

ADAMS BROADWELL JOSEPH & CARDOZO

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

520 CAPITOL MALL, SUITE 350  
SACRAMENTO, CA 95814-4721

TEL: (916) 444-6201

FAX: (916) 444-6209

sdudley@adamsbroadwell.com

SO. SAN FRANCISCO OFFICE

601 GATEWAY BLVD., SUITE 1000  
SO. SAN FRANCISCO, CA 94080

TEL: (650) 589-1660

FAX: (650) 589-5062

DANIEL L. CARDOZO  
CHRISTINA M. CARO  
YAIR CHAVER  
SARA F. DUDLEY  
THOMAS A. ENSLOW  
ANDREW J. GRAF  
TANYA A. GULESSERIAN  
KYLE C. JONES  
RACHAEL E. KOSS  
NIRIT LOTAN  
CAMILLE G. STOUGH

MARC D. JOSEPH  
*Of Counsel*

July 8, 2019

**Agenda Item: 4**

**Via Email and Hand Delivery**

President Richard Valle and Honorable Members,  
Board of Supervisors of Alameda County  
1221 Oak Street, Suite 536  
Oakland, CA 94612  
c/o Clerk of Board, Board of Supervisors, Anika Campbell-Belton  
Email c/o [Anika.campbell-belton@acgov.org](mailto:Anika.campbell-belton@acgov.org)

**Re: Agenda Item 4: Appeal of Alameda County Residents for Responsible Development of Village Green Mixed-Use Project (PLN2018-00086/TR-8488)**

Dear President Valle, Honorable Board Members:

We are writing on behalf of **Alameda County Residents for Responsible Development** ("Alameda County Residents") to urge the Board of Supervisors ("Board") to uphold Alameda County Residents' appeal ("Appeal") of the Planning Commission's February 19, 2019 approval of the Tract Map Subdivision (TR-8488), Site Development Review, and the Final Addendum ("Addendum") to the 2004 San Lorenzo Village Center Specific Plan Environmental Impact Report ("EIR") for the Village Green Mixed-Use Project, PLN2018-00086/TR-8488 ("Project"). The Project is proposed by Demmon Partners/Mitch McKinzie (collectively, "Applicant"). The Project includes the proposed development of 163 rental housing units, 11,524 square feet of indoor retail space, and 660 square feet of outdoor retail space on the west side of Hesperian Boulevard, between Paseo Grande and Via Mercado in the San Lorenzo area of unincorporated Alameda County.

Alameda County Residents urges the Board to uphold the Appeal, and to make all necessary findings to remand the Project to County Staff to prepare a legally adequate environmental impact report ("EIR") for the Project pursuant to

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the California Environmental Quality Act (“CEQA”)<sup>1</sup> and the CEQA Guidelines<sup>2</sup> which thoroughly discloses and mitigates its significant environmental effects.

As detailed in our February 27, 2019 Appeal letter (“Appeal”),<sup>3</sup> February 18, 2019 comment letter to the Planning Commission regarding the Addendum (“Comment Letter”) and its attached expert report from Kaitlyn Heck and Matt Hagemann, P.G., C.Hg. at Soil Water Air Protection Enterprises (“February SWAPE Report”),<sup>4</sup> there is substantial evidence demonstrating that the Project will have potentially significant and unmitigated air quality and public health and safety impacts that the County failed to address in its CEQA Addendum. These errors and omissions include:

- 1) the Addendum fails to accurately disclose the Project’s potentially significant construction and operational air quality impacts;
- 2) the Addendum fails to disclose potentially significant health risks from exposure to toxic air contaminants (“TACs”) during Project construction and operation;
- 3) the Addendum fails to accurately disclose and analyze the Project’s potentially significant greenhouse gas (“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.

As discussed below, the Staff Report for this Appeal hearing fails to remedy any of these issues. The County must prepare and circulate a legally adequate EIR to address these deficiencies. In the absence of this requisite CEQA analysis and

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<sup>1</sup> Pub. Resources Code, § 21000 et seq.

<sup>2</sup> Cal. Code Regs., tit. 14, § 15000 et seq.

<sup>3</sup> See February 27, 2019 letter from Adams Broadwell Joseph & Cardozo to the Planning Commission, *Appeal of Planning Commission February 19, 2019 Approval of Tract Map Subdivision (TR-8488), and Final Addendum to the 2004 San Lorenzo Village Center Specific Plan EIR (Village Green Mixed-Use Project) (PLN2018-00086/TR-8488) (Demmon Partners, Mitch McKinzie)* (“Appeal”) and Exhibit 1 to the Appeal, February 18, 2019 comments on *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)*. These documents are also included in the June 2019 Staff Report and incorporated by reference as if fully set forth herein.

<sup>4</sup> Attached hereto as **Exhibit A**.

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mitigation, the Board lacks substantial evidence to uphold the findings made by the Planning Commission that the Project would not result in any new and significant environmental impacts that were not previously analyzed in the 2004 Specific Plan EIR.

The Appeal also asks the Board to vacate the Planning Commission's approval of the Project's Tentative Tract Map ("TTM") because the approval violated the California Subdivision Map Act ("Map Act"). Under the Map Act, the County is required to "deny approval of a tentative map" if the project's design is "likely to cause substantial environmental damage" or "is likely to cause serious public health problems."<sup>5</sup> The Appeal demonstrates that the Project is likely to have these effects, and that the County has failed to mitigate them. The Commission therefore should have denied the TTM. The Map Act also requires written findings when a project causes changes to any existing approved ordinances, policies, or standards.<sup>6</sup> In this case, the TTM for the Project requires an increase from the existing Specific Plan density allocation from 150 units to 163 units in subarea 5 of the Village Green planning area in order to accommodate the Project's design. This is a reallocation of density away from other Specific Plan subareas which renders the Project inconsistent with the existing Specific Plan. The Planning Commission failed to make findings to this effect.

We have reviewed the June 14, 2019 Appeal Staff Report ("Staff Report"), Resolution No. R-2019-[unnumbered] ("Draft Resolution"), the April 17, 2019 response letter from environmental consultant Lamphier-Gregory ("Responses to Comments"), and the April 22, 2019 letter from the Applicant's attorney, Richard Selna, at the law firm of Wendel Rosen ("Applicant Letter").<sup>7</sup> After reviewing these documents, we conclude that the Staff Report fails to correct the substantial deficiencies in Addendum's environmental analysis that we identified in our Appeal. The Planning Commission's approval of the Project approval therefore still fails comply with CEQA and the Map Act.<sup>8</sup> This letter was prepared with the assistance

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<sup>5</sup> Gov. Code, § 66474(e), (f).

<sup>6</sup> Gov. Code, § 66474.2(c); § 66474(a), (b).

<sup>7</sup> The June 14, 2019 Staff Report and its attachments are incorporated by reference as if fully set forth herein.

<sup>8</sup> Alameda Residents has also reviewed the appeal by Richard Hancocks, Agenda Item #5, and the Staff Report concerning that appeal, *available at*

[http://www.acgov.org/board/bos\\_calendar/documents/DocsAgendaPlan\\_07\\_09\\_19/5HancocksPLN201](http://www.acgov.org/board/bos_calendar/documents/DocsAgendaPlan_07_09_19/5HancocksPLN201)

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of Alameda Residents' expert Kaitlyn Heck of Soil Water Air Protection Enterprises, who has prepared a supplemental expert report ("July SWAPE Report").<sup>9</sup>

The Board cannot approve the Project until the County fully complies with CEQA and the Map Act. To uphold the Appeal, the Board must vacate the Planning Commission's February 19, 2019 Project approvals and adopt findings explaining that the County's decision to prepare an Addendum to the 2004 Specific Plan Environmental EIR violated CEQA, that the Commission's approval of the TTM violated the Map Act, and that the Commission's approval of the Project's Site Development Review violated County Zoning Codes. The Board should then remand the Project to staff to prepare and circulate a subsequent or supplemental EIR which complies with CEQA.

## I. APPELLANTS' INTEREST

Alameda County Residents has a strong interest in ensuring that the County fully discloses and mitigates the Project's significant environmental impacts before the Project can be approved and built in their community. 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. Members of Alameda County Residents live, work, recreate and raise their families in the County of Alameda, including the unincorporated area of San Lorenzo. 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. Accordingly, these members would be directly affected by the Project's environmental and health and safety impacts, including, in particular, the Project's inadequately mitigated health risks from exposure to TACs like diesel emissions, known carcinogens, that will be generated by the Project.

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[800086.pdf](#), and incorporated by reference as if fully set forth herein. We concur with Mr. Hancock's concerns regarding the Project's inconsistencies with the Eden Area General Plan and San Lorenzo Village Center Specific Plan, regarding the Project's insufficient allocation of retail use and lack of parking.

<sup>9</sup> Attached hereto as **Exhibit A**.

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Recent editorials regarding the Project have sought to chill Alameda County Residents' public participation in the Project's administrative process by contending that union workers are not entitled to raise environmental concerns about projects in their community. These statements are inaccurate and distract from the merits of the Appeal.

CEQA was designed to ensure that projects thoroughly mitigate their environmental impacts through transparent public processes in order to "inform the public and [] responsible officials of the environmental consequences of their decisions before they are made."<sup>10</sup> For this reason, the Legislature has clearly explained that "public participation is an essential part of the CEQA process."<sup>11</sup>

As Alameda County residents and local community members, Residents' members have a direct interest in enforcing the State's environmental laws that encourage sustainable development and ensure a safe working environment for its members and have the same rights to raise their concerns about the Project's environmental and public health impacts as any other Alameda County resident.

## **II. FINDINGS IN SUPPORT OF THE APPEAL**

Specific findings that the Board should make to uphold the Appeal include the following.

### **A. CEQA**

Pursuant to Public Resources Code Section 21166 and CEQA Guidelines Section 15162, the Board should find that the County must prepare a subsequent or supplemental EIR for the Project because there is substantial evidence demonstrating that one or more of the following events has occurred:

- (a) Substantial changes are proposed in the Project which will require major revisions of the Specific Plan EIR;

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<sup>10</sup> *Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.* (1993) 6 Cal. 4th 1112, 1123.

<sup>11</sup> CEQA Guidelines, § 15201.

- (b) Substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the Specific Plan EIR; and/or
- (c) New information, which was not known and could not have been known at the time the Specific Plan EIR was certified as complete, becomes available.<sup>12</sup>

These findings are supported by substantial evidence submitted in support of the Appeal which demonstrates the following:

- **Changes in Specific Plan Density:** The Project requires an increase from the existing Specific Plan density allocation from 150 units to 163 units in subarea 5 of the Village Green planning area in order to accommodate the Project's design. This is a reallocation of density away from other Specific Plan subareas which renders the Project inconsistent with the existing Specific Plan. This is a substantial change from the project that was analyzed in the Specific Plan EIR, and must be addressed in a subsequent EIR.<sup>13</sup>
- **Significant Health Risk from TAC Exposure:** Health risk modeling performed by Alameda County Residents' air quality consultants demonstrates that the Project is likely to result in potentially significant health risks from human exposure to TACs during both Project construction and operation that exceed applicable significance thresholds. These risks include an excess construction-related cancer risk to children of 40 in one million, and an operational cancer risk over the course of Project operation (28.25 years) of approximately 49 in one million – both of which exceed the Bay Area Air Quality Management District's ("BAAQMD") health risk significance threshold of 10 in one million.<sup>14</sup> This information was not disclosed in either the Specific Plan EIR or the Addendum, and is therefore

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<sup>12</sup> Pub. Resources Code, § 21166(a)-(c); CEQA Guidelines, § 15162(a)(1)-(3).

<sup>13</sup> CEQA Guidelines, § 15162(a)(1).

<sup>14</sup> See Appeal, Exhibit 1, pp. 18-21, and attached SWAPE Report, pp. 7-8.

new information demonstrating that the Project will have more severe air quality impacts than previously analyzed.<sup>15</sup>

- **Significant GHG Emissions:** The Addendum acknowledges that, at the time the 2004 Specific Plan EIR was certified, CEQA did not require a GHG impact analysis.<sup>16</sup> The Specific Plan EIR therefore did not analyze GHG impacts. This requirement was added in 2010, representing a substantial change in CEQA’s legal requirements.<sup>17</sup> The Addendum included a GHG analysis, but it relied on inaccurate air emissions modeling to conclude that the Project would have less than significant GHG impacts. Alameda County Residents’ air quality consultants performed an independent analysis of the Project’s GHG emissions using corrected modeling, and concluded that the Project’s total GHG per service population emissions total 3.0 MT CO<sub>2</sub>e/SP/year, which exceeds BAAQMD’s 2030 “Substantial Progress” significance threshold, resulting in a potentially significant GHG impact.<sup>18</sup> This is new information demonstrating that the Project is likely to have significant GHG impacts that were not previously known in 2004 and were not disclosed or mitigated in the Addendum.<sup>19</sup>
- **Potentially Significant Hazardous Materials Risks:** The Addendum failed to disclose the potentially significant impacts associated with the Project’s proposal to relocate a gas pipeline adjacent to the Project site. The Addendum assumes, without supporting evidence, that the existing pipeline is in good condition and is suitable for relocation.<sup>20</sup> However, new information has become known since the 2004 Specific Plan EIR was prepared which demonstrates that disturbance of existing underground gas pipelines may cause significant impacts from leaking or gas explosions.<sup>21</sup> The County must prepare an EIR which adequately discloses and mitigates this potentially significant risk.<sup>22</sup>

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<sup>15</sup> CEQA Guidelines, § 15162(a)(2), (3).

<sup>16</sup> Addendum, p. 82.

<sup>17</sup> Addendum, p. 82.

<sup>18</sup> See Appeal, Exhibit 1, pp. 22-24, and attached February 2019 SWAPE Report, pp. 13-14.

<sup>19</sup> CEQA Guidelines, § 15162(a)(2), (3).

<sup>20</sup> Addendum, p. 7; February 4, 2019 Planning Commission Staff Report, pp. 4, 50.

<sup>21</sup> See Appeal, Exhibit 1, pp. 28-30.

<sup>22</sup> CEQA Guidelines, § 15162(a)(2), (3).

## **B. Map Act**

Pursuant to Government Code Section 66474, the Board should find that:

- The design of the TTM or the Project's proposed improvements are likely to cause substantial environmental damage or substantially and avoidably injure fish or wildlife or their habitat;<sup>23</sup> and
- The design of the TTM or the Project's proposed type of improvements are likely to cause serious public health problems;<sup>24</sup> and
- The proposed TTM, Project design, or improvement of the proposed subdivision is not consistent with the applicable specific plan.<sup>25</sup>

As discussed above, the Appeal includes substantial evidence supporting the findings required by Government Code Section 66474(e) (environmental damage) and Government Code Section 66474(f) (public health problems) in Alameda County Residents' expert reports, which conclude that the Project has potentially significant and unmitigated health risk from exposure to TACs, potentially significant GHG emissions, and potentially significant hazardous materials risks from relocating the gas pipeline. The findings required by Government Code Sections 66474(a) and (b) (plan inconsistency) are supported by the fact that the Project requires reallocation of residential units within Specific Plan subarea 5 in order to accommodate the Project's proposed 163 units.

## **C. County Code**

The Board should issue findings upholding the Appeal, and vacating the Planning Commission's approval of the Addendum, TTR, and Site Development Review for the Project based on the evidence presented in the Appeal, pursuant to one or more of the following sections of the Alameda County Code:

- Section 17.54.670 (Appeals of Zoning / land use development approvals);
- Section 17.54.710 (Board of supervisors—Action on appeals);

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<sup>23</sup> Gov. Code, § 66474(e).

<sup>24</sup> Gov. Code, § 66474(f).

<sup>25</sup> Gov. Code, § 66474(a), (b).



- Section 16.08.100 (Tentative Map Appeals); and
- Section 17.54.260 (Site development review—Action approving Site Development Review failed to ensure compliance with County Codes).

### **III. THE STAFF REPORT FAILS TO RESOLVE THE ISSUES RAISED IN THE APPEAL**

#### **A. The County Must Prepare Subsequent or Supplemental EIR Which Discloses All Potentially Significant Impacts to Air Quality.**

As detailed in our Appeal and further addressed below, the Addendum's air quality analysis contains numerous deficiencies. While the Responses to Comments provide some clarifying data, it fails to address all of these concerns.<sup>26</sup> First, the Responses fail to correct the Addendum's unsupported reliance on unsubstantiated input parameters to estimate the Project's construction and operational air emissions.<sup>27</sup> As a result, the Project's construction and operational air pollution emissions remain underestimated, resulting in an inaccurate air quality analysis. Second, Mitigation Measure AQ-1 fails to require feasible and effective mitigation to reduce the Project's potentially significant health risks from exposure to toxic air contaminants, and is therefore both ineffective and unenforceable. Third, the Addendum's construction and operational health risk modeling remains inaccurate due to its reliance on inaccurate emissions modeling to calculate health risk. The County failed to prepare quantitative operational health risk for nearby, off-site receptors and the construction health risk is still underestimated as it continues to rely on a flawed model and uses an incorrect duration for construction scheduling. Updated and refined health risk modeling is required. For these reasons, the County should uphold the Appeal and instruct County staff to prepare an EIR which discloses, analyzes and mitigates these impacts.

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<sup>26</sup> The Responses to Comments addressed Alameda Residents' concerns regarding parking supply and the Project's operational emissions impacts on-site receptors.

<sup>27</sup> February SWAPE Report, pp. 1-6; July SWAPE Report, pp. 1-5.

1. *Reliance on Inaccurate and Unsubstantiated Input Parameters in Air Emissions Modeling*

a. *Existing Building to be Demolished*

The Staff Report and Addendum provide inconsistent figures regarding the size of the existing building, given variously as 4,000 sq/ft or 5,000 sq/ft which render the Addendum's air quality analysis inconsistent with the Project description in the Addendum.<sup>28</sup> Our Comment Letter and Appeal explained that the Addendum overestimated the existing commercial land use at the Project site by approximately 1,000 square feet, and, as a result, underestimated the Project's net operational emissions.<sup>29</sup> This error resulted from the Addendum modeling a reduction in emissions based on an existing 5,000 sq/ft building, whereas the Project description in the Addendum states that the Project site is currently occupied with a "vacant 4,000 square-foot building (formerly Kavanagh Liquors)."<sup>30</sup> The Responses to Comments attempts to defend the Addendum's reliance on this exaggerated building size by stating that the building is "approximately" 5,000 sq./ft.<sup>31</sup> However, the Staff Report did not modify the Project description in the Addendum. Therefore, our comment regarding the Addendum's underestimation of the Project's net operational emissions remains unresolved. This is a factual inconsistency that must be resolved in a subsequent EIR. Furthermore, air modeling best practices dictate that parameters should be conservatively inputted in favor of protecting the environment and human health; here, requiring that the 4,000 sq/ft figure be used.<sup>32</sup>

b. *Commercial Space*

The Addendum's air modeling underestimates the proposed quantity of indoor commercial space by 24 sq/ft in its air modelling and consequently underestimates impacts. The Responses to Comments does not address this inaccuracy.<sup>33</sup> The Addendum's air modeling also omitted 660 sq/ft of outdoor

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<sup>28</sup> July SWAPE Report, pp. 1-2.

<sup>29</sup> See Comment Letter, p. 16.

<sup>30</sup> Final Addendum, p. 2.

<sup>31</sup> Responses to Comments, p. 1.

<sup>32</sup> July SWAPE Report, pp. 1-2.

<sup>33</sup> July SWAPE Report, pp. 2-3.

seating. The Responses to Comments makes the conclusory and unsupported statement that outdoor seating does not require any construction, and therefore the County did not have to model any emissions associated with the outdoor seating. This assumption is unsupported. As SWAPE explains, the Addendum indicates that the outdoor seating area will be paved with concrete, which will generate construction emissions.<sup>34</sup> Furthermore, the outdoor seating area may be painted, which SWAPE explains would generate construction and operational emissions, including potentially significant VOC emissions.<sup>35</sup> By ignoring the grading, paving, and painting that will be necessary to create this space, the Addendum and Staff Report completely fail to quantify these potentially significant impacts.<sup>36</sup>

c. Grading Haul Trips

The Responses to Comments acknowledges that grading haul trips will be required for the Project. The February SWAPE Report estimated that 163 haul trips are necessary. The Responses to Comments cites a lower figure.<sup>37</sup> Yet, *zero* grading haul trips are modeled in CalEEMOD. The Responses to Comments attempts to explain this omission by claiming that demolition and grading haul trips were modeled together.<sup>38</sup> However, this assumption is incorrect. As SWAPE explains, CalEEMod contains specific - and different - line items for truck trips associated with “grading” activities and for those associated with “demolition” activities.<sup>39</sup> In order to analyze grading haul truck trips in CalEEMod, the user must input the amount of graded soil to be imported or removed during grading. The model then extrapolates grading truck trips based on soil removal.<sup>40</sup> SWAPE’s review of the Addendum’s modeling demonstrates that the County failed to input any amount of soil to be imported during the grading phase of construction; thus, no grading truck trips were analyzed.<sup>41</sup> A subsequent EIR must be prepared which accurately calculates the number of grading haul trips required, discloses this figure to the public, and inputs it correctly into CalEEMod.

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<sup>34</sup> Addendum, p. 211.

<sup>35</sup> Exhibit A, pp. 2-3.

<sup>36</sup> July SWAPE Report, pp. 2-3.

<sup>37</sup> Responses to Comments, pp. 2-3.

<sup>38</sup> Responses to Comments, pp. 2-3.

<sup>39</sup> July SWAPE Report, pp. 3-4.

<sup>40</sup> July SWAPE Report, pp. 3-4.

<sup>41</sup> July SWAPE Report, pp. 3-4; Addendum, Attachment A, pp. 212 -214.

## 2. *Construction Emissions and Mitigation Measure AQ-1*

Air Quality Mitigation Measure AQ-1 is ineffective and unenforceable. Revised and enforceable mitigation measures should be included in a subsequent EIR.

Mitigation Measure AQ-1 purports to reduce diesel particulate matter (“DPM”) exhaust emissions from construction equipment by providing a performance standard requiring a 79% reduction in construction emissions.<sup>42</sup> Yet, Mitigation Measure AQ-1 does not commit the Applicant to strategies that will achieve this rate of reduction. Rather, the Measure authorizes various DPM reduction methods which it contends will achieve this reduction, but for which the Addendum contains no supporting analysis, including authorizing the use of Tier 2 engines and Level 3 DPFs.

As the Appeal explains, the Addendum failed to include an analysis of DPM emissions reductions achieved by the use of the Tier 2 engines and Level 3 DPFs on which Mitigation Measure AQ-1 relies. The only DPM emission reductions that were modeled in the Addendum rely on higher level Tier 3 and Tier 4 engines, which achieve substantially greater DPM reductions than Tier 2 engines. Therefore, the use of Tier 2 engines described in Mitigation Measure AQ-1 will not achieve the emissions reductions modeled in the Addendum. The Staff Report merely reiterates the Addendum’s unsupported conclusions. Thus, just like the Addendum, the Staff Report lacks substantial evidence to support the County’s assertion that Mitigation Measure AQ-1 will effectively reduce DPM emissions by 79%. Moreover, because Mitigation Measure AQ-1 expressly authorizes the use of Tier 2 engines, even if the Applicant complies with the Measure, it will not achieve the required reductions to reduce DPM emissions to less than significant levels. As a result, this measure is ineffective as drafted, and the use of the Addendum’s assumed application of Tier 3, Tier 4 Interim, and Level 3 DPF construction equipment is unenforceable against the Applicant.

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<sup>42</sup> Addendum, pp. 56-57.

Furthermore, the Addendum's air modelling assumes that Tier 3, Interim Tier 4 engines and DPM filters will all be used. These methods are not included in AQ-1 either individually or in conjunction in AQ-1. The Response to Comments merely reiterates the Addendum's approach and does not address these concerns.<sup>43</sup>

### 3. *Health Risk Assessment Modelling – Construction Impacts*

Although the Addendum includes an HRA based on refined AERMOD modelling for construction impacts, this model underestimates the Project's impacts because it relies on an incorrect 15-month construction schedule, in addition to the other input parameter errors discussed above.<sup>44</sup> The Addendum's HRA is based on a 15-month construction schedule and not the 24-month schedule described in the Addendum. The Responses to Comments asserts, with no supporting analysis, that there is no appreciable difference between the 15 and 24-month schedules, as under the 15-month schedule, impacts were modelled at a higher intensity over the shorter duration.<sup>45</sup> This analysis ignores the fact that an HRA is based on air pollution exposure *over time*, not merely intensity.<sup>46</sup> For example, whether an infant will be exposed to construction impacts for the first 15 months of life, compared to his or her first two years of life, significantly changes the health risk calculus for that child. The Responses to Comments merely reiterates the Addendum's findings. Therefore, our concerns still stand.

### 4. *Health Risk Assessment Modelling – Operational Impacts*

The Addendum does not include an HRA which quantifies impacts to nearby off-site receptors. The Responses to Comments attempts to justify this omission, stating that the Project does not include stationary sources of toxic air contaminants ("TACs").<sup>47</sup> However, SWAPE's screening level HRA, which is based on the correct input parameters which identify operational sources of TAC emissions, shows that the operational cancer risk to nearby off-site receptors is **49:1 million**, well-above the Bay Area Air Quality Management District's significance

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<sup>43</sup> Responses to Comments, pp. 2-3.

<sup>44</sup> July SWAPE Report, pp. 5-6.

<sup>45</sup> Responses to Comments, pp. 2, 3-4.

<sup>46</sup> See July SWAPE Report, p. 6

<sup>47</sup> See Responses to Comments, pp. 3-4.

threshold of 10:1 million.<sup>48</sup> Because SWAPE's conservative modeling reflects a potentially significant impact, a subsequent EIR which includes more refined modeling is required.<sup>49</sup>

**B. The County Must Prepare a Subsequent or Supplemental EIR Which Discloses All Potentially Significant Impacts to Global Climate Change from GHG Emissions.**

As explained in the Appeal, Alameda Residents' Comment Letter and attached February SWAPE Report found that the Project's GHG emissions were underestimated, based on the flawed input parameters described above. SWAPE's GHG modeling provided substantial evidence demonstrating that, when correctly modeled, GHG impacts to global climate change over the life of the Project are potentially significant and mitigation measures are required.<sup>50</sup> Several feasible measures were included in the SWAPE Report.<sup>51</sup> The Staff Report rejects the GHG mitigation measures proposed by SWAPE, and instead attempts to defend the Addendum's unsupported assertion that there will be no impact to global climate change from the Project's GHG emissions. Therefore, Alameda Residents' comments on this issue still stand.<sup>52</sup>

**C. A Subsequent or Supplemental EIR is Required to Address Significant New Information Related to Hazards and Hazardous Materials: Relocation of PG&E Gas Pipeline.**

Since the 2004 Specific Plan EIR was certified, new information of substantial importance related to the condition of existing gas pipelines and hazards associated with their maintenance and relocation is now known, which could not have been known at the time the EIR was certified. This new information challenges key assumptions underlying the 2004 Specific Plan EIR and the Addendum. The Responses to Comments does not address these concerns. This new

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<sup>48</sup> July SWAPE Report, pp. 6-7; February SWAPE Report, pp. 8-12.

<sup>49</sup> July SWAPE Report, pp. 6-7; February SWAPE Report, pp. 8-12.

<sup>50</sup> Comment Letter, pp. 21-24; February SWAPE Report, pp. 12-18.

<sup>51</sup> February SWAPE Report, pp. 12-18.

<sup>52</sup> July SWAPE Report, pp. 8-9.

information must be disclosed and analyzed in a subsequent EIR for public review and comment.<sup>53</sup>

The Addendum explains that the Project will relocate a local street, Via Mercado, approximately 150 feet south of its existing location. To facilitate the street relocation, the Applicant must also relocate an existing underground gas pipeline and reconnect it to an existing gas line along Hesperian Boulevard.<sup>54</sup> Neither the 2004 Specific Plan EIR nor the Addendum contains any analysis of the potential hazards associated with the relocation of the Via Mercado gas line. The Addendum then concludes that there will be “no impact” public safety and that no mitigation is required.

Alameda Residents’ Comment Letter demonstrates that disturbance of existing Bay Area underground gas pipelines may cause significant impacts from gas leakage and this can result in gas explosions and fires. Alameda Residents’ Comment Letter and attached exhibits describe the deadly San Bruno gas explosion in 2010, subsequent State investigation of the condition of local gas lines and inadequacies in PG&E’s protocols and procedures, and a description of recent incidents in 2019, which demonstrate that the concerns raised by the San Bruno tragedy have not been fully resolved. This is new information of substantial importance which demonstrates that existing laws may not be adequate to avoid or mitigate the potentially significant hazardous risks associated with the Project’s pipeline removal. These risks must be fully disclosed, analyzed, and mitigated in a subsequent EIR.

The Responses to Comments do not dispute the occurrence or severity of the recent gas explosions cited by Alameda Residents. However, the Responses to Comments continue to endorse the Addendum’s underlying and outdated assumptions that existing underground pipelines are in good working order and regularly maintained, such that routine relocations will not create a safety hazard. As explained in our Appeal, this assumption overlooks new information about the current deteriorated condition of much urban infrastructure, including gas pipelines. The Response to Comments does not dispute that these assumptions are based on the 2004 Specific Plan EIR, which was prepared 15 years ago and

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<sup>53</sup> Pub. Resources Code, § 21166(c); see also CEQA Guidelines, § 15162(a)(3).

<sup>54</sup> February 2019 Staff Report, pp. 4, 50, 117-122.

significantly predates the recent infrastructure failures identified in the Appeal. The 2004 Specific Plan also did not disclose or analyze the potentially impacts from removal of the pipeline in its current 2019 condition, because current conditions did not exist in 2004. The Addendum fails to disclose the current condition of the pipeline, and fails to propose mitigation measures to lessen or avoid the potentially significant risks to public health and safety that could result from its removal.<sup>55</sup> The Addendum remains inadequate in this regard.

The Responses to Comments similarly concludes that there will be “no impact” to public health and safety from the Via Mercado pipeline relocation because “all demolition, excavation, transportation and or construction work is required to comply with all local, state and federal procedures” including coordination between the County and PG&E.<sup>56</sup> This approach violates CEQA. In its analysis of hazards, CEQA requires that an agency analyze whether a project will “[c]reate 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,” and provide feasible mitigation measures to reduce these impacts.<sup>57</sup> In determining if impacts will be significant, California courts have found that the presumption of “no adverse impact” cannot be based solely on compliance with a regulatory program, absent analysis of project-specific facts. This was precisely the holding in *Californians for Alternatives to Toxics v. Department of Food & Agriculture* (2005) 136 Cal.App.4th 1 (“*CAT*”). There, the Department of Food & Agriculture sought to use pesticides to eradicate a crop-damaging insect, and analyzed these impacts in an EIR. The agency found that there would be no significant adverse impacts from statewide pesticide use, based on the agency’s presumed compliance with a comprehensive pesticide regulatory scheme. The court rejected this approach, finding that the agency “abused its discretion by relying on [their] regulatory scheme as a substitute for performing its *own evaluation* of the environmental impacts of using pesticides under the [project].”<sup>58</sup>

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<sup>55</sup> See Responses to Comments, pp. 5-6.

<sup>56</sup> Responses to Comments, p. 5; see also Addendum, p. 86 (finding no impact from relocation of gas line).

<sup>57</sup> CEQA Guidelines, Appendix G, Section IX.b; see also Pub. Resources Code, at § 21100(b)(3) (EIR must contain mitigation measures sufficient to minimize identified significant impacts).

<sup>58</sup> *Californians for Alternatives to Toxics v. Department of Food & Agriculture* (2005) 136 Cal.App.4th 1, 16 (emphasis added).



Just like the Department of Food & Agriculture's inadequate impact analysis in *CAT*, the Addendum and Staff Report also base their "no impact" conclusion on the Applicant's compliance with "local, state and federal procedures." The County's reliance on regulatory compliance is inadequate to ensure that the pipeline removal will not result in significant impacts. Moreover, given the availability of new information regarding the potentially massive risks to human health and safety posed by disturbance of underground pipelines, which was not known when the 2004 Specific Plan was certified, it is incumbent on the County to fully analyze and mitigate this risk. The County cannot conclude that compliance with regulatory scheme concerning pipeline relocation is sufficient to mitigate or avoid impacts, absent an analysis of this new information.

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.

#### **D. THE APPROVAL OF THE TTM VIOLATES THE SUBDIVISION MAP ACT**

The design of the subdivision and its proposed improvements (including relocation of the gas line) are likely to cause environmental damage or injure the public health.<sup>59</sup> The Planning Commission was therefore required to deny the TTM and make the required denial findings under the Government Code.<sup>60</sup> The Applicant Letter ignores the substantial evidence submitted by Alameda County Residents which demonstrates that the Project, as approved by the Planning Commission, continues to have significant environmental impacts that are "are likely to cause environmental damage or injure the public health" within the meaning of the Map Act. The Applicant Letter also misstates the law concerning the County's obligations under the Map Act. The Board should vacate the Planning Commission's approval of the TTM application and deny the TTM by making findings consistent with the Map Act.

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<sup>59</sup> Gov. Code, § 66474(e), (f).

<sup>60</sup> See generally, Gov. Code, § 66474.

1. *The Planning Commission failed to make the required findings under the Map Act, Government Code, section 66474, subdivisions (a)-(g).*

The Government Code, section 66474, subdivisions (a)-(g) states the findings that an agency must make under the Map Act when *either* approving or denying a TTM. The Planning Commission failed to make any of these required findings in the proposed Resolution of Approval. The Board must remand the application to the Planning Commission to make findings consistent with the agency's obligations under the Map Act.

Government Code, section 66474 requires a local agency to make specific findings and to deny a TTM if the map or design of any improvement is inconsistent with any applicable general or specific plan, when the design of the subdivision or the proposed improvements are "likely to cause substantial environmental damage," or are "likely to cause serious health problems."<sup>61</sup>

The Applicant Letter states, without citation to any authority, that Government Code section 66474 findings "are only applicable in the case of a map *denial*."<sup>62</sup> This is false. Under the Map Act "a local agency may approve a tentative map only if none of the findings can be made. The resolution of approval *or* denial of a tentative map should thus include findings that *affirmatively address each of the statutory grounds for denial or approval*."<sup>63</sup>

Here, the Project is likely to cause adverse impacts to air quality, GHG emissions, and hazards, and thus is not consistent with the adopted general and specific plans, absent subsequent review. The Planning Commission therefore had

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<sup>61</sup> See Gov. Code, § 66474(a)-(f).

<sup>62</sup> Applicant Letter, p. 1 (emphasis in original).

<sup>63</sup> A. Lindgren & S. Mattas, California Land Use Practice (Cal. CEB) 2d. ed., *Subdivision Map Act*, § 9.76 (rev. Oct. 2018) (emphasis added); see also *Spring Valley Lake Assn. v. City of Victorville* (2016) 248 Cal.App.4th 91, 105-106 (interpreting Gov. Code, § 66474 and citing Lindgren & Mattas, § 9.76 with approval, and stating "On its face, Government Code section 66474 requires a city to deny approval of a parcel map if it makes any one of several findings. The code section does not explicitly address what findings a city must make when, as here, it approves a parcel map... [W]e conclude the City was required to affirmatively address all of the matters covered by Government Code section 66474 before approving the parcel map").

an affirmative obligation under the Government Code to deny the TTM and make findings to this effect. Yet, the Planning Commission's Resolution of Approval attached to the February 2019 Staff Report stated only that the Project is in the "public interest" and did not make any of the required findings under Government Code, section 66474.

Furthermore, where an EIR has been prepared and demonstrates that there will be significant impacts, the Map Act provides that a TTM can only be approved where the agency adopts a Statement of Overriding Considerations under CEQA. The Statement of Overriding Considerations must include findings that the project's benefits outweigh its environmentally adverse impacts.<sup>64</sup> Here, the Planning Commission must prepare a subsequent EIR and if impacts to air quality, GHG, and hazards cannot be lessened or avoided to less than significant levels, adopt a Statement of Overriding Considerations before approving the TTM.

Accordingly, the Planning Commission was required to make findings pursuant to its approval of the TTM, which it failed to do. The TTM should be denied, as the record reflects that the Project is likely to cause environmental damage. The Board should uphold the Appeal, issue denial findings for the TTM, and remand the TTM application to staff to amend the TTM as necessary following preparation of an EIR that addresses the Project's unmitigated environmental impacts.

2. *The resolutions and February 2019 staff report failed to include mandatory findings regarding changes in land use densities requested by the Project Applicant.*

Government Code, section 66474.2, subdivision (c) states that approval of a TTM must consider whether the application will include a policy change. Here, the Applicant is requesting a shift in residential density among the subareas, resulting in an increase from the existing Specific Plan density allocation from 150 units to 163 units in subarea 5 of the Village Green planning area. The Addendum explains that it was required to analyze this density reallocation as a change in a previously approved land use policy which could result in a potential land use impact:

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<sup>64</sup> Gov. Code, § 66474.01.

The Specific Plan limits residential density in the Plan Area overall to 19.66 dwelling units per acre (du/ac); within subareas 2, 4, and 5A through 5D, it limits the number of dwelling units to 450 total. The Specific Plan EIR, certified and approved by the County in June 2004, states that “densities may be shifted or reallocated among these subareas provided that the maximum number of units within these subareas does not exceed 450..... Changes to the Project defined in the Specific Plan • With the addition of the 163 dwelling units proposed for Village Green, cumulative development in subareas 2, 4, 5A-5D would total 241 dwelling units and 12,184 sf of retail....While the Project is consistent with the overall development evaluated in the Specific Plan EIR, the specific parameters of land use for the proposed Project differ from those detailed in the Specific Plan for the subareas proposed for development.”<sup>65</sup> Thus, the Addendum acknowledges that, although the Specific Plan contemplates a “total” unit allocation within the planning areas, reallocation of those total units between subareas still constitutes a policy change from the approved Specific Plan.<sup>66</sup>

Government Code, section 66474.2, subdivision (c) required similar findings to this effect. Yet, in approving the TTM, the Planning Commission failed to make specific findings concerning this policy change, in violation of the Map Act. The Applicant Letter contends that the general purpose and intent of Government Code, section 66474.2 is to “protect” applicants when an applicant requests a policy change.<sup>67</sup> Even if this were true, it does not alter the County’s duty to make findings under the Map Act regarding all policy changes required for the Project.

#### IV. CONCLUSION

Alameda County Residents respectfully requests that the Board uphold its Appeal and issue all necessary findings to vacate the Planning Commission’s decision approving the Project. In upholding the Appeal, the Board should remand the Project to Staff to prepare a legally adequate subsequent EIR which fully discloses and mitigates all of the Project’s potentially significant impacts that were

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<sup>65</sup> Addendum, p. 35.

<sup>66</sup> Addendum, pp. 4, 35, 37.

<sup>67</sup> Applicant Letter, p. 2.

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not known and were not previously addressed in the Specific Plan EIR before the Project can be approved.

Thank you for your consideration of this Appeal.

Sincerely,



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Sara F. Dudley

SFD:ljl

cc.

Albert Lopez, Planning Director: [Albert.Lopez@acgov.org](mailto:Albert.Lopez@acgov.org)

Rodrigo Orduña, Planner: [Rodrigo.orduna@acgov.org](mailto:Rodrigo.orduna@acgov.org)