

ADAMS BROADWELL JOSEPH & CARDOZO

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

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

TEL: (650) 589-1660
FAX: (650) 589-5062

wmumby@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

*Admitted in Colorado

November 23, 2020

Via Email Submission Only:

City Council of the City of Livermore

LivermoreCityCouncil@cityoflivermore.net

Council Member Trish Munro

pkmunro@cityoflivermore.net

Mayor John Marchand

mayormarchand@cityoflivermore.net

Council Member Robert W. Carling

rwearling@cityoflivermore.net

Vice Mayor Bob Woerner

bwoerner@cityoflivermore.net

Marie Weber, City Clerk

cityclerk@cityoflivermore.net

Council Member Bob Coomber

ricoomber@cityoflivermore.net

Re: Agenda Item 5.01 – Lassen Road Townhomes Project

Dear Honorable Mayor Marchand, Vice Mayor Woerner, City Council Members Coomber, Munro, and Carling, and City Clerk Weber:

On behalf of **Livermore Residents for Responsible Development** (“Livermore Residents”), we submit these comments in response to the November 23, 2020 City Council Staff Report on Agenda Item 5.01 (“Staff Report”) recommending approval of the Initial Study/Mitigated Negative Declaration (“IS/MND”) prepared by the City of Livermore (“the City”) for the Lassen Road Townhomes Project (“Project”).¹ In addition to these written comments, representatives for Livermore Residents will appear at the November 23, 2020 City Council hearing to make public comment on the Project.

¹ City Council Staff Report re Item 5.01: Lassen Road Townhomes Project (Nov. 23, 2020) (“Staff Report”); see also FirstCarbon Solutions, Final Initial Study/Mitigated Negative Declaration Lassen Road Residential Development Project, City of Livermore, Alameda County, California (“Final IS/MND”); FirstCarbon Solutions, DRAFT Lassen Road Residential Development Project Initial Study/Mitigated Negative Declaration, City of Livermore, Alameda County, California (“Draft IS/MND”).

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The IS/MND was prepared by the City pursuant to the California Environmental Quality Act (“CEQA”).² Westgate Ventures (“Applicant”) proposes to construct a residential development of 186 townhomes. The Project would include 11.94 acres of residential development with 186 dwellings, 450 parking spaces, and 23.26 acres of open space development, including vineyards, native oaks, fruit orchards, and olive trees, a trail, and an overlook area with benches. The townhomes will be two- and three-story buildings ranging from 28 to 38 feet.

The Project site is bounded by the Livermore Valley Joint Unified School District Corporation yard to the west, the Archdiocese of Oakland undeveloped property to the north, KinderCare Preschool, residential, and commercial uses to the east, and Interstate 580 to the south.

On November 14, 2019, we submitted comments on the Project’s Draft IS/MND.³ On June 16, 2020, we submitted comments on the Project’s Final IS/MND, which, as we explained to the Planning Commission, attempted to rebut our comments, but failed to resolve the major issues we raised.⁴ Livermore Residents appeared at the Planning Commission hearing on June 16, 2020 to provide further comment on the need to prepare an EIR. The Planning Commission voted to recommend approval to the City Council over our objections.

On November 18, 2020, the City Council Staff Report was released. The Staff Report includes responses to our June 16, 2020 comments and makes substantial revisions to the Project which require recirculation of a new CEQA document for further public comment. As detailed below, our concerns remain largely unresolved and our comments provide substantial evidence supporting a fair argument of potentially significant environmental impacts that must be analyzed in an environmental impact report (“EIR”) under CEQA.

The IS/MND fails to address significant air quality and health risk impacts from Project construction and operations and erroneously concludes that greenhouse gas (“GHG”) emissions impacts are less than significant by using an

² Public Resources Code § 21000 *et seq.*; 14 Cal. Code Regs. §§ 15000 *et seq.*

³ Letter from Adams Broadwell Joseph & Cardozo (“ABJC”) to City re Comments on the Initial Study/Mitigated Negative Declaration – Lassen Road Residential Development Project (Nov. 14, 2019) (“November 14, 2019 Comments”).

⁴ Letter from ABJC to City re Rebuttal Comments to Final Initial Study/Mitigated Negative Declaration for Lassen Road Residential Development Project (SCH #2019099018) (June 16, 2020) (“June 16, 2020 Comments”).

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arbitrary significance threshold which is not supported by substantial evidence. It also fails to adequately analyze and mitigate impacts to biological resources including rare plants and special-status species such as burrowing owls, California tiger salamanders, and California red-legged frogs. Finally, the IS/MND fails to mitigate potentially significant construction noise impacts. These significant environmental impacts, in turn, cause inconsistencies with Livermore General Plan policies that preclude approval of the proposed General Plan Amendment that is necessary for the Project to proceed.

These comments were prepared with the assistance of senior biologist and wildlife ecologist Scott Cashen, M.S., environmental health, air quality, and GHG expert Paul E. Rosenfeld, Ph.D, and hazardous materials expert Matt Hagemann, P.G., C.Hg. of Soil Water Air Protection Enterprise (“SWAPE”), and noise expert Derek Watry of Wilson Ihrig. Mr. Cashen’s response comments and curriculum vitae are attached as Attachment A.⁵ SWAPE’s response comments and curricula vitae are attached to this letter as Attachment B.⁶ Mr. Watry’s response comments and curriculum vitae are attached as Attachment C.⁷ These comments are fully incorporated herein and submitted to the City herewith. Therefore, the City must separately respond to the technical comments in Attachments A through C. References to the expert comments are included by Dropbox.

For the reasons discussed herein, and in the attached expert comments, Livermore Residents urges the City to reject the IS/MND at the City Council hearing set for November 23, 2020 to allow for preparation of a legally adequate environmental impact report (“EIR”) pursuant to CEQA.

I. STATEMENT OF INTEREST

Livermore Residents is an unincorporated association of individuals and labor organizations that may be adversely affected by the potential public and worker health and safety hazards and environmental impacts of the Project. The association includes City of Livermore residents Michael Keele, Brian Masters, and Brian Werner, the **International Brotherhood of Electrical Workers Local 595**,

⁵ **Attachment A:** Letter from S. Cashen to W. Mumby re Comments on the Staff Report for the Lassen Road Residential Development Project (Nov. 22, 2020) (“Cashen Response”).

⁶ **Attachment B:** Letter from SWAPE to C. Caro re Comments on the Lassen Road Residential Development Project (Nov. 23, 2020) (“SWAPE Response”).

⁷ **Attachment C:** Letter from D. Watry to W. Mumby & C. Caro re Rebuttal to Responses in Staff Report on Previous Construction Noise Comments (Nov. 22, 2020) (“Watry Response”).

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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 the City of Livermore and Alameda County.

Individual members of Livermore Residents and the affiliated labor organizations live, work, recreate, and raise their families in Alameda County, including the City of Livermore. 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. Livermore Residents has an interest in enforcing 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 STAFF REPORT INCORPORATES SUBSTANTIAL REVISIONS TO THE IS/MND REQUIRING PREPARATION OF AN EIR AND RECIRCULATION FOR ADDITIONAL PUBLIC COMMENT

The CEQA process generally only provides an official public comment period at the draft MND and draft EIR stages, but if an MND or EIR is "substantially revised" after the initial public notice, agencies are required to recirculate the CEQA document for additional public comment.⁸ A substantial revision includes identification of a new, avoidable significant effect or a determination that new or revised mitigation measures are necessary to reduce potential impacts to less than significant levels.⁹

As explained by Mr. Cashen, the Staff Report includes several documents that were not provided with the IS/MND: "(1) a map depicting a revised alignment of the offsite trails the Applicant proposes to construct (i.e., Trail T6 segments E1 and E2); (2) a Finding of Consistency Memorandum for realignment of Trail T6 segment E2; (3) a Biological Resources Assessment ("BRA") of the proposed trail realignment; (4) the IS/MND for the Catholic High School Project; and (5) the IS/MND for the Livermore Active Transportation Plan ("ATP")."¹⁰ This new

⁸ Pub. Res. Code § 21091(a), (b); 14 C.C.R. §§ 15073.5(a), 15088.5(a).

⁹ 14 C.C.R. § 15073.5(b).

¹⁰ Cashen Response, p. 1.

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information about the trail network and archdiocese property provide new information about the Project description and the scope and severity of potential impacts to biological resources which that was not included in the IS/MND when it was circulated for public comment. This new information demonstrates the potential for new and more severe significant effects than were previously analyzed in the IS/MND, and the need for revised or additional mitigation. Both factors require preparation of an EIR and recirculation for additional public comment.¹¹ For instance, the new BRA acknowledges that the western pond turtle requires upland habitat up to 0.5 km from water for egg-laying, which supports Mr. Cashen's analysis that Project construction must incorporate mitigation measures specific to avoiding impacts to the turtle in upland areas.¹²

Mr. Cashen previously commented that the IS/MND's compensatory mitigation for lost habitat was inadequate. Based on his review of information provided in the Staff Report's new biological analysis, Mr. Cashen observes that compensatory mitigation at the adjacent property is stronger than for the Project site without any justification given that the habitat types and resulting impacts are the same.¹³ This is further evidence of the inadequacy of the habitat mitigation proposed for the Project site and shows that there are significant biological impacts that remain unaddressed.

In fact, although the BRA concluded that the proposed trail has the potential to directly and indirectly impact special-status species and their habitat, the City continues to posit the unsupported claim that the portion of the trail on the Project site would not disturb any species or habitat, calling the indirect impacts from trail use discussed by Mr. Cashen "speculative."¹⁴ The IS/MND fails to analyze impacts associated with the onsite portion of the trail, instead including it as part of the compensatory mitigation for Project impacts to special-status species and their habitat.¹⁵ Given the BRA's approach to the offsite trail, requiring implementation of East Alameda County Conservation Strategy ("EACCS") measures to reduce impacts, the approach to trail impacts on the Project site is indefensible.¹⁶

¹¹ 14 C.C.R. §§ 15073.5(b); 15088.5(a). CEQA requires that a lead agency prepare and certify an EIR for any discretionary project that may have a significant adverse effect on the environment. Pub. Res. Code §§ 21002.1(a), 21100(a), 21151(a); 14 C.C.R. §§ 15064(a)(1), (f)(1), 15367.

¹² Cashen Response, p. 1.

¹³ Cashen Response, pp. 1–2.

¹⁴ Cashen Response, p. 2.

¹⁵ Cashen Response, p. 2.

¹⁶ Cashen Response, p. 2.

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Mr. Cashen also explains that the Development Agreement included with the Staff Report would require the developer to secure rights of way and design and construct segments E1 and E2 of the T-6, Arroyo Las Positas Trail, as identified in the Livermore Active Transportation Plan (“ATP”).¹⁷ This is new information about the Project’s proposed trail segment that was not included in the IS/MND, and is inconsistent with other new information included in the consistency memorandum, resulting in confusion about the scope of this Project component. The consistency memorandum apparently assumes that the ATP Planning Area encompasses the entire trail when, in fact, E1 and a portion of E2 are outside the ATP Planning Area.¹⁸ Moreover, the consistency memorandum’s analysis is limited to segment E2, and E1 presents a variety of environmental challenges that the City has apparently failed to address.¹⁹ As Mr. Cashen explains, the southern portion of E1 coincides with land subject to a Clean-Up and Abatement Order requiring restoration of wetlands on both sides of the access road.²⁰ This means it is uncertain, “(a) where precisely the trail would be located, (b) whether the developer would be able to secure a right of way, (c) when or if a biological site assessment would be conducted, (d) whether the trail might interfere with the requirements of the Clean-Up and Abatement Order, and (e) who would be accountable for mitigating impacts associated with this portion of the trail segment.”²¹ Without this information, the City is unable to accurately determine the scope and severity of the Project’s impacts on biological resources from construction of the Project’s proposed trail segment. The City therefore lacks substantial evidence to conclude that the IS/MND would fully mitigate these impacts.

The Staff Report also discloses that the proposed realignment of Trail T6 segment E2, which the IS/MND stated was meant to avoid the Arroyo Seco on the Project site, will actually create new potential significant biological impacts at the Arroyo Seco and Altamont Creek in the same habitat area just outside the bounds of the Project site. As explained by Mr. Cashen, “[a] paved trail along (or near) the bank of Altamont Creek would impact wildlife movement and habitat for special-status species. In addition to degrading habitat for the western pond turtle, California red-legged frog, and California tiger salamander, the trail would make

¹⁷ Cashen Response, p. 2.

¹⁸ Cashen Response, p. 3.

¹⁹ Cashen Response, pp. 2–3.

²⁰ Cashen Response, pp. 2–3.

²¹ Cashen Response, p. 3.

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these taxa susceptible to being trampled, handled, and illegally collected.”²² The BRA acknowledges trail construction would directly and indirectly impact sensitive habitats supporting special-status species, but it does not quantify the impacts, which impairs the ability of the City to properly mitigate for habitat loss as required in ATP mitigation measures BIO-2 and BIO-3.²³

The information disclosed in the Staff Report provides an entirely new description of the Project’s proposed revision of the trail alignment which is likely to result in numerous new, unmitigated environmental impacts which were not disclosed in the IS/MND and which require additional mitigation.²⁴ CEQA mandates these impacts be further analyzed in an EIR that is recirculated for public comment.²⁵

III. THE IS/MND STILL ENGAGES IN IMPROPER PIECEMEALING OF ENVIRONMENTAL REVIEW REGARDING THE PROJECT’S CONNECTION TO THE BROADER TRAIL NETWORK

In our initial Comments, we explained that CEQA requires agencies to assess the environmental impacts of all reasonably foreseeable phases of the project.²⁶ CEQA also forbids piecemealing of environmental analysis into separate environmental review documents where this process disguises the full, combined impact of the proposed development by breaking it into smaller pieces.²⁷ We identified that the Draft IS/MND discusses impacts associated with construction of portions of trails occurring on the Project site, but relegated discussion of the portions of the trail on the adjacent Archdiocese property to “a separate environmental review process.”²⁸ We explained that this approach was inadequate under CEQA because it obscures the full extent of the impacts the network of trails would have on biological resources. The Final IS/MND claimed that the impacts of the broader trail network could be properly evaluated in an addendum to the MND

²² Cashen Response, p. 8.

²³ Cashen Response, pp. 8–9.

²⁴ Cashen Response, pp. 8–9.

²⁵ Pub. Res. Code §§ 21002.1(a), 21100(a), 21151(a); 14 C.C.R. §§ 15064(a)(1), (f)(1), 15073.5(b), 15088.5(a), 15367; Cashen Response, p. 9.

²⁶ *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 396–397 (EIR held inadequate for failure to assess impacts of second phase of pharmacy school’s occupancy of a new medical research facility).

²⁷ *Arviv Enterprises v. South Valley Area Planning Commission* (2002) 101 Cal.App.4th 1333, 1340–1341, 1346.

²⁸ Draft IS/MND, p. 15 fn.2.

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for the Catholic high school on an adjacent property, but this did not resolve the bigger issue that cumulative impacts from the trail network's connection to Regional Trail Segment J had not been analyzed.

The new consistency memorandum does nothing to address our concerns about the piecemealing of the environmental review process. While the consistency memorandum claims that the proposed realignment of the trail that crosses the Project site would not result in any new or more severe environmental impacts, it still does not address the combined effects of the trail network on biological resources in the region. Even if these projects are properly considered separate projects, CEQA requires analysis of cumulative impacts, which as explained in prior comments and discussed in more detail later in this letter the IS/MND failed to do such an analysis with regard to biological resources.

IV. SUBSTANTIAL EVIDENCE SUPPORTS A FAIR ARGUMENT THAT AIR QUALITY AND HEALTH IMPACTS FROM PROJECT CONSTRUCTION AND OPERATIONS REMAIN SIGNIFICANT AND UNMITIGATED

As explained by SWAPE, the Staff Report fails to address the concerns from our prior comments regarding the IS/MND's incorrect assumptions in the CalEEMod modeling of construction and operational emissions.²⁹ As a result, the IS/MND and Staff Report still fail to accurately quantify the Project's air emissions and resulting health impacts from exposure to toxic air contaminants during Project construction and operation.

The IS/MND claimed an 84 percent reduction of construction emissions while only committing to a 63 percent reduction in a mitigation measure.³⁰ We previously explained that this error in the IS/MND's analysis required that an EIR be prepared to adequately evaluate the proposed Project's anticipated emissions, including a 63% reduction due to MM AIR-2.³¹ The Staff Report fails to correct this error, and the City failed to prepare an EIR in response to our comments, resulting in ongoing errors and omissions in the City's CEQA analysis which preclude the Council from adopting the IS/MND. Regarding operational emissions, the IS/MND still fails to substantiated its assumed reductions due to energy- and water-

²⁹ SWAPE Response, p. 1.

³⁰ SWAPE Response, p. 2.

³¹ SWAPE Response, p. 2.

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efficiency mitigation measures, resulting in unsupported conclusions regarding the efficacy of the IS/MND's proposed mitigation.³²

In addition, SWAPE explains that the Staff Report and IS/MND still fail to adequately evaluate the health risks from emissions of diesel particulate matter ("DPM"). First, the IS/MND did not prepare an operational health risk assessment and the Staff Report does nothing to remedy this omission.³³ By failing to analyze the Project's operational health risk, the IS/MND fails to disclose potentially significant health risks, fails to comply with OEHHA health risk disclosure guidelines, and fails to adhere to BAAQMD guidance.³⁴

Second, SWAPE's screening-level health analysis disclosed potentially significant health risk impacts requiring the preparation of an EIR.³⁵ Even with an assumed 63 percent reduction in emissions, SWAPE explains that the excess cancer risk still exceeds the BAAQMD threshold of 10 in one million.³⁶ The AERSCREEN model used by SWAPE identified a potentially significant health risk warranting further modeling and analysis in an EIR.³⁷ The Staff Report fails to respond to this comment. Moreover, SWAPE highlights that their health risk modeling only considered the Project's operational emissions and explains that, if construction emissions were added, the Project's health risks would be even more pronounced. This is substantial evidence of potentially cumulatively considerable health risk impacts that triggers the need for further study in an EIR under CEQA.³⁸

V. SUBSTANTIAL EVIDENCE SUPPORTS A FAIR ARGUMENT THAT GREENHOUSE GAS IMPACTS ARE SIGNIFICANT AND UNMITIGATED

As explained in our prior comments, CEQA Guidelines and case law mandate consideration of the latest science and legislative goals in determining the

³² SWAPE Response, pp. 2–4.

³³ SWAPE Response, pp. 4–5.

³⁴ SWAPE Response, pp. 4–5.

³⁵ SWAPE Response, pp. 5–7.

³⁶ SWAPE Response, pp. 5–7.

³⁷ SWAPE Response, pp. 5–7.

³⁸ See 14 C.C.R. §§ 15064(h) (requiring analysis of cumulative impacts), 15355(a) (defining cumulative impacts to include combination of individual effects from a single project or several projects).

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significance of greenhouse gas (“GHG”) emissions impacts.³⁹ Absent another clearly supported threshold, the BAAQMD 2030 substantial progress service population efficiency threshold of 2.6 MT CO₂e/service population (“SP”)/year is therefore the appropriate threshold with which to evaluate the Project’s 2021 emissions.⁴⁰

The Staff Report maintains that the IS/MND’s interpolated threshold of 4.1 MT/SP is legitimate, yet still fails to provide substantial evidence supporting its reliance on this new threshold. In fact, as SWAPE explains, given that the California Air Resources Board adopted *California’s 2017 Climate Change Scoping Plan* in November 2017, the Project (with a horizon between 2021 and 2030) can no longer linearly interpolate a threshold and must use the 2030 target.⁴¹ In addition, SWAPE explains that the Staff Report improperly assumes unsubstantiated GHG emissions reductions from energy efficiency.⁴²

As a result, SWAPE was able to demonstrate a significant GHG impact—an impact the Staff Report fails to address.⁴³ There is substantial evidence supporting the need for an EIR to analyze GHG impacts from the Project.

VI. SUBSTANTIAL EVIDENCE SUPPORTS A FAIR ARGUMENT THAT THE PROJECT MAY HAVE SIGNIFICANT, UNMITIGATED IMPACTS ON BIOLOGICAL RESOURCES

Mr. Cashen explains that the Staff Report fails to adequately address our concerns about potentially significant impacts to biological resources associated with the Project. As an initial matter, Mr. Cashen clarifies that he does not disagree with the effectiveness of the mitigation measures proposed by California Department of Fish and Wildlife (“CDFW”).⁴⁴ Rather, the issue he raised is that the IS/MND failed to incorporate CDFW’s recommendations to reduce impacts to biological resources, with the exception of adding winter surveys for burrowing

³⁹ 14 C.C.R. § 15064.4 (declaring that lead agency should consider the extent to which the project may increase GHG emissions, whether project emissions exceed a threshold of significance, and consistency with statewide, regional, or local plans for reduction of GHG emissions, and justify decisions with substantial evidence); *Cleveland National Forest Foundation v. San Diego Assn. of Governments* (2017) 3 Cal.5th 497, 519 (recognizing that SB 32 and CARB regulations could change what is needed under CEQA and requiring environmental impact analyses under CEQA to stay “in step with evolving scientific knowledge and state regulatory schemes”).

⁴⁰ SWAPE Rebuttal Comments, p. 14.

⁴¹ SWAPE Response, p. 8.

⁴² SWAPE Response, p. 8.

⁴³ SWAPE Response, pp. 8–9.

⁴⁴ Cashen Response, p. 3.

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owls.⁴⁵ Mr. Cashen also explained why the IS/MND still fails to accurately disclose and mitigate impacts to special-status species.

A. The Final IS/MND Still Fails to Remedy Deficiencies in the Characterization of the Biological Baseline

CEQA requires lead agencies to include a description of the physical environmental conditions, or “baseline,” in the vicinity of the Project as they exist at the time environmental review commences.⁴⁶ The impacts of the Project must be measured against the “real conditions on the ground.”⁴⁷ “[A]n inappropriate baseline may skew the environmental analysis flowing from it, resulting in an [environmental review document] that fails to comply with CEQA.”⁴⁸

Our initial Comments identified a series of problems with the Draft IS/MND’s biological baseline description. The IS/MND improperly assumed the absence of special-status species without conducting protocol-level surveys and determined that rare plants would not be present without substantial evidence to support this conclusion. The Final IS/MND also failed to provide any evidence demonstrating that the City’s biologists followed regulatory survey protocols or devoted the level of effort necessary to make substantiated predictions about the presence or absence of various species at the Project site. The Staff Report for the City Council meeting largely reiterates old arguments and does nothing to properly establish the biological baseline at the Project site. As explained below, even where the City claims new surveys were conducted, it fails to provide any evidence to support its claims.

i. Burrowing Owls

In his earlier comments, Mr. Cashen extensively explained why the IS/MND’s reasoning about the absence of burrowing owls was seriously flawed. Mr. Cashen now explains that there is still “no basis for implying absence of burrowing owls in

⁴⁵ Cashen Response, p. 3.

⁴⁶ 14 C.C.R. § 15125(a); *Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal.4th 310, 321 (“*CBE v. SCAQMD*”).

⁴⁷ *CBE v. SCAQMD*, 48 Cal.4th at 321; *Save Our Peninsula Com. v. Monterey County Bd. Of Supervisors* (2001) 87 Cal.App.4th 99, 121; *City of Carmel-by-the-Sea v. Bd. of Supervisors of Monterey County* (1986) 183 Cal.App.3d 229, 246.

⁴⁸ *San Franciscans for Livable Neighborhoods v. City & County of San Francisco* (“*SFLN*”) (2018) 26 Cal.App.5th 596, 615 (citations omitted).

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the Project area” because no surveys for burrowing owls were conducted.⁴⁹ In fact, according to the IS/MND for the Catholic high school project (adjacent to the Project site) the ecological conditions of “open grasslands” and “abundant ground squirrel burrows” in the Project area are characteristic of “ideal foraging and breeding habitat” for burrowing owls.⁵⁰ Therefore, the IS/MND still improperly discounts the potential presence of burrowing owls and its biological baseline is flawed. An EIR must be prepared.

ii. California Tiger Salamander

As explained by Mr. Cashen in his prior comments, the Final IS/MND unjustifiably removed the pre-construction survey requirement for California tiger salamanders by revising Mitigation Measure BIO-3.⁵¹ The City erroneously maintains that there is “low potential” for California tiger salamanders to occur at the site, even though the Draft IS/MND reported a “moderate potential” and CDFW recommended consultation to obtain a California Endangered Species Act permit.⁵²

Adequate detection and mitigation of impacts to salamanders depends on incorporation of surveys.⁵³ Mr. Cashen provided substantial evidence of high probability of salamanders at the site, warranting further analysis and mitigation.⁵⁴ The Staff Report continues to ignore this evidence. An EIR must be prepared to properly consider the likely presence of this species.

iii. California Red-Legged Frog

The IS/MND’s prior claims that California red-legged frogs will not occur at the Project site are undermined by the new information included with the City’s own Staff Report. As explained by Mr. Cashen, the IS/MND for the Catholic high school describes large pools and slow-moving water in arroyo that provide suitable habitat for the red-legged frog.⁵⁵ Furthermore, the BRA for the proposed trail realignment states that while no amphibians were observed on-site, the Arroyo Seco

⁴⁹ Cashen Response, p. 4.

⁵⁰ Cashen Response, p. 4.

⁵¹ Staff Report, Attachment 10, p. 912.

⁵² Staff Report, Attachment 11, p. 1010.

⁵³ Staff Report, Attachment 10, p. 912.

⁵⁴ Staff Report, Attachment 10, p. 912.

⁵⁵ Cashen Response, p. 5.

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may be inhabited by California red-legged frog and California tiger salamander.⁵⁶ This is substantial evidence demonstrating that the Project may have significant impacts on these species which have not been disclosed or mitigated. An EIR must be prepared to properly consider the likely presence of this species, and to mitigate potentially significant impacts.

iv. Special-Status Plants

As explained by Mr. Cashen in earlier comments, the City lacks substantial evidence to support its conclusion that there would be no adverse impacts to special-status plants. The IS/MND improperly relied on surveys conducted in October and November, which is outside the growing season of annuals like the special-status plants identified by Mr. Cashen.⁵⁷ The consultants even acknowledged that the surveys were not designed to determine the presence or absence of special-status plants.⁵⁸

While the Staff Report now claims that focused plant surveys were done in April 2020 and July 2020 showing a lack of special-status plants, no evidence of these surveys has been provided.⁵⁹ The surveys were not mentioned in the Final IS/MND and the survey reports are not included with the Staff Report.⁶⁰ Nor were any survey reports provided in response to the Public Records Act request made by Livermore Residents on May 19, 2020. CEQA prohibits reliance on hidden studies.⁶¹ The City has prevented the public from being able to evaluate the adequacy of these new surveys. The City's conclusions about no impacts to special-status plants are therefore unsubstantiated.

⁵⁶ Cashen Response, pp. 5–6.

⁵⁷ Cashen Response, p. 4.

⁵⁸ Cashen Response, p. 4.

⁵⁹ Cashen Response, p. 4.

⁶⁰ Cashen Response, p. 4.

⁶¹ *Santiago County Water District v. County 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.”).

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B. The IS/MND Fails to Remedy Its Inadequate Mitigation of Potentially Significant Impacts to Burrowing Owls

The Staff Report continues to falsely claim that the Project will protect burrowing owl habitat in accordance with EACCS guidance.⁶² The City's ongoing failure to comply with EACCS guidance results in significant, unmitigated impacts to burrowing owl habitat and a failure to comply with local plans and policies.

As explained by Mr. Cashen, "EACCS recommends three acres of habitat preservation for every acre of habitat loss. Even if one assumes habitat loss would be limited to the Residential Development Area, 36 acres of habitat compensation would be required for the Project to be 'in-line' with the EACCS."⁶³ The City has a conservation easement on a mere 12 acres of grassland at the site, which Mr. Cashen explains is inadequate under the EACCS, and is inconsistent with other similar mitigation measures required for the ATP.⁶⁴ Unlike the IS/MND for this Project, MM BIO-3 from the ATP IS/MND requires that compensation measures specified in the EACCS must be followed.⁶⁵ Mr. Cashen explains that "[i]t is illogical that the EACCS measures are required to reduce impacts to less-than-significant levels for the trail, but not for the residential development."⁶⁶ Furthermore, as described below, the IS/MND's deficient cumulative biological impacts analysis means that burrowing owls face prevalent pressure from habitat loss in the Alameda region.⁶⁷ Thus, there is a fair argument of significant impacts to burrowing owls necessitating the preparation of an EIR.

C. The IS/MND Fails to Remedy Its Inadequate Mitigation of Potentially Significant Impacts to California Red-Legged Frogs and California Tiger Salamanders

As referenced earlier, the Final IS/MND removed the pre-construction survey requirement for California tiger salamanders by revising Mitigation Measure BIO-3.⁶⁸ The Staff Report provides a misleading characterization of this revision to mitigation by suggesting that the change was made to conform to CDFW's

⁶² Cashen Response, pp. 4–5.

⁶³ Cashen Response, pp. 4–5.

⁶⁴ Staff Report, Attachment 10, p. 919.

⁶⁵ Cashen Response, p. 5.

⁶⁶ Cashen Response, p. 5.

⁶⁷ Cashen Response, pp. 6–7.

⁶⁸ Final IS/MND, Response to CASHEN-4, p. 2-190.

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comments. Rather, as Mr. Cashen explains the revisions were to “circumvent the issues CDFW raised” by removing mitigation without addressing the underlying problems that mitigation did not go far enough to protect California Tiger Salamanders.⁶⁹ “The proper response, in accordance with the spirit of CDFW’s comments, would have been to add further mitigation to enhance protections for the species, not weaken the mitigation measure even further.”⁷⁰

Better mitigation would have consisted of pre-construction surveys, exclusion fencing, daily inspections, and the presence of a biological monitor during construction activities.⁷¹ Although these measures would reduce the risk of unlawful take, Mr. Cashen and CDFW agree that take permits are necessary prior to Project implementation.⁷² Similarly, as Mr. Cashen explained in his prior comments, MM BIO-4 (regarding California red-legged frogs) is not consistent with the CDFW guidance either.⁷³ In any case, the revisions to MM BIO-3 and MM BIO-4 are not reflected in the Mitigation Monitoring and Reporting Program (“MMRP”), omissions that obfuscate what will be the City’s ultimate approach to mitigation and how enforceable and effective it will be.⁷⁴ An EIR must be prepared to address impacts to these two special-status species and adopt effective mitigation.

D. The IS/MND Still Fails to Analyze Cumulative Impacts to Biological Resources

As discussed in prior comments, CEQA requires an evaluation of cumulative impacts, defined as “two or more individual effects which, when considered together, are considerable.”⁷⁵ Such impacts may “result from individually minor but collectively significant projects taking place over a period of time.”⁷⁶ Cumulatively considerable means that “the incremental effects of an individual project are significant when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects.”⁷⁷

⁶⁹ Cashen Response, p. 3.

⁷⁰ Cashen Response, p. 4.

⁷¹ Staff Report, Attachment 10, pp. 940–941.

⁷² Staff Report, Attachment 10, pp. 940–941.

⁷³ Cashen Response, p. 6; Staff Report, Attachment 10, pp. 934–936, 942.

⁷⁴ Cashen Response, p. 4.

⁷⁵ 14 C.C.R. § 15355; see also Staff Report, Attachment 10, pp. 894–896 (explaining IS/MND’s failure to analyze cumulative impacts from habitat loss).

⁷⁶ 14 C.C.R. § 15355(b).

⁷⁷ 14 C.C.R. § 15064(h)(1).

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CEQA Guidelines section 15130(b)(1) provides two options for analyzing cumulative impacts: (A) list “past, present, and probable future projects producing related or cumulative impacts, including, if necessary, those projects outside the control of the agency, or” (B) summarize “projection contained in an adopted local, regional or statewide plan, or related planning document that describes or evaluates conditions contributing to the cumulative effect.”⁷⁸ “When relying on a plan, regulation or program, the lead agency should explain how implementing the particular requirements in the plan, regulation or program ensure that the project's incremental contribution to the cumulative effect is not cumulatively considerable.”⁷⁹

The IS/MND fails to conduct a proper cumulative biological impacts analysis as it does not list “past, present, and probable future projects producing related or cumulative impacts” or explain compliance with a local, regional, or statewide plan that would ensure that biological impacts would not be cumulatively considerable, as required by CEQA.⁸⁰ Indeed, as Mr. Cashen explains, the IS/MND does nothing to address cumulative impacts to any biological resources despite extensive development occurring in the area with the trail network and the Catholic high school on the Archdiocese property.⁸¹ Nor does the IS/MND disclose proposed development of the Monte Vista Memorial Gardens Project.⁸² Mr. Cashen explains that this omission is critical because “the project would be located in the immediate vicinity of Lassen Road Project” and because “a portion of the trail proposed by the Applicant coincides with the Monte Vista Memorial Gardens Project’s only access road.”⁸³ Mr. Cashen further explains that the IS/MND does not ensure compliance with the EACCS guidance or provide evidence that this will prevent cumulative impacts to biological resources.⁸⁴

The unanalyzed cumulative impacts could potentially harm a variety of biological resources, but, as explained in earlier comments, the cumulative effects have particularly dire consequences for burrowing owls which are suffering from

⁷⁸ 14 C.C.R. § 15130(b)(1).

⁷⁹ *Id.*; *see id.* § 15130(a) (stating that the lead agency shall describe its basis for concluding that an incremental effect is not cumulatively considerable).

⁸⁰ 14 C.C.R. § 15130(b)(1).

⁸¹ Cashen Response, p. 6.

⁸² Cashen Response, p. 6.

⁸³ Cashen Response, p. 6.

⁸⁴ Cashen Response, pp. 4–5, 8.

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habitat loss in Alameda County. Mr. Cashen explains that while the IS/MND claims that burrowing owl habitat is ubiquitous throughout North Livermore, it has no evidence supporting that assertion.⁸⁵ In fact, the IS/MND fails to disclose or evaluate several projects within a few miles of the Project impacting burrowing owl habitat including, Aramis Solar Project, Livermore Community Solar Farm, and Oasis Fund Livermore Grow Facility.⁸⁶ This sampling of projects in the area totals 561 acres of potential burrowing owl habitat that will be impacted.⁸⁷ Thus, there is substantial evidence that consider habitat has already been eliminated and much more is slated for development in the near future.⁸⁸ Mr. Cashen sums up these cumulative impacts as follows: “The Project, in conjunction with the Monte Vista Memorial Gardens Project and Catholic High School Project, will cause the burrowing owl population to contract to the north, where at least three relatively large projects are proposed. At a minimum, cumulative impacts on the burrowing owl population that remains in the North Livermore area will be very significant.”⁸⁹

The IS/MND therefore still fails to comply with CEQA. An EIR must be prepared to analyze and mitigate cumulative impacts to biological resources.

E. The IS/MND Conflicts with EACCS Guidance and Livermore General Plan Policies

As explained by Mr. Cashen, the IS/MND still conflicts with the EACCS Guidance for assessing and minimizing biological impacts.⁹⁰

In addition, our Comments explained that the Project failed to comply with policies in the Livermore General Plan. The Staff Report’s insistence that these policies are not violated is baseless. As explained in our prior comments, the Project fails to comply with Objectives OSC-1.1, Policy 4, requiring adequate mitigation of impacts to special-status species and OSC-1.2, Policy 8 requiring avoidance of take of special-status species by consulting with USFWS and CDFW.

Therefore, there is substantial evidence supporting a fair argument that the City has failed to comply with applicable plans and policies related to conserving

⁸⁵ Cashen Response, p. 7.

⁸⁶ Cashen Response, p. 7.

⁸⁷ Cashen Response, p. 7.

⁸⁸ Cashen Response, p. 7.

⁸⁹ Cashen Response, p. 7.

⁹⁰ Cashen Response, p. 5.

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biological resources and protecting special-status species. An EIR must be prepared with improved mitigation measures.

VII. SUBSTANTIAL EVIDENCE SUPPORTS A FAIR ARGUMENT THAT THE PROJECT CONSTRUCTION MAY RESULT IN SIGNIFICANT NOISE IMPACTS THAT REMAIN UNMITIGATED

Mr. Watry explains that his comments showing significant noise impacts remain inadequately addressed in the Staff Report. As an initial matter, the IS/MND maintains its reliance on an erroneous baseline noise measurement that was likely influenced by its proximity to the I-580 freeway, even when it made more reasonable baseline noise measurements closer to the KinderCare facility.⁹¹ The short-term measurements near the KinderCare facility had an average noise level of 59 dBA as opposed to the inflated baseline measurement of 71 to 75 dBA.⁹² The former number is more representative of the noise levels that are actually experienced by the children at KinderCare.⁹³ As Mr. Watry explains, “[t]here is no technical basis for this substitution which only serves to minimize the construction noise impact at KinderCare by grossly overstating the baseline conditions.”⁹⁴

Assuming the more reasonable baseline of 59 dBA, the IS/MND’s average noise level measurement at KinderCare of 84.4 dBA shows a significant 25 dBA increase from the baseline.⁹⁵ Even when the City disavowed the reasonableness of its assumption that the building’s nearest façade would be about 60 feet from the acoustic center of construction activity and revised its calculations assuming 250 feet, Mr. Watry was able to replicate the analysis to show 72 dBA, a 13 dBA increase from baseline noise levels.⁹⁶ As Mr. Watry explains, this is “still a significant increase according to Caltrans.”⁹⁷ The supplemental noise analysis included with the Staff Report yielded a noise level of 75.2 dBA at KinderCare, an even more significant increase of 16 dBA from the appropriate ambient noise baseline.⁹⁸ As explained in our prior comments, the IS/MND fails to adopt any mitigation that will actually reduce these significant noise impacts.

⁹¹ Watry Response, pp. 1–2.

⁹² Watry Response, pp. 1–2.

⁹³ Watry Response, pp. 1–2.

⁹⁴ Watry Response, p. 2.

⁹⁵ Watry Response, p. 2.

⁹⁶ Watry Response, p. 2.

⁹⁷ Watry Response, p. 2.

⁹⁸ Watry Response, pp. 2–3.

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As a result, there is substantial evidence supporting a fair argument that noise levels at the KinderCare facility will exceed the existing ambient by 13 to 25 dBA, amounting to a significant noise impact under CEQA.⁹⁹ Irrespective of the noise threshold selected by the City, evidence of a large relative increase in noise from ambient levels supports a fair argument of significant impacts under CEQA.¹⁰⁰ An EIR must be prepared to analyze and mitigate the impacts of significant construction noise on the children and staff at KinderCare.

VIII. CONCLUSION

We urge the City to fulfill its responsibilities under CEQA by withdrawing the IS/MND and preparing a legally adequate EIR to address the potentially significant impacts described in this comment letter and our previous comments. This new CEQA document must then be recirculated for public comment. Only by complying with all applicable laws will the City be able to ensure that the Project's environmental impacts are mitigated to less than significant levels, as required under CEQA.

Thank you for your attention to these comments.

Sincerely,



William Mumby

WM:acp
Attachments

⁹⁹ Watry Response, p. 3.

¹⁰⁰ *King & Gardiner Farms, LLC v. County of Kern* (2020) 45 Cal.App.5th 814, 894; *Keep Our Mountains Quiet v. County of Santa Clara* (2015) 236 Cal.App.4th 714, 732.