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December 12, 2023

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Re: Agenda Item 2: Gateway Plaza Apartments – 39160 Paseo Padre Parkway (PLN2023-00198)

Dear Mr. Nguyen and Mr. Hungerford:

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 2, the Application for a Discretionary Design Review Permit submitted by Kimco Realty (“Applicant”) to the City of Fremont (“City”) for the Gateway Plaza Apartments Project (PLN2023-00198) (“Project”) as well as the CEQA Environmental Consistency Checklist (“CEQA Checklist”) prepared for the Project.³ The Project proposes to demolish a 26,500-square-foot retail and fitness building into a five-story, 206-unit apartment building with a 265-spot parking garage. The Project is located at 39160, 39300, and 39250 Paseo Padre Parkway, Fremont CA 94538 (APN 507-465-13-1). The Project is located within the Central Community Plan Area. The project site which has a General Plan Designation of City Center, and is located within the City Center

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).

³ Informational Item No. 1, PLN2023-00198, Zoning Administrator Hearing (Dec. 12, 2023) [“CEQA Checklist”].

Place Type Zone, with a Zoning Designation of CC-UO (City Center – Urban Office).⁴

City Staff assert that the Project meets the criteria for a Class 32 Infill Exemption under California Environmental Quality Act⁵ (“CEQA”) Guidelines Section 15332 (“Class 32” or “Infill Exemption”) and a streamlining exemption pursuant to CEQA Guidelines Section 15183 (“Community Plan Exemption”),⁶ 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 City of Fremont 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.”⁷

The City’s conclusions are incorrect and unsupported by the record. As explained herein, the City cannot rely on the Class 32 exemption, on a Community Plan Exemption, or any other CEQA exemption or streamlining, because the City seeks to rely on mitigation measures as a basis for concluding that the Project is categorically exempt. The City’s reliance on Sections 15183, 15162, and 15164 is also misplaced because the Project was not contemplated in the 2011 General Plan Update, and has new or more severe significant impacts than previously analyzed in the 2011 General Plan Update EIR which are peculiar to the Project site 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

⁴ Kimco Realty, Project Description – Gateway Plaza Mixed Use Discretionary Design Review (DDR) Submittal, (Dec. 22, 2022), <https://www.dropbox.com/scl/fi/a0vxhbsh173r3zotcq833/Project-Description-Gateway-Plaza-DDR-Submittal-2022-12-22-1.pdf?rlkey=1v7tvmwtidsy1gfbghmow36h9&dl=0>.

⁵ Pub. Res. Code (“PRC”) §§ 21000 et seq.; 14 Cal. Code Regs. (“CCR” or “CEQA Guidelines”) §§ 15000 et seq.

⁶ CEQA Checklist, p. 4-5.

⁷ *Id.*

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approve the Project, the CEQA Checklist, or the Discretionary Design Review Permit at this time because the City has not complied with CEQA. The ZA also lacks substantial evidence demonstrating that the Project will not be detrimental to the general welfare due to inconsistencies with the General Plan, City Center Community Plan, and applicable local plans.

As discussed herein, the Project is likely to have several project-level individual and cumulative adverse impacts which were not previously analyzed require analysis and may require mitigation pursuant to CEQA. In particular, the Project is across the street from the Kaiser Permanente Fremont Medical Center, and may expose nearby sensitive receptors to significant air pollution, GHG emissions, noise, and hazards from construction and operation of the Project. The record contains inadequate project-level analysis of the Project's air quality, health risk, or noise impacts, and no analysis of whether the site can be adequately served by all required utilities and public services.⁸ These impacts are peculiar to the Project and were not analyzed at a project level in the General Plan EIR. The City therefore lacks substantial evidence to support its reliance on a CEQA exemption or CEQA streamlining.

The Project also fails to demonstrate consistency with the General Plan and Fremont City Center Community Plan. The record before the ZA does not contain substantial evidence 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.⁹

We prepared these comments with the assistance of acoustics, noise, and vibration expert Deborah Jue of Wilson Ihrig. Ms. Jue's Comments (“Jue Comments”) and CV are attached hereto as **Attachment A**.

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.¹⁰

⁸ 14 CCR § 15332(a), (d), (e).

⁹ Fremont Municipal Code § 18.235.060(c).

¹⁰ 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. 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.

The individual members of EBRRD 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 EBRRD 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, 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.¹¹ The EIR is the "heart" of this requirement,¹² and 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

¹¹ Cal. Code Regs., tit. 14, § 15002, subd. (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.

¹² *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 84.

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ecological points of no return.”¹³ To fulfill this purpose, the discussion of impacts in an EIR must be detailed, complete, and “reflect a good faith effort at full disclosure.”¹⁴ An adequate EIR must contain facts and analysis, not just an agency’s conclusions.¹⁵

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.¹⁶ CEQA imposes an affirmative obligation on agencies to avoid or reduce environmental harm by adopting feasible project alternatives or mitigation measures to address all potentially significant impacts identified in the agency’s CEQA analysis.¹⁷ Without an adequate analysis and description of feasible mitigation measures, it would be impossible for agencies relying upon an EIR or other environmental document to meet this obligation.

Under CEQA, mitigation measures must be fully enforceable through permit conditions, agreements or other legally binding instruments.¹⁸ A CEQA lead agency is precluded from making the required CEQA findings to approve a project unless the record shows that all uncertainties regarding the mitigation of impacts have been resolved. For this reason, an agency may not rely on mitigation measures of uncertain efficacy or feasibility.¹⁹ This approach helps “insure the integrity of the process of decision by precluding stubborn problems or serious criticism from being swept under the rug.”²⁰

Following preliminary review of a project to determine whether an activity is subject to CEQA, a lead agency is required to prepare an initial study to determine whether to prepare an EIR or negative declaration, identify whether 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.²¹ CEQA requires an agency to

¹³ *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

¹⁴ CEQA Guidelines, § 15151; *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 721-722.

¹⁵ *See Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 568.

¹⁶ CEQA Guidelines, § 15002, subd. (a)(2) and (3); *Berkeley Jets*, 91 Cal.App.4th, at p. 1354; *Laurel Heights Improvement Ass’n v. Regents of the University of Cal.* (1998) 47 Cal.3d 376, 400.

¹⁷ Pub. Resources Code, §§ 21002-21002.1.

¹⁸ CEQA Guidelines, § 15126.4, subd. (a)(2).

¹⁹ *Kings County Farm Bureau v. County of Hanford* (1990) 221 Cal.App.3d 692, 727-28 (a groundwater purchase agreement found to be inadequate mitigation because there was no record evidence that replacement water was available).

²⁰ *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 935.

²¹ CEQA Guidelines, §§ 15060, 15063, subd. (c).

analyze the potential environmental impacts of its proposed actions in an EIR except in certain limited circumstances.²² 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.”²³ A CEQA exemption may be invoked only if expressly authorized by the CEQA statute or guidelines and if there is no possibility of a significant effect on the environment. Exemptions must be narrowly construed and are not to be expanded beyond the scope of their plain language.²⁴

The CEQA Guidelines explain that when an EIR has been for a project, no subsequent EIR shall be prepared for that project unless the lead agency determines, *on the basis of substantial 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

²² See, e.g., Pub. Resources Code, § 21100.

²³ *Quail Botanical Gardens v. City of Encinitas* (1994) 29 Cal.App.4th 1597; Pub. Resources Code § 21080(c).

²⁴ *Castaic Lake Water Agency v. City of Santa Clarita* (1995) 41 Cal.App.4th 1257.

- 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.²⁵

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.²⁶

The Public Resources Code does not provide for addendums, but they are discussed briefly in the CEQA Guidelines, section 15164. The Natural Resources 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.²⁷

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.

²⁵ CEQA Guidelines § 15162(a)(1)-(3).

²⁶ CEQA Guidelines § 15162(b).

²⁷ *Save Our Heritage Organisation v. City of San Diego*, 28 Cal.App.5th 656, 664–65, 239 Cal. Rptr. 3d 231, 237, review denied (Jan. 16, 2019) (“SOH”) (citing the Natural Resources Agency.)

(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.²⁸ 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.²⁹ Moreover, the failure to provide information required by CEQA is a failure to proceed in the manner required by CEQA.³⁰ 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.³¹ 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."³² 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 prepared by the City. The CEQA Checklist does not simply provide "some changes or additions are necessary" to the EIR as is allowed under the Addendum provision.³³ Rather, it includes a new substantive analysis for a large development project which was not specifically analyzed in the General Plan Update EIR. Second, as explained further below, the Project will result in new or more severe significant impacts than analyzed in the General Plan Update EIR. The City's decision not to prepare a subsequent or supplemental EIR

²⁸ 14 C.C.R. § 15064(b).

²⁹ *Kings Cty. Farm Bur. v. Hanford* (1990) 221 Cal.App.3d 692, 732.

³⁰ *Sierra Club v. State Bd. Of Forestry* (1994) 7 Cal.4th 1215, 1236.

³¹ *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435.

³² *Id., Madera Oversight Coal., Inc. v. County of Madera* (2011) 199 Cal. App. 4th 48, 102.

³³ CEQA Guidelines § 15164(a).

for the project is not supported by substantial evidence.³⁴

III. THE CITY LACKS SUBSTANTIAL EVIDENCE TO SUPPORT APPROVAL OF THE PROJECT UNDER A CEQA INFILL EXEMPTION

The City improperly determined that the Project qualifies for Infill Exemption under CEQA Guidelines Section 15332.³⁵ CEQA is “an integral part of any public agency’s decision making process.”³⁶ It was enacted to require public agencies and decision makers to document and consider the environmental implications of their actions before formal decisions are made.³⁷ CEQA requires an agency to conduct adequate environmental review prior to taking any discretionary action that may significantly affect the environment unless an exemption applies.³⁸ Thus, exemptions must be narrowly construed and are not to be expanded beyond the scope of their plain language.³⁹

CEQA requires an agency to analyze whether a project conforms with the applicable land use plan, policy or regulation of an agency with jurisdiction over the project (including, but not limited to the general plan, specific plan, local coastal program, or zoning ordinance) adopted for the purpose of avoiding or mitigating an environmental effect.⁴⁰ Here, the Project fails to conform with the General Plan and the Fremont City Center Community Plan.

A. The Infill Exemption

CEQA Guidelines Section 15332 provides an exemption from CEQA for “benign infill projects that are consistent with the General Plan and Zoning requirements” of a municipality and that satisfy the following criteria:⁴¹

- (a) The project is consistent with the applicable general plan designation and all applicable general plan policies as well as with applicable zoning designation and regulations.
- (b) The proposed development occurs within city limits on a project site of no more than five acres substantially surrounded by urban uses.

³⁴ CEQA Guidelines §§ 15162 (a), 15164(e), and 15168(c)(4).

³⁵ CEQA Checklist, p. 4-5.

³⁶ Pub. Resources Code § 21006.

³⁷ *Id.*, §§ 21000, 21001.

³⁸ *Id.*, § 21100(a); *see also* CEQA Guidelines § 15004(a).

³⁹ *Castaic Lake Water Agency v. City of Santa Clarita* (1995) 41 Cal.App.4th 1257.

⁴⁰ CEQA Guidelines Appendix G, XI Land Use and Planning.

⁴¹ 14 CCR § 15332.

- (c) The project site has no value as habitat for endangered, rare or threatened species.
- (d) Approval of the project would not result in any significant effects relating to traffic, noise, air quality, or water quality.
- (e) The site can be adequately served by all required utilities and public services.

The Project fails to meet the requirements of Section 15332(a) and (d) because, as discussed below, the Project is likely to result in inconsistencies with the General Plan and the Fremont City Center Community Plan and may result in potentially significant impacts to air quality and water quality. For these reasons, the Project fails to qualify for the Infill Exemption.

Moreover, CEQA exemptions are negated where an exception applies pursuant to CEQA Guidelines, Section 15300.2, and Public Resources Code, Section 21084. Such exceptions apply under the following circumstances:

1. The project site is environmentally sensitive as defined by the project's location. A project that is ordinarily insignificant in its impact on the environment may in a particularly sensitive environment be significant.
2. The project and successive projects of the same type in the same place will result in cumulative impacts;
3. There are "unusual circumstances" creating the reasonable possibility of significant effects;
4. The project may result in damage to scenic resources, including, but not limited to, trees, historic buildings, rock, outcroppings, or similar resources, within an officially designated scenic highway, except with respect to improvements required as mitigation for projects for which negative declarations or EIRs have been prepared;
5. The project is located on a site that the Department of Toxic Substances Control and the Secretary of the Environmental Protection have identified, pursuant to Government Code section 65962.5, as being affected by hazardous wastes or clean-up problems; or
6. The project may cause a substantial adverse change in the significance of an historical resource.⁴²

Here, a CEQA exemption is inapplicable because: 1) the record does not contain substantial evidence that approval of the Project would not result in any significant effects relating to traffic, noise, air quality, or water quality; 2) the project and successive projects of the same type in the same place will result in

⁴² 14 CCR § 15300.2; Pub. Resources Code § 21084 (emphasis added).

cumulative impacts; and 3) there is a reasonable probability that the project will have a significant effect on the environment due to “unusual circumstances.”⁴³

A. Standard of Review for the Infill Exemption

The infill exemption requires a lead agency provide “substantial evidence to support [their] finding that the Project will not have a significant effect.”⁴⁴ “Substantial evidence” means enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached. Whether a fair argument can be made that the project may have a significant effect on the environment is to be determined by examining the whole record before the lead agency.⁴⁵ If a court locates substantial evidence in the record to support the City’s conclusion, the City’s decision will be upheld.⁴⁶

The record demonstrates that neither the City nor the Applicant have provided substantial evidence demonstrating that the Project qualifies for the infill exemption. By contrast, there is substantial evidence demonstrating that the Project may result in significant water quality impacts which precludes reliance on the infill exemption, and there is substantial evidence supporting a fair argument that the Project will result in significant, unmitigated environmental effects that require preparation of an EIR.

B. The City Cannot Rely on a Categorical Infill Exemption to Approve the Project Because the Project May Result in Significant Impacts to Water Quality

In order to approve the Project under an Infill Exemption, the City must determine, based on substantial evidence, that approval of the Project would not result in any significant effects relating to traffic, noise, air quality, or water quality. Here, the Project may result in significant water quality impacts that are specific to the Project, were not analyzed in the General Plan EIR, and which the CEQA Checklist fails to adequately analyze or mitigate.

⁴³ 14 CCR § 15300.2(c); *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 C4th 1086.

⁴⁴ *Banker’s Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego* (2006) 139 Cal.App.4th 249, 269.

⁴⁵ CEQA Guidelines § 15384.

⁴⁶ *Bankers Hill Hillcrest*, 139 Cal.App.4th at 269.

The Phase I Environmental Site Assessment identified one recognized environmental condition for the Property:

A former dry-cleaning facility was located adjacent to the Property, #1 Cleaners (2003-2021) and Gateway Cleaners/Panache Cleaners (1990-2002). According to a 1997 Phase II investigation, tetrachloroethylene (PCE) was detected in soil vapor up to 39,500 ug/m³. Another Phase II investigation was conducted in 2009 which found no impacts to soil or groundwater but did not collect soil vapor samples. This dry cleaner is known to have used PCE until 2002. Due to the former dry cleaner's proximity to the Property and the documented presence of PCE in soil vapor, this former dry cleaner is considered a REC.

The Phase II Report provides that "PCE impacts in the subsurface at the Site and adjacent units, all detections have been compared to their respective San Francisco Bay Regional Water Quality Control Board (RWQCB) Environmental Screening Levels (ESLs) for subslab/soil gas vapor intrusion, groundwater vapor intrusion and direct exposure *in commercial/industrial settings*."⁴⁷ The Phase II ESA failed to compare residual contamination to the more stringent residential ESLs which apply to the Project.

The Project aims to convert the contaminated site to residential use, not commercial/industrial use. Project construction will also disturb soil and groundwater, potentially releasing contaminants during construction. These impacts are peculiar to the Project site and were not known or analyzed at the time the General Plan EIR was prepared because the Project had not been proposed in 2011. The CEQA Checklist fails to analyze the Project's hazardous contamination impacts compared to residential screening levels, which may be significant and unmitigated. The City therefore lacks substantial evidence demonstrating that approval of the Project would not result in any significant effects relating to water quality, as required by CEQA Guidelines Section 15332 or any other exemption from environmental review.⁴⁸ Moreover, the onsite contamination may constitute an unusual circumstance where an exemption is likewise inapplicable.

⁴⁷ Focused Phase II Subsurface Environmental Investigation Report, 39250 Paseo Padre Parkway Fremont, California 94538 (July 14, 2023), p. 8, https://www.dropbox.com/scl/fi/5gou7pd7257mnk3l1y8gt/doc_Phase_II_revised_2023.07.14-3.pdf?rlkey=ko2ofv6a2hzhtna9eut75mzy&dl=0.

⁴⁸ 14 CCR § 15332.

C. The City Cannot Rely on a Categorical Infill Exemption or Any Other CEQA Exemption to Approve the Project Because the Project May Result in Significant Impacts to Air Quality

In order to approve the Project under an exemption, the City must determine, based on substantial evidence, that approval of the project would not result in any significant effects relating to traffic, noise, air quality, or water quality. The Project is across the street from the Kaiser Foundation Fremont Hospital.⁴⁹ Occupants of hospitals are considered sensitive receptors. The Kaiser Permanente IVF Clinic is within 90 feet of the Project.⁵⁰

The Air Quality, Energy, and Greenhouse Gas Emissions Analysis (“Air Quality Analysis”) prepared for the Project, provides, absent substantial evidence that “Once the project is constructed, the project would not be a source of substantial emissions. Therefore, nearby sensitive receptors are not expected to be exposed to substantial pollutant concentrations during project construction or operation.”⁵¹ But the Air Quality Analysis fails to analyze sources of operational emissions, including the back-up generator that will be required for the elevator onsite.

California Building Code Title 24, Part 2 § 2702.2.2 requires that “Standby power shall be provided for elevators and platform lifts.”⁵² 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.⁵³ The Project is required to have standby power in the form of a back-up generator for the onsite elevator. But the Air Quality analysis fails to analyze the Project’s back-up generator’s air quality and GHG emissions impacts in comparison to BAAQMD thresholds or on nearby sensitive receptors. Given the proximity to Kaiser Permanente Hospital, and the IVF clinic within 90 feet, 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 a categorical exemption, or any other CEQA exemption, because the Project may result in significant impacts to air quality which require mitigation.

⁴⁹ CEQA Checklist, p. 7.

⁵⁰ Air Quality, Energy, and Greenhouse Gas Emissions Analysis for the Fremont Gateway Plaza Apartments Project, Fremont, California, (September 22, 2023), p. 29.

⁵¹ *Id.*

⁵² California Building Code Title 24, Part 2 § 2702.2.2.

⁵³ *Id.* § 1009.4.1; 3008.8.

D. The City Cannot Rely on a Categorical Infill Exemption or Any Other CEQA Exemption to Approve the Project Because the Project May Result in Significant Impacts From Noise

An EIR must be prepared because the Project results in significant noise impacts, precluding reliance on an Infill Exemption or any other CEQA exemption. Here, the Project’s Noise analysis analyzes the Project’s noise impacts to Kaiser Hospital with a 600-foot distance between the center of construction to sensitive receptors in the hospital. This metric is incorrect, and unsupported by substantial evidence. In fact, the construction noise will be heard by receptors in Kaiser as close as 400 feet away from the edge of the Project’s construction site. The Noise Memo states that “[t]he nearest noise-sensitive use is the Kaiser Hospital to the east, approximately 400 feet from the eastern edge of the project site.”⁵⁴ But, when quantifying whether noise impacts will be significant, the Noise Memo inexplicably relies on a distance of 630 feet from Kaiser hospital.⁵⁵

Table H: Potential Construction Noise Impacts at Nearest Receptor

Receptor (Location)	Composite Noise Level at 50 feet ¹ (dBA L _{eq})	Distance from Center of Construction Activities (feet)	Composite Noise Level (dBA L _{eq})
Commercial (West)	88	90	83
Commercial (South)		235	74
Medical Center (North)		290	72
Medical Center (East)		390	70
Kaiser Hospital (East)		630	66

Source: Compiled by LSA (2023).

¹ The composite construction noise level represents the site preparation phases which are expected to result in the greatest noise level compared to other phases.

dBA L_{eq} = average A-weighted hourly noise level

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The CEQA Checklist’s conclusion that noise impacts will be less than significant is therefore inconsistent with the City’s own noise analysis and not supported by substantial evidence. EBRRD’s noise and acoustical expert consultant Deborah Jue of Wilson Ihrig reviewed the CEQA Checklist and determined that

⁵⁴ Noise and Vibration Impact Analysis for the Fremont Gateway Plaza Apartments Project, Fremont, California, (Oct. 31, 2023), p. 13, https://adamsbroadwell-my.sharepoint.com/:b/p/dweber/EaVNgixY-MtEofFKnd8z_ewBR3QUGKqssfKdAY5KgRynJQ?e=XvLkhc.

⁵⁵ *Id.* at 17.

⁵⁶ Noise and Vibration Impact Analysis for the Fremont Gateway Plaza Apartments Project, Fremont, California, (Oct. 31, 2023), p. 13, <https://www.dropbox.com/scl/fi/shggcx3v2izvsega62oqq/Fremont-Gateway-Plaza-Noise-Memo-20231031.pdf?rlkey=v1lvgglymwet8qylpzaizgc7&dl=0>.

noise from construction of the Project will be potentially significant, but remains unmitigated. Ms. Jue explains that the methodology used in the Noise Memo “is not adequate to identify potentially significant noise and vibration impacts since activities such as demolition and compaction would occur near the north and east property lines, closest to sensitive buildings. The Medical Center appears to be 90 ft to the north of the project, and the Kaiser hospital appears to be 415 ft to the east. Recalculating the noise and vibration impacts could identify significant impacts requiring mitigation.”⁵⁷ An exemption is improper and an EIR must be prepared to adequately analyze the Project’s potentially significant noise impacts to nearby sensitive receptors.

E. The City Cannot Rely on a Categorical Infill Exemption Or Any Other CEQA Exemption to Approve the Project Because 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.⁵⁸ 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 identifies 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
- Cumulative greenhouse gas emissions⁵⁹

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

⁵⁷ Jue Comments, p. 1.

⁵⁸ 14 CCR § 15300.2.

⁵⁹ CEQA Checklist, p. 3.

these impacts.”⁶⁰ The 2011 General Plan results in potentially significant, unmitigated cumulative greenhouse gas emissions, for which no mitigation would fully reduce the significant impacts.⁶¹ 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 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, absent substantial evidence that “[t]here are no further cumulative GHG effects associated with the Project, and an exception under CEQA Guidelines Sec. 15300.2 (b) pertaining to cumulative GHG impacts does not apply to the Project.”⁶² An exception to the exemption is applicable here, because the Project’s construction and operational emissions may result in a cumulatively significant greenhouse gas emissions impact, especially in light of the General Plan’s significant cumulative GHG impact.

The CEQA Checklist states that “[t]he project would also be subject to local policies that *may* affect emissions of greenhouse gas emissions.”⁶³ The CEQA Checklist’s reference to local policies that “may affect emissions of greenhouse gas emissions” does not constitute adequate mitigation to reduce the Project’s potentially significant cumulative greenhouse gas emissions impacts.

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

CEQA Guidelines Section 15183 (Community Plan) may apply only when a Project does not have impacts that are peculiar to the proposed project or parcel, are new or more significant than previously analyzed, are potentially significant off-site or cumulative impacts, or cannot be substantially mitigated by uniformly applicable development policies or standards.⁶⁴

As discussed above, the Project’s site-specific impacts were not analyzed in the General Plan EIR, which was relied upon for both the General Plan Update and the City Center Community Plan. The 15183 Community Plan exemption does not

⁶⁰ *Id.*

⁶¹ *Id.* at 3.

⁶² *Id.* at 51.

⁶³ CEQA Checklist, p. 51.

⁶⁴ 14 CCR § 15183(a)-(c).

apply to the Project because neither the Fremont City Center Community Plan, nor any of the other planning documents relied on in the Staff Report or CEQA Checklist, actually quantified project-level health risks, noise impacts, hazards, or traffic impacts. This Project was not contemplated in the Community Plan, or General Plan because the Project Application was filed December 12, 2022, long after both plans were adopted by the City.⁶⁵ The Fremont City Center Community Plan therefore did not fully address the Project's peculiar and more significant impacts related to soil and groundwater contamination, and from construction TAC emissions, traffic impacts, and noise, and there is substantial evidence demonstrating that the standard conditions of approval would not substantially mitigate these significant impacts, or reduce them to the greatest extent feasible, as required by CEQA.⁶⁶

The Project will have new or more severe significant impacts than previously analyzed in the General Plan or Community Plan. As discussed above, the Project site is highly contaminated and could pose a significant health and safety risk to construction workers, nearby residents, and off-site receptors which was not fully disclosed or analyzed under the Fremont City Center Community Plan EIR⁶⁷, or General Plan Update EIR. Furthermore, as discussed herein, the Project's health risks from TAC emissions, and GHG emissions during construction and operation may be significant and unmitigated. These impacts are peculiar to the Project and require site-specific CEQA analysis.

As described below, the site-specific analysis conducted for the Project in the CEQA Checklist is legally deficient in several ways and fails to incorporate all feasible mitigation to reduce these impacts to less than significant levels. Therefore, the City may not rely on a Community Plan Exemption for Project approval, and must provide detailed analysis of the Project's impacts in a subsequent or supplemental EIR.

Similarly, the absence of any previous project-specific analysis renders the City's determination that Standard Development Requirements ("SDRs") would mitigate the impact unsupported. The City's reliance on SDRs to mitigate these impacts, without first analyzing them in an EIR, violates the requirements of Section 15183, rendering it inapplicable to the Project.

⁶⁵ City of Fremont, Universal Planning Application, Gateway Plaza MU, APN 507-465-13-1, (Dec. 12, 2022), <https://www.dropbox.com/scl/fi/jf78hu7f65vjrxcmkkrf/Universal-Application.pdf?rlkey=f8engmvhy41q9xv1nzls0wn5s&dl=0>.

⁶⁶ PRC § 21081(a).

⁶⁷ City of Fremont, California, Fremont City Center Community Plan, (May 19, 2015), <https://www.fremont.gov/home/showpublisheddocument/1625/637752665509700000>.

A. The City Cannot Rely on a Community Plan Exemption to Approve the Project Because the Project May Result in Significant Impacts from Noise

As detailed above and in Deborah Jue's comments attached, the Project results in potentially significant noise impacts from construction which are not adequately analyzed or mitigated in the General Plan EIR, Noise Element, or Community Plan.

Ms. Jue determined that noise from traffic will be more significant than analyzed in the General Plan and Community Plan. Ms. Jue determined that the traffic noise analysis included in the Noise Memo does not adequately analyze truck traffic noise which is more severe than the free-flow noise levels analyzed previously. The General Plan Noise Element provides that trucks passing by at 50 feet can reach noise levels of 75-85 dBA. These noise levels may result in a significant noise impact to nearby sensitive receptors.

Ms. Jue concludes that the City's Noise Analysis for the Project is not supported by substantial evidence for its failure to appropriately evaluate the potential significance of temporary noise increases from construction traffic. Moreover, Ms. Jue found that the truck traffic noise analysis should consider the speed and stop-and-go conditions which can generate more severe noise levels than free-flow traffic.⁶⁸ Substantial evidence supports a fair argument that noise from the Project may be more severe than previously analyzed. A project-level EIR must be prepared to adequately analyze and mitigate the Project's potentially significant noise impacts, before the Project can lawfully be approved.

B. The City Cannot Rely on a Community Plan Exemption to Approve the Project Because the Project May Result in Significant Impacts from Hazards

The Project relies on SDRs to reduce hazards impacts to less than significant levels.⁶⁹ But the CEQA Checklist does not detail which SDRs will be required to reduce the Project's hazards impacts to less than significant. Moreover, the CEQA Checklist later states that no mitigation measures will be required to reduce the Project's hazards impacts.⁷⁰ The CEQA Checklist is therefore internally inconsistent and fails to provide substantial evidence to support the City's proposed finding that the Project would not result in significant, unmitigated hazardous

⁶⁸ Jue Comments, p. 2.

⁶⁹ CEQA Checklist, p. 52.

⁷⁰ *Id.* at 54.

materials impacts. These impacts must be disclosed and mitigated in a project-level EIR.

The CEQA Checklist also provides, absent substantial evidence that “[t]he proposed project would result in no new significant effects, on-site, off-site or cumulative, for this topic and there is no new information indicating a more severe adverse impact than discussed in the General Plan Update EIR.”⁷¹ But, the particular contamination of this site was not discussed in the General Plan Update EIR, and was not analyzed or mitigated in the General Plan Update EIR. The General Plan Update EIR refers only to air pollution from toxic air contaminants from dry cleaners, but does not specifically refer to hazardous contamination in soil as a result of dry cleaners historical use.⁷² The hazardous contamination onsite may therefore be more severe than previously analyzed in the General Plan Update EIR, and must be analyzed in a Project level EIR at this time, before the Project can lawfully be approved.

V. THE CITY CANNOT MAKE THE NECESSARY FINDINGS TO APPROVE THE PROJECT’S ENTITLEMENTS

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;
- (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.⁷³

As shown herein, the Project is inconsistent with the Project does not conform with the General Plan Safety and Noise Element which requires the City to “[m]aintain sufficient regulation of land use and construction to minimize potential health and safety risks associated with future, current or past use of hazardous materials in Fremont.”⁷⁴ As shown above, the Project will result in potential health

⁷¹ *Id.*

⁷² Fremont General Plan Update EIR, p. 4-260.

⁷³ Fremont Municipal Code § 18.235.060 (emphasis added).

⁷⁴ Fremont General Plan, Safety and Noise Element (Dec. 2011), p. 10-60.

and safety risks associated with the onsite contamination that was not adequately mitigated by the Standard Conditions of Approval, nor by the General Plan or Community Plan.

Moreover, the Project does not conform with the requirements of the General Plan Noise Element which requires that construction noise exceeding approximately 62 Ldn is only “Conditionally Acceptable” where the “Specified land use may be permitted only after detailed analysis of the noise reduction requirements and *needed noise insulation features* included in the design.”⁷⁵ No noise insulation features were included as part of the Project design nor as mitigation for potentially significant noise impacts to Kaiser Hospital.

**Table 10-4
Land Use Compatibility for
Community Exterior Noise Environments**

Land Use Category	Exterior Noise Exposure (Ldn)							
	<55	55	60	65	70	75	80	>80
Single-Family and Multi-Family Residential								
Hotels, Motels and other lodging								
Outdoor Sports and Recreation, Neighborhood Parks and Playgrounds								
Schools, Libraries, Museums, Hospitals, Personal Care, Meeting Halls, Churches								
Office Buildings, Business, Commercial, and Professional								
Auditoriums, Concert Halls, Amphitheaters								
<p>NORMALLY ACCEPTABLE: Specified land use is satisfactory, based upon the assumption that any buildings involved are of normal conventional construction, without any special insulation requirements</p>								
<p>CONDITIONALLY ACCEPTABLE: Specified land use may be permitted only after detailed analysis of the noise reduction requirements and needed noise insulation features included in the design.</p>								
<p>UNACCEPTABLE: New construction or development should generally not be undertaken because mitigation is usually not feasible to comply with noise element policies</p>								

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⁷⁵ Fremont General Plan, Safety and Noise Element (Dec. 2011), p. 10-64 (emphasis added).

⁷⁶ Fremont General Plan, Noise and Safety Element, p. 10-64.

Table H: Potential Construction Noise Impacts at Nearest Receptor

Receptor (Location)	Composite Noise Level at 50 feet ¹ (dBA L _{eq})	Distance from Center of Construction Activities (feet)	Composite Noise Level (dBA L _{eq})
Commercial (West)	88	90	83
Commercial (South)		235	74
Medical Center (North)		290	72
Medical Center (East)		390	70
Kaiser Hospital (East)		630	66

Source: Compiled by LSA (2023).

¹ The composite construction noise level represents the site preparation phases which are expected to result in the greatest noise level compared to other phases.

dBA L_{eq} = average A-weighted hourly noise level

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The Project’s potential construction noise impacts at the nearest receptors exceeds the General Plan Noise and Safety Elements requirements for “Community Exterior Noise Environments” as shown in the charts above.⁷⁸

The CEQA Checklist fails to mitigate the Project’s potentially significant noise impacts, as required by the General Plan’s Noise Element. The CEQA Checklist’s conclusion that noise impacts will be mitigated to less than significant is not supported by substantial evidence because the City fails to quantify the noise reductions. The Noise Memo does not provide any evidence regarding the ability of SDR measures to reduce noise below the thresholds of significance, and neither are the specific heights and locations of temporary noise barriers for construction identified.⁷⁹ Absent this data, the City’s determination that noise impacts are less than significant is not supported by substantial evidence.

Moreover, the City cannot approve the discretionary design review permit because the Project may be detrimental to public health due to the potentially significant hazards impacts, cumulative greenhouse gas emissions impacts, and air quality impacts from construction toxic air contaminants, as detailed herein.

VI. THE PROJECT IS INCONSISTENT WITH THE CITY’S HOUSING ELEMENT AND REGIONAL HOUSING NEEDS ASSESSMENT

The City’s Housing Element provides that the Project site was contemplated for construction of 645 moderate-income units.⁸⁰ This Project only proposes

⁷⁷ Noise and Vibration Impact Analysis for the Fremont Gateway Plaza Apartments Project, Fremont, California, (Oct. 31, 2023), p. 13.

⁷⁸ *Id.*; Fremont General Plan, Noise and Safety Element, p. 10-64.

⁷⁹ Jue Comments, p. 2.

⁸⁰ City of Fremont Housing Element (2023-2031), p. 8-51.

construction of 206 apartment units affordable to moderate-income households.⁸¹ This results in a dearth of 439 units contemplated in the General Plan Housing Element, that will not be built and do not bring the City closer to reaching its Regional Housing Needs Allocation (“RHNA”) goal. “In order to meet the RHNA targets... 574 new housing units for moderate income would need to be built in Fremont.”⁸² Additionally, in lieu of providing at least 10% of all units as affordable to low-income households, as required by Fremont Municipal Code § 18.155.030(b), the Applicant has agreed to pay an affordable housing fee in lieu of construction of units affordable to low-income and moderate-income households on site, in conformance with FMC §18.155.085(a).⁸³ More affordable units must be provided for the Project to be consistent with the City’s Housing Element and state law.

The Fremont Municipal Code provides that it is the goal of the City to foster an adequate supply of housing for all persons at all economic levels, thereby ensuring the preservation of an economically balanced community.⁸⁴ The Municipal Code recognizes that “[b]etween 2015 and 2020, the private market did not produce sufficient unregulated housing units affordable to households earning extremely low, very low, low, or moderate incomes.”⁸⁵ Further, the municipal code recognizes that:

The ability for lower wage workers to live and work in the same city has become increasingly difficult. Local workers that cannot access affordable housing in Fremont face longer, more costly commutes and reduced access to public transit. Additionally, the increased distance between affordable housing and job opportunities contributes to traffic congestion and greenhouse gas emissions.⁸⁶

The Project’s failure to provide sufficient affordable housing contravenes the housing goals laid out in the Municipal Code and is detrimental to the general welfare of the City of Fremont.

⁸¹ Kimco Realty, Project Description – Gateway Plaza Mixed Use Discretionary Design Review (DDR) Submittal, (Dec. 22, 2022).

⁸² Fremont General Plan Update DEIR, SCH No. 2010082060 (July 2011), p. 4-30.

⁸³ City of Fremont, Gateway Plaza Mixed Use, Affordable Housing Plan Proposal, (April 14, 2023), https://www.dropbox.com/scl/fi/tdo7ivGj23em8zvqptaav/Doc_2023-04-14-Affordable-Housing-Proposal-Application-Form-Gateway-Mixed-Use-2.pdf?rlkey=wwa6vnixs3mo7rzwst9hi2z96&dl=0.

⁸⁴ Fremont Municipal Code § 18.155.010.

⁸⁵ *Id.* at § 18.155.010(b)(2).

⁸⁶ *Id.* at § 18.155.010(b)(4).

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VII. CONCLUSION

As discussed herein, the City lacks substantial evidence to rely on a Class 32 Infill Exemption, Community Plan Exemption, or CEQA Addendum for Project approval. The Project results in potentially significant project-level impacts which are peculiar to the Project site and require mitigation, thus precluding reliance on any CEQA exemption. The Project does not conform with the General Plan, or Community Plan, and results in significant air quality, hazards, water quality, noise, and traffic impacts. As a result, the Project cannot be approved until the City complies with CEQA and prepares an Initial Study and an EIR for the Project.

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

Sincerely,



Kelilah D. Federman

Attachment
KDF:acp