

# Drafting Defensible Findings

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# Findings Overview

- No public agency shall approve or carry out a project for which an EIR has been certified which identifies one or more significant impacts on the environment unless it makes certain written findings.
- The agency may find that all significant impacts will be mitigated or avoided, or that mitigation or avoidance is within the responsibility and jurisdiction of another agency and has been, or can and should be, adopted by the other agency.

# Findings Overview (cont'd)

- If all significant impacts cannot be mitigated, the agency cannot approve the project unless it finds both mitigation measures and project alternatives infeasible *and* makes a statement of overriding considerations.

Pub. Res. Code 21081; Guidelines  
15091, 15093.

# Lead Agency vs. Responsible Agency Findings

- Responsible agencies as well as lead agencies must make findings and, if necessary, statements of overriding considerations. Guidelines 15096 (h).
- Responsible agencies must make findings regarding “each significant impact of the project.” Guidelines 15096 (h).
- But a responsible agency must mitigate or avoid only “the direct or indirect effects of those parts of the project which it decides to carry out, finance, or approve.” Guidelines 15096 (g); Pub. Res. Code 21002.1 (d).

# Practical Importance of Findings

- Litigation
  - The agency's findings are important to reviewing judges. *Protect Our Water v. County of Merced*, 110 Cal. App. 4th 362, 372 (2003) (project approval reversed because court "cannot discern the required findings under CEQA").
  - Findings (not EIR) make feasibility determinations.
  - Findings are the agency's last chance to resolve controversial issues raised at the last minute.
  - Findings show the court the careful deliberation with which the agency decisionmakers considered the project and its environmental effects.
  - In briefing, the findings should provide clear, concise citations for key facts.

# Practical Importance (cont'd)

- Project Implementation
  - Findings provide the agency's final description of the mitigation measures actually imposed on the project.
  - Findings often clarify the EIR's determinations re significant impacts and mitigation. This clarity is important for any subsequent approvals using the same EIR.

# Findings Components

- Introduction
- EIR Certification (if not elsewhere)
- Adoption of Mitigation Measures
- Findings re Significant Impacts
  - Mitigated
  - “Can and Should” Findings
  - Mitigation Infeasible
- Project Alternatives Infeasible
- Special Issues
- Statement of Overriding Considerations
- Statement on Location and Custodian of Documents Constituting Record of Proceedings

# The Introduction

- Although not required, include an introduction in the findings, focusing on the EIR preparation and public review process for the project. In litigation, such a summary
  - provides a convenient citation for the extensive environmental and public review the project received; and
  - demonstrates that that level of care was important to the decisionmakers who approved the project.

# Certification of the EIR

- Frequently the lead agency's decisionmaking body certifies the EIR well before it approves the project; in this case, the EIR certification is issued before the findings.
- If EIR certification and project approval occur at the same meeting, the lead agency often includes its certification of the EIR in the findings.
- Reminder: The NOD follows project approval, not EIR certification.

# Certification of the EIR (cont'd)

- The certification states that the final EIR:
    - has been completed in compliance with CEQA;
    - reflects the lead agency's independent judgment and analysis; and
    - has been presented to the decision making body, which reviewed and considered the information in it before approving the project.
- Guidelines 15090(a).

# Adoption of Mitigation Measures

- Although not required, findings often describe the actions taken to adopt mitigation measures and make them enforceable through conditions of approval, contracts, or other legally binding means.
- Such a description may be useful in litigation, where attacks on the enforceability of mitigation measures are common.

# Impact Findings

(PRC § 21081; Guidelines § 15091)

- The agency must make one or more of the following findings for each significant effect:
  - Project changes or alterations avoid or substantially lessen the effect
  - Such changes or alterations are within the responsibility of another agency and can and should be adopted by that agency
  - Specific economic, legal, social, technological, or other considerations make mitigations or alternatives infeasible

# Insignificant Impacts

- No findings are required regarding impacts identified as less than significant or “no impact” in the EIR. Often findings do include a list of these insignificant impacts.
- Recommendation: Because findings are required only for significant impacts, separately list insignificant impacts only if time is available to do so without error; do not create inconsistencies in findings.

# Insignificant Impacts (cont'd)

- Reminder re cumulative impacts: Only cumulative impacts to which the project would make a “cumulatively considerable” contribution should be classified as significant cumulative impacts to which 21081 findings apply.

# Significant Impacts That Will Be Mitigated

- The first finding a lead agency may make regarding a significant impact is that “Changes or alterations have been required in, or incorporated into, the project which mitigate or avoid the significant effects on the environment.” Pub. Res. Code section 21081(a)(1).

# Significant Impacts

- Each finding must be “accompanied by” a brief explanation of the rationale for the finding. Guidelines 15091(a).
- This requirement may be satisfied by a reference to the explanation and analysis in the EIR; the explanation is not required to be set forth in the text of the findings document itself. *Mira Mar Mobile Community v. City of Oceanside*, 119 Cal. App. 4th 477 (2004)

# Significant Impacts (cont'd)

- Each finding must be supported by substantial evidence in the record of the agency's proceedings. Guidelines 15091(b).

# Two Approaches to Form for Mitigation Findings

- Long form: In this approach, the text of the findings document recites, for each significant impact:
  - A statement of the relevant facts regarding the significant impact;
  - A list of the relevant mitigation measures;

# Two Approaches to Form (cont'd)

- A statement that the mitigation measures have been imposed; and
- A finding whether the identified impact will be mitigated to a less than significant level.

# Two Approaches to Form (cont'd)

- Short form: In this approach, the text of the findings refers to the EIR's analysis and attaches either the MMRP or the Impact Summary table from the EIR.
  - If, after completion of the Final EIR, the decisionmaking body has modified any of the EIR's significance determinations or mitigation measures, those revisions should be shown in the attachment to the Findings.

# Short Form Is Usually Preferable

- The short form avoids inadvertent inconsistencies between the EIR, the MMRP and the Findings. Inconsistencies are damaging because they undermine:
  - the judicial deference that the agency's findings should receive in litigation
  - the efforts of those charged with implementing the mitigation measures, who do not know which document is correct.

# Short Form Is Usually Preferable (cont'd)

- Long form findings never include as much information as the EIR discussion does; paraphrasing the EIR discussion risks omitting precisely the reasoning upon which a court would have relied.

# Importance of the EIR

- Regardless of whether the long form or short form of impact mitigation findings is used, a well-prepared EIR is key.
  - Makes preparation of findings relatively simple.
  - Avoids need for “clean up” in findings that may undermine the EIR in litigation.
- EIR should logically and consistently discuss impacts, including cumulative impacts, and mitigation measures.

# “Changes or Alterations”

- When to measure them?
  - Original project scope?
  - As described in EIR?
  - Post-hearing?
- What counts as mitigation?
  - Mere regulatory compliance?
  - Pro-rata or fair share?
- Public Records Act considerations

# Two Recent Cases On Mitigation Findings

- Evidence that other agencies disagreed with the lead agency's conclusion (even if the other agencies have specialized expertise) is not enough to carry the burden of showing a lack of substantial evidence to support the lead agency's finding. *California Native Plant Society v. City of Rancho Cordova*, 172 Cal.App.4th 603, 625-626 (2009).

## Two Recent Cases (cont'd)

- A court will not defer to a decision-making body's findings that mitigation measures are effective where the findings "are not supported by substantial evidence or defy common sense." *Gray v. County of Madera*, 167 Cal.App.4th 1099, 1118 (2008).

# “Can and Should” Findings

- The second finding an agency may make regarding a significant impact is that “Those changes or alterations are within the responsibility and jurisdiction of another public agency and have been, or can and should be, adopted by that other agency.” Pub. Res. Code 21081(a)(2).

# “Can and Should” (cont’d)

- A finding disclaiming responsibility to mitigate a significant impact on this ground is appropriate only when another agency has *exclusive* responsibility for mitigation of the impact. Guidelines 15091(c); *City of Marina v. Board of Trustees*, 39 Cal. 4th 341, 366-367 (2006).

# “Can and Should” (cont’d)

- Unclear whether a “can and should” finding must be accompanied by a finding whether the impact will in fact be mitigated to less-than-significant.
- If in doubt whether another agency will in fact adopt a measure, that it “can and should,” most agencies will make a back-up infeasibility finding and statement of overriding considerations.

# Third Party Responsibility

- In *City of Marina v. Board of Trustees*, 39 Cal. 4th 341 (2006), the California Supreme Court held:
  - The CEQA lead agency has the power and the duty to assess the adequacy of mitigation measures, including project payments into a regional mitigation program

# Third Party Responsibility (cont'd)

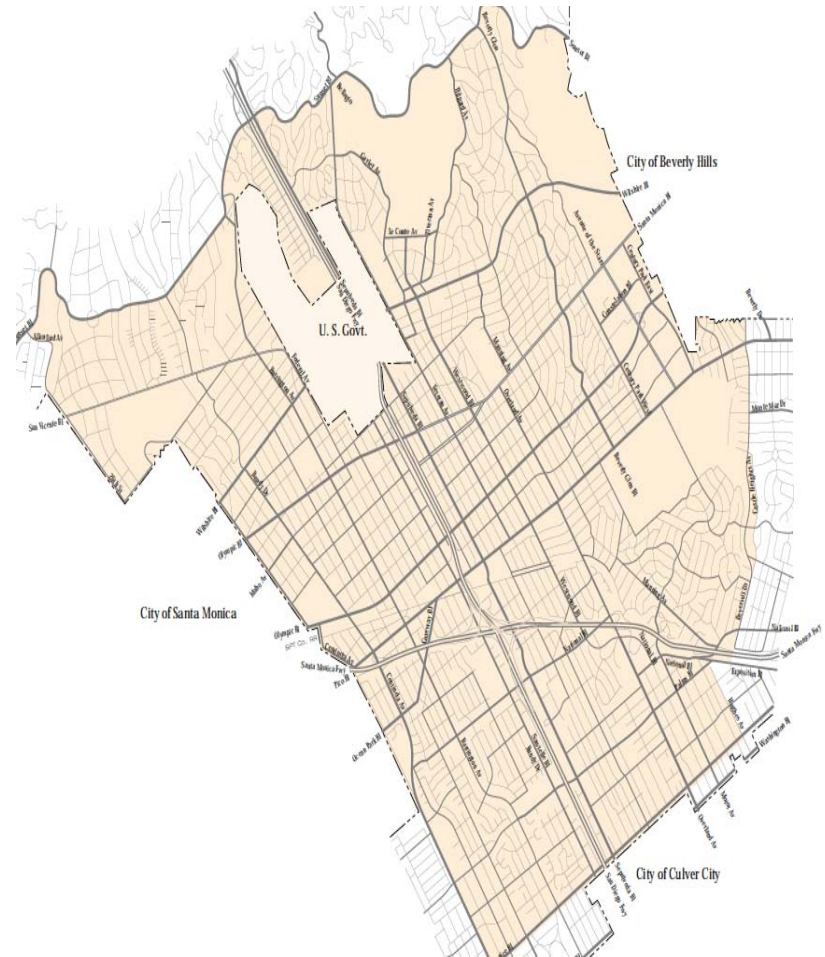
- To qualify as “feasible” mitigation, a funding program must constitute “a reasonable plan for mitigation”;
- no “time-specific” schedule is required;
- the need for contributions by other jurisdictions and control by a regional entity do not render the mitigation program “infeasible”;

# Third Party Responsibility (cont'd)

- Another agency's control over a regional mitigation fund does not justify the lead agency in relying on a "can and should" finding to avoid contributing to the fund; and
- A statement of overriding considerations is proper only when the measures necessary to mitigate or avoid significant environmental effects have properly been found to be infeasible.

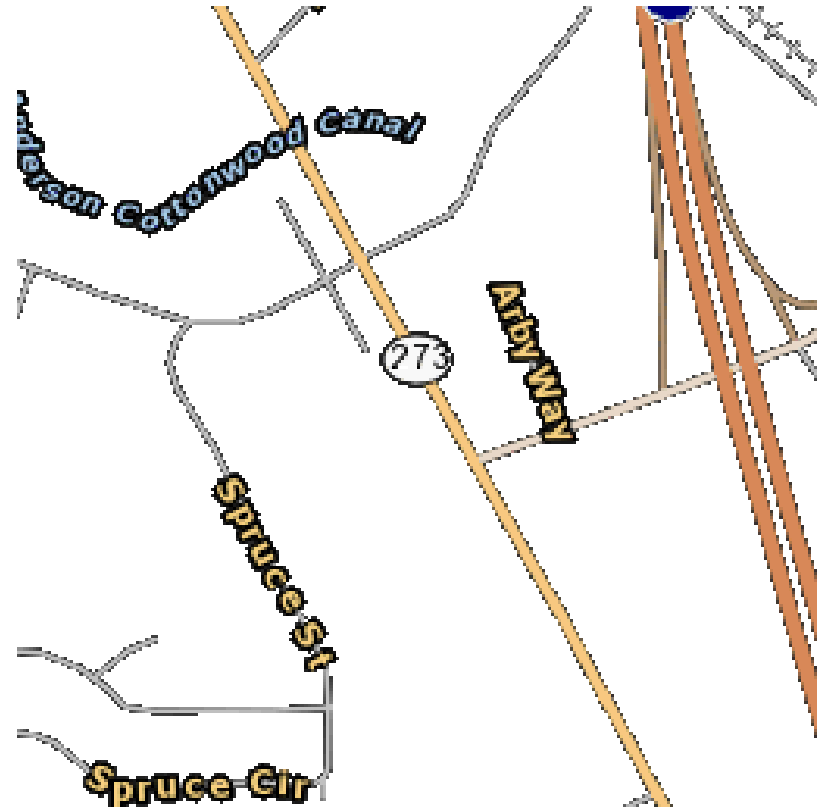
# Third Party Responsibility

- *Federation of Hillside and Canyon Assns. v. City of Los Angeles* (2004) 126 Cal. App. 4th 1180
  - Los Angeles general plan framework EIR anticipated significant impacts on transportation. Los Angeles believed it would be able to fund its share of the costs of those measures, but could not guarantee state and federal funding for them, and found the mitigation infeasible.
  - Result might differ following *City of Marina* (2006).



# Third Party Responsibility

- *Anderson First Coalition v. City of Anderson* (2005)  
130 Cal. App. 4<sup>th</sup> 1173  
“When future traffic congestion will result from the cumulative impact of several projects, cumulative traffic mitigation measures for a single project (that is one of the several projects) may be deemed sufficient if those measures are based on a reasonable plan of actual mitigation that the relevant agency commits itself to implementing.”



# Infeasibility of Mitigation or Alternatives

- The third finding an agency may make regarding a significant impact is that “Specific economic, legal, social, technological, or other considerations, including considerations for the provision of employment opportunities for highly trained workers, make infeasible the mitigation measures or alternatives identified in the environmental impact report.” Pub. Res. Code 21081(a)(3).

# Infeasibility of Mitigation Measures Or Alternatives

- If the lead agency finds that a mitigation measure or an alternative is infeasible, the lead agency must explain the specific reasons for rejecting the identified mitigation measure or alternative.  
*Preservation Action Council v. City of San Jose* (2006) 141 Cal.App.4th 1336, 1355-1357.

# Feasibility

- Capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social and technological factors (Pub. Resources Code § 21061.1; Guidelines § 15364).

# Infeasibility: No Short Form Findings

- The EIR need not discuss feasibility of mitigation measures and alternatives, so reference to the EIR is unlikely to be adequate regarding feasibility.
- Feasibility determinations are the core of the agency's findings and should be separately and carefully drafted.

# Examples of Legal Infeasibility

- Re dual glazed window and window air-conditioning retrofit to attenuate sound: “Requiring this mitigation without the homeowner’s consent would be legally infeasible. To the extent access is unobtainable, as described in the Statement of Overriding Considerations, the City Council has determined that this impact is acceptable because....”

# Legal Infeasibility (cont'd)

- Ability to acquire off-site land for mitigation (Map Act §66462.5 v. police power)
- *Uphold Our Heritage v. Town of Woodside*, 147 Cal. App. 4th 587 (2007) (applicant's refusal to rehabilitate historic mansion did not make such an alternative legally infeasible)

# Economic Infeasibility: Show Your Work

- *Citizens of Goleta Valley v. Bd. of Supervisors (Goleta II)*, 52 Cal. 3d 553, 575, fn. 7. (1990)

Alternative site “was not feasible because it had soil erosion problems, and could not accommodate more than a 100- to 200-unit hotel, *a capacity which an economic analysis had shown to be less than economically viable.*”

# Economic Infeasibility (cont'd)

- *Association of Irrigated Residents v. County of Madera*, 107 Cal. App. 4th 1383 (2003) (expert provided economic analysis demonstrating negative economic return from reduced size alternative)

# Economic Infeasibility (cont'd)

- *San Franciscans Upholding the Downtown Plan v. City and County of San Francisco*, 102 Cal. App. 4th 656 (2002) (economic consultant prepared detailed studies showing shortfall between amount prudent person would invest and cost of required rehabilitation under each alternative)

# Economic Infeasibility (cont'd)

- *City of Fremont v. San Francisco Bay Area Rapid Transit District*, 34 Cal. App. 4th 1780 (1995) (evidence showing alternative would cost \$60 million more than project supports conclusion of economic infeasibility)

# Economic Infeasibility (cont'd)

- *Save Round Valley Alliance v. County of Inyo*, 157 Cal. App. 4th 1437 (2007)  
(fact that project proponent cannot achieve same economic return from development of alternative site is not determinative of economic feasibility; reduced profitability must be sufficiently severe as to render it impractical to proceed with the project)

# Economic Infeasibility (cont'd)

- *Uphold Our Heritage v. Town of Woodside*, 147 Cal. App. 4th 587 (2007) (evidence of difference between cost of alternative and cost of project is needed to assess whether the alternative's added costs or lost profits are so severe as to render it impractical to proceed)

# Inconsistency with Goals or Policies

- *Citizens of Goleta Valley v. Bd. of Supervisors*, 52 Cal. 3d 553 (1990) (City could rely on adopted Local Coastal Plan to assess feasibility of alternative sites and determine appropriateness based on public policy considerations)

# Inconsistency with Goals or Policies (cont'd)

- *Save Our Residential Environment v. City of West Hollywood*, 9 Cal. App. 4th 1745 (1992) (City relied on general plan policies in eliminating alternative sites from consideration)
- *Sierra Club v. Gilroy City Council*, 222 Cal. App. 3d 30 (1990) (City rejected alternative because it would not provide as much housing as City needed)

# Inconsistency with Goals or Policies (cont'd)

- *City of Del Mar v. City of San Diego*, 133 Cal. App. 3d 401 (1982) (City entitled to rely on adopted staged growth management plan in evaluating various project alternatives)

# Inconsistency with Goals or Policies (cont'd)

- *Mira Mar Mobile Community v. City of Oceanside*, 119 Cal. App. 4th 477 (2004) (where project was consistent with adopted redevelopment plan, no analysis of offsite alternatives was required)

# Inconsistency with Goals or Policies (cont'd)

- *Save Round Valley Alliance v. County of Inyo*, 157 Cal. App. 4th 1437 (2007)  
(mere fact that alternative would require change in general plan or change in zoning designation is an insufficient basis for rejecting the alternative where land use designation simply is a reflection of federal ownership)

# Inconsistency with Project Objectives

- *In re Bay Delta Programmatic Environmental Impact Report Coordinated Proceedings (Calfed)*, 43 Cal. 4th 1143 (2008) (substantial evidence and rule of reason supported elimination of reduced export alternative during scoping because it would not achieve the primary purpose for the Calfed program)

# Inconsistency with Project Objectives (cont'd)

- *Sierra Club v. County of Napa*, 121 Cal. App. 4th 1490 (2004) (letter from project proponent's vice president explained why, given site constraints, the approved project was the only place on the property to construct a facility of the size and layout that project proponent needed to meet its fundamental business objectives of efficiency and consolidation)

# Inconsistency with Project Objectives (cont'd)

- *Save Round Valley Alliance v. County of Inyo*, 157 Cal. App. 4th 1437 (2007) (project proponent's unwillingness to engage in land exchange and perceptions about aesthetic quality of alternative site did not support conclusion that exchange was infeasible)

# Inconsistency with Project Objectives (cont'd)

- *Preservation Action Council v. City of San Jose*, 141 Cal. App. 4th 1336 (2006) (no independent facts and analysis supported applicant claim that reduced size store would put it at a competitive disadvantage; applicant's reasons for rejecting smaller size store cannot be determinative of feasibility)

# Inconsistency with Project Objectives (cont'd)

- Importance of the EIR: Rejection of alternatives for inconsistency with project objectives is most likely to be defensible if the EIR's project objectives have been well considered.
  - If too narrow, the project objectives appear manipulated to allow only the precise project proposed.

# Inconsistency with Project Objectives (cont'd)

- If too broad, the project objectives allow virtually any project to be described as consistent.

# Rejection of Mitigation Measure Based On Effectiveness

- An otherwise “feasible” mitigation measure may be rejected because it will not actually be effective in mitigating an impact or will not provide meaningful additional mitigation beyond the measures that are adopted.

-- *A Local & Regional Monitor v. City of Los Angeles* (1993) 12 Cal. App. 4th 1773, 1810.

-- *San Franciscans for Reasonable Growth v. City and County of San Francisco* (1989) 209 Cal. App. 3d 1502, 1519.

# Rejection of Mitigation Measure Based On Effectiveness (cont'd)

- Such findings are most common where:
  - the agency decisionmakers conclude that the EIR's preparers have identified excessive and duplicative mitigation measures for a significant impact; or

# Rejection of Mitigation Measure Based On Effectiveness (cont'd)

- public commenters have suggested additional mitigation measures for impacts that are already reduced to less-than-significant with mitigation measures identified in the Draft EIR

# Make Findings on Mitigation Measures and Alternatives Proposed by EIR Commenters

- Section 21081 requires findings on significant impacts and alternatives identified in the EIR; public comments are part of the EIR
- A mitigation measure or alternative proposed by a commenter is generally important to that commenter; providing the decisionmakers' reasons for rejection shows that public comment was taken seriously.

# Make Findings on Mitigation Measures and Alternatives Proposed by EIR Commenters (cont'd)

- Importance of the EIR: Findings on commenter-proposed mitigation measures and alternatives are much easier if the responses to comments in the Final EIR have been thoughtfully prepared.

# Additional Environmental Findings

- If a substantial controversy has arisen over the EIR's choice of methodology to analyze impacts, specific findings could explain the choice of methodology
- If new issues, late comments or last-minute information have come to light since the EIR was completed, findings should explain why they do not raise new significant impacts or otherwise require further analysis.
- If changes have been made in the project or mitigation measures, use findings to explain the changes and why they do not trigger recirculation.

# Statement of Overriding Considerations

- A Lead Agency cannot approve a project if it will have significant effects on the environment unless it finds that the benefits outweigh the unavoidable adverse environmental effects. This is called a statement of overriding considerations and is the one point in the CEQA process where environmental impacts from the project can be balanced against project benefits. (Public Resources Code § 21081(b); CEQA Guidelines §§ 15021(d), 15093.)

# Statement of Overriding Considerations (cont'd)

- The statement of overriding considerations is a written statement explaining why the agency is willing to accept each significant effect. The statement states forth the specific overriding social, economic, legal, technical or other beneficial project aspects supporting the agency's decision and must be based on substantial evidence in the final EIR or elsewhere in the record. (*Sierra Club v. Contra Costa County* (1992) 10 Cal. App. 4<sup>th</sup> 1212, 1222-1224.)

# Statement of Overriding Considerations (cont'd)

- Typically, a statement of overriding considerations begins with a summary of the unavoidable impacts and then list the factors justifying project approval, despite these impacts. For example, if a development project would result in unavoidable impacts, potential benefits would include: creation of local jobs, construction of a new school, and/or increase to the tax base.

# Statement of Overriding Considerations (cont'd)

- Findings required - benefits outweigh impacts.

# Project Benefits

- Must be substantiated in the record
- Usually in staff report or other policy document
- Side agreement (development agreement)
  - Caution re characterization in DA of mitigation v. benefit
- Use of Economic Impact Analysis to document impacts/benefits
- Oral or written testimony
- Keep list of benefits short and well-documented; unsubstantiated benefits can invalidate project approval. *Sierra Club v. Contra Costa County*, 10 Cal. App. 4th 1212, 1223-1224 (1992).

# Project Benefits

compliance v. furtherance v. exceedance

- Consider:
  - The project's noise impacts are within General Plan standards v.
  - “The project furthers the General Plan objective of creating jobs in the downtown area.” v.
  - “The project provides a jobs/housing ratio of 2:1, in excess of the general plan goal of 1:1.”

# Statement on Location and Custodian of Documents Constituting Record of Proceedings

- Include this in findings if it is not included in another approval document. Pub. Res. Code 21081.6(a)(2).

# Examples of Findings Approaches Common Framework

- Impact: Assessment of Impact
- Mitigation:
  - All mitigation has been applied or
  - Mitigation is infeasible
- Alternatives
  - will/won't avoid impact or mitigate beyond project's mitigation
  - Won't provide project benefits (to same extent)
- Project benefits outweigh impacts