in excess of 15 percent since lines in the septic tank leach field need to run relatively flat. In addition, in hillside areas, soil depth is often limited, requiring a greater number of leach lines and a larger leach field than might otherwise be necessary on flatter ground. To compensate, there is often the temptation to try to 'regrade' slopes to provide areas suitable for leach field installation. However, this requires increased landform modification, which in turn increases the risks of slope instability and the loss of visual and biological resources. [¶]

Additionally, mitigation measures identified in the draft and final environmental impact reports included the following: "All septic systems (i.e., trench/leach fields and seepage pits) shall be installed at locations pursuant to the requirements of the Los Angeles County Health Department"; "Prior to the installation of a private sewer or septic system, the project applicant(s) shall consult with the California Regional Water Quality Control Board (RWQCB) on a project-by-project basis to obtain waste discharge requirements"; "Prior to tentative map approval and issuance of building permits, as applicable, the project applicant(s) shall analyze and demonstrate the feasibility of constructing on-site sewage disposal systems . . . for any given subdivision pursuant to the requirements of the Uniform Plumbing Code and subject to review and approval by the City of San Dimas"; and "Prior to the approval of any on-site sewage disposal systems or the issuance of drilling permits, soil testing and applicable geological reports shall be submitted to the County of Los Angeles Department of Health Services and to the City of San Dimas for review and approval . . . ."

While the extension of sewer systems into the higher elevations of the foothills is physically possible, it would be prohibitively expensive to do so. Because of the high costs associated with sewer extension and the development densities that could be physically accommodated within the area's steep hillside to support these costs, it is most likely that individual homes would install septic tanks. The area needed for placement of a septic tank leach field would be a key factor in minimum lot sizes in the hills. [¶] One of the criteria by which a septic filter field is judged the United States Department of Agriculture, Soil Conservation Service, *Report and General Soil Map, Los Angeles County, December, 1969, the Soil Limitation Rating for Septic Tank Filter Fields* (see Table 5.10-2, below). [*Sic*] These criteria state: [¶] '*The septic tank filter field is part of the septic tank absorption system for on-site sewage disposal. It is a subsurface tile system laid in such a way that effluent from the septic tank is distributed with reasonable uniformity into the natural soil. Three degrees of limitation are used: slight, moderate, and severe.* [¶] *Criteria and standards used for rating soils are made on the basis of soil limitations. The soil limitation rating is based on soil depth, slope, permeability, percolation rate, water table, soil drainage, and overflow or flooding hazards. The most limiting part of the soil is used in determining the rating.*' [¶] Given the [soil limitation rating criteria for septic tank filter fields] identified in Table 5.10-2, prior to the installation of any septic tank and/or septic tank filter field, site-specific soils reports would need to be prepared."

Also in June 1999, as part of Amendment 99-1, the general plan amendment and specific plan No. 25 were adopted. The general plan amendment and the specific plan, as enacted, were consistent with recommendations in the November 1998 northern foothills study in all material respects including minimum lot size, maximum building height, use of overhead and underground utilities, and protection of primary ridgelines.

2. Environmental impact report purposes

The California Supreme Court has explained that an environmental impact report serves an informational purpose. "The Legislature has made clear that an [environmental impact report] is 'an informational document' and that '[t]he purpose of an environmental impact report is to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project.' (§ 21061; Guidelines, § 15003, subds. (b)- (e).) . . . [¶] The [environmental impact report] is the primary means of achieving the Legislature's considered declaration that it is the policy of this state to 'take all action necessary to protect, rehabilitate, and enhance the environmental quality of the state.' (§ 21001, subd. (a).) The [environmental impact report] is therefore 'the heart of [the California Environmental Quality Act].' (Guidelines, § 15003, subd. (a); *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810 [].) An [environmental impact report] is an 'environmental "alarm bell" whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return.' (*Ibid.*; *Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 822 [].) The [environmental impact report] is also intended 'to demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action.' (*No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 86 [] . . . ; Guidelines, § 15003, subd. (d).) Because the [environmental impact

report] must be certified or rejected by public officials, it is a document of accountability. If [the California Environmental Quality Act] is scrupulously followed, the public will know the basis on which its responsible officials either approve or reject environmentally significant action, and the public, being duly informed, can respond accordingly to action with which it disagrees. (*People v. County of Kern* (1974) 39 Cal.App.3d 830, 842 []; Guidelines, § 15003, subd. (e).) The [environmental impact report] process protects not only the environment but also informed self-government." (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 391-392; accord, *Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1229.)

Similarly, in *Concerned Citizens of Costa Mesa, Inc. v. 32nd District Agricultural Assn.* (1986) 42 Cal.3d 929, 935-936, the California Supreme Court held as follows: "We have indicated that [the California Environmental Quality Act's] fundamental objective is 'to ensure "that environmental considerations play a significant role in governmental decision-making."' (*Fullerton Joint Union High School Dist. v. State Bd. of Education* (1982) 32 Cal.3d 779, 797 [].) To facilitate [the California Environmental Quality Act's] informational role, the [environmental impact report] must contain facts and analysis, not just the agency's bare conclusions or opinions. This requirement enables the decision-makers and the public to make an 'independent, reasoned judgment' about a proposed project. (*Santiago County Water Dist. v. County of Orange*[*, supra,*] 118 Cal.App.3d [at p.] 831 []; *People v. County of Kern*[*, supra,*] 39 Cal.App.3d [at p.] 841 [] . . .); see also Cal. Admin. Code, tit. 14, § 15151.) [¶] 'Public participation is an essential part of the [California Environmental Quality Act] process' (Cal. Admin. Code, tit. 14, § 15201) . . . . [¶] As one commentator has noted, 'the "privileged position" that members of the public hold in the [California Environmental Quality Act] process . . . is based on a belief that citizens can make important contributions to environmental protection and on notions of democratic decision-making . . . .' (Selmi, *The Judicial Development of the California Environmental Quality Act* (1984) 18 U.C.Davis L.Rev. 197, 215-126.) '[The California Environmental Quality Act] compels an interactive

process of assessment of environmental impacts and responsive project modification which must be genuine. It must be open to the public, premised upon a full and meaningful disclosure of the scope, purposes, and effect of a consistently described project, with flexibility to respond to unforeseen insights that emerge from the process.' (*County of Inyo v. City of Los Angeles* (1984) 160 Cal.App.3d 1178, 1185 [].) In short, a project must be open for public discussion and subject to agency modification during the [California Environmental Quality Act] process. (*Ibid.*) This process helps demonstrate to the public that the agency has in fact analyzed and considered the environmental implications of its actions. (*No Oil, Inc. v. City of Los Angeles*[*, supra,*] 13 Cal.3d [at p.] 86 [].)"

3. Standard of review

The city's general plan amendment and adoption of specific plan No. 25 were legislative acts. (*Fall River Wild Trout Foundation v. County of Shasta* (1999) 70 Cal.App.4th 482, 488; *William S. Hart Union High School Dist. v. Regional Planning Com.* (1991) 226 Cal.App.3d 1612, 1625.) Therefore, our review of the city's action is governed by section 21168.5. (*Fall River Wild Trout Foundation v. County of Shasta, supra,* 70 Cal.App.4th at p. 488; see *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 567-568.) Section 21168.5 provides as follows: "In any action or proceeding, other than an action or proceeding under Section 21168, to attack, review, set aside, void or annul a determination, finding, or decision of a public agency on the grounds of noncompliance with this division, the inquiry shall extend only to whether there was a prejudicial abuse of discretion. Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence." In *Laurel Heights Improvement Assn. v. Regents of University of California, supra,* 47 Cal.3d at page 392, the Supreme Court held, "As a result of this standard, 'The court does not pass upon the correctness of the

[environmental impact report's] environmental conclusions, but only upon its sufficiency as an informative document.' (*County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 189 [].)" We review the administrative record independently and apply the section 21168.5 abuse of discretion standard of review. (*Association of Irritated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1390; *Fall River Wild Trout Foundation v. County of Shasta, supra,* 70 Cal.App.4th at p. 488; *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1375-1376.)

Plaintiff contends the city failed to comply with the information disclosure requirements imposed by the California Environmental Quality Act. Noncompliance with the California Environmental Quality Act's information disclosure provisions may constitute a prejudicial abuse of discretion, but prejudice is not presumed. (§ 21005.) [23] Construing section 21005 in *Association of Irritated Residents v. County of Madera, supra,* 107 Cal.App.4th at page 1391, the Court of Appeal held, "Noncompliance with [the California Environmental Quality Act's] information disclosure requirements is not per se reversible; prejudice must be shown. ([Pub. Resources Code,] § 21005, subd. (b).) . . . [A] prejudicial abuse of discretion occurs if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the [environmental impact review] process.' [Citations.]

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[23] Section 21005 states, "(a) The Legislature finds and declares that it is the policy of the state that *noncompliance with the information disclosure provisions of this division which precludes relevant information from being presented to the public agency*, or noncompliance with substantive requirements of this division, *may constitute a prejudicial abuse of discretion* within the meaning of Sections 21168 and 21168.5, *regardless of whether a different outcome would have resulted if the public agency had complied with those provisions.* [¶] (b) It is the intent of the Legislature that, in undertaking judicial review pursuant to Sections 21168 and 21168.5, courts shall continue to follow the established principle that *there is no presumption that error is prejudicial*. [¶] (c) It is further the intent of the Legislature that any court, which finds, or, in the process of reviewing a previous court finding, finds, that a public agency has taken an action without compliance with this division, shall specifically address each of the alleged grounds for noncompliance." (Italics added.)

Numerous authorities have followed and applied this prejudice standard. (See, e.g., *Cadiz* [*Land Co. v. Rail Cycle* (2000)] 83 Cal.App.4th [74,] 95 []; *Fall River Wild Trout Foundation v. County of Shasta*[*, supra,*] 70 Cal.App.4th [at p.] 492 []; [*County of*] *Amador* [*v. El Dorado County Water Agency* (1999)] 76 Cal.App.4th [931,] 946 []; *Del Mar Terrace Conservancy, Inc. v. City Council* (1992) 10 Cal.App.4th 712, 730 [] [disapproved on another point in *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 576, fn. 6].)" If the omission of information frustrates the purpose of the public comment provisions of the California Environmental Quality Act and makes meaningful assessment of potential environmental impacts impossible, the government agency has not proceeded as required by law, and prejudice is presumed. (*Association of Irritated Residents v. County of Madera, supra,* 107 Cal.App.4th at pp. 1391-1392; *Neighbors of Cavitt Ranch v. County of Placer* (2003) 106 Cal.App.4th 1092, 1100-1101; cf. *Sierra Club v. State Bd. of Forestry, supra,* 7 Cal.4th at pp. 1236-1237.)

4. Plaintiff's contentions

Plaintiff contends the city failed to comply with Guidelines section 15082(a)(1). Pursuant to Guidelines section 15082(a)(1), "The Notice of Preparation shall provide the responsible agencies with sufficient information describing the project and the potential environmental effects to enable the responsible agencies to make a meaningful response. At a minimum, the information shall include: [¶] (A) Description of the project, [¶] (B) Location of the project . . . . [¶] (C) Probable environmental effects of the project." We assume that when, as here, the public is invited to participate in the scoping process, Guidelines section 15082(a)(1) must be read as requiring that "sufficient information" be provided to the public as well as to "responsible agencies." The city does not contend otherwise. A copy of the initial study may, as here, be used to supply the necessary information. (Guidelines, § 15082(a)(2).)

Plaintiff's initial California Environmental Quality Act argument is as follows. According to plaintiff, the city failed to make available to the public during the scoping period the November 1998 northern foothills study (and in particular, Chapter 5 thereof). Plaintiff argues that, during the scoping period, only the June 1998 draft of the northern foothills study was available to the public. Plaintiff asserts, "Because these changes impact the viability of such environmental issues as the economic feasibility of utilizing sewers instead of septic tanks and leach fields, the ability of both the agencies and the public to comment on the scope of the [environmental impact report] was compromised." Further, plaintiff argues, "This procedural error was prejudicial both to the agencies' ability to comment on the scope of the [environmental impact report] and on the public's ability to do so."

The first question before us is whether the city failed to make the November 1998 version of the northern foothills study available for review by interested agencies and members of the public as it stated it would do when it issued the December 21, 1998, notice of preparation. More specifically, the question is whether the version of the

document the city actually made available was in fact an earlier and different draft of the northern foothills study. On the record before us, we cannot conclude that the November 1998 version of the northern foothills study was unavailable to the public during the scoping period. Plaintiff has not shown by reference to the record that the November 1998 document was not made available to the public during the scoping period. There is some evidence that in January 1999 plaintiff's counsel may have been given a copy of the study that did not reflect the November 1998 revisions. There was also some evidence the November 1998 draft had previously been provided by the city to plaintiff's "consulting team." In any event, there is no evidence from which we could conclude that the November 1998 study was unavailable *to the public* during the scoping period. The record simply does not support that conclusion. Therefore, we reject plaintiff's assertion the city made available to the public only the June 1998 version of the northern foothills study and not the November 1998 document on which the initial study relied.

Even if we *were* to conclude the city made only the June 1998 version of the study available to agencies and the public during the scoping period, we would not conclude there was a violation of Guideline, section 15082(a)(1) which provides, "Immediately after deciding that an environmental impact report is required, for a project, the lead agency shall send to each responsible agency a notice of preparation stating that an environmental impact report will be prepared. . . . [¶] The notice of preparation shall provide the responsible agencies [and the public] with sufficient information describing the project and the potential environmental effects to enable the responsible agencies [and the public] to make a meaningful response." It is true that the June 1998 draft, in comparison to the November 1998 northern foothills study, proposed a greater allowable density, larger minimum lot sizes, higher maximum building heights, lesser restrictions on development along primary ridgelines, and preservation of open space through a transfer of development rights program rather than a purchase of development rights program, all generally more favorable to potential developers. But specifics as to the development restrictions that might be imposed were not critical to the informative

purposes of the notice of preparation. The June 1998 draft of the November 1998 northern foothills study described the project and its location as required by Guidelines sections 15082(a)(1)(A) and (B). The initial study which was completed on December 17, 1998, and circulated with the notice of preparation on December 18, 1998, itself discussed the probable environmental effects. (Guidelines, § 15082(a)(2)(C).) Both the June 1998 draft and the November 1998 northern foothills study were consistent with respect to the type of development proposed—low-density and low profile—and the environmental concerns raised by allowing such construction. The parameters of the restricted development envisioned by the city were at all times clear. The focus during the scoping process was to identify feasible alternatives to the proposed project warranting environmental impact review. (*Citizens of Goleta Valley v. Board of Supervisors, supra,* 52 Cal.3d at p. 569; Guidelines, § 15083(b).) The information provided in the initial study and the June 1998 draft of the northern foothills study was sufficient to allow responsible agencies and the public to make a meaningful response to the notice of preparation. The specifics of proposed development restrictions, including density, lot size, building height, and the like, may have been of interest to prospective developers, but they were not essential to allow interested parties to meaningfully comment on the necessary scope of *environmental review*.

It is noteworthy that the sole *specific,* rather than conclusory, example plaintiff offers of the purportedly prejudicial effect of the manner in which the city proceeded lacks merit. Plaintiff argues: "For instance, the Initial Study states that the [environmental impact report] 'will discuss the potential opportunity for a portion of the project area to connect to the public sewer system in Glendora.' [ADM.R3:0627] But the actual final document changes the lot sizes to make that 'opportunity' uneconomic (as based on the facts stated elsewhere in the [consultant's study] [*see,* ADM.R7:1901-1908] and the [final environmental impact report] contains no such discussion. [*See,* ADM.R4:1169-1170]. By way of example, the Southern California Water Company may well have had additional comments addressed to the health and safety of the City's

proposal if it had had the opportunity to learn that the lot sizes had been increased *so as to make sewers uneconomic*. [ADM.R3:0705] And the County of Los Angeles, Department of Health Services may also have responded with additional important information. [*See,* ADM.R3:0714]." (Italics added.) The portion of the final environmental impact report plaintiff cites in support of its argument discusses *existing* wastewater conditions, not the potential impact of the proposed project in terms of wastewater. It describes the existing sewer system and states as follows: "Existing development with the Northern Foothills project area is currently being served with sewer service . . . . Because existing development is limited to the lower portions of the project area, sewer services have not been extended into the middle or upper portions of the foothills, nor does the City currently have plans to do so."

As noted above, however, the probable use of septic systems given the proposed low density development was raised in the December 17, 1998, initial study which was circulated with the December 18, 1998, notice of preparation. The December 17, 1998, initial study stated as follows: "*Sewer or septic tanks?* **Potentially Significant Impact.** [¶] Existing development within the Northern Foothills areas is currently being served with sewer service. Because this development is limited to the lower portions of the project area, sewer services have not been extended into the higher elevations of the foothills. Due to the high costs associated with sewer extension and the low likelihood that the development densities proposed in the area's steep hillside could support the required costs, it is anticipated that individual homes would utilize septic tanks. The Program EIR will discuss potential constraints associated with placement of septic tank leach fields. In addition, the Program EIR will discuss the potential opportunity for a portion of the project area to connect to the public sewer system in Glendora."

In addition, both the draft and June 1999 final environmental impact reports discussed the increased demand for wastewater services that would result from development of future projects in the foothills area. The reports noted: "[I]n many areas of the project area, extension of sewer lines may not be economically and/or physically

feasible. Therefore, on-site sewage disposal systems (i.e., septic tanks/seepage ponds) would be required." The June 1999 final environmental impact report went on to discuss at length the feasibility and impact of both sewer lines and septic tanks. Also, the June 1999 final environmental impact report discusses the potential constraints associated with the use of septic tanks.

In addition, as noted above, mitigation measures identified in the final environmental impact report included the following: "All septic systems (i.e., trench/leach fields and seepage pits) shall be installed at locations pursuant to the requirements of the Los Angeles County Health Department"; "Prior to the installation of a private sewer or septic system, the project applicant(s) shall consult with the California Regional Water Quality Control Board (RWQCB) on a project-by-project basis to obtain waste discharge requirements"; "Prior to tentative map approval and issuance of building permits, as applicable, the project applicant(s) shall analyze and demonstrate the feasibility of constructing on-site sewage disposal systems . . . for any given subdivision pursuant to the requirements of the Uniform Plumbing Code and subject to review and approval by the City of San Dimas"; and "Prior to the approval of any on-site sewage disposal systems or the issuance of drilling permits, soil testing and applicable geological reports shall be submitted to the County of Los Angeles Department of Health Services and to the City of San Dimas for review and approval . . . ." Hence, it was envisioned that wastewater systems specific to a particular development project would have to be proposed and approved. It was further expected that approval would be conditioned in part on the satisfaction of health, sanitation, and environmental concerns.

Moreover, the fact that connection to public sewer systems was unlikely to be economically feasible given the low density development proposed, and that use of septic tanks was therefore anticipated, was, as the trial court found, an issue that was raised in the December 17, 1998, initial study itself. In addition, the sewer system versus septic tank question was addressed in agency responses to the December 18, 1998, notice of preparation, in a consultant's report, and in both the March 1999 draft and June 1999

final environmental impact reports. That sewer systems might not be economically feasible and that septic systems might therefore be required was an issue that was raised and addressed at the outset of and continuing through the environmental review process. That the possibility of connection to the *Glendora sewer system* was not specifically discussed could not have prevented any public agency or interested private party from addressing health, safety, or environmental issues relating to the use of septic systems. Hence, the city did not prejudicially fail to comply with information disclosure requirements of the California Environmental Quality Act. There is no showing information was omitted that undermined or frustrated the opportunity for interested parties to meaningfully assess or to comment on the potential environmental impacts of the proposed project with respect to wastewater systems. Whether development on plaintiff's property could be served by connection to the Glendora sewer system, which would apparently be less expensive than connecting to the San Dimas sewer system, was not an environmentally sensitive issue in and of itself. There is no showing environmental concerns would have been raised that were not addressed had the possibility of connection to the Glendora system been specifically explored.

Plaintiff argues the city violated Guidelines section 15150 by failing to make available for public review documents—the general plan amendment, zone change, and specific plan—that were incorporated by reference into the June 1999 environmental impact report. Guidelines section 15150 states: "(a) An [environmental impact report] or negative declaration may incorporate by reference all or portions of another document which is a matter of public record or is generally available to the public. Where all or part of another document is incorporated by reference, the incorporated language shall be considered to be set forth in full as part of the text of the [environmental impact report] or negative declaration. [¶] (b) Where part of another document is incorporated by reference, such other document shall be made available to the public for inspection at a public place or public building. The [environmental impact report] or negative declaration shall state where the incorporated documents will be available for inspection.

At a minimum, the incorporated document shall be made available to the public in an office of the lead agency in the county where the project would be carried out or in one or more public buildings such as county offices or public libraries if the lead agency does not have an office in the county. [¶] (c) Where an [environmental impact report] or negative declaration uses incorporation by reference, the incorporated part of the referenced document shall be briefly summarized where possible or briefly described if the data or information cannot be summarized. The relationship between the incorporated part of the referenced document and the [environmental impact report] shall be described. [¶] (d) Where an agency incorporates information from an [environmental impact report] that has previously been reviewed through the state review system, the state identification number of the incorporated document should be included in the summary or designation described in Subsection (c). [¶] (e) Examples of materials that may be incorporated by reference include but are not limited to: [¶] (1) A description of the environmental setting from another [environmental impact report]. [¶] (2) A description of the air pollution problems prepared by an air pollution control agency concerning a process involved in the project. [¶] (3) A description of the city or county general plan that applies to the location of the project. [¶] (f) Incorporation by reference is most appropriate for including long, descriptive, or technical materials that provide general background but do not contribute directly to the analysis of the problem at hand."

The city concedes that the resolution enacting the general plan amendment and the ordinance adopting the specific plan did not exist when the environmental impact report was prepared. The city urges that the availability of the resolution and ordinance was immaterial because the project reflected in those documents was adequately described and discussed in the environmental review documents. We agree. The proposed language of the general plan amendment and specific development parameters set forth in the November 1998 northern foothills study were entirely consistent with the general plan amendment and specific plan No. 25 as adopted. Moreover, plaintiff has not argued and has not shown that relevant information reflected in the general plan amendment and

the specific plan was withheld thereby precluding informed decision making, knowledgeable public participation, and meaningful assessment of potential environmental impacts. (§§ 21005, 21168.5; *Association of Irritated Residents v. City of Madera, supra,* 107 Cal.App.4th at p.1391; *Neighbors of Cavitt Ranch v. County of Placer, supra,* 106 Cal.App.4th at pp. 1100-1101; *Cadiz Land Co. v. Rail Cycle, supra,* 83 Cal.App.4th at p. 95; *Fall River Wild Trout Foundation v. County of Shasta, supra,* 70 Cal.App.4th at p. 492.) We find no prejudicial abuse of discretion.

Finally, plaintiff argues the city violated the California Environmental Quality Act by proposing development feasibility zones without subjecting that determination to environmental review. As noted above, the city's proposed development plan included feasibility zones selected primarily by reference to slope and access to water. The city proposed to allow higher density development within those zones than outside of them. Plaintiff contends the city failed to comply with Guidelines section 15004(b), which states: "Choosing the precise time for [California Environmental Quality Act] compliance involves a balancing of competing factors. [Environmental impact reports] and negative declarations should be prepared as early as feasible in the planning process to enable environmental considerations to influence project program and design and yet late enough to provide meaningful information for environmental assessment." Plaintiff describes the city's determination of the boundaries of feasibility development zones as discretionary, but concludes, "That failure to analyze the establishment of the zones is a violation of [the California Environmental Quality Act]."

The issue plaintiff raises involves the timing of preparation of the environmental impact report in relation to the process of defining the project. This calls for a delicate balancing of competing factors. (Guidelines, § 15004(b).) However, the precise time at which an environmental impact report must be prepared during the project planning process is a decision committed in the first instance to the discretion and judgment of the agency. (*Mount Sutro Defense Committee v. Regents of University of California* (1978) 77 Cal.App.3d 20, 37.) As the Court of Appeal held in *Mount Sutro Defense Committee,*

"[I]n order to achieve the salutary objectives of [the California Environmental Quality Act] the determination of the earliest feasible time to introduce and coordinate environmental considerations into the planning process is to be made initially by the agency itself, which decision must be respected in the absence of manifest abuse. (§ 21168.5; *No Oil, Inc. v. City of Los Angeles, supra,* 13 Cal.3d [at p.] 88.)" (*Mount Sutro Defense Committee v. Regents of University of California, supra,* 77 Cal.App.3d at p. 40; accord, e.g., *City of Vernon v. Board of Harbor Commrs.* (1998) 63 Cal.App.4th 677, 690; *Stand Tall on Principles v. Shasta Union High School Dist.* (1991) 235 Cal.App.3d 772, 780; 66A Cal.Jur.3d, Zoning and Other Land Controls, § 196, pp. 61-62.)

Our review of the administrative record reveals no prohibition on the part of the city to changes in the proposed project if required to mitigate environmental impacts. In addition, as Judge Yaffe found, the record contains substantial evidence property owners and the public were given the opportunity to comment on the development feasibility zones. Further, plaintiff has not demonstrated, by citation to the record, that there was any dispute as to the environmental consequences of the proposed development feasibility zones. Under these circumstances, we find no manifest abuse of discretion.

[The balance of the opinion is to be published.]

IV. DISPOSITION

The judgment is affirmed. Defendants, the City of San Dimas and the city council of the City of San Dimas, are to recover their costs on appeal from plaintiff, NJD, Ltd.

CERTIFIED FOR PARTIAL PUBLICATION

TURNER, P.J.

We concur:

ARMSTRONG, J.

MOSK, J.