

Case No. A102148

IN THE COURT OF APPEAL OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

HOWARD ZACK, DIANE ZACK,

Petitioners and Respondents,

vs.

MARIN EMERGENCY RADIO AUTHORITY, and
DOES 1-10,

Respondent and Appellant.

AND RELATED ACTIONS.

Appeal from the Superior Court for Marin County
Michael B. Dufficy, Judge
Marin County Case Nos. CV 024952 and CV024971, consolidated

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

The California Supreme Court has recognized that “[a] centralized and well-coordinated governmental response to a public emergency is essential to the security and welfare of the citizens of California.” Macias v. State of California, 10 Cal.4th 844, 860 (1995). With that goal in mind, Appellant, Marin Emergency Radio Authority (“MERA”), was formed by the County of Marin (“the County”) in conjunction with its constituent municipalities and supporting agencies to protect its citizens in emergency situations, both minor and catastrophic. But MERA cannot presently fulfill its mandate—at least not until the trial court’s erroneous grant of mandamus relief and the Town of Tiburon’s (“Tiburon”) illegal Stop Work Order are vacated.

In its Opening Brief, MERA provided a detailed analysis of the issues before the Court. Petitioners and Tiburon (collectively referred to as “Petitioners” except when noted) fail to respond to that showing. Instead, they attempt to distract the Court with irrelevant and inaccurate facts and baseless legal theories.¹ Petitioners, and most notably Tiburon, attempt to

¹ Sadly, Tiburon’s brief presents a particularly salacious and distorted version of the record, punctuated throughout with belittling remarks and *ad hominum* attacks. Tiburon is now bent on blaming everyone else for the delays in completing the system. In an effort to draw attention away from its own admitted misdeeds, Tiburon now blames the City of San Rafael for

evoke sympathy by casting spurious accusations that MERA is nothing more than a rogue, power hungry agency bent on installing a “dangerous” antenna in a “not opulent” neighborhood. But that is not reality. The antenna is safe and an independent study proves it. Tiburon is hardly a modest locale; it is one of the most affluent enclaves in the state. As for the Mt. Tiburon site, Petitioners conveniently omit the fact that Tiburon’s General Plan designates the property as a “Government Facility” zoned specifically for public use. That is why the site is or has been home to a radio transmitter and antenna, a water tank and pump house.

But more significantly, MERA is far from the faceless monster that Petitioners claim it to be. MERA is a public partnership between the County and its cities and districts. It is run by individuals representing its members who volunteer their time to serve on MERA’s Board. Their singular interest is to ensure that there is a communications infrastructure in place to protect

foisting an overly ambitious plan on the County out of financial self interest; Tiburon blames Motorola for choosing the Mt. Tiburon site; and of course, Tiburon blames MERA for everything else. (Tiburon Brief at 4-7.) It also is important to note that the only issues relevant to Tiburon are those relating to the applicability of its zoning and building ordinances to MERA. As such, Tiburon’s false accusations regarding MERA’s alleged conduct, particularly those pertaining to the MERA’s site selection process, are entirely irrelevant. In addition, they are based on extra record evidence, and therefore, should be disregarded by the court. MERA will address Tiburon’s misstatements to the extent they have any bearing on the legal issues presented.

the safety and well being of the County's residents. Petitioners' unseemly demonization of MERA is unfair, unsupported and is irrelevant to any issue before the Court.

Stripped of their rhetoric, Petitioners' arguments quickly deteriorate. First, Petitioners fail to overcome the presumption that MERA acted legally and properly with respect to the Mt. Tiburon site. Both concede, as they must, that the County is immune from Tiburon's local building regulation by operation of the intergovernmental immunity set forth in Government Code sections 53090 and 53091. Akins v. County of Sonoma, 67 Cal.2d 185, 194 (1967) (holding that under Government Code sections 53090 and 53091 a city building code did not apply to county-owned property within city limits); see also Los Angeles County v. City of Los Angeles, 212 Cal.App.2d 160, 165 (1963) (same). Under the Act, the *only* restrictions on the manner of exercising such power—if any—are those that are applicable to the agency designated under Government Code section 6509. Rider v. City of San Diego, 18 Cal.4th 1035, 1050 (1998). Since Tiburon's local regulations are inapplicable to the County as a matter of law, such restrictions have no application to MERA. Cooper v. Mountain Recreation and Conservancy Authority, 61 Cal.App.4th 1115, 1117-18 (1998).

Petitioners endeavor to avoid the inevitable by insisting that MERA is a “local agency” under Government Code sections 53090 and 53091, and that absent the delegation of its land use authority by Tiburon, MERA remains subject to Tiburon’s local building and zoning ordinances. But those code sections cannot be construed in isolation; they must be harmonized with the provisions of section 6509. Moreover, MERA’s right to enjoy the County’s intergovernmental immunity does not, as suggested by Petitioners, depend on the delegation of *any* authority by Tiburon.

Perhaps recognizing the weakness of their arguments, Petitioners then try to argue for the first time on appeal that Government Code section 6509 is inapplicable because MERA’s individual members lack the necessary power to develop and operate an emergency communication system. Despite the fact that it is Petitioners’ burden to demonstrate that MERA acted *ultra vires*, they make no effort in that regard. In any event, MERA more than adequately establishes that its members possess the requisite power to move forward with the Project. Petitioners’ superficial and myopic treatment of the relevant enabling statutes falls far short of showing that MERA lacks the common power at issue.

Petitioners also press claims under the California Environmental Quality Act (“CEQA”) that badly misrepresent the record and misstate the

law. They complain that MERA should have prepared a Supplemental Environmental Impact Report (“SEIR”) to discuss “new” alternative sites and information, despite the fact that the Final Environmental Impact Report (“FEIR”) already concluded that the Project would result in *no significant impacts* at the Mt. Tiburon location. CEQA Guidelines, § 15162, subd. (a)(3)(C) & (D). Nor is the information new—Petitioners make no showing why these supposedly new alternatives could not have been presented during the original environmental review process. Even if there were something wrong with the EIR—which there is not—the time for raising such challenges has long since passed. See Laurel Heights Improvement Assn. v. Regents of the University of California 6 Cal.4th 1112, 1130 (1993) (“Laurel Heights II”).

Raising the specter of due process, Petitioners complain that they and Tiburon were left out of the environmental review process. They were not. MERA provided all notices required by law and Petitioners have not shown otherwise. Petitioners must now live with the consequences of their decision to absent themselves from that process.

Petitioners’ remaining arguments fair no better. They contend that in the course of condemning the Mt. Tiburon site, MERA should have submitted its plans to Tiburon under Government Code section 65402. Even

though MERA legally is exempt from that requirement, MERA did, in fact, submit its plans to Tiburon and then exercised its statutory right to overrule Tiburon's improper rejection of its plans. In any event, the claim is moot in light of Petitioners' admission that they are not seeking to invalidate the condemnation of the Mt. Tiburon site.

Finally, Petitioners demand that the Court stop MERA from constructing the Mt. Tiburon antenna because the broadcast licenses issued by the Federal Communications Commission ("FCC") are in the name of the County, not MERA. The problem for Petitioners is that they lack standing to challenge the sufficiency of MERA's licenses; only the FCC has that authority and only in federal court. Nor are these claims ripe for adjudication. The validity of the FCC licenses is germane only to the operation of the communications system, not its construction. Until the system is operational, the circumstances pertaining to the licenses are subject to change. Thus, any injunction based on the *present* state of the record would constitute an improper advisory opinion. Even if the Court were to address the substantive merits of the FCC claims, it would find none.

No amount of sleight-of-hand or contorted legal analysis can obscure the fundamental flaws in the respective positions advanced by Petitioners. MERA has complied with each and every legal requirement to which it is

subject. As much as they would like to keep the antenna away from their neighborhood, neither Petitioners nor Tiburon have any right to dictate to MERA how best to serve the needs of the County’s residents. The writs compelling MERA to comport with inapposite laws and to prepare unnecessary environmental reports must be vacated.

II. MERA IS EXEMPT FROM TIBURON’S LOCAL ZONING AND BUILDING ORDINANCES

A. THE COUNTY’S IMMUNITY FROM LOCAL REGULATION APPLIES TO MERA, AS A MATTER OF LAW

1. Cooper Confirms MERA’s Position

Despite the clear meaning and straightforward operation of Government Code section 6509, Petitioners persist in claiming—incorrectly—that MERA is subject to Tiburon’s building and zoning ordinances. The centerpiece of their argument is the notion that under Government Code sections 53090 and 53091, a joint powers authority is a “local agency” that must comply with local zoning and building regulations *unless* the local government has “delegated” its land use power to the agency. Because Tiburon did not delegate such duties to MERA, MERA

allegedly must comply with Tiburon’s building ordinances—so the theory goes.²

The elemental flaw in Petitioners’ argument is that it rests on an inapplicable analytical framework. MERA has never argued that Tiburon somehow “delegated” to MERA its authority to review land use decisions. Rather, as MERA consistently has made clear, its immunity derives from the fact that under Government Code section 6509, it is subject only to those restrictions applicable to its designated agency—the County. MERA enjoys the intergovernmental immunity afforded by Government Code section 53090 *by operation of law*, not as a result of any third party delegation of land use authority.

The propriety of MERA’s analysis is confirmed by the Court of Appeal’s decision in Cooper. In Cooper, the Petitioner, a private citizen, filed a petition for writ of mandate to challenge the purchase of property by a joint powers authority known as the Mountains Recreation and Conservation Authority (“Authority”). The Authority was comprised of the Santa Monica Mountains Conservancy (“Conservancy”), two park districts,

² Similarly, Petitioners also suggest that the MERA’s Joint Powers Agreement insufficiently delegates power from its members to the agency ostensibly because its does not specify “how MERA will comply with local land use and zoning laws in order to implement its express authority to provide a radio system.” (Pratt Brief at 21.)

and Los Angeles County. Petitioner argued that the Authority had failed to obtain the requisite approval from the Public Works Board prior to acquiring the land. Though admitting the park districts were not subject to that restriction, the Petitioner argued that under California law the Conservancy was required to do so. The trial court disagreed and dismissed the petition.

The appellate court affirmed and held that the Authority was *not* required to obtain prior approval from the board, even though such a requirement existed as to one of the joint power authority's members, i.e., the Conservancy. Id. at 1117-18. In reaching its decision, the court focused on the fact that under Government Code section 6509, the restrictions imposed on a joint powers authority, if any, are determined by the restrictions specifically applicable to *the agency designated under section 6509*. Id. at 1118. The Authority's joint powers agreement expressly designated the park districts as the section 6509 agency. Id. The court concluded that "[u]nder the [joint powers] agreement, the Authority is subject to the same restrictions as the park district . . . [and] [s]eeking approval from the public works board *is not among those restrictions.*" Id. (italics added).

Under Cooper, it is clear that where the joint powers authority's *designee* under section 6509 is exempt from certain regulations, *so too is the*

joint powers authority. Notably, this rule holds true even if some of the authority's members, if acting on their own accord, would otherwise be subject to such restrictions. In other words, the critical inquiry is whether the "party designated by the [joint powers] agreement" is subject to a particular restriction. If not, then neither is the joint powers authority. Id. This reasoning is entirely consistent with Supreme Court precedent recognizing that the purpose of Government Code section 6509 was to avoid "the possibly conflicting procedural restrictions that apply to the various contracting parties." Rider v. City of San Diego, 18 Cal.4th 1035, 1050 (1998).

Aware of its controlling and preclusive effect, Petitioners strain unsuccessfully to distinguish Cooper from this case. With little discussion, they collectively dismiss Cooper as "irrelevant" because it does not address whether a joint powers authority is exempt from all land use regulations. (Pratt Brief at 29 n.19; Tiburon Brief at 38.) That argument misses the point. Cooper is critical because it establishes the proper framework for evaluating what restrictions, if any, limit the exercise of power by a joint powers authority. Indeed, even the trial court below understood as much. (AA 583.)

Petitioners also attempt to distinguish Cooper on the ground that it allegedly addressed the “*manner*” in which the joint powers authority exercised its power as opposed to the “*scope*” of its power. (Zack Brief at 31-21.) Aside from Petitioners’ failure to cite any authority to support this contention, such distinction is purely an illusory one. The Petitioner in Cooper argued that the Authority was obligated legally to obtain local governmental “approval” prior to acquiring the land. That is virtually the same argument posited by Petitioners—namely, that MERA was obligated to seek approval from Tiburon prior to proceeding with development of the Mt. Tiburon site.

At bottom, while Tiburon’s zoning regulations ostensibly may apply to some of MERA’s members, it is undisputed that no such requirement applies to the County. Since the County is MERA’s designated agency under Government Code section 6509, and because the County is not subject to Tiburon’s building regulations, Cooper confirms that MERA also need not comply. 61 Cal.App.4th at 1118.

2. City of Burbank is Inapposite

Ignoring Cooper, Petitioners instead rely on the completely distinguishable case of City of Burbank v. Burbank-Glendale-Pasadena Airport Authority, 72 Cal.App.4th 366 (1999). Specifically, they maintain

the court in City of Burbank rejected the contention raised here—that a joint powers authority is not immune from local regulations because its designated or lead agency is immune. City of Burbank makes no such pronouncement nor does it even address Government Code section 6509.

The issue before the court in Burbank was whether a joint powers authority seeking to expand a local airport was subject to Public Resources Code section 21661.6, which requires a political subdivision seeking to expand a public airport first to submit its expansion plans to the appropriate city council.³ The joint powers authority was formed by the Cities of Burbank, Glendale and Pasadena to acquire and operate a privately-owned airport located within the Burbank city limits. After the Authority attempted to bypass the statutory review process, Burbank filed suit against the Authority seeking to enjoin its expansion plans absent compliance with section 21661.6. The trial court rejected Burbank’s claims, finding section 21661.6 unenforceable against the Authority because it was “irreconcilably inconsistent” with the Authority’s power of eminent domain. Id. at 373.

³ Subdivision (a) of Public Resources Code section 21661.6 provides, in relevant part: “Prior to the acquisition of land ... by any political subdivision for the purpose of expanding or enlarging any existing publicly owned airport, the acquiring entity shall submit a plan of that expansion or enlargement to the board of supervisors of the county, or the city council of the city, in which the property proposed to be acquired is located.”

The court also ruled in the alternative that Burbank had “delegated to the Authority any rights it may have under California Public Utilities Code section 21661.6.” Id. at 373.

The Court of Appeal reversed, holding that the Authority was, in fact, subject to Public Resources Code section 21661.6. The court rejected the Authority’s contention that the code undermined the Authority’s power of eminent domain. The court reasoned that nothing in the text of section 21661.6 would “annul” such power. Id. at 375. The court further rejected the lower court’s determination that Burbank had *delegated* to the Authority the review power conferred by the Code. Id. at 376-77. Aside from the fact that the joint powers agreement contained no express delegation of power, the court found that a municipality could not “delegate discretionary powers in such a way that that results in a total abdication of [its police] powers.

City of Burbank is wholly inapt to the instant case. MERA’s exemption from Tiburon’s land use regulations is based on the intergovernmental immunity set forth in Government Code section 53090, subdivision (a), applicable by operation of Government Code section 6509. Those statutes are discussed nowhere in City of Burbank. Nor could they even possibly be relevant given that, unlike MERA, all of the members of the joint powers authority in that case were municipalities. Petitioners

ignore that City of Burbank instead addressed the separate and distinct issue of whether a city can *delegate* its extensive planning authority under Public Resources Code section 21661.6, a statute that pertains specifically to airport expansion. Section 21661.6 is not at issue here nor is the issue of delegation.⁴ Indeed, even the court below recognized that City of Burbank has no bearing on this case. (AA 589.)

B. MERA POSSESSES THE NECESSARY COMMON POWER

1. Petitioners Fail to Overcome the Presumption that MERA Acted in Conformance with the Law

Petitioners next attempt to sustain the trial court's ruling by arguing that Section 6509 is inapplicable because not all of MERA's members are individually empowered to develop an emergency radio system. Having admittedly failed to raise this issue below, Petitioners are now foreclosed from doing so on appeal. Holmes v. California Nat. Guard, 90 Cal.App.4th 297, 313 (2001) (finding that claims not raised in the trial court are waived on appeal). Petitioners also make no effort to fulfill their burden of

⁴ Petitioners also mischaracterize the facts and holding City of Burbank. They allege that "[t]he Airport Authority was subject to the City of Burbank's building and zoning ordinances despite the fact that each city acting alone would have been immune from the City of Burbank's building and zoning ordinances under Government Code section 53090." (Zack's Brief at 24-25.) The court's opinion includes no such finding. The question whether a joint powers authority specifically is exempt from Government Code section 53091 was not at issue.

overcoming the presumption that MERA acted within its legal authority.

See Santa Monica Beach, Ltd. v. Superior Court, 19 Cal.4th 952, 966

(1999). Their failure to make any effort to meet such burden alone is fatal to their requests for mandamus relief.

Attempting to turn the tables on MERA, Tiburon claims that with respect to the Cross-Petition, MERA must demonstrate that its members possess the necessary common power. (Tiburon Brief at 24.) That is untrue. The basis of Tiburon's decision to issue a Stop Work Order had nothing to do with the adequacy of the authority held by MERA's individual members. Rather, Tiburon's attempt to foist its zoning regulations on MERA was predicated on the false premise that a joint powers authority is a local agency subject to local regulation under the Government Code. (AR 2653-57, AR 2676.)

2. MERA Has Established that its Members Possess the Requisite Power

Notwithstanding the above, MERA has amply demonstrated that it holds the common power to construct and operate an emergency radio system for the benefit of the County's residents. As a threshold matter, Petitioners utterly ignore the fact that each of MERA's members *already operates their own radio systems and transmitters—and have done so for decades*. (AR 076.) That is the reason they were invited to become

members of MERA in the first place. (AR 075). Thus, it strains credulity for Petitioners to contend that MERA's members lack the requisite power to develop and operate an emergency radio system given that it is their *existing* patchwork of incompatible systems that are so badly in need of replacement. (AR 60-67, AR 75-117.)

Tellingly, Petitioners do not dispute that most of MERA's members, namely, the County, its municipalities and its fire and police districts, have the power to operate an emergency radio system. Instead, they focus their energies on challenging the powers of the remaining five members. In its Opening Brief, MERA analyzed the various enabling statutes applicable to its five water, community college, transportation, and public utility district members. In doing so, MERA established that their respective authority flows implicitly from the powers conferred, and is otherwise consistent with the mission of each agency. In response, Petitioners offer nothing more than conclusory assertions that none of the statutes cited by MERA expressly authorizes the construction of the proposed system. (Zack Brief at 33-36; Pratt Brief at 22-24; Tiburon Brief at 24-25.) But whether there are any statutes expressly authorizing the construction of a communications system is not controlling. To the contrary, the law is clear that a public entity, district or agency may exercise any powers "necessarily or fairly implied in

or incident to the powers expressly granted, or essential to the declared objects and purposes of the [entity].” Harden v. Superior Court, 44 Cal.2d 630, 639 (1955).⁵

As an ancillary matter, Petitioners cite Government Code section 56037, a statute that they readily concede “by its terms does not apply here,” for the unremarkable proposition that certain of MERA’s members have limited power. (Zack Brief at 34-35.)⁶ From there, Petitioners postulate that under MERA’s approach to statutory construction, its member districts could do anything they want with their property, such as building a “hospital” or a “nuclear power plant.” (Zack Brief 35; Pratt Brief at 23.)

These fanciful hypotheticals have little basis in reality, given that the exercise of a local agency’s power in those instances would be restricted by local regulations under Government Code section 53091. It is noteworthy

⁵ See also US Ecology, Inc. v. State of California, 92 Cal.App.4th 113, 132 (2001) (holding that “an administrative agency has the power to contract on a particular matter if this power may be fairly implied from the general statutory scheme” notwithstanding the lack of any express statutory authority); City of North Sacramento v. Citizens Utilities Co., 192 Cal.App.2d 482, 483 (1961) (finding that while city had no express authorization to condemn portions of a water district lying outside its boundaries, such authorization was implied “as incidental to the existence of other powers expressly granted”).

⁶ Presumably, Petitioners’ citation in their brief to “Government Code section 54037” is a typographical error, as that section pertains to the imposition and collection of fees for off street motor vehicle parking.

that court in County of Los Angeles easily dismissed a concern analogous to that raised herein. 212 Cal.App.2d at 167. There, the court held that a county was not bound to comply with local building and zoning ordinances with respect to county property located within city limits. The court observed that:

It is true that a situation could arise in which, for example, an injudicious exercise of its authority by a county by the erection in a city of a hospital or jail facility in a neighborhood zoned for residential use might cause undue hardship to residents of that community. *But problems of that nature are to be resolved by action of the Legislature when the need therefor arises....*

Id. (italics added).

Moreover, MERA is not, as Petitioners insist, claiming that its individual district members have unlimited authority to develop and use their property. Nor is MERA proposing that all its members have the power to construct *any* radio system. Rather, in the context of the specific circumstances presented in this case, such expertise in the development and operation of an *emergency* radio system to facilitate the use of their services for the health and safety of the County's population, is entirely consistent with their authority and purpose.⁷

⁷ MERA previously referenced the Public Safety Communications Act of 2002 ("PSCA"), Government Code section 8592, *et seq.*, to illustrate the importance the State has placed on developing a modern, coordinated

Effective government agencies do not operate in a vacuum. They must coordinate their resources in a manner intended to maximize public benefit, particularly in this day and age where local entities are facing unprecedented financial crisis. Nonetheless, local governments and agencies have an unflagging obligation to their citizens to provide coordinated and integrated emergency services. e.g., Gov. Code § 8550 (“It is ... the policy of this state that all emergency services functions of this state be coordinated as far as possible with the comparable functions of its political subdivisions ... the end that the most effective use may be made of all manpower, resources, and facilities for dealing with any emergency that may occur.”); accord Macias, 10 Cal.4th at 860. Thus, even with limitations on certain districts’ authority, the development of a coordinated communications system is entirely consistent with their respective and collective mandates.

emergency communications system. (AOB at 31-32.) Petitioners falsely state that MERA failed to raise this point below. In fact, the Reporter’s Transcript on Appeal from the January 28, 2003 hearing below confirms that MERA discussed the PSCA at the hearing below in response to the trial court’s *sua sponte* “common powers” analysis. (Reporter’s Transcript on Appeal, January 28, 2003, at 14:16-15:10.)

3. MERA’s Common Power Does Not Depend Upon the “Power of Immunity”

Finally, Petitioners contend that immunity from local regulation is a “power” that cannot be exercised by MERA because all its members purportedly lack such power. (Zack Brief at 37.) No court ever has characterized an intergovernmental immunity as a “power”—nor does such reasoning make any sense. Unlike a power, an intergovernmental immunity cannot be exercised by itself. As applied here, the concept of immunity only becomes relevant if there is some restriction that affects the manner in which the joint powers agency is able to exercise its power. If there is no applicable restriction, immunity is not germane.⁸

C. EVEN IF MERA’S POWERS ARE CONSTRUED AS STATUTORY, MERA STILL IS EXEMPT FROM LOCAL REGULATION

As discussed in MERA’s Opening Brief, a joint powers authority may, in addition to “common power,” exercise a statutory power, i.e., a power that arises from the Act. (AOB at 20-22.) Looking to the bond provisions of the Act, Government Code section 6546, the lower court

⁸ If immunity were a power that all of MERA’s members were required to hold, there would be no need to determine whether the County was subject to local restrictions. That would render the “designee” provision of Government Code section 6509 superfluous, which is contrary to the well settled rules of statutory construction. See Dix v. Superior Court, 53 Cal.3d 442, 459 (1991).

determined that MERA's powers derived from the Act, and therefore, under Rider, Government Code section 6509 was inapplicable. (AA 585.)

However, MERA's authority clearly does not arise from Government Code section 6546. Nevertheless, even if it did, MERA still need not comply with Tiburon's zoning and building restrictions, *irrespective* of section 6509.

Rider holds that where an agency exercises a "power it holds independently under state law, it is not subject to any of the restrictions that would apply to the contracting parties." Rider, 18 Cal.4th at 1051. The court then states that "*in place of those restrictions*" the Act supplies its own regulations. Id. (italics added). It is for that reason that in the case of a power expressly conferred by the Act, there is no need to resort to Government Code section 6509. Id. at 1052. Thus, to the extent that Section 6509 is construed as providing the source of MERA's authority to construct and operate an emergency communications network, the only restrictions applicable would be those provided by the Act. Petitioners have not cited any applicable restrictions.

The dichotomy drawn by the Rider court between common powers and statutory powers—and the source of their corresponding restrictions—makes logical sense. It creates a paradigm of parallelism in the manner of a system of checks and balances. Tiburon attempts to dismiss MERA's

reading of Rider, claiming that the case states only that a “joint powers authority need not comply with other statutory procedures governing bond issuance.” (Tiburon Brief at 28.) This contention lacks merit. If MERA’s power did indeed flow from the Act, then MERA would hold that power “independently of the contracting parties.” Rider, 18 Cal.4th at 1051. Under Tiburon’s reasoning, however, MERA would then be facing the daunting task of “comply[ing] with all of the possibly conflicting procedural restrictions that apply to the various contracting parties.” Id. Such an outcome would be inherently inconsistent with the spirit and intent of the Act and the teachings of Rider.

D. MERA’S PRIOR ACTIONS HAVE NO LEGAL SIGNIFICANCE IN THIS ACTION

Petitioners next claim that MERA has previously acknowledged the applicability of local land use requirements in its formation documents and in the environmental impact reports and have, in other instances, complied with the locality’s permitting process. (Zack Brief at 14-16, 28; Tiburon Brief at 37; Pratt Brief at 25-26.) However, nothing in any of those documents creates a binding obligation or estoppel on MERA to comply

with local building and zoning regulations.⁹ At most, they indicate MERA's political willingness in other circumstances to utilize available processes.

In any event, Petitioners do not cite any authority or provide any analysis to show that MERA's prior unrelated conduct obligates it to comply with Tiburon's ordinances here. Rather, MERA had no legal obligation to do so.

MERA resorted to proceeding with construction of the antenna without Tiburon's approval only after the failure of its two earlier cooperative attempts to work through Tiburon's normal permitting processes. First, Tiburon rejected MERA's application for a use permit for the Mt. Tiburon site; later, this court overturned Tiburon's approval of the antenna at the Sugarloaf site. With time to complete the project running out, MERA was forced to take advantage of the exemptions available to it under Governing Code Sections 6509, 53090 and 53091 and proceed with the project in the absence of Tiburon's approval. This demonstrates not inconsistency, but rather, MERA's resourcefulness in the face of yet another roadblock in its effort to implement this critically important emergency radio system.

⁹ The doctrine of estoppel is inapplicable to the government where, as here, its application would nullify of a rule of policy adopted for the benefit of the public. Strong v. County of Santa Cruz, 15 Cal.3d 720, 725 (1975).

E. MERA IS NOT REQUIRED TO COMPLY WITH THE COUNTY'S BUILDING OR ZONING REGULATIONS

Finally, Petitioners assert that notwithstanding MERA's immunity from Tiburon's regulations, MERA has not complied with *the County's* land use requirements. (Zack Brief at 39-40.) As a threshold matter, this claim fails because it was not alleged in the Petitions filed below. As a result, the claim is not properly before the Court. Spates v. Dameron Hosp. Ass'n, -- Cal.App.4th--; 2003 WL 22924545 at *7 (Dec. 11, 2003) (holding that a defendant need only address claims actually alleged in the complaint).¹⁰

Procedural defects notwithstanding, Petitioners' argument has no substantive merit. There is no authority to support the suggestion that a county's land use regulations automatically apply to a county whenever a county is exempt from a city's building and zoning ordinances. In fact, the courts have reached the opposite conclusion. See Sunny Slope Water Co. v. City of Pasadena, 1 Cal.2d 87, 98 (1934) ("it is quite clear that the city is not bound by its zoning ordinance"); see also 4 Matthew Bender, California Environmental Law and Land Use Practice (2002) § 60.102[5], p. 60-141 ("absent an expression of legislative intent to the contrary, a zoning ordinance does not bind the city or county which enacts it."); C.J. Kubach

¹⁰ This failure is significant because the County, undoubtedly a necessary party to such a claim, is not a party to this action. Code. Civ. Proc. § 389.

Co. v. McGuire, 199 Cal. 215, 217 (1926) (“the state and its agencies are not bound by enactments limiting the rights and interests of its citizens unless such public authorities are included within the limitation expressly or by necessary implication”).¹¹

F. THE REMAINING ISSUES RAISED BY TIBURON LACK MERIT

1. Application of Intergovernmental Immunity to MERA Will Have No Impact on Local Land Use Regulation

Apparently trying to create a policy hook, Tiburon contends that affording MERA immunity from local zoning and building regulations will have serious consequences for local governments because it would expand the immunities to such entities. (Tiburon Brief at 31-37.) Tiburon purports to trace the history of Government Code sections 53090 through 53095, noting that the Legislature purportedly enacted those provisions as a means of enhancing local land use control. Tiburon then asserts that because a “joint powers authority” is not listed as exempt from the definition of “local agency,” a determination that MERA is immune from local zoning ordinances somehow is inconsistent with that Legislative purpose. (Tiburon Brief at 31, 36.) In fact, it even goes so far as to claim that exempting

¹¹ Petitioners’ reliance on Akins, 67 Cal.2d 185 (1967) is misplaced, as the issue whether the county had to comply with its own building codes was not presented or discussed.

MERA from its land use regulations will “nullify the Legislature’s intention to mandate local land control[.]” (*Id.* at 32.)

The flaw in Tiburon’s analysis is that it attempts to apply Government Code sections 53090 and 53091 in isolation from Government Code section 6509. It also misconstrues MERA’s position. MERA has never argued that *all* joint powers authorities are exempt from local regulation. Rather, consistent with Government Code section 6509 and California Supreme Court authority, a joint powers authority is subject only to those restrictions to which its designated agency is subject. It is the fact that the County—which is not subject to any such restrictions—is MERA’s designated agency that is controlling in this instance. Such reasoning does not require any expansion of Government Code section 53090 nor does it in any way undermine local control of land use matters.

As an ancillary matter, Tiburon contends that MERA is controlled by members that are not immune from local regulation, and therefore, granting immunity to MERA would create an “enormous loophole” to Section 53091 by granting the “broadest immunity to agencies and activities never contemplated by the Legislature.” (Tiburon Brief at 32, 36.) This argument, again unsupported by any legal authority, also is misplaced.

For purposes of Government Code section 6509, which members of a joint powers authority have “majority control” is irrelevant. As explained in Cooper, what *is* relevant is what restrictions, if any, apply to the authority’s *designated* agency. 64 Cal.App.4th at 1117-18. The restrictions applicable to the other members, even if those members have “majority control,” do not impact the Authority itself. Id. Tiburon may not like it, but that is what the California Legislature has determined, and that is how the statutes operate.

2. The Alleged Existence of “Feasible Alternatives” is Irrelevant

Next, Tiburon argues, without citation to any authority, that its land use regulations preclude MERA’s right to develop the Mt. Tiburon site because it “has several feasible alternatives” to Mt. Tiburon, such as the Sugarloaf site. (Tiburon Brief at 21.) However, the alleged presence of other “feasible alternatives”—a term germane to CEQA—has no bearing on whether MERA is subject to local building and zoning regulations, the salient issue presented in MERA’s Cross-Petition.¹²

¹² As discussed *infra*, the Sugarloaf site is not an alternative site in any event.

3. The Doctrine of Exhaustion of Administrative Remedies is Inapplicable

Tiburon also continues to proffer the unfounded argument that MERA's Cross-Petition is not properly before the Court because MERA did not pursue additional administrative review of the illegal Stop Work Order. (Tiburon's Brief at 42-46.) Though exhaustion of administrative remedies typically is addressed as a threshold issue, the trial court elected not to discuss Tiburon's argument anywhere in its lengthy ruling. Nonetheless, there is no merit to this argument and it should be summarily rejected.

a) *Exhaustion is not a rigid doctrine*

The exhaustion requirement is a purely a procedural rule of law. Though sometimes phrased in "jurisdictional" terms, the rule does not implicate the subject matter jurisdiction of the court. Sacramento County Deputy Sheriffs' Assn. v. County of Sacramento, 220 Cal.App.3d 280, 285-86 (1990). "The basic purpose for the exhaustion doctrine is to lighten the burden of overworked courts in cases where administrative remedies are available and are as likely as the judicial remedy to provide the wanted relief." Yamaha Motor Corp. v. Superior Court, 185 Cal.App.3d 1232, 1240-1241 (1986) (citations and internal quotations omitted).

The doctrine "has not hardened into inflexible dogma." Volpicelli v. Jared Sydney Torrance Memorial Hosp., 109 Cal.App.3d 242, 253 (1980).

Nor is the rule a “rigid” one: Exhaustion “is sometimes required and sometimes not.” Public Employment Relations Bd. v. Superior Court, 13 Cal.App.4th 1816, 1827 (1993). Significantly, courts consistently have recognized numerous exceptions to the rule, such as “when the subject matter of the controversy lies outside the administrative agency’s jurisdiction, when pursuit of an administrative remedy would result in irreparable harm, when the administrative agency cannot grant an adequate remedy, and when the aggrieved party can positively state what the administrative agency’s decision in his particular case would be.” County of Contra Costa v. State, 177 Cal.App.3d 62, 73 (1986).

b) *It would have been futile to take an administrative appeal*

In this case, exhaustion is no impediment to MERA’s Cross-Petition because it would have been *futile* for MERA to have pursued administrative procedures. It is well settled that a party need not pursue the administrative review process where, as here, the outcome of the administrative review process was certain to be adverse. Ogo Assocs. v. City of Torrance, 37 Cal.App.3d 830, 834 (1974). Tiburon speculates that an administrative appeal would not have been futile because the Town Council had not yet taken an official position on the Stop Work Order and MERA’s claim of immunity until after the commencement of the underlying litigation.

(Tiburon Brief at 45-46.) Not only is that claim completely unsupported, it is contradicted by the record.

Months before the Stop Work Order, Tiburon consistently and unequivocally took the position that MERA was subject to its local zoning and building processes. On May 13, 2002, Tiburon's Town Council fired off a strongly worded missive explicitly rejecting MERA's proposed resolution that it was immune from Tiburon's zoning and other ordinances. (AR 2653-57.) In a similar vein, only days after issuing its Stop Work Order, the Town Council defended its issuance of that Order and again made clear Tiburon's position that "[a]ny construction by MERA on [the Mt. Tiburon site] without a Town permit would be illegal." (AR 2676.) Tiburon's suggestion that MERA "could not have known the [Tiburon] Council's views on its immunity claims" simply rings hollow. (Tiburon Brief at 46.)

Equally specious is Tiburon's related assertion that the outcome of an administrative appeal would have been "uncertain" because an "*independent* hearing officer hears the appeals." (Tiburon Brief at 46 (italics added).) But that is *not* what Section 31.18 of Tiburon's Municipal Code says. That section provide that "[t]he town manager shall designate the hearing officer for the administrative citation hearing." Contrary to Tiburon's

representations, nothing in the Code specifies that the hearing officer is “independent.” In fact, the Code vests complete discretion in the Town Manager as to the selection of the Hearing Officer. The apparent suggestion by Tiburon that MERA would have received a fair hearing is nothing more than wishful thinking. See Glover v. St. Louis S. F. R. Co., 393 U.S. 324, 331 (1969) (holding that administrative remedies were futile where the persons with authority over the union grievance process were hostile towards granting relief).

c) The instant dispute is outside the scope of Tiburon’s jurisdiction

A second exception to exhaustion requirements applies here because the issues in dispute fall outside the scope of Tiburon’s jurisdiction. It is elementary that the construction of a statute (or ordinance) and its applicability, as is the case with the issues presented in MERA’s Cross-Petition, is solely a question of law. Killian v. City and County of San Francisco, 77 Cal.App.3d 1, 7 (1978). The ultimate resolution of such legal questions rests with the courts. McKee v. Bell-Carter Olive Co., 186 Cal.App.3d 1230, 1245 (1986) (noting that exhaustion is excused when the issue involved is “a dispositive question of law peculiarly within judicial competence”) (citations and internal quotations omitted); Richman v. Santa Monica Rent Control Bd., 7 Cal.App.4th 1457, 1463 (1992) (issue

pertaining to statutory construction of rent control statute presented a legal question that was not barred by failure to exhaust).¹³

Tiburon claims that MERA was obligated to pursue an administrative appeal “even where the litigant claims to be exempt from the regulatory body’s permit authority.” (Tiburon Brief at 44.) As support, Tiburon mistakenly relies on South Coast Regional Commission v. Gordon, 18 Cal.3d 832 (1977). In Gordon, the plaintiff coastal commission filed suit to block the defendant landowner from constructing a home on his property without a proper permit. As an affirmative defense, the landowner claimed that he was entitled to an exemption provided under regulations promulgated by the commission.

On appeal, the Court held that the landowner was barred from asserting an exemption defense because he had not first presented his request for an exemption to the commission. Id. at 835. The Court explained that the “exemption” at issue was a part of a regulatory framework promulgated by the regional coastal commission. Id. Those regulations mandated that any person claiming an exemption file a claim with the regional

¹³ At a minimum, the questions of law presented implicate significant policy issues. See Public Employment Relations Bd., 13 Cal.App.4th at 1827 (noting that exhaustion is not required where “important questions of constitutional law or public policy governing agency authority are tendered”).

commission, providing all information necessary to support his claim. Id. (citing Cal. Adm. Code, Tit. 14, § 13701.) The regulations further provided for a hearing and appeals process. Given that framework, the Court found that allowing the landowner to claim an exemption in the lawsuit would “not only frustrate one of the underlying purposes of the exhaustion doctrine, i.e., the need for judicial intervention might be obviated by the outcome of the administrative proceedings, but would also reward developers who made no attempt to fulfill the requirements of the act and the regulations, while penalizing those who made a good faith effort to comply.” Id. at 838.

The circumstances presented in Gordon are fundamentally distinct from the instant action. Unlike the landowner in Gordon, MERA is not claiming an “exemption” from local regulation under the rubric of any regulatory framework. The intergovernmental immunity claimed by MERA exists by operation of law. In other words, the immunity applies irrespective of any determination by Tiburon or any other agency or entity to the contrary. Thus, the rationale for exhaustion is not implicated under facts presented.

III. PETITIONERS HAVE NOT SHOWN THAT MERA HAS VIOLATED CEQA

A. PETITIONERS MISSTATE THE STANDARD OF REVIEW FOR REQUIRING AN SEIR

Petitioners’ arguments in support of their CEQA claims are riddled with errors—starting with their articulation of the standard of review.

Petitioners aver that “[t]he court shall review the record as a whole to determine whether there is substantial evidence in the record to require an SEIR....” (Pratt Brief at 32.) Petitioners have it backwards.

The question is *not* whether substantial evidence in the record requires an SEIR. Nor is the question whether the EIR is correct or “could have been better.” Laurel Heights Improvement Assn. v. Regents of University of California, 47 Cal.3d 376, 409 (1988) (“Laurel Heights I”). Rather, the *proper inquiry is whether substantial evidence in the record supports MERA’s decision not to prepare an SEIR. See Santa Teresa Citizen Action Group v. City of San Jose*, -- Cal.App.4th --; 2003 WL 22969324 at *6 (Dec. 18, 2003) (“The reviewing court upholds an agency’s decision not to require an SEIR if the administrative record as a whole contains substantial evidence to support the determination that the changes in the project or its circumstances were not so substantial as to require major modifications of

the EIR.’’). As will be discussed below, Petitioners’ arguments are based largely on their miscomprehension of the proper standard of review.

B. ALLEGEDLY “NEW” ALTERNATIVES DO NOT COMPEL PREPARATION OF AN SEIR

The crux of Petitioners’ argument under CEQA is that MERA should have prepared an SEIR to examine “new” feasible alternative sites that supposedly became known after MERA certified the EIR. In support of their contention, Petitioners point to (1) Tiburon’s revised proposal for the Sugarloaf site and (2) several other possible locations, such as Gilmartin Drive, Wolfback Ridge, St. Hillary Open Space, and Angel Island. (Pratt Brief at 32-39; Zack Brief at 46-47.) However, the various arguments presented are little more than an untimely, backdoor attempt to challenge the sufficiency of the EIR. Moreover, none of the “new” information is “new” at all, and even if it were, it is woefully insufficient to trigger the preparation of an SEIR.

1. The Fact that the Certified EIR Found That the Project Would Result in No Significant Effects at Mt. Tiburon Bars Petitioners’ CEQA Claims

As set forth in MERA’s Opening Brief (AOB at 37), the parameters for requiring an SEIR are contained in the indisputably clear language of CEQA Guidelines section 15162, subdivision (a)(3). That Guideline states, in relevant part:

[No subsequent EIR shall be prepared unless the lead agency determines that] “[n]ew information of substantial importance, which was not known and could not have been known with the exercise of reasonable diligence at the time the previous EIR was certified as complete . . . shows any of the following:

[¶]

Mitigation measures or alternatives previously found not to be feasible would in fact be feasible *and would substantially reduce one or more significant effects of the project*, but the project proponents decline to adopt the mitigation measure or alternative.

Mitigation measures or alternatives which are considerably different from those analyzed in the previous EIR *would substantially reduce one or more significant effects on the environment*, but the project proponents decline to adopt the mitigation measure or alternative.”

CEQA Guidelines, § 15162, subd. (a)(3)(C) & (D) (italics added).

The initial inquiry presented by these Guidelines is whether the original EIR found that the project would result in *any significant effects* on the environment. If the answer is in the negative, then the existence of new feasible alternatives is completely irrelevant because there are no significant effects to be reduced. Id. As applied here, Petitioners’ contention that an SEIR is necessary to consider “new” site alternatives fails, as a matter of law, because (1) MERA’s certified EIR concluded that the Mt. Tiburon facility would *not* result in any significant unavoidable impacts (AR 2:542-

545) and (2) such finding is now absolutely immune from collateral attack, see Pub. Resources Code, §§ 21080.1, 21167.2; CEQA Guidelines, § 15231; Laurel Heights II, 6 Cal.4th at 1130.

Undoubtedly aware of legal barriers posed by these key rules of CEQA law, Petitioners' response is to feign that they do not exist. In the Pratts' brief, Petitioners conveniently neglect to quote the language of the Guidelines provision in full. (Pratt Brief at 31-32.) Curiously, the Zacks quote the relevant Guidelines but then essentially ignore them by declaring that an SEIR should have been prepared given that "a number of sites exist in the Town and elsewhere at which the proposed Antenna would have far less environmental impact...." (Zack Brief at 46.)

Apparently, the Zacks invite the Court to revisit the presumptively valid EIR and compare the various *less-than-significant* impacts at the Mt. Tiburon site with allegedly *less-than-significant* impacts at other sites. The law, however, forecloses such an invitation. Given the EIR's determination regarding the lack of any significant effects on the Mt. Tiburon site, MERA need not consider any other alternatives, *even if* they allegedly are better from an environmental standpoint. See Laurel Hills Homeowners Assn. v. City Council, 83 Cal.App.3d 515, 521 (1978) ("CEQA does not mandate the choice of the environmentally best feasible project"). In light of Petitioners'

failure to overcome EIR’s conclusive determination that the Project would result in less-than-significant impacts at the Mt. Tiburon site, their contentions regarding the existence of other feasible alternatives must fail as a matter of law. See Laurel Heights II, 6 Cal.4th at 1130 (CEQA process cannot be reopened after time to challenge EIR has passed).

2. Petitioners’ Alleged “Subsequently Developed” Information Regarding Alternative Sites is Meaningless

Even if Petitioners had a legal basis on which to compel the reopening of the CEQA process—which they do not—their “subsequently developed information” does not warrant the preparation of an SEIR.

a) Tiburon’s revised Sugarloaf proposal did not merit the preparation of an SEIR

Petitioners contend that an SEIR is necessary to consider Tiburon’s revised proposal for the installation of a shorter antenna at the Sugarloaf site. This contention fails on several levels. First, Petitioners make no effort to show that the proposal qualifies as “new” information under CEQA. CEQA Guidelines, § 15162, subd. (a)(3). Even *Tiburon* studiously avoids any explanation of why it could not, with reasonable diligence, have presented its proposal at the time the EIR was certified. (Tiburon Brief at 14-15.)

Second, even if the information were “new” within the meaning of the Guidelines, there is no substantive merit to the suggestion that the revised

proposal was sufficient to trigger a legal obligation to prepare an SEIR. Petitioners maintain that Sugarloaf is preferable to the Mt. Tiburon location because of its lower RFR exposure. (Pratt Brief at 35-36.) That difference is negligible, however. (AR 7:2256.) The highest RFR exposure level at the nearest residential property line adjacent to the Mt. Tiburon Tank site would be 21.5% of the FCC limit. (AR 1:273; AR 2:544-545.) The highest RFR exposure level at the nearest residential property line adjacent to the Sugarloaf site would be 12.9% of the federal limit. (AR 7:2256.) *In either case, the RFR levels are well below the FCC public exposure limit and, therefore, are less-than-significant.* So long as the lead agency ensures that environmental impacts are below significant levels, the law is clear that an agency is under no obligation to consider the feasibility of or select an “environmentally superior” alternative. See Rio Vista Farm Bureau Center v. County of Solano, 5 Cal.App.4th 351, 379 (1992) (citing Laurel Heights I, 47 Cal.3d at 402).

Also without merit is Petitioners’ claim that the antenna at Sugarloaf would have been shorter, and thereby would have resulted in a reduced visual impact. (Pratt Brief at 35.) This argument ignores that the revised proposal required altering the existing environment, and hence, was fraught with potential significant visual and/or biological impacts of its own. (AOB

at 40.) And even assuming that Tiburon were correct that the Sugarloaf antenna would have blended in better (and MERA does not agree that it would)¹⁴, any decrease in visual impacts still would not necessitate an SEIR in light of the EIR's binding determination that the Project resulted in less than significant visual impact at Mt. Tiburon. (AR 2:544.)

Likewise without merit is Petitioners' suggestion that MERA should have prepared an SEIR because the original EIR allegedly contained incorrect technical information regarding the Sugarloaf site. (Pratt Brief at 35.) The EIR included an analysis of the Sugarloaf site performed by MERA consultants and engineers. (AR 2:594-595, 600.) Although MERA supplied Tiburon with copies of the Initial Study and Draft EIR, Tiburon failed to comment or participate in scoping for the Project. (AR 3:991.)¹⁵

¹⁴ The difference between the proposed antennae is only twelve feet. (AR 7:2256.)

¹⁵ Tiburon relies upon after-the-fact declarations to argue that its representatives supposedly warned MERA that Mt. Tiburon was not a suitable site for the wireless communications facility. (Tiburon Brief at 7-8.) MERA disputes that Tiburon ever discouraged use of the site until the Petitioners became vocal during CUP proceedings before the Tiburon Planning Commission. In any event, it is undisputed that Tiburon *never* put any of its concerns in writing *nor* did it make any effort to refine the Sugarloaf site alternative until long after MERA had certified the EIR. Tiburon and Petitioners' various declarations (e.g., RA 1053, 1055, 1225, 1228, 1231, 1239, 1242, 1279, 1283, 1288, 1300 and 1502) are irrelevant to this case because they were not part of the administrative record before MERA's Board of Directors as of May 13, 2002, the date of the

Additionally, the EIR did not reject Sugarloaf as a result of any technical issues. In fact, the EIR found both sites offered comparable systems performance. (AR 2:599.) Thus, there was nothing wrong with the information in the EIR relating to the Sugarloaf site. But even if there were, such would be of no avail to Petitioners. See Laurel Heights II, 6 Cal.4th at 1130 (finding that a presumptively valid EIR “acts to preclude the reopening of the CEQA process even if the initial EIR is discovered to have been fundamentally inaccurate and misleading in the description of a significant effect”).

b) The remaining alternative sites also do not merit the preparation of an SEIR

Next, Petitioners maintain that an SEIR is required to take into account alternative sites such as Gilmartin Drive, Wolfback Ridge, St. Hillary Open Space, Angel Island. (Zack Brief at 46-47; Pratt Brief at 35-36.) Petitioners tout these sites supposedly as having advantages over Mt. Tiburon. (Zack Brief at 47; Pratt Brief at 36.) However, all of these locales admittedly existed at the time MERA processed the EIR. (Zack Brief at 46.)

condemnation action. As such, under Supreme Court precedent, each of these declarations constitutes inadmissible extra-record evidence that must be disregarded. See Western States Petroleum Assn. v. Superior Court, 9 Cal.4th 559, 573-74 (1995); accord Santa Teresa Citizen Action Group v. City of San Jose, -- Cal.App.4th --, 2003 WL 22969324 at *9 (Dec. 18, 2003) (extra record evidence inadmissible to support writ petition).

With reasonable diligence, Petitioners could have employed their consultants and critiqued the project during the winter of 1999-2000, when other members of the public commented on the Draft EIR. (AR 3:762.) Having failed to do so, Petitioners cannot meet their threshold burden of demonstrating that this “new” information could not have been presented with the exercise of reasonable diligence prior to certification of the EIR. See A Local And Regional Monitor v. City of Los Angeles, 12 Cal.App.4th 1773, 1800 (1993) (“ALARM I”); CEQA Guidelines, § 15162, subd. (a)(3).

Irrespective of the foregoing, the record substantiates the reason these other sites were either infeasible or presented significant impacts. (AR 6:2023, 2039, 2041-2050; AR 7:2240.) For example, Senator John Burton wrote MERA to explain that the Angel Island option would be “impossible” for a number of reasons. (AR 5:2039.) A communications consultant hired by Petitioners informed the Tiburon Town Council that the Gilmartin site would be “terrible” for the Project. (Petitioners’ Supplemental Administrative Record 4:5630.) Similarly, Wolfback Ridge and St. Hilary Open Space would pose issues regarding necessary system coverage requirements. (AR 6:2022, 6:2049.) It was not surprising then that even Tiburon reached the conclusion that “there is no feasible non-residential site” other than Mt. Tiburon. (AR 7:2240-2241.)

c) *Petitioners' attack on MERA's Methodology of reviewing alternative sites is Frivolous*

There also is no merit to Petitioners' challenge to the propriety of MERA's method of analyzing alternative site locations. Petitioners state that MERA's site selection was "arbitrary" and did not consider an entire "universe" of potentially feasible locations. (Pratt Brief at 34.) Again, that argument is foreclosed by the irrefutable adequacy of the EIR. Petitioners' opportunity to critique the EIR passed long ago, and the law forbids them from doing so under the guise of seeking an SEIR. Once a lead agency certifies an EIR, CEQA "provides a balance against the burdens created by the environmental review process and accords a reasonable measure of finality and certainty to the results achieved." Friends of Davis v. City of Davis, 83 Cal.App.4th 1004, 1018 (2000). For that reason, "the interests of finality are favored over the policy of favoring public comment." Laurel Heights II, 6 Cal.4th at 1130. Therefore, whatever alleged flaws Petitioners may now perceive in the EIR, they cannot be asserted as grounds for requiring an SEIR.

Even if Petitioners' claim were not time-barred, the record substantiates the propriety of the EIR's analysis. Far from being "arbitrary," the EIR articulated rational criteria for the location and selection of facility sites. (AR 2:589; AR 3:894-898.) MERA selected sites on the basis of

system-wide operability, as a change in the location of any one site could result in coverage complications for the entire network. (AR 2:589.) This operational constraint affected MERA's ability to look at multiple alternatives for each of the seventeen sites. Accordingly, it was appropriate that the EIR examined system-wide alternatives rather than site-by-site alternatives. (AR 2:587.)

Striving to be as consistent as possible with local land-use policy, MERA sought to utilize existing telecommunications sites while avoiding undeveloped sites. (AR 2:589.)¹⁶ This objective explains, in part, why MERA selected the Mt. Tiburon Tank site—a site zoned by Tiburon for public utilities—and passed on open space parcels such as the Gilmartin and St. Hilary's properties. (AR 1:160.) MERA also endeavored to minimize the number of sites necessary to achieve the system's coverage objectives, so as to minimize system-wide environmental impacts, costs, and operating complications. (AR 2:589.) This objective also explains why MERA did not include as alternatives certain two-site scenarios now championed by Petitioners.

¹⁶ Oddly, Petitioners simultaneously dispute and concede that the Mt. Tiburon Tank site includes an existing telecommunications antenna. (Pratt Brief at 34 n.9.) The antenna and transmitter do, in fact, exist; they are the property of Southern Marin Dispatch. (AR 2:539; AR 4:1385.)

In short, Petitioners' demand that MERA revisit the EIR process and examine additional alternatives amounts to nothing more than a belated attack on the EIR's project objectives and range of alternatives. Such attacks are now foreclosed. See Pub. Resources Code, §§ 21167.2, 21080.1, subd. (a).

3. The TRAUMAS Litigation Is Easily Distinguishable and Has No Binding Effect on MERA In This Case

For the first time on appeal, Petitioners contend that the Superior Court's decision in TRAUMAS v. Town of Tiburon, the lawsuit involving the Sugarloaf site, "collaterally estops" MERA from proceeding at Mt. Tiburon without an SEIR. (Pratt Brief at 35-36, 39-40.) Since Petitioners failed to raise this contention below, they cannot now do so on appeal. Holmes, 90 Cal.App.4th at 313.

Even if the claim were not waived, it has no merit. A prior judgment is binding in subsequent proceedings when "(1) the identical issue is under consideration; (2) a final judgment was reached on the merits in the earlier adjudication; (3) the party against whom that judgment is now asserted was a party or in privity with a party in the prior action." City of Bell Gardens v. County of Los Angeles, 231 Cal.App.3d 1563, 1567 (1991) (quoting Summerford v. Board of Retirement, 72 Cal.App.3d 128, 130 (1977)). The first prong of this test is absent in this case.

In the TRAUMAS action, the Superior Court considered Tiburon's independent effort to approve an entirely new site for the MERA Southern Marin system component.¹⁷ Not only would the proposal have moved the site from Mt. Tiburon Tank to Sugarloaf, it also would have reconfigured the Sugarloaf site, as compared to the alternatives description in the original EIR. (AR 7:2242-2243.) The court, therefore, ruled that Tiburon needed to prepare an SEIR if such a major revision in the project were to occur. (AA 2:347-348.) However, *that is not* the issue currently before this Court.

At issue here is whether MERA, in taking steps to implement an unchanged project at a previously approved site, should have prepared an SEIR. Clearly, these are not "identical issues" that estop MERA from proceeding without an SEIR. The Sugarloaf project proposed by Tiburon had never before been analyzed in an EIR. (AA 2:348.) Conversely, the Mt.

¹⁷ Petitioners argue that MERA should be directed to review and select the revised Sugarloaf alternative because MERA allegedly "urged" Tiburon to approve the site and "participated in the defense of the TRAUMAS lawsuit." (Pratt Brief at 39-40.) In fact, the record reflects that MERA's preference to move forward with *the Mt. Tiburon site* actually compelled Tiburon to hastily push through the Sugarloaf urgency ordinance. (AR 7:2241.) Moreover, MERA never rescinded its approval of the Mt. Tiburon site and never abandoned its right to implement the project there, as evidenced by MERA's declination of Tiburon's Mayor's request for MERA to withdraw consideration of the Mt. Tiburon site. (AR 5:1885.)

Tiburon site has been analyzed thoroughly and is consistent with the presumptively valid, certified EIR.

Moreover, the court in TRAUMAS did not find that the information in the EIR was incorrect or inadequate. As noted, the court merely determined that an SEIR was required because Tiburon’s proposal was “in the nature of a new project” that was inconsistent with the description of Sugarloaf in the EIR. (AA 2:347-348.) Indeed, the court below here could not, as a matter of law, have required an SEIR due to errors in the underlying EIR because such findings are barred where an EIR is subject to a conclusive presumption of validity. See Laurel Heights II, 6 Cal.4th at 1130.

C. PETITIONERS HAVE NOT DEMONSTRATED THAT NEW OR MORE SEVERE ENVIRONMENTAL IMPACTS WILL RESULT FROM THE PROJECT

1. As Above, Petitioners’ Claims Regarding Environmental Impacts are Neither Timely Nor “New”

Petitioners’ contentions regarding Project impacts suffer from the same deficiencies as their arguments relating to site alternatives.¹⁸

¹⁸ Petitioners’ arguments relating to project impacts are not a model of clarity. The Zacks, for instance, allege “significant effects previously examined will be substantially more severe than shown in the previous EIR.” (Zack Brief at 46.) They offer no additional explanation or specificity as to the particular impacts implicated. Although Pratts allege that “changed circumstances” require preparation of an SEIR, they do not explain how those changed circumstances, if any, relate to more severe

Petitioners claim the Mt. Tiburon site had “inextricably interwoven liabilities,” including alleged health hazards, an attractive nuisance, and blighted views. (Pratt Brief at 32-33.) In advancing this argument, Petitioners once again ignore that the EIR took these concerns into account and concluded that *all impacts* at the Mt. Tiburon site would be *less-than-significant*. In particular, the EIR found that neighboring property owners and hikers will not be exposed to harmful levels of radio frequency radiation (“RFR”), and that the antenna tower will not create a significant aesthetic impact. (AR 1:272-276; AR 2:542-545.) Those findings are presumptively valid and are now immune from any challenge. See Pub. Resources Code, §§ 21080.1, 21167.2; CEQA Guidelines, § 15231; Laurel Heights II, 6 Cal.4th at 1130. Nor have Petitioners made *any* effort to demonstrate that any of this information is new under CEQA Guideline section 15162, subdivision (a)(3).

impacts. (Pratt Brief at 38.) The Court retains discretion to treat as waived any argument which, though raised in a brief, “is not supported by pertinent or cognizable legal argument or proper citation of authority.” Associated Builders & Contractors, Inc. v. San Francisco Airports Comm’n, 21 Cal.4th 352, 366 (1999); see also Dills v. Redwoods Assocs., Ltd., 28 Cal.App.4th 888, 890 (1994) (appellate brief made only passing reference to certain issues, without argument or authority; court could “not develop” the party’s arguments, and therefore declined to reach the inadequately treated issue).

2. Substantial Evidence Supports MERA's Conclusion That RFR Impacts Are Less Than Significant

Even if this Court decides that Petitioners' evidence qualifies as "new information of substantial importance" under Guidelines section 15162, substantial evidence in the record nevertheless supports MERA's determination that RFR impacts will not be significant. As pointed out in MERA's Opening Brief (AOB 9-10), expert engineering consultants, Hammett & Edison, Inc. ("Hammett"), prepared a study of RFR conditions at each of the seventeen system sites (AR 1:215-307), including Mt. Tiburon (AR 1:272-276).

The results of that study soundly dispel the myth perpetuated by Petitioners regarding the alleged RFR danger. Not only were the maximum RFR levels found to be well under the applicable public limit (AR 1:273, AR 2:544), the study confirmed that that the maximum ambient RFR levels anywhere at the Zack house due to the proposed antenna facility would be 21.5% of the FCC standard for public exposure. (Id.) The maximum RFR levels anywhere at the Zack's playhouse would be a mere 1.2% of the applicable public limit. (Id.)

Without elaboration, Petitioners cite to their consultant's presentation to the MERA Board on April 11, 2002. (Pratt Brief at 36.) That Petitioners' consultants might have reached a different opinion regarding

RFR impacts is of no legal significance. See Laurel Heights I, 47 Cal.3d at 409 (“It is also well established that [d]isagreement among experts does not make an EIR inadequate.”) (citations and internal quotations omitted). Also, the presentation does not constitute “new information” requiring preparation of an SEIR because, with the exercise of reasonable diligence, it could have been made prior to certification of the EIR. See CEQA Guidelines, § 15162, subd. (a)(3); Fort Mojave Indian Tribe v. California Department of Health Services, 38 Cal.App.4th 1574, 1592 (1995).

3. Case law Cited by Petitioners is Distinguishable

Petitioners cite Mira Monte Homeowners Assn. v. County of Ventura, 165 Cal.App.3d 357 (1985) (“Mira Monte”) to support generally the argument that MERA should have prepared an SEIR. (Pratt Brief at 38.) In Mira Monte, the County Board of Supervisors declined to prepare a supplemental EIR even though County staff discovered, prior to certification of the initial EIR, that the project would actually result in a previously unanticipated significant impact to wetlands. 165 Cal.App.3d at 360-361. The court ruled the County should have prepared an SEIR even though the Board imposed conditions to mitigate the newly identified impact to wetlands. Id. at 364-365.

Mira Monte is distinguishable. Unlike the instant case, Mira Monte addressed the issue whether to recirculate a Draft EIR, not the critical issue here of whether the agency should have prepared an SEIR. E.g., Bowman v. City of Petaluma, 185 Cal.App.3d 1065, 1075 n.9 (1986) (discussing Mira Monte; accord Fund for Environmental Defense v. County of Orange, 204 Cal.App.3d 1538, 1551 (1988). Further, Mira Monte did not involve the substantial evidence standard which, as discussed, is the core of this Court's standard of review.

Also misplaced is Petitioners' citation to City of San Jose v. Great Oaks Water Co., 192 Cal.App.3d 1005 (1987) to support the proposition that an SEIR is required even when a mere change of ownership takes place. (Pratt Brief at 38.) In that case, the lead agency made substantial changes to a project after it had certified an EIR. City of San Jose, 192 Cal.App.3d at 1015. In contrast, MERA proposed no changes to the Project at the Mt. Tiburon site when it exercised its eminent domain authority. Rather, MERA merely moved forward with precisely the same plan it had already analyzed in its certified EIR. Therefore, there are no new potential impacts to be evaluated. MERA was entitled to rely on the existing EIR.

**D. MERA WAS NOT REQUIRED TO PREPARE WRITTEN
FACTUAL FINDINGS IN CONNECTION WITH ITS DECISION NOT
TO PREPARE AN SEIR**

Petitioners contend that MERA was required to prepare elaborate written findings of fact in connection with its decision to condemn the Mt. Tiburon Tank parcel without preparation of an SEIR. (Pratt Brief at 36-38.) As MERA stated in its Opening Brief (AOB at 47-48), CEQA requires only that a lead agency provide “a *brief* explanation of the decision not to prepare a subsequent EIR pursuant to Section 15162[.]” CEQA Guidelines, § 15164, subd. (e) (italics added). The explanation may be included anywhere in the administrative record. *Id.* MERA’s explanation appears, in part, in a Board Resolution dated May 13, 2002. (AR 8:2658-2661.) The EIR itself also provides justification for proceeding without an SEIR, in that no significant impacts were determined to occur at the Mt. Tiburon site. (AR 2:542-545.) Moreover, evidence in the record reflects why Petitioners’ “new” alternatives are either infeasible or present new significant impacts. (AR 6:2023, 2039, 2041-2050; AR 7:2240.)

MERA’s course of action is well supported in the case law. For example, in Fund for Environmental Defense, 204 Cal.App.3d 1538, the court held that findings are not required to support an agency’s decision to forego preparation of an SEIR. Petitioners argue that in Fund for

Environmental Defense the changes in the project did not result in any effects that were not already discussed in the EIR, whereas in this case, MERA's EIR did not discuss "new feasible alternatives." (Pratt Brief at 38.) Petitioners are confused.

As discussed above, there are no "new feasible alternatives"—all of the alternative sites mentioned by Petitioners existed at the time the EIR was certified. Further, Petitioners ignore that the surrounding physical environs at the Mt. Tiburon site did not substantially change between February 24, 2000 (certification of the EIR), and May 13, 2002 (condemnation). The circumstances of this case, therefore, are no different than those in Fund For Environmental Defense.

In sum, Petitioners fail to explain why a findings requirement would apply under subdivision (a)(3) of Guidelines section 15162, but not under subdivision (a)(2). In either situation, findings are required only if the agency determines that significant impacts will result. See Fund For Environmental Defense, 204 Cal.App.3d at 1553. CEQA Guidelines sections 15162 and 15164 establish legal criteria for determining whether an SEIR is necessary in a given situation. Petitioners mistake these criteria for

an explicit findings requirement.¹⁹ In fact, an agency’s justification for not preparing an SEIR may be implied by evidence in the administrative record. See Benton v. Board of Supervisors of Napa County, 226 Cal.App.3d 1467, 1483 (1991); ALARM I, 12 Cal.App.4th at 1808. To the extent that MERA’s Resolution 2002-01 does not perform an in-depth analysis of the legal criteria of section 15162, MERA’s grounds for condemning the Mt. Tiburon parcel without preparing an SEIR are evident from the record. Nothing more was required.

E. PETITIONERS WERE NOT ENTITLED TO ACTUAL NOTICE OF THE CONDEMNATION PROCEEDING

1. CEQA Does Not Specify Actual Notice

Attempting to create the chimera of a constitutional violation, Petitioners argue that, under CEQA, MERA should have provided actual notice to Petitioners of the May 13, 2002 meeting during which MERA’s

¹⁹ Presumably, had the Legislature intended to require an agency to prepare written findings in connection with its decision not to prepare an SEIR, the Legislature would have expressly stated such a requirement. See Pub. Resources Code, § 21081; CEQA Guidelines, § 15091 (both sections mandating findings where project causes significant impacts); see also Pub. Resources Code, § 21083.1 (courts directed to interpret CEQA in a manner that does “not . . . impose[] procedural or substantive requirements beyond those explicitly stated” in the statute or guidelines).

Board of Directors approved the condemnation action. (Pratt Brief at 41-43.)²⁰ Petitioners are incorrect.

As a matter of policy, CEQA generally encourages agencies to facilitate public comment. That policy, however, is subject to limitations, especially where, as here, the agency has completed the EIR process. As noted, once an EIR has been certified, the interests of finality prevail over the need for additional public involvement. See Laurel Heights II, 6 Cal.4th at 1130.²¹ Accordingly, CEQA Guidelines section 15164, subdivision (c), provides that an addendum to a certified EIR need not be circulated for public review and comment. Although MERA did not elect to prepare an addendum, the same rule applies in this case. See ALARM I, 12 Cal.App.4th at 1804 (rejecting Petitioner's claim that agency was required to

²⁰ Although Petitioners complain they did not receive notice, they actually attended the May 13, 2002 Board meeting, as well as meetings on February 11, 2002, and April 11, 2002. (SAR 4:5573; SAR 5:5789, 5792.) The Board allowed Petitioners to make extended presentations and accepted written comments. (SAR 5:5682-5784.)

²¹ Petitioners cite No Oil, Inc. v. City of Los Angeles, 13 Cal.3d 68, 86 (1974) in support of the general notion that CEQA makes elected officials accountable to the public for decisions with ecological consequences. (Pratt Brief at 42.) In No Oil, the Supreme Court applied that policy where the lead agency decided as an initial matter not to prepare an EIR for a drilling project. Here, the policy has already been satisfied because MERA prepared an EIR with the required public notice and comment.

hold noticed hearing on whether new evidence was sufficient to warrant an SEIR).

- a) *Public Resources Code section 21092.2 does not require actual notice of an agency's decision to forego an SEIR*

Petitioners attempt to make much of a letter submitted by COPAS to MERA, dated July 27, 2000, requesting notice of all meetings. (SAR 2:5308; Pratt Brief at 42.) By May 13, 2002, the date MERA resolved to condemn the Mt. Tiburon tank site, this request, arguably, had become stale. Nevertheless, Petitioners argue that actual notice was required pursuant to Public Resources Code section 21092.2, which provides, in part:

The notices required pursuant to Sections 21080.4, 21083.9, 21092, 21108, and 21152 shall be mailed to any person who has filed a written request for notices . . . [] This section may not be construed in any manner that results in the invalidation of an action because of the failure of a person to receive a requested notice, provided that there has been substantial compliance with the requirements of this section.

None of the statutes referenced above apply to an SEIR. The notice required pursuant to section 21080.4 relates to issuance of a “Notice of Preparation” of an EIR. The notice required pursuant to section 21083.9 relates to the lead agency’s scoping meetings with responsible agencies prior to preparation of the Draft EIR. The notice required pursuant to section 21092 relates to the public comment period on a negative declaration or EIR

and any hearings on the final adoption of a negative declaration or EIR. The notice required pursuant to sections 21108 and 21152 relate to issuance of an agency's "Notice of Determination" that a project will or will not have significant impacts. Not one of these sections relates to an agency's decision whether to prepare an SEIR. Public Resources Code section 21092.2 simply did not require MERA to provide notice to COPAS of its May 13, 2002 meeting.²²

b) *MERA did not curtail the right of Tiburon or its citizens to comment on the EIR*

Petitioners contend that MERA, the lead agency, somehow inhibited the ability of Tiburon, a responsible agency, to review the EIR. (Pratt Brief at 42-43.) The argument rests on a false premise: that Tiburon is an "advisory body" to MERA. Tiburon is a MERA *member agency*. Tiburon does not function as a planning commission to the MERA Board of Directors. Petitioners clumsily argue that MERA should have delayed certification of the Final EIR until Tiburon was able to review the Draft EIR in connection with its consideration of MERA's CUP application. But the process does not work that way. A responsible agency must consider the

²² In any event, MERA "substantially complied" with section 21092.2. (AR 3:989-991, 1003, 1063, 1069, 1103, 1107, 1125, 1193.)

EIR as prepared by the lead agency. See CEQA Guidelines, § 15096, subd.

(a.) In fact, Tiburon is presumed to have waived any objection to the adequacy of the EIR because it did not challenge MERA's certification within the applicable statute of limitations. See CEQA Guidelines, § 15096, subd. (e)(2).

Despite Petitioners' protestations to the contrary, Tiburon and its affected citizens had every opportunity to be fully informed and to offer meaningful input into the EIR process. The record confirms that MERA provided the notice required by law, but Petitioners did not participate. (AR 3:1095, 762, 1125, 1132, 1136-1140.)²³ Tiburon also had an opportunity and duty to participate in the scoping and comment phases of the EIR process. See CEQA Guidelines, § 15096, subds. (b)-(d). It neglected to do so. (AR 3:991, 1005-1058, 1069, 762.)²⁴ Petitioners' grievance is better directed toward Tiburon—not MERA.

²³ MERA provided the required public notice by posting in the Marin Independent Journal. See CEQA Guidelines, § 15087, subd. (a)(1).

²⁴ Tiburon protests that its failure to consult or comment on the Draft EIR did not prevent it from exercising discretion on MERA's subsequent CUP application. (Tiburon Brief at 39-41.) Once again, Tiburon misconstrues MERA's arguments. MERA has never argued that its certification of the EIR removed Tiburon's discretion as a responsible agency *prior to MERA's condemnation action*. MERA's argument is that Tiburon's failure to consult and comment on the Draft EIR is relevant to the issue whether the revised

2. The Condemnation Was a Quasi-Legislative Act to Which No Due Process Rights Attach

Petitioners argue MERA's exercise of eminent domain power was a "quasi-adjudicatory act" thereby entitling them to constitutional due process protections. (Zack Brief at 47-49.) Once more, Petitioners are wrong. The law is clear that when a condemnation action involves a fundamental political question, the action is quasi-*legislative*. Code Civ. Proc., § 1245.255, subd. (a); Anaheim Redevelopment Agency v. Dusek, 193 Cal.App.3d 249, 260 (1987) (holding that a redevelopment agency's decision to condemn a specific property for redevelopment was a quasi-legislative act to which due process concerns are inapplicable); see also Oceanside Marina Towers Assn. v. Oceanside Community Development Commission, 187 Cal.App.3d 735, 744-745 (1986) (same rule even if condemnation has substantial impact on surrounding property).

Citing Horn v. County of Ventura, 24 Cal.3d 605 (1979), Petitioners insist that MERA's condemnation of the parcel was a quasi-adjudicative act that triggered due process protections. There, the Supreme Court considered a County's approval of a tentative subdivision map. The Court ruled that a tentative map approval, like a variance or conditional use permit, is a quasi-

Sugarloaf proposal was actually "new information" under Guidelines section 15162(a)(3).

adjudicatory approval. Horn, 24 Cal.3d at 614. Although the County posted notice of its proceedings at central public buildings, the court ruled the County's notice was insufficient as to adjacent property owners whose lots could be affected by the subdivision approval. Id. at 618.

Petitioners' reliance on Horn is misplaced. By its own terms, Horn is limited to quasi-adjudicatory decisions that affect an individual based on facts specific to the individual case. Id. at 613. In contrast, a decision that is a quasi-legislative act is "not burden[ed]" by individualized requirements of due process such as prior notice and a hearing. Id. Thus, Petitioners were not protected by constitutional procedural due process principles, and were not entitled to prior notice of MERA's proceedings on the condemnation of the Mt. Tiburon Tank parcel.

IV. THERE HAS BEEN NO VIOLATION OF GOVERNMENT CODE SECTION 65402

In its Opening Brief, MERA established that the lower court erred in finding that it had violated Government Code section 65402. MERA pointed out that: (1) by operation of Government Code section 6509, MERA was under no obligation to comply with that code section, see Lawlor v. City of Redding, 7 Cal.App.4th 778, 783 (1992) and (2) even so, MERA had, in fact, complied by submitting its plans for the development of Mt. Tiburon to the Tiburon Planning Commission. Moreover, MERA

highlighted the fact that the issue was moot for all intents and purposes because Petitioners have admitted that they are not attempting to invalidate the condemnation of the Mt. Tiburon site.

Petitioners offer no meaningful response to any of MERA's arguments, other than the *ipse dixit* that MERA has not complied with Government Code section 65402. (Pratt Brief at 30; Zack Brief at 44.) What Petitioners fail to explain, however, is why this remains a "live" issue given their uncontroverted admission that they are not challenging the propriety of the condemnation. In short, there is no actionable controversy regarding Government Code section 65402, and even if there were, the record establishes that MERA complied with all its requirements.

V. PETITIONERS FAIL TO REFUTE THE JURISDICTIONAL AND SUBSTANTIVE INFIRMITY OF THEIR FCC CLAIMS

MERA demonstrated in its Opening Brief that Petitioners' claims under the FCC were not properly before the Court because Petitioners lack standing and the claims are otherwise not ripe. Alternatively, even if jurisdiction were proper, Petitioners had failed to establish any substantive violation of any FCC regulations. As will be set forth below, Petitioners fail to overcome any of these arguments.

A. THERE IS NO JURISDICTION TO SUPPORT PETITIONERS' FCC CLAIMS

There is no dispute there is no private right of action for an injunction under Section 301 of the Communications Act of 1934, 47 U.S.C. section 301, for unauthorized operation of a radio system. See United States v. Dunifer, 219 F.2d 1004, 1006-1007 (9th Cir. 2000). Petitioners insist they are not bound by those restrictions because they are not seeking to enforce any FCC regulations. However, in their Opposition Brief, Petitioners expressly seek an injunction barring MERA from developing *or* operating its antenna at the Mt. Tiburon site “until such time as MERA can show proper FCC licensing.” (Zack Brief at 64.) That determination inherently requires the Court to assess whether MERA is in compliance with FCC licensing requirements within the meaning of the Communications Act. More importantly, such determination can be made only in an action brought by the FCC in federal court—not a state court action filed by a private party. Dunifer, 219 F.2d 1006-1007.

In an attempt to distinguish Dunifer, Petitioners contend that the case applies only to actions to set aside an FCC order—which they assert is not at issue here. (Zack Brief at 52.) Dunifer stands for the well-settled proposition that the Communication Act vests federal courts with jurisdiction to entertain actions by the government to enjoin the

unauthorized broadcast of radio signals. 219 F.2d at 1006. Notably, that is precisely what Petitioners are attempting to do here, i.e., to block “MERA[’s] attempts to develop and operate the proposed radio system without the mandatory FCC licensing.” (Zack Brief at 51.)

Finally, Petitioners can find little solace in In re Marriage of Hunt, 933 S.W. 2d 437 (1996), a case cited for its observation that “a state court ... [has] power to adjudicate issues involving FCC licenses as long as the state court does not affirmatively interfere with the FCC to authorize the transfer, assignment or other disposition of licenses.” That case has no application here where the issue relates directly to a party’s authorization under the Communications Act to broadcast radio signals. Petitioners cite no authority establishing that private litigants have standing to bring such claims in state court, let alone any court.²⁵

B. JURISDICTIONAL DEFECTS NOTWITHSTANDING, PETITIONERS’ FCC CLAIMS ARE SUBSTANTIVELY FLAWED

Petitioners have no legal right to bring their putative FCC claims in this Court. But even if they did, the claims undoubtedly would fail.

²⁵ Petitioners also offer no substantive response to the fact that the entry of an injunction at this juncture would constitute an improper advisory opinion. See Sheyko v. Saenz, 112 Cal.App.4th 675, 692 (2003) (holding that a upholding a “part of a judgment ordering an agency to stop doing what it has not done” was an “would validate an advisory opinion on an abstract question, rather than adjudicate a ripe controversy.”) (citation omitted).

Notably, Petitioners do not challenge the adequacy of the licenses themselves or their sufficiency to authorize the operation of the proposed emergency radio system. Rather, they nitpick whose name must appear on the licenses. The County initially obtained the licenses in its own name at a time when MERA did not yet exist. (AOB at 53.) The County has the option of sharing the licenses (which it already has agreed to do) or transferring them outright to MERA. Either is sufficient to address Petitioners' concerns to the extent that such concerns merit any judicial consideration (which they do not).

Petitioners baldly accuse MERA of violating the law by "borrowing" the FCC licenses from the County. (Zack Brief at 55.) Citing section 310(d) of the Communications Act, Petitioners claim the County's sharing agreement with MERA is invalid because it lacks the FCC's review and approval. But no such approval is required. Petitioners overlook that the regulations promulgated by the FCC that specifically allow a licensee to share the use of its license. 47 C.F.R. § 90.179. Nothing in the regulations specify approval of an application to the FCC in order for such a sharing arrangement to take effect.

Alternatively, Petitioners maintain that the County's sharing arrangement relinquishes too much control to MERA such that it is

tantamount to a “de facto” assignment of the licenses. (Zack Brief at 56.)

Petitioners points to language in MERA’s Project Operating Agreement (“POA”) in which the County purports to recognize that MERA has discretion over the operation, control and management of the project. However, Petitioners misconstrue the import of that Agreement. The purpose of the POA was to permit the issuance of the 1999 revenue bonds. (AA 476.) It was not intended to impose any additional legal restrictions on the operation of MERA, or in particular, additional legal restrictions in the process of siting antennas or wireless communication facilities for MERA. (Id.) Furthermore, the POA was not intended to supercede, or override any portions thereof, to the Joint Powers Agreement that governed the legal and operational relationship between the various member agencies that constituted MERA. (Id.) Thus, the POA is irrelevant to MERA’s ability to comply with FCC requirements.

Further, Petitioners overlook the rationale underlying the “control” requirement, namely, to provide the FCC with the ability to hold the licensee accountable for operational activities conducted under the auspices of the license. This is necessary to ensure compliance with any relevant FCC regulations. See 47 U.S.C. § 301 (stating that the purpose of the FCC is to permit the United States to maintain control over “all channels of radio

transmission,” *inter alia*, through the use of licenses); Todisco v. United States, 298 F.2d 208, 211 (9th Cir. 1961) (“the purpose of the licensing law is to prevent interference with radio communications.”). Consistent with this rationale, the provisions of the POA ensure that the County and other MERA members have the right to access and maintain the emergency radio system, including the antenna. (AA 483.) Additionally, the County, retains the authority to access and control the emergency radio system to ensure compliance with any and all FCC requirements. (Id.) This, coupled with the written sharing agreement, suffices to establish MERA’s right to share the license issued to the County of Marin.

VI. CONCLUSION

For the reasons stated above and in MERA’s Opening Brief, MERA respectfully requests the Court to vacate the judgment of the trial court and enter judgment in favor of MERA on its Cross-Petition against Tiburon.

DATED: December 22, 2003

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CERTIFICATION OF COMPLIANCE WITH WORD LIMIT

Pursuant to California Rule of Court, Rule 14(c)(1), I certify that this brief, as counted by Microsoft Word, contains 14,487 words.

DATED: December 22, 2003

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