

ADAMS BROADWELL JOSEPH & CARDOZO

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

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

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

kfederman@adamsbroadwell.com

SACRAMENTO OFFICE

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

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

KEVIN T. CARMICHAEL
CHRISTINA M. CARO
THOMAS A. ENSLOW
KELILAH D. FEDERMAN
RICHARD M. FRANCO
ANDREW J. GRAF
TANYA A. GULESSERIAN
DARIEN K. KEY
RACHAEL E. KOSS
AIDAN P. MARSHALL
TARA C. RENGIFO
MICHAEL R. SEVILLE

Of Counsel
MARC D. JOSEPH
DANIEL L. CARDOZO

April 26, 2022

Via Email and Overnight Mail

Dublin Planning Commission

Dawn Benson

Catheryn Grier

Renata Tyler

Janine Thalblum

Stephen Wright

Kashef Qaadri

City of Dublin

100 Civic Plaza

Dublin, CA 94568

Email:

PlanningCommission@ci.dublin.ca.us

Amy Million

Principal Planner,

City of Dublin

100 Civic Plaza

Dublin, CA 94568

Email: amy.million@dublin.ca.gov

Jeff Baker

Community Development Director

City of Dublin

100 Civic Plaza

Dublin, CA 94568

Email: jeff.baker@dublin.ca.gov

Re: Comments on Agenda Item 6.1 Inspiration Drive Memory Care and Assisted Living Projects (PLPA-2020-00044 and PLPA-2020-00045) (SCH Number 2021110251)

Dear Commissioners: Benson, Grier, Tyler, Thalblum, Write, Qaadri, Ms. Million, and Mr. Baker:

These comments are submitted on behalf of **East Bay Residents for Responsible Development** (“East Bay Residents”) regarding Agenda Item 6.1, Inspiration Drive Memory Care and Assisted Living Projects (PLPA-2020-00044 and PLPA-2020-00045) (SCH Number 2021110251) (collectively the “Project”), proposed by Steven Ring of Fulcrum Real Estate Development (“Applicant”) and regarding the 2021 Supplemental Mitigated Negative Declaration (“MND”) prepared by the City of Dublin (“City”) for the Project.¹

¹ City of Dublin Community Development Department, Initial Study Mitigated Negative Declaration, Inspiration Drive Memory Care and Assisted Living Facility Project PLPA-2020-00044 & PLPA-2020-00045 (“MND”).
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The Project proposes to develop a 55-bed memory care facility on Parcel 2 and an 84-bed assisted living facility on Parcel 3 of the Valley Christian Center (“VCC”) site. The Project site is located at Assessor Parcel Number (“APN”) 941-0022-003, 941-0022-004, 941-0022-005 and 941-0022-006 at 7500 Inspiration Drive in the City of Dublin, Alameda County, California. The site consists of four parcels, totaling 50.6 acres, which are part of the larger Valley Christian Center (“VCC”) site. Requested approvals include a Planned Development Rezoning with Stage 1 and Stage 2 Development Plans, Site Development Review Permits, a Street Vacation, and Tentative Parcel Map 11241. The General Plan designation for the Project site is Public/Semi-Public. Parcel 2 is located within the A (Agricultural) zoning District, both Parcels 2 and 3 are located within the Planned Development zoning district Ordinance No. 07-03.² The Project relies on analysis in the 2003 Valley Christian Center Expansion/Master Plan Project Environmental Impact Report (“VCC EIR”) and Mitigation Monitoring and Reporting Program (“VCC MMRP”)³ and the 2018 Supplemental Mitigated Negative Declaration (“2018 MND”).⁴

The Dublin Planning Commission should not recommend that the City Council approve the MND or the Project entitlements, because the MND fails to comply with CEQA, as shown herein.

We have reviewed the MND, its technical appendices, and reference documents with the assistance of East Bay Residents’ expert consultants whose comments and qualifications are attached. Based on our review of the MND, it is clear that the MND fails as an information document under CEQA and lacks substantial evidence to support its conclusions that the Project’s significant impacts would be mitigated to the greatest extent feasible.

There is also substantial evidence supporting a fair argument that the Project’s potentially significant environmental impacts are far more extensive than disclosed in the MND. East Bay Residents and their expert consultants have

² Dublin Planning Commission, April 26, 2022, Regular Meeting Agenda Packet. Available at: <https://d3n9y02raazwpg.cloudfront.net/dublin/b66f12f2-6db0-11ec-85e3-0050569183fa-ab7ea741-4587-411e-82f1-bcf7b0ec0e28-1650498883.pdf> (“Agenda Packet”).

³ Final Environmental Impact Report, Valley Christian Center Expansion Program, PA #00-017, SCH # 2002012070 (March 2003).

⁴ Supplemental Mitigated Negative Declaration / Initial Study, Valley Christian Center, Planning Application Number: PLPA-2014-00052 (June 8, 2018).

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identified numerous potentially significant impacts that the MND either mischaracterizes, underestimates, or fails to identify. Moreover, many of the mitigation measures described in the MND will not, in fact, mitigate impacts to the extent claimed.

We prepared these comments with the assistance of air quality and hazards expert Matt Hagemann P.G., C.Hg, and Paul E Rosenfeld, Ph.D. of Soil Water Air Protection Enterprises (“SWAPE”); and expert environmental biologist and wildlife ecologist Scott Cashen M.S.

SWAPE’s comments and curriculum vitae are attached hereto as Exhibit A.⁵ SWAPE concludes that the Project may result in potentially significant construction air emissions and health risk from exposure to toxic air contaminants (“TACs”) that were not adequately analyzed or mitigated in the MND. SWAPE also found the Project’s operational emissions may exceed significance thresholds and are not adequately mitigated.

Mr. Cashen’s comments and curriculum vitae are attached hereto as Exhibit B.⁶ Mr. Cashen concludes that the Project’s baseline analysis of existing sensitive natural communities is inaccurate and unsupported, rendering the MND inadequate under CEQA. Further, the MND fails to analyze and mitigate potentially significant impacts to special status plants and animals and fails to analyze and mitigate potentially significant impacts caused by habitat degradation and cumulative suburban sprawl. SWAPE’s and Mr. Cashen’s comment letters and all attachments thereto are incorporated by reference as if fully set forth herein.⁷

⁵ See **Exhibit A**, SWAPE, Comments on Inspiration Drive Memory Care Project (“SWAPE Comments”).

⁶ See **Exhibit B**, Scott Cashen, Comments on the Initial Study and Mitigated Negative Declaration for the Inspiration Drive Memory Care and Assisted Living Facility Project (April 23, 2022), (“Cashen Comments”).

⁷ East Bay Residents reserves the right to supplement these comments, and to file further comments at any and all future proceedings and hearings related to the Project. Gov. Code § 65009(b); PRC § 21177(a); *Bakersfield Citizens for Local Control v. Bakersfield* (“*Bakersfield*”) (2004) 124 Cal. App. 4th 1184, 1199-1203; see *Galante Vineyards v. Monterey Water Dist.* (1997) 60 Cal. App. 4th 1109, 1121.

I. STATEMENT OF INTEREST

East Bay Residents is an unincorporated association of individuals and labor organizations that may be adversely affected by the potential impacts associated with Project development. East Bay Residents includes the **International Brotherhood of Electrical Workers Local 595, Plumbers & Steamfitters Local 342, Sheet Metal Workers Local 104, Sprinkler Fitters Local 483** their members and their families, and other individuals that live and/or work in the City of Dublin and Alameda County. East Bay Residents supports sustainable development in the East Bay. Residents has a strong interest in enforcing the State's environmental laws that encourage sustainable development and ensure a safe working environment for its members.

Individual members of East Bay Residents and its member organizations include Dublin residents Gary Bonnitti, Devin Kettle, and Connor Smith. The individual members live, work, recreate, and raise their families in the City of Dublin and surrounding communities. Accordingly, 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 will be first in line to be exposed to any health and safety hazards that exist onsite.

In addition, East Bay Residents has an interest in enforcing environmental laws that encourage sustainable development and ensure a safe working environment for its members. Environmentally detrimental projects can jeopardize future jobs by making it more difficult and more expensive for business and industry to expand in the region, and by making the area less desirable for new businesses and new residents. Indeed, continued environmental degradation can, and has, caused construction moratoriums and other restrictions on growth that, in turn, reduce future employment opportunities.

II. LEGAL BACKGROUND

CEQA requires that lead agencies analyze any project with potentially significant environmental impacts in an EIR.⁸ "Its purpose is to inform the public and its responsible officials of the environmental consequences of their decisions *before* they are made. Thus, the EIR protects not only the environment, but also

⁸ See Pub. Resources Code § 21000; CEQA Guidelines § 15002.
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informed self-government.”⁹ 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.”¹⁰

CEQA’s purpose and goals must be met through the preparation of an EIR, except in certain limited circumstances.¹¹ 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 that standard, a lead agency “shall” 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.¹²

In contrast, a mitigated negative declaration may be prepared only when, after preparing an initial study, a lead agency determines that a project may have a significant effect on the environment, but:

- (1) revisions in the project plans or proposals made by, or agreed to by, the applicant before the proposed negative declaration and initial study are released for public review *would avoid the effects or mitigate the effects to a point where clearly no significant effect on the environment would occur,*
- and (2) there is *no substantial evidence* in light of the whole record before the public agency that the project, as revised, *may* have a significant effect on the environment.¹³

Courts have held that if “no EIR has been prepared for a nonexempt project, but substantial evidence in the record supports a fair argument that the project may result in significant adverse impacts, the proper remedy is to order preparation of an EIR.”¹⁴ The fair argument standard creates a “low threshold” favoring

⁹ *Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 564 (internal citations omitted).

¹⁰ *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

¹¹ See Pub. Resources Code § 21100.

¹² Pub. Resources Code §§ 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.

¹³ Pub. Resources Code § 21064.5 (emphasis added).

¹⁴ See, e.g., *Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 319-320.

environmental review through an EIR, rather than through issuance of a negative declaration.¹⁵ An agency's decision not to require an EIR can be upheld only when there is no credible evidence to the contrary.¹⁶

“Substantial evidence” required to support a fair argument is defined as “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 According to the CEQA Guidelines, when determining whether an EIR is required, the lead agency is required to apply the principles set forth in Section 15064, subdivision (f):

[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.

Furthermore, CEQA documents, including EIRs and MNDs, must mitigate significant impacts through measures that are “fully enforceable through permit conditions, agreements, or other legally binding instruments.”¹⁸ Deferring formulation of mitigation measures to post-approval studies is generally impermissible.¹⁹ Mitigation measures adopted after Project approval deny the public the opportunity to comment on the Project as modified to mitigate impacts.²⁰ If identification of specific mitigation measures is impractical until a later stage in the Project, specific performance criteria must be articulated and further approvals must be made contingent upon meeting these performance criteria.²¹ Courts have

¹⁵ *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 928; *Citizens Action to Serve All Students v. Thornley* (1990) 222 Cal.App.3d 748, 754.

¹⁶ *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th, 1307, 1318; see also *Friends of B Street v. City of Hayward* (1980) 106 Cal.App.3d 988, 1002 (“If there was substantial evidence that the proposed project might have a significant environmental impact, evidence to the contrary is not sufficient to support a decision to dispense with preparation of an EIR and adopt a negative declaration, because it could be ‘fairly argued’ that the project might have a significant environmental impact”).

¹⁷ CEQA Guidelines § 15384(a).

¹⁸ CEQA Guidelines § 15126.4(a)(2).

¹⁹ *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 308-309; Pub. Resources Code § 21061.

²⁰ *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1393; *Quail Botanical, supra*, 29 Cal.App.4th at p. 1604, fn. 5.

²¹ *Gentry*, 36 Cal.App.4th at 1393.

held that simply requiring a project applicant to obtain a future report and then comply with the report's recommendations is insufficient to meet the standard for properly deferred mitigation.²²

Public Resources Code Section 21093 and CEQA Guidelines Section 15152 authorize the use of tiered EIRs covering broader general matters planning or policy level actions at the programmatic level, followed by more project-specific matters in focused or site-specific EIRs or negative declarations.²³ CEQA Guidelines Section 15152 provides that "where an EIR [or negative declaration] has been prepared and certified for a program, plan, policy or ordinance consistent with the requirements of this section, any lead agency for a later project pursuant to or consistent with the program, plan, policy or ordinance should limit the [project-level] EIR or negative declaration on the later project to effects which: (1) were not examined as significant effects on the environment in the prior EIR; or (2) are susceptible to substantial reduction or avoidance by the choice of specific revisions in the project, by the imposition of conditions, or other means."²⁴

The MND explains that, pursuant to CEQA Guidelines Section 15152, the MND is tiered off of the VCC EIR, which evaluated proposed improvements to the existing VCC to include an expanded church, as well as a private school.²⁵ The MND also explains that it is tiered off of the 2018 Supplemental MND, which analyzed proposed changes to the VCC Master Plan.²⁶ The 2018 MND evaluated whether the proposed changes to the development program for the VCC program would result in any new or substantially more severe significant environmental impacts than those analyzed in the VCC EIR.²⁷ The MND discusses the Project's air quality, biological resources, and hazardous materials impacts at a project level, pursuant to CEQA Guidelines Section 15152(d), as effects that were not previously

²² *Id.*

²³ PRC § 21093; 14 CCR § 15152.

²⁴ 14 CCR § 15152(d).

²⁵ MND, p. 1.

²⁶ MND, p. 2.

²⁷ 2018 MND, p. 3.

analyzed at the project level in the VCC EIR or 2018 MND.²⁸ Accordingly, the issue of whether the MND's analysis and mitigation of these impacts is adequate, or whether an EIR is required, is subject to the fair argument standard.

Public Resources Code Section 21166 and CEQA Guidelines Section 15162 provide that when an environmental impact report or negative declaration has been prepared for a project, a subsequent or supplemental EIR is required where one or more of the following events occur:

- (a) Substantial changes are proposed in the project which will require major revisions of the EIR or Negative Declaration due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects;
- (b) Substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the EIR or Negative Declaration due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects; or
- (c) 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 EIR or Negative Declaration was certified as complete, becomes available that shows:
 - a. The project will have one or more significant effects not discussed in the previous EIR or negative declaration; Significant effects previously examined will be substantially more severe than shown in the previous EIR;
 - b. 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
 - c. Mitigation measures or alternatives which are considerably different from those analyzed in the previous EIR would substantially reduce one or more significant effects on the

²⁸ See e.g. MND, pp. 46-47 (VCC EIR did not quantify construction emissions, so MND includes emission modeling); p. 51 ("VCC EIR did not evaluate the potential of the VCC to expose sensitive receptors to substantial pollutant concentrations; therefore, the exposure of sensitive receptors to pollutant concentrations would be a new impact as compared to the project evaluated in the VCC EIR."); p. 55 (MND includes a project-level Biological Resources Analysis for the current project); VCC EIR, p. 4 (stating that hazardous materials was a "topic[] not addressed in the EIR").

environment, but the project proponents decline to adopt the mitigation measure or alternative.²⁹

The MND applies these subsequent review standards to its consideration of the Project's greenhouse gas ("GHG") and transportation / vehicle miles travelled ("VMT") impacts, due to the changes in CEQA legal requirements for to analysis of these impacts.³⁰

As shown herein, in addition to being new project-level impacts that were not evaluated in the VCC EIR, a subsequent or supplemental EIR ("supplemental EIR") is also required for the Project, rather than a supplemental MND, because the removal and relocation of the Conservation Easement on Parcel 3 constitutes substantial changes with respect to the circumstances under which the Project is being undertaken and should result in major revisions of the VCC EIR.

As explained herein, an EIR is required for the Project because there is substantial evidence supporting a fair argument that the Project has significant, unmitigated impacts that were not adequately disclosed and mitigated in the MND. The MND therefore fails to satisfy the basic purposes of CEQA. The MND fails to adequately disclose, investigate, and analyze the Project's potentially significant impacts, and fails to provide substantial evidence to conclude that impacts will be mitigated to a less than significant level. Because the MND lacks basic information regarding the Project's potentially significant impacts, the MND's conclusion that the Project will have a less than significant impact on the environment is unsupported.³¹ The City failed to gather the relevant data to support its finding of no significant impacts. Moreover, substantial evidence shows that the Project may result in potentially significant impacts. Therefore, a fair argument can be made that the Project may cause significant impacts requiring the preparation of an EIR.

III. THE MND FAILS TO PROVIDE A COMPLETE AND ACCURATE BASELINE

The MND fails to adequately describe the environmental setting against which the Project's environmental impacts are to be measured for several critical aspects of the Project. This contravenes the fundamental purpose of the environmental review process, which is to determine whether there is a potentially substantial, adverse change compared to the existing setting. CEQA requires an

²⁹ PRC § 21166; 14 CCR § 15162.

³⁰ See e.g. MND, pp. 92, 152.

³¹ PRC § 21064.5.

Initial Study to include an accurate and complete identification of the environmental setting.³² A lead agency thus must include a description of the physical environmental conditions, or “baseline,” in the vicinity of the project as they exist at the time environmental review commences.³³ As the courts have repeatedly held, the impacts of a project must be measured against the “real conditions on the ground.”³⁴ The description of the environmental setting constitutes the “baseline” physical conditions against which the lead agency assesses the significance of a project’s impacts.³⁵ The MND fails to rely on expert opinion supported by facts, technical studies or other substantial evidence to document its findings related to the environmental baseline.³⁶

A. The MND Fails to Provide Sufficient Baseline Information on Hazards and Hazardous Materials

The MND fails to provide a complete and accurate description of the Project’s environmental setting related to hazards and hazardous materials, and thus, the MND’s impact assessment for impacts to hazards are inadequate.

The VCC EIR did not analyze hazardous materials impacts at all, thus the City must perform a project-level analysis of these impacts for the Project.³⁷ The MND states that it reviewed the Cortese List (the California Department of Toxic Substances’ list of hazardous waste facilities subject to corrective action as part of the Health and Safety Code), but did not perform a site-specific Phase I Environmental Site Assessment (“ESA”) or any site-specific sampling related to hazardous contamination.³⁸ Hazardous materials experts from SWAPE explain that a review of the online regulatory databases to determine hazards and hazardous materials is an insufficient basis for determining the presence of onsite hazards.³⁹

³² 14 CCR § 15063(d)(2).

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

³⁴ *CBE v. SCAQMD*, 48 Cal. 4th at 321; *Save Our Peninsula Com. v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 121-22; *City of Carmel-by-the-Sea v. Bd. of Supervisors of Monterey County* (1986) 183 Cal.App.3d 229, 246.

³⁵ 14 CCR § 15125(a); *CBE v. SCAQMD*, 48 Cal. 4th at 321.

³⁶ 14 CCR § 15063(a)(3).

³⁷ See VCC EIR, p. 4 (topics not considered – hazardous materials).

³⁸ MND, p. 98.

³⁹ SWAPE Comments, p. 1.

Absent an ESA, the City lacks substantial evidence, and the public lacks certainty, to conclude that no existing release, a past release, or a threat of a release of any hazardous substances or petroleum products into structures on the property or into the ground, groundwater, or surface water may pose potentially significant hazards impacts during Project construction or o.⁴⁰ SWAPE concludes that a Phase I ESA is necessary to provide an adequate disclosure of hazards and hazardous materials on the Project site.⁴¹ At present, the City has not provided substantial evidence to support its environmental setting analysis with respect to hazards and hazardous materials on the Project site.

B. The MND Fails to Provide Sufficient Baseline Information on Congdon's Tarplant and other Sensitive Plant Communities

The MND fails to provide a complete and accurate description of the Project's environmental setting related to Congdon's Tarplant and other sensitive and rare plants, and thus, the MND's impact assessment and proposed mitigation for impacts to Congdon's Tarplant and sensitive and rare plants are inadequate.

The MND fails to support its conclusions regarding the existence of sensitive natural plant species on the Project site, because the Applicant failed to conduct protocol level surveys to determine whether these species may occur onsite. Absent protocol level surveys for rare plants on the Project site, the MND's assertion that impacts to rare plants can be mitigated to less than significant levels are not supported by substantial evidence.

Biologist Mr. Cashen determined that the Applicant did not conduct adequate baseline surveys to establish the existing baseline conditions for rare plants. The MND defers the rare plant survey to a later date, after the public review process has closed and the project has been approved. This deprives the public of an opportunity to review the rare plant survey and ensure the survey accurately reflects conditions on the ground.

i. Congdon's Tarplant

The MND fails to provide an adequate baseline for Congdon's Tarplant because the Applicant has not conducted focused surveys to establish distribution

⁴⁰ SWAPE Comments, p. 2.

⁴¹ *Id.*

and abundance of Congdon's Tarplant.⁴² Congdon's Tarplant is listed as rare, under the rank 1B.1 by the California Native Plant Society. The presence of Congdon's Tarplant in the southeastern portion of the Project site (Parcel 3) in 2018 and the inferred presence of Congdon's Tarplant in the northeastern portion of the Project site (Parcel 1) in 2015, strongly suggests that the species may occur in other portions of the Project site. The MND's analysis regarding the Project's baseline with respect to Congdon's Tarplant is therefore not supported by substantial evidence, as required by CEQA.

Mitigation Measure BIO-3 provides that the Applicant shall retain a botanist to conduct rare plant surveys within the construction zone after the Project is approved. However, since the surveys have not been conducted, and the City will not receive any survey results until after the Project is approved, the City lacks substantial evidence to support a baseline analysis regarding the Congdon's Tarplant. The baseline information in the MND is entirely lacking, and the requisite baseline analysis of this rare plant is therefore impermissibly deferred, in violation of CEQA. An EIR must be prepared which adequately analyzes the environmental setting with respect to Congdon's Tarplant on the Project site before the City can approve the Project.

C. The MND Fails to Provide Sufficient Baseline Information on Oak Woodlands

The MND fails to provide a complete and accurate description of the Project's environmental setting related to Oak Woodlands including Coast Live Oak, and thus, the MND's impact assessment and proposed mitigation for impacts to Oak Woodlands are inadequate. Coast Live Oak trees are required to be protected by Dublin General Plan Section 7.4, but the MND fails to even analyze the baseline number of trees on the Project site.

The MND does not provide clarity regarding how many oak trees are onsite, and how many will be impacted or felled for project construction. The baseline analysis for Oak Woodlands is therefore not supported by substantial evidence. An EIR must be prepared which adequately analyzes the baseline for Oak Woodlands on the Project site.

⁴² Cashen Comments, p. 3.
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The East Alameda County Conservation Strategy (“EACCS”) provides that “During project-level analysis of parcels with proposed impacts, applicants will provide information on oak woodland stand size and species composition to the authorizing land use jurisdiction as part of the permit process for inclusion in the Conservation Strategy database.”⁴³ The MND fails to include information as to the oak woodland stand size or the species composition on the Project site for public review or agency oversight as recommended by the EACCS.

D. The MND Fails to Provide Sufficient Baseline Information on California red-legged frog, White-tailed Kite, Loggerhead Shrike, grasshopper sparrow, Nuttall’s Woodpecker, and Oak Titmouse

The MND fails to provide a complete and accurate description of the Project’s environmental setting related to California red-legged frog, White-tailed Kite, Loggerhead Shrike, grasshopper sparrow, Nuttall’s Woodpecker, and Oak Titmouse species, and thus, the MND’s impact assessment and proposed mitigation for impacts to those species are inadequate. California red-legged frog are listed as threatened under the Endangered Species Act.⁴⁴ White-tailed Kite are listed as a Fully Protected Species by the California Department of Fish and Wildlife and are protected under the Federal Migratory Bird Treaty Act.

Mr. Cashen determined that the MND conflicts with the 2015 Biological Resources Assessment (“BRA”).⁴⁵ The 2015 BRA found that six-special status animal species have a “moderate” potential to occur on the Project site, including the California red-legged frog, White-tailed Kite, Loggerhead Shrike, grasshopper sparrow, Nuttall’s Woodpecker, and Oak Titmouse.⁴⁶ But the MND concludes that such species only have a potential to occur on the Project site. An EIR must be prepared which adequately analyzes the environmental setting with respect to these species on the Project site before the City can approve the Project.

⁴³ East Alameda County Conservation Strategy, p. 3-20. Available at: http://www.eastalco-conservation.org/documents/eaccs_ch3_oct2010.pdf.

⁴⁴ U.S. Fish and Wildlife Service, Environmental Conservation Online System, California red-legged frog (*Rana draytonii*). Available at: <https://ecos.fws.gov/ecp/species/2891>.

⁴⁵ Cashen Comments, p. 2.

⁴⁶ Cashen Comments, p. 2; WRA Environmental Consultants, Biological Resources Assessment Dublin Valley Christian Center, Dublin, Alameda County, California (June 15, 2015).

E. The MND Fails to Provide Sufficient Baseline Information on Foraging Birds

The MND fails to provide a complete and accurate description of the Project's environmental setting related to the site's value as foraging habitat for birds, and thus, the MND's impact assessment and proposed mitigation for impacts to foraging birds are inadequate.

The 2015 BRA provides that the Project site provides foraging habitat for the pallid bat, hoary bat, golden eagle, northern harrier, ferruginous hawk, prairie falcon, and tricolored blackbird—all of which are special-status species.⁴⁷ Special status species means species that are designated as sensitive, rare, declining, or threatened across their range in California. The BRA provides that 13 special status species have the potential to occur on the Project site, but the Applicant made no effort to conduct focused surveys to determine the baseline levels of these species onsite. The MND's environmental setting analysis is therefore not based on substantial evidence in the record. An EIR must be prepared which adequately analyzes the environmental setting with respect to foraging birds on the Project site before the City can approve the Project.

IV. AN EIR IS REQUIRED BECAUSE THERE IS SUBSTANTIAL EVIDENCE SUPPORTING A FAIR ARGUMENT THAT THE PROJECT WILL HAVE SIGNIFICANT ADVERSE ENVIRONMENTAL IMPACTS

A. The Change to the Conservation Easement is a New Circumstance Requiring the Preparation of the EIR

The MND cannot legally tier from the VCC EIR because the change to the borders of the Conservation Easement causes substantial changes in circumstances which will require major revisions in the VCC EIR due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects.⁴⁸ An EIR must be prepared which accurately reflects the significant environmental effects that will occur as a result of the adjustment of the boundary of the Conservation Easement on Parcel 3.

⁴⁷ Cashen Comments, p. 3.

⁴⁸ PRC § 21166; 14 CCR § 15162(b).

Generally, a Conservation Easement is a limitation in a deed or other instrument which is binding on successive owners of the land, and “the purpose of which is to retain the land predominantly in its natural, scenic, historical, agricultural, forested, or open-space condition.”⁴⁹ A conservation easement “shall be perpetual in duration.”⁵⁰ The shifting of the easement contravenes the purpose of the easement, and constitutes a change in circumstance underlying the Project such that an EIR must be prepared.

The change in the Conservation Easement’s borders constitutes a substantial change in circumstances requiring the preparation of an EIR to fully analyze impacts to biological resources and hydrology associated with Project construction and operation. The Conservation Easement includes habitat for the rare Congdon’s Tarplant. In fact, Congdon’s Tarplant was detected within the portion of the Conservation Easement in the most recent Biological Resources Analysis conducted for the Project.⁵¹ The MND fails to analyze the impacts to the Congdon’s Tarplant as a result of the change in the boundary of the Conservation Easement on Parcel 3. An EIR must be prepared due to this change in circumstance resulting in a significant environmental effect.

B. The City Lacks Substantial Evidence to Support the MND’s Conclusion that the Project Would Result in Less than Significant Air Quality Impacts

The MND explains that the VCC EIR did not quantify construction emissions, and includes site-specific modeling to address Project impacts. However, the City’s analysis of the Project’s air quality emissions contains several errors and omissions which render it inadequate. As a result, the MND concludes, without support and contrary to substantial evidence, that the Project would not cause a new impact beyond that analyzed in the VCC EIR.

SWAPE concludes that the Project’s demolition, site preparation, grading, building construction, architectural coating, and paving phases of the Project were inaccurately characterized in the City’s modeling. As such, the MND underestimates the Project construction air emission impacts. SWAPE explains that by disproportionately altering and extending some of the individual construct phase lengths without proper justification, the MND’s modeling assumes there are a

⁴⁹ Cal. Civil Code § 815.1.

⁵⁰ *Id.* at § 815.2(b).

⁵¹ Cashen Comments, p. 7.

greater number of days to complete construction.⁵² This causes an improper reduction of emissions emitted per day.⁵³ SWAPE finds that the model may significantly underestimate the peak daily emissions associated with the construction phases of the Project.⁵⁴ Therefore, SWAPE finds that the MND's air emissions modeling and analysis is not supported by substantial evidence in the record.⁵⁵

As a result of these errors and omissions, the MND's air quality analysis and modeling cannot be relied on to determine whether air quality impacts are new or more severe than those impacts analyzed in the VCC EIR.⁵⁶ An EIR must be prepared to adequately analyze and mitigate Project construction and operational air emissions.

C. Substantial Evidence Supports a Fair Argument that Project Construction and Operation Would Result in Significant, Unmitigated Health Risk Impacts

The MND's analysis of Project's health risk impact is inadequate because it omits an analysis of the Project's operational health risk impacts. SWAPE performed a screening level health risk analysis ("HRA") of the Project's construction and operational health risk impacts from exposure of sensitive receptors to Project-related air pollution, and concludes that the Project will result in significant, unmitigated health impacts that exceed thresholds and require mitigation. An EIR must be prepared to accurately disclose and mitigate these impacts.

CEQA requires a detailed analysis of the public health impacts from air pollutants that would be generated by a development project.⁵⁷ The City's analysis of the Project's health risk from construction emissions is inadequate. The MND

⁵² SWAPE Comments, p. 4.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Sierra Club*, 6 Cal.5th at 518–522; CEQA's statutory scheme and legislative intent also include an express mandate that agencies analyze human health impacts and determine whether the ***“environmental effects of a project will cause substantial adverse effects on human beings, either directly or indirectly.”*** (Public Resources Code § 21083(b)(3) (emphasis added).) Moreover, CEQA directs agencies to “take immediate steps to identify any critical thresholds for the ***health and safety of the people*** of the state and take all coordinated actions necessary to prevent such thresholds being reached.” (Public Resources Code § 21000(d) (emphasis added).)

concludes, absent substantial evidence, that the Project's construction air quality emission impacts would be less than significant.⁵⁸ SWAPE found that the MND failed to provide input parameters and model output files to provide certainty that the health risk impact calculations are supported by substantial evidence. The VCC EIR did not evaluate the health risk of potential projects, in fact, the MND provides that the "VCC EIR did not evaluate the potential of the VCC to expose sensitive receptors to substantial pollutant concentrations; therefore, the exposure of sensitive receptors to pollutant concentrations would be a new impact as compared to the project evaluated in the VCC EIR."⁵⁹ Still, the City concludes, absent substantial evidence, that "construction of the proposed project would not exceed BAAQMD thresholds and would not expose nearby sensitive receptors to substantial pollutant concentrations" with the Implementation of Mitigation Measure AIR-2.⁶⁰ SWAPE concluded that the City's assertion that TAC emission exposure is not significant, is not supported by substantial evidence.⁶¹

SWAPE calculated the excess cancer risk associated with Project operation and found that the excess cancer risk for infants, children, and adults at the maximally exposed individual resident located approximately 350 meters away, over the course of Project operation, are approximately 0.701, 2.55, and 3.94 in one million, respectively.⁶² SWAPE calculated that the excess cancer risk associated with Project operation is approximately 3.65 in one million.⁶³ SWAPE found that with the MND's construction-related cancer risk of 7.18 in one million, and estimates an excess cancer risk of approximately 10.83 in one million over the course of a residential lifetime (30 years) (p. 53, Table G).⁶⁴ As such, the lifetime cancer risk exceeds the BAAQMD threshold of 10 in one million, thus resulting in a potentially significant impact not addressed or mitigated by the MND.

The City did not conduct an HRA for the operation of the Project. This is particularly problematic because operation of the Project is expected to generate an estimated 329 average daily vehicle trips, which would produce additional exhaust emissions and continue to expose nearby, existing sensitive receptors to diesel particulate matter ("DPM") emissions during Project operation.⁶⁵

⁵⁸ MND, p. 53.

⁵⁹ MND, p. 51.

⁶⁰ MND, p. 84.

⁶¹ MND, p. 53.

⁶² SWAPE Comments, p. 7.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ SWAPE Comments, p. 7; MND, p. 150.

SWAPE concludes that the MND failed to evaluate the TAC emissions associated with Project operation or indicate the concentrations at which such pollutants would trigger adverse health effects. CEQA Guidelines require an EIR identify “relevant specifics of ... health and safety problems caused by the physical changes.”⁶⁶ The DEIR and its appendices make no mention of a health risk analysis (HRA). The DEIR’s discussion of health impacts is therefore inadequate as a matter of law and the DEIR fails as an informational document.⁶⁷ The MND is insufficient because it fails to explain “why it was not feasible to provide an analysis that connected the air quality effects to human health consequences.”⁶⁸

The Office of Environmental Health Hazard Assessment (“OEHHA”) recommends the preparation of HRAs where a project causes exposure exceeding 6 months, and should analyze the health risk over the lifetime of the Project estimated to be 30 years. SWAPE concludes that an EIR should be prepared which includes an HRA to analyze the health risks posed to nearby sensitive receptors from DPM emissions generated during Project operation.

Diesel exhaust contains nearly 40 toxic substances, including TACs and may pose a serious public health risk for residents in the vicinity of the facility. TACs are airborne substances that are capable of causing short-term (acute) and/or long-term (chronic or carcinogenic, i.e., cancer causing) adverse human health effects (i.e., injury or illness). TACs include both organic and inorganic chemical substances. The current California list of TACs includes approximately 200 compounds, including particulate emissions from diesel-fueled engines.

⁶⁶ *Id.*

⁶⁷ *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 519; *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 134 Cal.App.4th 1184, 1220 (“After reading the EIRs, the public would have no idea of the health consequences that result when more pollutants are added to a nonattainment basin. On remand, the health impacts resulting from the adverse air quality impacts must be identified and analyzed in the new EIRs.”).

⁶⁸ *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 525.
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Diesel exhaust has been linked to a range of serious health problems including an increase in respiratory disease, lung damage, cancer, and premature death.^{69,70,71} Fine DPM is deposited deep in the lungs in the smallest airways and can result in increased respiratory symptoms and disease; decreased lung function, particularly in children and individuals with asthma; alterations in lung tissue and respiratory tract defense mechanisms; and premature death.⁷² Exposure to DPM increases the risk of lung cancer. It also causes non-cancer effects including chronic bronchitis, inflammation of lung tissue, thickening of the alveolar walls, immunological allergic reactions, and airway constriction.⁷³ DPM is a TAC that is recognized by state and federal agencies as causing severe health risk because it contains toxic materials, unlike PM_{2.5} and PM₁₀.⁷⁴

While the potential exposure period for the closest sensitive receptor may be only 20 months, the inherent toxicity of the TACs requires the City to first quantify the concentration released into the environment at each of the sensitive receptor locations through air dispersion modeling, calculate the dose of each TAC at that location, and quantify the cancer risk and hazard index for each of the chemicals of concern.⁷⁵ Following that analysis, then the City can make a determination of the relative significance of the emissions. The City's failure to perform such an analysis is clearly a major flaw in their MND and may be placing the residents of the adjacent structures at risk from the construction and operational phases of the

⁶⁹ California Air Resources Board, Initial Statement of Reasons for Rulemaking, Proposed Identification of Diesel Exhaust as a Toxic Air Contaminant, Staff Report, June 1998; see also California Air Resources Board, Overview: Diesel Exhaust & Health, <https://ww2.arb.ca.gov/resources/overview-diesel-exhaust-and-health#:~:text=Diesel%20Particulate%20Matter%20and%20Health&text=In%201998%2C%20CARB%20identified%20DPM,and%20other%20adverse%20health%20effects.>

⁷⁰ U.S. EPA, Health Assessment Document for Diesel Engine Exhaust, Report EPA/600/8-90/057F, May 2002.

⁷¹ Environmental Defense Fund, Cleaner Diesel Handbook, Bring Cleaner Fuel and Diesel Retrofits into Your Neighborhood, April 2005; http://www.edf.org/documents/4941_cleanerdieselhandbook.pdf, accessed July 5, 2020.

⁷² California Air Resources Board, Initial Statement of Reasons for Rulemaking, Proposed Identification of Diesel Exhaust as a Toxic Air Contaminant, Staff Report, June 1998.

⁷³ Findings of the Scientific Review Panel on The Report on Diesel Exhaust as adopted at the Panel's April 22, 1998 Meeting.

⁷⁴ Health & Safety Code § 39655(a) (defining "toxic air contaminant" as air pollutants "which may cause or contribute to an increase in mortality or in serious illness, or which may pose a present or potential hazard to human health. A substance that is listed as a hazardous air pollutant pursuant to subsection (b) of Section 112 of the federal act (42 U.S.C. Sec. 7412 (b)) is a toxic air contaminant.")

⁷⁵ SWAPE Comments, p. 4.
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Project.⁷⁶ Further, SWAPE determined that the City's analysis disproportionately altered and extended some of the individual construction length phases without proper justification, thereby underestimating emissions associated with certain phases of construction and underestimated the health risks associated therewith.⁷⁷

The MND lacks substantial evidence to support its conclusion that the Project would result in less than significant health risks from Project construction and operational TACs. The City must prepare an HRA in an EIR for the Project to quantify the Project's health risk impacts and mitigate any significant impacts to the greatest extent feasible.

D. The City Lacks Substantial Evidence to Support the MND's Conclusion that the Project's Energy Impacts are Less Than Significant

The City's analysis of the Project's energy impacts is inadequate. The MND concludes, absent substantial evidence, that the Project's energy impacts would not result in any new or more severe impacts compared to those previously identified in the VCC EIR, and no new mitigation is required. The evidence presented in the MND supporting this conclusion is not adequate.

SWAPE concludes that the MND relied on energy modeling that underestimates the Project's operational energy emissions.⁷⁸ SWAPE found that the modeling relied on Title 24 standards to reduce emissions in the model, but Title 24 standards are not required as mitigation for the Project.⁷⁹ As such, the MND's conclusion that energy impacts are not more severe than analyzed in the VCC EIR is based on inadequate data modeling.⁸⁰ An EIR must be prepared which accurately reflects the operational energy emissions of the project, and adequately mitigates such impacts.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ SWAPE Comments, p. 6.

⁷⁹ *Id.*

⁸⁰ *Id.*

E. Substantial Evidence Supports a Fair Argument that the Project Is Likely to Result in Significant, Unmitigated Impacts to Biological Resources

The MND fails to comply with CEQA for failure to analyze and mitigate potentially significant impacts to biological resources. The MND's conclusions regarding the significance of impacts to biological resources is therefore not supported by substantial evidence. The MND also does not comport with a legislative policy underlying CEQA, to:

Prevent the elimination of fish or wildlife species due to man's activities, ensure that fish and wildlife populations do not drop below self-perpetuating levels, and preserve for future generations representations of all plant and animal communities.⁸¹

Mr. Cashen reviewed the MND, relevant biological resources, and public data related to the Projects' impacts on several sensitive-status species. Mr. Cashen concludes that the Project is likely to have significant, unmitigated impacts on several species and their habitat. An EIR must be prepared which adequately analyzes and mitigates Project impacts to biological resources.

i. *California Red-Legged Frog*

The MND's analysis regarding Project impacts to California Red-Legged Frog ("CRLF") is not supported by substantial evidence. The 2015 BRA provides that the "CRLF may inhabit the wet riparian areas and uplands within the Study Area 200 feet of these wet areas."⁸² But, the MND fails to analyze the significance of the Project's impacts on the upland habitat for CRLF, and only requires compensatory mitigation if CRLF are detected during one single pre-construction survey within 24 hours of initial ground disturbance.⁸³ Impacts to CRLF remain significant because the mitigation measures proposed by Mitigation Measure BIO-4 are not adequate to reduce impacts to less than significant, for the following reasons.

⁸¹ PRC § 21001(c).

⁸² 2015 BRA, p. 22; Cashen Comments, p. 4.

⁸³ Cashen Comments, p. 4; Inspiration Drive Memory Care and Assisted Living Facility Project: Mitigation Monitoring or Reporting Program, p. 11 ("MMRP").

First, Mr. Cashen determined that a single pre-construction survey within 24 hours of initial ground disturbance is not sufficient to avoid impacts to CRLF, “due to their low detection rate.”⁸⁴ Mr. Cashen cited substantial evidence that CRLF hide very effectively. The US Fish and Wildlife Service wrote that “Frogs foraging, resting, or dispersing in upland areas also may not be detected by surveys. A great deal of experience, especially with nighttime surveys, is necessary to ensure detection of frogs.”⁸⁵ Absent adequate surveys, including nighttime surveys, the impacts of the Project on CRLF may be significant, and result in the extirpation of the frogs onsite. Pre-construction surveys should be conducted over the course of weeks, including nighttime surveys. In fact, the US Fish and Wildlife Service recommends in their Guidance on Site Assessment and Field Surveys for the California Red-Legged Frog that:

This Guidance recommends a total of up to eight (8) surveys to determine the presence of CRF at or near a project site. Two (2) day surveys and four (4) night surveys are recommended during the breeding season; one (1) day and one (1) night survey is recommended during the non-breeding season. Each survey must take place at least seven (7) days apart. At least one survey must be conducted prior to August 15th. The survey period must be over a minimum period of 6 weeks (i.e., the time between the first and last survey must be at least 6 weeks). Throughout the species’ range, the non-breeding season is defined as between July 1 and September 30.

Additionally, Mr. Cashen concluded that if surveys show that CRLF are found within the aquatic habitat, they are assumed present in upland habitat within 1 mile of the aquatic habitat.⁸⁶ As such, the Applicant should have assumed the Project area would be inhabited by CRLF, but the MND failed to conduct any such surveys, and rather deferred this analysis until after Project approval. Presence of the CRLF at the Project site requires compensatory mitigation and Section 7 consultation with the US Fish and Wildlife Service.⁸⁷

Second, Mr. Cashen concluded that the relocation of the frogs will result in a significant impact that was not disclosed or analyzed in the MND, MMRP, or VCC EIR.⁸⁸ In fact, moving frogs from one site to another can spread parasites and diseases, especially chytridiomycosis, which is prevalent in California’s amphibian

⁸⁴ Cashen Comments, p. 8.

⁸⁵ *Id.*

⁸⁶ Cashen Comments, p. 8.

⁸⁷ *Id.*

⁸⁸ *Id.* at 9.

populations.⁸⁹ Mr. Cashen asserted that the California Department of Fish and Wildlife generally does not support the use of relocation, salvage, or transplantation as mitigation for impacts to rare, threatened, or endangered species.⁹⁰ The measure in Mitigation Measure BIO-4 providing that the frogs would be moved to a “S Fish and Wildlife/California Department of Fish and Wildlife approved relocation site” is not sufficient to ameliorate these issues because the MND does not provide the public certainty that 1) such a site exists; 2) which agency will identify an appropriate relocation site; 3) and has not provided any evidence that such a measure would adequately mitigate impacts to CRLF. In fact, evidence shows that MM BIO-4 would further negatively impact the CRLF, rather than mitigating it.

Third, the mitigation measures provided in BIO-4 constitute impermissibly deferred analysis and improperly deferred mitigation. The CEQA Guidelines provide that “[t]he specific details of a mitigation measure... may be developed after project approval when it is impractical or infeasible to include those details during the project’s environmental review.”⁹¹ The MND does not state why specifying the potential “avoidance, preservation, creation and/or purchase of credits” was impractical or infeasible at the time the MND was drafted.⁹²

In *Preserve Wild Santee v. City of Santee*, the city impermissibly deferred mitigation where the EIR did not state why specifying performance standards for mitigation measures “was impractical or infeasible at the time the EIR was certified.”⁹³ The court determined that although the City must ultimately approve the mitigation standards, this does not cure these informational defects in the environmental review document.⁹⁴ Further, the court in *Endangered Habitats League, Inc. v. County of Orange*, held that mitigation that does no more than require a report to be prepared and followed, or allow approval by a county department without setting any standards is inadequate.⁹⁵ Here, the City impermissibly deferred mitigation with respect to the CRLF in violation of CEQA,

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ 14 CCR § 15126.4(a)(1)(B).

⁹² MMRP, p. 12.

⁹³ *Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 281.

⁹⁴ *Id.*

⁹⁵ *Endangered Habitats League, Inc. v. County of Orange*, (2005) 131 Cal.App.4th 777, 794. 5883-005j

for failure to disclose and analyze the deferred mitigation measure that may be part of the Section 7 permitting process.⁹⁶ An EIR must be prepared which adequately analyzes and mitigates the impacts of the Project on CRLF in accordance with CEQA.

ii. *Congdon's Tarplant*

The MND's analysis of impacts to Congdon's Tarplant is not supported by substantial evidence. As discussed above, the MND fails to adequately analyze the baseline environmental setting with respect to existing Congdon's Tarplant on the Project site. This results in inadequate mitigation. The mitigation measures proposed in Mitigation Measure BIO-3 would not adequately analyze or mitigate impacts to Congdon's Tarplant on the Project site and within the existing Conservation Easement on Parcel 3.

Mitigation Measure BIO-3 proposes vague and unenforceable mitigation. Mitigation Measure BIO-3 states that "Impacts to special-status plants shall be avoided to the fullest extent feasible."⁹⁷ This measure is neither specific nor legally enforceable. MM BIO-3 further provides, that "Mature seeds shall be collected from all plants that are present and planted in a suitable mitigation area within the Parcel 3 Conservation Easement."⁹⁸ It is concerning that the City is merely shifting these rare plants from one Conservation Easement to a new conservation easement site, because the public cannot be certain the City will not allow for the later movement of the Conservation Easement's borders to support further development, as they did in the current Project.

Further, BIO-3 constitutes inadequate mitigation because neither the MND nor the MMRP provide any evidence that translocation of Congdon's Tarplant seeds is likely to succeed.⁹⁹ Mr. Cashen cites substantial evidence to support the argument that, for most plant species, attempts to establish new plant populations are experimental and often unsuccessful.¹⁰⁰ Additionally, Mr. Cashen cites the California Native Plant Society which has stated that "[l]osses of plant populations considered 'significant' under the California Environmental Quality Act (CEQA) or

⁹⁶ MMRP, p. 12.

⁹⁷ *Id.* at 8.

⁹⁸ *Id.* at 10.

⁹⁹ Cashen Comments, p. 7.

¹⁰⁰ *Id.*; Fiedler PL, Mitigation-related translocation, relocation and reintroduction projects involving endangered and threatened, and rare plant species in California, Final Report to the California Department of Fish and Game (1991).

the National Environmental Quality Act (NEPA) cannot be mitigated to less-than-significant levels using *ex situ* conservation techniques.”¹⁰¹ Mr. Cashen concludes that it is not sufficient that the soil type in Parcel 3 is the same for the translocation of the Congdon’s Tarplant seeds.¹⁰² But, rare plants may require a particular set of pollinators, fungi or other associate species, aspect, hydrological regime, microclimate, or some combination of these or other factors for survival.¹⁰³ As a result, CNPS cautions that: “[a]dequate studies of microhabitat selection, fecundity, essential pollinators, community relationships, and other important biological characteristics must be completed before seeds or other plant materials are removed from natural habitats for an *ex situ* conservation effort.”¹⁰⁴

The MND and the MMRP fail to analyze these factors and thus fail to adequately mitigate impacts to Congdon’s Tarplant to less than significant levels. An EIR must be prepared which adequately analyzes and mitigates impacts to Congdon’s Tarplant before the Project can be approved.

V. SUBSTANTIAL EVIDENCE SUPPORTS A FAIR ARGUMENT THAT THE PROJECT WILL RESULT IN SIGNIFICANT, UNMITIGATED CUMULATIVE IMPACTS

CEQA Guidelines Section 15152(f)(2) provides that “When assessing whether there is a new significant cumulative effect, the lead agency shall consider whether the incremental effects of the project would be considerable when viewed in the context of past, present, and probable future projects. At this point, the question is not whether there is a significant cumulative impact, but whether the effects of the project are cumulatively considerable. For a discussion on how to assess whether project impacts are cumulatively considerable, see Section 15064(i).”¹⁰⁵

The MND fails to accurately characterize the significant cumulative impacts associated with the Project. CEQA requires an MND’s cumulative impacts analysis evaluate the incremental impact of the project in conjunction with, or collectively

¹⁰¹ Cashen Comments, p. 7; California Native Plant Society, Policy on Appropriate Application of *Ex Situ* Conservation Techniques (1992). Available at: https://www.cnps.org/wp-content/uploads/2018/04/ex_situ-conservation.pdf.

¹⁰² Cashen Comments, p. 7.

¹⁰³ *Id.* at 8; California Native Plant Society, Statement Opposing Transplanting as Mitigation for Impacts to Rare Plants (1998). Available at: <https://www.cnps.org/wp-content/uploads/2018/04/transplanting2.pdf>.

¹⁰⁴ Cashen Comments, p. 8.

¹⁰⁵ 14 CCR § 15152(f)(2).

with, other closely related past, present, and reasonably foreseeable probable future projects.¹⁰⁶ “Cumulative impacts” are defined as “two or more individual effects, which, when considered together, are considerable or which compound or increase other environmental impacts.”¹⁰⁷ The purpose of this requirement is to avoid “piecemeal” approval of projects without consideration of the total environmental effects the project would have when taken together.¹⁰⁸ The adequacy of an EIR’s discussion of cumulative impacts is determined by standard of practicality and reasonableness.¹⁰⁹

The MND’s statement that the Project will not result in any new cumulative impacts is not supported by substantial evidence. The MND fails to adequately analyze the cumulative impacts of suburban sprawl on rare plants including the Congdon’s Tarplant.¹¹⁰ Mr. Cashen concluded that the “analysis” in the VCC EIR was predicated on the belief that the project would not cumulatively impact any special-status plants or animals.¹¹¹ It is now known that at least one special-status species, the Congdon’s Tarplant would be directly impacted by the Project.¹¹² The 2018 Supplemental IS/MND did not rectify the deficiency because it merely cited the “analysis” in the VCC EIR: that “No cumulatively considerable impacts were identified with the VCC project in 2004, as documented in the final EIR.”¹¹³

As Mr. Cashen demonstrated in his comments, Congdon’s Tarplant has been documented at the following project sites (recently proposed or approved) in the City of Dublin: SCS Dublin, East Ranch (Croak Property), Boulevard (Dublin Crossing), Ikea Retail Center, and Zeiss Innovation Center. None of these projects were contemplated in the VCC EIR (or 2018 Supplemental IS/MND).¹¹⁴ Collectively, the proposed Project, in conjunction with the projects listed above, would eliminate most of the Congdon’s Tarplant populations remaining in the City of Dublin.¹¹⁵ Mr. Cashen concluded that this impact would be very significant and because the

¹⁰⁶ *Id.*; 14 CCR § 15355(b); *City of Long Beach v. Los Angeles Unified School Dist.* (2009) 176 Cal.App.4th 889, 905.

¹⁰⁷ 14 CCR § 15355.

¹⁰⁸ Cecily Talbert Barclay and Matthew S. Gray, *California Land Use and Planning Law* (Solano Press, 37th ed. 2020) p. 180.

¹⁰⁹ *Environmental Protection & Information Center v. California Dept. of Forestry & Fire Protection* (2008) 44 Cal.4th 459, 525; 14 CCR § 15130(b).

¹¹⁰ Cashen Comments, p. 6.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ 2018 Supplemental IS/MND, p. 90.

¹¹⁴ Cashen Comments, p. 6.

¹¹⁵ *Id.*

Project does not adhere to the terms of the EACCS, its incremental contribution to the impact would be cumulatively considerable.¹¹⁶ An EIR must be prepared which accurately analyzes and mitigates the Project's cumulatively considerable impacts to sensitive and rare biological resources.

VI. THE CITY LACKS SUBSTANTIAL EVIDENCE TO APPROVE THE PROJECT'S LAND USE PERMITS

A. The City Lacks Substantial Evidence to Make the Findings Required for the Tentative Parcel Map No. 11241

Tentative Map approval requires that the following findings are made and supported by substantial evidence in the public record, including: "The subdivision design and proposed improvement will not cause substantial environmental damage or substantially and avoidably injure fish or wildlife or their habitat"; and "The design of the subdivision or type of improvement will not cause serious public health concerns."¹¹⁷

As detailed above, the Project may result in significant impacts to biological resources and their habitats. As such, the City cannot make the necessary findings that the Project will not cause substantial environmental damage to fish or wildlife as required by the Dublin Municipal Code.

Additionally, the City cannot make the necessary finding, supported by substantial evidence, that the Project will not result in serious public health concerns. As demonstrated above, and in SWAPE comment letter and expert modeling, the Project may result in a significant cancer risk associated with toxic air contaminants and diesel particulate matter emissions. The City cannot make the necessary findings required under the Tentative Parcel Map approval, and cannot approve the Project absent adequate mitigation as detailed herein and in expert comments attached.

¹¹⁶ *Id.*

¹¹⁷ Dublin Municipal Code § 9.08(c)(4) and (5).
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VII. CONCLUSION

There is substantial evidence supporting a fair argument that the Project may result in potentially significant adverse impacts that were not identified in the MND, nor the VCC EIR, and thus have not been adequately analyzed or mitigated. The City also lacks substantial evidence to support many of the MND's significance conclusions, in violation of CEQA.

We urge the City to fulfill its responsibilities under CEQA by withdrawing the MND and preparing a legally adequate EIR to address the potentially significant impacts described in this comment letter and the attached letters from SWAPE and Mr. Cashen. This is the only way the City and the public will be able to ensure that the Project's significant environmental impacts are mitigated to less than significant levels.

Sincerely,



Kelilah D. Federman

KDF:lj

Exhibits