

July 16, 2020

Agenda Item 7 A

Via Overnight and Electronic Mail

David Morrison  
Director, Napa Planning Commission  
1195 Third Street, Suite 210  
Napa, CA 94559  
Email: [David.Morrison@countyofnapa.org](mailto:David.Morrison@countyofnapa.org)

**Re: Agenda Item 7 A First and Oxbow Hotel Project  
(File No. PL16-0124)**

Dear Director Morrison:

We are writing on behalf of **Napa Residents for Responsible Development** (“Napa Residents”) to submit comments to the City of Napa’s (“City”) Addendum (“Addendum”) to the Final Downtown Specific Plan Program Environmental Impact Report (“PEIR”) prepared pursuant to the California Environmental Quality Act (“CEQA”) for the First and Oxbow Hotel Project (“Project”) proposed by Foxbow Development LLC (“Applicant”).<sup>1</sup>

The Project consists of the construction of two four-story hotel buildings on two lots totaling over 184,000 square feet and including up to 74 hotel rooms. The Project will include up to eleven commercial tenants, space for conferences and meetings, and 121 subterranean parking spaces.

Based on our review of the Addendum and the PEIR, the City cannot approve the Project without preparing a supplemental environmental impact report (“EIR”). Specifically, we note that the impacts to air quality, greenhouse gas (“GHG”)

<sup>1</sup> City of Napa, Initial Study/Addendum First & Oxbow Gateway Project (June 2020) (hereafter “Addendum”); City of Napa, Final Downtown Napa Specific Plan Program Environmental Impact Report SCH# 2010042043, (March 2012) (hereafter “PEIR”).

emissions, and transportation identified in the Addendum include impacts that are beyond the scope of the PEIR and impacts that are new impacts that were not considered in the PEIR. We reserve the right to supplement these comments at later hearings on this Project after we receive more detailed expert opinions.<sup>2</sup>

## I. STATEMENT OF INTEREST

Napa 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. Napa Residents includes the **International Brotherhood of Electrical Workers Local 180, Plumbers & Steamfitters Local 343, 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 Napa and Napa County.

Individual members of Napa Residents and the affiliated labor organizations live, work, recreate and raise their families in the City of Napa and Napa County. They would be directly affected by the Project's environmental and health and safety impacts. Individual members may also work on the Project itself. Accordingly, they will be first in line to be exposed to any health and safety hazards that exist onsite. Napa 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 making it more difficult and more expensive for business and industry to expand in the region, and by making it less desirable for businesses to locate and people to live there.

## II. THE CITY MUST PREPARE A SUBSEQUENT OR SUPPLEMENTAL EIR FOR THIS PROJECT

CEQA has two basic purposes, neither of which is satisfied by the Project's Addendum. First, CEQA is designed to inform decision makers and the public about the potential, significant environmental impacts of a project before harm is

<sup>2</sup> Gov. Code § 65009(b); PRC § 21177(a); *Bakersfield Citizens for Local Control v. Bakersfield* ("Bakersfield") (2004) 124 Cal. App. 4th 1184, 1199-1203; see *Galante Vineyards v. Monterey Water Dist.* (1997) 60 Cal. App. 4th 1109, 1121.

done to the environment.<sup>3</sup> The EIR is the “heart” of this requirement.<sup>4</sup> The EIR 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.”<sup>5</sup>

To fulfill this function, the discussion of impacts in an EIR must be detailed, complete, and “reflect a good faith effort at full disclosure.”<sup>6</sup> An adequate EIR must contain facts and analysis, not just an agency’s conclusions.<sup>7</sup> CEQA requires an EIR to disclose all potential direct, indirect, and cumulative significant environmental impacts of a project.<sup>8</sup>

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.<sup>9</sup> If an EIR identifies potentially significant impacts, it must then propose and evaluate mitigation measures to minimize these impacts.<sup>10</sup> CEQA imposes an affirmative obligation on agencies to avoid or reduce environmental harm by adopting feasible project alternatives or mitigation measures.<sup>11</sup> 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 through permit conditions, agreements or other legally binding instruments.<sup>12</sup> A CEQA lead agency is precluded from making the required CEQA findings unless the

<sup>3</sup> 14 CCR § 15002(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. Yorty* (1973) 32 Cal.App.3d 795, 810.

<sup>4</sup> *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 84.

<sup>5</sup> *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

<sup>6</sup> 14 CCR, § 15151; *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 721-722.

<sup>7</sup> See *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 568.

<sup>8</sup> PRC, § 21100(b)(1); 14 CCR, § 15126.2(a).

<sup>9</sup> 14 CCR, § 15002(a)(2) and (3); *Berkeley Jets*, 91 Cal.App.4th at 1354; *Laurel Heights Improvement Ass’n v. Regents of the University of Cal.* (1998) 47 Cal.3d 376, 400.

<sup>10</sup> PRC, §§ 21002.1(a), 21100(b)(3).

<sup>11</sup> *Id.*, §§ 21002-21002.1.

<sup>12</sup> 14 CCR, § 15126.4(a)(2).

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.<sup>13</sup> This approach helps “insure the integrity of the process of decision by precluding stubborn problems or serious criticism from being swept under the rug.”<sup>14</sup>

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.<sup>15</sup> CEQA requires an agency to analyze the potential environmental impacts of its proposed actions in an EIR except in certain limited circumstances.<sup>16</sup> 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.”<sup>17</sup>

**A. The City Cannot Approve the Project Under Section 15168 of CEQA Because the Project Has Effects that Were Not Examined in the Program EIR and the Project is Not “Within the Scope” of the PEIR**

CEQA allows for a program level EIR to be used with later activities under certain conditions. To evaluate the sufficiency of a program EIR for use with later activities the City needs to take a two-step approach:

First, the City must consider whether the later activity will result in environmental effects that were not examined in the EIR.<sup>18</sup> If the later activity involves site-specific operations, as it does here, the City must evaluate the site and activity to determine whether the environmental effects were covered in the

<sup>13</sup> *Kings County Farm Bur. 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).

<sup>14</sup> *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 935.

<sup>15</sup> 14 CCR, §§ 15060, 15063(c).

<sup>16</sup> *See, e.g.*, PRC, § 21100.

<sup>17</sup> *Quail Botanical Gardens v. City of Encinitas* (1994) 29 Cal.App.4th 1597; Pub. Resources Code § 21080(c).

<sup>18</sup> 14 CCR §15168(c)(1).

program EIR and document its findings by a checklist.<sup>19</sup> If the agency finds that the activity would have environmental effects that were not examined in the program EIR, it must prepare an initial study leading to either an EIR or negative declaration.<sup>20</sup>

Here, the Addendum notes that planned hotel development within the Downtown Napa Specific Plan Area *exceeds* the rooms envisioned within the PEIR.<sup>21</sup> Thus, impacts from this Project exceed the scope of the analysis within the PEIR. Impacts from the Project include impacts to GHG and transportation. We will supplement these comments with further evidence at a later date.

**B. The City Cannot Approve the Project under §15168 Because it Lacks Substantial Evidence to Support the Conclusion of “No New Effects” Under §15162**

Even if the Project were within the scope of the PEIR (which it is not), CEQA requires the City to show, supported by substantial evidence, that the Project would result in no new significant effects and no new mitigation measure would be required.<sup>22</sup>

When an EIR has previously been prepared, CEQA requires the lead agency to conduct subsequent or supplemental environmental review 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.<sup>23</sup>

<sup>19</sup> 14 CCR §15168(c)(4).

<sup>20</sup> 14 CCR §15168(c)(1).

<sup>21</sup> Addendum, p. 124.

<sup>22</sup> 14 CCR §§ 15162; 15168(c)(2).

<sup>23</sup> PRC § 21166.

The CEQA Guidelines explain that the lead agency must determine, based on substantial evidence in light of the whole record, if one or more of the following events occur:

- (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;
- (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.<sup>24</sup>

We will supplement these comments to explain that the Project would result in significant effects not disclosed or analyzed in the PEIR. As described briefly below, the Project would result in significant impacts not disclosed in the PEIR for, at the very least, GHG, transportation and air quality resource areas. Therefore, the City must prepare a Supplemental EIR for the Project.

1. The City violated CEQA by failing to conduct a proper GHG analysis

The Addendum correctly notes that further state legislation, goals, and plans have been developed for reducing GHG emissions since the 2012 PEIR.<sup>25</sup> These new measures include Senate Bill 32, which mandates a 40 percent reduction in GHG emissions from 1990 levels by 2030.<sup>26</sup> These new circumstances mandating further GHG reductions demonstrate that the impacts identified in the PEIR are more severe than initially analyzed.

The Addendum attempts to address this major change in GHG reduction goals by conducting a new analysis using a reduction goal of 40 percent below the 2020 threshold used within the PEIR, but does not provide substantial evidence to support the use of this threshold, or show how compliance with this threshold supports a conclusion of less than significant impact<sup>27</sup> On the contrary, guidance from the California Air Resources Board suggests that a net zero GHG emissions approach for land use projects is likely necessary to meet the state's GHG reduction goals.<sup>28</sup> The GHG threshold for land use projects must include substantial evidence

<sup>24</sup> 14 CCR § 15162(a)(1)-(3).

<sup>25</sup> See Addendum, p. 82.

<sup>26</sup> Health and Safety Code § 38556.

<sup>27</sup> Addendum, p. 82; see also *Center for Biological Diversity v. Dept. of Fish and Wildlife* (2015) 62 Cal. 4th 204, 225.

<sup>28</sup> California Air Resources Board, California's 2017 Climate Change Scoping Plan, p. 102.

to show that it will not interfere with state goals, which is missing from this analysis. The PEIR's GHG analysis is out of date and the analysis provided in the addendum is flawed. The City cannot approve the Project until it develops a proper GHG threshold, supported by substantial evidence, for its analysis.

Further, even if the City's GHG analysis did not violate CEQA, it still found the Project's emissions to be significant and considered the impact significant and unavoidable, without considering the myriad mitigation measures available for GHG emissions. The City easily could have considered more measures to make the Project more efficient or local offset measures that could be done to reduce GHG emissions. None of these options are considered in the Addendum. The City must withdraw this Addendum and fully consider the suite of options to mitigate GHG emissions in an SEIR.

2. The City violated CEQA by failing to conduct a VMT analysis for transportation impacts

As stated in the Addendum, after the PEIR was certified, major revisions were done in the transportation analysis sections of CEQA, following SB 743. The main change is the shift from level of service ("LOS") transportation impacts analysis to vehicle miles travel ("VMT") analysis.<sup>29</sup>

Despite this major shift in analysis mandated by CEQA, the City failed to include a VMT analysis in the Addendum's transportation analysis. Under the discussion of impact TRN-2, the City includes a two-paragraph discussion of why the Project would not be inconsistent with CEQA Guidelines Section 15064.3, subdivision (b), which provides instructions on how to conduct a VMT analysis.

First, the City argues that because the City "has not yet adopted a quantitative VMT threshold, as allowed by CEQA Guidelines (...) the project would not exceed an applicable threshold of significance."<sup>30</sup> This argument is entirely flawed. While the City does not have to adopt its own quantitative significance threshold, that does not relieve the City from its duty to review the Project's impacts against an "applicable threshold of significance".<sup>31</sup>

<sup>29</sup> Addendum, p. 123.

<sup>30</sup> Addendum, p. 129.

<sup>31</sup> CEQA Guidelines Sections 15064.3(b)(1), 15964.7.



Second, the City argues the Project should be presumed to have a less than significant impact under Guidelines Section 15064.3, subdivision (b)(1). This Section states that “Generally, projects within one-half mile of either an existing major transit stop (...) should be presumed to cause a less than significant transportation impact”.

The City argues that:

[T]he project site is located 0.4 mile from the Soscol Gateway Transit Center, which provides a connection between Napa and the greater Bay Area. In addition, an existing transit stop is located on the east side of Soscol Avenue, just south of the project site. Given the projects proximity to an existing major transit center, the project would be expected to have a less than significant impact on VMT.<sup>32</sup>

This justification, however, is entirely flawed for two reasons: first, “major transit stop” is defined in CEQA as a site containing any of the following: (a) An existing rail or bus rapid transit station, (b) A ferry terminal served by either a bus or rail transit service, or (c) The intersection of two or more major bus routes with a frequency of service interval of 15 minutes or less during the morning and afternoon peak commute periods.<sup>33</sup> The City failed to show that the Soscol Gateway Transit Center qualifies as a “major transit stop” under this definition. The City merely states the Project is close to a “major transit center” but not to a “major transit stop” as defined under CEQA. Therefore, the presumption does not apply, and its use is not supported by the evidence.

Second, as the City itself acknowledges, this presumption applies to “certain projects (including residential, retail, and office projects, as well as projects that are a mix of these uses)”.<sup>34</sup> The Office of Planning and Research Technical Advisory on Evaluating Transportation Impacts Under CEQA specifically states this presumption applies to “certain projects”, and lists types of projects that do not include hotel projects.<sup>35</sup> For this reason too, the presumption should not be used here.

<sup>32</sup> Addendum, p. 129.

<sup>33</sup> PRC § 21064.3.

<sup>34</sup> Addendum, p. 129.

<sup>35</sup> [https://opr.ca.gov/docs/20190122-743\\_Technical\\_Advisory.pdf](https://opr.ca.gov/docs/20190122-743_Technical_Advisory.pdf), p. 13.

The City must therefore conduct a proper VMT analysis as required under CEQA to account for the Project's transportation impacts and mitigate any significant impact. Only after conducting this analysis may the City reach a conclusion regarding the Project's impacts and their severity.

**III. CONCLUSION**

The existing Addendum is insufficient to meet CEQA's requirements of disclosure and mitigation of environmental impacts. The Project exceeds the scope of the PEIR, and the Project will create new impacts not identified in the PEIR. The Planning Commission should not recommend that this Project advance to the City Council at this time.

Sincerely,



Kyle C. Jones

KCJ:ljl