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June 21, 2017

Via Email and Hand Delivery

Adhi Nagraj, Chair
Honorable Members of the Planning Commission
City of Oakland
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Re: Public Hearing: Oak Knoll Mixed Use Community Plan Project

Dear Chairperson Nagraj and Honorable Members of the Planning Commission:

We are writing on behalf of Oakland Residents for Responsible Development ("Oakland Residents") regarding Oak Knoll Mixed Use Community Plan Project ("Project").[1]

Oakland Residents and its technical consultants have reviewed the Planning Commission Staff Report for the Project ("Staff Report"). The Staff Report introduces new Project elements which were not analyzed in the Project's Final Supplemental Environmental Impact Report ("FSEIR"), and which the Staff Report admits Staff did not have adequate information to meaningfully analyze prior to this hearing.

[1] Oakland Residents submitted comments on the Draft Supplemental Environmental Impact Report ("DSEIR") for the Project in October 2016, and comments to the Landmarks Preservation Advisory Board ("LPAB") on May 8, 2017. Those comments are incorporated by reference. Oakland Residents reserves the right to supplement these comments at later hearings and proceedings on this Project. Gov. Code § 65009(b); PRC § 21177(a); *Bakersfield Citizens for Local Control v. Bakersfield* (2004) 124 Cal. App. 4th 1184, 1199-1203; *see Galante Vineyards v. Monterey Water Dist.* (1997) 60 Cal. App. 4th 1109, 1121.

For the first time, the Staff Report acknowledges that the Project's Development Agreement is still under consideration, and has not yet been developed. Rather than attach a proposed Agreement, the Staff Report identifies a list of potential terms that the Development Agreement "may" include. This fails to meet basic Planning Code requirements, and fails to enable either the public of the Planning Commission to meaningfully consider the proposed Development Agreement under the California Environmental Quality Act ("CEQA").[2] Furthermore, the Staff Report makes clear that some of the proposed terms for the Development Agreement may result in significant environmental impacts that were not analyzed in the FSEIR.

The Staff Report also proposes establishing a Community Facilities District ("CFD") to manage Project infrastructure development. The Staff Report explains that "[s]taff has not had adequate time to consider a CFD or other financing options available, what should be included in the CFD, the recent changes in state law regarding formation of a CFD and the draft Condition of Approval may or may not be adequate to protect the residents and the City and provide clear obligations to the developer."[3]

Finally, Oakland Residents has reviewed the FSEIR along with our technical consultants. The FSEIR fails to adequately respond to expert comments on traffic and biological resources issues, fails to adequately mitigate several potentially significant impacts, proposes impermissibly deferred mitigation, and contains numerous other errors and omissions that preclude a meaningful analysis of the Project's environmental impacts. The Commission may not recommend certification of the FSEIR until it fully complies with CEQA.

The Commission lacks adequate information and the requisite substantial evidence to make the necessary recommendations to the City Council to approve the Project. The Commission should follow the recommendation in the Staff Report to continue its hearing on the Project to a future date after the proposed Development Agreement has been drafted and circulated to Commission members and the public for review, and after the City has corrected the errors and omissions in the FSEIR.[4]

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[2] Pub. Res. Code ("PRC") §§ 21000 et seq.; 14 Cal. Code Regs. ("CCR") §§ 15000 et seq.
[3] Staff Report, p. 31.
[4] Furthermore, the Commission must offer further public comment on all aspects of the Project at the continued hearing. The Commission may not close public comment or public testimony on this item

We prepared these comments with the assistance of air quality expert Jessie Jaeger of SWAPE;[5] expert traffic engineer Daniel Smith;[6] and conservation biologist and wildlife ecologist Scott Cashen.[7] Their comment letters and all attachments thereto are incorporated by reference as if fully set forth herein.

I. STATEMENT OF INTEREST

Oakland Residents for Responsible Development ("Oakland Residents") is an unincorporated association of individuals and labor organizations that may be adversely affected by the potential public and worker health and safety hazards and environmental and public service impacts of the Project. The association includes Alan Guan, Risi Agbabiaka, Peter Lew, Bridgette Hall, Tanya Pitts, UA Plumbers and Pipefitters Local 342, International Brotherhood of Electrical Workers Local 595, Sheet Metal Workers Local 104, Sprinkler Fitters Local 483 and their members and their families; and other individuals that live and/or work in the City of Oakland and Alameda County.

Individual members of Oakland Residents and the its affiliated labor organizations live, work, recreate and raise their families in Alameda County, including the City of Oakland. They would be directly affected by the Project's environmental and health and safety impacts. Individual members may also work on the Project itself. Accordingly, they will be first in line to be exposed to any health and safety hazards that exist onsite. Oakland Residents has an interest in enforcing environmental laws that encourage sustainable development and ensure a safe working environment for its members. Environmentally detrimental projects can jeopardize future jobs by making it more difficult and more expensive for business and industry to expand in the region, and by making it less desirable for businesses to locate and people to live there.

II. THE COMMISSION MAY NOT RECOMMEND APPROVAL OF THE PROJECT IN THE ABSENCE OF A PROPOSED DEVELOPMENT AGREEMENT

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because both the Development Agreement and the FSEIR will require further public comment following the release of the proposed Development Agreement.

[5] SWAPE's technical comments and curriculum vitae are attached hereto as Exhibit A.

[6] Mr. Smith's technical comments and curriculum vitae are attached hereto as Exhibit B.

[7] Mr. Cashen's technical comments and curriculum vitae are attached hereto as Exhibit B.

The Staff Report explains that the City and the Applicant are "considering" a Development Agreement with respect to the development of the property and the Project. A Development Agreement would vest the Applicant with the right to develop the Project in accordance with the land use entitlements, Conditions of Approval (including payment of certain fees and construction and/or funding of certain improvements) adopted concurrently with the Development Agreement, and the land use policies in the General Plan and other existing City regulations in existence as of the adoption date.[8] This commitment by the City would provide an economic benefit to the Applicant and the Project. In exchange, the City may request that the Applicant provide economic benefits, affordable housing, and other comparable benefits to the City in exchange for the concessions granted by the Development Agreement.[9]

The Staff Report correctly explains that City Planning Codes require the Planning Commission consider, hold a public hearing, and make a recommendation to the City Council to approve or deny a proposed Development Agreement Application based on terms of the proposed Development Agreement.[10] As discussed below, the Commission is not able to make a recommendation to the City Council to approve the Project or the Development Agreement in the absence of a draft Agreement. Instead, the Commission must continue this hearing until a proposed Development Agreement has been prepared and circulated to both the Commission and the public for review.

A. The Commission Must Consider the Proposed Development Agreement Before Making a Recommendation to the City Council

1. <u>The Development Agreement is Part of the Project</u>.

The Project application, the FSEIR, and the Agenda identify a Development Agreement as one of the planning permits required for the Project.[11] When a development agreement is required to implement a project, it is considered

[8] Staff Report, p. 14.
[9] Planning Code Section 17.138.030.
[10] Staff Report, p. 31.
[11] See DSEIR, pp. 3-54, 3-55.

part of the project.[12] Development agreements must be enacted in accordance with the Government Code and applicable local planning codes, and require environmental review at the time of adoption. Therefore, any development agreement for the Project must be considered by the City's decision-makers at the same time as the rest of the Project approvals.

2. <u>City Planning Codes Require the Planning Commission to Consider Proposed Development Agreements Before They Are Considered by the City Council</u>.

The City's procedure for approving development agreements is set forth in City Planning Code Chapter 17.138, Development Agreement Procedure. The Chapter describes the criteria for approving development agreements, required components for development agreement applications, and requires independent consideration of the proposed agreement by both the Planning Commission and City Council.

a. <u>Development Agreement Application</u>.

Development agreement applications must include a fee, a copy of the proposed development agreement, and any other supporting materials necessary to describe the agreement, its proposed duration and terms, any special conditions to be imposed pursuant to Section 17.138.015, and a program for periodic review of the agreement.[13]

The Applicant submitted its development agreement application for the Project ("Application") on November 25, 2015. The Application failed to include a copy of the proposed development agreement, and no development agreement was included in the FSEIR. Recent responses to Public Records Act obtained by this office disclosed that, as of March 8, 2017, the Applicant failed to pay the development agreement processing fee required under Planning Code Section 17.138.020, and, as of May 22, 2017, had not yet submitted a proposed development

[12] See Gov. Code § 65864; 14 Cal. Code Regs. ("CCR") §§15352(a), (b), 15378; *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116.
[13] Planning Code, Section 17.138.020.

agreement to the City.[14] Thus, as of May 22, 2017, the development agreement application remained incomplete.

b. Planning Commission Action.

Planning Code Section 17.138.030 requires that "[a]n application for a development agreement shall be considered by the City Planning Commission which shall hold a public hearing on the application."[15] Because Section 17.138.020 requires the application to include the proposed development agreement, Section 17.138.030 necessarily requires that the Commission consider the underlying development agreement at this hearing.

Section 17.138.030 further requires that the Commission determine whether the development agreement application is consistent with the Oakland General Plan and any applicable district plans and development maps, and whether it provides adequate benefits to the City in exchange for the regulatory concessions provided to the developer.[16] Finally, Section 17.138.030 requires that the Commission make a recommendation to the City Council on whether or not to approve the development agreement application based on these factors.[17] In order to make this recommendation, the Commission must be familiar with the terms proposed in the agreement.

The Agenda identifies the development agreement as one of its planned actions on the Project, and states that the Commission will "provide a recommendation to City Council regarding...the Development Agreement."[18] In order to make this recommendation, the Commission must review and consider the proposed development agreement prior to the hearing. The proposed development agreement must also be provided to the public for review prior to the hearing.[19] The

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[14] See March 8, 2017 and January 30, 2017 emails from Planner Heather Klein to Applicant re outstanding planning fees.
[15] Planning Code Section 17.138.030.
[16] *Id.* ("The Commission shall determine whether the proposal conforms to the criterion set forth in Section 17.138.050, and may recommend approval or disapproval of the application, or recommend its approval subject to changes in the development agreement or conditions of approval, giving consideration to the factors set forth in Section 17.138.060.").
[17] *Id.*
[18] See June 21, 2017 Agenda, p. 9.
[19] See Gov. Code §§ 65092, 65867.
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Staff Report failed to attach a proposed Development Agreement. Therefore, the Commission is not in a position to take action on the proposed Agreement.

c. Council Action.

The Planning Code prohibits the City Council from setting a public hearing on a proposed development agreement until the Planning Commission issues its recommendation on the agreement.[20] Once the Commission recommendation has been made, the Council then sets its own a public hearing on the agreement. Prior to the Council hearing, the Council may refer the matter back to the Planning Commission for further consideration and advice.[21] At the Council hearing, the Council must consider the recommendation of the Planning Commission, and must determine whether the development agreement is consistent with the Oakland General Plan and any applicable district plans and development maps, and whether it provides adequate benefits to the City in exchange for the regulatory concessions provided to the developer.[22] The Council then decides whether to approve the development agreement, approve it subject to changes or conditions, or deny it.[23]

Section 17.138.04 makes clear that the Council may not act on a proposed development agreement unless it has first been considered by the Planning Commission. Thus, because the Planning Commission is unable to consider the Project's proposed development agreement at this hearing, the City Council is prohibited from setting a separate hearing to consider the development agreement.

3. The Planning Commission Cannot Recommend Certification of the FSEIR to the City Council Until the Commission Has Considered the Development Agreement.

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[20] Planning Code section 17.138.040 ("After a recommendation has been rendered by the Commission, the City Council shall set the date for consideration of the matter.").
[21] *Id.*
[22] *Id.* ("The Council shall review the recommendation of the Commission and shall determine whether the proposal conforms to the criterion set forth in Section 17.138.050, and may approve or disapprove the proposed development agreement, or approve it subject to changes therein or conditions of approval, giving consideration to the factors set forth in Section 17.138.060.").
[23] *Id.*

CEQA requires that an EIR consider the "whole of an action."[24] This includes all phases of a project that are reasonably foreseeable.[25] This also includes development agreements.[26] The City has identified the development agreement as one of the Project's necessary planning permits. Therefore, it must be analyzed under CEQA before the Project can be approved.[27]

In order to recommend certification of the Final SEIR to the City Council, the Planning Commission must make mandatory finding that the EIR has been "completed in compliance with CEQA"; that the Commission has reviewed and considered the information contained in the Final SEIR; and that the Final EIR reflects the lead agency's independent judgment and analysis.[28]

The Commission cannot make these findings if it has not reviewed and considered the development agreement. It would be arbitrary and capricious for the Commission to do so. Moreover, any recommendation to approve the Final SEIR in the absence of the development agreement would lack the substantial evidence necessary for the Council to rely on the Commission's findings.

B. The Terms Currently Proposed for the Development Agreement May Result in New and Potentially Significant Environmental Impacts That Were Not Analyzed in the FSEIR.

The Staff Report contains outline of some proposed Development Agreement terms, but contains no analysis of the environmental impacts of these proposed terms. This violates CEQA's requirement that an EIR consider the "whole of an action,"[29] and results in a failure to disclose potentially significant impacts.

1. Concurrent Construction of Project Phases.

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[24] 14 CCR § 15378; *Habitat & Watershed Caretakers v. City of Santa Cruz* (2013) 213 Cal.App.4th 1277, 1297.
[25] *Id.*
[26] *Save Tara,* 45 Cal.4th 116; *Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal. App. 4th 899, 926-927.
[27] *Save Tara,* 45 Cal.4th 116.
[28] 14 CCR § 15090(a)(1)-(3).
[29] 14 CCR § 15378; *Habitat & Watershed Caretakers v. City of Santa Cruz* (2013) 213 Cal.App.4th 1277, 1297.

The Staff Report explains that one of the Development Agreement terms currently under consideration would give the Applicant the right to develop "any phase of the Project at any particular time" in order to meet market demand.[30] The Project involves three distinct phases which would build out geographically distinct portions of the Project site during each phase.[31] Since these phases involve buildout of different neighborhoods, if incorporated into the Development Agreement, this concession could conceivably mean that some or all Project construction phases could overlap, or be constructed concurrently. This could exponentially increase the Project's construction impacts, including impacts on air quality from construction emissions and traffic impacts.

The Development Agreement was not included in the FSEIR, and the FSEIR did not analyze overlapping and concurrent construction of Project phases. Therefore, the City has conducted no analysis of the potentially significant impacts of this proposal, and has no evidence on which to conclude that this proposed Development Agreement term would not cause significant impacts beyond what was analyzed in the FSEIR.

a. Construction Emissions.

The FSEIR analyzed construction emissions separately for each phase of the Project, and did not analyze emissions for overlapping or concurrently constructed Project phases.[32] The Staff Report also fails to quantify this potentially significant impact.

SWAPE concludes that overlapping or concurrent construction of Project phases would significantly increase construction emissions over applicable significance thresholds set by the Bay Area Air Quality Management District ("BAAQMD"), even with existing mitigation, as follows:

Maximum Daily Construction Emissions (lbs/day)					
Activity	ROG	CO	NO_x	PM10	PM2.5

[30] Staff Report, p. 16.
[31] DSEIR, p. 3-42.
[32] DSEIR, p. 4.2-23 ("Emissions were estimated separately for each of the construction phases of the Project, and for both on-site crushing and off-site hauling scenarios under Phase I.").

Phase I, Phase II, Phase III	57.1	190.7	120	29.1	11.5
BAAQMD Regional Threshold (lbs/day)	**54**	**-**	**54**	**82**	**54**
Threshold Exceeded?	***Yes***	*No*	***Yes***	*No*	*No*

[33]

As demonstrated above, when construction emissions are evaluated assuming that all three construction phases are developed together, the Project's construction-related ROG and NO_x emissions would both exceed the 54 pounds per day (lb/day) threshold set forth by BAAQMD. This demonstrates that, under the terms of the DA, the proposed Project could result in significant air quality impacts which were not previously evaluated in the FSEIR.

This is significant impact that was not disclosed in the FSEIR, and for which the City has not provided any mitigation. The Commission cannot recommend approval of this Development Agreement term unless and until these impacts are fully mitigated.

b. Construction Traffic.

The FSEIR did not analyze cumulative Project construction traffic from overlapping or concurrent construction of Project phases.

The FSEIR acknowledges that Project construction may cause potentially significant traffic impacts during each individual phase of construction:

> During the construction of each phase of the Oak Knoll development, temporary and intermittent transportation impacts may result from truck movements as well as construction worker vehicles to and from the construction site. The construction-related traffic may temporary reduce capacities of roadways in the vicinity because of the slower movements and larger turning radii of construction trucks compared to passenger vehicles.[34]

The FSEIR then concludes that construction traffic for each individual phase will be less than significant with implementation of SCA TRA-1.[35] However, the

[33] Exhibit A, p. 2.
[34] DSEIR, p. 4.13-96.
[35] DSEIR, p. 4.13-97.

FSEIR did not analyze whether SCA TRA-1 would be effective to mitigate construction traffic impacts of all phases of the Project were constructed concurrently.[36] Therefore, the City lacks substantial evidence on which to conclude that this proposed Development Agreement term.

c. Reduction in Traffic Mitigations.

The Staff Report proposes that the Development Agreement would give the Applicant a reduction in its Traffic Impact Fee ("TIF") in return for doing the intersection improvements at beginning of Project construction.[37] However, the Applicant should not be entitled to any TIF reductions since the FSEIR has concluded that traffic impacts are significant and unavoidable. This concession would violate City's duties under CEQA to apply all feasible mitigation measures to the Project before declaring an impact to be significant and unavoidable.

III. THE FSEIR FAILS TO COMPLY WITH CEQA

The Commission cannot recommend certification of the FSEIR because the FSEIR fails to comply with CEQA.

A. The FSEIR Fails to Adequately Disclose and Mitigate Potentially Significant Impacts.

1. Traffic Impacts.

a. The Project's Proposed Transportation Demand Management Program Provides Inadequate Public Transit Service.

In addressing transit services to the Project area, the FSEIR includes school trip routes as if they were services available to the general public. This analysis is incorrect, and obscures the true sparsity of transit services to the Project area. The FSEIR also fails to note that the limited routes available to general public use are

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[36] Moreover, as discussed below, SCA TRA-1 impermissibly defers creation of the Project's Construction Management Plan. Therefore, the City lacks substantial evidence on which to conclude that even the Project's traffic impacts during separately constructed Project phases will be effectively mitigated.

[37] Staff Report, p. 15.

downhill of the Project site. As Mr. Smith explains, as a result, persons accessing or returning to the Project site face a steep uphill walk to complete their trip.[38]

In this circumstance, Mr. Smith opines that the shuttle service to BART proposed in the Transportation Demand Management Program (DSEIR Appendix BB) is a potentially excellent mitigation measure.[39] However, he explains that the proposed headway between stops, possibly as long as 40 minutes between shuttle stops during the peak morning and evening peak periods, is too infrequent to achieve meaningful ridership. With such infrequent service, persons who just missed a shuttle are likely to resort to a ride-hailing service, defeating the purpose of the shuttle. To be effective, Mr. Smith recommends that the FSEIR's traffic mitigation measures be updated to require shuttles to operate at a headway of about 20 minutes.[40]

b. The FSEIR Fails to Adopt Feasible Mitigation Recommended by Caltrans.

The FSEIR characterizes impacts Trans-1, Trans-2, Trans-3, Trans-5, Trans-8, Trans-9, Trans-10, Trans-12, and Trans-14 as significant and unavoidable because they involve impacts to transportation facilities not under the City of Oakland's jurisdiction.

In a letter dated October 12, 2016. Caltrans commented that the City and the applicant should implement feasible mitigations to these impacts as required Project mitigation on a fair share basis, operating through the Caltrans encroachment permit process. However, the City's response is ambiguous, stating "the City will Coordinate with Caltrans and the Project applicant on design, funding, and timing for implementation of the mitigation measures that require coordination with Caltrans". This response is inadequate, and fails to take Caltrans proposed mitigation plan seriously. Consistent with Caltrans' comments, Mr. Smith recommends that the FSEIR's MMRP be amended to require the Applicant to commit to specified amounts of fair share funding toward each mitigation measure to an escrow account for that purpose and coordinate with Caltrans regarding how any other fair share fees will be made good to enable implementation.[41]

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[38] Exhibit B, p. 1-2.
[39] *Id.*
[40] *Id.*
[41] Exhibit B, p. 3.
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The Staff Report asserts that the mitigation measures that relate to roadways under Caltrans jurisdiction cannot go through the Caltrans encroachment permit process until the FSEIR is certified. The Caltrans encroachment permit process is meant to assure that improvements or mitigation measures constructed by other jurisdictions or private parties on Caltrans facilities are operationally sensible, conform to State and (when applicable) U.S. Department of Transportation highway design standards or qualify for reasonable exceptions to design standards and assure that traveler and worker safety is reasonably protected during the construction period. Caltrans generally consults with the applicant agency following preparation of its CEQA document. However, this does not preclude the local jurisdiction from requiring a funding commitment for the mitigation measures from the Applicant as a condition for the FSEIR approval.

c. <u>There is Additional, Feasible Mitigation for Intersection Impacts that the FSEIR Should Incorporate.</u>

Mitigation Measure Trans-6 at the intersection of Golf Links Road and Mountain Boulevard attempts to resolve traffic impacts by restriping lanes at the intersection, signalizing it and coordinating the new signal with signals at the intersections of Golf Links Road with freeway ramps on both sides of I-580. However, as the FSEIR observes, the mitigation measure might result in queue blockages at the nearby intersections of Golf Links Road with both sets of I-580 ramps.[42] Mr. Smith explains that these blockages alone do not render traffic impacts at the intersection of Golf Links with Mountain "significant and unavoidable" as the FSEIR claims. Rather, Mr. Smith explains that there is sufficient undeveloped land to the east of Mountain Boulevard near Golf Links Road that the alignment of Mountain Boulevard could be shifted to the east, significantly increasing the separation between the intersection of Mountain with Golf Links and the intersection of Golf Links with the eastbound I-580 ramps, thereby potentially curing the queue blockage problem.[43] CEQA requires the environmental analysis to consider all feasible mitigation measures before declaring that an impact is significant and unavoidable. The FSEIR should be revised to analyze this potentially effective mitigation measure.

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[42] DSEIR, p. 4.13-69.
[43] Exhibit B, p. 3.

2. **Biological Resources**.

a. The FSEIR Fails To Adequately Disclose Existing Conditions Regarding Oak Woodlands.

In an attempt to correct prior deficiencies in its baseline analysis, the FSEIR added the following text regarding the status of oak woodlands in Alameda County:

> According to the CALVEG dataset (a classification of Californian Vegetation. 2009. U.S. Dept. of Agriculture, U.S. Forest Service, Regional Ecology Group, San Francisco. Accessed October, 2016), there are approximately 103,000 acres of hardwood forests/ woodlands in Alameda County, the vast majority of which are likely oak woodlands. Of the 103,000 acres, approximately 39,000 acres (37 percent) are located within protected areas that are included in the California Protected Areas Database (CPAD, 2016). The approximately 16.97 acres of oak woodlands that would be either temporarily or permanently impacted by the Project represent approximately 0.016 percent of the oak woodlands in Alameda County.[44]

This information is misleading for two reasons. First, it does not correspond to the geographic scope of the City's cumulative impacts assessment, which was limited to development projects in the City of Oakland. If the City has determined that all of Alameda County is the appropriate geographic scope for analyzing cumulative impacts to oak woodlands, then it must also disclose and analyze all other past, present, and probable future projects in Alameda County that are contributing to cumulative impacts. Alternatively, if the City has determined that the City of Oakland is the appropriate geographic scope for analysis, then it must present data pertaining to the amount of oak woodlands in the City of Oakland. However, the FSEIR may not use data on impacts at the City-level, and then apply them to data on existing conditions at the County-level, as was done in the FSEIR. This applies an arbitrary set of baseline conditions to the FSEIR's impact analysis.

Second, the information provided in the FSEIR fails to distinguish between coast live oak woodlands (which occur on the Project site) and other types of oak woodlands. According to the Conservation Lands Network, there are 35,924 acres of Coast Live Oak Woodland in Alameda County. Of those, there are only 8,644

[44] Response to Comment M10. FSEIR, p. 6-152.

acres of Coast Live Oak Woodland in the "Middle East Bay Hills," and only 4,421 of those acres are protected (Attachment 1). As explained by Mr. Cashen, this inaccuracy belies the FSEIR's failure to recognize critical qualities of the existing Oak woodland conditions at the Project site, resulting in a failure to adequately analyze the Project's impacts on this sensitive resource.[45]

B. The FSEIR Fails to Adequately Disclose and Mitigate Cumulative Impacts to Biological Resources.

CEQA requires the lead agency to include a reasonable and good faith analysis of cumulative impacts in an EIR.[46] The analysis must be sufficiently detailed to correspond to the severity of the impact and the likelihood that it will occur.[47] While an EIR may provide less detail in its cumulative impact analysis than for project-specific effects, the discussion must provide sufficient specificity to enable the agency to make findings that a project will, or will not, have a significant cumulative impact where the possible effects of the project are "individually limited but cumulatively considerable."[48] The term "'cumulatively considerable' means that the incremental effects of an individual project are considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects."[49]

Finally, analysis of cumulative impacts must examine reasonable, feasible options for reducing or avoiding the project's significant cumulative effects,[50] and may adopt mitigation measures to reduce those effects to less than significant levels.[51] Mere conclusory statements about cumulative impacts are inadequate, as are cumulative impact discussions that ignore or minimize a project's cumulative impacts.[52] An agency's determination that cumulative impacts of a project are, or

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[45] Exhibit C, pp. 1-4.
[46] 14 §§ CCR 15130(a); 15065(a); 15355(b); *Cadiz Land Co., Inc. v. Rail Cycle, L.P.* (2000) 83 Cal.App.4th 74, 109.
[47] 14 CCR § 15130(b); *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 729 ("Kings County") (EIR inadequate for failure to include "some data" on cumulative groundwater impacts).
[48] PRC § 21083(b)(2); 14 CCR §§ 15064(h)(1), 15065(a)(3). 14 CCR § 15130(b).
[49] PRC § 21083(b)(2).
[50] 14 CCR § 15130(b)(5).
[51] 14 § CCR 15130(a)(3).
[52] *See San Joaquin Raptor V. County of Stanislaus (1994) 27 Cal. App. 4th 713, 733-734; Mtn. Lion Coal. V. Fish & Game Comm'n (1989) 214 Cal. App. 3d 1043, 1052-53; Kings County*, 221 Cal.App.3d at 729.
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are not, significant must be supported by substantial evidence and reasoned, good faith analysis.[53]

The FSEIR failed to make a reasonable or good faith attempt to disclose the Project's cumulative impacts in conjunction with other reasonably forseeable projects in the vicinity of the Project. The City's cumulative impacts assessment was limited to development projects in the City of Oakland.[54] Expert Scott Cashen brought this issue to the City's attention in his comments on the DSEIR. However, the FSEIR fails to address or resolve those issues.

For example, the City's response to Comment M14 states: "...the Draft SEIR inaccurately stated that the 1998 EIR for the redevelopment of site did not address cumulative impacts on biological resources. In fact, the 1998 EIR/EIS concluded:

> Reuse of [the site] in combination with other regional development would not significantly contribute cumulatively to the regional loss of sensitive wildlife habitat and native vegetation. Rifle Range Creek riparian corridor is the only sensitive habitat and existing regulations require mitigation for any impacts to this area, including those measures identified in the OUSD's Developer Fee Justification Study (OUSD, 1996). (1998 EIR/EIS at p. 5-5)."[55]

The excerpt above represents a bare conclusion, with no analysis, and no analytic bridge to establish how the EIR/EIS prepares reached this conclusion. As explained by Mr. Cashen, this issue is compounded because the riparian corridor *is not* the only sensitive habitat, and there is no discussion of cumulative impacts to other sensitive habitats, or to sensitive species.[56]

According to the FSEIR: "[t]he amount of habitat lost through past and present projects is captured in the discussion of the area's existing conditions, discussed on pages 4.3-2–4.3-25 of the Draft SEIR."[57] This statement is incorrect. Nowhere does the DSEIR quantify or discuss the amount of habitat lost through past and present projects. The FSEIR further states that "[t]he effect of reasonably foreseeable future projects and the Project on biological resources is discussed on

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[53] *Preserve Wild Santee* (2012) 210 Cal.App.4th 260, 276-80.
[54] DSEIR, Appendix G.
[55] Response to Comment M14. FSEIR, p. 6-157.
[56] See Exhibit C, p. 11.
[57] Response to Comment M14. FSEIR, p. 6-158.

pages 4.3-84–4.3-85 of the Draft SEIR."[58] The DSEIR did indeed identify the potential for various cumulative effects. For example, the DSEIR indicates: "other cumulative development in proximity to the Project site could affect the same habitat, species, and wildlife corridor (Rifle Range Creek)..."[59] However, the DSEIR did not quantify those cumulative effects. For example, nowhere did the DSEIR quantify how much oak woodland habitat existed historically, how much has been lost due to past and present projects, and how much more is expected to be lost due to reasonably foreseeable future projects. Thus, the FSEIR fails to include any analysis to support is conclusion that the Project's cumulative impacts to biological resources would not be cumulatively considerable, in violation of CEQA.[60]

C. The FSEIR Contains Impermissibly Deferred Mitigation.

It is generally improper to defer the formulation of mitigation measures.[61] An exception to this general rule applies when the agency has committed itself to specific performance criteria for evaluating the efficacy of the measures to be implemented in the future, and the future mitigation measures are formulated and operational before the project activity that they regulate begins.[62] As the courts have explained, deferral of mitigation may be permitted only where the lead agency: (1) undertakes a complete analysis of the significance of the environmental impact; (2) proposes potential mitigation measures early in the planning process; and (3) articulates specific performance criteria that would ensure that adequate mitigation measures were eventually implemented.[63]

The mitigation measures discussed below are examples of impermissibly deferred mitigation. The City must revise these measures to correct their deficiencies and include specific and measureable performance standards, and must recirculate the DSEIR for public review.

1. <u>Fire Safety Plan.</u>

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[58] *Ibid.*
[59] DSEIR, p. 4.3-85.
[60] DSEIR, p. 4.3-85.
[61] 14 CCR § 15126.4(a)(1)(B); *POET v. CARB*, 218 Cal.App.4th at 735.
[62] *POET*, 218 Cal.App.4th at 738.
[63] *Comtys. for a Better Env't v. City of Richmond* (2010) 184 Cal.App.4th 70, 95; *Cal. Native Plant Socy' v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 621.

SCA HAZ-4 requires the creation of a Fire Safety Plan following Project approval. The FSEIR explains that SCA HAZ-4 requires "preparation of a Fire Safety Plan that specifies all of the fire safety features incorporated into each phase of the Project and the schedule for implementation of the features."[64] However, the SCA HAZ-4 improperly defers development and disclosure of critical fire safety response plans based on a subsequent analysis of the severity of potential fire impacts, thereby relegating critical analysis of fire impacts a post-approval stage, out of sight of public input. This deferred analysis is prohibited by CEQA, and fails to demonstrate the diligence in addressing fire hazards within the City that Oakland's citizens deserve.

2. **Landslides.**

SCA Implementation Measures GEO-2 and GEO-2.3 improperly defer both analysis and mitigation of potentially significant impacts from landslides at the Project site to a post-approval geotechnical report. In particular, SCA GEO-2 defers analysis of seismically-induced landslides, slope instability, and necessary measures for geologic hazard abatement.[65]

By deferring analysis of seismic impacts and landslides to future compliance with SCA GEO-2, the FSEIR unlawfully defers its environmental analysis of these impacts, and omits critical information that the public is entitled to review and comment on.[66] City cannot defer its threshold significance determination to a post-approval phase. Because its analysis of landslide impacts is deferred, the FSEIR lacks substantial evidence to support its conclusion that the soil stabilization measures identified in SCA GEO 2.3 will be effective to reduce landslide impacts to less than significant levels. Moreover, SCA GEO 2.3 lacks adequate performance standards because it fails to include any requirement for regulatory or engineering oversight to ensure that the Applicant properly implements the soil stability measures enumerated in this SCA.

3. **Historic Resources.**

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[64] DSEIR, p, 4.12-9.

[65] See DSEIR, p. 2-24 (""SCA Implementation Measures GEO-2.3: To further implement SCA GEO-2, the Project applicant shall implement these following corrective measures to repair existing unstable site conditions, as applicable, ***based on the site-specific geotechnical report to be developed pursuant to SCA GEO-2.")***.

[66] See *Madera Oversight Coalition, Inc. v. County Of Madera* (2011) 199 Cal. App. 4th 48, 82-83.

Mitigation Measure CUL-1.2 improperly defers analysis and disclosure of baseline structural building conditions at Club Knoll, and of the relocation work plan.[67] This is particularly egregious given that FSEIR relies on the dilapidated existing condition of Club Knoll to justify the extensive structural and aesthetic alterations proposed in the rehabilitation plan. Similarly, Mitigation Measure CUL-1.3: Relocation Travel Route, impermissibly defers creation of the Relocation Travel Route Plan for the historic building. Finally, the FSEIR's New Mitigation Measure CUL-1.4 (Building Features Inventory and Plan) impermissibly defers preparation of a Building Features Inventory and Plan. These measures effectively preclude the public from analyzing the Applicant's relocation plan for Club Knoll, in violation of CEQA.

4. **Other Deferred Plans**.

The FSEIR defers the creation of several other plans to a post-approval stage, without adequate performance standards, and without the opportunity for public scrutiny. These include:

- SCA TRA-1, Construction Traffic and Parking, which requires that a Construction Traffic Management Plan be developed as part of a larger Construction Management Plan to address potentially significant impacts during a project's construction.[68]
- SCA BIO-3: Creek Protection Plan.
- SCA HYD-1: Erosion and Sedimentation Control Plan for Construction
- SCA HAZ-3: Hazardous Materials Business Plan.
- SCA Implementation Measure HAZ-2.2b: Deferred creation of Soil Management Plan to outline required procedures for handling and disposing impacted soil.

These plans must be developed and circulated for public review in a revised DSEIR prior to Project approval.

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[67] DSEIR, p. 2-19, MM CUL-1.2 Baseline Building Conditions Study (Structural). ("Prior to approval of a construction-related permit for Club Knoll, the Project sponsor shall prepare a Baseline Building Conditions Study to establish the baseline condition of the building and determine what kind of stabilization might be necessary to relocate the building.'").; DSEIR, p. 2-21.
[68] DSEIR, pp. 4.13-96 to -97.

IV. THE PROJECT'S PROPOSED ZONING CHANGES ARE INCONSISTENT WITH THE GENERAL PLAN

The Project proposes to change the zoning at the Project site from the existing Hillside Residential land use classifications of RH-3 (single family dwellings with 12,000 sf lots) and RH-4 (single family homes with lots of 6500 to 8000 sf), and create 7 new zones that are specific to the Project (D-OK-1 through D-OK-7). The new zoning would allow development of:

- Up to 5 residential units/acre (i.e. 5 units per 8000 sf) (D-OK-1 through D-OK-3).
- Commercial zone for "neighborhood-serving retail," such as supermarkets, banks, cafes, and dry-cleaners (D-OK-4).
- District Community Zone to create maintain, and enhance areas for community activities and commercial uses that provide a community amenity. This District would apply only to the relocation area for Club Knoll (D-OK-5).
- Open Space Zone for parks and outdoor recreation (D-OK-6).
- Passive Open Space Zone for open space preservation (D-OK-7).[69]

While the City is authorized by State law to amend its zoning codes. any changes to the zoning code must be consistent with the General Plan. Under California law, a general plan serves as a "charter for future development,"[70] and embodies "fundamental land use decisions that guide the future growth and development of cities and counties."[71] The general plan has been aptly described as "the constitution for all future developments" within a city or county.[72] Further, the "propriety of virtually any local decision affecting land use and development depends upon consistency with the applicable general plan and its elements."[73] The consistency doctrine has been described as the "linchpin of California's land use and development laws; it is the principle which infuses the concept of planned growth

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[69] Staff Report, pp. 16-18.
[70] *Lesher Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 54.
[71] *City of Santa Ana v. City of Garden Grove* (1979) 100 Cal.App.3d 521, 532.
[72] *Families Unafraid to Uphold Rural El Dorado County v. Board of Supervisors of El Dorado County* (1998) 62 Cal.App.4th 1334, 1335.
[73] *Citizens of Goleta Valley v. Board of Supervisors of County of Santa Barbara* (1990) 52 Cal.3d 553, 570.

with the force of law."[74] In this case, the Project's proposed residential density, open space uses, and commercial uses would result in violations of key General Plan policies.

First, the Project's proposal to increase density will create incompatibility with other neighboring residential densities which remains at 1 unit per 8000 sf. This would violate GP LU Policy 7.1, Ensuring Compatible Development.

Second, the Project would violate General Plan policies regarding affordable housing. The General Plan encourages development that provides housing to households with "a range of incomes."[75] Here, since the Applicant is proposing to buy affordable housing "credits" in another area of the City rather than include on-site affordable housing. This is inconsistent with GP LU Policy 6.1.

Third, the Project's proposed zoning changes, and the Project generally, fail to comply with GP LU Policy 7.6, which requires subdivided parcels to minimize environmental impacts.[76] Oakland Residents' DSEIR comments provided evidence documenting that Project has significant and inadequately mitigated environmental impacts. The comments provided herein demonstrate that the FSEIR fails to adequately respond to those comments, and fails to adequately mitigate significant impacts to air quality, traffic, and biological resources. As a result, the Project remains inconsistent with GP LU Policy 7.6.

Finally, the Project fails to minimize significant adverse impacts on historic resources, in violation of GP HPE Policy 3.1.[77] This Policy requires projects to "make all reasonable efforts to avoid or minimize adverse effects" on landmarked historic properties.[78] The proposed zoning changes would require relocation of Club Knoll in order to place it in the new "commercial zone." As discussed in Oakland Residents' comments to the LPAB, the proposed relocation of Club Knoll will have significant adverse impacts on Club Knoll that the City has failed to mitigate. Thus, the zoning change to D-OK-5 is inconsistent with this Policy.

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[74] *Corona-Norco Unified School District v. City of Corona* (1993) 17 Cal.App.4th 985, 994.
[75] GP LU Policy 6.1.
[76] GP LU Policy 7.6.
[77] GP HPE Policy 3.1.
[78] *Id.*

V. CONCLUSION

For the reasons discussed herein, Oakland Residents respectfully requests that the Commission follow the first recommendation in the Staff Report and continue this hearing to a later date following the release of a proposed Development Agreement, the development of the CFD proposal, and after the City has made all necessary revisions to, and recirculation of, the FSEIR.

Thank you for your consideration of these comments. Please place them in the record of proceedings for the Project.

Sincerely,

Christina M. Caro

CMC:acp

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