ADAMS BROADWELL JOSEPH & CARDOZO
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
601 GATEWAY BOULEVARD, SUITE 1000
SOUTH SAN FRANCISCO, CA 94080-7037

TEL: (650) 589-1660
FAX: (650) 589-5062
kfederman@adamsbroadwell.com

ARIANA ABEDIFARD
KEVIN T. CARMICHAEL
CHRISTINA M. CARO
THOMAS A. ENSLOW
KELILAH D. FEDERMAN
RICHARD M. FRANCO
ANDREW J. GRAF
TANYA A. GULESSERIAN
DARION N. JOHNSTON
RACHAEL E. KOSS
AIDAN P. MARSHALL
TARA C. RENGIFO

Of Counsel
MARC D. JOSEPH
DANIEL L. CARDOZO

SACRAMENTO OFFICE

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

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

February 22, 2024

Via Hand Delivery and Email

Fremont Planning Commission
Charles Haiyun Liu, Chair
Yonggang Zhang, Vice Chair
Members: Jasmine Basrai;
Reena Rao; Shobana Ramamurthi
Craig Steckler; Benjamin Yee

Emails: cliu@fremont.gov
yzhang@fremont.gov
jbasrai@fremont.gov
rrao@fremont.gov
sramamurthi@fremont.gov
csteckler@fremont.gov
byee@fremont.gov

Via Email Only

Mark Hungerford, Staff Planner
Email: mhungerford@fremont.gov

Joel Pullen, Planning Manager
Email: jpullen@fremont.gov

Re: Agenda Item 3 - Supplemental Comments on Appeal to Planning Commission of Zoning Administrator Approval of Gateway Plaza Apartments Project (PLN2024-00091; PLN2023-00198)

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 Gateway Plaza Apartments Project (PLN2023-00198) ("Project") and approval of the CEQA Environmental Consistency Checklist ("CEQA Checklist") prepared for the Project (collectively, the "Appeal"). These comments also respond to the Staff Report prepared for the February 22, 2024

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

The Project proposes to construct a 206-unit apartment building within the Gateway Plaza Shopping Center at 36190 Paseo Padre Parkway in the Central Community Plan Area under exemptions from the California Environmental Quality Act ("CEQA")[3] pursuant to CEQA Guidelines Section 15332, Infill Development Projects, and pursuant to CEQA Guidelines Section 15183, and CEQA Guidelines Sections 15162 and 15164. The City's reliance on a CEQA Guidelines Section 15332 (Class 32) Infill Exemption, a streamlining exemption pursuant to CEQA Guidelines Section 15183, and a CEQA addendum pursuant to CEQA Guidelines Section 15162 and 15164 for project approval is misplaced, and a Project-level EIR must be prepared.

We prepared these comments with the assistance of acoustics, noise, and vibration expert Jack Meighan of Wilson Ihrig[4] and air quality and hazardous resources experts Matt Hagemann and Paul Rosenfeld from Soil Water Air Protection Enterprise ("SWAPE").[5] Their analysis demonstrates that the Project has significant air quality, health risk 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 Planning 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 in order to prepare a legally adequate project-level environmental impact report ("EIR") for the Project to address all potentially significant impacts of the Project.

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[1] Fremont Planning Commission Report (ID # 5092) 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 Gateway Plaza Apartments Project and its CEQA Document (Feb. 8, 2024), (hereinafter, "Response to Appeal").
[3] Pub. Res. Code ("PRC") §§ 21000 et seq.; 14 Cal. Code Regs. ("CCR" or "CEQA Guidelines") §§ 15000 et seq.
[4] Ms. Jue's Comments ("Jue Appeal Comments") and CV are attached hereto as **Attachment A**
[5] SWAPE's Comments ("SWAPE Comments"), along with Mr. Hagemann and Mr. Rosenfeld's CVs are attached hereto as **Attachment B.**

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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.[6] The Zoning Administrator's reliance on a Class 32 Infill Exemption under California Environmental Quality Act[7] ("CEQA") Guidelines Section 15332 ("Class 32" or "Infill Exemption"), a streamlining exemption pursuant to CEQA Guidelines Section 15183 ("Community Plan Exemption"),[8] and a CEQA addendum pursuant to CEQA Guidelines Sections 15162 and 15164, violated CEQA and were 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, public health, and noise impacts, which require disclosure and mitigation in a project-level EIR.

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,

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[6] See **Exhibit C**.
[7] Pub. Res. Code ("PRC") §§ 21000 et seq.; 14 Cal. Code Regs. ("CCR" or "CEQA Guidelines") §§ 15000 et seq.
[8] CEQA Checklist, p. 4-5.

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 for the Project. First, CEQA is designed to inform decision makers and the public about the potential, significant environmental impacts of a project before harm is done to the environment.[9] To fulfill this function, the discussion of impacts in a CEQA document must be detailed, complete, and "reflect a good faith effort at full disclosure."[10] An adequate CEQA document must contain facts and analysis, not just an agency's conclusions.[11] The City's CEQA analysis must disclose all potential direct and indirect, significant environmental impacts of the Project.[12]

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.[13] If an IS/MND or an EIR identifies potentially significant impacts, it must then propose and evaluate mitigation measures to minimize these impacts.[14] CEQA imposes an affirmative obligation on agencies to avoid or reduce environmental harm by adopting feasible project alternatives or mitigation measures.[15] Without an adequate analysis and description of feasible mitigation measures, it would be impossible for agencies relying upon the CEQA document to meet this obligation.

Under CEQA, a lead agency must not only adopt measures to avoid or minimize adverse impacts, but must ensure that mitigation conditions are fully enforceable through permit conditions, agreements or other legally binding

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[9] 14 Cal. Code Regs. § 15002(a)(1) ("CEQA Guidelines"); *Berkeley Keep Jets Over the Bay v. Bd. of Port Comm'rs.* (2001) 91 Cal.App.4th 1344, 1354 ("*Berkeley Jets*"); *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.
[10] CEQA Guidelines § 15151; *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 721-722.
[11] *See Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 568.
[12] Pub. Resources Code § 21100(b)(1); CEQA Guidelines § 15126.2(a).
[13] 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.
[14] Pub. Resources Code §§ 21002.1(a), 21100(b)(3).
[15] *Id.*, §§ 21002-21002.1.

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instruments.[16] 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.[17] This approach helps "insure the integrity of the process of decision by precluding stubborn problems or serious criticism from being swept under the rug."[18]

Following preliminary review of a project to determine whether an activity is subject to CEQA, a lead agency is required to prepare an initial study to determine whether to prepare an EIR or negative declaration, identify whether tiering or another appropriate process can be used for analysis of the project's environmental effects, or determine whether a previously prepared CEQA document could be used for the project, among other purposes.[19] The initial study must accurately describe the project, identify the environmental setting, identify environmental effects and show "some evidence" to support those conclusions, and a discussion of ways to mitigate the significant effects of the project, if any.[20]

CEQA requires an agency to analyze the potential environmental impacts of its proposed actions in an EIR except in certain limited circumstances.[21] An exemption is improper where a project may result in significant environmental impacts.[22] If there is a reasonable possibility of a significant effect on the environment, then the project must be reviewed under CEQA and mitigation measures may be considered only as part of that CEQA review.[23] Similarly, 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.[24]

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[16] CEQA Guidelines § 15126.4(a)(2).
[17] *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).
[18] *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 935.
[19] CEQA Guidelines §§ 15060, 15063(c).
[20] CEQA Guidelines § 15063(d) (emphasis added).
[21] *See, e.g.,* Pub. Resources Code § 21100.
[22] 14 CCR § 15332(d).
[23] 125 CA4th at 1102.
[24] 14 CCR §§ 15162; 15183; 15183.3.

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

When a proposed project is a modified version of a previously approved project for which an EIR or an IS/MND has been prepared, CEQA 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.[25]

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

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

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(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.[26]

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.[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.
(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

[26] CEQA Guidelines §§ 15162(a)(1)-(3).
[27] CEQA Guidelines § 15162(b).

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explanation must be supported by substantial evidence.

In any case, the decision must be supported by substantial evidence.[28] 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 Significant Environmental Impacts

The Staff Report's Response to Appeal ("Staff Report") acknowledges that "the specifics of the Gateway Plaza Apartment Project, or any other individual development project, were not known and could not have been known when the General Plan EIR was prepared in 2011."[29] 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 and Jue 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.[30] These include Tier 4 Final Engine Tier requirements, ULSD diesel, use of an electric generator, and measures to reduce truck idling times. Additionally, Ms. Jue identifies noise mitigation in the form of a Construction Vibration Plan and noise reduction barriers, which would further reduce the Project's significant unmitigated construction noise impacts on the nearby Kaiser Hospital.

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[28] *Id.* §§ 15162 (a), 15164(e), and 15168(c)(4).
[29] Response to Appeal, p. 2.
[30] *See* CEQA Guidelines §§ 15162(a)(1)-(3).

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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 report attached hereto, the Project results in significant air quality impacts from diesel particulate matter ("DPM") emissions which are more severe than previously analyzed and require additional mitigation beyond that required in the General Plan MMRP.

SWAPE conducted a quantified health risk analysis ("HRA") which found that the Project's operational emissions exceed Bay Area Air Quality Management District ("BAAQMD") thresholds of 10 in one million cancer risk. Specifically, *SWAPE found that the Project results in an excess cancer risk of 11.3 in one million for Project operation, and an excess cancer risk of approximately 17.3 in one million over the course of a residential lifetime.*[31] *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 health risk impact.*[32] Additional mitigation measures are therefore required to reduce the significant cancer risk from Project operation to less than significant levels. The evidence presented by SWAPE constitutes new information demonstrating that the Project has new and more severe health risk impacts than previously analyzed in the GP EIR, triggering the need for a subsequent EIR under CEQA Guidelines Section 15162.[33]

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.[34] SWAPE recommends feasible mitigation to further reduce the Project's DPM 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 a hospital, the Project should require proponents to use Tier 4 equipment for all engines above 50 horsepower.[35] The Kaiser Permanente IVF Clinic is within 90 feet north of the Project and the Kaiser Hospital is approximately 415 feet to the east of

[31] SWAPE Comments, p. 8-9.
[32] SWAPE Comments, p. 9-10.
[33] 14 CCR § 15162 (a)(3).
[34] 14 CCR § 15162 (a)(3)(C), (D).
[35] SWAPE Comments, p. 10.

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the Project.[36] The General Plan's MMRP does not require the use of Tier 4 Final Engines or Tier 4 Engines generally. As such, the requirement to include Tier 4 and Tier 4 Final Engines would be considerably different from the absence of such a requirement in the General Plan's MMRP. Tier 4 Final Engines as mitigation is feasible and "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."[37]

Tier 4 Final Engines may not have been contemplated in the General Plan EIR in 2011 because they did not begin to be phased in under CARB regulations until 2013 (2 years after the GP EIR was certified).[38] Additionally:

> Tier 3 engines were manufactured between 2006 and 2011 and [] continue[d] to be produced until Tier 4 engines are completely phased in. Tier 4 engines are the newest and some incorporate hybrid electric technology; they began phase in of small engines (less than 75 horsepower) in 2008. Larger equipment is phased in between 2012 and 2014 with an increasing percentage of equipment required to meet the new standards.[39]

Tier 4 Final Engines are feasible and would "reduce the Project's emissions", according to SWAPE.[40] Unlike in 2011, Tier 4 equipment is readily available in the construction market. Following 2014, "[n]ew stationary and nonroad CI engines are equipped by the engine manufacturer with emission controls to meet the Tier 4 final emission standards..."[41] But these may not have been readily available in 2011. According to SWAPE Tier 4 Final equipment is both necessary and feasible to reduce the Project's significant air quality and health risk impacts identified.[42]

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[36] Air Quality, Energy, and Greenhouse Gas Emissions Analysis for the Fremont Gateway Plaza Apartments Project, Fremont, California, (September 22, 2023), p. 29.
[37] CEQA Guidelines §§ 15162(a)(1)-(3).
[38] 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] Alameda County, Sand Hill Wind Project Draft Environmental Impact Report (November 2013), https://www.acgov.org/cda/planning/landuseprojects/documents/Ch03-03_AQ_DEIR.pdf; South Coast Air Quality Management District 2011 Portable Engine Tier Ratings, http://www.aqmd.gov/home/permits/equipment-registration/perp/portable-engine-tier-ratings.
[40] SWAPE Comments, p. 10.
[41] US EPA, FACT SHEET: Proposed Amendments to the Standards for Performance for Stationary Compression Ignition Internal Combustion Engines, https://www.epa.gov/stationary-engines/fact-sheet-proposed-amendments-standards-performance-stationary-compression.
[42] SWAPE Comments, p. 10.

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Second, the GP MMRP also lacked 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.[43] This measure, and others recommended by SWAPE to reduce air pollution impacts would in fact be feasible and 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.[44]

The City may contend that implementation of the City's Standard Development Requirements ("SDRs")[45] related to construction emissions[46] 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. Moreover, the SDRs do not specify Tier 4 equipment. A subsequent EIR must therefore be prepared to adequately mitigate the Project's air quality and health risk impacts.

Additionally, as explained in our prior comments to the Zoning Administrator, a backup generator is required by California Building Code due to the presence of elevators in the proposed residential building.[47] But the Air Quality analysis prepared for the Project failed to analyze this source of operational emissions. California Building Code Title 24, Part 2 § 2702.2.2 requires that "Standby power shall be provided for elevators and platform lifts."[48] 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.[49] The Project is therefore required to have standby power in the form of a back-up generator for the onsite elevator. Backup generators commonly emit DPM and other criteria pollutant and GHG emissions.[50] The Project does not

[43] SWAPE Comments, p. 11.
[44] CEQA Guidelines §§ 15162(a)(1)-(3).
[45] FMC Chapter 18.218.
[46] FMC § 18.218.050(a)(2).
[47] California Building Code Title 24, Part 2 § 2702.2.2.
[48] California Building Code Title 24, Part 2 § 2702.2.2.
[49] *Id.* § 1009.4.1; 3008.8.
[50] See e.g. Air Quality Implications Of Backup Generators in California, California Energy Commission, available at https://www.google.com/search?q=Backup+generators+DPM+and+other+criteria+pollutant+and+GHG+emissions+california&client=firefox-b-1-d&sca_esv=dcfe5edb8f188ebf&sxsrf=ACQVn0_m-

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include a condition requiring the use of all-electric backup generators; therefore, emissions from the Project's backup generator are reasonably foreseeable. 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 site's 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. SWAPE recommends feasible mitigation to reduce potential generator emissions including a recommendation that "generators on site shall be fueled with ultra-low sulfur diesel fuel (ULSD) or a biodiesel blend approved by the original engine manufacturer with sulfur content of 15 ppm or less."[51] This measure, and others recommended by SWAPE to reduce air pollution impacts, 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.[52] The City should include these measures in a subsequent EIR, as required by CEQA.

C. Noise and Vibration Impacts are More Severe than Previously Analyzed and Mitigation Recommended by Wilson Ihrig is Considerably Different from Mitigation Analyzed Previously and Would Substantially Reduce the Project's Significant Effects on the Environment

The City's noise analysis lacks substantial evidence to conclude that the Project would not expose nearby sensitive receptors to excessive construction and traffic noise from the Project. Construction noise impacts may therefore be more severe than analyzed in the General Plan EIR. As demonstrated in Wilson Ihrig's Comments, "vibration from demolition and similar sources would far exceed NIH criteria and **generate significant impacts that require mitigation**."[53] An exemption may be improper and an EIR must be prepared to adequately analyze the Project's potentially significant noise impacts to nearby sensitive receptors.

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[51] SWAPE Comments, p. 11.

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

[53] Jue Appeal Comments, p. 3 (emphasis in original).

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Mitigation proposed by Deborah Jue of Wilson Ihrig to address these significant noise and vibration impacts is considerably different from measures enacted in the General Plan EIR MMRP for construction vibration, because the MMRP included only vibration reduction *recommendations*, not binding mitigation.[54] The Construction Vibration Mitigation Measure NOI-5 in the General Plan MMRP recommends that:

> Mitigation Measure NOI-S: Limitations on Construction Activities Generating Excessive Vibration. The following best practice measures when applicable are *recommended* to reduce vibration from construction activities:
>
> - Comply with construction hours ordinance to limit hours of exposure.
> - Avoid impact pile-driving where possible. Drilled piles causes lower vibration levels where geological conditions permit their use.
> - Minimize or avoid using vibratory rollers and tampers near sensitive areas.
> - When vibration sensitive structures are adjacent to a subject site, survey condition of existing structures and when necessary perform site specific vibration studies to direct construction activities. Contractors shall continue to monitor effects of construction activities on surveyed sensitive structures and offer repair or compensation for damage.
> - Construction management plans for substantial construction projects shall include predefined vibration reduction measures, notification requirements for properties within 200 feet of construction schedule, and contact information for on-site coordination and complaints.

Given that these measures are best practice measures recommended to reduce vibration from construction activities, they are not binding mitigation and are considerably different from binding mitigation proposed by Ms. Jue to feasibly reduce construction vibration impacts.

Ms. Jue recommends that the Project proponent be required to include a Construction Vibration Plan:

> - Collect information from medical facilities regarding vibration sensitive equipment, identify applicable criteria and existing measures these facilities employ to control vibration.
> - If necessary, conduct vibration measurements to document existing conditions and confirm that existing isolation systems

[54] Fremont General Plan EIR, MMRP, p. 46, https://www.fremont.gov/home/showpublisheddocument/837/637750631772530000.

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would be sufficient to control construction vibration to acceptable levels.

- Identify additional vibration control measures such as
  - schedule around medical equipment operational hours,
  - use low-vibration excavation and demolition techniques,
  - provide upgrades to on-site vibration isolation systems.
  - Plan submittal subject to review from vibration sensitive stakeholders and approval by the City of Fremont.

This proposed measure to reduce significant construction impacts from construction vibration sensitive receptors at the Kaiser Hospital complex is "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.[55]

Further, Deborah Jue recommends feasible construction mitigation measures which are considerably different from the nonbinding recommendations proposed by the General Plan. Ms. Jue recommends the Project proponent be required to include a Construction Noise Plan, to include:

- Collect information from nearby commercial and medical facilities regarding noise sensitive uses that could be exposed to on-going construction noise
- Identify noise control measures such as
  - schedule around noise sensitive use operational hours,
  - provide temporary noise barriers that provide a minimum STC 25 rating and block direct and flanking noise (e.g., 3-sided enclosure)
  - minimum 8 ft height, but 10 to 15 ft height may be needed
  - provide 10 dBA minimum reduction.

Ms. Jue's expert recommendation that mitigation include quantifiable reductions in construction noise impacts is considerably different from mitigation proposed in the General Plan MMRP. As such, a subsequent EIR should be prepared to adequately analyze and mitigate the Project's potentially significant construction noise and vibration impacts.

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

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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.[56] CEQA is "an integral part of any public agency's decision making process."[57] 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.[58] 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.[59] Thus, exemptions must be narrowly construed and are not to be expanded beyond the scope of their plain language.[60]

To rely on a categorical exemption, the City must determine, based on substantial evidence, that approval of the Project would not result in any significant effects on the environment.[61] In order to qualify for an Infill Exemption, projects must be consistent with the general plan, and cannot have any significant effects relating to traffic, noise, air quality, or water quality.[62] Here, the Project fails to conform with the General Plan and the Fremont City Center Community Plan, and has significant unmitigated effects on air quality and from noise, which preclude reliance on an exemption.

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:

(a) <u>*The project is consistent with the applicable general plan designation and all applicable general plan policies*</u> as well as with applicable zoning designation and regulations.

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[56] CEQA Checklist, p. 4-5.
[57] Pub. Resources Code § 21006.
[58] *Id.*, §§ 21000, 21001.
[59] *Id.*, § 21100(a); *see also* CEQA Guidelines § 15004(a).
[60] *Castaic Lake Water Agency v. City of Santa Clarita* (1995) 41 Cal.App.4th 1257.
[61] Pub. Res. Code §§ 21080(b)(9); 21084(a); *Banker's Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego* (2006) 139 Cal.App.4th 249, 269 (lead agency must provide "substantial evidence to support [their] finding that the Project will not have a significant effect.")
[62] 14 CCR § 15332.

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(b) The proposed development occurs within city limits on a project site of no more than five acres substantially surrounded by urban uses.
(c) The project site has no value as habitat for endangered, rare or threatened species.
(d) <u>Approval of the project would not result in any significant effects relating to traffic, noise, air quality, or water quality.</u>
(e) The site can be adequately served by all required utilities and public services.[63]

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 noise. 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. *<u>The project and successive projects of the same type in the same place will result in cumulative impacts;</u>*
3. *<u>There are "unusual circumstances" creating the reasonable possibility of significant effects;</u>*
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.[64]

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[63] 14 CCR § 15332 (emphasis added).
[64] 14 CCR § 15300.2; Pub. Resources Code § 21084 (emphasis added).

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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 cumulative impacts; and 3) there is a reasonable probability that the project will have a significant effect on the environment due to "unusual circumstances" given the proximity of the Kaiser hospital next to the Project site.[65]

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."[66] "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.[67] If a court locates substantial evidence in the record to support the City's conclusion, the City's decision will be upheld.[68]

The record demonstrates that neither the City nor the Applicant have provided substantial evidence demonstrating that the Project qualifies for the Infill Exemption, or any other categorical exemption. In fact, there is substantial evidence demonstrating that the Project may result in significant air quality, public health, and noise impacts which precludes reliance on the infill exemption and require preparation of an EIR.

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

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

[65] 14 CCR § 15300.2(c); *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 C4th 1086.
[66] *Banker's Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego* (2006) 139 Cal.App.4th 249, 269.
[67] CEQA Guidelines § 15384.
[68] *Bankers Hill Hillcrest*, 139 Cal.App.4th at 269.

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Hospital.[69] Occupants of hospitals are considered sensitive receptors. The Kaiser Permanente IVF Clinic is within 90 feet of the Project.[70]

SWAPE's analysis determined that the City failed to evaluate the toxic air contaminant emissions associated with Project operation or indicate the concentrations at which such pollutants would trigger adverse health effects.[71] Without making a reasonable effort to connect the Project's operational TAC emissions to the potential health risks posed to nearby receptors, the Project is inconsistent with the requirement to correlate the Project-generated emissions with potential adverse impacts on human health.[72]

SWAPE recalculated the Project's health risk impacts in a quantitative health risk analysis ("HRA"). The CEQA Checklist's Air Quality and GHG Analysis indicated that operational activities will generate approximately 20 pounds of DPM per year throughout operation.[73] SWAPE calculated the excess cancer risk associated with Project operation is approximately 11.3 in one million for infants, children, and adults.[74] SWAPE also estimated an excess cancer risk of approximately 17.3 in one million over the course of a residential lifetime.[75] As such, the operational and lifetime cancer risk exceeds the BAAQMD threshold of 10 in one million, resulting in a potentially significant air quality and health risk impact not previously addressed or mitigated by the General Plan EIR. The City cannot rely on a categorical exemption, or any other CEQA exemption, because the Project may result in significant impacts to air quality and public health which require mitigation before the Project can lawfully be approved.

Moreover, emissions from the Project's mandatory backup generator may result in potentially significant air quality emissions. California Building Code Title 24, Part 2 § 2702.2.2 requires that "Standby power shall be provided for elevators and platform lifts."[76] Where, as here, a building has an accessible floor four or more stories above an emergency exit, the building must have an elevator

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[69] CEQA Checklist, p. 7.
[70] Air Quality, Energy, and Greenhouse Gas Emissions Analysis for the Fremont Gateway Plaza Apartments Project, Fremont, California, (September 22, 2023), p. 29.
[71] SWAPE Comments, p. 3.
[72] *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 519; *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 134 Cal.App.4th 1184, *1220* ("After reading the EIRs, the public would have no idea of the health consequences that result when more pollutants are added to a nonattainment basin. On remand, the health impacts resulting from the adverse air quality impacts must be identified and analyzed in the new EIRs.").
[73] SWAPE Comments, p. 4.
[74] SWAPE Comments, p. 9.
[75] *Id.*
[76] California Building Code Title 24, Part 2 § 2702.2.2.

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with a standby power for the elevator equipment.[77] 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.

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 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. The Project results in significant construction noise emissions which are not exempt from the Noise Ordinance. Deborah Jue calculated that "[n]oise from the hoe ram during demolition... would be significant and requires mitigation."[78]

But, the Project's Noise Analysis incorrectly analyzes the Project's noise impacts and is not remedied by the Staff Report or Response to Appeal. The Response to Appeal doubles down on the use of an inadequate distance at the center of the site, by stating this is a "common professional best practice and a logical means for approximating the average construction noise from a larger construction site."[79] 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.[80] 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."[81] But, when quantifying whether noise impacts will be significant, the Noise Memo relies on a distance of 630 feet from Kaiser hospital.[82] Ms. Jue determined this metric is misplaced and unsupported by substantial evidence because "the significant impact

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[77] *Id.* § 1009.4.1; 3008.8.
[78] Jue Appeal Comments, p. 3.
[79] Response to Appeal, p. 7.
[80] Jue Appeal Comments, p. 2.
[81] Noise and Vibration Impact Analysis for the Fremont Gateway Plaza Apartments Project, Fremont, California, (Oct. 31, 2023), p. 13.
[82] *Id.* at 17.

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on noise sensitive receptors close to one edge of the project would be obscured by using a larger distance. In this case, the choice to use 630 feet instead of 400 feet is a 58% increase in distance that undervalues the noise impact by 4 dBA."[83]

Thus, the City'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. An exemption is improper and an EIR must be prepared to adequately analyze the Project's potentially significant noise impacts to nearby sensitive receptors.

D. The Proximity of the Kaiser Hospital to the Project Site and Resulting Significant Impacts Are Unusual Circumstances Which Preclude Reliance on a Categorical Exemption

CEQA prohibits categorical exemptions where an exception applies pursuant to CEQA Guidelines, Section 15300.2. An exception applies where there is a significant effect due to unusual circumstances.[84] The Project's proximity to the Kaiser Hospital is an unusual circumstance due to the health and noise-sensitive nature of the hospital zone.

The Kaiser Permanente IVF Clinic is within 90 feet north of the Project and the Kaiser Hospital is approximately 415 feet to the east of the Project.[85] Per General Plan Policy 10-8.6 and Implementation 10-8.6.A, it is the policy of the City of Fremont to locate hospitals, medical facilities, and other noise sensitive uses and sensitive receptors away from noise and pollution sources. The Project will create significant construction noise and air pollution impacts directly adjacent to the Kaiser hospital, creating an unusual circumstance which conflicts with the City's hospital placement policies and results in significant effects on public health and noise. This circumstance creates an exception to the City's proposed categorical exemption.

[83] Jue Appeal Comments, p. 2.
[84] 14 CCR § 15300.2(c) ("Significant Effect. A categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.").
[85] Air Quality, Energy, and Greenhouse Gas Emissions Analysis for the Fremont Gateway Plaza Apartments Project, Fremont, California, (September 22, 2023), p. 29.

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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.[86]

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 December 12, 2022, long after both plans were adopted by the City.[87] The Fremont City Center Community Plan therefore did not fully address the Project's peculiar and more significant impacts 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.[88]

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 pose a significant public 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 EIR[89], or General Plan Update EIR. Furthermore, the Project's health risks from TAC emissions during construction and operation are significant and unmitigated. These impacts are peculiar to the Project and require site-specific CEQA analysis.

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[86] 14 CCR § 15183(a)-(c).
[87] City of Fremont, Universal Planning Application, Gateway Plaza MU, APN 507-465-13-1, (Dec. 12, 2022).
[88] PRC § 21081(a).
[89] City of Fremont, California, Fremont City Center Community Plan, (May 19, 2015), https://www.fremont.gov/home/showpublisheddocument/1625/637752665509700000.

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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 City Cannot Rely on a Community Plan Exemption to Approve the Project Because the Project May Result in Significant Impacts from Noise that Are Peculiar to the Project Site and Not Substantially Mitigated

As detailed above and in Deborah Jue's comments attached, the Project results in potentially significant noise and vibration impacts from construction and construction traffic 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.[90] The General Plan Noise Element provides that trucks passing by at 50 feet can reach noise levels of 75-85 dBA.[91] These noise levels may result in a significant noise impact to nearby sensitive receptors.

Ms. Jue concluded 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.[92] 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.[93] Ms. Jue's comments provide substantial evidence demonstrating that noise from the Project may be more severe than previously analyzed. As discussed above, Ms. Jue 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.

[90] Jue Comments, p. 2.
[91] Fremont General Plan Safety and Noise Element (Dec. 2011), p. 10-41; 10-48.
[92] Jue Comments, p. 2.
[93] Jue Comments, p. 2.

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The Staff Report's Response to Appeal provides that "[t]emporary construction noise is considered less than significant, provided the Project complies with the construction hours as specified in the City's Noise Ordinance, and implements the Standard Development Requirements of Section 18.218.050(g) of the FMC related to construction noise."[94] 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."[95] 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.[96]

The Response to Appeal provides that even Construction Period traffic noise, "like all construction noise levels generated during permitted construction hours, construction-period traffic noise is exempt from compliance with City noise standards, and temporary construction noise is considered less than significant."[97] The City is incorrect for grouping construction noise with traffic noise in this way. The Fremont Noise Ordinance provides that "construction work" or "construction activity" shall mean any site preparation, assembly, erection, substantial repair, alteration, demolition or similar action, for or on any private property, public or private right-of-way, streets, structures, utilities, facilities, or other similar property.[98] Construction-period traffic noise does not constitute "construction activity" for purposes of exempting it from compliance with the City's noise standards. The Staff Report's Responses to Appeal is therefore unsupported in its conclusion that construction traffic noise is less than significant. Rather, substantial evidence demonstrates that construction traffic noise is significant, more severe than previously analyzed, and unmitigated, as demonstrated in Deborah Jue's expert comments, requiring preparation of a subsequent EIR.

Moreover, 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 emergency or in the performance of emergency work, and activities involving

[94] Response to Appeal, p. 8.
[95] *Id.*
[96] Fremont Municipal Code § 9.25.040.
[97] Response to Appeal, p. 10.
[98] Fremont Municipal Code § 9.25.030.

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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.

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(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, and as demonstrated in Deborah Jue's comments, remains significant and unmitigated.

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.[99]

The Project's significant air quality, public health, 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.

VI. 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 City's fee schedule.[100] 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*.[101] 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

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[99] Fremont Municipal Code § 18.235.060 (emphasis added).
[100] City of Fremont Fee Schedule (July 1, 2023), p. 6, https://www.fremont.gov/home/showpublisheddocument/13864/638300253322870000.
[101] *Id.*

development services," then requires the project applicants to replenish deposits when needed to continue processing their project application.[102] 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."[103] 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.[104]

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.[105] City staff informed Appellants that the appeal filing would be rejected unless Appellants signed the Reimbursement Agreement.[106] 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."[107] 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, though not expressly prohibited; or, otherwise contrary to good morals.[108] 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.[109] Contracts

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[102] 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.
[103] *Id.* at p. 1.
[104] *California Teachers Ass'n v. State of Cal.* (1999) 20 Cal. 4th 327, 331.
[105] See City of Fremont, Universal Planning Application, Part II, *Reimbursement Agreement.*
[106] 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.
[107] Civil Code § 1608.
[108] Civil Code § 1667.
[109] *Asdourian v. Araj* (1985) 38 Cal.3d 276, 282.

that are against public policy, as with the City's Reimbursement Agreement, are void and unenforceable.[110]

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,[111] 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.[112] 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..."[113] 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..."[114] 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.[115]

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 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

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[110] 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.").
[111] Cal. Const. Art. III.
[112] 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.
[113] *Id.*, at 338-39.
[114] *Id.*, at 338.
[115] See *id.*, at 331, 333, 338.

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have been paid in full."[116] "Any unused portion of any deposit shall be returned to the person paying the deposit upon completion of the project."[117] If the City were to enforce the Reimbursement Agreement, it may attempt to 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.[118] 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.[119] 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,*[120] a teacher filed a facial challenge to Education Code Section 44944(e) 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.[121] 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.[122] In finding the statute invalid on its face, the Court asserted that the right of access to courts extends to the constitutional right to petition administrative tribunals.[123]

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

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[116] Fremont Municipal Code § 18.310.020.
[117] *Id.* at § 18.310.030.
[118] See City of Fremont, Universal Planning Application, Part II, *Reimbursement Agreement.*
[119] See Pub. Res. Code § 21177; *Tomlinson v. County of Alameda* (2012) 54 Cal.4th. 281, 291.
[120] (1999) 20 Cal. 4th 327, 331.
[121] *Id.* at 332.
[122] *Id.*
[123] *Id.* at 335; *Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal. 3d 1118, 1135.

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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.

VII. CONCLUSION

As discussed herein, the Zoning Administrator lacked 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 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.

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

Sincerely,

Kelilah D. Federman

Attachments
KDF:acp

6861-008acp