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September 25, 2019

By Hand Delivery

Planning Division
Planning and Inspection Department
City of Santa Clara
1500 Warburton Avenue
Santa Clara, CA 95050

Re: **Appeal of the Architectural Committee's Approval of the LS1 Data Center Project and Adoption of the Mitigated Negative Declaration (PLN2019-13745, CEQ2019-01071)**

Dear Planning Commission:

We write on behalf of Santa Clara Citizens for Sensible Industry ("SCCSI"), pursuant to the City of Santa Clara ("the City") Zoning Ordinance § 18.76.020(h), to request that the Planning Commission grant this appeal and reverse the September 18, 2019 decision of the City's Architectural Review Committee to approve the LS1 Data Center Project ("Project") located at 2175 Martin Avenue, Santa Clara, California 95050 and adopt the final Mitigated Negative Declaration¹ ("MND") for the proposed Project, prepared by the City's Community Development Department pursuant to the California Environmental Quality Act ("CEQA").²

I. ACTION BEING APPEALED

LVP Martin Avenue Associates LLC c/o Lightstone Group ("Applicant") proposes to demolish a single story building previously used for industrial warehousing, manufacturing, and office purposes and construct a three-story,

¹ City of Santa Clara, Mitigated Negative Declaration: LS1 Data Center Project (Sept. 2019) (*hereinafter* "Final MND").

² Pub. Resources Code § 21000 *et seq.*
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79,300 square foot (“sf”) data center with a floor area ratio (“FAR”) of 1.08.³ On August 26, 2019, we submitted comments, with the assistance of our technical expert James Clark, Ph.D., on the draft Initial Study and MND for the proposed Project (“Comment Letter”).⁴ As detailed therein, the Project presents potentially significant, unmitigated impacts due the MND’s failure to sufficiently describe the current environmental setting for biological resources.⁵ In addition, we offered substantial evidence supporting a fair argument that the Project’s impacts to air quality, biological resources, energy, and land use are potentially significant and unmitigated.⁶ Finally, the City’s analysis of the Project’s cumulative energy impacts is inadequate as a matter of law and substantial evidence supports a fair argument that the Project’s energy impacts are cumulatively considerable.⁷ Based on the substantial evidence presented, the City must prepare an environmental impact report (“EIR”) for the Project.

Furthermore, the Architectural Committee violated Zoning Ordinance § 18.76.020 by finding that the design and location of the proposed Project is such that it is in keeping with the character of the neighborhood and is such as not to be detrimental to the harmonious development contemplated by the Zoning Ordinance and the Santa Clara 2010-2035 General Plan (“General Plan”) despite evidence to the contrary. Specifically, the Project is inconsistent with the General Plan because the Project’s FAR exceeds the applicable maximum and no valid exception to this policy exists.⁸ In addition, a condition of approval allowing an alternative replacement rate for protected trees with approval from the Director of Community Development Department conflicts with the General Plan.⁹

On September 16, 2019, we received a copy of the Community Development Department’s staff report to the Architectural Committee,¹⁰ and were notified of the

³ Final MND, exhibit A at p. 7 (*hereinafter* “Initial Study”)

⁴ Letter from Andrew J. Graf, Adams Broadwell Joseph & Cardozo to Nimisha Agrawal, Community Development Department, City of Santa Clara re: Comments on the LS1 Data Center Project Proposed Mitigated Negative Declaration (MND) (PLN2019-13745 and CEQ2019-01071) (Aug. 26, 2019) (*hereinafter* “Comment Letter”).

⁵ *Id.* at pp. 4-7.

⁶ *Id.* at pp. 7-14, 21-22.

⁷ *Id.* at pp. 14-20.

⁸ *Id.* at pp. 20-23

⁹ *Id.* at pp. 11-12, 23.

¹⁰ City of Santa Clara, Architectural Committee Project Overview: Agenda Item #8.A (undated) (*hereinafter* “Staff Report”).

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publication of the final MND, which included the City's responses to comments on the draft MND.¹¹ The Architectural Committee approved the Project and adopted the MND at a public hearing on September 18, 2019.¹² Minutes for the hearing were not available at the time of this submission.¹³

We respectfully request the Planning Commission grant our appeal and reverse the Architectural Committee's approval of the Project and adoption of the MND.

II. STATEMENT OF INTEREST

SCCSI is an unincorporated association of individuals and labor organizations who 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, California Unions for Reliable Energy and its organization members and the members' families, and other individuals who live, work, recreate and raise their families in the City. They would be directly affected by the Project's environmental and health and safety impacts.

Individual members may also work on the Project itself. They would be the first in line to be exposed to any health and safety hazards which may be present on the Project site. They each have a personal interest in protecting the Project area from unnecessary, adverse environmental and public health impacts.

SCCSI 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.

¹¹ Email from Nimisha Agrawal, Community Development Department, City of Santa Clara to Janet Laurain, Adams Broadwell Joseph & Cardozo re: LS1 Data Center September 18th Hearing (Sept. 16, 2019).

¹² Email from Nimisha Agrawal, Community Development Department, City of Santa Clara to Janet Laurain, Adams Broadwell Joseph & Cardozo re: LS1 Data Center Appeal Deadline and Architectural Committee Decision on the Project (Sept. 24, 2019).

¹³ *Ibid.*

SCCSI 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 determinantal 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.

The labor organization members of SCCSI 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.¹⁴ It is for these purposes that we offer these comments.

III. REASONS FOR APPEAL

The City's responses to the comments on the draft MND do not adequately address the issues raised by SCCSI and other members of the public. As outlined in our Comment Letter and below, substantial evidence supports a fair argument the Project may have significant environmental impacts. Therefore, the Architectural Committee's decision to adopt the final MND must be reversed, and an EIR must be prepared.

Moreover, the Architectural Committee cannot make the necessary findings and determinations required under Zoning Ordinance § 18.76.020 because the proposed Project conflicts with the harmonious development contemplated by the General Plan. Therefore, the Architectural Committee's decision to approve the Project must be reversed.

¹⁴ Pub. Resources Code § 21871(a)(3); *Citizens for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151, 171.

A. The Planning Commission Must Reverse the Architectural Committee's Decision to Adopt the MND Because Substantial Evidence Supports a Fair Argument the Project May Have Significant, Unmitigated Environmental Impacts

CEQA contains a strong presumption in favor of requiring a lead agency to prepare an EIR. This presumption is reflected in the “fair argument” standard. Under this standard, a lead agency must prepare an EIR whenever substantial evidence in the whole record before the agency supports a fair argument that a project may have a significant effect on the environment.¹⁵

A mitigated negative declaration may only be prepared if the Project includes legally binding measures which, based on substantial evidence, avoid or mitigate potentially significant environmental impacts.¹⁶ “Substantial evidence” required to support a fair argument is “enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached.”¹⁷ “[I]n marginal cases where it is not clear whether there is substantial evidence that a project may have a significant effect on the environment, the lead agency shall be guided by the following principle: If there is disagreement among expert opinion supported by facts over the significance of an effect on the environment, the Lead Agency shall treat the effect as significant and shall prepare an EIR.”¹⁸

As shown in our Comment Letter, substantial evidence supports a fair argument the Project may cause a significant environmental effect.¹⁹ As described below, the City's responses to comments fail to rebut this presumption.²⁰ Therefore, the Planning Commission must reverse the Architectural Committee's decision to

¹⁵ *Id.* §§ 21080(d), 21082.2(d); CEQA Guidelines §§ 15002(k)(3), 15064(f)(1), (h)(1); *Laurel Heights Improvement Assn. v. Regents of the Univ. of Cal.* (1993) 6 Cal.4th 1112, 1123; *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75, 82; *Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 150-151; *Quail Botanical Gardens Found., Inc. v. City of Encinitas* (1994) 29 Cal.App.4th 1597, 1601-1602.

¹⁶ Pub. Resources Code § 21064.5.

¹⁷ CEQA Guidelines § 15384(a).

¹⁸ *Id.* § 15064(f).

¹⁹ See generally Comment Letter at pp. 4-22.

²⁰ Final MND, exhibit B (*hereinafter* “City's Responses to Comments”)

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adopt the MND and direct the Community Development Department to prepare an EIR for the Project.

1. The City Fails to Adequately Describe the Environmental Setting for Biological Resources

The City did not make any changes to the Initial Study's discussion of biological resources. In response to our Comment Letter,²¹ the City contends the MND correctly concludes the Project would not result in any impacts on any special-status species because no natural or sensitive habitats are present due to the developed nature of the project site and surrounding area.²² The City relies on the observations made by Torrey Edell during a site visit.²³

The City cannot conclude "no natural or sensitive habitats are present on the project site" simply because of the developed nature of the site and surrounding area. Such a conclusion inherently conflicts with the City's finding that the Project's construction could impact suitable nesting habitat for numerous bird species.²⁴ It also conflicts with the City's own admission that 22 special-status species have been documented within the U.S. Geological Survey 7.5-minute quadrangle for the Project site according to the California Natural Diversity Database ("CNDBB").²⁵ The City claims "nearly all of the [CNDBB] occurrences are unreliable because they are outdated and have poor accuracy." Even if true, this assertion acknowledges some of the occurrences are reliable and special-status species have the potential to occur on the Project site, such as special-status nesting birds.²⁶

Moreover, the City cannot rely on the observations of Ms. Edell. The record does not contain any evidence regarding Ms. Edell's qualifications. Nor does the record contain any evidence regarding Ms. Edell's "general observations about

²¹ Comment Letter at pp. 5-6.

²² City's Responses to Comments at p. 4.

²³ *Ibid.*

²⁴ Initial Study at pp. 56-57.

²⁵ City's Responses to Comments at p. 4.

²⁶ *Ibid.*

overall site conditions.”²⁷ To the contrary, the City states the only record available related to Ms. Edell’s site visit is the tree inventory report.²⁸ This report only documents the trees located on the property, and contains no other information which could support any conclusions regarding special-status wildlife species.²⁹

Because the City fails to properly investigate and disclose the potential for special-status species to occur on the Project, the MND fails to adequately mitigate potentially significant impacts to special-status wildlife. Therefore, substantial evidence supports a fair argument the Project may have significant, unmitigated impacts, which must be analyzed and mitigated in an EIR.

2. Substantial Evidence Supports a Fair Argument the Project Could Result in Significant, Unmitigated Environmental Impacts

a. The Project’s DPM Emissions Are Potentially Significant and Unmitigated

The City did not make any changes to its discussion regarding the potential impacts of diesel particulate matter (“DPM”) emissions. In response to our Comment Letter,³⁰ the City claims we incorrectly assumed “PM2.5 D” to mean DPM based on information included in Air Quality Technical Report (“AQTR”) Appendix 1-A and Appendix 1-B.³¹ The City states that DPM emissions were based PM2.5 exhaust emissions outlined AQTR Appendix 2-A.³² However, the City then fails to explain how the assumptions outlined in AQTR Appendix 2-A support its analysis. In fact, the City then relies on AQTR Appendix 1-A and Appendix 1-B to show its DPM emissions calculations is correct.³³ Given the inconsistency in the City’s explanation, and the City’s continued reliance on AQTR Appendix 1-A and Appendix 1-B to support its contention, substantial evidence, based on Dr. Clark’s

²⁷ City of Santa Clara, LS1 Data Center Administrative Record (July 31, 2019) (“This site visit was conducted as part of the Tree Inventory; there is not a separate record for it included in the administrative record.”).

²⁸ City’s Responses to Comments at p. 4.

²⁹ See *generally* Initial Study, appen. 4.4-1.

³⁰ Comment Letter at pp. 10, attachment A.

³¹ City’s Responses to Comments at p. 7.

³² *Ibid.*

³³ *Ibid.*

opinion,³⁴ continues to support a fair argument that the Project has potentially significant, unmitigated impacts. Therefore, an EIR must be prepared.

b. BIO-2.1 Fails to Adequately Mitigate the Potentially Significant Impacts to Protected Trees to Less than Significant

The City did not make any changes to mitigation measure BIO-2.1. In response to our Comment Letter,³⁵ the City concludes the mitigation measure is consistent with the General Plan and would not result in an environmental impact.³⁶ Although General Plan Policy 5.3.1-P10 requires a tree replacement plan at a 2:1 ratio,³⁷ the City a mitigation measure allowing a lower replacement rate for the Project.³⁸ The City does not rely on a General Plan policy for this assertion, but instead concludes it is permitted to have a lower replacement rate due to “past practice and to have an onsite benefit rather than an off-site benefit.”³⁹

An unwritten rule, which is inconsistent with the General Plan, cannot reduce the Project’s potentially significant impacts. If the City desires to change the General Plan policy, then it must propose an amendment to the General Plan and conduct environmental review. Under Policy 5.3.1-P10, the Project must add at least 24 new trees because it proposes to remove 12 trees. However, the Project will result in a replacement rate lower than 2:1 because it only requires 15 new trees.⁴⁰

As the City acknowledges, this policy is meant to increase the urban forest and minimize the heat island effect.⁴¹ The United States Environmental Protection Agency describes the heat island effect as follows:

As urban areas develop, changes occur in their landscape. Buildings, roads, and other infrastructure replace open land and vegetation. Surfaces that were once permeable and moist become impermeable and dry. These changes

³⁴ Comment Letter at pp. 10, attachment A.

³⁵ *Id.* at pp. 11-12.

³⁶ City’s Responses to Comments at p. 8.

³⁷ General Plan at p. 5-28.

³⁸ City’s Responses to Comments at p. 8.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

cause urban regions to become warmer than their rural surroundings, forming an “island” of higher temperatures in their landscapes.⁴²

The heat island effect can cause (1) increased energy consumption, (2) elevated emissions of air pollutants and greenhouse gases, (3) compromised human health and comfort, and (4) impaired water quality.⁴³

The General Plan addresses the heat island effect by requiring a tree replacement rate of 2:1.⁴⁴ Since mitigation measure BIO-2.1 permits a replacement rate lower than what is allowed under Policy 5.3.1-P10, the Project presents potentially significant, unmitigated impacts to energy, air quality, public and worker health, and water quality. Therefore, an EIR must be prepared.

c. The Project May Have Significant, Unmitigated Impacts on Energy Resources

The City provides a supplemental analysis of the Project’s power use efficiency (“PUE”).⁴⁵ However, this supplemental analysis fails to address the contentions raised in our Comment Letter and raises more questions than answers. As discussed in the Comment Letter,⁴⁶ PUE is not an effective measure for demonstrating efficient energy consumption.⁴⁷ “[T]here are concerns that the metric does not consider the actual productivity or efficiency of the equipment. As a result, a data center in which no infrastructure upgrades are made actually achieves an improved PUE as the IT equipment ages and uses more power.”⁴⁸

⁴² United States Environmental Protection Agency, Heat Islands: Learn About Heat Islands, <https://www.epa.gov/heat-islands/learn-about-heat-islands> (last accessed Sept. 24, 2019).

⁴³ United States Environmental Protection Agency, Heat Islands: Heat Island Impacts, <https://www.epa.gov/heat-islands/heat-island-impacts> (last accessed Sept. 24, 2019).

⁴⁴ General Plan at p. 5-28.

⁴⁵ City’s Responses to Comments at pp. 9-10.

⁴⁶ Comment Letter at pp. 12-14.

⁴⁷ The Green Grid, White Paper #63: Data Center Environmental Impacts – Main Impacts and Proposal for the Data Center Maturity Model (2014) p. 9.

⁴⁸ Beth Whitehead, et al., *Assessing the Environmental Impact of Data Centers Part 1: Background, Energy Use, and Metrics*, Building and Environment 82 (2014) p. 157; see also Nathaniel Horner, et al., *Power Usage Effectiveness in Data Centers: Overloaded and Underachieving*, The Electricity Journal 29 (2016) p. 63 (“A low-overhead facility running older, less efficient servers could conceivably achieve a low PUE while still using more energy than it needs.”).

The City presents additional evidence of a worst case “mechanical PUE” of 1.19.⁴⁹ Notably, the City still does not identify all the equipment which will use electricity during operation. The only equipment identified is the “20 (N+2) DA250 and MCV440 systems,”⁵⁰ which are the thermal management systems. This equipment was not disclosed in the draft MND or the assumptions used by the mechanical equipment manufacturer.

Appendix F of the CEQA Guidelines identifies several items which should be disclosed when evaluating the energy consumption for a project, including disclosure of the “energy consuming equipment and processes which will be used during construction, operation and/or removal of the project. If appropriate, this discussion should consider the energy intensiveness of materials and equipment for the project.”⁵¹ The City does not include a description of all energy consuming equipment and processes. The assumptions and methods for how the City determines the Project’s energy use is critical to evaluating whether the Project’s operation may have a significant impact on energy. Without this information, decisionmakers and the public cannot properly evaluate the Project’s potential impacts on energy use.

Instead, the City relies on the an undisclosed analysis prepared by the mechanical equipment manufacturer and reviewed by the Project engineer⁵² The City fails to reconcile why the annual “mechanical PUE” of 1.19 discussed in its response to comments is substantially lower than the annual PUE of 1.37 described in the draft MND.⁵³ If anything, the City’s response shows PUE is not a reliable method of assessing the energy consumption of data centers given the significant discrepancies between the draft MND and the City’s responses to comments.

d. The Project’s FAR Conflicts with the General Plan Resulting in Potentially Significant, Unmitigated Environmental Impact

The City did not make any changes to its discussion and conclusions regarding the Project’s FAR. In response to our Comment Letter,⁵⁴ the City

⁴⁹ City’s Responses to Comments at pp. 9-10.

⁵⁰ *Id.* at p. 9.

⁵¹ CEQA Guidelines, appen. F.

⁵² City’s Responses to Comments at pp. 9-10.

⁵³ *Ibid.*

⁵⁴ Comment Letter at pp. 20-22.

concludes the General Plan Discretionary Use Policy 5.5.1-P9 applies to the Project, which gives the City discretion to allow an increased FAR for qualifying projects.⁵⁵ The City explains the “FAR restrictions are intended to serve as a mechanism for regulating employment density, which can be correlated with environmental impacts.”⁵⁶ This City is incorrect in both its conclusion and explanation.

First, the City erroneously applies Policy 5.5.1-P9. The policy states:

For Data Centers *on Light or Heavy Industrial* designated properties, allow a 20 percent increase in the maximum allowed non-residential square-footage, provided that sufficient onsite land area is available to meet the parking requirements for other uses allowed under those designations, and provided that the increased intensity is compatible with planned uses on neighboring properties and consistent with other applicable General Plan policies.⁵⁷

The City incorrectly attempts to substitute the land use designations for the Zoning Ordinance (ML and MH) with the land use designations for the General Plan (Light Industrial and Heavy Industrial).⁵⁸ The General Plan contains four separate land use designations for office/industrial development: Low-Intensity Office/R&D, High-Intensity Office/R&D, Light Industrial, and Heavy Industrial.⁵⁹ Each of these designations contains a maximum FAR.⁶⁰

Policy 5.3.5-P12 does not apply to areas *designated by the General Plan* as Low-Intensity Office/R&D. Instead, the policy only applies to projects located in areas *designated by the General Plan* as Light Industrial or Heavy Industrial areas. Consistent with Policy 5.3.5-P12, the discretionary FAR increase for Light Industrial or Heavy Industrial areas is intended to promote development of data centers “in Light and Heavy industrial areas to compliment employment areas and

⁵⁵ City’s Responses to Comments at p. 13.

⁵⁶ *Ibid.*

⁵⁷ General Plan at p. 5-49 (emphasis added).

⁵⁸ City’s Responses to Comments at p. 13 (“Santa Clara General Plan Discretionary Use Policy 5.5.1-P9 allows a 20 percent FAR increase for data centers on designated ML or MH properties, provided that sufficient on-site land area is available to meet the parking requirements of other uses allowed under those designations and the increased intensity is compatible with planned uses on neighboring properties and consistent with other general plan policies.”)

⁵⁹ General Plan at pp. 5-14 to 5-15.

⁶⁰ *Ibid.*

retail uses.”⁶¹ Because the discretionary FAR increase does not apply to development on land designated by the General Plan as Low-Intensity Office/R&D, and the Project exceeds the applicable maximum FAR for that land use designation, the Project is inconsistent with the General Plan.

Second, FAR restrictions do not regulate employment density; rather, FAR measures land use intensity.⁶² “The standards for land use classifications establish range for density and intensity, but do not guarantee development at the maximum density or intensity specified for each classification.”⁶³ These policies address neighborhood compatibility.⁶⁴ Since the Project’s FAR exceeds the applicable maximum for Low-Intensity Office/R&D, an no applicable exception applies, the Project is incompatible with the surrounding area. Therefore, the Project has potentially significant, unmitigated impacts to land use, and an EIR must be prepared.

3. Substantial Evidence Supports a Fair Argument the Project’s Energy Impacts Are Cumulatively Considerable

The City contends its cumulative impacts analysis is not list based because it considers a broader cumulative setting.⁶⁵ However, this statement directly contradicts the language included in the Initial Study, which states: “The cumulative projects identified in Table 4.21-1 as well as other future development would result in a change in the demand for energy. Some of these projects could consider to the demand for energy or result in the large amounts of fuel, water, or energy, or use these in a wasteful manner, which would be considered a significant cumulative impact.”⁶⁶ Table 4.21-1 did not contain all development projects now included in the Final MND.⁶⁷ The City failed to recirculate the final MND for public review and comment.

⁶¹ *Id.* at p. 5-27 (“5.3.5-P12 Promote development, such as manufacturing, auto services and data centers, in Light and Heavy Industrial classifications to compliment employment areas and retail uses.”).

⁶² General Plan at p. 5-12.

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ City’s Responses to Comments at p. 11.

⁶⁶ Initial Study at p. 174.

⁶⁷ See City’s Responses to Comments at pp. 11-13.

Moreover, the City's analysis improperly compares the incremental effects of the proposed Project with the collective impacts of all other relevant projects. When undertaking a cumulative impact analysis, an agency cannot simply compare the incremental effects of a proposed project *against* the collective impacts of all other relevant projects yielding the proposed project's relative impact vis-à-vis the impacts of other projects.⁶⁸ Rather, the lead agency must *add* the project's incremental impact to the anticipated impacts of other projects.⁶⁹ Because the City revised Table 4.21-1, but then failed to conduct the proper analysis as required under CEQA, the Project has potentially significant, unmitigated cumulative impacts on energy. Therefore, an EIR must be prepared.

B. The Planning Commission Must Reverse the Architectural Committee's Decision to Approve the Project Because the Project Conflicts with the General Plan and Zoning Ordinance

Zoning Ordinance § 18.76 establishes the architectural review process for proposed development projects in the City. The purpose of architectural review is to (1) encourage orderly and harmonious appearance of structures and property, (2) maintain the public health, safety and welfare, (3) maintain the property and improvement values throughout the City, and (4) encourage the physical development of the City as intended by the General Plan.⁷⁰ In order to grant approval, the Architectural Committee must make certain findings and determinations on a proposed project.⁷¹ If the Committee is unable to make the findings and determinations prerequisite to the granting of architectural approval, the application must be denied.⁷²

The Committee must find that the design and location of the proposed development is such that it is in keeping with the character of the neighborhood and is such not to be determinantal to the harmonious development contemplated by the Zoning Ordinance and the General Plan.⁷³ However, the Architectural Committee had no evidence to make this finding. As detailed in our Comment Letter and

⁶⁸ *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal. App. 4th 98, 117-20.

⁶⁹ *Ibid.*

⁷⁰ Zoning Ordinance § 18.76.010.

⁷¹ *Id.* § 18.76.020(c).

⁷² *Id.* § 18.76.020(e).

⁷³ *Id.* § 18.76.020(c)(3).

discussed herein, the Project conflicts with the General Plan because the Architectural Committee erroneously applied Discretionary Use Policy 5.5.1-P9 and a condition of approval conflicts with Policy 5.3.1-P10.⁷⁴ Due to these inconsistencies, the Project differs from the character of the neighborhood and is detrimental to the harmonious development of the City as contemplated by the General Plan. Therefore, the Architectural Committee's approval of the Project must be overturned for violating Zoning Ordinance § 18.76.020.

1. The Architectural Committee Erroneously Applied Discretionary Use Policy 5.3.5-P12

The Architectural Committee concludes the Project is in keeping with the character of the neighborhood and is not detrimental to the harmonious development contemplated by the Zoning Ordinance or General Plan because the "proposed development is 2-3 stories higher than the surrounding low to mid-rise structures, but is consistent to the adjacent industrial uses."⁷⁵ The Architectural Committee also found that the "project would include ancillary equipment (backup generators and above ground fuel storage tanks), loading dock, circulation and parking, and landscape improvements in conformance with the ML zoning district development standards and consistent with the development of data centers throughout the City."⁷⁶ However, these findings are erroneous because the Architectural Committee misinterpreted the discretionary use policy permitting a 20 percent increase for a Project's FAR.

The Architectural Committee confirmed that the project site is currently designated Low Intensity Office/R&D in the General Plan and is zoned light industrial (ML).⁷⁷ In addition, the Architectural Committee confirmed the FAR of 1.08 for the Project exceeds the base FAR of 1.0 set by the General Plan.⁷⁸ But the Architectural Committee concluded that the Project's FAR is within the 20 percent increase allowance for data centers pursuant to Discretionary Use Policy 5.5.1-P9.⁷⁹ The Architectural Committee relied on the City's interpretation of the Policy as

⁷⁴ Comment Letter at pp. 11-12, 20-24.

⁷⁵ Staff Report at p. 4.

⁷⁶ *Ibid.*

⁷⁷ *Id.* at p. 2.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

allowing a 20 percent increase for data centers on “designated ML or MH properties.”⁸⁰ This, however, is a misreading of the policy.

Policy 5.5.1-P9 states:

*For Data Centers on Light or Heavy Industrial designated properties, allow a 20 percent increase in the maximum allowed non-residential square-footage, provided that sufficient onsite land area is available to meet the parking requirements for other uses allowed under those designations, and provided that the increased intensity is compatible with planned uses on neighboring properties and consistent with other applicable General Plan policies.*⁸¹

The Architectural Committee incorrectly attempted to substitute the land use designations for the Zoning Ordinance (ML and MH) with the land use designations for the General Plan (Light Industrial and Heavy Industrial) with the.⁸² Policy 5.5.1-P9 does not apply to areas designated as Low-Intensity Office/R&D. Instead, the policy only applies to projects located in areas *designated by the General Plan* as light industrial or heavy industrial areas.

Because the discretionary FAR increase does not apply to development on land designated by the General Plan as Low-Intensity Office/R&D, and the Project exceeds the applicable maximum FAR for that land use designation, the Project is inconsistent with the General Plan. Therefore, the Architectural Committee cannot find that the design and location of the Project is such that it is keeping with the character of the neighborhood and is not be detrimental to the harmonious development contemplated by the Zoning Ordinance and the General Plan.

2. Condition of Approval C6 Conflicts with General Plan Policy 5.3.1-P10

The Architectural Committee included a condition of approval that conflicts with the General Plan. Specifically, condition of approval C6 conflicts with Policy 5.3.1-P10 because it permits a replacement rate lower than what is required under the General Plan. Condition C6 states:

⁸⁰ City’s Responses to Comments at p. 13.

⁸¹ General Plan at p. 5-49 (emphasis added).

⁸² City’s Responses to Comments at p. 13.

Project site landscaping shall be maintained in good condition throughout the life of the Project and no trees shall be removed without City review and approval. Trees permitted by the City for removal shall be replaced at a 2:1 ratio with 24-inch box specimen tree, or equal alternative as approved by the Director of Community Development.⁸³

The clause permitting an “equal alternative as approved by the Director of Community Development”⁸⁴ conflicts with the Policy 5.3.1-P10, which requires “new development to provide street trees and a minimum 2:1 on- or off-site replacement rate for trees removed as part of the proposal to help increase the urban forest and minimize the heat island effect.”⁸⁵ The Project proposes to remove 12 protected trees from the Project site, but only anticipates adding 15 new trees. This conflicts with the 2:1 ratio required by Policy 5.3.1-P10, which would mandate the inclusion of at least 24 trees.

The General plan does not contain any exceptions to the 2:1 tree replacement ratio for protected trees. In fact, the City does not cite to any written authority supporting their contention that the Director of the Community Development Department has the discretion to approve a lower replacement rate. Instead, the City relies on an unwritten policy of “past practice.”⁸⁶

The City cannot rely on an unwritten rule, which facially conflicts with the General Plan. If the City desires to change the General Plan policies, then the City must propose an amendment to the General Plan and conduct environmental review pursuant to CEQA, just as it did when the City adopted Policy 5.3.1.-P10. Because the condition of approval conflicts with the General Plan, the Architectural Committee cannot find that the design and location of the Project is such that it is keeping with the character of the neighborhood and is not detrimental to the harmonious development contemplated by the Zoning Ordinance and the General Plan.

⁸³ Staff Report, attach. 1 at p. 2.

⁸⁴ *Ibid.*

⁸⁵ General Plan at p. 5-28.

⁸⁶ Initial Study at p. 57.

IV. REQUESTED RELIEF

We request that the Planning Commission grant this appeal and reverse the Architectural Committee's decision to adopt the MND and approve the Project. In addition, we request the City conduct further analysis of the Project's potentially significant environmental impacts in an environmental impact report. By doing so, the City and public can be sure all adverse environmental and public health impacts of the Project are adequately analyzed, disclosed, and mitigated.

Sincerely,



Andrew J. Graf
Associate

Attachment
AJG:acp



Planning and Inspection Department

Planning Division
1500 Warburton Avenue
Santa Clara, CA 95050
Ph: (408) 615-2450

Appeal Form

Instructions

Use this form to appeal a decision of the Architectural Review Committee or Planning Commission. **All appeals must be filed in the Planning Division within seven calendar days of the action being appealed.**

Appeals from the Architectural Review Committee are made to the Planning Commission and will be set for hearing on the next available Planning Commission agenda. Appeals from the Planning Commission are made to the City Council and will be placed on the subsequent City Council Agenda to set a hearing date. Please contact the Planning Division at the number listed above with any inquiries about the process.

Please print, complete, and sign this form before mailing or delivering to the City, along with the fee payment, and supporting documentation, letters, etc. (if any).

Appeal Fees

Appeal Fees are set by the Municipal Code of the City of Santa Clara and are subject to annual review. Please call the Planning Division for the current Appeal Fee. **Fee payment must be received by the City of Santa Clara before this form submittal can be certified as complete.**

Appeal fees may be paid by cash, check, or with VISA, MasterCard, or American Express, at the Permit Center at City Hall. Alternatively, checks or money orders made payable to City of Santa Clara can be mailed or delivered to Planning Division, City Hall, 1500 Warburton Avenue, Santa Clara, California 95050.

Appellant Declaration

Name: Adams Broadwell Joseph & Cardozo
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Phone number: (650) 589-1660
E-mail address: agraf@adamsbroadwell.com

In accordance with the provisions of the Municipal Code of the City of Santa Clara, I hereby appeal the following action of the:

Architectural Review Committee Planning Commission

at it's meeting of September 18, 2019
(date)

Agenda Item No.: 8.A

File No.(s): PLN2019-13745; CEQ2019-01071

Address:/APN(s): 2175 Martin Avenue, Santa Clara, CA ; APN 224-10-115

Appellant Statement

(If more space is required, attach a separate sheet of paper.)

Action being appealed:

Please see attached letter.

Reason for Appeal:

Please see attached letter.

Certification of Authenticity

Beware, you are subject to prosecution if you unlawfully submit this form. Under penalty of law, transmission of this form to the City of Santa Clara is your certification that you are authorized to submit it and that the information presented is authentic.



Signature of Appellant

9/25/2019

Date