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May 19, 2021

Via Email and Overnight Delivery

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Re: **Appeal to City Council re 1188 E 14th Street (PLN18-0036, APN 77-447-14-6, 77-447-7-1, 77-447-14-7, 77-447-15-6)**

Dear Ms. Miguel, Ms. Robustelli, Mr. Mogenson:

We are writing on behalf of East Bay Residents for Responsible Development ("East Bay Residents" or "Residents") to appeal the San Leandro Board of Zoning Adjustments' ("PC-BZA" or "Board of Zoning Adjustments") May 6, 2021 approval of the 1188 E 14th Street Project / Callan & E. 14th Street Project (PLN18-0036, APN 77-447-14-6, 77-447-7-1, 77-447-14-7, 77-447-15-6) (collectively, "Project") as well as the CEQA Infill Environmental Checklist ("CEQA Checklist") prepared for the Project by the City of San Leandro ("City") pursuant to the California Environmental Quality Act ("CEQA").[1] This Appeal is taken from the following actions[2]:

[1] Pub. Resources Code ("PRC") §§ 21000 et seq.; 14 Cal. Code Regs. ("CCR" or "CEQA Guidelines") §§ 15000 et seq.
[2] This appeal is also accompanied by payment of the appeal fee of $534.00 for the City Clerk and $568 for the Planning Department in accordance with the City of San Leandro Fee Schedule ("Appeal Fee"). Receipts documenting concurrent payment of the Appeal Fee are attached hereto as **Exhibit 1.**

1. PC-BZA's May 6, 2021 approval of Staff's environmental determination and approval of the CEQA Findings of Fact and Determinations for Approval of PLN18-0036 for the Project.
2. PC-BZA's May 6, 2021 related approval of the Project, including adoption of Resolution 2021-002, approval of a Conditional Use Permit ("CUP"), Site Plan Review for PLN18-0036, and Parking Exception, subject to the condition that the Project include solar panels, electric HVAC instead of gas, and ten inclusionary housing units instead of five units.
3. Any and all other May 6, 2021 actions taken by the PC-BZA to approve the Project.[3]

The Project, proposed by 14th & Callan Street Developer LLC ("Applicant"), includes the development of a 196-unit five-story mixed-use residential development with an approximately 23,000 square foot ("SF") supermarket and an approximately 5,600 SF ground floor retail space with 286-space parking garage located on the 1.6-acre site. The Project is located in the DA-1(S), Downtown Area 1 (Special Policy Area 3) zoning district. The Applicant originally proposed to provide five units of inclusionary housing. However, at the May 6, 2021 hearing, the Board of Zoning Adjustments ("Board") required that an additional five units of inclusionary housing be added to the Project.

This Appeal letter, and Resident's attached May 6, 2021 comments to the Board ("Comments") demonstrate that the Board's decision to approve the Project violated CEQA, zoning laws and the City's municipal codes, and was not supported by substantial evidence in the record. Specifically, our prior comments, as well as the comments of local residents and members of the public that were submitted to the Board, identified several flaws in the City's environmental analysis, and provided new information and substantial evidence demonstrating that the Project will have new and more significant impacts than previously analyzed in the City's 2035 General Plan Update Final Environmental Impact Report ("General Plan EIR") and the 2007 Downtown San Leandro Transit-Oriented Development Strategy EIR ("TOD EIR") and the San Leandro General Plan, and that these impacts will not be substantially mitigated by the Uniformly Applicable

[3] The PC-BZA's May 6, 2021 actions related to the Project were identified as Agenda Items 6.C and 6.D on the PC-BZA hearing agenda.

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Development Standards laid out in the 2006 General Plan EIR.[4] Additionally, at the May 6, 2021 hearing, Board members raised issues related to the Project's compliance with current Zoning Code requirements for inclusionary housing. These issues were not fully resolved by the Board prior to its approval of the Project.

The City's CEQA Infill Checklist purports to evaluate the Project's potential environmental impacts and consistency with these prior EIRs, and erroneously asserts that the Project is exempt from further CEQA review pursuant to the Qualified In-fill Exemption under Public Resources Code Section 21094.5 and CEQA Guidelines Section 15183.3. However, as explained in our Comments and more fully below, the CEQA Infill Checklist fails to disclose, analyze, and mitigate the Project's specific significant impacts, and new information shows that the effects will be more significant than described in the prior EIRs.[5]

The CEQA Infill Checklist failed to adequately disclose and mitigate the impacts of the Project, in violation of CEQA. The Board failed to resolve these deficiencies, and failed to remand the Project to Staff to prepare an Infill EIR, prior to approving the Project. The Board of Zoning Adjustments lacked substantial evidence to support its decision to approve the Project. As explained herein, the City Council should vacate the Board's approvals and remand the Project to Staff to prepare a legally adequate EIR before the Project can be presented to City decisionmakers for approval.[6]

This Appeal letter and its attachments raise the issues that are contested on appeal, and address issues and evidence that was previously presented to the Board of Zoning Adjustments prior to its approval of the Project. We previously filed comments on the Project on May 6, 2021 with the assistance of technical experts Matt Hagemann and Paul E. Rosenfeld, Ph.D. of Soil Water Air Protection Enterprises ("SWAPE"), Daniel T. Smith, Jr., P.E., principal at Smith Engineering & Management and Deborah Jue, acoustics, noise and vibration expert of Wilson Ihrig.[7] Our members submitted oral comments at the May 6, 2021 Board meeting regarding the hazardous materials in the soil and groundwater on the Project site,

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[4] Environmental Impact Report San Leandro General Plan Update, SCH# 2001092001, November, 2001, p. III.K-8.
[5] 14 Cal. Code Regs. § 15183.3.
[6] PRC § 21094.5(a); 14 CCR § 15164(e); see *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal. 3d 506, 515.
[7] East Bay Residents' May 6, 2021 written comments to the Board of Zoning Adjustments are attached hereto as **Exhibit 2** and incorporate by reference.

as well as the unmitigated health risk, air quality and greenhouse gas emissions from the Project. Residents' prior comments are incorporated by reference herein, and support this Appeal.

East Bay Residents urges the City Council to grant this Appeal and remand the Project to City Staff to prepare an Infill EIR for the Project. The Project should not be rescheduled for a further public hearing until these issues have been addressed. East Bay Residents reserves the right to submit supplemental comments and evidence at any later hearings and proceedings related to the Project, in accordance with State law.[8]

I. STATEMENT OF INTEREST

East Bay 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 and public service impacts of the Project. The association includes San Leandro residents Gene Jones, Anthony Haynes, and Mario Oliveira, UA Plumbers and Pipefitters Local 342, International Brotherhood of Electrical Workers Local 595, Sheet Metal Workers Local 104, Sprinkler Fitters Local 483, their members and families, and other individuals that live and/or work in the City of San Leandro and Alameda County.

Individual members of East Bay Residents and its affiliated labor organizations live, work, recreate and raise their families in Alameda County, including in the City of San Leandro. 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.

The organizational members of East Bay Residents also have 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

[8] Gov. Code § 65009(b); PRC § 21177(a) (allowing members of the public to submit additional evidence to the lead agency regarding a project's CEQA compliance "until the close of the final hearing on the project"); *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.

businesses to locate and people to live there. Indeed, continued degradation can, and has, caused restrictions on growth that reduce future employment opportunities. Finally, East Bay Residents members are concerned about projects that present environmental and land use impacts without providing countervailing economic and community benefits.

I. LEGAL BACKGROUND

CEQA has two basic purposes, neither of which is satisfied by the CEQA Analysis. First, CEQA is designed to inform decision makers and the public about the potential, significant environmental impacts of a project before harm is done to the environment.[9] The EIR is the "heart" of this requirement.[10] The EIR has been described as "an environmental 'alarm bell' whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return."[11]

To fulfill this function, the discussion of impacts in an EIR must be detailed, complete, and reflect a good faith effort at full disclosure."[12] An adequate EIR must contain facts and analysis, not just an agency's conclusions.[13] CEQA requires an EIR to disclose all potential direct and indirect, significant environmental impacts of a project.[14]

Further, CEQA directs public agencies to avoid or reduce environmental damage when possible by requiring imposition of mitigation measures and by requiring the consideration of environmentally superior alternatives.[15] If an EIR identifies potentially significant impacts, it must then propose and evaluate mitigation measures to minimize these impacts.[16] CEQA imposes an affirmative obligation on agencies to avoid or reduce environmental harm by adopting feasible

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[9] 14 Cal. Code Regs. § 15002(a)(1) ("CEQA Guidelines"); *Berkeley Keep Jets Over the Bay v. Bd. of Port Comm'rs.* (2001) 91 Cal.App.4th 1344, 1354 ("*Berkeley Jets*"); *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.
[10] *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 84.
[11] *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.
[12] CEQA Guidelines § 15151; *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 721-722.
[13] *See Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 568.
[14] Pub. Resources Code § 21100(b)(1); CEQA Guidelines § 15126.2(a).
[15] CEQA Guidelines § 15002(a)(2) and (3); *Berkeley Jets,* 91 Cal.App.4th at 1354; *Laurel Heights Improvement Ass'n v. Regents of the University of Cal.* (1998) 47 Cal.3d 376, 400.
[16] Pub. Resources Code §§ 21002.1(a), 21100(b)(3).

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project alternatives or mitigation measures.[17] Without an adequate analysis and description of feasible mitigation measures, it would be impossible for agencies relying upon the EIR to meet this obligation.

Under CEQA, an EIR must not only discuss measures to avoid or minimize adverse impacts, but must ensure that mitigation conditions are fully enforceable through permit conditions, agreements or other legally binding instruments.[18] A CEQA lead agency is precluded from making the required CEQA findings unless the record shows that all uncertainties regarding the mitigation of impacts have been resolved; an agency may not rely on mitigation measures of uncertain efficacy or feasibility.[19] This approach helps "ensure the integrity of the process of decision by precluding stubborn problems or serious criticism from being swept under the rug."[20]

Following preliminary review of a project to determine whether an activity is subject to CEQA, a lead agency is required to prepare an initial study to determine whether to prepare an EIR or negative declaration, identify whether tiering or another appropriate process can be used for analysis of the project's environmental effects, or determine whether a previously prepared CEQA document could be used for the project, among other purposes.[21] The initial study must accurately describe the project, identify the environmental setting, identify environmental effects and show "some evidence" to support those conclusions, and a discussion of ways to mitigate the significant effects of the project, if any.[22] CEQA requires an agency to analyze the potential environmental impacts of its proposed actions in an EIR except in certain limited circumstances.[23] A negative declaration may be prepared instead of an EIR when, after preparing an initial study, a lead agency determines that a project "would not have a significant effect on the environment."[24] If the project has potentially significant environmental effects but those effects can be reduced to a level of insignificance by mitigation measures that the project's

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[17] *Id.*, §§ 21002-21002.1.
[18] CEQA Guidelines § 15126.4(a)(2).
[19] *Kings County Farm Bur. v. County of Hanford* (1990) 221 Cal.App.3d 692, 727-28 (a groundwater purchase agreement found to be inadequate mitigation because there was no record evidence that replacement water was available).
[20] *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 935.
[21] CEQA Guidelines §§ 15060, 15063(c).
[22] CEQA Guidelines § 15063(d) (emphasis added).
[23] *See, e.g.,* Pub. Resources Code § 21100.
[24] *Quail Botanical Gardens v. City of Encinitas* (1994) 29 Cal.App.4th 1597; Pub. Resources Code § 21080(c).

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proponent has agreed to undertake, the lead agency may prepare a mitigated negative declaration ("MND").[25]

This appeal is file pursuant to Title 5 of the San Leandro Zoning Code Chapter 5.04 which provides, decisions by Board of Zoning Adjustments may be appealed to the City Council.[26] An appeal shall be initiated within 15 days of the date of the decision.[27] Here, the appeal period ends on May 21, 2021. This Appeal is timely filed within the time authorized by the Code.

A. CEQA Infill Exemption

The Board of Zoning Adjustments relied on a narrow CEQA exemption that allow approval of projects without an EIR in very narrow circumstances, CEQA Section 21094.5[28] and CEQA Guidelines Section 15183.3 ("Infill Exemption").[29] The Infill Exemption provides that, if an EIR was previously certified for a planning level decision of a city or county, subsequent CEQA review may be limited to evaluating a project's effects on the environment that are either (A) specific to the project or to the project site and were not addressed as significant effects in the prior environmental impact report or (B) where substantial new information shows the effects will be more significant than described in the prior environmental impact report.[30] The Infill Exemption allows a lead agency to forego preparation of an EIR if neither of these situations occur, or if the lead agency determines that uniformly applicable development policies or standards adopted by the agency will substantially mitigate the new effects. A lead agency's determination pursuant to this section must be supported by substantial evidence.[31]

As discussed in our Comments and below, there is substantial new information demonstrating that the Project is likely to result in significant effects related to hazardous materials, health risk, air quality, greenhouse gas emissions, noise, and transportation that are not mitigated, let alone substantially mitigated, by the City's standard conditions of approval. These impacts require that an EIR be prepared.

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[25] Pub. Resources Code § 21080 (c)(2); 14 CCR § 15064(f)(2).
[26] San Leandro Zoning Code § 5.20.100.
[27] San Leandro Zoning Code § 5.20.108(A).
[28] Pub. Res. Code § 21094.5.
[29] 14 Cal. Code Regs. § 15183.3.
[30] Pub. Res. Code § 21094.5(a); 14 Cal. Code Regs. § 15183.3(a), (c).
[31] Pub. Res. Code § 21094.5(a).

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Additionally, under the City's Zoning Code, in order to approve a CUP, the Board of Zoning Adjustments was required to determine "on the basis of the application, plans, materials, and testimony submitted… [t]hat the proposed location of the use and the proposed conditions under which it would be operated or maintained will be consistent with the General Plan; will not be detrimental to the public health, safety or welfare of persons residing, or working in, or adjacent to, the neighborhood of such use; and will not be detrimental to the properties or improvements in the vicinity, or to the general welfare of the City."[32] Further, the Zoning Code requires that the Board may approve a use permit if the Board finds that "That the proposed use will not create adverse impacts on traffic or create demands exceeding the capacity of public services and facilities, which cannot be mitigated."[33] There is substantial evidence demonstrating that the Project will be detrimental to the public health, safety and the general welfare of San Leandro residents, and that the Project would create adverse impacts that were not adequately analyzed in the Checklist. These impacts render the Project inconsistent with mandatory Zoning Code requirements, resulting in an additional CEQA violation.[34] The Board, therefore, should not have approved this Project without first mitigating such impacts in an Infill EIR. The City Council must remand this Project to Staff to complete a thorough environmental review in an Infill EIR in order to satisfy CEQA.

B. Subsequent CEQA Review

CEQA Guidelines § 15183.3(d)(2)(C) requires that "If the infill project would result in new specific effects or more significant effects, and uniformly applicable development policies or standards would not substantially mitigate such effects, those effects are subject to CEQA. With respect to those effects that are subject to CEQA, the lead agency shall prepare an infill EIR if the written checklist shows that the effects of the infill project would be potentially significant. In this circumstance, the lead agency shall prepare an infill EIR."[35]

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[32] San Leandro Zoning Code § 5.08.124(A)(2).
[33] *Id.* at § 5.08.124(A)(4).
[34] Under CEQA, a significant environmental impact results if there is a conflict with any land use plan, policy, or regulation adopted for the purpose of avoiding or mitigating an environmental effect. *Pocket Protectors v. Sacramento* (2005) 124 Cal.App.4th 903; *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 783-4 (Project's inconsistencies with local plans and policies constitute significant impacts under CEQA).
[35] CEQA Guidelines § 15183.3(d)(2)(C).

An Infill EIR must be prepared for this Project, based on the limitations in Public Resources Code section 21094.5(b), because the Project includes new specific effects, and the significant effects of the infill project were not address in the prior EIR, and are more significant than the effects addressed in the prior EIR.[36] A new specific effect may result if, for example, the prior EIR stated that sufficient site-specific information was not available to analyze the significance of that effect.[37] Here, the new specific effects include: air quality; hazardous materials; health risk; noise; and greenhouse gas emissions.

Further, additional review is required to explain whether substantial new information shows that the adverse environmental effects of the infill project are more significant than described in the prior EIR. "More significant" means an effect will be substantially more severe than described in the prior EIR.[38] More significant effects include those that result from changes in circumstances or changes in the development assumptions underlying the prior EIR's analysis.[39] An effect is also more significant if substantial new information shows that: (1) mitigation measures that were previously rejected as infeasible are in fact feasible, and such measures are not included in the project; (2) feasible mitigation measures considerably different than those previously analyzed could substantially reduce a significant effect described in the prior EIR, but such measures are not included in the project; or (3) an applicable mitigation measure was adopted in connection with a planning level decision, but the lead agency determines that it is not feasible for the infill project to implement that measure.[40]

Here, the City must prepare an Infill EIR because the Project would result in new specific effects and more significant effects, and uniformly applicable development standards would not substantially mitigate such effects.[41]

When a previously approved project for which an EIR or an MND has been prepared is modified, CEQA requires the lead agency to conduct subsequent or supplemental environmental review when one or more of the following events occur:

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[36] CEQA Guidelines § 15183.3(d)(1)(C).
[37] CEQA Guidelines § 15183.3(d)(1)(C).
[38] *Id.* at § 15183.3(d)(1)(D).
[39] *Id.*
[40] *Id.*
[41] CEQA Guidelines § 15183.3(d)(2)(C).

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(a) Substantial changes are proposed in the project which will require major revisions of the environmental impact report;
(b) Substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the environmental impact report; or
(c) New information, which was not known and could not have been known at the time the environmental impact report was certified as complete, becomes available.[42]

In assessing the need for subsequent or supplemental environmental review, the lead agency must determine, on the basis of substantial evidence in light of the whole record, if one or more of the following events have occurred:

(1) Substantial changes are proposed in the project which will require major revisions of the previous EIR due to the involvement of new significant effects or a substantial increase in the severity of previously identified effects;
(2) Substantial changes occur with respect to the circumstances under which the project is undertaken which will require major revisions of the previous EIR due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects; or
(3) New information of substantial importance, which was not known and could not have been known with the exercise of reasonable diligence at the time the previous EIR was certified as complete or the negative declaration was adopted, shows any of the following:

    (A) The project will have one or more significant effects not discussed in the previous EIR or negative declaration;
    (B) Significant effects previously examined will be substantially more severe than shown in the previous EIR;
    (C) Mitigation measures or alternatives previously found not to be feasible would in fact be feasible, and would substantially reduce one or more significant effects of the project, but the project proponents decline to adopt the mitigation measure or alternative; or
    (D) Mitigation measures or alternatives which are considerably different from those analyzed in the previous EIR would substantially reduce

[42] Pub. Resources Code § 21166; CEQA Guidelines § 15162.

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> one or more significant effects on the environment, but the project proponents decline to adopt the mitigation measure or alternative.[43]

Only where ***none*** of the conditions described above calling for preparation of a subsequent or supplemental EIR have occurred may the lead agency consider preparing a subsequent negative declaration, an addendum or no further documentation.[44] The decision must be supported by substantial evidence.[45]

"Substantial evidence" under CEQA means "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."[46] Further, "[w]hether a fair argument can be made that the project may have a significant effect on the environment is to be determined by examining the whole record before the lead agency. Argument, speculation, unsubstantiated opinion or narrative, evidence which is clearly erroneous or inaccurate, or evidence of social or economic impacts which do not contribute to or are not caused by physical impacts on the environment does not constitute substantial evidence."[47] Substantial evidence "shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts."[48] Here, the Board's decision to approve the Project violated CEQA, land use laws and the City's municipal codes, and was not supported by substantial evidence in the record.

II. THE CITY COUNCIL MUST PREPARE AN INFILL EIR BECAUSE THE PROJECT WILL RESULT IN NEW AND MORE SIGNIFICANT EFFECTS AND UNIFORMLY APPLICABLE DEVELOPMENT POLICIES DO NOT SUBSTANTIALLY MITIGATE SUCH EFFECTS

CEQA Guidelines § 15183.3(d)(2)(C) requires that "If the infill project would result in new specific effects or more significant effects, and uniformly applicable development policies or standards would not substantially mitigate such effects, those effects are subject to CEQA. With respect to those effects that are subject to CEQA, the lead agency shall prepare an infill EIR if the written checklist shows

[43] CEQA Guidelines §§ 15162(a)(1)-(3).
[44] CEQA Guidelines § 15162(b).
[45] *Id.* §§ 15162 (a), 15164(e), and 15168(c)(4).
[46] CEQA Guidelines § 15384(a).
[47] *Id.*
[48] *Id.* at § 15384(b).

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that the effects of the infill project would be potentially significant. In this circumstance, the lead agency shall prepare an infill EIR."[49]

Here, the City must prepare an Infill EIR because the Project would result in new specific effects and more significant effects to housing, air quality, health risk, hazardous materials, greenhouse gas emissions, noise, and traffic; and uniformly applicable development standards would not substantially mitigate such effects.[50]

A. The Project Will Cause New Significant and Unmitigated Housing Impacts

The failure to provide sufficient inclusionary housing in this Project violates the City's Zoning Ordinance. The San Leandro Zoning Code provides that projects with 50 or more units must provide 15% of total units as Inclusionary Units.[51] "Inclusionary Unit" means a dwelling unit that must be offered at Affordable Rent or available at an Affordable Housing Cost to moderate-, low- and very low-income Households.[52] At the current rate required by the Zoning Code, this Project would be required to include 29 inclusionary units.[53] But, the Board of Zoning Adjustment approved this Project with only ten inclusionary units.[54] This dearth of inclusionary housing is contrary to the goals set forth in the San Leandro Zoning Code and Housing Element.

Title 6 of the San Leandro Zoning Code provides that the purpose of the Inclusionary Housing Chapter is to:

> Offset the demand on housing that is created by new development and mitigate environmental and other impacts that accompany new residential and commercial development by protecting the economic diversity of the City's housing stock, reducing traffic, transit and related air quality impacts, promoting jobs/housing balance and reducing the demands placed on transportation infrastructure in the region; and

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[49] CEQA Guidelines § 15183.3(d)(2)(C).
[50] CEQA Guidelines § 15183.3(d)(2)(C).
[51] San Leandro Zoning Code §6.04.112(B).
[52] San Leandro Zoning Code §6.04.108(P).
[53] San Leandro Zoning Code §6.04.112(B).
[54] City of San Leandro, California, Planning Commission and Board of Zoning Adjustments, 5/6/2021 7:00 PM, Meeting Video available here: http://sanleandro.granicus.com/MediaPlayer.php?view_id=2&clip_id=1667.

> Increase the supply of affordable ownership and rental housing in San Leandro as identified in the established Housing Element Goal 53, Affordable Housing Development. Policy 53.04 of Goal 53 requires the inclusion of affordable housing in new housing developments. (Ord. 2020-002 § 4; Ord. 2004-023 § 3).[55]

The Zoning Code provides no exception to these requirements for properties purchased prior to the Inclusionary Housing requirements enactment. Exemptions from the rule are limited to:[56]

> A. The reconstruction of any structures that have been destroyed by fire, flood, earthquake or other act of nature.
> B. Developments that already have more units that qualify as affordable to moderate-, low- and very low-income Households than this chapter requires.
> C. Housing constructed by other government agencies.
> D. Accessory dwelling units.

Applicants are therefore not "grandfathered" in under the prior inclusionary housing requirements, as was stated at the Board of Zoning Adjustments May 6, 2021 hearing.[57] The Inclusionary Zoning requirement may therefore be retroactively applied to the Project.[58]

While there is a strong policy against construing statutes to be retroactive[59], there is no constitutional prohibition against retroactive legislation that does not impair contract or vested rights.[60] "It is well settled that [a] new ordinance may operate retroactively to require a denial of the application, or the nullification of a permit already issued, provided that the applicant has not already engaged in substantial building or incurred expenses in connection therewith."[61] Further, "[t]here is no law of California to prevent the enforcement of a retroactive measure

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[55] San Leandro Zoning Code § 6.04.100.
[56] San Leandro Zoning Code § 6.04.116.
[57] City of San Leandro, California, Planning Commission and Board of Zoning Adjustments, 5/6/2021 7:00 PM, Meeting Video *available here:* http://sanleandro.granicus.com/MediaPlayer.php?view_id=2&clip_id=1667.
[58] See *Melton v. City of San Pablo* (1967) 252 Cal. App. 2d 794.
[59] *Aetna Cas. & Surety Co. v. Industrial Acc. Comm.*, 30 Cal.2d 388.
[60] McCann v. Jordan, 218 Cal. 577.
[61] *Id.* at 580; *Brougher* v. *Board of Public Works,* 205 Cal. 426; *Wheat* v. *Barrett,* 210 Cal. 193.

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so long as it does not result in impairing the obligations of a contract or interfere with vested rights existing prior to the enactment of the law."[62] In this case, the Project is not grandfathered out of compliance with the Zoning Code's Inclusionary Housing requirements, and the Project does not fall under any of the exceptions. The Project's failure to comply with Inclusionary Housing requirements is therefore a violation of the Zoning Code which the City must enforce. Following the filing of this Appeal, the Project's permits will not receive final approval unless or until they are approved by the City Council. There are therefore no vested rights related to the Project which would be impaired by retroactive application of the City's Inclusionary Housing requirements in response to this Appeal. If the City Council were to approve the Project without requiring the full number of inclusionary housing units set forth in the Zoning Code, it would increase the deficit of affordable housing in the City, to the detriment of the City and the welfare of its residents. It could also cause the City to fall farther behind in meeting State RHNA requirements related to affordable housing. The City Council should retroactively apply these requirements to the Project to require the full number of inclusionary housing.

The Board of Zoning Adjustments voted to increase the number of inclusionary housing units at the May 6, 2021 hearing from five to ten.[63] If the Board of Zoning Adjustments felt it appropriate to change the number of inclusionary units from five to ten, in the best interest of the people of San Leandro, then the City Council should act in line with the Board, and in compliance with the Zoning Code, and require an additional 19 inclusionary units be added to the Project. The San Leandro City Council should not approve the Project without bringing the Project up to modern day standards for inclusionary housing. The Project should, therefore, add an additional 19 inclusionary units to provide the required 29 units of inclusionary housing under the Zoning Code.

B. The Project Will Cause New Significant and Unmitigated Air Quality Impacts

The decision by the Board of Zoning Adjustments to approve the Project violated CEQA and San Leandro Zoning Code Section because the Checklist failed to accurately analyze the Project's construction and operational air quality

[62] Roth Drug, Inc., v. Johnson (1936) 13 Cal.App.2d 720; *City of Los Angeles* v. *Oliver,* 102 Cal.App. 299, 309; *McCann* v. *Jordan,* (1933) 218 Cal. 577.
[63]

emissions as well as the public health risks to the surrounding community from exposure to toxic air contaminants ("TACs") generated by the Project, which are new or more severe than previously analyzed.

The Checklist and the 2035 General Plan EIR were inconsistent in their analysis of air quality impacts. The Checklist determined the Air Quality impacts would be less than significant, but the General Plan EIR determined they would be significant and unavoidable.

Our experts determined the Project's construction and operational emissions are underestimated, and therefore the Board's approval of the Project was not based on substantial evidence in violation of CEQA. Further, SWAPE determined that the Checklist's calculation regarding off-road vehicles is not supported by substantial evidence.[64] SWAPE also determined that the Checklist underestimated the Project's mobile source operational emissions. The Project's mobile-source emissions may constitute a new and potentially significant impact in the Project, that was not addressed or mitigated in the prior EIR. An Infill EIR is required to remedy these significant construction and operational emission analysis deficiencies, in order to adequately mitigate such issues prior to Project approval by the City Council.

The Project's air quality impacts remain unmitigated. The Project is not consistent with the General Plan because General Plan Policy 31.04 provides that the City must "Require new development to be designed and constructed in a way that reduces the potential for future air quality problems, such as odors and the emission of any and all air pollutants."[65] The Board therefore cannot approve the Conditional Use Permit due to the inconsistency with the General Plan policy. Further, the mitigation measures presented in the General Plan and Checklist would not substantially mitigate the impacts of the Project.

The Checklist approved by the Board does not ensure that best available control technologies are used for operations that could generate air pollutants as required by General Plan Policy EH-3.4.[66] Further, the use of Tier-4 Interim mitigation measures does not constitute sufficient mitigation. As SWAPE describes in their comments, Tier 4 Interim measures do not constitute adequate mitigation

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[64] SWAPE Comments, p. 7.
[65] General Plan p. 7-49.
[66] General Plan p. 7-49.

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because they do not go above-and-beyond existing laws, regulations, and requirements that would reduce environmental impacts.[67] Tier 4 Interim measures would already be considered part of the Project, as the Checklist states they are required by the EPA. But, CEQA requires that mitigation measures are measures which are not part of the original project design. In *Trisha Lee Lotus et al. v. Department of Transportation et al.* the court held that "[b]y compressing the analysis of impacts and mitigation measures into a single issue, the EIR disregards the requirements of CEQA."[68]

But, as our experts at SWAPE determined, the Tier 4 Interim measures are not within the mitigation monitoring and reporting plan ("MMRP").[69] As such, these mitigation measures are not enforceable. "As Tier 4 Interim construction equipment is not formally included as a mitigation measures, we cannot guarantee that Tier 4 Interim emission standards would be implemented, monitored, and enforced on the Project site. Thus, the model's assumption that the entire off-road construction fleet would meet Tier 4 interim emission standards is incorrect."[70] The Checklist's air quality analysis is therefore not based on substantial evidence. An Infill EIR must be prepared to remedy this inadequacy and adequately analyze and mitigate air quality impacts prior to Project approval by the City Council.

C. The Project Will Cause New Significant and Unmitigated Health Risk Impacts

The Board of Zoning Adjustments approved this Project in violation of CEQA and San Leandro Zoning Code Section 5.08.124(A)(2) which prohibits the Board of Zoning Adjustments from approving a Use Permit where the Project would be detrimental to the general welfare of the City.[71] Here, the Project exceeds allowable Cancer Risk thresholds. The Project's unmitigated construction health risk assessment indicates that the Project would pose an excess cancer risk of 54.7 in one million to people living nearby.[72] This health risk exceeds the BAAQMD

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[67] SWAPE Comments, p. 12; "CEQA Portal Topic Paper Mitigation Measures." AEP, February 2020, *available at:* https://ceqaportal.org/tp/CEQA%20Mitigation%202020.pdf, p. 5.
[68] Lotus v. Department of Transportation (2014) 223 Cal.App.4th 645,656.
[69] SWAPE Comments p. 13.
[70] SWAPE Comments p. 13.
[71] San Leandro Zoning Code Section 5.08.124(A)(2).
[72] Checklist p. 4-17, Table 4-3.

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significance threshold of 10 in one million, and shonld have been disclosed as a significant impact in the Checklist, but was not.[73]

The Checklist conflates analysis and mitigation hy concluding that impacts would be less than significant because Uniformly Applicable Development Policies would decrease cancer risk impacts to the off-site residential MER from 54.7 in a million to 4.9 in a million.[74] This is an additional CEQA violation.[75]

In light of the inadequate health risk analysis presented in the Checklist, SWAPE conducted their own health risk analysis using the Project's construction and operational emissions, as seen in the table below.[76]

The Closest Exposed Individual at an Existing Residential Receptor

Activity	Duration (years)	Concentration (ug/m3)	Breathing Rate (L/kg-day)	ASF	Cancer Risk with ASFs*
Construction	0.25	*	361	10	*
3rd Trimester Duration	***0.25***			***3rd Trimester Exposure***	
Construction	1.42	*	1090	10	*
Operation	0.58	0.3138	1090	10	2.6E-05
Infant Exposure Duration	***2.00***			***Infant Exposure***	***2.6E-05***
Operation	14.00	0.3138	572	3	8.2E-05
Child Exposure Duration	***14.00***			***Child Exposure***	***8.2E-05***
Operation	14.00	0.3138	261	1	1.3E-05
Adult Exposure Duration	***14.00***			***Adult Exposure***	***1.3E-05***
Lifetime Exposure Duration	**30.00**			**Lifetime Exposure**	**1.2E-04**

* Construction-related cancer risk calculated separately in the Checklist.

[73] Checklist, p. 4-18, concluding that construction-related health impacts would be less than significant.
[74] Checklist, p. 4-18.
[75] *Lotus v. Dep't of Transp.* (2014) 223 Cal. App. 4th 645, 651-52.
[76] SWAPE Comments p. 21

As demonstrated in the table above, SWAPE estimated the excess cancer risk of approximately 124.9 in one million over the course of a residential lifetime from Project construction and operation combined.[77] The infant, child, adult, and lifetime cancer risks all exceed the BAAQMD threshold of 10 in one million, thus resulting in a potentially significant impact which is more severe than the health risk identified in the Checklist, and was not previously addressed in the General Plan EIR or the Checklist.

SWAPE concluded that the screening-level health risk analysis ("HRA") demonstrates that construction and operation of the Project could result in a potentially significant health risk impact, when correct exposure assumptions and up-to-date, applicable guidance are used.[78] SWAPE further explains that the Checklist contains no mitigation to address the Project's operational health risk, and that the Project's construction-related health risk would not be substantially mitigated by the Uniformly Applicable Development Policies because the Checklist applied Tier 4 Interim emissions reductions in its health risk modeling which is not required by the City's Standard Conditions of Approval. Thus, the Project's health risk remains significant and unmitigated.

Since SWAPE's screening-level HRA indicates a potentially significant impact, the City should prepare an Infill EIR with an HRA which makes a reasonable effort to connect the Project's air quality emissions and the potential health risks posed to nearby receptors. Thus, the City should prepare an updated, quantified air pollution model as well as an updated, quantified refined HRA which adequately and accurately evaluates health risk impacts associated with both Project construction and operation.[79]

General Plan Action EH-3.4.B requires a Health Risk Assessment for projects near freeways and high-volume roadways, as here. But the health risk analysis in the Checklist fails to satisfy General Plan requirements.[80] Additionally, SWAPE determined that without making a reasonable effort to connect the Project's operational TAC emissions to the potential health risks posed to nearby receptors, the Project is inconsistent with CEQA's requirement to correlate the increase in TAC emissions with potential adverse impacts on human health.[81] SWAPE

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[77] SWAPE Comments p. 21.
[78] SWAPE Comments p. 22.
[79] *Id.*
[80] SWAPE Comments p. 18.
[81] SWAPE Comments p. 17.

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recommends that an analysis of health risk impacts posed to nearby sensitive receptors from Project operation be included in a full CEQA analysis for the Project.[82]

The Cancer Risk for this Project exceeds allowable thresholds. As analyzed above, the health risk analysis in the Checklist is inadequate under CEQA, an Infill EIR must be prepared to adequately analyze and mitigate the impacts to human health from this Project.

D. The Project Will Cause New Significant and Unmitigated Hazardous Materials Impacts

The Project site has a history of contamination from the site's former use as an auto repair facility and a dry cleaner and from the nearby gas station which stores petroleum in underground storage tanks.[83] The Project may remain contaminated by hazardous materials and is listed on the Geotracker site (Cortese list),[84] which states[85]:

> The Phase II investigations indicate groundwater in the vicinity of the Site contains low levels of total petroleum hydrocarbons as diesel. Shallow soil samples collected at the Site had reported low levels of total petroleum hydrocarbons as diesel and motor oil and various metals; pesticides and lead were detected exceeding risk-based screening levels. Soil gas samples collected off-site exceeded commercial or residential risk-based screening levels for volatile organic compounds including benzene, tetrachloroethene, ethylbenzene, naphthalene and chloroform; soil gas samples collected on-Site exceeded commercial or residential risk-based screening levels for volatile organic compounds including benzene, tetrachloroethene, ethylbenzene, naphthalene, chloroform and vinyl chloride. The primary chemicals of potential concern identified during investigations conducted to date include volatile organic compounds (VOCs), lead, pesticides, and petroleum.

The Checklist fails to disclose the Project site's Cortese listing, and fails to disclose the existing contamination described on the Geotracker website. As

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[82] *Id.* at p. 18.
[83] Checklist p. 4-61.
[84] SWAPE Comments, pp. 1-4.
[85] 14th & Callan Redevelopment (T10000016541) 1120 E 14th Street (Former address)

SWAPE explains, the State Geotracker's description of contamination at the Project site is entirely inconsistent with the Checklist's conclusion that "the project site does not contain outstanding surface or subsurface recognized environmental conditions that require further investigation."[86] Absent mitigation, disturbance of contaminated soil during Project construction may release contaminants which could pose significant health and safety risks to workers and sensitive receptors near the Project site. This is a more significant impact than analyzed in the General Plan EIR, and is not disclosed in the Checklist, resulting in violations of CEQA's disclosure requirements. Moreover, to the extent the City relies on CEQA Guidelines exemption 15183.3, the Project site's presence on the Cortese list precludes reliance on the exemption.[87]

In order to approve a Conditional Use Permit, the Board of Zoning Adjustments must determine "on the basis of the application, plans, materials, and testimony submitted… [t]hat the proposed location of the use and the proposed conditions under which it would be operated or maintained will be consistent with the General Plan; will not be detrimental to the public health, safety or welfare of persons residing, or working in, or adjacent to, the neighborhood of such use; and will not be detrimental to the properties or improvements in the vicinity, or to the general welfare of the City."[88] The Checklist does not show, with substantial evidence, that the soil contamination onsite will not be detrimental to public health, safety or welfare of people living and working on the Project site.

General Plan Policy EH-5.2 provides for the clean-up of contaminated sites to "[e]nsure that the necessary steps are taken to clean up residual hazardous wastes on any contaminated sites proposed for redevelopment or reuse. Require soil evaluations as needed to ensure that risks are assessed and appropriate remediation is provided."[89] Here, appropriate remediation for onsite contamination has not been provided.

SWAPE concludes that the Checklist fails to adequately disclose and mitigate this potentially significant impact from hazardous materials, and identifies specific mitigation measures that should be incorporated into an EIR and mitigation plan for the Project to protect future occupants from exposure to contaminated soil vapor,

[86] SWAPE Comments, pp. 2-3; Checklist p. p. 4-63.
[87] Pub. Res. Code § 21084(d).
[88] San Leandro Zoning Code § 5.08.124(A)(2).
[89] General Plan p. 7-55.

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and to ensure removal of contaminated soil prior to Project construction. These mitigation measures must be included as binding mitigation in an Infill EIR.

E. The Project Will Cause New Significant and Unmitigated Greenhouse Gas Emission Impacts

In order to approve a Conditional Use Permit, the Board of Zoning Adjustments must determine "on the basis of the application, plans, materials, and testimony submitted… [t]hat the proposed location of the use and the proposed conditions under which it would be operated or maintained will be consistent with the General Plan; will not be detrimental to the public health, safety or welfare of persons residing, or working in, or adjacent to, the neighborhood of such use; and will not be detrimental to the properties or improvements in the vicinity, or to the general welfare of the City."[90] The excessive GHG emissions of this Project, absent adequate mitigation, would be detrimental to the public health, safety and welfare of San Leandro residents and would be detrimental to the general welfare of the City. The Board violated the Zoning Code in approving this Project.

SWAPE determined that the Checklist's conclusion that GHG emissions will be less than significant is not based on substantial evidence. SWAPE conducted accurate GHG modeling which found that the Project will exceed allowable thresholds of GHG emissions "thus resulting in a potentially significant impact not previously mitigated in the Checklist or General Plan EIR."[91] The GHG impact from this Project is therefore more significant than addressed in the prior EIR. The City Council and Staff must prepare an Infill EIR to adequately address and mitigate GHG emissions.

F. The Project Will Cause New Significant and Unmitigated Noise Impacts

Approval of the Project by the Board violated San Leandro Zoning Code Section 5.08.124(A)(2) which prohibits the Board of Zoning Adjustments from approving a Use Permit where the Project would be detrimental to the general welfare of the City.[92] Approval of the Project with unmitigated noise pollution would constitute a detriment to the general welfare of the City. The Checklist

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[90] San Leandro Zoning Code § 5.08.124(A)(2).
[91] SWAPE Comments p. 24.
[92] San Leandro Zoning Code Section 5.08.124(A)(2).

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concluded that noise impacts from construction, traffic, parking and truck loading, building mechanical equipment and rooftop deck would not be more significant than the impacts that were evaluated in the prior EIR.[93] This statement is not supported by substantial evidence because the Checklist and the General Plan EIR failed to provide a threshold of significance for noise impacts.[94] Therefore, the decision by the Board of Zoning Adjustments to approve the Project was not based on substantial evidence, in violation of CEQA.

The increased traffic resulting from Project construction and operation will constitute an exacerbation of noise impacts in the area and must be analyzed. It is not sufficient that the Checklist relies on the analysis in the 2035 General Plan EIR and the TOD EIR, because this Project will exacerbate existing noise impacts. An Infill EIR must be prepared to adequately analyze and mitigate the exacerbation of noise impacts from this Project.

Further, this Project contains noise impacts which were not mentioned or analyzed in either the Checklist or the General Plan EIR. Neither analysis mentions the refrigeration and ventilation equipment that may be required for a grocery store, nor the exhaust fans that may be required for a restaurant. Further, the Checklist and the General Plan EIR do not conduct any analysis about an emergency generator that may be required by the California Building Code for elevators onsite.[95] This type of emergency generator must be tested for an hour each month.[96] "Without proper equipment selection and mitigation design, these additional noise sources would possibly exceed the "normally acceptable" land use standards at nearby noise receptors."[97] This would constitute an environmental impact that is more significant than was represented in the General Plan EIR. An Infill EIR is therefore required to adequately analyze and mitigate the impacts from noise and vibration from construction and operation of this Project.

General Plan Action EH-7.5.A and EH7.5.B establish conditions of approval for projects likely to have noise and vibration impacts. But, Wilson Ihrig determined that the Uniformly Applicable Development Standards detailed in the General Plan would "likely be ineffective at reducing actual construction noise."[98] Additionally,

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[93] Checklist p. 4-90 - 92.
[94] Wilson Ihrig Comments p. 2.
[95] California Building Code 2016 § 3003.1.3.
[96] Wilson Ihrig Comments, p. 4.
[97] Wilson Ihrig Comments, p. 4.
[98] Wilson Ihrig Comments, p. 1.

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Wilson Ihrig determined that the Checklist lacks sufficient discussion of noise impacts and the corresponding necessary mitigation measures to assure the community that all rooftop and mechanical equipment will be designed to meet applicable land use standards.[99] Further, Wilson Ihrig determined that the noise impacts from refrigeration noise and other noise sources from the Project are missing from the analysis, and are therefore unmitigated. An Infill EIR is required to adequately analyze and mitigate noise impacts prior to Project approval by the City Council.

G. The Project Will Cause New Significant and Unmitigated Traffic Impacts

The Zoning Code provides that the Board may only approve a project if it determine "[t]hat the proposed use will not create adverse impacts on traffic or create demands exceeding the capacity of public services and facilities..."[100] The Project was approved by the Board in violation of the Zoning Code because the Project would create adverse impacts on traffic that are not adequately mitigated.

The Project will have significant new impacts from traffic. Our traffic expert Mr. Smith determined that the Project's non-residential component would create a significant transportation impact. The increased transportation impact would be an exacerbation of existing environmental conditions in San Leandro and requires adequate analysis under an Infill EIR.

The Project will generate significant levels of vehicle miles travelled ("VMT"). The statement that the Project would generate less VMT than the average in the area is not supported by substantial evidence.[101] Mr. Smith determined that the Checklist miscalculated the Project trip generation.[102] Absent this correct calculation, the City's traffic calculations are not supported by substantial evidence. Mr. Smith found that the "extra discounting on the residential trips in the PM peak eliminates 45 of the 71 (over 63 percent) of residential trips… the discount of residential trips amounts to almost 29 percent of the 156 net new PM peak hour trips that are ultimately assigned to the street system. So, this one error alone is sufficient to result in substantial understatement of the Project's impacts on PM

[99] Wilson Ihrig Comments, p. 4.
[100] San Leandro Zoning Code Section 5.08.124.
[101] Smith Comments p. 2.
[102] Smith Comments p. 2.

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peak hour delay/level of service and traffic queues."[103] Additionally, Mr. Smith found that the exit into Hyde Street for large trucks may constitute a safety issue that was not analyzed or mitigated in the Checklist. This discrepancy and the issues addressed in Mr. Smith's comments constitute inadequate traffic analysis and must be remedied in an Infill EIR to satisfy CEQA.

Further, Mr. Smith determined that the Project will have significant adverse impacts on traffic and create demands exceeding the capacity of public services and facilities[104], these cannot be mitigated by the proposed Uniformly Applicable Development Standards laid out in the General Plan.[105] Mr. Smith determined that the Checklist failed to disclose potentially significant cumulative effects that are specific to the Project, that were not analyzed, and are more severe than, the traffic issues raised in the General Plan EIR.[106] An Infill EIR must be prepared to adequately address and mitigate impacts from traffic prior to final Project approval by the City Council.

III. THE BOARD LACKED SUBSTANTIAL EVIDENCE TO MAKE THE REQUIRED FINDINGS TO APPROVE THE PROJECT UNDER THE ZONING CODE

Under the City's Zoning Code, in order to approve a CUP, the Board of Zoning Adjustments was required to determine "on the basis of the application, plans, materials, and testimony submitted… [t]hat the proposed location of the use and the proposed conditions under which it would be operated or maintained will be consistent with the General Plan; will not be detrimental to the public health, safety or welfare of persons residing, or working in, or adjacent to, the neighborhood of such use; and will not be detrimental to the properties or improvements in the vicinity, or to the general welfare of the City."[107] Further, the Zoning Code requires that the Board may approve a use permit if the Board finds that "That the proposed use will not create adverse impacts on traffic or create demands exceeding the capacity of public services and facilities, which cannot be mitigated."[108]

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[103] Smith Comments, p. 4.
[104] Smith Comments p. 6.
[105] General Plan Appendix A, p. 6-7.
[106] Smith Comments p. 6.
[107] San Leandro Zoning Code § 5.08.124(A)(2).
[108] *Id.* at § 5.08.124(A)(4).

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As discussed in our Comments and herein, there is substantial new information demonstrating that the Project is likely to result in significant effects related to hazardous materials, health risk, air quality, greenhouse gas emissions, noise, and transportation that are not mitigated, let alone substantially mitigated, by the City's standard conditions of approval. There is therefore substantial evidence demonstrating that the Project will be detrimental to the public health, safety and the general welfare of San Leandro residents, and that the Project would create adverse impacts that were not adequately analyzed or mitigated before the Board approved the Project. The Board, therefore, lacked substantial evidence to support its findings to approve the Project under the Zoning Code.

The City Council must remand this Project to Staff to complete a thorough environmental review in an Infill EIR in order to satisfy Zoning Code and State land use law requirements.

IV. THE CITY'S "AGREEMENT FOR PAYMENT OF PLANNING APPEAL FEES" VIOLATES APPELLANTS' DUE PROCESS RIGHTS

Pursuant to City Codes and the Appeal Fee Schedule, Residents were charged $568 for the Planning appeal fee and $534 for the City Clerk fee.[109] These Appeal fees were reasonable and are not contested by Residents.

However, in order to file this Appeal, Residents were also required to sign a form titled "Agreement For Payment Of Planning Appeal Fees" which purports to require Appellants to "pay all direct costs as listed in the City's adopted fee schedule for the review and processing of application(s) for the subject project" including but not limited to "hourly personnel charges plus a factor of 3.38 for benefits and administrative overhead; legal fees; communications via telephone or written correspondence with the appellant, property owner, architect, engineer, etc.; analysis and preparation of staff reports and findings; and attendance at public hearings."[110] The Form also purports to require the appellant to "hold the City harmless from all costs and expenses, including attorney's fees, incurred by the City or held to be the liability of the City in connection with the City's defense of its

[109] See Exhibit 1.
[110] See Exhibit 1, p. 2.

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actions in any proceeding brought in any State or Federal Court challenging the City's actions with respect to [the] project."[111]

Residents presumes that these terms on the Form are intended to apply to the applicant seeking entitlements from the City for a development project, and not to members of the public seeking to enforce the City's compliance with local, State, or federal land use and environmental laws, as Residents seek to do here. However, in the event that the City subsequently seeks to charge Residents or its representatives any of the above-described fees, Residents reserves its right to object to additional Appeal fees as a violation of Residents' due process rights to petition the government, and/or to pay any subsequent fees under protest.

If the City were to require appellants to pay undetermined fees and costs associated with an administrative appeal, as set forth in the Firm, the City would violate appellants' due process rights to a hearing. A party must first exhaust its administrative remedies before it can bring a lawsuit challenging a CEQA determination.[112] If an appeal of a CEQA decision is available to a higher administrative body and that remedy is not pursued, an action challenging the agency decision is therefore barred. For CEQA decisions made by a nonelected decision making body, CEQA specifically allows for appeals of these decisions to an agency's elected decision making body.[113] Agencies have the power to charge reasonable fees for filing administrative appeals of decisions.[114] However, such a fee cannot impose a burden upon the exercise of the due process right to a hearing.[115]

Here, if members of the public seek to challenge the Board's approval of the Project, they must appeal the Planning Commission's decision to the City Council, as required by the City's Zoning Code, as well as CEQA and State land use laws. Just as the statute did in *California Teachers Association*, if the City were to charge appellants for the entire (and, as yet, unknown) costs of both filing an administrative appeal, and of challenging any future project approval in court, the potentially substantial and unknown monetary obligation to challenge the City's decision to approve the Project will chill appellants' required exercise of a due process hearing in order to exhaust administrative remedies. It would also conflict

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[111] *Id.*
[112] Pub. Res. Code § 21177; *Tomlinson v. County of Alameda* (2012) 54 Cal.4th. 281, 291.
[113] See Pub. Res. Code § 21151(c).
[114] 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.
[115] *California Teachers Association v. State of California* (1999) 20 Cal. 4th 327, 331-32;

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with CEQA and mandamus statutory requirements which provide that agencies and the recipients of project approvals may not recover their attorneys fees from petitioners in lawsuits challenging the agency's approval of a project pursuant to CEQA, State land use and planning, or other environmental laws.

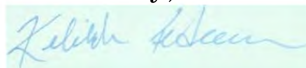
The threat of substantial monetary obligations on appellants would place too great a burden on the exercise of a due process right to a hearing that is required under CEQA in order to access the courts. Any attempt by the City to collect the costs identified on page 2 of the Form from Residents or other appellants would therefore constitute a due process violation.

V. CONCLUSION

The City cannot rely on the Infill Exemption for all the reasons stated in East Bay Residents May 6, 2021 Comments and herein including, but not limited to, unmitigated air quality, health risk, hazardous materials, greenhouse gas emissions, noise, traffic, and housing. The City must prepare an Infill EIR before the Project can be approved because the Project would result in new specific effects and more significant effects to air quality, health risk, hazardous materials, greenhouse gas emissions, noise, and traffic; and uniformly applicable development standards would not substantially mitigate such effects.[116]

Thank you for your consideration of these comments.

Sincerely,



Kelilah D. Federman
Associate Attorney

KDF:acp
Attachment

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[116] CEQA Guidelines § 15183.3(d)(2)(C).

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