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December 12, 2023

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Re: Agenda Item 1: Fremont Hub Mixed-Use Project
(PLN 2022-00487)

On behalf of **East Bay Residents for Responsible Development** (“East Bay Residents” or “EBRRD”), we submit these comments on the Agenda¹ and Staff Report² prepared for Public Hearing Agenda Item 1, the Application for Discretionary Design Review Permit for the Kimco Realty Fremont Hub Mixed-Use Project (PLN 2022-00487) (“Project”) proposed by Kimco Realty (“Applicant”), as well as the CEQA Environmental Compliance Checklist (“CEQA Checklist”) prepared by the City of Fremont (“City”) for the Project.³ The Project is proposed to be located at 39150 Argonaut Way, in the City of Fremont in Alameda County (APN: 501-976-12). The Project site is located in the Central Community Plan Area with a General Plan designation of City Center – Commercial, within the City Center Urban Neighborhood (CC-UN) Zone.

¹ City of Fremont, Agenda, Zoning Administrator Public Hearing, City of Fremont California, 39550 Liberty Street, 3:00 P.M., Niles Conference Room (Dec. 12, 2023).

² City of Fremont, Zoning Administrator Permit Staff Report (Dec. 12, 2023), <https://www.fremont.gov/home/showdocument?id=14533&t=638375592918312380> [“Staff Report”].

³ Informational Item No. 1, PLN2022-00487, Zoning Administrator Hearing (Dec. 12, 2023), <https://www.fremont.gov/home/showdocument?id=14531&t=638375590576689126> [“CEQA Checklist”].

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The Project proposes a two-phase development on 5.86 acres of City Center - Urban Neighborhood zoned land consisting of a new freestanding retail-pharmacy building (Phase 1A) and a six-story mixed-use building (Phase 1B). Phase 1A includes construction of a 13,000 SF retail-pharmacy building along the site's Mowry Avenue frontage. Phase 1B includes construction of a six-story mixed-use building containing 314 market-rate apartment units and 14,157 square feet of ground floor retail-commercial space. The Project would demolish 69,308 square feet of existing retail-commercial floor area and 426 surface parking spaces. Construction activities for the project are anticipated to begin in 2025 and continue for 24 months ending in 2027.

Pursuant to the California Environmental Quality Act ("CEQA"), the City prepared a "CEQA Environmental Consistency Checklist" ("CEQA Checklist") for the Project. The CEQA Checklist was prepared pursuant to CEQA Guidelines Section 15183, which allows a streamlined environmental review process for projects that are consistent with the densities established by existing zoning, community plan or general plan policies for which an EIR was certified and for which project-specific effects which are peculiar to the project have been previously analyzed. The CEQA Checklist and Staff Report claim that the Project would be consistent with the development density established in the City of Fremont's 2011 General Plan Update, for which the 2011 General Plan Update Environmental Impact Report ("EIR") was prepared, and assert that no project-level EIR is required. The City also relies on CEQA Guidelines Sections 15162 and 15164 to conclude that no subsequent EIR is required based on proposed findings that "[the CEQA Checklist] and other evidence in the record supports the use of the certified General Plan Update EIR for the project pursuant to CEQA Guidelines Sections 15162 and 15164, finding that the mitigation measures from the EIR are applied to and adequate for the proposed project, which is within the scope of the EIR, and that no further CEQA documentation is required."⁴

The City's conclusions are incorrect. As will be shown in these preliminary comments, the City's reliance on CEQA Guidelines Sections 15183, 15162, and 15164 is misplaced because the Project was not contemplated in the 2011 General Plan Update and the Project has new or more severe significant impacts than previously analyzed in the 2011 General Plan Update EIR which are peculiar to the Project and were not known and could not have been known at the time of the EIR's certification, because the Project had not yet been proposed when the 2011 EIR was certified. As a result, the Zoning Administrator ("ZA") lacks substantial evidence to approve the Project, the CEQA Checklist, or the Discretionary Design Review Permit at this time because the City has not complied with CEQA.

⁴ Staff Report, pg. 14.

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There is also substantial evidence in the record demonstrating that the proposed Project is likely to result in potentially significant impacts to air quality and public health, and from hazardous materials, which are peculiar to the Project, are new or more severe than previously analyzed, or were not disclosed, analyzed or mitigated in the 2011 General Plan Update EIR. The City therefore cannot rely on a CEQA Checklist per CEQA Guidelines Sections 15183 and must prepare a project-level EIR to disclose and mitigate project-specific impacts. For the same reasons, a subsequent EIR is required pursuant to Public Resources Code Section 21166 and CEQA Guidelines Sections 15162 and 15164.

Further, as a result of the Project's inadequate environmental review, the Project fails to demonstrate consistency with the General Plan and Community Plan. The record before the ZA does not contain substantial evidence demonstrating that the Project will "not be detrimental to the public health or safety [or] unreasonably interfere with the use and enjoyment of adjacent development nor be detrimental to the public health, safety, or welfare" as required for approval of the discretionary design review permit.⁵

The ZA cannot recommend approval of the Project until the errors in the CEQA Checklist are remedied and substantial evidence supporting its conclusions is provided in an EIR. East Bay Residents urges the ZA to continue today's hearing and fulfill its responsibilities under CEQA and the Fremont Municipal Code by withdrawing the CEQA Checklist and preparing a project-level EIR to address the issues raised in these comments.

We reserve the right to supplement these comments with additional comments, issues, and evidence at later hearings and proceedings related to the Project.

I. STATEMENT OF INTEREST

East Bay Residents for Responsible Development ("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. The association includes the **UA Plumbers and Pipefitters Local 342, International Brotherhood of Electrical Workers Local 595, Sheet Metal Workers Local 104, Sprinkler Fitters Local 483**, and their members and their families who live and/or work in the City of Fremont and Alameda County.

⁵ Fremont Municipal Code § 18.235.060(c).

The individual members of East Bay Residents live, work, and raise their families in the City and in Alameda County. They would be directly affected by the Project's unmitigated impacts. Individual members may also work on the Project itself. They would therefore be first in line to be exposed to any health and safety hazards that may exist on the Project site.

The organizational members of East Bay Residents also have an interest in enforcing the City's planning and zoning laws and the State's environmental laws that encourage sustainable development and ensure a safe working environment for its members. Environmentally detrimental projects can jeopardize future jobs by making it more difficult and more expensive for business and industry to expand in the region, and by making it less desirable for businesses to locate and people to live there. 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 are built without providing opportunities to improve local recruitment, apprenticeship training, and retention of skilled workforces, and without providing lifesaving healthcare expenditures for the construction workforce.

II. LEGAL BACKGROUND

CEQA has two basic purposes, neither of which the City has satisfied in this case. 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.⁶ The Environmental Impact Report ("EIR") is the "heart" of this requirement.⁷ 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."⁸ To fulfill this function, the discussion of impacts in an EIR must be detailed, complete, and "reflect a good faith effort at full disclosure."⁹ An adequate EIR must contain facts and analysis, not just an agency's conclusions.¹⁰ CEQA requires an EIR to disclose all potential direct and indirect, significant environmental impacts of a project.¹¹

⁶ 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.

⁷ *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 84.

⁸ *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

⁹ CEQA Guidelines § 15151; *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 721-722.

¹⁰ *See Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 568.

¹¹ Pub. Resources Code § 21100(b)(1); CEQA Guidelines § 15126.2(a).

Second, 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.¹² If an EIR identifies potentially significant impacts, it must then propose and evaluate mitigation measures to minimize these impacts.¹³ CEQA imposes an affirmative obligation on agencies to avoid or reduce environmental harm by adopting feasible project alternatives or mitigation measures.¹⁴ 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.¹⁵ 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.¹⁶ This approach helps “insure the integrity of the process of decision by precluding stubborn problems or serious criticism from being swept under the rug.”¹⁷

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 a program EIR, tiering, or other appropriate process can be used for analysis of the project’s environmental effects, or determine whether a previously prepared EIR could be used with the project, among other purposes.¹⁸ CEQA requires an agency to analyze the potential environmental impacts of its proposed actions in an EIR except in certain limited circumstances.¹⁹ 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.”²⁰

¹² 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.

¹³ Pub. Resources Code §§ 21002.1(a), 21100(b)(3).

¹⁴ *Id.*, §§ 21002-21002.1.

¹⁵ CEQA Guidelines § 15126.4(a)(2).

¹⁶ *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).

¹⁷ *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 935.

¹⁸ CEQA Guidelines §§ 15060, 15063(c).

¹⁹ *See, e.g.*, Pub. Resources Code § 21100.

²⁰ *Quail Botanical Gardens v. City of Encinitas* (1994) 29 Cal.App.4th 1597; Pub. Resources Code § 21080(c).

CEQA streamlining under CEQA Guidelines Section 15183 (“Community Plan exemption) allows approval of projects without an EIR only in narrow circumstances. Section 15183 provides that if an EIR was previously certified for a planning level decision of a city or county, subsequent CEQA review of consistent projects 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.²¹ Section 15183 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.²²

CEQA’s subsequent review standard requires the lead agency to conduct subsequent or supplemental environmental review when one or more of the following events occur:

- (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.²³

III. THE CITY LACKS SUBSTANTIAL EVIDENCE TO SUPPORT APPROVAL OF THE PROJECT UNDER A COMMUNITY PLAN EXEMPTION

CEQA Guidelines Section 15183, the Community Plan exemption, provides a streamlined process for environmental review of projects that are “consistent with the development density established by existing zoning, community plan, or general plan policies for which an EIR was certified,” authorizing agencies to avoid duplicative environmental review “except as might be necessary to examine whether there are project-specific significant effects which are peculiar to the

²¹ Pub. Res. Code § 21094.5(a); 14 Cal. Code Regs. §§ 15183, 15183.3(a), (c).

²² Pub. Res. Code § 21094.5(a).

²³ Pub. Resources Code § 21166; CEQA Guidelines § 15162.

project or its site.”²⁴ Section 15183(c) provides that an EIR must be prepared if the Project will have new or more severe significant impacts than previously analyzed: “[i]f an impact is not peculiar to the parcel or to the project, has been addressed as a significant effect in the prior EIR, or can be substantially mitigated by the imposition of uniformly applied development policies or standards. . . then an additional EIR need not be prepared for the project solely on the basis of that impact.”²⁵

Here, the City has failed to demonstrate that the Project can be lawfully approved based on the CEQA Checklist provided. The Community Plan exemption is inapplicable because this Project was not contemplated in the 2011 General Plan because the Project Application was filed May 6, 2022.²⁶ Further, the Project has new or more severe significant impacts than previously analyzed in the 2011 General Plan EIR which are peculiar to the Project site. These include health risk, air quality, and contamination from hazardous materials. As a result, reliance on the Community Plan exemption is misplaced, and an EIR must be prepared.

A. The Project Was Not Analyzed by the 2011 General Plan Update EIR and City Center Community Plan

On December 13, 2011, the Fremont City Council adopted the General Plan Update²⁷ and certified the General Plan Update EIR.²⁸ The Staff Report asserts that the “[t]he programmatic mitigation measures from the General Plan Update EIR and/or the standard development requirements contained within FMC Chapter 18.218 adequately address the potential environmental effects of the project.”²⁹ And the CEQA Checklist finds that “there are no new significant effects peculiar to this Project or this Project’s site other than those previously identified in the General Plan Update EIR.”³⁰ However, the 2011 General Plan Update did not contemplate the Project, as the Project did not exist in December 2011. Rather, the Project was proposed over a decade later, in May 2022. Therefore, it was impossible

²⁴ 14 C.C.R. § 15183(a).

²⁵ 14 C.C.R. § 15183(c).

²⁶ City of Fremont, Universal Planning Application, Fremont Hub MU, APN 501-976-12, (May 6, 2022),

[https://www.dropbox.com/scl/fo/5cq7cn32isgad117hfk6k/h/Web%20References/App Universal Application %28Executed%29.pdf?rlkey=s1bh4fmu8pca4y37pq3zkdpxn&dl=0](https://www.dropbox.com/scl/fo/5cq7cn32isgad117hfk6k/h/Web%20References/App%20Universal%20Application%28Executed%29.pdf?rlkey=s1bh4fmu8pca4y37pq3zkdpxn&dl=0),

²⁷ City of Fremont, General Plan, <https://www.fremont.gov/government/departments/community-development/planning-building-permit-services/plans-maps-guidelines/general-plan>.

²⁸ City of Fremont, Resolution No. 2011-67,

<https://www.fremont.gov/home/showpublisheddocument/835/637750631768300000>.

²⁹ Staff Report, pg. 12.

³⁰ CEQA Checklist, pg. 3.

for the General Plan Update EIR to have contemplated the impacts of this Project. In fact, as demonstrated below and supported by substantial evidence, the Project is likely to result in significant impacts to air quality and public health—impacts that are specific to Project development – that were not contemplated or analyzed by the General Plan Update EIR.

In relying on the Community Plan exemption, the City also references the City Center Community Plan.³¹ However, the City cannot rely on the City Center Community Plan for this exemption because there was no EIR certified for the City Center Community Plan.³² Instead, as the City explains:

“When the City of Fremont adopted the 2015 City Center Community Plan, the City concluded that the environmental effect attributed to the City Center Community Plan had been fully anticipated under the General Plan Update EIR ... The Community Development Director was directed to file a Notice of Determination with the Alameda County Clerk’s office, acknowledging that the City Center Community Plan relied on the general Plan Update EIR for its CEQA review.”³³

As explained above, the General Plan Update EIR does not adequately address this Project. Thus, because the City Center Community Plan relies on the same General Plan Update EIR, rather than having its own EIR, the City Center Community Plan is also insufficient as it still does not address this Project. In fact, while the City Center Community Plan provides a general directive for the Hub—particularly, Policy 16.8 states that “[a] variety of uses — including large format retail, commercial, residential, or a mix of all of these – may occur in the Hub”—the City Center Community Plan did provide any consideration of the extent of demolition and construction that this Project proposes.

Since the General Plan Update EIR does not adequately address this Project, and the City Center Community Plan is based on that EIR rather than having its own, both the General Plan Update EIR and the City Center Community Plan are insufficient for addressing this Project's site-specific impacts. Consequently, an EIR must be prepared to fully assess the environmental implications of the Project.

³¹ CEQA Checklist, pg. 1.

³² See 14 C.C.R. § 15183(a) (“CEQA mandates that projects which are consistent with the development density established by existing zoning, community plan, or general plan policies for which an EIR was certified shall not require additional environmental review...”).

³³ CEQA Checklist, pg. 3.

B. The Project May Result in New and Significant Project-Level Hazards Impacts that Were Not Contemplated or Analyzed in the General Plan EIR

1. Soil and Groundwater Contamination

The Project site has unmitigated soil and groundwater contamination that is peculiar to the Project site and was not analyzed or mitigated in the General Plan Update EIR. This contamination results in potentially significant hazardous materials impacts from Project development which require project-level analysis and mitigation in an EIR.

The Project site is bounded on both sides by gas stations, and the Project is immediately adjacent to a site listed on the Cortese list.³⁴ In particular, the former Texaco gas station at 4004 Mowry Avenue encountered a release of Petroleum hydrocarbons from underground storage tanks (“USTs”) and associated piping at the former Texaco gas station. As a result of this historical use as a gas station, petroleum hydrocarbons are present in groundwater, and groundwater sampling has indicated concentrations of TPH-g as high as 350,000 ppb.³⁵ The Phase I Report prepared for the Project determined that the site is a recognized environmental condition (“REC”) because of “the presence of and likely continued migration of petroleum hydrocarbons onto the Property.”³⁶ The migration of petroleum hydrocarbons onto the Property through groundwater may result in a significant hazards impact that was not contemplated or addressed in the 2011 General Plan Update EIR.

The Phase I Report also fails to provide substantial evidence that the Project will not result in significant contaminant migration on nearby drinking water wells. In fact, the Phase I Report indicates that the Project will require mitigation to reduce significant hazards and water quality impacts:

According to the results from previous soil investigations, no exceedances of the San Francisco Bay Regional Water Quality Control Board (RWQCB) Environmental Screening Levels (ESLs) for commercial shallow soil exposure were observed in the soil; however, PCE was detected at concentrations above the respective RWQCB ESLs in both groundwater and soil vapor (RWQCB, 2016).

³⁴ https://geotracker.waterboards.ca.gov/profile_report.asp?global_id=T0600101349.

³⁵ Roux Associates, Inc. Environmental Consulting & Management, Phase I Environmental Site Assessment, Fremont Hub Shopping Center, Fremont, California. (January 2, 2018), pg. iv.

³⁶ *Id.*

In December 2006, Bureau Veritas conducted ERD remedial injections, using Hydrogen Release Compound (HRC®) to address PCE in groundwater at the Site (Bureau Veritas, 2007). Following ERD remedial injections, Bureau Veritas conducted performance monitoring to assess the effectiveness of the ERD activities at the Site. The performance monitoring results indicated that HRC® injections were effective at reducing PCE concentrations in groundwater; however, PCE concentrations were still detected above the ESLs. Therefore, additional groundwater remediation would be necessary to further reduce PCE concentrations and subsequent daughter compounds below the RWQCB ESLs.

The CEQA Checklist also references this remediation, finding that:

[O]ngoing remediation strategies to remove free product at the gas station site could be implemented solely within the gas station site, and that proposed project buildings would not interfere or impede the implementation of potential remediation. The existing monitoring wells within the proposed building footprints will be appropriately abandoned and replaced in suitable locations under ACWD oversight and guidance. It can therefore be conservatively concluded that the proposed project would not result in any significant impacts related to the upset and accident release of hazardous materials into the environment.

Project construction would result in excavation of soil and potential groundwater disturbance or dewatering which can lead to chemical releases. These impacts, which are peculiar to the Project, were not analyzed in a prior project-level CEQA document, and could not have been analyzed in the prior General Plan EIR because the Project had not yet been proposed, and it was therefore unknown that construction of the Fremont HUB Project could result in potentially significant releases of contaminants. The City's own evidence demonstrates that these impacts may be significant and that remediation may be required to reduce potentially significant hazards impacts. As such, the City may not rely on Section 15183 streamlining. An EIR must be prepared to address these issues.

C. The Project May Result in New and Significant Construction and Operational Impacts That Were Not Contemplated in the 2011 General Plan Update EIR and Are More Severe Than Previously Analyzed

1. The Project May Result in Significant Operational Impacts to Air Quality Not Previously Analyzed

The CEQA Checklist also fails to adequately analyze the Project's air quality impacts. The Air Quality, Energy, and Greenhouse Gas Emissions Analysis ("Air Quality Analysis") prepared for the Project, provides, 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."³⁷ The CEQA Checklist incorporates this analysis to find that "nearby sensitive receptors are not expected to be exposed to substantial pollutant concentrations during project construction or operation."³⁸ But the Air Quality Analysis omits key sources of emissions, including failing to analyze the back-up generator that will be required for the elevator that is required as part of the Project. The Air Quality Analysis analyzed only construction back-up generators, even though an emergency generator is legally required for the elevator system at the Project.

California Building Code Title 24, Part 2 § 2702.2.2 requires that "Standby power shall be provided for elevators and platform lifts."³⁹ Where, as here, a building has an accessible floor four or more stories above an emergency exit, the building must have an elevator with a standby power for the elevator equipment.⁴⁰ The Project is required to have standby power in the form of a back-up generator for the elevator onsite. But the Air Quality Analysis fails to analyze the emissions associated with the Project's required back-up generator. The record omits critical information regarding air quality and GHG impacts on nearby sensitive receptors. Given the proximity to nearby sensitive receptors, the air quality and health risk impacts of the back-up generator may be significant, but are insufficiently analyzed and mitigated. The City cannot rely on the Community Plan exemption because the Project may result in significant impacts to operational air quality that were not contemplated in the General Plan Update EIR.

2. The Project May Result in Significant Construction and Traffic Noise Impacts That Were Not Previously Analyzed

The General Plan Update EIR determined that "Noise increases related to traffic, and noise conflicts of incompatible uses and construction noise" are

³⁷ Air Quality, Energy, and Greenhouse Gas Emissions Analysis for the Fremont Hub Mixed-Use Project, Fremont, California, (October 31, 2023), pg. 29.

³⁸ CEQA Checklist, pg. 27.

³⁹ California Building Code Title 24, Part 2 § 2702.2.2.

⁴⁰ *Id.* § 1009.4.1; 3008.8.

significant and unavoidable, and that no feasible mitigation was found capable of fully reducing these impacts.⁴¹

Here, the City concludes, absent substantial evidence, that noise impacts can be reduced to less than significant levels through implementation of Standard Development Requirements (“SDRs”) as part of the Fremont Municipal Code Chapter 18.218.⁴² However, compliance with existing noise regulations does provide substantial evidence foreclosing the possibility of significant impacts.⁴³ The City’s noise analysis lacks substantial evidence to conclude that the Project would not expose nearby sensitive receptors to excessive construction and traffic noise from the Project. An exemption may be improper and an EIR must be prepared to adequately analyze the Project’s potentially significant noise impacts to nearby sensitive receptors.

3. The Project May Result in Significant Cumulative GHG Impacts

An EIR must be prepared and an exemption is improper, where, as here, the Project and successive projects of the same type in the same place will result in cumulative impacts.⁴⁴ The CEQA Checklist provides that, concurrent with adoption of the 2011 General Plan Update, the City also prepared and certified a General Plan Update EIR (SCH#2010082060). The 2011 General Plan EIR identified potentially significant environmental impacts in the topics of Transportation and Circulation, Cultural and Archaeological Resources, Air Quality, Agricultural Resources, Noise, Utilities and Service Systems, Hydrology and Water Quality, and Global Climate Change. Mitigation were identified to reduce all potentially significant effects to a less-than-significant level, except for the following:

- Unacceptable levels of service at specified intersections and on specified roadway segments
- Air quality emissions and Clean Air Plan consistency
- Noise increases related to traffic, and noise conflicts of incompatible uses and construction noise
- Potential demolition of cultural and historic resources
- Loss or conversion of prime or unique farmland to urban uses, and

⁴¹ Staff Report, pg. 3.

⁴² Staff Report, pg. 3; 64.

⁴³ *Keep our Mountains Quiet v. Santa Clara* (2015) 236 Cal.App.4th 714, 733; *CBE v. CRA* (2002) 103 Cal.App.4th 98, 115-16.

⁴⁴ 14 CCR § 15300.2.

- Cumulative greenhouse gas emissions⁴⁵

The Project will contribute to and exacerbate these impacts. The CEQA Checklist fails to meaningfully address the Project's cumulative impacts and instead states that "[n]o feasible mitigation was found capable of fully reducing these impacts."⁴⁶ The 2011 General Plan results in potentially significant, unmitigated cumulative greenhouse gas emissions, for which no mitigation would fully reduce the significant impacts.⁴⁷ Here, the Project's increased contribution to the General Plan's significant exceedances of cumulative greenhouse gas emissions is a project-level impact that is peculiar to the Project site, was not analyzed in the General Plan Update EIR, and will result in more severe GHG impacts than previously contemplated. These project-specific impacts must be analyzed in a project-level EIR.

The CEQA Checklist states "the proposed project would still contribute to the significant and unavoidable impacts identified in the General Plan FEIR but would not result in any operational GHG impacts that are new or more significant than those analyzed in the General Plan FEIR."⁴⁸ This conclusion is unsupported given that the CEQA Checklist omits project-specific sources of GHG emissions which were not known at the time the General Plan Update EIR was prepared. For example, the Project may result in operational GHG impacts that are new and more significant than those analyzed in the General Plan Update EIR because the Project may utilize an onsite diesel backup generator, as discussed herein, which may result in significant GHG emission impacts. An EIR must be prepared to adequately analyze the Project's potentially significant GHG emissions impacts before the Project can lawfully be approved.

IV. THE CITY MUST PREPARE A SUBSEQUENT OR SUPPLEMENTAL EIR WHICH DISCLOSES, ANALYZES, AND MITIGATES THE PROJECT'S POTENTIALLY SIGNIFICANT IMPACTS TO AIR QUALITY, PUBLIC HEALTH, HAZARDOUS MATERIALS, NOISE, AND GREENHOUSE GAS EMISSIONS.

When an EIR has previously been prepared that could apply to the Project, CEQA requires the lead agency to conduct subsequent or supplemental environmental review if the lead agency determines, *on the basis of substantial*

⁴⁵ CEQA Checklist, pg. 3.

⁴⁶ *Id.*

⁴⁷ CEQA Checklist, pg. 3.

⁴⁸ CEQA Checklist, pg. 49.

evidence in the light of the whole record, one or more of the following:

- (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 one or more significant effects on the environment, but the project proponents decline to adopt the mitigation measure or alternative.⁴⁹

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.⁵⁰

The Public Resources Code does not provide for addendums, but they are discussed briefly in the CEQA Guidelines Section 15164. The Natural Resources

⁴⁹ CEQA Guidelines § 15162(a)(1)-(3).

⁵⁰ CEQA Guidelines § 15162(b).

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Agency, which drafts the CEQA Guidelines, has described the purpose of an addendum as a method for making “minor changes” to an EIR:

The concept of an addendum to an EIR is new in the CEQA [G]uidelines, although such a device has been used by many agencies previously. This section is designed to provide clear authority for the practice and to encourage other agencies to use the device as a way of making minor corrections in EIRs without recirculating the EIR. The addendum is the other side of the coin from the supplement to an EIR. This section provides an interpretation with a label and an explanation of the kind of document that does not need additional public review.⁵¹

CEQA Guidelines, section 15164 states the following concerning the use of addendums:

- (a) The lead agency or a responsible agency shall prepare an addendum to a previously certified EIR if some changes or additions are necessary but none of the conditions described in Section 15162 calling for preparation of a subsequent EIR have occurred.
- (b) An addendum to an adopted negative declaration may be prepared if only minor technical changes or additions are necessary or none of the conditions described in Section 15162 calling for the preparation of a subsequent EIR or negative declaration have occurred.
- (c) An addendum need not be circulated for public review but can be included in or attached to the final EIR or adopted negative declaration.
- (d) The decision-making body shall consider the addendum with the final EIR or adopted negative declaration prior to making a decision on the project.
- (e) A brief explanation of the decision not to prepare a subsequent EIR pursuant to Section 15162 should be included in an addendum to an EIR, the lead agency's required findings on the project, or elsewhere in the record. The explanation must be supported by substantial evidence.

The lead agency's significance determination for each impact must be supported by substantial evidence, including accurate scientific and factual data.⁵² Under CEQA, an agency cannot conclude that an impact is less than significant unless it produces rigorous analysis and concrete substantial evidence justifying the finding.⁵³ Moreover, the failure to provide information required by CEQA is a

⁵¹ *Save Our Heritage Organization v. City of San Diego*, 28 Cal.App.5th 656, 664–65, 239 Cal. Rptr. 3d 231, 237, review denied (Jan. 16, 2019) (“*SOHO*”) (citing the Natural Resources Agency.)

⁵² 14 C.C.R. § 15064(b).

⁵³ *Kings Cty. Farm Bur. v. Hanford* (1990) 221 Cal.App.3d 692, 732.

failure to proceed in the manner required by CEQA.⁵⁴ Challenges to an agency's failure to proceed in the manner required by CEQA, such as the failure to address a subject required to be covered in an EIR or to disclose information about a project's environmental effects or alternatives, are subject to a less deferential standard than challenges to an agency's factual conclusions.⁵⁵ In reviewing challenges to an agency's approval of an EIR based on a lack of substantial evidence, the court will "determine de novo whether the agency has employed the correct procedures, scrupulously enforcing all legislatively mandated CEQA requirements."⁵⁶ In this case, the City's decision not to prepare a subsequent or supplemental EIR for the Project is not supported by substantial evidence because of these unanalyzed and/or unmitigated impacts.

Here, the City has failed to demonstrate that the Project can be lawfully approved based on the CEQA Checklist provided. The CEQA Checklist does not simply provide "some changes or additions are necessary" to the EIR as is allowed under the Addendum provision.⁵⁷ Rather, as explained above, it includes a new substantive analysis for a large development project which was not specifically analyzed in the General Plan Update EIR. Because the Project and its predicted impacts was not borne until May 2022, these impacts qualify as "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."⁵⁸ Thus, for the reasons explained above, the City's decision not to prepare a subsequent or supplemental EIR for the project is not supported by substantial evidence.⁵⁹

V. THE CITY CANNOT MAKE THE NECESSARY FINDINGS TO APPROVE THE PROJECT'S ENTITLEMENTS UNDER THE MUNICIPAL CODE

In order to approve a discretionary design review permit, the Zoning Administrator must make the following findings:

- (a) The proposed project is consistent with the general plan, any applicable community or specific plan, planning and zoning regulations, and any adopted design rules and guidelines;

⁵⁴ *Sierra Club v. State Bd. Of Forestry* (1994) 7 Cal.4th 1215, 1236.

⁵⁵ *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435.

⁵⁶ *Id., Madera Oversight Coal., Inc. v. County of Madera* (2011) 199 Cal. App. 4th 48, 102.

⁵⁷ CEQA Guidelines § 15164(a).

⁵⁸ CEQA Guidelines § 15162(a)(3).

⁵⁹ CEQA Guidelines §§ 15162 (a), 15164(e), and 15168(e)(4).

- (b) When a proposed project is inconsistent with an adopted design rule, the purpose and intent of the design rule is met through alternative means;
- (c) The multifamily residential¹ project’s architectural, site, and landscape design will not be detrimental to the public health or safety; or a nonmultifamily project’s architectural, site, and landscape design will not unreasonably interfere with the use and enjoyment of adjacent development nor be detrimental to the public health, safety, or welfare.⁶⁰

As shown herein, the Project is inconsistent with the General Plan because, as detailed above, the Project may result in impacts detrimental to public health and safety due to the potentially significant air quality, health risk, hazards impacts, and noise impacts discussed herein.

VI. CONCLUSION

As discussed herein, the City lacks substantial evidence to rely the Community Plan Exemption and CEQA Guidelines Sections 15162 and 15164 for Project approval. The Project does not conform with the General Plan, and results in significant impacts to air quality, greenhouse gas emissions, noise and hazards that are specific to the Project, more severe than previously analyzed, and were not known or analyzed in the General Plan Update EIR because the Project had not been proposed at the time the EIR was certified. As a result, the Project cannot be approved until the City complies with CEQA and prepares a project-level EIR for the Project.

Thank you for your attention to these comments. Please include them in the record of proceedings for the Project.

Sincerely,



Ariana Abedifard

AA:acp

⁶⁰ Fremont Municipal Code § 18.235.060 (emphases added).