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January 27, 2021

Via Email Only

Chair Lance Saleme and Planning Commission Members
City of Santa Clara
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**Re: Agenda Item No 2: Appeal of the Development Review Hearing
Adoption of a Mitigated Negative Declaration and Architectural
Approval of 1111 Comstock Data Center Project (PLN2019-13941;
CEQ2020-01079)**

Dear Chair Saleme and Planning Commission Members:

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

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; underground electrical conduit with concrete encasement would be installed onsite and would connect to an existing underground Silicon Valley Power ("SVP") electric line. Standby backup emergency electrical generators would be installed to provide for

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an uninterrupted power supply. Six 3,000-KW diesel-fueled engine generators and one 500-kW diesel-fueled engine generator would be located within a generator room on the first floor of the building. Fuel for the generators would be stored in two 30,000-gallon underground storage tanks which would feed individual 160-gallon day tanks located adjacent to each generator. 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 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 from the Project due to emissions of toxic air contaminants ("TACs") from the Project's backup diesel generators, as well as other potentially significant impacts to air quality, public health, and from greenhouse gas ("GHG") emissions, which the IS/MND fails to adequately mitigate. Based on these potentially significant and unmitigated impacts, as well as other deficiencies in the Initial Study, Santa Clara Citizens' comments concluded that the IS/MND in its current form 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 Development Review Officer adopted the IS/MND and approved the Permits. Santa Clara Citizens timely appealed this decision on November 11, 2020 ("Appeal"). Citizens' representative was improperly charged \$10,203.26 to file the Appeal, an excessive and unconscionable fee which violated Citizens' due process rights and the City's own Fee Schedule for Santa Clara residents ("Appeal Fee"). Citizens paid the Appeal Fee in protest, and herein request that the Planning Commission order the City to reimburse Citizens for the excess fees it was charged.

The City prepared Responses to Comments ("Responses") which responded to some, but not all, of the issues raised in the Comment Letter. Review of the Responses, and further review of the IS/MND, demonstrates that the City failed to resolve many of the IS/MND's deficiencies identified by Citizens, and that the IS/MND still fails to address many of the Project's potentially significant impacts, including energy impacts, GHG emissions, and emissions from backup generators, in violation of CEQA. This letter addresses the Responses and additional deficiencies in the IS/MND which the City must correct before the Project can be approved.

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We respectfully request that the Planning Commission uphold this appeal and reverse the decision of the Director to adopt the IS/MND and approve the Permits. We reserve the right to supplement these comments at later hearings on this Project.¹

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 City of Santa Clara resident Mr. Long Vu, and other 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 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

¹ 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.

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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 offer these comments

II. CEQA REQUIRES THE CITY TO PREPARE AN ENVIRONMENTAL IMPACT REPORT

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.² This standard requires preparation of an EIR if any substantial evidence in the record indicates that a project may have an adverse environmental effect.³ As a matter of law, substantial evidence includes both expert and lay opinion based on fact.⁴ Even if other substantial evidence supports a different conclusion, the agency nevertheless must prepare an EIR.⁵ As we have shown in our two Comment Letters and Appeal Letter, there is substantial evidence that the Project **may** cause significant adverse environmental and public health effects.

The City has failed to comply with its duty under CEQA to evaluate *any* potential significant environmental impacts through an EIR. As explained in our Comment Letter and herein, as well as in the attached rebuttal of our technical expert, James Clark,⁶ the City must prepare an EIR for this Project.

² *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 928.

³ 14 C.C.R. § 15064(f)(1); *Pocket Protectors*, 124 Cal.App.4th at 931.

⁴ 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).

⁵ *Arviv 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.

⁶ **Exhibit A: James Clark Comments, January 26, 2021 (“Clark Comments”).**

A. The IS/MND's Emissions Calculations and Determinations of Significance Are Unsupported by Substantial Evidence

1. The IS/MND's Analysis of Greenhouse Gas Emissions Relies on an Unsupported Threshold

CEQA requires agencies to consider both direct and indirect GHG emissions and air quality impacts associated with a project.⁷ An agency's evaluation of the significance of the environmental impacts of a project requires "consideration of reasonably foreseeable indirect physical changes caused by the project."⁸ Substantial evidence must support an agency's conclusions regarding significance of impacts, even when a project appears consistent with state and regional emission reduction goals.⁹

The City argues that the Project would not generate significant GHG emissions, either directly or indirectly, because it 1) would receive electricity from a utility (Silicon Valley Power) which is on track to meet the SB 32 2030 GHG emission reduction target; 2) would result in lower emissions (43.5 percent) than the statewide average for an equivalent facility due to SVP's power mix; 3) would include energy efficiency measures to reduce emissions to the extent feasible; and 4) would be consistent with applicable plans and policies adopted to reduce GHG emissions.¹⁰ The qualitative threshold against which the City evaluates the Project's GHG emissions is unsupported, and its analysis flawed, for several reasons.

First, the City cannot rely on SVP's power mix to ensure that the Project will not contribute to GHG emissions. According to the IS/MND, 25% of SVP's power mix is generated by GHG-emitting natural gas (16%) and coal-fired (9%) sources.¹¹ Though the City asserts that SVP recently eliminated coal-fired power, and will increase its use of renewable sources of energy in the future, the Project will continue to draw energy from the grid throughout its life, which by the IS/MND's own admission includes GHG-emitting sources. Even with measures to increase reliance on renewables, fossil-fuel powered energy facilities will continue to provide

⁷ 14 C.C.R. § 15064(d).

⁸ *Id.*

⁹ *Ctr. for Biological Diversity v. Dept. of Fish & Wildlife* ("CBD") (2015) 62 Cal.4th 204, 225–229, 240–241.

¹⁰ Response A.8, p. 12.

¹¹ SVP's 2017 Power Mix included 9% from coal and 16% from natural gas, IS/MND, p. 68. 4938-012acp

power to California's energy grid until they are phased out, likely until at least 2045 according to the state's Renewables Portfolio Standards.¹²

The IS/MND discloses that at least 16% of the Project's energy at the time of approval will consist of GHG-emitting fossil-fuel energy from natural gas.¹³ The Project has a 10 MW capacity, meaning that a full 1.6 MW of energy used by the Project will have indirect GHG emissions. The IS/MND's reliance on SVP's power mix does nothing to reduce or eliminate this significant GHG impact. Indeed, the IS/MND states that Santa Clara offers SVP energy consumers a "carbon-free energy option," yet fails to require it for the Project.¹⁴ Thus, the IS/MND both fails to disclose a significant GHG impact, and fails to require reasonably feasible mitigation to reduce the impact to less than significant levels, by relying on an unsupported significance threshold related to SVP's illusory "power mix."¹⁵

Any GHG emissions resulting from the generation of energy to operate the Project's data center would be necessarily caused by the data center. In other words, the data center would contribute to GHG emissions. The City must prepare an EIR to disclose and mitigate these impacts.

Secondly, the IS/MND's claim that the incorporation of a "variety of energy efficiency measures" will contribute to reductions of GHG emissions is an overstatement and not legally supported. The Project in fact only lists 2 such measures, consisting of:

(1) Power Usage Effectiveness ("PUE"): The Project's PUE (the ratio of total power used by the facility to the power used exclusively for its information technology equipment) would be 1.2.¹⁶ This brings the Project into compliance with the City's Climate Action Plan Measure 2.3.¹⁷

¹² See IS/MND, p. 50 ("SB 100, passed in 2018, increased the 2030 renewable source requirement to 60%, and requires 100 percent of electricity in California to be provided by 100 percent renewable and carbon-free sources by 2045.").

¹³ IS/MND, p. 68.

¹⁴ IS/MND, p. 52, FN 22.

¹⁵ Responses, p. 12.

¹⁶ IS/MND, p. 54.

¹⁷ We argued in our initial comments, and reiterate here, that because the CAP was adopted to achieve 2020 emissions reduction targets, consistency with the CAP does not support a determination that impacts will be less than significant beyond that year.

(2) Energy and Water Use Efficiency in Building Design: the project proposes to implement efficiency measures, including evaporative cooling instead of mechanical cooling for IT and electrical rooms; daylight penetration of common areas; reflective roof surface; meet or exceed Title 24 requirements; clean air vehicle parking; low-flow plumbing fixtures; low-water use landscaping.

This approach fails to comply with CEQA, which requires the lead agency to not only describe a project's impacts resulting from energy in an EIR, it must quantify them, and may not merely rely on energy efficiency measures to reduce energy-related impacts.¹⁸

Finally, the Project's consistency with state and local climate goals and regulations cannot substitute as evidence that the Project will have no significant impacts on GHG emissions, absent more than mere conclusory statements regarding the Project's consistency with regulations. The City must also provide a reasoned explanation supported by substantial evidence that the Project's consistency with state climate goals render its GHG impacts less than significant.¹⁹ The following illustrate the inadequacy of the IS/MND's discussion of the Project's qualitative threshold:

- The IS/MND states that the Project "would be required to comply with General Plan Policy 5.8.5-P1, which requires new development to implement [transportation demand management ("TDM")] programs that can include site-design measures, including preferred carpool and vanpool parking, enhanced pedestrian access, bicycle storage and recreational facilities."²⁰ It does not indicate, however, whether or how the Project intends to comply with this policy. It appears no TDM program has been prepared, and the IS/MND does not list

¹⁸ *Ukiah Citizens for Safety First v. City of Ukiah* (2016) 248 Cal.App.4th 256, 264-65 (energy impact analysis requires clarification and technical information regarding project-related energy usage and conservation features); *Spring Valley Lake Association v. City of Victorville* (2016) 248 Cal.App.4th 91, 103 (EIR must show factual basis of its assumptions that both energy use and greenhouse gas emissions will be reduced); *California Clean Energy Committee v. City of Woodland* (2014) 225 Cal.App.4th 173, 210 ("CEQA EIR requirements are not satisfied by saying an environmental impact is something less than some previously unknown amount").

¹⁹ *Ctr. for Biological Diversity v. Dept. of Fish & Wildlife* ("CBD") (2015) 62 Cal.4th 204, 225-229, 240-241.

²⁰ IS/MND, p. 72.

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specific measures that it intends to implement to bring it into compliance with GP Policy 5.8.5-P1.

- The IS/MND asserts that implementation of General Plan policies that increase energy efficiency or reduce energy use would reduce the Project's indirect GHG emissions associated with the energy generation.²¹ Consistency with these policies will be achieved by the Project's proposal to use emergency generators with "advanced air pollution controls," as well as the implication that generator testing would be performed intermittently to reduce impacts from concurrent generator emissions. The IS/MND also states, however, that the Project's generators would use diesel-fueled engines that meet U.S. EPA Tier 2 emissions standards.²² A cleaner alternative, which would meet the GP's policy of minimizing public health hazards and reducing emissions, would be the use of Tier 4 engines, which have been recommended in similar data center projects by CARB.²³
- The IS/MND states that the Project is in compliance with the Bay Area 2017 Clean Air Plan's Energy Sector Control Measures. Analysis of its compliance, however, is limited to the statement that "energy efficiency measures have been included in the design and operation of the electrical and mechanical systems on the site."²⁴ What those measures are or how they ensure consistency with the Clean Air Plan is absent.
- Analysis of the Project's consistency with California's Climate Change Scoping Plan offers even less discussion. The IS/MND offers only the statement that the Project "would be generally consistent" with the Scoping Plan.²⁵

²¹ GP Policy 5.10.2-P3 encourages implementation of technological advances that minimize public health hazards and reduce the generation of air pollutants." IS/MND, pp. 72–73.

²² IS/MND Appendix A, p. 2.

²³ Comments by CARB on the California Energy Commission's Proposed Decision for the Proposed Sequoia Data Center Project (19-SPPE-03) (October 15, 2020).

²⁴ IS/MND, p. 72.

²⁵ IS/MND, p. 74.

Though the City may, at its discretion, choose to evaluate the Project's GHG emissions according to a qualitative threshold, the IS/MND's unsupported, conclusory statements do not qualify as adequate analyses of consistency with local, state, and regional plans because they lack any discussion of the plans' goals and policies as they apply to the Project.

An agency cannot conclude that an impact is less than significant unless it produces rigorous analysis and concrete substantial evidence justifying the finding.²⁶ While courts have found it could be reasonable to use consistency with AB 32 and other California climate goals as a measure of significance under CEQA, agencies must support their conclusions about a project's consistency with statewide emissions reduction goals with substantial evidence for CEQA to be satisfied. Absent clear evidence that the Project would, in fact, aid in the achievement of statewide emissions reductions goals, the City cannot properly conclude that GHG emissions impacts would be insignificant.

2. The IS/MND Fails to Consider Reasonably Foreseeable Impacts from Backup Generator Emergency Operations

In our Comments on the IS/MND, we asserted that the assumption in the IS/MND that the backup generators will only ever run for 50 hours per year ignores the reality of power failures, utility shutdowns, and the very purpose of a data center—to provide an uninterrupted power supply—in its emissions calculations.²⁷ The City's Response pointed out that CEQA does not require evaluation of emergency conditions.²⁸

CEQA requires that a Project's reasonably foreseeable impacts be assessed. As pointed out by CARB in its comments to the CEC, data centers market themselves on the premise that they will provide reliable, uninterrupted power at all times, even during power loss events.²⁹ "These obligations and operational realities mean forecasting a reasonable range of uses during power outages is appropriate. Such use is reasonably foreseeable. Although we recognize continuing work to limit reliability events and power shutoffs, data centers are constructed on the reasonable premise that such outages do occur, and that we must manage the

²⁶ *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 516, 520; *Kings County Farm Bureau*, 221 Cal.App.3d at 732.

²⁷ Comments, p. 10,

²⁸ Response A.4, p. 8.

²⁹ Comments by CARB on the California Energy Commission's Proposed Decision for the Proposed Sequoia Data Center Project (19-SPPE-03) (October 15, 2020).

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continuing risks of a warming climate.”³⁰ CARB’s comments provide substantial evidence demonstrating that emergency operations are a common place operation of data centers, and a reasonably foreseeable use which requires analysis under CEQA.

The City argues that because of SVP’s record with respect to power outages and shutoffs (which it maintains is better than PG&E or San Jose Clean Energy) renders the possibility of emergency operations of backup generators remote, CARB’s assertion that weather events that lead to power shutoffs are likely to become more frequent, not less, means operation of backup generators is reasonably foreseeable.

“In CARB’s view, data center emergency operations are not speculative, and an evaluation of their operations during loss of power—for which the centers are being specifically designed, and for which they are marketed to customers—is also not speculative. CEQA requires an appropriate evaluation even of foreseeable impacts otherwise imprecise in scope or contingent in occurrence.”³¹

B. The Project Has Potentially Significant Operational Energy Impacts Which the IS/MND Fails to Disclose and Mitigate

The IS/MND concludes that though the Project will result in an increase in energy consumption at the site, its incorporation of energy efficiency measures and compliance with standards such as those in the Title 24 and the Green Building Standards Code will reduce its energy impacts to less than significant.³² This conclusion is clearly erroneous and unsupported when considering that the increase in energy use will be massive: 89,352 MWh per year compared to the 196 MWh that the current industrial site consumes yearly.³³ The IS/MND further claims that the Project’s energy impacts require no mitigation due to its consistency with various regulatory standards, such as the Renewables Portfolio Standards, building codes, Energy Star, and the Advanced Clean Cars Program.³⁴ The extent of its analysis of the Project’s consistency with any of these programs, however, consists of a reiteration of SVP’s role as supplier of Project energy; vague indications of lighting control, air economization, and low-flow plumbing fixtures; and conclusory

³⁰ Id.

³¹ Id.

³² IS/MND, p. 54.

³³ IS/MND, p. 54.

³⁴ IS/MND, pp. 50–51.

statements regarding compliance with policies.³⁵ The IS/MND declares that compliance with these measures will account for the colossal 455-fold increase in energy use.³⁶

Courts have routinely rejected this approach to energy impact analysis. In *Ukiah Citizens*, the Court of Appeal held that the EIR inadequately described the energy impacts of a Costco project where the EIR relied on the project's compliance with energy conservation standards to conclude that energy consumption would be less than significant.³⁷ The Court determined that the EIR certified by the City of Ukiah failed to comply with CEQA's energy impacts analysis requirements because it failed to evaluate energy impacts from transportation, construction, or operation, relying instead on compliance with building codes and separate GHG emissions mitigation measures to conclude that impacts would be less than significant.³⁸ The Court concluded that the EIR failed to adequately describe or discuss the energy impacts of the project. Consequently, the Court ordered the City of Ukiah to recirculate the EIR for public comment with a legally adequate energy impacts analysis.³⁹

The City's reliance on compliance with standards such as Title 24 to replace a meaningful analysis of the Project's actual energy impacts violates CEQA. Just as the courts in *CCEC* and *Ukiah Citizens* held that the lead agencies could not rely on state-mandated Title 24 and CALGreen building codes as evidence to conclude that the projects' energy consumption impacts would be rendered less than significant, the City cannot merely point to Title 24 and California Green Building Standards to support the IS/MND's conclusion that the Project's energy impacts will not be significant.

C. Cumulative Impacts from Emissions Were Not Evaluated

CEQA Guidelines section 15064 specifies how to demonstrate consistency with a greenhouse gas reduction plan. That section states: "When relying on a plan, regulation or program [for the reduction of GHG emissions], the lead agency should explain how implementing the plan, regulation or program ensures that the

³⁵ *Id.*, p. 55.

³⁶ IS/MND, p. 54.

³⁷ *Ukiah Citizens for Safety First v. City of Ukiah* ("*Ukiah Citizens*") (2016) 248 Cal.App.4th 256, 263-266.

³⁸ *Id.*

³⁹ *Id.* at 266-267.

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project's incremental contribution to the cumulative effect is not cumulatively considerable." Additionally, the consistency analysis "must identify those requirements specified in the plan that apply to the project, and if those requirements are not otherwise binding and enforceable, incorporate those requirements as mitigation measures applicable to the project."⁴⁰

Rather than identifying explaining how implementation measures would result in less-than-significant cumulative impacts, the IS/MND merely makes the conclusory statement that due to such measures, "the proposed project would not result in substantial adverse effects on human beings, individually or cumulatively."⁴¹ The IS/MND wholly fails to explain how these measures will protect against cumulatively considerable impacts.

Furthermore, the region where the Project will be located has seen a proliferation of similar data center projects, all proposing to use backup diesel generators and most—including the Project at issue—proposing to use the dirtier Tier 2 engines, rather than the cleaner Tier 4.⁴² The increase has been such that CARB's recent comments to the California Energy Commission included the recommendation that data centers include in their emissions modeling estimates the simultaneous operation of backup generators during power outages. "The only purpose for the installation of the backup diesel generators for this proposed project is to operate and provide power to the data center due to a disruption in utility power. Modeling at least some impact from simultaneous operation of the backup generators is no more speculative than assuming no hours of simultaneous operation or even in modeling the permitted 50 hours annually of operation for maintenance, which requires a similar degree of CEC making reasonable assumptions."⁴³

⁴⁰ 14 C.C.R. § 15183.5(b)(2); BAAQMD CEQA Guidelines (May 2017), p. 4-4 ("A project must demonstrate its consistency by identifying and implementing all applicable feasible measures and policies from the GHG Reduction Strategy into the project.").

⁴¹ IS/MND, p. 145.

⁴² Comments by CARB on the California Energy Commission's Proposed Decision for the Proposed Sequoia Data Center Project (19-SPPE-03) (October 15, 2020).

⁴³ Id.

III. THE CITY'S UNREASONABLE FEE FOR FILING AN APPEAL VIOLATES SANTA CLARA CITIZENS' DUE PROCESS RIGHTS

The Courts have upheld the authority of agencies to charge reasonable fees for filing administrative appeals of decisions.⁴⁴ Agencies cannot, however, impose fees so excessive that they discourage the exercise of a party's due process rights to a hearing.⁴⁵ The fees an agency imposes may not preclude a party from filing an appeal, and they likewise cannot create "an incentive not to make such a demand and not to mount a rigorous defense."⁴⁶

CEQA's standing requirements do not require that a party reside in the region where a project is taking place in order to challenge an agency's findings of significant environmental impacts. A project's environmental impacts can be felt regardless of legislative boundaries: "Effects of environmental abuse are not contained by political lines; strict rules of standing that might be appropriate in other contexts have no application where broad and long-term effects are involved."⁴⁷

Though anyone can legally challenge the City's conclusions regarding the Project's environmental impacts contained in the IS/MND, the City's new fee schedule, adopted by the City Council on April 28, 2020 as Resolution 20-8839 and made effective July 1, 2020, imposes such an exorbitant fee upon nonresidents of Santa Clara who wish to file an appeal as to violate due process. Though residents of the City are required to pay \$469 to file an appeal, "all others" are now charged \$9,381.⁴⁸ "All others" includes anyone who does not reside within City limits—including nonresident neighbors who may live in much closer proximity to a project site than residents across the city. The fee is so high—20 times higher than what residents pay—as to be prohibitive.

Santa Clara Citizens' appeal, filed on November 12, 2020, was improperly assessed a \$10,203.26 fee,⁴⁹ despite the fact that Appellants members include Santa Clara residents. This was an illegal and unconscionable fee.

⁴⁴ See *Friends of Glendora v. City of Glendora* (2010) 182 Cal.App.4th 573, 579–80; see also *Sea & Sage Audubon Society, Inc. v. Planning Com.* (1983) 34 Cal.3d 412, 419.

⁴⁵ *California Teachers Association v. State of California* (1999) 20 Cal. 4th 327, 331.

⁴⁶ *Id.* at 352.

⁴⁷ *Bozung v. Local Agency Formation Com.* (1975) 13 Cal. 3d 263, 272.

⁴⁸ **Exhibit B:** Santa Clara Planning Application Fee Schedule.

⁴⁹ **Exhibit C:** Itemized Receipt of Appeal Fees.

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In addition to the City's due process violations in the form of unconscionable fees, Santa Clara Citizens' membership rolls consist of many residents of the City, including Long Vu. This appeal of the Design Review Officer's decision clearly should not have been subject to the \$9,381 fee. A timely refund for the difference between the resident fee and the nonresident fee of \$8,912 is requested.⁵⁰

IV. RELIEF REQUESTED

Santa Clara Citizens requests that the Planning Commission grant its Appeal and reverse the November 4, 2020 decisions of the Development Review Officer to 1) adopt the Mitigated Negative Declaration and approve the Architectural Review for the Project. We further request that the City prepare an EIR which fully analyzes and mitigates the Project's potentially significant environmental impacts as described in our Comment Letters and this Appeal. 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 required by law.

Finally, we request relief in the form of reimbursement of the excessive Appeal Fee paid.

Sincerely,



Kendra Hartmann

KH:acp
Attachment

⁵⁰ Santa Clara Citizens was also charged \$822.26 for a "Technology Surcharge"; the City's Fee Schedule states that the Technology Surcharge "will be assessed at 3.37% of the application fee for all applications except those that are collected 'at cost.'"