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February 18, 2019

Via Email and Hand Delivery (on 2/19/2019)

Chair Jeffrey Moore
Honorable Members Planning Commission of Alameda County
Alameda County
Public Hearing Room
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Email: c/o Albert.Lopez@acgov.org (Planning Director);
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Via Email Only

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**Re: Agenda Item I.3: Demmon Partners, Mitch Mckinzie, Tract Map
Subdivision (TR-8488) and Site Development Review, PLN2018-
00086/TR-8488 (Village Green Mixed-Use Project)**

Dear Chair Moore, Honorable Members of the Planning Commission, Mr. Lopez and Mr. Orduna:

We are writing on behalf of **Alameda County Residents for Responsible Development** ("Alameda County Residents") regarding the Agenda Item I.3: Demmon Partners, Mitch Mckinzie, Tract Map Subdivision (TR-8488) and Site Development Review, PLN2018-00086/TR-8488 (Project) and the Village Green Mixed-Use Final Addendum to the 2004 San Lorenzo Village Center Specific Plan EIR ("Addendum"), prepared pursuant to the California Environmental Quality Act ("CEQA").¹ The Project proposes to construct 163 rental housing units along with 11,524 square feet of indoor retail and 660

¹ Pub. Resources Code, § 21000 et seq.; 14 Cal. Code regs. §§ 15000 et seq. ("CEQA Guidelines").

square feet of outdoor retail space. The Project site is located on the west side of Hesperian Boulevard between Paseo Grande and Via Mercado in the San Lorenzo area of unincorporated Alameda County.³ The Project is proposed by Demmon Partners/Mitch McKinzie ("Applicant"). Required Project approvals include a Tentative Tract Map ("TTM") prepared pursuant to the Subdivision Map Act ("SMA")⁴ and the County's Subdivision Ordinance;⁴ Site Development Review ("SDR"), pursuant to the Alameda County Code ("Code"); and approval of a CEQA document for the Project.⁵

We have reviewed the Addendum; Alameda County Community Development Agency Planning Department Staff Report (Feb. 19, 2019) ("Staff Report"); February 4, 2019 Staff Report ("February 4, 2019 Staff Report"); San Lorenzo Village Center Specific Plan ("Specific Plan"); San Lorenzo Village Center Specific Plan EIR ("Specific Plan EIR"); Alameda County Eden Area General Plan (Mar. 2010) ("General Plan"); and the Alameda County Eden Area General Plan EIR ("General Plan EIR"). In addition, these comments were prepared with the assistance of air quality expert Kaitlyn Heck of Water Air Protection Enterprise ("SWAPE Report"). The SWAPE Report and curriculum vitae of Ms. Heck are attached hereto as Exhibit A and are fully incorporated by reference. The SWAPE Report must be considered part of the Project record, and the County should separately respond to the comments in the SWAPE Report. Alameda County Residents reserves the right to submit supplemental comments at any later hearings and proceedings related to the Project.⁶

Having reviewed the above-cited materials, and related Project documents, we have determined that the Addendum and proposed Project approvals violate CEQA, State land use law, and County Codes. First, the Staff Report incorrectly recommends that the Planning Commission approve the Addendum before final changes are made to the Project during SDR review. The Staff Report recommends that the Planning Commission approve the CEQA Addendum at the February 19

³ Addendum, p. 2.

⁴ Gov. Code, § 66410 et seq.

⁴ County Code, Title 16, Subdivisions; Staff Report, p. 18; Addendum, p. 8.

⁵ Addendum, p. 8; Staff Report, pp. 1-2.

⁶ Gov. Code § 65009(b); PRC § 21177(a); *Bakersfield Citizens for Local Control v. Bakersfield* ("Bakersfield") (2004) 124 Cal. App. 4th 1184, 1199-1208; see *Galante Vineyards v. Monterey Water Dist.* (1997) 60 Cal. App. 4th 1109, 1121.

hearing.⁷ However, the Staff Report explains that the Planning Director will consider and approve the Project's SDR permit at a later date. The Planning Director has discretion to require changes in the Project before approving an SDR permit,⁸ including modifications related to environmental factors such as the Project's "environmental setting" and "environmental significance or limitations."⁹ Modifications to the Project that are made by the Planning Director are subject to CEQA review, and may alter the underlying Project description.¹⁰ It would be inconsistent with, and violate, CEQA if the Planning Commission were to approve the Project's CEQA document before the Planning Director's SDR review is complete.

Additionally, the Addendum fails to comply with CEQA in several respects, including: (1) failing to adequately disclose and analyze the Project's air quality impacts, by using unsubstantiated input parameters used to estimate project emissions and by failing to conduct an adequate analysis of the health risks posed by the Project's construction and operational emissions;¹¹ 2) failing to adequately disclose and analyze the proposed Project's greenhouse gas ("GHG") impacts; 3) failing to require all feasible mitigation measures to reduce operational GHG emissions to less than significant levels; 4) failing to consider significant new information concerning fire risk and safety issues caused by the Project; and 5) proposing to adopt the Addendum before SDR is complete, in reliance on an unstable project description. Finally, the Project's proposed TTM fails to comply with the SMA because the County is unable to make the required findings necessary for approval of the TTM under the SMA.

The Planning Commission must not take any action to approve the Project at this time. Specifically, the Commission may not take any action to approve a CEQA

⁷ Staff Report, p. 1.

⁸ County Code § 17.54.260.A; Alameda County Planning Department Guide: Applying for a Site Development Review ("SDR Guide"), at p. 1 (after the hearing, the Planning Director will "make a decision to approve, deny or require changes or conditions in the proposed project"), available at <https://www.acgov.org/cda/planning/ordinance/documents/SDR.pdf>

⁹ Alameda County Code, § 17.54.210.

¹⁰ Pub. Res. Code § 21080(a); SDR Guide, p. 1 (explaining that SDR applications are generally subject to CEQA).

¹¹ See *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502 (CEQA document must provide adequate discussion of how project's anticipated air quality effects will adversely affect human health); *Berkeley Keep Jets Over the Bay Com. v. Board of Port Comrs.* (2001) 91 Cal.App.4th 1344, 1371.

document for the Project until the Project's SDR review is complete. To comply with CEQA, the County must also withdraw the Addendum, and prepare and circulate a legally adequate *subsequent* environmental impact report ("EIR") for public comment which fully discloses, analyze, and mitigates the Project's potentially significant air quality impacts, health risk, and GHG impacts. Finally, the County must defer any decisions related to the Project's other approvals until it circulates a subsequent EIR for public review and comment that enables the County to make the required findings under the SMA and County Codes that the Project complies with State and local law.

I STATEMENT OF INTEREST

Alameda County Residents is an unincorporated association of individuals and labor organizations that may be adversely affected by the potential public impacts associated with Project development. Alameda County Residents includes: the International Brotherhood of Electrical Workers Local 595; Plumbers & Steamfitters Local 342; Sheet Metal Workers Local 104; Sprinkler Fitters Local 483 and their members and their families; and other individuals that live and/or work in Alameda County, including San Lorenzo resident James Correa.

Individual members of Alameda County Residents, including Mr. Correa and the affiliated labor organizations live, work, recreate and raise their families in the County of Alameda, including the unincorporated area of San Lorenzo. These members 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. Alameda County Residents has a strong interest in enforcing the State's environmental laws that encourage sustainable development and ensure a safe working environment for its members. Environmentally detrimental projects can jeopardize future jobs by causing building moratoriums or restrictions, making it more difficult and more expensive for business and industry to expand in the region, and making it less desirable for businesses to locate and people to live there.

II. THE PLANNING COMMISSION MAY NOT APPROVE A CEQA DOCUMENT FOR THE PROJECT UNTIL SITE DEVELOPMENT REVIEW IS COMPLETE

CEQA requires that the environmental review document prepared for a project consider the “whole of an action.”¹² This includes all discretionary approvals and phases of a project that are reasonably foreseeable.¹³ In order to adopt a CEQA addendum, as proposed in the Staff Report, the decision making body of the lead agency must make findings, supported by substantial evidence in the record, that none of the conditions described in Guidelines Section 15162 calling for preparation of a subsequent EIR have occurred, including substantial changes in the project, changed circumstances, or new information related to the project’s environmental effects, alternatives, or mitigation measures.¹⁴ In order to adopt any other kind of CEQA document, the decision making body must make similar findings, supported by substantial evidence, certifying that the CEQA document analyzes the “whole of the project” and has otherwise been completed in compliance with CEQA.¹⁵

The Commission cannot make the requisite CEQA findings to approve the Addendum (or any other CEQA document for the Project) at this time because the Project’s SDR review has not been completed. As explained below, SDR review may result in changes and modifications to the Project which alter the Project description or cause new and significant environmental effects which are not addressed in the current Addendum and must be analyzed pursuant to CEQA before any CEQA document can be approved by the Commission. The Commission therefore lacks substantial evidence in the record before it to find that the CEQA Addendum complies with CEQA. The Commission must defer any proposed approval the Project’s CEQA document until SDR review is complete.

¹² 14 CCR § 15378(a); *Habitat & Watershed Caretakers v. City of Santa Cruz* (2018) 213 Cal.App.4th 1277, 1297.

¹³ *Id.*; Pub. Res. Code §§ 21080(a); 21065(c) (“Project” includes “activity that involves the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies”); 14 CCR § 15378(a)(3).

¹⁴ 14 CCR § 15164(a); 14 CCR § 15162(a).

¹⁵ See e.g. 14 CCR § 15090(a)(findings for EIR certification).

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The Project requires three discretionary approvals from the County in order to proceed – a TTM, SDR, and approval of a CEQA document.¹⁶ Because SDR is one of the required discretionary approvals, it is subject to CEQA.¹⁷ This is confirmed by the County Code, which expressly states that the purpose of SDR is to “recognize the environmental limitations on development,” and by the County’s Planning Department’s guidance document, *Guide: Applying for a Site Development Review* (“SDR Guide”), which acknowledges that SDR review by the Planning Director for projects like this one is “not exempt from CEQA.”¹⁸

The Staff Report states that the Planning Director will consider the site development review application “[s]ubsequent to” the Planning Commission’s approval of the TTM and Addendum.¹⁹ This procedure derives from County Code SDR provisions, which require developments of new buildings over 1,000 sq/ft within the C-1 zone where the Project is located²⁰ to undergo SDR review.²¹ A public hearing on SDR review is generally required for projects of this size.²² The County Code also authorizes the Planning Director to issue SDR approvals.²³ However, the Staff Report fails to explain that it is inconsistent with, and would violate, CEQA for the Planning Commission to approve the CEQA Addendum *before* the Planning Director completes SDR review. This is because the Planning Director has authority to substantially modify the Project prior to issuing its SDR approval in ways that may require further CEQA analysis.

Under the County Code, the Planning Director has discretion to require changes and conditions in the Project after conducting a public hearing on SDR but

¹⁶ Addendum, p. 8; Staff Report, pp. 1-2.

¹⁷ Pub. Res. Code § 21080(a).

¹⁸ See SDR Guide, p. 1 (“[g]enerally applications of this type are not exempt from [CEQA].”) (emphasis in original).

¹⁹ February 19, 2019 Staff Report, p. 1.

²⁰ February 19, 2019 Staff Report, p. 1 (project is located in C-1 zone); Alameda County Code, § 17.54.220 et seq. (site development procedures); Alameda County Code, § 17.53.060.

²¹ Alameda County Code, § 17.38.050 (when SDR is triggered in C-1 zone and stating that procedures for SDR follow those set forth in Alameda County Code, 17.54.210 et seq.).

²² County Code, § 17.54.220 (public hearing not required unless designated by Planning Director); SDR Guide, p. 2 (“The Planning Department always holds public hearing on a Site Development Reviews for project with ten or more residential or any commercial development.”).

²³ See

before approving the SDR permit.²⁴ This includes modifications to address environmental factors such as the Project's "environmental setting," "environmental significance or limitations," and "emission of dangerous or objectionable noise, odors, lights, dust, smoke or vibrations"²⁵ As the Code explains:²⁶

Site development review is intended to promote orderly, attractive, and harmonious development; **recognize environmental limitations on development...**and promote the general welfare by preventing establishment of uses or erection of structures having qualities which would not meet the specific intent clauses or performance standards of this title or which are not properly related to ... their environmental setting. Where the use proposed, the adjacent land uses, environmental significance or limitations, topography, or traffic circulation is found to so require, the planning director may establish more stringent regulations than those otherwise specified for the district.²⁷

...The **planning director**, upon receipt of an application for site development review, **shall make such investigations as are necessary** to determine whether or not the proposed use or structure conforms or **may be** conditioned to conform fully to the regulations for the district.²⁸

...If from the information submitted, the planning director finds that compliance with the requirements of this title and the intent set forth herein would not be secure, the planning director shall disapprove or

²⁴ County Code § 17.54.260.A; Alameda County Planning Department (Guide: Applying for a Site Development Review ("SDR Guide"), at p. 1 (after the hearing, the Planning Director will "make a decision to approve, deny or require changes or conditions in the proposed project"), available at <https://www.acgov.org/cda/planning/ordinance/documents/SDR.pdf>

²⁵ Alameda County Code, §§ 17.54.210; 17.54.250; 17.54.260.

²⁶ Pub. Resources Code, § 21080, subda. (a), (b)(1) (distinguishing between discretionary and ministerial approval); see, e.g., *Friends of Westwood v. City of Los Angeles* (1987) 191 Cal.App.3d 259 (discretionary review triggered when agency can make decisions that address environmental impacts); *Sierra Club v. County of Sonoma* (2017) 11 Cal.App.5th 11 (citing and applying *Friends of Westwood v. City of Los Angeles*).

²⁷ Alameda County Code, § 17.54.210 (emphasis added).

²⁸ Alameda County Code, § 17.54.240 (emphasis added).

approve subject to such specified conditions, changes, or additions as will assure compliance.²⁹

.... within two weeks after the hearing, the Planning Director will make a decision to approve, deny or require changes or conditions in the proposed project.³⁰

The Code also gives the Planning Director discretion to consult experts if the Project may negatively impact the environment with dangerous or objectionable emissions.³¹

Although SDR review is intended to promote compliance with County regulations, any changes and modifications to the Project made by the Planning Director as part of its SDR approval could fundamentally alter the scope or design of the Project. Such changes must be included in the CEQA document's Project description. Changes and modifications to the Project made by the Planning Director may also have potentially significant impacts, either individually or cumulatively, on other aspects of the environment, such as land use and aesthetics.³² These impacts must also be analyzed in the CEQA document before the Commission can certify that it has been completed in compliance with CEQA.³³

There is no substantial evidence in the record before the Planning Commission that the current CEQA Addendum addresses all changes or modifications that will be required by the Planning Director, because the Planning Director has not issued its decision on SDR review. The County Code authorizes the Planning Director to require changes and modifications to the Project during the weeks following the SDR hearing and issuance of the Planning Director's final

²⁹ Alameda County Code, § 17.54.260 (emphasis added).

³⁰ See SDR Guide, p. 1.

³¹ Alameda County Code, § 17.54.250.

³² For example, the Planning Director would have the discretion to alter project design, such that instead of three and four story buildings, development on a specific subarea is concentrated into one six story building, provided that the density limit was not exceeded. This would clearly implicate project aesthetics (light, air, and views) as well as design standards. See Addendum, pp. 43-46 (aesthetics); pp. 106-116 (land use and design, including Table 10, consistency with design standards in the Specific Plan).

³³ 14 CCR § 15164(e); see 14 CCR 15090(a).

SDR decision. It is therefore unknown what changes or modifications will be required until the Planning Director issues its SDR decision. Because any modifications by SDR would become part of the Project, they are subject to CEQA review, which must occur *before* the Commission can approve the Project's CEQA document. The Commission therefore lacks substantial evidence to support the requisite CEQA findings in the Staff Report's Draft Resolution that the Addendum was prepared in compliance with CEQA.³⁴

The Commission cannot approve the CEQA Addendum at the February 19, 2019 hearing. The hearing must be continued to a future date following the Planning Director's decision on the Project's SDR review, so that the County can determine the extent to which SDR revisions may trigger the need for further CEQA review.

III. THE COUNTY MUST PREPARE A SUBSEQUENT OR SUPPLEMENTAL EIR WHICH DISCLOSES ALL POTENTIALLY SIGNIFICANT AIR QUALITY AND GHG IMPACTS, INCLUDES FEASIBLE MITIGATION MEASURES, AND CONSIDERS ALL RELEVANT FACTORS TRIGGERING SUBSEQUENT CEQA REVIEW.

The County must withdraw the Addendum and conduct subsequent review, pursuant to CEQA, in order to accurately disclose and analyze the Project's potentially significant air quality impacts and conduct adequate health risk analyses of the Project's potentially significant health impacts from construction and operational emissions. A subsequent or supplemental EIR is also required to accurately disclose and analyze the Project's potentially significant GHG emissions and impacts, to incorporate feasible mitigation measures to reduce GHG emissions, and consider significant new information concerning fire risk and safety.

³⁴ 14 CCR § 15164(e); see 14 CCR 15090(a); see Staff Report, Draft February 18, 2019 Planning Commission Resolution at p. 1 ("the proposed application was reviewed in accordance with the provisions of the California Environment Quality Act (CEQA) and an Addendum to the San Lorenzo Village Center Specific Plan EIR Final Environmental Impact Report (EIR) was prepared in accordance with CEQA Section 15164, because the project will not have significant new impacts or substantially increase previously identified significant impacts studied in the EIR.").

A. CEQA's Requirements: Subsequent Review, Supplemental Review, and Addendums

CEQA has two basic purposes, neither of which the County has satisfied in this case. First, CEQA is designed to inform decision makers and the public about the potential, significant environmental impacts of a project before harm is done to the environment.³⁵ The EIR is the "heart" of this requirement,³⁶ and has been described as "an environmental 'alarm bell' whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return."³⁷ To fulfill this purpose, the discussion of impacts in an EIR must be detailed, complete, and "reflect a good faith effort at full disclosure."³⁸ An adequate EIR must contain facts and analysis, not just an agency's conclusions.³⁹

Second, CEQA directs public agencies to avoid or reduce environmental damage when possible by requiring imposition of mitigation measures and by requiring the consideration of environmentally superior alternatives.⁴⁰ If an EIR identifies potentially significant impacts, it must then propose and evaluate mitigation measures to minimize these impacts.⁴¹ CEQA imposes an affirmative obligation on agencies to avoid or reduce environmental harm by adopting feasible project alternatives or mitigation measures.⁴² Without an adequate analysis and description of feasible mitigation measures, it would be impossible for agencies relying upon the EIR to meet this obligation.

Under CEQA, an EIR must not only discuss measures to avoid or minimize adverse impacts, but must ensure that mitigation conditions are fully enforceable

³⁵ Cal. Code Regs., tit. 14, § 15002, subd. (a)(1) ("CEQA Guidelines"); *Berkeley Keep Jets Over the Bay v. Bd. of Port Comm'rs.* (2001) 91 Cal.App.4th 1344, 1354 ("Berkeley Jets"); *County of Inyo v. Yarty* (1973) 32 Cal.App.3d 795, 810.

³⁶ *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 84.

³⁷ *County of Inyo v. Yarty* (1973) 32 Cal.App.3d 795, 810.

³⁸ CEQA Guidelines, § 15151; *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 721-722.

³⁹ *See Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 568.

⁴⁰ CEQA Guidelines, § 15002, subd. (a)(2) and (8); *Berkeley Jets*, 91 Cal.App.4th, at p. 1354; *Laurel Heights Improvement Ass'n v. Regents of the University of Cal.* (1998) 47 Cal.3d 376, 400.

⁴¹ Pub. Resources Code, §§ 21002.1(a), 21100(b)(3).

⁴² Pub. Resources Code, §§ 21002-21002.1.

through permit conditions, agreements or other legally binding instruments.⁴³ A CEQA lead agency is precluded from making the required CEQA findings unless the record shows that all uncertainties regarding the mitigation of impacts have been resolved; an agency may not rely on mitigation measures of uncertain efficacy or feasibility.⁴⁴ This approach helps “insure the integrity of the process of decision by precluding stubborn problems or serious criticism from being swept under the rug.”⁴⁵

Following preliminary review of a project to determine whether an activity is subject to CEQA, a lead agency is required to prepare an initial study to determine whether to prepare an EIR or negative declaration, identify whether a program EIR, tiering, or other appropriate process can be used for analysis of the project’s environmental effects, or determine whether a previously prepared EIR could be used with the project, among other purposes.⁴⁶ CEQA requires an agency to analyze the potential environmental impacts of its proposed actions in an EIR except in certain limited circumstances.⁴⁷ A negative declaration may be prepared instead of an EIR when, after preparing an initial study, a lead agency determines that a project “would not have a significant effect on the environment.”⁴⁸

In situations such as the one here, where a program EIR has been prepared that could apply to a later project, CEQA requires the lead agency to conduct a two-step process to examine the later project to determine whether additional environmental review is required.⁴⁹ First, the agency must consider whether the project will result in environmental effects that were not examined in the program EIR.⁵⁰ If the agency finds the activity would have environmental effects that were not examined in the program EIR, it must then prepare an initial study to

⁴³ CEQA Guidelines, § 15126.4, subd. (a)(2).

⁴⁴ *Kings County Farm Bureau v. County of Hanford* (1990) 221 Cal.App.3d 692, 727-28 (a groundwater purchase agreement found to be inadequate mitigation because there was no record evidence that replacement water was available).

⁴⁵ *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 935.

⁴⁶ CEQA Guidelines, §§ 15060, 15063, subd. (c).

⁴⁷ See, e.g., Pub. Resources Code, § 21100.

⁴⁸ *Quail Botanical Gardens v. City of Encinitas* (1994) 29 Cal.App.4th 1597; Pub. Resources Code § 21080(c).

⁴⁹ See CEQA Guidelines, 15168, subd. (c); S. Kostka & M. Zischke, Practice Under the California Environmental Quality Act 2d, § 10.16 (Mar. 2018).

⁵⁰ CEQA Guidelines, § 15168, subd. (c)(1).

determine whether to prepare an EIR or negative declaration to address those effects.⁶¹

Second, if the agency determines the project is covered by the program EIR, it must then consider whether any new or more significant environmental effects could occur due to changes in circumstances or project scope, or new information that could not have been considered in the program EIR.⁶² More specifically, pursuant to Public Resources Code section 21166, subsequent or supplemental environmental review is required when one or more of the following events occur:

- (a) Substantial changes are proposed in the project which will require major revisions of the environmental impact report;
- (b) Substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the environmental impact report; or
- (c) New information, which was not known and could not have been known at the time the environmental impact report was certified as complete, becomes available.⁶³

CEQA Guidelines section 15162 elaborates on this requirement:

- (a) When an EIR has been certified or a negative declaration adopted for a project, no subsequent EIR shall be prepared for that project unless the lead agency determines, on the basis of substantial evidence in the light of the whole record, one or more of the following:
 - (1) Substantial changes are proposed in the project which will require major revisions of the previous EIR due to the involvement of new significant effects or a substantial increase in the severity of previously identified effects;

⁶¹ CEQA Guidelines, § 15168, subd. (c)(1).

⁶² CEQA Guidelines, § 15168, subd. (c)(2).

⁶³ Pub. Resources Code, § 21166.

- (2) Substantial changes occur with respect to the circumstances under which the project is undertaken which will require major revisions of the previous EIR due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects; or
- (3) New 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 or the negative declaration was adopted, shows any of the following:
 - (A) The project will have one or more significant effects not discussed in the previous EIR or negative declaration;
 - (B) Significant effects previously examined will be substantially more severe than shown in the previous EIR;
 - (C) 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; or
 - (D) 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.⁵⁴

The lead agency makes this determination, based on substantial evidence in light of the whole record. And, only where *none* of the conditions described above calling for preparation of a subsequent or supplemental EIR have occurred may the lead agency consider preparing a subsequent negative declaration, an addendum or

⁵⁴ CEQA Guidelines, § 15162, subd. (a)(1)-(3).

no further documentation.⁵⁵ The County's decision not prepare a subsequent or supplemental EIR must be supported by substantial evidence.⁵⁶

The Public Resources Code does not provide for addendums, but they are discussed briefly in the CEQA Guidelines, section 15164. The Natural Resources Agency, which drafts the CEQA Guidelines, has described the purpose of an addendum as a method for making "minor changes" to an EIR:

The concept of an addendum to an EIR is new in the CEQA [G]uidelines, although such a device has been used by many agencies previously. This section is designed to provide clear authority for the practice and to encourage other agencies to use the device as a way of making minor corrections in EIRs without recirculating the EIR. The addendum is the other side of the coin from the supplement to an EIR. This section provides an interpretation with a label and an explanation of the kind of document that does not need additional public review.⁵⁷

CEQA Guidelines, section 15164 states the following concerning the use of addendums:

- (a) The lead agency or a responsible agency shall prepare an addendum to a previously certified EIR if some changes or additions are necessary but none of the conditions described in Section 15162 calling for preparation of a subsequent EIR have occurred.
- (b) An addendum to an adopted negative declaration may be prepared if only minor technical changes or additions are necessary or none of the conditions described in Section 15162 calling for the preparation of a subsequent EIR or negative declaration have occurred.
- (c) An addendum need not be circulated for public review but can be included in or attached to the final EIR or adopted negative declaration.

⁵⁵ CEQA Guidelines, § 15162, subd. (b).

⁵⁶ CEQA Guidelines, §§ 15162 subd. (a), 15164, subd. (e), 15168, subd. (c)(4).

⁵⁷ *Save Our Heritage Organisation v. City of San Diego*, 28 Cal.App.5th 656, 664–65, 239 Cal. Rptr. 3d 231, 237, review denied (Jan. 10, 2019) ("*SOHO*" (citing the Natural Resources Agency.)

(d) The decision-making body shall consider the addendum with the final EIR or adopted negative declaration prior to making a decision on the project.

(e) A brief explanation of the decision not to prepare a subsequent EIR pursuant to Section 15162 should be included in an addendum to an EIR, the lead agency's required findings on the project, or elsewhere in the record. The explanation must be supported by substantial evidence.

The terms "supplement" and "subsequent" EIR are not interchangeable and this distinction implicates the public review process. "A supplement to an EIR is a document that contains additions or changes needed to make the previous EIR adequate ... In contrast ... a subsequent EIR revises the previous EIR, rather than simply supplements it."⁵⁸ With subsequent review the "revised EIR must receive the same circulation and review as the original EIR."⁵⁹ An addendum is a form of supplemental review, is as such it is not subject to the notice and comment procedures of a subsequent EIR.

Here, the County must prepare and circulate a *subsequent* EIR for public notice and comment. By failing to do so, the County has failed to comply with CEQA. As discussed below, the Addendum fails to comply with CEQA, and a subsequent EIR is required, for the following reasons: 1) the Addendum fails to accurately disclose and analyze the Project's potentially significant air quality impacts by relying on unsubstantiated input parameters to estimate Project emissions; 2) the Addendum fails to include an adequate health risk analysis; 3) the Addendum fails to accurately disclose and analyze the Project's potentially significant GHG impacts; 4) the Addendum fails to incorporate all feasible mitigation measures to reduce GHG emissions to less than significant levels; and 5) the Addendum fails to consider significant new information of substantial importance concerning fire risk and safety in the Project vicinity.

⁵⁸ S. Koskte & M. Zischke, Practice Under the Environmental Quality Act 2d., § 19.4, p. 19-8 (Mar. 2018).

⁵⁹ S. Koskte & M. Zischke, Practice Under the Environmental Quality Act 2d., § 19.4, p. 19-8, (Mar. 2018), *emphasis added*; see also CEQA Guidelines, §§ 15162, 15163.

B. The Addendum Fails to Accurately Disclose and Analyze the Project's Potentially Significant Air Quality Impacts.

The Addendum relies on unsubstantiated input parameters to estimate the Project construction and operational air emissions.⁶⁰ As a result, the Project's construction and operational air pollution emissions are both underestimated, resulting in an inaccurate air quality analysis.⁶¹

1. Incorrect Land Use Size.

The Addendum's *Air Quality and Greenhouse Gas Analysis* ("Air Quality Analysis")⁶² uses California Emissions Estimator Model ("CalEEMod") to quantify the Project's construction and operational emissions. SWAPE reviewed the Air Quality Analysis and concludes that the Project's CalEEMod output files demonstrate that incorrect land use sizes were inputted for both existing and proposed uses.

The Addendum proposes to demolish a 4,000 sq/ft existing retail store and 230-space parking lot and construct 163 residential units, 12,184 square feet of retail space, and 326 parking spaces.⁶³ Yet, as SWAPE explains, the Air Quality Analysis inputted an existing 5,000 sq/ft retail store (overestimating the existing retail land use by approximately 1,000 sq/ft), and construction of 11,500 sq/ft retail space and 230 parking spaces (underestimating parking spaces by 96 spaces and retail land use size by approximately 684 square feet).⁶⁴ Square footage is used for calculations, such as determining wall space to be painted and building volume to be heated and cooled, variables that impact air pollution emissions such as VOCs and energy impacts.⁶⁵ Because the Air Quality Analysis underestimates the size of the parking and retail uses, the resulting emissions from demolition and construction were also underestimated. SWAPE explains that the construction emissions reported in the Addendum were factually incorrect and underestimated,

⁶⁰ SWAPE Report, pp. 1-6.

⁶¹ SWAPE Report, pp. 2.

⁶² See Appendix, Attachment A, *Air Quality and Greenhouse Gas Analysis*.

⁶³ Addendum, pp. 2, 4-5.

⁶⁴ Air Quality Analysis, pp. 211.

⁶⁵ SWAPE Report, pp. 2-3.

and therefore do not reflect an accurate analysis of the Project's actual construction emissions.

2. *Incorrect Construction Schedule.*

The proposed Project's CalEEMod output files demonstrate that the air pollution model assumed a 15-month construction schedule. However, the Addendum states that construction will occur over 24 months.⁶⁶ Because the construction schedule was underestimated, SWAPE concludes that construction related air emissions were also underestimated.⁶⁷

3. *Incorrect Application of Tier 3, Tier 4 Interim, and Level 3 Diesel Particulate Filter Engines When Calculating Construction Emissions.*

SWAPE's review of the Project's CalEEMod output files reveals that the Air Quality Analysis incorrectly applied Tier 3, Tier 4 Interim, and Level 3 Diesel Particulate Filters ("DPF") mitigation to the Project's construction emissions when no such mitigation is required in the Addendum or the Project's proposed conditions of approval.⁶⁸ The Addendum's Mitigation Measure AQ-1 suggests, but does not require, the use of Tier 2 engines or other methods that would achieve the same reductions as would be found when using diesel particulate filters, such as Level 3 DPF engines.⁶⁹ However, the Applicant's models assumed that some engines would be equipped with lower emission Tier 3 and 4 engines, in addition to Level 3 DPF engines, which are not mentioned in Mitigation Measure AQ-1.⁷⁰ As a result, SWAPE concludes that the Air Quality Analysis severely underestimates the Project's construction-related air emissions, resulting in an inaccurate analysis of construction emissions.⁷¹ The Addendum's reliance on Tier 3 and 4 engines to reduce emissions is also unsupported and improper because it is unenforceable mitigation.⁷²

⁶⁶ SWAPE Report, pp. 3-4.

⁶⁷ SWAPE Report, pp. 3-4.

⁶⁸ SWAPE Report, pp. 4-5.

⁶⁹ SWAPE Report, pp. 4-5.

⁷⁰ SWAPE Report, pp. 4-5.

⁷¹ SWAPE Report, pp. 4-5.

⁷² Agency may not rely on unenforceable mitigation. Mitigation measures must be fully enforceable through permit conditions, agreements or other legally binding instruments. 14 CCR §16126.4(a)(2).

4. *Underestimation of the Number of Hauling Truck Trips Expected to Occur During Grading.*

SWAPE's review of the Project's CalEEMod output files reveals that the Air Quality Analysis underestimates the amount of soil that would be hauled during grading, and thus the number of hauling trips required during the 24-month long construction process. As a result, SWAPE concludes that the Air Quality Analysis severely underestimates the Project's construction-related air emissions.

C. *New Information From Updated Air Modeling Demonstrates that the Project's Construction and Operational Air Emissions Are Likely to Result in Significant Health Risks That Were Not Previously Known.*

SWAPE conducted updated CalEEMod modeling of the Project's construction and operational air emissions using the Project description and other site-specific land use factors identified in the Addendum. SWAPE concluded that, when the correct and updated parameters are used, the Project's construction and operational emissions are significantly higher than the emissions disclosed in the Addendum.

Using the updated emissions modeling, SWAPE then evaluated the health risk from exposure to toxic air contaminants ("TACs")⁷⁸ during Project construction and operation. SWAPE's health risk modeling demonstrates that the Project is likely to result in potentially significant health risks from human exposure to TACs during both construction and operation that exceed applicable significance thresholds. This information was not disclosed in either the SP EIR or the Addendum, and is therefore new information demonstrating that the Project will have more severe air quality impacts than previously analyzed. An EIR must be prepared which accurately discloses and analyzes health risks from Project construction and operation, including risks to existing sensitive receptors.

⁷⁸ See Addendum, p. 55 ("Construction equipment and associated heavy-duty truck traffic generates diesel exhaust, which is a known TAC. Construction exhaust emissions may still pose health risks for sensitive receptors such as surrounding residents. The primary community risk impact issues associated with construction emissions are cancer risk and exposure to PM_{2.5}. Diesel exhaust poses both a potential health and nuisance impact to nearby receptors.").

1. Construction-related health risk.

The Addendum includes a construction health risk assessment (“HRA”), which purports to evaluate whether mobile source diesel particulate matter (“DPM”) from Project construction, a TAC, would pose a significant health risk to nearby sensitive receptors.⁷⁴ The HRA concludes that impacts would be less than significant.⁷⁵ However, because the Addendum’s air modeling relies on incorrect and unsubstantiated parameters, the Project’s actual construction air pollutant emissions are similarly underestimated. As SWAPE explains, the results of the Addendum’s emissions modeling is not an accurate or reliable source of data from which to evaluate the Project’s construction-related health risk.⁷⁶

A subsequent EIR must be prepared, with an updated construction health risk analysis, in order to accurately determine the extent of the Project’s actual impacts to human health.

2. Operational health risk.

The Addendum incorrectly concludes that Project operation will have a less than significant impact on the health of future occupants without analyzing the impacts of exposure of on-site sensitive receptors to DPM emissions generated by Project operation.⁷⁷

The Addendum asserts that it analyzes operational health risk.⁷⁸ However, the Addendum’s health risk analysis relies on BAAQMD’s Stationary Source Risk & Hazard Analysis Tool, which analyzes health risk from exposure to nearby off-site highway emissions and stationary sources based on real-time emissions data collected by BAAQMD, but does not analyze emissions from future development

⁷⁴ Addendum, p. 55.

⁷⁵ SWAPE Report, p. 7.

⁷⁶ SWAPE Report, p. 7.

⁷⁷ SWAPE Report, p. 8; *Sierra Club v. County of Fresno*, 6 Cal.5th at 522-524 (CEQA document inadequate for failure to adequately explain how air pollutants the Project generated would impact public health); *Berkeley Keep Jets Over the Bay Com. v. Board of Port Cmrs.*, 81 Cal.App.4th at 1371.

⁷⁸ Addendum, p. 57.

projects.⁷⁹ The Addendum does not include any analysis of health risk to future occupants or nearby off-site sensitive receptors resulting from the Project's own operational emissions, despite the fact that such an analysis is feasible.⁸⁰ This fails to comply with CEQA's requirement that an air quality analysis must "relate the expected adverse air quality impacts [from air pollutants that the project is expected to generate] to likely health consequences or explain in meaningful detail why it is not feasible at the time of drafting to provide such an analysis."⁸¹

As a result of this omission, the Addendum's significance conclusion regarding the Project's operational health effects is incorrect and entirely unsupported. This approach is also inconsistent with the OEHHA Guidance, which recommends parameters that use an exposure for the life of a project (here, 80 years) for maximally exposed individual residents ("MEIR").⁸²

3. An Updated HRA Indicates Significant, Previously-Undisclosed Operational Health Impacts.

In an effort to demonstrate the Project's actual operational health risk posed by the Project to sensitive receptors, SWAPE conducted a screening level risk assessment for operational impacts, using AERSCREEN, an air quality dispersion model recommended by the Office of Environmental Health and Hazard Assessment ("OEHHA").⁸³ Using SWAPE's CalEEMod emissions modeling, which concluded

⁷⁹ Addendum, pp. 57-58; see BAAQMD Tools and Methodologies, *Roadway Screening Analysis Calculator and Stationary Source Screening Analysis Tool*, available at <http://www.baaqmd.gov/plans-and-climate/california-environmental-quality-act-ceqa/ceqa-tools> (last visited February 15, 2019).

⁸⁰ See SWAPE Report, pp. 9-11 (SWAPE calculated the excess cancer risk to the residential receptors located closest to the Project site using CalEEMod modeling data for the Project's operational emissions and applicable HRA methodologies prescribed by OEHHA and BAAQMD).

⁸¹ *Sierra Club v. County of Fresno*, 6 Cal.5th at 516; see 14 § CCR 15126.2(a) (analysis of "significant environmental impacts" requires an analysis of "any significant environmental effects the project might cause by bringing development and people into the area affected"); *California Bldg. Industry Assn. v. Bay Area Air Quality Management District* (2016) 82 Cal.4th 369, 385 ("CEQA generally requires an evaluation of environmental conditions and hazards existing on a proposed project site if such conditions and hazards may cause substantial adverse impacts to future residents or users of the project"), citing CEQA Guidelines § 15126.2(a).

⁸² SWAPE Report, pp. 8-9.

⁸³ SWAPE Report, pp. 9-12.

that the Project will generate approximately 57.2 pounds of DPM per year, and an estimated operational exposure of 28.25 years, SWAPE calculated a potentially significant operational health impact that is not disclosed in the Addendum. As SWAPE explains:

[T]he excess cancer risk to adults, children, and infants at a sensitive receptor located approximately 25 meters away, over the course of Project operation, are approximately 4.4, 40, and 4.5 in one million, respectively. Furthermore, the excess operational cancer risk over the course of Project operation (28.25 years) is approximately 49 in one million. The child and lifetime operational cancer risk greatly exceed the BAAQMD's threshold of 10 in one million, thus resulting in a potentially significant impact not previously addressed in the Addendum.⁸⁴

The screening level health risk analysis performed by SWAPE is more conservative and protective of human health and safety than the more refined health risk analysis that the project Applicant would generally perform.⁸⁵ As SWAPE explains, screening level health risk analyses are used to determine if more refined modeling is necessary. Based on the results of the SWAPE screening level health risk analysis, more refined modeling is required for operational impacts.⁸⁶ A subsequent EIR must be prepared to evaluate the Project's health risks, mitigation measures, and alternatives for operational impacts.

D. New Information Demonstrates that the Project Will Have Significant Impacts from Greenhouse Gas Emissions that Was Not Previously Known.

The Addendum fails to adequately assess the Project's GHG emissions and impacts and fails to consider all feasible mitigation measures available to reduce the Project's potentially significant GHG emissions to less than significant levels. The County must circulate a subsequent EIR for public review and comment with an updated GHG analysis.

⁸⁴ SWAPE Report, p. 11.

⁸⁵ SWAPE Report, p. 12.

⁸⁶ SWAPE Report, p. 12.

1. *Failure to Adequately Assess the Project's GHG Impacts.*

GHG impacts are calculated using modeling from emission sources, divided by service population. Here, the service population is 567 residents and employees.⁸⁷ Using this metric, the Addendum concludes that GHG impacts will be less than significant, and not exceed the Air District's 2030 "substantial progress" threshold. However, as discussed in section V, *infra.*, the modeling used in the Addendum is based on inaccurate parameters.⁸⁸

The County must withdraw the Addendum and prepare a subsequent EIR with accurately modeled GHG emissions.

2. *Updated GHG Analysis Indicates Significant, Previously Undisclosed GHG Emissions.*

SWAPE concluded that the Project will generate significant GHG emissions. The SWAPE Report demonstrates that, with updated and accurate parameters, GHG emissions exceed the Air District's threshold and result in a "potentially significant" impact.⁸⁹

SWAPE performed an independent analysis of the Project's GHG impacts using its updated CalEEMod results, and compared these emissions to BAAQMD's per service population efficiency threshold, the same threshold used in the Addendum. SWAPE calculated that the Project will generate approximately 1,712 MT CO_{2e}/year.⁹⁰ SWAPE then compared the Project's per service population GHG emissions to the BAAQMD 2020 efficiency threshold of 4.6 MT CO_{2e}/SP/year and the 2030 "Substantial Progress" significance threshold of 2.6 MT CO_{2e}/SP/year.⁹¹ SWAPE concluded that the Project's total GHG per service population emissions of 3.0 MT CO_{2e}/SP/year exceed the 2030 "Substantial Progress" significance threshold utilized by the Addendum, thus resulting in a potentially significant impact.⁹²

⁸⁷ SWAPE Report, p. 13.

⁸⁸ SWAPE Report, p. 13.

⁸⁹ SWAPE Report, p. 14.

⁹⁰ SWAPE Report, pp. 13-14.

⁹¹ SWAPE Report, p. 14.

⁹² SWAPE Report, p. 14.

| Annual Greenhouse Gas Emissions | | |
|--|--------------------------|-----------------------------------|
| Source | Project Emissions | Unit |
| Total Annual Emissions | 1,712 | MT CO ₂ e/year |
| Maximum Service Population | 567 | Employees |
| Per Service Population Annual Emissions | 3.0 | MT CO₂e/sp/year |
| 2020 BAAQMD Project Level Efficiency Threshold | 4.6 | MT CO ₂ e/sp/year |
| <i>Exceed?</i> | No | - |
| Per Service Population Annual Emissions | 3.0 | MT CO₂e/sp/year |
| 2030 Substantial Progress Project Level Efficiency Threshold | 2.6 | MT CO ₂ e/sp/year |
| <i>Exceed?</i> | Yes | - |

SWAPE's analysis constitutes new information demonstrating that the Project is likely to have significant GHG impacts that were not previously known and were not disclosed in the Addendum. Based on the results of this analysis, an EIR must be prepared to include air modeling with correct input parameters, as well as an updated GHG analysis which utilizes accurate, Project-specific emissions estimates.

3. *Additional Feasible Mitigation Measures to Reduce Operational Emissions.*

SWAPE's analysis demonstrates that the Project's operational DPM and GHG emissions may present potentially significant impacts that are not disclosed in the Addendum.

The Project is required to comply with California Title 24 standards for energy efficiency, as well as the County's Green Building Ordinance, which requires multi-family mixed-use residential projects like this one to achieve a minimum of 25 points according to the latest *Build It Green GreenPoint Rated* home construction

guidelines and a minimum LEED rating.⁹³ The Addendum relies on compliance with these existing laws to reduce the Project's air emissions to less than significant levels.⁹⁴ However, since the Addendum's air emissions modeling is inaccurate, the County lacks substantial evidence to conclude that mere reliance on compliance with these other laws will adequately reduce the Project's DPM and GHG emissions to less than significant levels.

In order to ensure that these requirements are effectively met, and to ensure that adequate energy efficiency measures are implemented to reduce operational DPM and GHG emissions to less than significant levels, SWAPE identified numerous feasible mitigation measures that can be incorporated as binding mitigation in a subsequent EIR, including, but not limited to, passive solar design; reduction of unnecessary light sources; and shaded heating and ventilation equipment.⁹⁵

The County must withdraw the Addendum and prepare a subsequent EIR which incorporates all feasible mitigation measures to reduce the Project's potentially significant DPM and GHG emissions to less than significant levels.

E. The Project Description is not Accurate, Finite or Stable.

By delaying design approval (the SDR process) until after the Addendum is approved, the County proposes to violate CEQA by failing to present the public and decision makers with an accurate, stable, and finite Project description.

"An accurate, stable and finite project description is the sine qua non of an informative and legally sufficient [CEQA document]."⁹⁶ A project description must contain a "general description of the project technical, economic, and environmental consequences."⁹⁷ The concept of stability means that a project description must be

⁹³ Addendum, p. 84.

⁹⁴ Addendum, p. 84 ("With required compliance, the Project would be consistent with programs and policy measures identified in the Alameda County CCAP, and the impacts of the Project would be less than significant.").

⁹⁵ SWAPE Report, pp. 14-17.

⁹⁶ *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 193 (*County of Inyo*); see also CEQA Guidelines, § 15124 (requirements for a project description).

⁹⁷ CEQA Guidelines, § 15124, subd. (c).

both internally consistent and consistent throughout the environmental review process. A project description that “incessantly shifts” is “curtailed” or “enigmatic” acts to “vitiate” an agency’s “[CEQA] process as a vehicle for intelligent public participation.”⁹⁸

The County’s SDR process is acting as design review for the Project.⁹⁹ The intent of SDR is “to promote orderly, attractive, and harmonious development” while recognizing “environmental limitations on development.”¹⁰⁰ SDR entails submitting an application, with plans prepared by a civil engineer, paying a fee, and subjecting the plans to review and approval by the Planning Director. The Director may also use consultants.¹⁰¹ The approval becomes final unless appealed to the Board of Supervisors within ten days.¹⁰²

Design review is also an enforceable mitigation measure incorporated into the 2004 Specific Plan and thus is enforceable and applicable to the Addendum.¹⁰³ The 2004 Specific Plan EIR, Land Use and Urban Design Mitigation Measure IV.1.3, provides: “Design Review: The Specific Plan should be amended to incorporate a design review process such, or similar to, the County’s ‘PD’ (Planned Development) zoning review. The intent of this process’ mechanics would be apply the design guidelines of the Specific Plan against proposed developments, and to provide the public with an opportunity to participate in the Specific Plan implementation process.”¹⁰⁴

The Staff Report (pages 8 and 9) provides a description of the Project’s urban design, and the Addendum’s sections on Aesthetics (pages 43 to 46) and Land Use (pages 106 to 118) speak to this issue. Table 10, “Consistency of Project Design and Land Use with Specific Plan Guidelines” analyzes the Project against the Specific

⁹⁸ *Washos Meadows Community v. Dept. of Parks & Recreation* (2017) 17 Cal.App.5th 277, 288 (finding agency’s description of multiple alternatives instead of a single projection description a violation of CEQA and quoting *County of Inyo* with approval).

⁹⁹ The County’s SDR guidelines for areas zoned C-1, as the Project is, are found at Alameda County Code, § 17.38.050 and the SDR process generally is at 17.54.210 et seq.

¹⁰⁰ Alameda County Code, § 17.54.210.

¹⁰¹ Alameda County Code, §§ 17.54.230, 17.54.240, 17.54.250.

¹⁰² Alameda County Code, § 17.54.290.

¹⁰³ 2004 Specific Plan EIR, Land Use and Urban Design Mitigation Measure IV.1.3, “Design Review”.

¹⁰⁴ 2004 Specific Plan EIR, Land Use and Urban Design Mitigation Measure IV.1.3, “Design Review”.

Plan's design guidelines. The purpose of this disclosure and analysis is to inform the public and decision makers as to what the Project is, notably, what it will look like.

The Staff Report notes, however, that SDR approval will be made by solely the Planning Director, "[s]ubsequent to" the Planning Commission hearing.¹⁰⁵ This is a discretionary approval process. Therefore, the Director, at his or her discretion, may change or alter the Project's design *after* the Addendum has been approved. In this way, the public and County decision makers do not know if the Project that is before them at the Planning Commission hearing is the Project that will ultimately be designed and built. This violates CEQA's requirement for an accurate, finite, and mostly importantly, *stable* project description.

For these reasons, the County can only approve an SDR application if the County withdraws the Addendum and related approvals, and prepares an EIR with a project description that reflects the Project that is ultimately described and approved in the SDR process.

F. A Subsequent EIR is Required to Address Significant New Information Related to Hazards.

New information of substantial importance related to Hazardous and Hazardous Materials is now known, which could not have been known at the time the 2004 Specific Plan EIR was certified. A subsequent EIR must be prepared to disclose and analyze this new information for public review and comment.

Public Resources Code section 21166, subdivision (c) states that subsequent review is necessary when there is "[n]ew information, which was not known and could not have been known at the time the environmental impact report was certified as complete, becomes available."¹⁰⁶ Such new information "may require preparation of a subsequent EIR if the new information raises significant questions about the key assumptions or information relied upon in the previous document."¹⁰⁷

¹⁰⁵ February 4, 2019 Staff Report, p. 1.

¹⁰⁶ Pub. Resources Code, § 21166; see also CEQA Guidelines, § 15162, subd. (a)(3).

¹⁰⁷ S. Kostka & M. Zischke, Practice Under the California Environmental Quality Act 2d., § 19.20, p. 19-21 (Rev. Mar. 2018); see also *Security Environmental Systems v. South Coast Air Quality Management Dist.* (1991) 229 Cal.App.3d 110, 124 (negative declaration based on assumptions and not hard data concerning air quality emissions; subsequent review required for permit to construct

Here, the Addendum states that the project would not expose people or structures to significant risk from wildland fires, that the Project was consistent with the thresholds analyzed in the 2004 Specific Plan EIR, and that risks were less than significant.¹⁰⁸ However, this assessment does not consider that the Applicant now seeks to relocate a gas pipeline which runs on “the west side of Hesperian Blvd and north side of Via Mercado, adjacent to the proposed development.”¹⁰⁹

Gas pipe relocations must be reviewed and coordinated with Pacific Gas & Electric (“PG&E”) and be consistent with their safety and inspection practices.¹¹⁰ The underlying conclusion of the 2004 Specific Plan, 2004 Specific Plan EIR, and now this Addendum, was that existing underground pipelines are in good working order and regularly maintained, such that routine relocations, when coordinated with the agency, will not result in increased risk to human health from gas line explosions and resulting fires, including the potential to cause or exacerbate a hazardous materials accident.¹¹¹

This conclusion is incorrect. New information has become known since the 2004 Specific Plan EIR was prepared which demonstrates that disturbance of existing Bay Area underground gas pipelines may cause significant impacts from leaking or gas explosions. For example, since the 2004 Specific Plan EIR was certified, “[o]n September 9, 2010, a 30-inch diameter natural gas transmission pipeline, owned and operated by Pacific Gas and Electric Company (PG&E) ruptured in San Bruno, California. Gas escaping from the rupture ignited resulting in the loss of eight lives, injuries to 58 people, destruction of 38 homes, and damage

incinerator which based analysis on prior assumptions); *Moss v. County of Humboldt* (2008) 162 Cal.App.4th 1041, 1062 (74% increase in water usage from creek since prior EIR was substantial new information requiring subsequent review).

¹⁰⁸ Addendum, p. 94; Specific Plan EIR, pp. 291-292.

¹⁰⁹ February 4, 2019 Staff Report, pp. 4, 50 (utility relocation map and note 3 stating that PGE will relocate Via Mercado gas line), 117-122 (January 2, 2019 PG&E Letter, discussing gas line relocation); Addendum, p. 7.

¹¹⁰ See Staff Report, p. 4.

¹¹¹ See e.g. Addendum, p. 7 (concluding that “There is no new information that was not known and could not have been known at the time the prior EIR was certified that shows that the Project would have more, or more severe, significant effects on utility services in the surrounding areas. Impacts to utilities would be less than significant.”).

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to 70 other homes.”¹¹² The California Public Utilities Commission (“CPUC”) subsequently found that the San Bruno pipeline was in deteriorated condition prior to the explosion.¹¹³ More recently, on February 17, 2019, construction workers installing underground fiber optic cables in a San Francisco neighborhood ruptured an underground gas pipeline along Geary Boulevard, igniting a massive fire that damaged several nearby buildings.¹¹⁴



Although no one was killed in the Geary gas explosion, the fire caused significant property damage and disruption to traffic and local neighborhoods, and

¹¹² California Public Utilities Comm., San Bruno Incident Report, <http://www.cpuc.ca.gov/General.aspx?id=5476> (last visited Feb. 14, 2019.)

¹¹³ California Public Utilities Comm., San Bruno Incident Report, http://www.cpuc.ca.gov/uploadedFiles/CPUC_Public_Website/Content/Safety/Natural_Gas_Pipeline/News/AgendaStaffReportreOHPGESanBrunoExplosion.pdf (last visited Feb. 14, 2019). The San Bruno Reports are attached hereto as **Exhibit B** fully incorporated into this Comment Letter, and must be made part of the administrative record for this Project.

¹¹⁴ See February 10, 2019, SF Gate, *San Francisco gas explosion shoots fire that burns buildings*, available at <https://www.sfgate.com/news/us/article/Gas-line-explosion-in-San-Francisco-seats-building-13595404.php> (last visited, February 15, 2019), attached hereto as **Exhibit C**.

required the use of substantial utility and fire protection services to put the fire out and restore power.¹¹⁵

In this case, the Addendum explains that the Project will relocate a local street, Via Mercado, approximately 150 feet south of its existing location.¹¹⁶ In order to facilitate the street relocation, the Applicant must also relocate an existing underground gas pipeline from the existing Via Mercado to the proposed Via Mercado, and reconnect it to an existing gas line along Hesperian Blvd.¹¹⁷ The Addendum fails to discuss the existing condition of the gas pipeline or analyze the potential impacts of its relocation. The Staff Report explains that PG&E's comments on the Project acknowledged the presence of this gas pipeline and several other underground service lines on and in the direct vicinity of the Project, and that "modification or relocation requests should be coordinated with PG&E."¹¹⁸ The Addendum concludes that the Project will result in equal or less significant impacts from hazardous releases than previously identified in the 2004 Specific Plan EIR.¹¹⁹

However, neither the Addendum nor the Staff Report contain any analysis of the potentially significant impacts that could occur from disturbing the Via Mercado gas pipeline or any other underground service lines that will be disturbed or relocated by the Project. Moreover, the Addendum contains no mitigation measures for any hazardous materials impacts.¹²⁰ This violates CEQA's requirement that the County analyze whether the Project will "create a significant hazard to the public or the environment through reasonably foreseeable upset and accident conditions involving the release of hazardous materials into the environment,"¹²¹ and provide feasible mitigation to reduce potentially significant impacts to less than significant levels.¹²²

¹¹⁵ *Id.*

¹¹⁶ Addendum, p. 6.

¹¹⁷ Addendum, p. 7.

¹¹⁸ Staff Report, p. 4.

¹¹⁹ Addendum, p. 86.

¹²⁰ See Addendum, pp. 86-94 (Hazards and Hazardous Materials section).

¹²¹ Addendum, p. 86; CEQA Guidelines, Appendix G, Section VIII.b.

¹²² Pub. Res. Code §§ 21002.1(a), 21100(b)(3) (CEQA document must contain mitigation measures sufficient to minimize the significant adverse environmental impacts identified in the document).

The Specific Plan EIR was certified based on information available in 2004 which indicated that the pipelines on the Project site, including the pipeline slated for relocation, were maintained in good working order and are suitable for relocation. However, new information about the potentially significant impacts from disturbing gas pipelines during routine construction activities demonstrates that the Project is likely to have new or more severe significant effects not discussed in the Specific Plan EIR.¹²⁸

Given the potentially massive risks to human health and safety posed by disturbance of underground pipelines, this information is of substantial importance. It was not known, and could not have been known, even with the exercise of reasonable diligence, when the 2004 Specific Plan was certified, as these events and subsequent regulatory investigation and reporting of them had not occurred. The County must prepare an EIR that adequately discloses the potentially significant hazardous impacts from disturbing underground pipelines, and which incorporates feasible mitigation measures to reduce these impacts to less than significant levels.

IV. THE PLANNING COMMISSION CANNOT MAKE THE REQUIRED FINDINGS UNDER THE SUBDIVISION MAP ACT TO APPROVE THE PROJECT'S VESTING TENTATIVE MAP

The County cannot make the required findings under the SMA to approve the Project's VTM because the Project fails to comply with CEQA, and the proposed Resolution of Approval fails to include requisite findings regarding the Project's density reallocation, as required by the SMA. The County cannot approve the resolutions concerning the VTM and Conditions of Approval on the basis of these inadequate findings. The proposed Resolution must be withdrawn from consideration at the February 19, 2019 hearing, and resubmitted when and if the County can make the required findings.

¹²⁸ 14 CCR § 15162(a)(8). The deteriorated condition of some existing Bay Area underground gas pipelines may also be a changed circumstance under which the Project is being undertaken which did not exist when the Specific Plan EIR was certified in 2004. 14 CCR § 15162(a)(2).

A. The Planning Commission Cannot Make Mandatory SMA Findings Regarding Environmental Impacts.

The SMA provides guidance as to the findings that the agency must make when approving a tentative map.

Government Code, section 66474, provides:

A legislative body of a city or county shall deny approval of a tentative map, or a parcel map for which a tentative map was not required, if it makes any of the following findings:

- (a) That the proposed map is not consistent with applicable general and specific plans as specified in Section 65451.
- (b) That the design or improvement of the proposed subdivision is not consistent with applicable general and specific plans.
- (c) That the site is not physically suitable for the type of development.
- (d) That the site is not physically suitable for the proposed density of development.
- (e) That the design of the subdivision or the proposed improvements are likely to cause substantial environmental damage or substantially and avoidably injure fish or wildlife or their habitat.
- (f) That the design of the subdivision or type of improvements is likely to cause serious public health problems.
- (g) That the design of the subdivision or the type of improvements will conflict with easements, acquired by the public at large, for access through or use of, property within the proposed subdivision. In this connection, the governing body may approve a map if it finds that alternate easements, for access or for use, will be provided, and that these will be substantially equivalent to ones previously acquired by the public. This subsection shall apply only to easements of record or to

easements established by judgment of a court of competent jurisdiction and no authority is hereby granted to a legislative body to determine that the public at large has acquired easements for access through or use of property within the proposed subdivision.

(Emphasis added.)

Furthermore, where an EIR has been prepared, and demonstrates that there will be significant and unavoidable environmental impacts, a VTM can be certified only if the decision makers issue a statement of overriding considerations, per Government Code, section 66474.01:

Notwithstanding subdivision (e) of Section 66474, a local government may approve a tentative map, or a parcel map for which a tentative map was not required, if an environmental impact report was prepared with respect to the project and a finding was made pursuant to paragraph (3) of subdivision (a) of Section 21081 of the Public Resources Code that specific economic, social, or other considerations make infeasible the mitigation measures or project alternatives identified in the environmental impact report.¹²⁴

Government Code, section 66474, subsections (e) and (f) implicate CEQA, and prohibit decision makers from approving a tract map where the project is “likely to cause substantial environmental damage” or “cause serious public health problems.”¹²⁵ Here, as discussed in section II, *infra.*, approval of the project is likely to cause substantial impacts to air quality and GHG emissions. The proposed Resolution of Approval does not include specific findings concerning these impacts. Rather, the resolutions attached to the February 4, 2019 Staff Report state only that the Project is in the “public interest” and cite factors in support of that conclusion.¹²⁶ Nor could the Commission make such findings based on the record before it, because the County has not issued a subsequent EIR, has not determined that these impacts are significant and unavoidable, and has not issued a statement

¹²⁴ CA Govt Code § 66474.01.

¹²⁵ Gov. Code, § 66474, subds. (e), (f).

¹²⁶ February 4, 2019 Staff Report, attached Resolution [unnumbered attachment], Resolution Number [unnumbered Resolution].

of overriding considerations to address the Project's outstanding, unmitigated significant impacts.

B. The Draft Resolutions and Staff Report Fail to Include Mandatory SMA Findings Regarding Changes in Land Use Densities Requested by the Project Applicant.

Government Code, section 66474.2 states that approval must be made pursuant to a noticed public hearing, and must consider the following:

(a) Except as otherwise provided in subdivision (b) or (c), in determining whether to approve or disapprove an application for a tentative map, the local agency shall apply only those ordinances, policies, and standards in effect at the date the local agency has determined that the application is complete pursuant to Section 65943 of the Government Code.

(b) Subdivision (a) shall not apply to a local agency which, before it has determined an application for a tentative map to be complete pursuant to Section 65943, has done both of the following:

(1) Initiated proceedings by way of ordinance, resolution, or motion.

(2) Published notice in the manner prescribed in subdivision (a) of Section 65090 containing a description sufficient to notify the public of the nature of the proposed change in the applicable general or specific plans, or zoning or subdivision ordinances. A local agency which has complied with this subdivision may apply any ordinances, policies, or standards enacted or instituted as a result of those proceedings which are in effect on the date the local agency approves or disapproves the tentative map.

(c) If the subdivision applicant requests changes in applicable ordinances, policies or standards in connection with the same

development project, any ordinances, policies or standards adopted pursuant to the applicant's request shall apply.

(Emphasis added). As Government Code, section 66474.2, subsection (c) makes clear, if an applicant requires changes to any approved ordinances, policies, or standards, then the agency must make specific findings to that extent.

Here, the Applicant is requesting a shift in density allocations, taking the residential housing allocations from other Project subareas and reassigning them to this Project.¹²⁷ Due to this change in Project parameters, the County issued an Addendum to the EIR (as opposed to negative declaration or mitigated negative declaration), in effect recognizing this change in policy. The County did not make specific findings concerning these impacts; rather, the resolutions attached to the February 4, 2019 Staff Report state only that the Project is in the “public interest” and cite factors in support of that conclusion.¹²⁸ This fails to comply with the SMA’s express requirement make VTM findings regarding the Project’s shift in density allocations.

¹²⁷ Addendum pp. 33-34, 107-108 (see Table 9, demonstrating density allocation shift).

¹²⁸ February 4, 2019 Staff Report, attached Resolution [unnumbered attachment], Resolution Number [unnumbered Resolution].

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V. CONCLUSION

The County must prepare and circulate a legally adequate subsequent EIR for the Project which fully discloses and mitigates the Project's potentially significant impacts that were not known and were not addressed in the Specific Plan EIR before the Project can be approved. The EIR must also incorporate all Project changes or modifications required by the Planning Director in its SDR review. Finally, the County must postpone the related approvals under the SMA for a VTM, unless and until it can make the required findings.

Thank you for your consideration of these comments.

Sincerely,



Sara F. Dudley

SFD:lj1

Attachments