

ADAMS BROADWELL JOSÉPH & CARDOZO

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

601 GATEWAY BOULEVARD, SUITE 1000  
SOUTH SAN FRANCISCO, CA 94080-7037

TEL: (650) 589-1660  
FAX: (650) 589-6062

khartmann@adamsbroadwell.com

SACRAMENTO OFFICE

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

TEL: (916) 444-6201  
FAX: (916) 444-6209

DANIEL L. CARDOZO  
CHRISTINA M. CARO  
THOMAS A. ENSLOW  
ANDREW J. GRAF  
TANYA A. GULESSERIAN  
KENDRA D. HARTMANN\*  
KYLE C. JONES  
RACHAEL E. KOSS  
NIRIT LOTAN  
WILLIAM C. MUMBY

MARC D. JOSEPH  
*Of Counsel*

\*Not admitted in California  
Licensed in Colorado

November 12, 2020

**By Hand-Delivery**

Mayor Gillmor and City Council Members  
Santa Clara City Council  
City Hall  
City of Santa Clara  
1500 Warburton Avenue  
Santa Clara, CA 95050

**Re: Appeal of the Mitigated Negative Declaration for 1111 Comstock  
Data Center Project (PLN2019-13941; CEQ2020-01079)**

Dear City Council:

We are writing on behalf of **Santa Clara Citizens for Sensible Industry** ("Santa Clara Citizens") to appeal the November 4, 2020 decision of the City of Santa Clara Development Review Officer ("City") at a Development Review Hearing to adopt the Mitigated Negative Declaration and Mitigation Monitoring and Reporting Program (collectively with the Initial Study, "IS/MND") for the 1111 Comstock Data Center Project ("Project") and approve the Architectural Review for the Project and Minor Modification to increase the building height to 87 feet and reduce the parking space requirements for the Project (collectively, "Permits").

The Project, proposed by Prime Data Centers ("Applicant"), proposes to demolish an existing 23,765-square-foot industrial building and construct a four-story, 121,170-square-foot data center building on the 1.38-acre Project site (APN 224-08-092). The data center building would house computer servers designed to provide 10 megawatts ("MW") of information technology power; backup generators; underground fuel storage containers; and mechanical cooling equipment on the building's roof. The site, zoned as Light Industrial with a General Plan designation of Low Intensity Office/R&D, is located north of Comstock Street, east of Kenneth

4938-007acp

November 12, 2020

Page 2

Street, south of Bayshore Freeway, and west of Lafayette Street within the City of Santa Clara.

On October 13, 2020, we submitted comments on the IS/MND prepared for the Project ("Comment Letter"). Our comments were prepared with the assistance of technical expert James J.J. Clark, Ph.D. of Clark & Associates Environmental Consulting, Inc. As detailed therein, we identified potentially significant and unmitigated impacts due to emissions from the Project's backup diesel generators, as well as significant impacts to air quality, public health, and greenhouse gas ("GHG") emissions from the Project. Our Comment Letter also showed that the IS/MND fails as a matter of law to address energy impacts as required under CEQA. Based on these potentially significant and unmitigated impacts, as well as other deficiencies in the Initial Study, our comments concluded that the MND in its current form and substance violates CEQA and that substantial evidence supports a fair argument that an environmental impact report ("EIR") is required for the Project.

At the November 4, 2020 public hearing, the MND was adopted and the Permits were approved. We request that the City Council uphold this appeal and reverse the decision of the Director to adopt the IS/MND and approve the Permits.

## I. STATEMENT OF INTEREST

Santa Clara Citizens is an unincorporated association of individuals and labor organizations that may be adversely affected by the potential health, safety, public service, and environmental impacts of the Project. The association includes individuals and organizations, including **California Unions for Reliable Energy** ("CURE") and its local affiliates, and the affiliates' members and their families, who live, work, recreate and raise their families in the City of Santa Clara and Santa Clara County.

Since its founding in 1997, CURE has been committed to building a strong economy and a healthier environment. Its members help solve the State's energy problems by building, maintaining, and operating conventional and renewable energy power plants and transmission facilities. CURE members have an interest in enforcing environmental laws that encourage sustainable development and ensure a safe working environment for its members. Individual members live, work, recreate, and raise their families in Santa Clara. They would be directly affected by the Project's environmental and health and safety impacts. Its members

4938-007acp

November 12, 2020

Page 3

may also work on the Project itself. They will, therefore, be first in line to be exposed to any hazardous materials, air contaminants or other health and safety hazards that exist onsite.

Santa Clara Citizens supports the development of data centers where properly analyzed and carefully planned to minimize impacts on the environment. Any proposed project should avoid impacts to public health, energy resources, sensitive species and habitats, and should take all feasible steps to ensure significant impacts are mitigated to the maximum extent feasible. Only by maintaining the highest standards can development truly be sustainable.

Santa Clara Citizens and its members are concerned with projects that can result in serious environmental harm without providing countervailing economic benefits such as decent wages and benefits. Environmentally detrimental projects can jeopardize future jobs by making it more difficult and more expensive for industry to expand in the City and the surrounding region, and by making it less desirable for businesses to locate and people to live and recreate in the City, including in the vicinity of the Project. Continued degradation can, and has, caused construction moratoriums and other restrictions on growth that, in turn, reduces future employment opportunities. Santa Clara Citizens' members therefore have a direct interest in enforcing environmental laws that minimize the adverse impacts of projects that would otherwise degrade the environment. CEQA provides a balancing process whereby economic benefits are weighted against significant impacts to the environment. It is for these purposes that we submit this appeal.

## II. BASIS FOR THE APPEAL

CEQA contains a strong presumption in favor of requiring a lead agency to prepare an EIR. The "fair argument" standard reflects this presumption. The fair argument standard is an exceptionally low threshold favoring environmental review in an EIR rather than a negative declaration.<sup>1</sup> This standard requires preparation of an EIR if any substantial evidence in the record indicates that a project may have an adverse environmental effect.<sup>2</sup> As a matter of law, substantial evidence includes both expert and lay opinion based on fact.<sup>3</sup>

---

<sup>1</sup> *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 928.

<sup>2</sup> 14 C.C.R. § 15064(f)(1); *Pocket Protectors*, 124 Cal.App.4th at 931.

<sup>3</sup> PRC § 21080(e)(1) (For purposes of CEQA, "substantial evidence includes fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact."); 14 C.C.R. § 15064(f)(5).  
4938-007aep

As we have shown in our Comment Letter, there is substantial evidence that the project may cause significant environmental effects requiring the City to prepare an EIR. The City's Response to Comments ("Response") failed to rebut this presumption, and instead attempted to dismiss our comments by stating that the City provides substantial evidence to support its conclusions. However, even if other substantial evidence supports a different conclusion, the City nevertheless must prepare an EIR under CEQA.<sup>4</sup>

A negative declaration is improper, and an EIR must be prepared, whenever it can be fairly argued on the basis of substantial evidence that the project may have a significant environmental impact.<sup>5</sup> "[S]ignificant effect on the environment" is defined as "a substantial, or potentially substantial, adverse change in the environment."<sup>6</sup> An effect on the environment need not be "momentous" to meet the CEQA test for significance; it is enough that the impacts are "not trivial."<sup>7</sup> Substantial evidence, for purposes of the fair argument standard, includes "fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact."<sup>8</sup>

Whether a fair argument exists is a question of law that the court reviews de novo, with a preference for resolving doubts in favor of environmental review.<sup>9</sup> In reviewing a decision to prepare a negative declaration rather than an EIR, courts "do not defer to the agency's determination."<sup>10</sup>

The fair argument standard creates a "low threshold" for requiring preparation of an EIR and affords no deference to the agency's determination.<sup>11</sup> Where substantial evidence supporting a fair argument of significant impacts is presented, the lead agency must prepare an EIR "even though it may also be

---

<sup>4</sup> *Arvin Enterprises v. South Valley Area Planning Comm.* (2002) 101 Cal.App.4th 1333, 1346; *Stanislaus Audubon v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 150-151; *Quail Botanical Gardens v. City of Encinitas* (1994) 29 Cal.App.4th 1597.

<sup>5</sup> Pub. Resources Code § 21151; 14 CCR § 15064(f); *Citizens for Responsible Equitable Env't Dev. v. City of Chula Vista* ("CREED") (2011) 197 Cal.App.4th 327, 330-331; *Communities for a Better Env't v. South Coast Air Quality Mgmt. Dist.* (2010) 48 Cal.4th 310, 319 ("CBE v. SCAQMD").

<sup>6</sup> Pub. Resources Code § 21068; 14 CCR § 15382; *County Sanitation Dist. No. 2 v. County of Kern* (2005) 127 Cal.App.4th 1544, 1581.

<sup>7</sup> *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 83 fn. 16.

<sup>8</sup> Pub. Resources Code § 21080(e)(1) (emphasis added); *CREED*, 197 Cal.App.4th at 331.

<sup>9</sup> *CREED*, 197 Cal.App.4th at 331; *Pocket Protectors*, 124 Cal.App.4th at 927.

<sup>10</sup> *Mejia v. City of Los Angeles* (2005) 130 Cal.App.4th 322, 332; *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1318.

<sup>11</sup> *Pocket Protectors*, 124 Cal.App.4th at 928.

November 12, 2020

Page 5

presented with other substantial evidence that the project will not have a significant effect.”<sup>12</sup> A reviewing court must require an EIR if the record contains any “substantial evidence” suggesting that a project “may have an adverse environmental effect”—even if contrary evidence exists to support the agency’s decision.<sup>13</sup>

Where experts have presented conflicting evidence on the extent of the environmental effects of a project, the agency must consider the effects to be significant and prepare an EIR.<sup>14</sup> In short, when “expert opinions clash, an EIR should be done.”<sup>15</sup> “It is the function of an EIR, not a negative declaration, to resolve conflicting claims, based on substantial evidence, as to the environmental effects of a project.”<sup>16</sup> In the context of reviewing a mitigated negative declaration, “neither the lead agency nor a court may ‘weigh’ conflicting substantial evidence to determine whether an EIR must be prepared in the first instance.”<sup>17</sup> Where such substantial evidence is presented, “evidence to the contrary is not sufficient to support a decision to dispense with preparation of an EIR and adopt a negative declaration, because it could be ‘fairly argued’ that the project might have a significant environmental impact.”<sup>18</sup>

The fair argument test requires the preparation of an EIR whenever “there is substantial evidence that any aspect of the project, either individually or cumulatively, may cause a significant effect on the environment, regardless of whether the overall effect of the project is adverse or beneficial.”<sup>19</sup> Such substantial evidence is present here. The City Council should uphold this appeal and reverse the decision to approve Permits and adopt the IS/MND, and require the City to take a closer look at the Project’s potentially significant environmental impacts in an EIR.

---

<sup>12</sup> Pub. Resources Code § 21151(a); 14 CCR § 15064(f)(1); *Pocket Protectors*, 124 Cal.App.4th at 927; *County Sanitation Dist. No. 2*, 127 Cal.App.4th at 1579 (“where the question is the sufficiency of the evidence to support a fair argument, deference to the agency’s determination is not appropriate.”) (quoting *Sierra Club*).

<sup>13</sup> *Mejia*, 130 Cal.App.4th at 332–333.

<sup>14</sup> *Pocket Protectors*, 124 Cal.App.4th at 935; *Sierra Club*, 6 Cal.App.4th at 1317–1318; CEQA Guidelines § 15064(f)(5).

<sup>15</sup> *Pocket Protectors*, 124 Cal.App.4th at 928; *Sierra Club*, 6 Cal.App.4th at 1317–1318.

<sup>16</sup> *Pocket Protectors*, 124 Cal.App.4th at 935.

<sup>17</sup> *Id.* at 935.

<sup>18</sup> *Sundstrom*, 202 Cal.App.3d at 310 (citation omitted).

<sup>19</sup> 14 C.C.R. § 15063(b)(1) (emphasis added).

4938-007acp

**a. The City Failed to Provide the Documents Referenced in the MND to the Public for the Entire Comment Period, as Required by CEQA**

The City violated CEQA and improperly truncated the public comment period when it failed to make all documents referenced or relied on in the IS/MND available for public review during the entire public comment period.<sup>20</sup> As a result, Santa Clara Citizens and other members of the public were unable to complete a meaningful review and analysis of the IS/MND and its supporting evidence.

In its response to our Comment Letter, the City asserted that the CEQA Guidelines no longer require an agency to provide documents referenced in a negative declaration or mitigated negative declaration, but that the CEQA Guidelines only require that documents “incorporated by reference” be made available.<sup>21</sup> This is an incomplete and inaccurate reading of the law. Though Section 15072 of the CEQA Guidelines was indeed amended to include documents “incorporated by reference” in its description of the required contents of a notice of intent to adopt a negative declaration, Section 21092 of the Act continues to require that notice of preparation of a CEQA document include “the address where copies of the draft environmental impact report or negative declaration, and *all documents referenced* in the draft environmental impact report or negative declaration, are available for review.”<sup>22</sup>

The courts have held that the failure to provide even a few pages of a CEQA document for a portion of the review and comment period invalidates the entire CEQA process, and that such a failure must be remedied by permitting additional public comment.<sup>23</sup> It is also well settled that a CEQA document may not rely on hidden studies or documents that are not provided to the public.<sup>24</sup>

---

<sup>20</sup> See Pub. Resources Code § 21092(b)(1); 14 C.C.R. § 15072(g)(4).

<sup>21</sup> Response A.2, pg. 6; 14 C.C.R. § 15072(g)(4).

<sup>22</sup> Pub. Resources Code § 21092(b)(1).

<sup>23</sup> *Ultramar v. South Coast Air Quality Man. Dist.* (1993) 17 Cal.App.4th 689, 699.

<sup>24</sup> *Santiago Cty. Water Dist. v. Cty. of Orange* (1981) 118 Cal.App.3d 818, 831 (“Whatever is required to be considered in an EIR must be in that formal report; what any official might have known from other writings or oral presentations cannot supply what is lacking in the report.”).

**b. The IS/MND Fails to Adequately Disclose, Analyze, and Mitigate the Project's Potentially Significant Public Health Impacts**

The IS/MND concludes that the Project would not expose sensitive receptors to substantial pollutant concentrations.<sup>25</sup> As indicated in our Comment Letter, the IS/MND's Air Quality Assessment erroneously states that the "closest sensitive receptors to the proposed project site are existing residences about 3,315 feet north of the project site,"<sup>26</sup> while the Granada Islamic School is much closer—1,700 feet—to the Project site. The City responded that "[t]he IS states on pages 30 and 36 that the Granada Islamic School is the closest sensitive receptor to the project site, and so this comment is incorrect."<sup>27</sup> The comment's factual basis is clearly not incorrect (as evidenced by the statements on Page 10 of the Air Quality Assessment), but more importantly, the City appears to have missed the purpose of the comment: to point out that the Assessment does not include calculations of health impacts at the closest sensitive receptor.

Potential health impacts from operation of the Project's generators were evaluated using air quality dispersion modeling and applying BAAQMD recommended health impact calculation methods.<sup>28</sup> Though the IS/MND states that "[t]he maximum increased cancer risk at the closest sensitive receptor, Granada Islamic School, would be 0.02 in one million, and the maximum increased cancer risk at the closest residence would be 0.1 in one million," it is unclear where those numbers came from. Nothing in the Assessment indicates whether the evaluations of health impacts were actually performed at the Granada Islamic School or at the residences further away. The Assessment's initial erroneous assumption that the closest sensitive receptors were the residences more than 3,000 feet from the Project site does not appear to have been corrected during calculations of health risks, as Figure 2 in the Assessment does not include the Granada Islamic School in its display of sensitive receptors. As explained by Dr. Clark, such an oversight would significantly alter the assumptions and conclusions of the IS/MND. The City must re-analyze the Project's potentially significant impacts in an EIR.

---

<sup>25</sup> IS/MND, p. 36.

<sup>26</sup> IS/MND Appendix A, p. 5.

<sup>27</sup> Response A.5, p. 10.

<sup>28</sup> IS/MND Appendix A, p. 15.

As required by CEQA, the City must prepare a site-specific baseline health risk assessment (“HRA”) that calculates the excess incremental lifetime risk for all of the nearby receptors. Though the City responded that the IS/MND included an HRA, the assessment,<sup>29</sup> as pointed out in our Comment Letter, does not include calculations for all of the nearby receptors. As Dr. Clark points out in his comments, “[t]he City’s emissions estimates for criteria pollutants do not substitute for a health risk analysis of the cancer risk posed by exposure to toxic air contaminants (TACs), in particular diesel particulate matter (DPM), released during Project construction and operation.”<sup>30</sup>

**c. Compliance with Plans and Policies Does Not Establish that the Project’s GHG Emissions Would Be Less Than Significant**

As stated in our Comment Letter, the IS/MND relies on obtaining the status of less-than-significant for the Project’s emissions from a plan that is set to expire before the Project is implemented. The City’s Climate Action Plan, adopted in 2013, contains projected emissions and measures designed to help the City meet statewide 2020 goals established by AB 32.<sup>31</sup> As acknowledged in the IS/MND, “consistency with the CAP cannot be used to determine significance under CEQA.”<sup>32</sup> The City responded that because the Project would receive electricity from a utility on track to meet the SB 32 2030 GHG emission reduction target and would be consistent with applicable plans and policies adopted to reduce GHG emissions, “the project would not generate greenhouse gas emissions, either directly or indirectly, that may have a significant impact on the environment.”<sup>33</sup>

This argument, however, ignores the clear mandate of CEQA and case law that an agency may only rely on a qualified GHG reduction plan that follows specific rules and guidelines set forth in Section 15183.5 of the CEQA Guidelines.<sup>34</sup> A CAP that is no longer valid to be used as a qualified GHG reduction plan clearly does not satisfy this requirement.

---

<sup>29</sup> Response A.7, p. 11.

<sup>30</sup> Dr. Clark Comments, pp. 9–10.

<sup>31</sup> *Id.* at 67.

<sup>32</sup> *Id.*

<sup>33</sup> Response A.10, p. 14.

<sup>34</sup> 14 C.C.R. § 15183.5; see *Center for Biological Diversity v. Department of Fish and Wildlife* (2015) 62 Cal.4th 204.

4938-007acp



The IS/MND argues that because electricity—by far the biggest source of the Project’s emissions—is provided by Silicon Valley Power, “a utility on track to meet the 2030 GHG emissions reductions target established by SB 32,” the Project would generate lower emissions than the statewide average for an equivalent facility.<sup>35</sup> The IS/MND fails, however, to establish that the Project’s consistency with these plans and programs will ensure that the Project’s contribution to global climate change is not significant. Case law demonstrates that limiting discussion to a project’s consistency with statewide goals is not sufficient by itself, and that substantial discussion of the applicability of the statewide goals to the specific project is required.<sup>36</sup>

Furthermore, substantial evidence supports a fair argument that the Project’s GHG emissions are significant notwithstanding their consistency with local, regional, and state plans. As stated above, the Project’s total operational emissions amount of 10,323 MTCO<sub>2</sub>e annually is significantly higher than the 1,100 MTCO<sub>2</sub>e/year threshold established by BAAQMD. Though the City’s Response points out that BAAQMD’s CEQA guidelines no longer require the use of this threshold,<sup>37</sup> the huge disparity between the Project’s operational emissions and a threshold that until very recently was required to avoid significant impacts cannot be ignored. The IS/MND fails to describe how these operational emissions might be abated through the Project’s compliance with GHG reduction strategies.

### **III. THE DIRECTOR LACKS SUBSTANTIAL EVIDENCE TO MAKE THE FINDINGS REQUIRED TO GRANT ARCHITECTURAL APPROVAL UNDER THE SANTA CLARA CITY CODE**

Santa Clara City Code Section 18.76.010 provides that one of the purposes of the architectural review process is to “[m]aintain the public health, safety and welfare.” Furthermore, Section 18.76.020, subsection (d)(4) provides that to approve a project, the Director must find that the Project cannot “[m]aterially affect adversely the health, comfort or general welfare of persons residing or working in the neighborhood of said development.”<sup>38</sup>

---

<sup>35</sup> *Id.*

<sup>36</sup> See, e.g., *Center for Biological Diversity v. Dept. of Fish and Wildlife* (2015) 62 Cal.4th 204.

<sup>37</sup> Response A.8, p. 12.

<sup>38</sup> S.C.C.C. § 18.76.020(d).

**a. The Project's Failure to Demonstrate Less-Than-Significant Public Health Risks and GHG Emissions May Result in Adverse Impacts to Persons Residing or Working in the Area**

The IS/MND's inconsistent calculations and statements with regard to health risks to nearby sensitive receptors make it impossible for the Director to unequivocally maintain the public health, safety, and welfare or guarantee that the Project will be consistent with Santa Clara City Code Section 18.76.020, subsection (d)(4).

Meanwhile, the Project's operational GHG emissions, which exceed BAAQMD's latest numeric threshold of significance for land use projects, will adversely affect those in the immediate vicinity of the Project, as well as all Californians in the form of increased drought, wildfires, and rising sea levels.

The Project is in close proximity to residences and schools and is surrounded by office buildings and other industry. The City's analysis in the IS/MND and Response to our Comment Letter do not support a finding that the Project approval will not materially affect adversely the welfare of persons residing or working in the neighborhood of the Project.

**IV. RELIEF REQUESTED**

Santa Clara Citizens requests that the City Council grant this appeal and rescind the November 4, 2020 decisions to 1) adopt the IS/MND and 2) approve the Permits. We further request that the City conduct further analysis on the Project's potentially significant environmental impacts in an EIR and correct the City's deficiencies in the CEQA process that prejudiced Santa Clara Citizens, as described above. By doing so, the City and public can ensure that all adverse environmental and public health impacts of the Project are adequately analyzed, disclosed, and mitigated as is required by law.

**a. Procedural Requirements for Appeals**

Santa Clara Citizens has satisfied the procedural requirements for an appeal of a decision of the Development Review Officer as set forth in the Santa Clara City Code. City Code sections 18.76.020(i) and (j) state:

November 12, 2020

Page 11

(i) In the event the applicant or any interested party are not satisfied with the decision of the Director or designee for a single-family residential project, they may, within seven days after such decision, appeal in writing to the Planning Commission.

(j) For a project other than a single-family residential project, in the event the applicant or any interested party are not satisfied with the decision of the Director, they may, within seven days after such decision, appeal in writing to the City Council, in accordance with the procedures set forth in SCCC 18.108.060(b). In the event the applicant or any interested party are not satisfied with the decision of the Planning Commission for a single-family residential project, they may, within seven days after such decision, appeal in writing to the City Council, in accordance with the procedures set forth in SCCC 18.108.060(b). Said appeal shall be taken by the filing of a notice in writing to that effect with the City Clerk. All appeals of architectural review approvals will be heard de novo. The Director of Community Development may refer any application for architectural consideration to the City Council for its decision with the same effect as if an appeal had been taken.

Here, the Director made the decision on the adoption of the IS/MND and approval of the Permits on November 4, 2020. This letter and the attached appeal form constitute notice in writing of the appeal.

We have also enclosed a check for the appeal fee for non-applicants.

Thank you for your consideration of this appeal to the City Council.

Sincerely,

A handwritten signature in blue ink, appearing to read "Kendra Hartmann" or "Tanya Gulesserian", written over a light blue circular stamp.

Kendra Hartmann  
Tanya Gulesserian

KDH:acp

1938-007acp