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February 22, 2024

Via Hand Delivery and Email

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Re: Agenda Item 2 - Supplemental Comments on Appeal to Planning Commission of Zoning Administrator Approval of Fremont Hub Mixed-Use Project Discretionary Design Review Permit (PLN2022-00487)

Dear Honorable Commissioners Liu, Zhang, Basrai, Rao, Ramamurthi, Steckler, and Yee; Mr. Hungerford, and Mr. Pullen:

We are writing on behalf of East Bay Residents for Responsible Development ("East Bay Residents" or "EBRRD") to provide supplemental comments on our appeal of the December 12, 2023 Fremont Zoning Administrator approval of the Discretionary Design Review Permit submitted by Kimco Realty ("Applicant") to the City of Fremont ("City") for the Fremont Hub Mixed-Use Project (PLN 2022-00487) ("Project") and approval of the CEQA Environmental Compliance Checklist ("CEQA Checklist") prepared for the Project (collectively, "Appeal"). These comments also respond to the Staff Report prepared for the February 22, 2024 Planning

Commission hearing on our Appeal,[1] and the Responses to Appeal Memorandum prepared by Lamphier-Gregory.[2]

We prepared these comments with the assistance of acoustics, noise, and vibration expert Jack Meighan of Wilson Ihrig[3] and air quality and hazardous resources experts Matt Hagemann and Paul Rosenfeld from Soil Water Air Protection Enterprise ("SWAPE").[4] Their analysis demonstrates that the Project has potentially significant air quality and noise impacts which are peculiar to the Project, more than previously analyzed in the prior planning EIRs, and which are not fully mitigated by the City's existing mitigation measures or standard development requirements.

East Bay Residents respectfully requests that the Commission uphold this appeal, vacate the Zoning Administrator's December 12, 2023 decision to approve the Project, and require Staff to withdraw the CEQA Checklist prepare a legally adequate project-level environmental impact report ("EIR") for the Project to address all potentially significant impacts of the Project.

I. BASIS FOR APPEAL

The basis for East Bay Residents' appeal is set forth in these comments, and in East Bay Residents' December 12, 2023 comments to the Zoning Administrator.[5] The Zoning Administrator's reliance on a streamlining exemption pursuant to CEQA Guidelines Section 15183 ("Community Plan Exemption") and a CEQA addendum pursuant to CEQA Guidelines Sections 15162 and 15164 violated CEQA and was not supported by substantial evidence 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. These impacts include potentially significant air quality and noise impacts, which require disclosure and mitigation in a project-level EIR.

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[1] Fremont Planning Commission Report (ID # 5090) Meeting of February 22, 2024, p. 2 (hereinafter, "Staff Report").
[2] Memorandum from Scott Gregory, Lamphier-Gregory to Mark Hungerford, Senior Planner City of Fremont Community Development, Response to Appeal of Fremont Hub Mixed Use Project and its CEQA Document (Feb. 8, 2024), (hereinafter, "Response to Appeal").
[3] Mr. Meighan's Comments ("Meighan Comments") and CV are attached hereto as **Attachment A**
[4] SWAPE's Comments ("SWAPE Comments"), along with Mr. Hagemann and Mr. Rosenfeld's CVs are attached hereto as **Attachment B.**
[5] See **Attachment C**.

II. APPELLANTS' BACKGROUND

Appellants East Bay Residents is an unincorporated association of individuals and labor organizations directly affected by the Project. The association includes Fremont residents Patrick Buffy, Ray Burks, Ralph Neves, as well as 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. EBRRD's members 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.

III. OVERVIEW OF CEQA REQUIREMENTS

CEQA has two basic purposes, neither of which is satisfied by the City's decision to forego an EIR and rely on a CEQA Consistency Checklist. 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

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[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.

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]

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

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[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).
[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.

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] Reliance on CEQA tiering or streamlining from prior EIRs is improper where a project may have significant effects that were not previously examined, are more severe than previously analyzed, or require mitigation beyond existing requirements.[20]

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]

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[18] CEQA Guidelines §§ 15060, 15063(c).
[19] *See, e.g.,* Pub. Resources Code § 21100.
[20] 14 CCR §§ 15162; 15183; 15183.3.
[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.

IV. THE CITY'S DECISION NOT TO PREPARE A SUBSEQUENT EIR PURSUANT TO SECTION 15162 AND 15164 WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

The CEQA Guidelines explain that the lead agency must determine, on the basis of substantial evidence in light of the whole record, whether one or more of the following events occur:

> (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.[24]

[24] CEQA Guidelines §§ 15162(a)(1)-(3).

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.[25]

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.

In any case, the decision must be supported by substantial evidence.[26] Here, the City's decision not to prepare a subsequent CEQA document in the form of a Project-level EIR was not supported by substantial evidence and is contrary to substantial evidence from Appellants' experts demonstrating that one or more of the triggering events under CEQA Guidelines section 15162 and 15164 has occurred.

A. A Subsequent EIR Must Be Prepared Because Feasible Mitigation May Further Reduce the Project's Potentially Significant Environmental Impacts

The Response to Appeal acknowledges that "the specifics of the Fremont Hub Mixed use Project, or any other currently contemplated individual development project, was not known and could not have been known when the General Plan EIR

[25] CEQA Guidelines § 15162(b).
[26] *Id.* §§ 15162 (a), 15164(e), and 15168(c)(4).

was prepared in 2011."[27] Appellants agree that the specifics of the Project were not contemplated in 2011 for the preparation of the General Plan EIR and its Mitigation Monitoring and Reporting Program ("MMRP").

Feasible mitigation measures and alternatives which are considerably different from those analyzed in the previous EIR, and in some cases did not exist when the 2011 EIR was prepared, are presented in the SWAPE Comments which would substantially reduce one or more significant effects on the environment, but these measures have not been adopted as Project mitigation measures or alternatives.[28] These include Tier 4 Final Engine Tier requirements, ULSD diesel, use of an electric generator, and measures to reduce truck idling times.

B. Air Quality Mitigation Recommended by SWAPE is Considerably Different from Mitigation Previously Analyzed and Would Substantially Reduce the Project's Significant Effects on the Environment

As demonstrated in SWAPE's comments attached hereto, the Project may result in significant air quality impacts from reactive organic compound ("ROG") emissions which are more severe than previously analyzed and require additional mitigation beyond that required in the General Plan MMRP.

SWAPE identified a potential error in calculations from the air quality analysis.[29] Specifically, they identified an unjustified change in the construction phase lengths input in the tool used to analyze air quality impacts.[30] They found that using appropriate construction phase lengths would have allowed the City to identify a potentially significant impact.[31] SWAPE's analysis indicates that *the Project's construction-related emissions, particularly ROG emissions, exceed the applicable Bay Area Air Quality Management District ("BAAQMD") threshold.*[32] *SWAPE concludes that even with implementation of the General Plan's mitigation measures as laid out in the MMRP, and reliance on BAAQMD's Basic Construction Mitigation Measures, the Project would still result in a significant, unmitigated impact.*[33] Additional mitigation measures are therefore required to reduce emissions to less than significant levels.

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[27] Response to Appeal, pg. 2.
[28] *See* CEQA Guidelines §§ 15162(a)(1)-(3).
[29] *See generally* SWAPE Comments, in reference to the LSA Air Quality and Greenhouse Gas Memo, October 31, 2023, prepared for the City of Fremont by LSA Associates
[30] SWAPE Comments, pp. 1-4.
[31] SWAPE Comments, pg. 4.
[32] SWAPE Comments, pg. 5.
[33] SWAPE Comments, pg. 6.

The evidence presented by SWAPE constitutes new information demonstrating that the Project has new and more severe air quality impacts than previously analyzed in the GP EIR, triggering the need for a subsequent EIR under CEQA Guidelines Section 15162.[34] SWAPE's comments also demonstrate that mitigation measures which are substantially different from those analyzed in the previous EIR would substantially reduce one or more significant effects on the environment, which the City and project proponents declined to adopt.[35] SWAPE recommends feasible mitigation to further reduce the Project's ROG emissions which were not available or considered when the GP EIR was adopted

First, SWAPE recommends that because the Project is within 500 feet of residences, the Project should require proponents to use Tier 4 Final equipment for all engines above 50 horsepower. According to the City, there are residences within the "immediate vicinity" of the Project.[36] This includes multi-family residential uses approximately 380 feet from the project site.[37] The General Plan's MMRP does not require the use of Tier 4 Final Engines. Tier 4 Final Engines were not contemplated because Tier 4 Final did not begin to be phased in until 2013 (2 years after the GP EIR was certified).[38] Tier 3 engines were manufactured between 2006 and 2011 and continued to be produced until Tier 4 engines are completely phased in.[39] Tier 4 engines are the newest and some incorporate hybrid electric technology. CARB began phase in of *small* Tier 4 interim engines (less than 75 horsepower) in 2008, and Tier 4 Final engines in 2013.[40] Larger tier 4 equipment began being phased in between 2012 and 2014 with an increasing percentage of equipment required to meet the new standards.[41] However, unlike in 2011, Tier 4 Final equipment is readily available in the construction market nowadays.[42] According to SWAPE, the

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[34] 14 CCR § 15162 (a)(3).
[35] 14 CCR § 15162 (a)(3)(C), (D).
[36] CEQA Checklist, pg. 70,; *see also LSA Air Quality and Greenhouse Gas Memo* (October 31, 2023), pg.27 ("The proposed project site is located in an urban area in close proximity to existing residential uses").
[37] *Noise and Vibration Impact Analysis for the Fremont Hub Mixed-Use Project, Fremont, California* (October 31st, 2023), pg. 14.
[38] See Tier 4 phasing timeline in See "San Francisco Clean Construction Ordinance Implementation Guide for San Francisco Public Projects." August 2015, *available at:* https://www.sfdph.org/dph/files/EHSdocs/AirQuality/San_Francisco_Clean_Construction_Ordinance_2015.pdf, p. 6
[39] As summarized by Alameda County, see Draft Environmental Impact Report for Sand Hill Wind Project (November 2013), pg. 3.3-17, available here: https://www.acgov.org/cda/planning/landuseprojects/documents/Ch03-03_AQ_DEIR.pdf
[40] See FN 39.
[41] *Id.*
[42] U.S. Environmental Protection Agency, "FACT SHEET: Proposed Amendments to the Standards for Performance for Stationary Compression Ignition Internal Combustion Engines," available here:

use of Tier 4 Final equipment is both necessary and feasible to reduce the significant ROG impact identified.[43] Therefore, requiring Tier 4 Final Engines is mitigation "previously found not to be feasible" but now "would in fact be feasible."[44] It is also "considerably different from [mitigation] analyzed in the previous EIR"[45] because the EIR did not propose any tier restrictions, much less Tier 4 Final equipment. The mitigation "would substantially reduce one or more significant effects on the environment, but the project proponents decline to adopt the mitigation measure or alternative."[46]

The GP MMRP also lacked the feasible mitigation measure recommended by SWAPE that the Project include Diesel nonroad construction equipment used on site for more than 10 total days shall have either (1) engines meeting EPA Tier 4 nonroad emissions standards or (2) emission control technology verified by EPA or CARB for use with nonroad engines to reduce PM emissions by a minimum of 85% for engines for 50 hp and greater and by a minimum of 20% for engines less than 50 hp.[47] This measure, and others recommended by SWAPE to reduce air pollution impacts, "would in fact be feasible"[48] are "considerably different from [mitigation] analyzed in the previous EIR [and] would substantially reduce one or more significant effects on the environment, but the project proponents decline to adopt the mitigation measure or alternative.[49]

The City may contend that implementation of the City's Standard Development Requirements ("SDRs")[50] related to construction emissions[51] satisfies this requirement. That contention is misplaced because the SDRs were not in place when the 2011 EIR was certified and therefore were not considered at the time and are considerably different than the mitigation in the GP EIR. A subsequent EIR must therefore be prepared to adequately mitigate the Project's air quality impacts.

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https://casetext.com/regulation/california-code-of-regulations/title-14-natural-resources/division-6-resources-agency/chapter-3-guidelines-for-implementation-of-the-california-environmental-quality-act/article-11-types-of-eirs/section-15162-subsequent-eirs-and-negative-declarations ("New stationary and nonroad CI engines are equipped by the engine manufacturer with emission controls to meet the Tier 4 final emission standards, which generally began with either the 2014 or 2015 model year.")

[43] SWAPE Comments, pg. 6.
[44] CEQA Guidelines §§ 15162(a)(3)(C).
[45] CEQA Guidelines §§ 15162(a)(3)(D).
[46] CEQA Guidelines §§ 15162(a)(1)-(3).
[47] SWAPE Comments, pg. 7.
[48] CEQA Guidelines §§ 15162(a)(3)(C).
[49] CEQA Guidelines §§ 15162(a)(1)-(3).
[50] FMC Chapter 18.218.
[51] FMC § 18.218.050(a)(2).

V. 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 project or its site."[52] 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."[53]

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 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 air quality, health risks, noise impacts, or traffic impacts. This Project was not contemplated in the Community Plan, or General Plan because the Project Application was filed May 6, 2022, long after both plans were adopted by the City.[54] The Fremont City Center Community Plan therefore did not fully address the Project's peculiar and more significant impacts related to construction ROG emissions 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.[55]

The Project will have new or more severe significant impacts than previously analyzed in the General Plan or Community Plan. As discussed herein and in SWAPE's Comments, the Project could create significant ROG emissions that were

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[52] 14 C.C.R. § 15183(a).
[53] 14 C.C.R. § 15183(c).
[54] City of Fremont, Universal Planning Application, Fremont Hub MU, APN 501-976-12, (May 6, 2022).
[55] PRC § 21081(a).

not disclosed or analyzed under the Fremont City Center Community Plan EIR,[56] or General Plan Update EIR. Furthermore, as demonstrated by Mr. Meighan's comments, the proposed mitigation measures for vibration impacts during construction and operation are not adequately addressed and mitigated. 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 previously adopted mitigation measures and SDRs would not 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 project-level EIR.

A. The Project May Result in New and Significant Project-Level Air Quality Impacts that Were Not Contemplated or Analyzed in the General Plan EIR that Are Peculiar to the Project Site and Not Substantially Mitigated

As SWAPE highlights in their comment letter, there are significant shortcomings in the evaluation of the Project's air quality impacts[57] that lead to an underestimation of air quality impacts. First, the air quality analysis relied on CalEEMod Version 2022.1, which lacks complete output files necessary to accurately assess the Project's emissions.[58] Without the complete output files, it is difficult to verify the accuracy of the air modeling and subsequent analysis, potentially leading to underestimation and inadequate addressing of air quality impacts.[59]

Additionally, SWAPE identified unsubstantiated changes to individual construction phase lengths in the air quality analysis.[60] While the total construction duration is stated as approximately 24 months, the analysis failed to provide specific evidence justifying the length of each phase.[61] This discrepancy may lead to an underestimation of peak daily emissions during certain phases of construction. Indeed, as SWAPE demonstrated, using appropriate construction phase lengths would have allowed the City to identify a potentially significant impact. SWAPE's

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[56] City of Fremont, California, Fremont City Center Community Plan, (May 19, 2015), https://www.fremont.gov/home/showpublisheddocument/1625/637752665509700000.
[57] As demonstrated in the LSA Air Quality and Greenhouse Gas Memo, October 31, 2023, prepared for the City of Fremont by LSA Associates
[58] SWAPE Comments, pp. 1-3.
[59] *Id.*
[60] SWAPE Comments, pp. 3-4.
[61] *Id.*

analysis indicates that **the Project's construction-related emissions, particularly ROG emissions, exceed the applicable BAAQMD threshold.**[62] This suggests a potentially significant air quality impact, necessitating the consideration of feasible mitigation measures. SWAPE recommends implementing various mitigation measures that the City did not propose.[63]

SWAPE's comments provide substantial evidence demonstrating that air quality impacts from the Project may be more severe than previously analyzed. As discussed above, SWAPE also concludes that the mitigation measures in the MMRP do not substantially mitigate these impacts. 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 Project May Result in New and Significant Project-Level Noise Quality Impacts that Were Not Contemplated or Analyzed in the General Plan EIR that Are Peculiar to the Project Site and Not Substantially Mitigated

1. Wilson Ihrig's Analysis Demonstrates Flaws in the City's Analysis of Noise Impacts, Thereby Resulting in an Underestimation of Noise Impacts

As Mr. Meighan demonstrates, noise impact analysis[64] prepared for the Project reveals various shortcomings that may result in an underestimation of noise impacts. For example, Mr. Meighan identified improper use of ground factors and usage factors in construction noise calculations.[65] These miscalculations may have resulted in missing a significant impact. Indeed, with proper implementation of Usage Factors, Mr. Meighan identified a significant increase in noise levels that is possibly significant and should be studied in an EIR.[66]

Further, the mitigation measures proposed for vibration are insufficient. As Mr. Meighan points out, the construction management plan ("CMP") is not sufficient to mitigate the potentially significant vibration levels resulting from construction activities utilizing heavy equipment because it lacks explicit measures to address potential vibration damage to nearby buildings.[67] The CMP's general

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[62] SWAPE Comments, pp. 4-5.
[63] SWAPE Comments, pp. 5-8.
[64] *Noise and Vibration Impact Analysis for the Fremont Hub Mixed-Use Project, Fremont, California* (October 31st, 2023), prepared by LSA.
[65] Meighan Comments, pg. 3.
[66] Meighan Comments, pg. 3-4.
[67] Meighan Comments, pg. 4.

procedures do not specifically target vibration mitigation, and therefore do not adequately mitigate this impact. Therefore, Mr. Meighan recommends explicit inclusion of measures to address vibration damage within the CMP.[68]

2. The Project's Construction Noise Significance Thresholds are Not Supported by Substantial Evidence

The Project's construction noise assessment violates CEQA by relying on absolute noise levels and failing to consider the magnitude of changes in noise levels as a threshold for significance. Courts have held that reliance on a maximum noise level as the sole threshold of significance for noise impacts violates CEQA because it fails to consider whether the magnitude of changes in noise levels is significant.[69]

In *Keep our Mountains Quiet v. County of Santa Clara,*[70] neighbors of a wedding venue sued over the County of Santa Clara's failure to prepare an EIR for a proposed project to allow use permits for wedding and other party events at a residential property abutting an open space preserve. Neighbors and their noise expert contended that previous events at the facility had caused significant noise impacts that reverberated in neighbors' homes and disrupted the use and enjoyment of their property.[71] Similar to the CEQA Checklist in this case, the City's CEQA document relied on the noise standards set forth in its noise ordinance as its thresholds for significant noise exposure from the project, deeming any increase to be insignificant so long as the absolute noise level did not exceed those standards.[72] The Court examined a long line of CEQA cases which have uniformly held that conformity with land use regulations is not conclusive of whether or not a project has significant noise impacts[73] in holding that the County's reliance on the project's compliance with noise regulations did not constitute substantial evidence supporting the County's finding of no significant impacts.[74] And in *King & Gardiner Farms,* a lead agency "determined the significance of [noise] impacts based solely on

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[68] Meighan Comments, pg. 4.
[69] *King & Gardiner Farms, LLC,* 45 Cal.App.5th at 865.
[70] *Keep our Mountains Quiet v. County of Santa Clara* (2015) 236 Cal.App.4th 714.
[71] *Id.* at 724.
[72] *Id.* at 732.
[73] *Id., citing Citizens for Responsible & Open Government v. City of Grand Terrace* (2008) 160 Cal.App.4th 1323, 1338; *Oro Fino Gold Mining Corp. v. County of El Dorado* (1990) 225 Cal.App.3d 872, 881–882; *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1416 (project's effects can be significant even if "they are not greater than those deemed acceptable in a general plan"); *Environmental Planning & Information Council v. County of El Dorado* (1982) 131 Cal.App.3d 350, 354, ("CEQA nowhere calls for evaluation of the impacts of a proposed project on an existing general plan").
[74] *Id.* at 732-734; see also *King & Gardiner Farms, LLC v. County of Kern* (2020) 45 Cal.App.5th 814, 893, as modified on denial of reh'g (Mar. 20, 2020).

whether the estimated ambient noise level with the project would exceed the 65 decibels threshold set forth in the County's general plan.... Based on prior case law, we conclude the magnitude of the noise increase must be addressed to determine the significance of change in noise levels."[75]

The CEQA Checklist makes the same error here by failing to analyze the significance of the magnitude of the noise increase. As Mr. Meighan points out, the analysis establishes only the City of Fremont's Municipal Code Section 18.160.010 as the threshold for significant noise exposure from the noise generated by the project.[76] However, this standard only limits construction activities within 500 feet of residences to the weekday hours of 6:00 a.m. to 10:00 p.m., and weekend or holiday hours of 8:00 a.m. to 8:00 p.m.. The analysis suggests that there are no specific thresholds for significant daytime construction noise, implying that any increase in noise during daytime hours, regardless of its magnitude, is considered insignificant as long as it occurs within those hours. In doing so, the City fails to address the significance of increases in noise levels over ambient noise levels, as required by CEQA.

Further, the City's analysis provides construction noise levels at various distances and stages of construction but fails to compare these levels to any significance thresholds. The analysis simply asserts that loud construction activities would be deemed "less than significant" without offering any benchmark ambient values or analyzing what level of noise increase over ambient levels would be considered significant. The Response to Appeal also asserts that, "According to the Fremont Noise Ordinance, temporary construction noise levels generated during permitted construction hours are exempt from compliance with City noise standards."[77] This is not accurate. As demonstrated below, construction noise is not exempt from the City's noise ordinance where it is not for Public Health, Welfare, and Safety Activities.[78]

The Municipal Code does not provide an exemption for construction noise as the Response to Appeal asserts. The Fremont Municipal Code includes only the following exemptions from the Noise Ordinance, none of which include the type of construction noise required for Project construction and operation:

> (a) Emergency Work. The provisions of this title shall not apply to the emission of sound for the purpose of alerting persons to the existence of an

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[75] *King & Gardiner Farms, LLC*, 45 Cal.App.5th at 830.
[76] Meighan Comments, pg. 2.
[77] Response to Appeal, pg. 10.
[78] Fremont Municipal Code § 9.25.040.

emergency or in the performance of emergency work, and activities involving the execution of the duties of duly authorized governmental personnel and others providing emergency response to the general public, including but not limited to sworn peace officers, emergency personnel, utility personnel, and the operation of emergency response vehicles and equipment.

(b) Entertainment Events and Operations. The provisions of this chapter shall not apply to those reasonable sounds emanating from authorized school bands, school athletic and school entertainment events and occasional public and private outdoor or indoor gatherings, public dances, shows, bands, sporting and entertainment events conducted between the hours of 7:00 a.m. and 10:00 p.m., and special events for which a permit has been issued pursuant to Chapter 12.25. In addition, noise associated with activities that are part of urban core operations as defined in Section 18.188.020 or with places of entertainment that are in compliance with Section 5.45.130.

(c) Federal or State Preempted Activities. The provisions of this chapter shall not apply to any other activity the noise level of which is regulated by state or federal law.

(d) Maintenance to Residential Property. The provisions of this chapter shall not apply to noise sources associated with maintenance to property used for residential purposes, provided the activities take place between the hours of 7:00 a.m. and 10:00 p.m.

(e) Garbage Removal. The provisions of this chapter shall not apply to garbage removal services in commercial and mixed-use districts, even if the garbage services are located adjacent to residential districts.

(f) Industrial Districts. The provisions of this chapter shall not apply to industrial districts I-S, I-T, and G-I zones.

(g) Public Health, Welfare and Safety Activities. The provisions of this chapter shall not apply to construction, maintenance and repair operations conducted by public agencies, franchisees of the city and/or utility companies or their contractors which are deemed necessary to serve the best interests of the public and to protect the public health, welfare and safety, including but not limited to trash collection, street sweeping, tree removal, debris and limb removal, removal of downed wires, restoring electrical service, repairing traffic signals, unplugging sewers, vacuuming catch basins, repairing of damaged poles, removal of abandoned vehicles, repairing of water hydrants

and mains, gas lines, oil lines, sewers, storm drains, roads, sidewalks, etc. (Ord. 04-2021 § 1, 4-20-21.)

Project construction does not fall into any of these categories. The Project's construction noise is therefore not exempt from the City's Noise Ordinance. The City must prepare an EIR with adequate thresholds that can accurately measure whether a significant noise impact will occur.

In conclusion, the City should prepare an EIR that establishes clear thresholds of significance, includes correct calculation methodologies, and provides accurate mitigation measures. These revisions are crucial for conducting a comprehensive evaluation of noise impacts under CEQA.

VI. 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.[79]

The Project's significant air quality and noise impacts from construction and operation will render the Project detrimental to the public health and safety. Therefore, the Zoning Administrator lacked the necessary basis to support approval of the discretionary design review permit.

VII. APPEAL FEE

Fremont Municipal Code § 18.300.030(a) requires appellants to pay an appeal "fee." In filing this appeal, Appellants paid the required $1800 pursuant to the

[79] Fremont Municipal Code § 18.235.060 (emphasis added).

City's fee schedule.[80] Pursuant to the fee schedule, Appeals from staff actions to the Planning Commission based on FMC Volume II, Title 18 (Planning and Zoning) are required to pay an $1,800 *deposit*.[81] As described in the City's Land Use and Development Service Deposit Policies (Resolution 2010-23), the City collects deposits "from developers in connection with land use planning applications and development services," then requires the project applicants to replenish deposits when needed to continue processing their project application.[82] The deposit policies clarify that services related to processing development project applications are to be "paid for by those developers and not be borne by the general public."[83] Accordingly, no additional fees, costs, or deposit replenishments may be charged against East Bay Residents related to its administrative appeal of the Zoning Administrator's decision.[84]

When Appellants submitted the Appeal for filing on December 21, 2023, they were also forced to sign a "Reimbursement Agreement," which purports to authorize the City the charge Appellants an undefined and unlimited amount of additional money for "staff review, coordination, and processing costs based on real time expended" on the appeal.[85] City staff informed Appellants that the appeal filing would be rejected unless Appellants signed the Reimbursement Agreement.[86] Appellants were therefore required to sign the Reimbursement Agreement as a condition of filing the Appeal. The Reimbursement Agreement is both an illegal contract that is void as against public policy, and an unduly burdensome requirement which violates EBRRD's due process rights.

California Civil Code Section 1608 codifies the doctrine of contract illegality and provides that "[i]f any part of a single consideration for one or more objects, or of several considerations for a single object, is unlawful, the entire contract is void."[87] Under Civil Code Section1667, "unlawful" is broadly defined as that which is contrary to an express provision of law; contrary to the policy of express law,

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[80] City of Fremont Fee Schedule (July 1, 2023), pg. 6, https://www.fremont.gov/home/showpublisheddocument/13864/638300253322870000.
[81] *Id.*
[82] Resolution No. 2010-23, A Resolution of the City Council of the City of Fremont Revising and Restating the City's Policies and Administrative Procedures Regarding Land Use and Development Service Deposits, https://www.fremont.gov/home/showpublisheddocument/12883/638162823284770000.
[83] *Id.*, pg. 1.
[84] *California Teachers Ass'n v. State of Cal.* (1999) 20 Cal. 4th 327, 331.
[85] See City of Fremont, Universal Planning Application, Part II, *Reimbursement Agreement.*
[86] Telephone communication between C. Caro (Adams Broadwell) and M. Hungerford (Fremont planner), 12/21/23. Additionally, Appellants first attempt to file the Appeal on 12/21/23 without completing or signing the Reimbursement Agreement was rejected by planning staff at the counter.
[87] Civil Code § 1608.

though not expressly prohibited; or, otherwise contrary to good morals.[88] In determining illegality, the court considers a variety of factors, including the policy of the transgressed law, the kind of illegality and the particular facts.[89] Contracts that are against public policy, as with the City's Reimbursement Agreement, are void and unenforceable.[90]

The Reimbursement Agreement is an illegal and unenforceable contract because it is contrary to express laws authorizing members of the public to petition the government for redress of public wrongs,[91] contrary to law requiring Appellants to exhaust administrative appeals in order to maintain the right to file a public interest lawsuit, and is contrary to the laws and "good morals" associated with the public's statutory right to participate in public land use and environmental permitting processes. Any fees or costs which the City may ask Appellants to pay pursuant to the Reimbursement Agreement are void as against public policy and would result in a violation of Appellants' due process rights.

Agencies have the power to charge reasonable fees for filing administrative appeals of decisions.[92] However, such a fee cannot impose a burden upon the exercise of the due process right to a hearing. "The guarantee of procedural due process - a meaningful opportunity to be heard - is an aspect of the constitutional right of access to the courts for all persons..."[93] A cost cannot be imposed on the exercise of a right to a hearing if it has "no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them..."[94] Imposing a substantial and/or open-ended monetary obligation on an individual exercising their due process right to a hearing is unconstitutional if it is imposed simply because an individual is obtaining the due process hearing itself since it chills the exercise of an individual's rights to demand a hearing, which places too great a burden on the exercise of the right to due process.[95]

Pursuant to Municipal Code Section 18.300.030, when an appeal is filed by an interested party, the matter shall be scheduled for a hearing by the planning

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[88] Civil Code § 1667.
[89] *Asdourian v. Araj* (1985) 38 Cal.3d 276, 282.
[90] Civil Code § 1667; *Yoo v. Jho* (2007) 147 Cal.App.4th 1249, 1251; *see Trumbo v. Bank of Berkeley* (1947) 77 Cal.App.2d 704, 710 ("The law does not imply a promise to pay for services illegally rendered under a contract expressly prohibited by statute.").
[91] Cal. Const. Art. III.
[92] See *Friends of Glendora v. City of Glendora* (2010) 182 Cal.App.4th 573, 579–80; see also *Sea & Sage Audubon Society, Inc. v. Planning Com.* (1983) 34 Cal.3d 412, 419.
[93] *Id.*, at 338-39.
[94] *Id.*, at 338.
[95] See *id.*, at 331, 333, 338.

commission, as applicable. Moreover, the Code states that "[u]ntil all applicable fees, charges and expenses have been paid in full, no action shall be taken on any application, appeal or other matter pertaining to this title as to which a fee, charge or payment of expense is required, nor shall the applicant be permitted to obtain a building permit or establish a use until all applicable fees, charges, and expenses have been paid in full."[96] "Any unused portion of any deposit shall be returned to the person paying the deposit upon completion of the project."[97] If the City were to enforce the Reimbursement Agreement, it may attempt withhold a decision on the Appeal unless and until Appellants pay the City for "staff review, coordination, and processing costs based on real time expended" on the appeal.[98] This would be a clear violation of Appellants' due process rights.

Any party that desires to bring a lawsuit on this decision is required to exhaust its administrative remedies.[99] CEQA provides an avenue for doing this through Public Resources Code section 21151(c), allowing parties to appeal Zoning Administrator decisions to the Planning Commission and Planning Commission decisions to the City Council. Since East Bay Residents is required to appeal the Zoning Administrator's decision to the Planning Commission (and possibly to the City Council) in order to exhaust administrative remedies, the City cannot impose a fee on the appellant that would chill its exercise of their right to appeal and right to a hearing in front of Planning Commission and City Council.

In *California Teachers Association v. State of California,*[100] a teacher filed a facial challenge to Education Code section 44944€ because the statute required teachers to pay the state one-half of the costs of the administrative law judge if they exercised his or her right to a hearing regarding a threatened suspension or dismissal and who did not prevail at the hearing. The costs of the plaintiff's administrative hearing were later calculated to be over $7,000.[101] The plaintiff refused to pay this bill, asserting that such a fee placed an undue burden upon his due process right to a hearing intended to determine whether he should lose his property interest in continued employment.[102] In finding the statute invalid on its

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[96] Fremont Municipal Code § 18.310.020.
[97] *Id.* at § 18.310.030.
[98] See City of Fremont, Universal Planning Application, Part II, *Reimbursement Agreement.*
[99] See Pub. Res. Code § 21177; *Tomlinson v. County of Alameda* (2012) 54 Cal.4th. 281, 291.
[100] (1999) 20 Cal. 4th 327, 331.
[101] *Id.* at 332.
[102] *Id.*

face, the Court asserted that the right of access to courts extends to the constitutional right to petition administrative tribunals.[103]

Similar to the statute challenged in *California Teachers Association*, the City's policy regarding fees and costs associated with appealing a Zoning Administrator decision and Planning Commission decision are open-ended and could amount to a substantial monetary obligation simply for obtaining a due process hearing for which there is no alternative. Appellants must appeal the Zoning Administrator's decision to the Planning Commission, and ultimately to the City Council, as required by the City's Zoning Code as well as CEQA, in order to exhaust administrative remedies before filing a lawsuit. Just as the statute did in *California Teachers Association*, the potentially substantial and unknown monetary obligation the City may try to impose under the Reimbursement Agreement to challenge the Zoning Administrator's decision will chill Appellants' required exercise of a due process hearing in order to exhaust administrative remedies.

The threat of substantial monetary obligations on Appellants imposed by the Reimbursement Agreement places too great a burden on the exercise of a due process right to a hearing that is required under CEQA in order to access the courts. The City's assertion that Appellants must pay an unknown fee beyond the $1800 appeal fee associated with appealing a Zoning Administrator decision to Planning Commission is contrary to law and void as against public policy.

VIII. CONCLUSION

As discussed herein, the Zoning Administrator lacked substantial evidence to rely on a 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 additional 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 and noise impacts.

For these reasons, EBRRD respectfully asks that the Planning Commission uphold this Appeal and remand the Project to staff to comply with CEQA and prepare an Initial Study and project-level EIR for the Project.

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[103] *Id.* at 335; *Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal. 3d 1118, 1135.

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

Sincerely,

Ariana Abedifard

Attachments
AA:acp