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March 14, 2019

Via Email and Overnight Delivery

Chair Carla Hansen and Planning Commission Members
 c/o Mr. Sean Moss
 City of El Cerrito
 Community Development Dept.
 10890 San Pablo Avenue
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Ms. Melanie Mintz, Director, Community Development Dept.
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Ms. Margaret Kavanaugh-Lynch, Manager, Community Development Dept.
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Re: Appeal to Planning Commission of Design Review Board Action on Wednesday, March 6, 2019, Polaris Apartments (formerly Baxter Creek Apartments) – Tier II Design Review, Agenda Item # 4, Application No. PL17-0028

Dear Mr. Moss and Members of the Planning Commission:

We are writing on behalf of **El Cerrito Residents for Responsible Development** (“El Cerrito Residents”) to appeal the Design Review Board (“Board”), Tier II Design Review approval for the Polaris Apartments (formerly Baxter Creek Apartments), proposed by Charles Oewel, 11965 San Pablo LLC (“Applicant”), Application No. PL17-0028 (“Project”).

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Appeals to the Planning Commission (“Commission”) are directed to the Zoning Administer or a staff member appointed by the Community Development Director to receive appeals.¹ In email and phone correspondence with our office, Mr. Moss stated that he was the staff member who was so appointed. We have also copied Melanie Mintz and Margaret Kavanaugh-Lynch of the Community Development Department on this correspondence. Enclosed please find a check for \$500.00 for filing fees.²

The Project is located at 11965 San Pablo Avenue in the City of El Cerrito, and proposes the demolition of one existing structure and parking lot, and construction of an 8-story, 85-foot-tall multi-family residential building with 144 dwelling units and 77 parking spaces in an underground garage. The Board reviewed the Project at its November 7, 2018 hearing. The Board continued the hearing until December 5, 2018 in order to consider community comments. At the December 5 meeting, the Board directed the applicant to revise its design to address Board concerns. The item was continued to January 24, 2019, continued again to February 6, 2019. It was continued a third and final to the Board’s March 6, hearing (Agenda Item # 4), where it made the decision appealed here.

We previously submitted comment letters on the Project on March 6, 2018 (“March 2019 Comment Letter”), February 28, 2019 (February 2019 Comment Letter), and on November 7, 2018 (“November 2018 Comment Letter”). Attachment 1 to the November 2018 Comment Letter is an analysis of the Project’s environmental impacts prepared by technical experts Matthew Hagemann and Hadley Nolan of Soil Water Air Protection Enterprise (“SWAPE Comments”). We incorporate these documents by reference as if fully set forth herein.

The Board’s approval of the Project violates the City’s Municipal Code concerning design review and the California Environmental Quality Act, Public Resources Code, section 21000 et seq. (“CEQA”). The Commission must overturn the approval, and remand the Project back to the Board, with instructions to City staff to prepare an environmental impact report (“EIR) or mitigated negative declaration (“MND”) for public review and comment.

¹ El Cerrito Municipal Code, § 19.31.060; see also *id.* at 19.38.70 (appeal procedures).

² Planning, Master Fee Schedule (Updated July 3, 2018).

The Board “may only approve a final design review application” when a project is consistent with adopted plans and the City’s design review criteria.³ The Project’s design contains a five-story sound wall located immediately adjacent to the Ohlone/Richmond Greenway (“Greenway”). This will result in significant visual, aesthetic and safety impacts. This is inconsistent with specific provisions of the El Cerrito General Plan, Land Use Policy LU5.6 and the Ohlone Greenway Master Plan, concerning development along the Greenway, as well the City’s related design review criteria, which mandate that “[p]rojects along the Ohlone Greenway shall enhance the usability and aesthetic appeal of the Greenway.”⁴ Accordingly, the Board’s approval is inconsistent with City’s Municipal Code. We respectfully request that the Commission overturn the approval and remand the Project to Board with direction to improve consistency with the City’s Ohlone Greenway policies.

Second, the Commission must overturn a decision of the Board where the Board has exceeded its authority.⁵ Here, the Board exceeded its authority by concluding in its Environmental Checklist, prepared pursuant CEQA, that that the Project would not result in new or greater impacts than were analyzed in the San Pablo Avenue Specific Plan Environmental Impact Report (“Specific Plan EIR”), and that further environmental review was required. The Board’s conclusion was incorrect as a matter of law. Substantial evidence exists that the Project may result in significant visual, aesthetic, safety, hazards and air quality impacts that were not evaluated and mitigated in the prior Specific Plan. First, the Project’s design will result in significant impacts to aesthetic resources, due to its proximity to the Greenway. Second, the Project is located on property that may be contaminated with pesticides due to its prior use as a nursery, and these impacts have not been fully disclosed, analyzed or mitigated. Finally, the Project will increase traffic emissions in an area that already poses a significant health risk to residents due to Interstate-80 traffic emissions and the nearby Home Depot diesel generator. These impacts were not disclosed, analyzed or mitigated in the Specific Plan EIR, and must be analyzed in site-specific, project-level environmental review. While the Project incorporates some conditions to address these issues, these conditions are neither adequate to reduce potential impacts below a level of significance nor a lawful substitute for required CEQA review. Even if the measures were adequate to

³ El Cerrito Municipal Code, § 19.38.060(A) (findings required for approval); *id.* at § 19.38.060(b) (design review criteria).

⁴ El Cerrito Municipal Code, § 19.38.060(B)(10).

⁵ El Cerrito Municipal Code, § 19.39.070(A).

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reduce impacts below a level of significance, CEQA still requires preparation of an EIR or an MND prior to adopting a mitigation measure in order to allow for public review and comment.

I. STATEMENT OF INTEREST

El Cerrito Residents is an unincorporated association of individuals and labor organizations that may be adversely affected by the potential public and worker health and safety standards and environmental impacts associated with Project development. El Cerrito 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 families; and other individuals that live and/or work in the City of El Cerrito and Contra Costa County, including El Cerrito resident Nicholas Albon.

Individual members of El Cerrito Residents and the affiliated labor organizations live, work, recreate and raise their families in the City of El Cerrito and Contra Costa County. 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. El Cerrito Residents have 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. AN EIR IS REQUIRED TO EVALUATE THE PROJECT'S VISUAL, AESTHETIC AND SAFETY IMPACTS, AND ITS INCONSISTENCY WITH THE CITY'S OHLONE GREENWAY POLICIES

Per the direction of the Board at their December 5, 2019 hearing, the applicants revised their design plans. The staff report and additional drawings and design descriptions released on March 1, 2019 and approved at the March 6, 2019 hearing, show that even with the design changes, a five-story "sound wall" will continue to create a continuous barrier directly adjacent to the Greenway, creating significant visual, aesthetic and safety impacts. This proposed five-story sound wall is inconsistent with the General Plan and the Ohlone Greenway Master Plan. The

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City must evaluate the impacts of this five-story sound wall in an EIR and require Project alterations or mitigation measures to create consistency with the City's Ohlone Greenway policies.

The proposed five-story sound wall is directly adjacent and parallel to the Greenway, with no setbacks, and sandwiches the trail between the Project and the existing aerial Bay Area Rapid Transit track.⁶ This creates a "tunneling" effect, depriving the Greenway of light and air, in conflict with the Ohlone Master Plan and General Plan Land Use Policy LU5.6. Specifically, General Plan Land Use Policy LU5.6 provides that new development abutting the Greenway must be evaluated with respect to how the development enhances the aesthetics and ambiance of the trail. Similarly, the Ohlone Greenway Master Plan expresses the City's intent to develop the Greenway in a manner that promotes visibility and improves safety and security.⁷ The proposed sound wall violates these policies by creating a significant barrier to light and air on the Greenway. In no way does it enhance the aesthetics or ambiance of the trail.

Even with the proposed windows in the sound wall, the Project will significantly darken the Greenway and decrease visibility along the trail. The Project's shadow analysis shows that the sound wall will continue to darken the pathway. It also continues to directly abut the Greenway, instead of providing any sort of setback, creating an effective tunnel along this section of the pathway. The failure to provide any setback is inconsistent with both the General Plan and Ohlone Greenway Master Plan policies. Even with the proposed windows, the sound wall's location and height will result in significant visual, aesthetic and safety impacts. As a result, it requires evaluation and an opportunity for public comment in an EIR.

Accordingly, the Board cannot support with facts and evidence a finding that the project is consistent with the design policies of the General Plan, the Ohlone Greenway Master Plan, and the City's design review criteria which mandate that the Project enhance the "usability and aesthetic appeal of the Greenway."⁸ The Commission must overturn the approval and remand the Project back to the Board,

⁶ November 2018 Comment Letter, p. 20.

⁷ See Ohlone Greenway Master Plan – El Cerrito, California, Design Guidelines, p. 26, <https://el-cerrito.org/478/Ohlone-Greenway-Master-Plan>; March 2019 Staff Report, pp. 13-14 (text of LU 5.6);

⁸ El Cerrito Municipal Code, § 19.38.060(A)(2), (A)(3).

with instructions to City staff to prepare an MND or EIR for public review and comment.

III. AN EIR IS REQUIRED TO EVALUATE OPERATIONAL IMPACTS FROM TRAFFIC EMISSIONS

Our initial comments noted the failure of the Project to prepare an HRA of the Project's impacts from construction-related TACs in violation of the San Pablo Avenue Specific Plan Program EIR's Mitigation Measure 5-2 (MM5-2) and MM 5-1.⁹ While an HRA was subsequently prepared for this Project in response to our comments, the HRA only addresses potential impacts from construction emissions. Substantial evidence exists that the Project's operational emissions may contribute to significant health risks to Project residents requiring mitigation. These impacts were not evaluated, disclosed, or mitigated in the Specific Plan EIR.

The TAC Assessment prepared for the Project found that traffic emissions from Interstate-80 ("I-80") and emissions from the nearby Home Depot diesel generator will exceed air quality significance thresholds and pose a significant health risk to future project residents.¹⁰ The Project will contribute to these air impacts by increasing traffic in the area by adding 144 housing units and 77 parking spaces to a site which currently contains only a vacant commercial building and driveway.¹¹

Condition of Approval #23 was added specifically to address this impact by requiring installation of a MERV 23 air filtration system. However, the imposition of this condition does not relieve the City of its duty to disclose and evaluate this impact in an EIR or MND.

The City cannot rely on mitigation measures, or conditions of approval styled as mitigation measures, in the absence of environmental review. "If a project may have a significant effect on the environment, CEQA review must occur, and only

⁹ March 2018 Staff Report, p. 11; Environmental Checklist (Attachment 3 to March 2018 Staff Report), Appendix A.

¹⁰ Environmental Checklist, p. 21; see also Appendix A, 11965 San Pablo Ave. TAC Assessment, at p. 6.

¹¹ Environmental Checklist, p. 2; March 2019 Staff Report, pp.3-4.
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then are mitigation measures relevant.”¹² “[T]here are sound reasons for precluding reliance upon mitigation measures at the preliminary stage” because doing so would permit an agency to “evade standards governing the preparation of” environmental review documents.¹³ These standards include, for example, public review and comment to evaluate the proposed measures efficacy in avoiding or lessening the impact.¹⁴ The failure to evaluate this impact in an EIR or MND thus violates CEQA.

The Design Review Board thus exceeded its authority in approving the Project, where further review is required under CEQA.¹⁵ The Commission must overturn the approval, and remand the Project back to the Board, with instructions for City staff to prepare an MND or EIR for public review and comment.

IV. AN EIR IS REQUIRED DUE TO POTENTIALLY SIGNIFICANT IMPACTS FROM DISTURBANCE OF CONTAMINATED SOIL

The Environmental Checklist concludes that the Specific Plan EIR adequately evaluated impacts from hazards and hazardous materials that would occur with implementation of the Project and that no new or more severe impacts would occur with implementation of the Project.¹⁶ The Board’s determination is not supported by substantial evidence and the Board exceeded its authority in approving the Project, absent this analysis.¹⁷ The Commission must overturn the approval, and remand the Project back to the Board, with instructions for City staff to prepare an MND or EIR for public review and comment.

As discussed further in the SWAPE Comments, the Phase I Environmental Site Assessment (“Phase I ESA”) prepared for the Project site acknowledged that, due to the long-term use of the site as part of a nursery operation, soil at the property may have been impacted by pesticides and herbicides.¹⁸ Without performing any soil sampling to determine the presence of pesticides or herbicides,

¹² *Salmon Protection & Watershed Network v. County of Marin* (2004) 125 Cal.App.4th 1098, 1107 (County could not rely on mitigation measures to support conclusion of environmental review with a categorical exemption).

¹³ *Salmon Protection & Watershed Network v. County of Marin* (2004) 125 Cal.App.4th 1098, 1108.

¹⁴ CEQA Guidelines, § 15126.4.

¹⁵ El Cerrito Municipal Code, § 19.38.070(A).

¹⁶ CEQA Checklist at p. 35.

¹⁷ El Cerrito Municipal Code, § 19.38.070(A).

¹⁸ SWAPE Comments at p. 2

however, the authors of the Phase I ESA speculate that “it is likely that the issue of potential residual pesticide concentration in shallow soils at the site would have been resolved during the building of the Taco Bell restaurant.”¹⁹ Mere speculation that residual soil contaminants were cleaned up prior to previous activities on the site is not sufficient to support a finding that no impacts from soil contamination would occur as a result of Project activities. Speculation and unsubstantiated opinion are not substantial evidence under CEQA.²⁰

SWAPE’s expert comments provide substantial evidence that construction workers, nearby residents and future occupants may be exposed to pesticide-containing soils and dust and that Project construction activities will exacerbate this risk.²¹

Because the presence of contaminants at the Project site and the potential for those contaminants to be disturbed during Project construction was not evaluated or disclosed in the Specific Plan EIR, CEQA requires evaluation of this potential impact in a project-specific EIR. The Commission must overturn the approval, and remand the Project back to the Board, with instructions to prepare an MND or EIR for public review and comment.

A. The Presence of Hazardous Contaminants at the Project Site Was Not Evaluated in the Specific Plan EIR

Because it is a high level plan, the Specific Plan EIR provides just a high-level discussion of soil contamination and remediation practices generally, not an examination of potential contamination issues on each individual project site from any type of potential future project. The Specific Plan EIR stated that “[e]ach project applicant in the plan area would be required to comply with all applicable, existing jurisdictional City-, regional- and State-mandated site assessment, remediation, removal, and disposal requirements for soil, surface water, and or groundwater contamination.”²² The Specific Plan EIR then outlined the typical procedures for evaluating soil contamination and concluded that “implementation of

¹⁹ SWAPE Comments at p. 2 (citing Phase I ESA, p. 2)

²⁰ CEQA Guidelines, § 15064(f)(5) (Speculation and unsubstantiated opinion are not substantial evidence).

²¹ SWAPE Comments at pp. 1-3.

²² Specific Plan DEIR at pp. 10-11.

these required, standard procedures would result in a less-than-significant impact associated with potential soil and surface/groundwater contamination.”²³

The Specific Plan EIR thus merely addresses contamination that is assessed and remediated pursuant to City or State oversight. The EIR does not address potential contamination that has not been previously disclosed or identified or that has not been assessed and remediated pursuant to City or State oversight. Here, the City identifies potential contamination on the site that was not disclosed or evaluated in the Specific Plan EIR and fails to identify any remediation or clean-up activities that were performed with City or State oversight.

Under CEQA Guidelines section 15168(d), the City may use the Program EIR to simplify preparing environmental documents on later parts of the program, to include preparing a focused EIR on new effects which had not been considered before. However, where the program EIR plainly shows that a particular effect of future activities was not examined, the Design Review Board could not properly find that the Project would have no new effects not examined in the program EIR, where the City’s own analysis shows a potential for harmful soil contaminants to exist on the Project site. SWAPE’s comments provide expert testimony that the Project may create significant health and safety risks as a result of the potential soil contamination.

Accordingly, the Board exceeded its authority in approving the Project.²⁴ The Commission must overturn the approval, and remand the Project back to the Board, with instructions to City staff to prepare an MND or EIR for public review and comment.

B. New Information Has Become Available Since the Certification of the San Pablo Avenue Specific Plan Programmatic EIR Showing Hazard Impacts from Project Construction May Be Significant

Even if the Specific Plan EIR’s discussion of possible soil contamination and worker exposure from future activities constitutes an examination of hazard impacts for future activities within the program, the potential for Project construction activities to expose construction workers and nearby residents to

²³ Specific Plan DEIR at pp. 10-11.

²⁴ El Cerrito Municipal Code, § 19.38.070(A).
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residual pesticide contamination identified in the Phase I ESA constitutes new information of substantial importance that was not known at the time the Program EIR was certified. Pursuant to CEQA Guidelines section 15162, a subsequent or supplemental EIR is required when 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, shows the Project will have one or more significant effects not discussed in the previous EIR or negative declaration. The Board exceeded its authority in approving the Project in light of this new information.²⁵ The Commission must overturn the approval, and remand the Project back to the Board, with instructions to City staff to prepare an MND or EIR for public review and comment.

In this case, the information regarding the potential to expose construction workers and residents to contaminated soil at the Project site constitutes new information. This information was brought to light through the Phase I ESA prepared in 2017 and the Project application. While the City may have been aware of the Project site's history of agricultural uses at the time the Specific Plan EIR was certified, it was not known at that time construction of the Project would require large scale disturbance of soils at the Project site. It was also not known that a project which includes areas of unpaved open space and a public play area would be developed at the site, potentially bringing future occupants and visitors into direct contact with recently-disturbed, contaminated soil.

As explained further in the SWAPE comments, this new information that Project activities may expose construction workers and residents to soils impacted by pesticides and herbicides from long history of agricultural use is of substantial importance.²⁶ SWAPE explains:

Because agriculture was practiced on the Project site prior to 1972, pesticides, including dichloro-diphenyl-trichloroethane (DDT), may be present in Project site soils from the application of pesticides. Organochlorine pesticides, such as DDT, 1,1-Dichloro-2,2-bis(p-chlorophenyl)-ethylene (DDE), and Chlordane, were used from the 1940s until they were banned in the

²⁵ El Cerrito Municipal Code, § 19.38.070(A).

²⁶ SWAPE Comments at pp. 1-3.

1972.²⁷ Despite being banned for almost 50 years, these compounds can persist in soil for hundreds of years.²⁸

Exposure to DDT can result in headaches, nausea, and convulsions. The U.S. EPA identifies DDT and DDE as probable human carcinogens. Chlordane has also been classified as a probable human carcinogen by the U.S. EPA.²⁹

In light of the new information of substantial importance that Project construction and subsequent use may expose construction workers, residents, future occupants, and visitors to soils containing DDT or other harmful pesticides. The speculation in the Phase I ESA that soil contamination was previously cleaned up is without basis and does not provide substantial evidence that no impacts would occur.

The Board exceeded its authority in approving the Project as consistent with the San Pablo Avenue Specific Plan, by failing to consider this information.³⁰ The Commission must overturn the approval and remand the Project back to the Design Review, with instructions to City staff to prepare an EIR to disclose and analyze the Project's potentially significant hazard impacts.

C. The City's New Condition Requiring Preparation of a Phase II Report Does Not Mitigate this Potential Impact and Does Not Supplant the Requirement to Evaluate this Impact in an EIR

The City acknowledges that the Project site may have significant soil contamination by imposing a new condition of approval requiring preparation of a Phase II Report.³¹ A Phase II report, however, would only provide testing and disclosure of potential soil contaminants. It does not, in itself, mitigate impacts from such contamination.

Furthermore, a condition of approval is not a lawful substitute for CEQA review. If a project may have a significant effect on the environment, CEQA review

²⁷ SWAPE Comments at p. 2 (citing U.S. EPA, DDT – A Brief History and Status, <https://www.epa.gov/ingredients-used-pesticide-products/ddt-brief-history-and-status>).

²⁸SWAPE Comments at p. 2 (citing Agency for Toxic Substances and Disease Registry, Public Health Statement for DDT, DDE, and DDD, <https://www.atsdr.cdc.gov/phs/phs.asp?id=79&tid=20>)

²⁹ SWAPE Comments at p. 3.

³⁰ El Cerrito Municipal Code, § 19.38.070(A).

³¹ March 2019 Staff Report, Condition of Approval #30.

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must occur, and only then are mitigation measures relevant.”³² If a fair argument exists that the Project may have contaminated soil that could be disturbed by Project construction and operation, then an EIR or an MND must be prepared.³³ The Commission must overturn the approval, and remand the Project back to the Board, with instructions to City staff to prepare an MND or EIR for public review and comment.

V. CONCLUSION

The Board violated the El Cerrito Municipal Code by approving a project which is inconsistent with adopted plans and the City’s design review criteria. The Board also violated CEQA by failing to prepare a project-level EIR or MND in light of the Project’s potentially significant impacts, which are were not analyzed, disclosed or mitigated in the Specific Plan EIR. El Cerrito Residents urges the Commission to overturn the approval of the Project and to direct City staff to prepare an EIR or MND that fully evaluates and mitigates the Project’s health risks, hazard, and aesthetic impacts.

Thank you for considering our comments.

Sincerely,



Sara Dudley

SFD:ljl

³² *Salmon Protection & Watershed Network v. County of Marin* (2004) 125 Cal.App.4th 1098, 1108.

³³ Pub. Resources Code, §§ 21100, 2115, CEQA Guidelines, § 15064(a)(1), (f)(1).