

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

trengifo@adamsbroadwell.com

SACRAMENTO OFFICE

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

TEL. (916) 444-6201

FAX. (916) 444-6209

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

*Of Counsel*

MARC D. JOSEPH  
DANIEL L. CARDOZO

June 6, 2023

**VIA EMAIL AND HAND DELIVERY**

Mia Casey, Mayor  
Rick Perez, Councilmember  
Rolan Resendiz, Councilmember  
Dolores Morales, Councilmember  
Tim Burns, Councilmember  
Hollister City Hall Council Chambers  
375 Fifth Street  
Hollister, CA 95023

Email: [cohmayor.casey@hollister.ca.gov](mailto:cohmayor.casey@hollister.ca.gov);

[coh.dist1@hollister.ca.gov](mailto:coh.dist1@hollister.ca.gov);

[coh.dist2@hollister.ca.gov](mailto:coh.dist2@hollister.ca.gov);

[coh.dist3@hollister.ca.gov](mailto:coh.dist3@hollister.ca.gov);

[coh.dist4@hollister.ca.gov](mailto:coh.dist4@hollister.ca.gov)

Jennifer Woodworth  
City Clerk  
Hollister City Hall  
375 Fifth Street  
Hollister, CA 95023

Email:

[coh.cityclerk@hollister.ca.gov](mailto:coh.cityclerk@hollister.ca.gov)

**VIA EMAIL**

Magda Gonzalez, Senior Planner  
339 Fifth Street  
Hollister, CA 95023

Phone: (925) 789-7160

Email: [planning@hollister.ca.gov](mailto:planning@hollister.ca.gov)

Received

JUN 07 2023

By: *JW*

Receive Stamp and Return

**Re: Appeal of Planning Commission Approval of Site & Architectural Review 2023-1 – Stodola Battery Energy Storage System Project**

Dear Mayor Casey, Councilmember Perez, Councilmember Resendiz, Councilmember Morales, Councilmember Burns, Ms. Woodworth, and Ms. Gonzalez:

On behalf of **Citizens for Responsible Industry** (“Citizens”), we submit this appeal of the City of Hollister (“City”) Planning Commission’s approval of the Stodola Battery Energy Storage System (“BESS”) Project (Site & Architectural Review 2023-1) (“Project”), proposed by RWE Solar Development, LLC (“Applicant”), including the approval of Site & Architectural Review 2023-1, adoption of Findings and Conditions of Approval, and determination that the

Project is exempt from the California Environmental Quality Act (“CEQA”)<sup>1</sup> pursuant to a Class 32 categorical exemption.

Citizens appeals the May 25, 2023 Planning Commission approval of Site & Architectural Review 2023-1, adoption of Findings and Conditions of Approval, and determination that the Project is exempt from CEQA pursuant to a Class 32 categorical exemption. This letter supplements Citizens’ appeal application form, filed concurrently herewith, and is accompanied by the required appeal fees.

## **I. PROJECT DESCRIPTION**

The Project requires a Site and Architectural Review to construct a 10-megawatt unmanned battery storage facility, with perimeter fencing and landscaping.<sup>2</sup> The Project consists of battery storage “lineups.”<sup>3</sup> Each lineup would include three battery containers, a water injection system, and a DC combiner box.<sup>4</sup> The Project will store and deliver electricity to the grid through a Generator Interconnection Agreement with Pacific Gas and Electric (“PG&E”).<sup>5</sup> The point of interconnect would be the existing Hollister Substation, located on the adjacent parcel.<sup>6</sup> The Hollister Substation is owned and operated by PG&E.<sup>7</sup> The Project will be located on a 1.66-acre parcel located at 431 Gateway Drive within the General Commercial (“GC”) Zoning District.<sup>8</sup> The Applicant will purchase the land, build, and commission the Project.<sup>9</sup>

## **II. BASIS FOR APPEAL**

On May 25, 2023, the City’s Planning Commission adopted a Resolution approving Site and Architectural Review 2023-1, subject to findings and conditions, and determined that the Project is exempt from CEQA pursuant to Class 32 Infill Exemption under CEQA Guidelines section 15332 (“Class 32 exemption” or “Infill

---

<sup>1</sup> Pub. Res. Code (“PRC” or “Pub. Res. Code”) §§ 21000, *et seq.*; 14 Cal. Code Regs. (“C.C.R.” or “CEQA Guidelines”) §§ 15000, *et seq.*

<sup>2</sup> City of Hollister, *Planning Commission Staff Report May 25, 2023 Item 2* at 1 (May 25, 2023), available at: [https://hollister.ca.gov/wp-content/uploads/2023/05/May-25-2023\\_PC-Agenda-Packet\\_For-Website.pdf](https://hollister.ca.gov/wp-content/uploads/2023/05/May-25-2023_PC-Agenda-Packet_For-Website.pdf).

<sup>3</sup> *Id.* at 2.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 1.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 2.

June 6, 2023

Page 3

Exemption”).<sup>10</sup> The City’s Code of Ordinances (“Code”), section 17.24.140 provides that “[a]ny person aggrieved by a decision or action of the Planning Commission may appeal that decision or action to the City Council,” “within 15 calendar days from the date of the decision or action, ....”<sup>11</sup> This appeal is timely filed in compliance with the City’s Code.

The reasons for this appeal are set forth herein. Our appeal is supported by noise expert Jack Meighan<sup>12</sup> and hazards experts Matt Hagemann, P.G., C.Hg., and Paul E. Rosenfeld, Ph.D., at Soil / Water / Air Protection Enterprise (“SWAPE”).<sup>13</sup>

As explained herein and in the attached comments, the Planning Commission abused its discretion and failed to proceed in the manner required by law by approving the Project in reliance on the Class 32 exemption and without substantial evidence to support the approval findings.<sup>14</sup> To qualify for a categorical exemption, a lead agency must provide substantial evidence that the Project will not have a significant effect.<sup>15</sup> Here, the Class 32 exemption is facially inapplicable to the Project because the Project may have significant impacts on air quality, public health, and noise. Additionally, the proposed development would occur on a site that is not substantially surrounded by urban uses. Prime Agriculture Lands surround the Project site to the north, precluding reliance on the Class 32 exemption.<sup>16</sup> Therefore, the Planning Commission’s decision that the Project is exempt from CEQA pursuant to the Infill Exemption was not supported by substantial evidence and failed to comply with CEQA.

The Planning Commission also abused its discretion and failed to proceed in the manner required by law in finding the Project to be exempt from CEQA because

---

<sup>10</sup> City of Hollister, *Planning Commission Staff Report May 25, 2023 Item 2* at 3 (May 25, 2023), available at: [https://hollister.ca.gov/wp-content/uploads/2023/05/May-25-2023\\_PC-Agenda-Packet\\_For-Website.pdf](https://hollister.ca.gov/wp-content/uploads/2023/05/May-25-2023_PC-Agenda-Packet_For-Website.pdf).

<sup>11</sup> City of Hollister, Code of Ordinances § 17.24.140(B)(1)-(2).

<sup>12</sup> Mr. Meighan’s technical comments and curriculum vitae are attached hereto as Exhibit A (hereinafter “Meighan Comments”).

<sup>13</sup> Matt Hagemann, P.G., C.Hg., and Paul E. Rosenfeld, Ph.D., at Soil / Water / Air Protection Enterprise (“SWAPE”) technical comments and curriculum vitae are attached hereto as Exhibit B (hereinafter “SWAPE Comments”).

<sup>14</sup> Code Civ. Proc § 1094.5(b); *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515.

<sup>15</sup> *Banker’s Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego* (2006) 139 Cal.App.4th 249, 269.

<sup>16</sup> City of Hollister, *General Plan; Chapter Six: Open Space and Agriculture Element* at 6.3, available at: [https://hollister.ca.gov/wp-content/uploads/2014/12/06\\_Open-Space.pdf](https://hollister.ca.gov/wp-content/uploads/2014/12/06_Open-Space.pdf).

mitigated categorical exemptions are expressly prohibited under CEQA.<sup>17</sup> The Project's Conditions of Approval adopted by the Planning Commission mitigate the Project's significant construction noise impacts by requiring that construction activities on the project site employ noise suppression devices and techniques.<sup>18</sup> This condition goes beyond the noise requirements in the City's Municipal Code in section 17.16.100.<sup>19</sup> The Planning Commission's inclusion of this requirement in the Conditions of Approval is evidence that the Project's construction noise impacts would be significant and require mitigation such that the Project is not exempt from CEQA.

Furthermore, the Planning Commission abused its discretion in failing to find that exceptions to the Class 32 exemption are applicable to the Project. There is substantial evidence demonstrating a reasonable possibility that cumulative impacts of successive projects of the same type in the same place over time will be significant,<sup>20</sup> and substantial evidence demonstrates that the Project would have a significant effect on human health and the environment due to unusual circumstances.<sup>21</sup> As such, these exceptions render the Infill Exemption to CEQA review inapplicable and the Planning Commission abused its discretion in adopting the Class 32 exemption.

The Project Description is also inadequate because it omitted critical details about the proposed BESS, such as the type of lithium-ion battery or battery chemistry and lacked sufficient information regarding the design of the BESS, including battery layout; the type of cooling system the BESS will contain; and the type of fire detection and fire suppression systems in place in the BESS. This information is critical to determine the environmental impacts of the BESS component.

The Planning Commission also lacked the substantial evidence necessary to approve the Project's requested Site and Architectural Review 2023-1. To approve

---

<sup>17</sup> *Salmon Pro. & Watershed Network v. County of Marin* ("SPAWN")(2004) 125 Cal.App.4th 1098, 1102; *Azusa Land Recl. Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal. App.4th 1165, 1198-1201.

<sup>18</sup> City of Hollister, *Planning Commission Staff Report May 25, 2023 Item 2* (May 25, 2023), available at: [https://hollister.ca.gov/wp-content/uploads/2023/05/May-25-2023\\_PC-Agenda-Packet\\_For-Website.pdf](https://hollister.ca.gov/wp-content/uploads/2023/05/May-25-2023_PC-Agenda-Packet_For-Website.pdf). The condition also states that construction equipment and activities shall "not" use noise suppression devices and techniques, which is inconsistent with the preceding requirement. For purposes of these comments, we assume that the condition intends to require these devices and techniques.

<sup>19</sup> City of Hollister, Municipal Code § 17.16.100(A); *see also* Ordinance No. 1137.

<sup>20</sup> 14 C.C.R. § 15300.2(b).

<sup>21</sup> *Id.* at § 15300.2(c).

the requested entitlement, the Planning Commission had to find, on the basis of substantial evidence, that the proposed Project would not be detrimental to the health, safety, and welfare of persons residing or working in the neighborhood or to the general welfare of the City. This finding is not supported by substantial evidence.

For the reasons set forth herein and in the attached expert comments, approval of the Project is likely to result in significant effects relating to air quality, public health, and noise. Additionally, the impacts on health and the environment from fires or other serious accidents caused by the Project's BESS may be significant and have not been disclosed or mitigated. The risks to health and safety from this Project are especially significant because the Project is surrounded by residences where people live, hotels where people work and visit, and a daycare within approximately 417 feet of the Project site that serves hundreds of children. Thus, the Planning Commission lacked substantial evidence to support a finding that the proposed Project would not be detrimental to the health, safety, and welfare of persons residing or working in the neighborhood or to the general welfare. The Planning Commission therefore abused its discretion in approving the Project's Site and Architectural Review 2023-1.

Because the Planning Commission abused its discretion and failed to proceed in the manner required by law, Citizens respectfully requests that the City Council uphold this appeal, vacate the Planning Commission's approval of the Project, and direct staff to prepare an Environmental Impact Report ("EIR") for the Project pursuant to CEQA. The EIR must contain the necessary supporting analysis to fully disclose and mitigate the Project's adverse impacts, including but not limited to construction and operational air quality and public health impacts, hazardous materials, noise, and land use impacts.

### **III. STANDING TO APPEAL AND STATEMENT OF INTEREST**

Pursuant to the City's Code, section 17.24.140, "[a]ny person aggrieved by a decision or action of the Planning Commission [including on a Site and Architectural Review]<sup>22</sup> may appeal that decision or action to the City Council."<sup>23</sup>

Citizens is a coalition of individuals and labor organizations whose members encourage sustainable development of California's energy and natural resources. The coalition includes City of Hollister residents and other members and organizations, including California Unions for Reliable Energy ("CURE") and its

---

<sup>22</sup> City of Hollister, Municipal Code § 17.24.190(E).

<sup>23</sup> *Id.* at § 17.24.140(B)(1)-(2).

local affiliates, and the affiliates' members who live, recreate, work, and raise families in City of Hollister and in communities near the Project site. Thus, Citizens, its participating organizations, and their members stand to be directly affected by the Project's impacts.

Since its founding in 1997, CURE has been committed to building a strong economy and a healthier environment. CURE's members help solve the State's energy problems by building, maintaining, and operating conventional and renewable energy power plants, energy storage, and transmission facilities. CURE has helped cut smog-forming pollutants in half, reduced toxic emissions, increased the use of recycled water for cooling systems, and pushed for groundbreaking pollution control equipment as the standard for all new power plants, all while helping to ensure that new power plants, energy storage, and transmission facilities are built with highly trained, professional workers who live and raise families in nearby communities.

Individual members of Citizens and its member organizations live, work, recreate, and raise their families in the City of Hollister, in the vicinity of the Project. Accordingly, they will be directly affected by the Project's environmental and health and safety impacts. Individual members may also work on the Project itself. They will be the first in line to be exposed to any health and safety hazards that exist onsite.

Citizens has an interest in enforcing environmental laws that encourage sustainable development and ensure a safe working environment for the members that they represent. Environmental degradation destroys cultural and wildlife areas, consumes limited fresh surface and ground water resources, causes water pollution, and imposes other stresses on the environmental carrying capacity of the state. This in turn jeopardizes future development by causing construction moratoriums and otherwise reducing future employment opportunities for Citizen's members. Citizens therefore has a direct interest in enforcing environmental laws to minimize the adverse impacts of projects that would otherwise degrade the environment.

Citizens and its members are aggrieved by the Planning Commission's decision to approve the Project and adopt unsupported approval findings in reliance on a CEQA exemption, without analyzing and mitigating the Project's potentially significant impacts in an EIR.

Finally, Citizens' members are concerned about projects that risk serious environmental harm without providing countervailing economic benefits. For these

reasons, Citizens' mission includes improving California's economy and the environment by ensuring that new conventional and renewable power plants and their related transmission facilities use the best practices to protect our clean air, land and water and to minimize their environmental impacts and footprint.

#### IV. LEGAL BACKGROUND

"CEQA and the regulations implementing it 'embody California's strong public policy of protecting the environment.'"<sup>24</sup> CEQA is designed to inform decision-makers and the public about the potential, significant environmental effects of a project.<sup>25</sup> "CEQA's fundamental goal [is] fostering informed decision-making."<sup>26</sup> "The purpose of CEQA is not to generate paper, but to compel government at all levels to make decisions with environmental consequences in mind."<sup>27</sup>

The implementation of CEQA is a multistep process that begins with whether the proposed activity is subject to CEQA at all.<sup>28</sup> Next, assuming CEQA applies, the agency must determine whether the activity qualifies for a categorical exemption.<sup>29</sup> If the project is exempt, the agency need not proceed with environmental review.<sup>30</sup> CEQA identifies certain classes of projects which are exempt from the provisions of CEQA.<sup>31</sup> These classes of activities generally do not have a significant effect on the environment.<sup>32</sup> "Where the specific issue is whether the lead agency correctly determined a project fell within a categorical exemption, [a court] must first determine as a matter of law the scope of the exemption and then determine if substantial evidence supports the agency's factual finding that the project fell within the exemption."<sup>33</sup> CEQA exemptions are to be narrowly construed and "[e]xemption categories are not to be expanded beyond the reasonable scope of their statutory language."<sup>34</sup> Erroneous reliance by a lead agency on a categorical exemption constitutes a prejudicial abuse of discretion and a violation of CEQA.<sup>35</sup>

---

<sup>24</sup> *Save the Agoura Cornell Knoll*, 46 Cal. App. 5th at 673.

<sup>25</sup> 14 C.C.R. § 15002(a)(1).

<sup>26</sup> *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 402.

<sup>27</sup> *Bozung v. LAFCO* (1975) 13 Cal.3d 263, 283.

<sup>28</sup> See Pub. Res. Code § 21065.

<sup>29</sup> 14 C.C.R. § 15061.

<sup>30</sup> *Id.*

<sup>31</sup> Pub. Res. Code § 21084(a); 14 C.C.R. §§ 15300, 15354.

<sup>32</sup> *Id.*

<sup>33</sup> *California Farm Bureau Fed'n v. California Wildlife Conservation Bd.* (2006) 143 Cal. App. 4th 173, 185.

<sup>34</sup> *Mountain Lion Found. v. Fish & Game Com.* (1997) 16 Cal.4th 105, 125.

<sup>35</sup> *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, 1192.

To qualify for a categorical exemption, a lead agency must provide “substantial evidence to support [its] finding that the Project will not have a significant effect.”<sup>36</sup> “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.<sup>37</sup> If a court locates substantial evidence in the record to support the agency’s conclusion, the agency’s decision will be upheld.<sup>38</sup> If, however, the record lacks substantial evidence, as here, a reviewing court will not uphold an exemption determination.

Section 15332 of the CEQA Guidelines provides an exemption from CEQA for projects characterized as in-fill development meeting the conditions:

- (a) The project is consistent with the applicable general plan designation and all applicable general plan policies as well as with applicable zoning designation and regulations.
- (b) The proposed development occurs within city limits on a project site of no more than five acres substantially surrounded by urban uses.
- (c) The project site has no value as habitat for endangered, rare or threatened species.
- (d) Approval of the project would not result in any significant effects relating to traffic, noise, air quality, or water quality.
- (e) The site can be adequately served by all required utilities and public services.<sup>39</sup>

If an agency meets its burden to demonstrate that the project is within a categorically exempt class, the burden shifts to the party challenging the categorical exemption to show that the project is not exempt due to an exception pursuant to CEQA Guidelines Section 15300.2.<sup>40</sup> One such exception is that 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.”<sup>41</sup> A categorical exemption is also inapplicable to an activity if “the

---

<sup>36</sup> *Banker’s Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego* (2006) 139 Cal.App.4th 249, 269.

<sup>37</sup> 14 C.C.R. § 15384.

<sup>38</sup> *Bankers Hill Hillcrest*, 139 Cal.App.4th at 269.

<sup>39</sup> 14 C.C.R. § 15332(a)-(e).

<sup>40</sup> *California Farm Bureau Fed’n*, 143 Cal. App. 4th at 186.

<sup>41</sup> 14 C.C.R. § 15300.2(c).



cumulative impact of successive projects of the same type in the same place, over time is significant.”<sup>42</sup>

Alternatively, if no exemptions are applicable, the agency must undertake environmental review of the activity, which begins with an initial study to determine whether the project may have a significant effect on the environment.<sup>43</sup> A negative declaration may be prepared “if there is no substantial evidence that the project or any of its aspects may cause a significant effect on the environment.”<sup>44</sup> A mitigated negative declaration is required if the initial study identifies potentially significant environmental effects but (1) those effects can be fully mitigated by changes in the project and (2) the project applicant agrees to incorporate those changes.<sup>45</sup> Because “[t]he adoption of a negative declaration...has a terminal effect on the environmental review process” by allowing the agency to dispense with the duty to prepare an EIR, negative declarations, as well as mitigated negative declarations, are allowed only in cases where there is not even a “fair argument” that the project will have a significant environmental effect.<sup>46</sup>

An EIR is necessary for any discretionary project that may have a significant adverse effect on the environment.<sup>47</sup> “At the heart of CEQA is the requirement that public agencies prepare an EIR for any project that may have a significant effect on the environment.”<sup>48</sup> A negative declaration is improper, and an EIR must be prepared, whenever it can be fairly argued on the basis of substantial evidence that the project may have a significant environmental impact.<sup>49</sup> A “significant effect on the environment” is defined as “a substantial, or potentially substantial, adverse change in the environment.”<sup>50</sup> Substantial evidence, for purposes of the fair argument standard, includes “fact, a reasonable assumption predicated upon fact, or *expert opinion* supported by fact.”<sup>51</sup>

---

<sup>42</sup> *Id.* at § 15300.2(b).

<sup>43</sup> *Id.* at § 15063.

<sup>44</sup> *Id.* at § 15063(b)(2).

<sup>45</sup> *Id.* at § 15070(b)(1)-(2).

<sup>46</sup> *Citizens of Lake Murray v. San Diego* (1989) 129 Cal.App.3d 436, 440; Pub. Res. Code §§ 21064, 21100.

<sup>47</sup> Pub. Res. Code § 21151(a).

<sup>48</sup> *Friends of College of San Mateo Gardens v. San Mateo County Community College Dist.* (2016) 1 Cal.5th 937, 944 (internal citations and quotations omitted).

<sup>49</sup> *Id.* at 957.

<sup>50</sup> Pub. Res. Code § 21068; 14 C.C.R. § 15382; *County Sanitation Dist. No. 2 v. County of Kern* (2005) 127 Cal.App.4th 1544, 1581.

<sup>51</sup> Pub. Res. Code § 21080(e)(1) (emphasis added); *Citizens for Responsible Equitable Environmental Development v. City of Chula Vista* (2011) 197 Cal.App.4th 327, 331.

## V. THE PROJECT DESCRIPTION IS INCOMPLETE

In determining whether an activity is subject to CEQA, a lead agency must determine whether the “activity is [] a project...,” and whether the “activity will [] result in a direct or reasonably foreseeable indirect physical change in the environment;...”<sup>52</sup> “Project” for purposes of CEQA review must entail “the whole of an action,....”<sup>53</sup> “An accurate and complete project description is necessary for an intelligent evaluation of the potential environmental impacts of the agency’s action... Only through an accurate view of the project may affected outsiders and public decision-makers balance the proposal’s benefit against its environmental cost, consider mitigation measures, assess the advantage of terminating the proposal ... and weigh other alternatives in the balance.”<sup>54</sup> Without a complete project description, the environmental analysis under CEQA is impermissibly limited, thus undermining meaningful public review.<sup>55</sup>

The Project Description is inadequate because it omitted critical details about the proposed BESS. As a result of these deficiencies, the Project Description misleads the public by failing to describe the full scope of the Project and its impacts. The Project Description fails to provide information regarding the type of lithium-ion battery or battery chemistry. The Project Description failed to provide the Material Safety Data Sheet (“MSDS”) for the batteries or otherwise characterize their chemical composition, which limits the analysis of fire, explosion, health, and other risks of the battery storage facility. This information is critically important for worker safety and on-site and off-site impacts in the event of an accident. Absent this information, the opportunity for meaningful public review is drastically limited.

The Project Description also omitted sufficient information regarding the design of the BESS, including battery layout; the type of cooling system the BESS will contain; and the type of fire detection and fire suppression systems in place in the BESS.<sup>56</sup> This information is critical to determine the environmental impacts of the BESS component.<sup>57</sup>

There is no future discretionary permit or review period that would enable decision makers or the public to analyze potential impacts to air quality, noise,

---

<sup>52</sup> 14 C.C.R. § 15060(c)(2)-(3).

<sup>53</sup> *Id.* at § 15378(a).

<sup>54</sup> *County of Inyo*, 71 Cal.App.3d at 192-193.

<sup>55</sup> *See, e.g., Laurel Heights Improvement Assn. v. Regents of the Univ. of Cal.* (1988) 47 Cal.3d 376.

<sup>56</sup> SWAPE Comments at 2.

<sup>57</sup> *Id.*

public health, or hazards from this Project. Approving a project without having identified and mitigated all of the Project's significant environmental effects violates CEQA's requirements. An EIR must be prepared which fully discloses all components of the Project.

**VI. THE PLANNING COMMISSION ABUSED ITS DISCRETION IN FINDING THE INFILL EXEMPTION APPLICABLE TO THE PROJECT**

Categorical exemptions are based on a finding that a class or category of projects does not have a significant effect on the environment.<sup>58</sup> Thus, an agency's finding that a particular proposed project comes within one of the exempt classes essentially includes an implied finding that the project has no significant effect on the environment.<sup>59</sup> 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.<sup>60</sup>

Here, the Class 32 Exemption is inapplicable to the Project due to its potentially significant effects on air quality, health risk, and noise, and because the proposed development occurs on a Project site substantially surrounded by urban uses.

**A. Approval of the Project Would Result Significant Effects Relating to Air Quality and Public Health**

The Planning Commission's decision to adopt the Class 32 exemption lacked substantial evidence to support the conclusion that the Project will not result in significant air quality impacts. The analysis of construction air quality impacts requires information on the proposed construction, which was not presented to the Planning Commission. The following are required: (a) detailed construction schedule; (b) figure showing access roads and construction area; (c) acres of disturbed land; (d) list of all construction equipment that will be used, its horsepower (hp) and engine tier; (e) CalEEMod or other analysis of emissions from constructing the project; (f) construction health risk assessment ("HRA") and air quality analysis; and (g) dust control plan. None of this information is in the record.

Proposed construction activities would result in the addition of air pollutants to the local airshed caused by on-site sources (i.e., off-road construction equipment,

---

<sup>58</sup> Pub. Res. Code §§ 21083, 21084; 14 C.C.R. § 15354.

<sup>59</sup> *Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106, 116.

<sup>60</sup> 14 C.C.R. § 15384.

soil disturbance) and off-site sources (i.e., on-road vendor trucks, haul trucks, and worker vehicle trips). The Project's construction equipment will emit air pollutants, including common pollutants like nitrogen oxide ("NOx"), and ozone precursor, and PM emissions, which contribute to these exceedances. Absent emissions modeling which quantifies the Project's construction emissions and compares them to applicable emissions thresholds, the Planning Commission did not have any evidence to support the finding that construction emissions would be less than significant.

The amount of pollution from construction equipment is also categorized using a system of engine tiers. Tier 1 has the highest emissions and Tier 4 Final has the lowest emissions.<sup>61</sup> The engine tier of the off-road construction equipment is the key factor that determines construction emissions and thus construction air quality impacts and public health impacts. The assumed engine tier for the construction equipment and the Project's construction activities is not disclosed and therefore substantial evidence did not support the Planning Commission's finding that the Project would not result in a significant unmitigated impact on air quality.

Construction emissions may be high enough to cause or contribute to violations of ambient air quality standards for PM10 and ozone. The North Central Coast Air Basin is currently designated nonattainment-transitional for the state ozone standards and nonattainment for the state PM10 standard. Absent an enforceable mitigation measure, the Applicant may select lower tier construction equipment, which emits far more pollutants than Tier 4 or Tier 4 Final engines.

Furthermore, emissions of PM2.5 and PM10 during construction are likely to be significant and unmitigated. Construction PM2.5 and PM10 emissions arise from three sources: (1) fugitive dust from grading, excavating, and other construction activities; (2) windblown dust from graded soils; and (3) engine exhaust. Fugitive dust emissions taken alone frequently exceed PM2.5 and PM10 significance thresholds. Construction emission control measures may be implemented as part of the Project but will not adequately mitigate these significant impacts. The Planning Commission therefore lacked substantial evidence to demonstrate that the Project's construction air quality impacts would be less than significant and abused its discretion in approving the Project as exempt from CEQA.

The City also omitted a health risk analysis ("HRA") for public review and the Planning Commission thus lacked substantial evidence to support the

---

<sup>61</sup> See, e.g., DieselNet, *Emission Standards: Nonroad Diesel Engines*, available at: <https://dieselnet.com/standards/us/nonroad.php>.

conclusion that the Project will not result in significant public health impacts. Absent a health risk analysis, the health impact of the Project's construction and operational emissions on sensitive receptors located near the Project site have not been quantified or disclosed, and the Planning Commission therefore lacked the requisite evidentiary basis to conclude that air pollution and public health impacts are less than significant to support reliance on a Class 32 Infill Exemption. This violates CEQA's requirement to analyze the health impact of a project's emissions on sensitive receptors. Moreover, readily available facts demonstrate that the Project is likely result in significant air quality and health risk impacts requiring preparation of an EIR.

A lead agency's significance determination must be supported by accurate scientific and factual data.<sup>62</sup> An agency cannot conclude that an impact is less than significant unless it produces rigorous analysis and concrete substantial evidence justifying the finding.<sup>63</sup> These standards apply to the analysis of public health impacts of a project. In *Sierra Club v. County of Fresno*, the California Supreme Court affirmed CEQA's mandate to protect public health and safety by holding that a CEQA document fails as an informational document when it fails to disclose the public health impacts from air pollutants that would be generated by a development project.<sup>64</sup> As the Court explained, "a sufficient discussion of significant impacts requires not merely a determination of whether an impact is significant, but some effort to explain the nature and magnitude of the impact."<sup>65</sup> The Court concluded that the county's EIR was inadequate for failing to disclose the nature and extent of public health impacts caused by the project's air pollution. As the Court explained, the EIR failed to comply with CEQA because after reading the EIR, "the public would have no idea of the health consequences that result when more pollutants are added to a nonattainment basin."<sup>66</sup>

Here, the Project site is located next to several residences where people live, hotels where people work and visit, and a daycare for infants, toddlers, and school-

---

<sup>62</sup> 14 C.C.R. § 15064(b).

<sup>63</sup> *Kings County Farm Bureau*, 221 Cal.App.3d at 732.

<sup>64</sup> *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 518–522.

<sup>65</sup> *Id.* at 519, citing *Cleveland National Forest Foundation v. San Diego Assn. of Governments* (2017) 3 Cal.5th 497, 514–515.

<sup>66</sup> *Id.* at 518. CEQA's statutory scheme and legislative intent also include an express mandate that agencies analyze human health impacts and determine whether the "***environmental effects of a project will cause substantial adverse effects on human beings, either directly or indirectly.***" (Public Resources Code § 21083(b)(3) (emphasis added).) Moreover, CEQA directs agencies to "take immediate steps to identify any critical thresholds for the ***health and safety of the people*** of the state and take all coordinated actions necessary to prevent such thresholds being reached." (Pub. Res. Code § 21000(d) (emphasis added).)

aged children within 1000 feet of the Project site. Specifically, the Hollister Child Development Center is located a mere 417 feet away from the Project site. Representatives from this nearby daycare center have previously expressed concerns before the City's Planning Commission about construction-related impacts from a now-approved hotel project located adjacent to this Project site.<sup>67</sup> The daycare representative "hoped the city could mitigate the ... construction debris because the center is right next to the proposed hotel," and expressed concerns about the project's construction "because there are hundreds of students that stay there from 6 a.m. to 6 p.m."<sup>68</sup>

Project construction equipment emits diesel particulate matter ("DPM"), a toxic air contaminant ("TAC"). The Project site is also located close to an ARCO gas station located about 0.2 miles from the Project site at 301 Gateway Drive.<sup>69</sup> These factors are likely to result in potentially significant individual and cumulative health risk impacts. The TAC emissions resulting from Project construction and operation must be quantified in order to assess whether exposure to TACs exceeds the Monterey Bay Air Resources District's ("MBARD") cancer risk significance threshold.<sup>70</sup>

#### **B. Approval of the Project Would Result Significant Effects Relating to Noise**

The Planning Commission lacked substantial evidence to support its finding that the Project will not result in significant noise impacts. To the contrary, the Planning Commission's adopted Conditions of Approval require noise suppression devices and techniques *as mitigation* for the Project's significant construction noise impacts, in violation of CEQA. The adoption of noise mitigation measures by the Planning Commission is evidence that the Project would otherwise result in significant construction noise impacts,<sup>71</sup> which precludes reliance on a CEQA exemption.<sup>72</sup>

Comments by Citizens' noise expert, Mr. Jack Meighan, provide substantial evidence demonstrating that the Project is likely to result in significant construction

---

<sup>67</sup> Noe Magaña, *Holiday Inn Express gets approval for site and architectural review* (November 4, 2019), available at: <https://benitolink.com/holiday-inn-express-gets-approval-for-site-and-architectural-review/>.

<sup>68</sup> *Id.*

<sup>69</sup> Google Maps.

<sup>70</sup> See Monterey Bay Air Resources District ("MBARD"), *CEQA Air Quality Guidelines* at 9-3 (2008), available at: <https://www.mbard.org/files/0ce48fe68/CEQA+Guidelines.pdf>.

<sup>71</sup> See also Meighan Comments at 1.

<sup>72</sup> *SPAWN*, 125 Cal.App.4th at 1106.

noise impacts that must be evaluated in an EIR.<sup>73</sup> Mr. Meighan's comments identified sensitive receptors as close as 150 feet from the Project site and set forth noise level estimations for equipment typically used during construction, such as a backhoe and grader, based on the Federal Highway Administration's Roadway Construction Noise Model.<sup>74</sup> Mr. Meighan calculated that the overall Leq during the Project's construction activities would be 72 dBA.<sup>75</sup> Although the City failed to provide information regarding the baseline noise levels against which to determine the significance of noise during Project construction, Mr. Meighan's comments constitute substantial evidence demonstrating that the ambient noise measurements would be substantially lower than 72 dBA such that "[a] construction noise level of 72 dBA could represent a significant increase in [noise] levels," and mitigation measures must be required.<sup>76</sup>

The Planning Commission thus did not have substantial evidence in the record to support a determination that noise impacts are less than significant. An EIR must be prepared to adequately analyze and mitigate potentially significant noise and vibration impacts.

### **C. The Proposed Development Does Not Occur on a Project Site Substantially Surrounded by Urban Uses**

The Class 32 exemption is facially inapplicable to the Project because the proposed development would occur on a site that is not substantially surrounded by urban uses, as required by CEQA Guidelines section 15332(b). Prime Agriculture Lands surround the Project site to the north, precluding reliance on the Class 32 Exemption.<sup>77</sup> Thus, the Project's categorical exemption is facially inapplicable.

## **VII. THE PROJECT IS NOT CATEGORICALLY EXEMPT GIVEN THAT THE PROJECT'S CONSTRUCTION NOISE IMPACTS WILL BE SIGNIFICANT IMPACTS REQUIRING MITIGATION**

An agency may not rely on a categorical exemption if to do so would require the imposition of mitigation measures to reduce potentially significant effects to less than significant levels.<sup>78</sup> Under CEQA Guidelines, "mitigation" includes: "(a) Avoiding the impact altogether by not taking a certain action or parts of an action.

---

<sup>73</sup> *Id.* at 2.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> City of Hollister, *General Plan; Chapter Six: Open Space and Agriculture Element* at 6.3, available at: [https://hollister.ca.gov/wp-content/uploads/2014/12/06\\_Open-Space.pdf](https://hollister.ca.gov/wp-content/uploads/2014/12/06_Open-Space.pdf).

<sup>78</sup> *SPAWN*, 125 Cal.App.4th at 1102; *Azusa Land Recl. Co.*, 52 Cal. App.4th at 1198-1201.

(b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation. (c) Rectifying the impact by repairing, rehabilitating, or restoring the impacted environment. (d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action. (e) Compensating for the impact by replacing or providing substitute resources or environments.”<sup>79</sup>

As established by the courts, “there are sound reasons for precluding reliance upon mitigation measures at the preliminary stage of determining eligibility for a categorical exemption. Regulatory guidelines dealing with the environmental review process under CEQA ‘contain elaborate standards—as well as significant procedural requirements—for determining whether *proposed* mitigation will adequately protect the environment and hence make an EIR unnecessary; in sharp contrast, the Guidelines governing preliminary review do not contain any requirements that expressly deal with the evaluation of mitigation measures.”<sup>80</sup>

In *SPAWN*, the court set aside the county’s approval of a project to construct a home, stating “[r]eliance upon mitigation measures (whether included in the application or later adopted) involves an evaluative process of assessing those mitigation measures and weighing them against potential environmental impacts, and that process must be conducted under established CEQA standards and procedures for EIRs or negative declarations.”<sup>81</sup> There, the county determined that the proposed construction of a home was categorically exempt from CEQA under a categorical exemption for single-family homes, even though the home was adjacent to a protected anadromous fish stream and within a stream conservation area which the county conceded was of “critical concern.”<sup>82</sup> The county’s conclusion that there was no reasonable possibility of significant environmental impacts that would preclude the exemption “was expressly founded on ‘dozens of conditions that have been applied to enhance mitigations and reduce to a minimum the possibility of any adverse environmental impacts.’”<sup>83</sup> The *SPAWN* court determined that “whether a project may impact a designated environmental resource must be made without reference to or reliance upon any proposed mitigation measures.”<sup>84</sup>

Here, the Conditions of Approval for the Project require that “Construction activities on the project site must employ noise suppression devices and

---

<sup>79</sup> 14 C.C.R. § 15370.

<sup>80</sup> *SPAWN*, 125 Cal.App.4th at 1108.

<sup>81</sup> *Id.* at 1108.

<sup>82</sup> *SPAWN*, 125 Cal.App.4th at 1106.

<sup>83</sup> *Id.* at 1107.

<sup>84</sup> *Id.* at 1108.



techniques....”<sup>85</sup> This condition goes beyond the requirements in the City’s Municipal Code for noise in section 17.16.100, which only limits construction activities to the hours of 7:00 a.m. to 6:00 p.m., Monday through Friday and 8:00 a.m. to 6:00 p.m. on Saturday and prohibits construction activities on Sundays and federally recognized holidays.<sup>86</sup> Thus, by adopting this Condition of Approval, the Planning Commission confirmed that noise mitigation measures are necessary to reduce the Project’s significant noise effects to less than significant levels such that no categorical exemption applies to the Project.

### **VIII. THE PROJECT FALLS WITHIN THE EXCEPTIONS TO CATEGORICAL EXEMPTIONS**

The CEQA Guidelines provide six (6) exceptions to the categorical exemptions.<sup>87</sup> If any of the exceptions apply to a project, the project is not subject to a categorical exemption. At least two (2) of these exceptions apply to the Project.

#### **A. The Class 32 Exemption is Inapplicable Because the Cumulative Impacts of Successive Projects of the Same Type in the Same Place Over Time is Significant**

Categorical exemptions are inapplicable when the “cumulative impact of successive projects of the same type in the same place, over time is significant.”<sup>88</sup> Cumulative impacts can result from individually minor but collectively significant impacts from projects taking place over a period of time.<sup>89</sup> Here, the Project may have significant cumulative impacts when considered with other nearby projects. Factors to consider when determining whether to include a related project in a cumulative impacts analysis include environmental resources impacted, location, and project type.<sup>90</sup>

---

<sup>85</sup> City of Hollister, *Planning Commission Staff Report May 25, 2023 Item 2* (May 25, 2023), available at: [https://hollister.ca.gov/wp-content/uploads/2023/05/May-25-2023\\_PC-Agenda-Packet\\_For-Website.pdf](https://hollister.ca.gov/wp-content/uploads/2023/05/May-25-2023_PC-Agenda-Packet_For-Website.pdf). The condition also states that construction equipment and activities shall “not” use noise suppression devices and techniques, which is inconsistent with the preceding requirement. For purposes of these comments, we assume that the condition intends to require these devices and techniques.

<sup>86</sup> City of Hollister, Municipal Code § 17.16.100(A); *see also* Ordinance No. 1137.

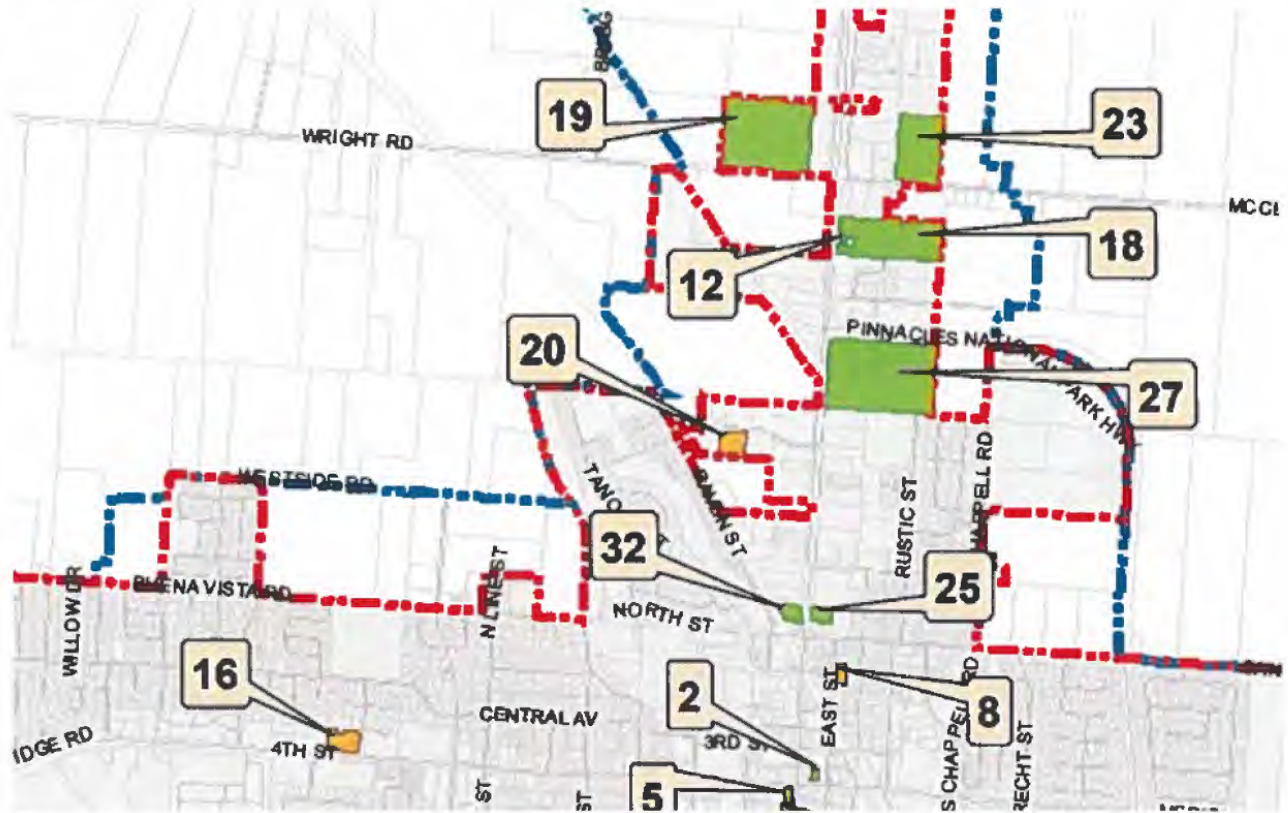
<sup>87</sup> 14 C.C.R. § 15300.2(a)-(f).

<sup>88</sup> 14 C.C.R. § 15300.2(b).

<sup>89</sup> *Id.* at § 15355.

<sup>90</sup> 14 C.C.R. § 15130(b)(2).

Based on the City's Commercial Projects List and as shown on the map below, there are several projects in various stages of construction within close proximity to the Project site.<sup>91</sup>



92

The concurrent construction air pollution, TACs, greenhouse gas emissions, and noise impacts may result in cumulatively significant impacts to the surrounding community that must be disclosed and analyzed in an EIR. Specifically with regards to noise impacts, Mr. Meighan's comments provide substantial evidence that the Project is likely to result in cumulatively significant operational noise impacts. Given that the City has not disclosed the site plan, dimensions of the units, or the transformer rating to the public, Mr. Meighan estimated construction noise levels based on the National Electrical Manufacturers Association ("NEMA") standards and the fact that the Project proposes to construct

<sup>91</sup> City of Hollister, *Commercial Projects List*, available at: [https://hollister.ca.gov/wp-content/uploads/2021/04/Commercial-Project-List\\_April-2021.pdf](https://hollister.ca.gov/wp-content/uploads/2021/04/Commercial-Project-List_April-2021.pdf).

<sup>92</sup> City of Hollister, *City of Hollister; Commercial Projects; April 2021* (April 2021), available at: <https://hollister.ca.gov/wp-content/uploads/2021/04/HollisterCommercialDevelopmentApril2021.pdf>.

and operate a 10 MW facility.<sup>93</sup> Mr. Meighan explained that noise from the Project's transformers could be 76 dBA at 7 feet, 46 dBA at the residences west of the Project site, and 48 dBA at the nearby Holiday Inn hotel.<sup>94</sup> Mr. Meighan then combined the Project's operational noise levels from the transformer only with noise levels from the nearby hotels and existing substation.<sup>95</sup>

According to his calculations, the cumulative nighttime Leq would be approximately 50 dBA at the residences west of the Project site and the cumulative nighttime Leq would be approximately 52 dBA at the Holiday Inn.<sup>96</sup> Based on the California Department of Transportation's ("Caltrans") Technical Noise Supplement to the Traffic Noise Analysis Protocol and Mr. Meighan's expertise, baseline nighttime noise levels in suburban areas can be as low as 35 dBA and Mr. Meighan therefore concluded that "[d]epending on the existing environment, 50 dBA may be a significant impact, especially since this noise would be constant throughout the night. The BESS could represent a potential 15 dBA increase over existing conditions, which is considered a significant impact in most jurisdictions."<sup>97</sup> Mr. Meighan's comments provide substantial evidence of potentially significant noise impacts during operations that must be adequately evaluated and mitigated in an EIR.

Given the proximity of similar projects with overlapping construction schedules and operations that may result in significant cumulative impacts, the exception makes the Class 32 exemption inapplicable to this Project.

**B. The Class 32 Exemption Must Not be Used Because There is a Reasonable Possibility that the Project will Have a Significant Effect on the Environment Due to Unusual Circumstances**

The Project may also have significant effects on the environment due to unusual circumstances. CEQA Guidelines state that 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."<sup>98</sup> The Supreme Court in *Berkeley Hillside Preservation v. City of Berkeley* clarified the meaning of the CEQA Guidelines language and the applicable standards of review, and set forth two tests to determine whether the unusual circumstances exception

---

<sup>93</sup> Meighan Comments at 3.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup>

<sup>98</sup> 14 C.F.R. § 15003.2(c).

applies.<sup>99</sup> “One may identify ‘evidence that the project will have a significant effect on the environment.’ Alternatively, one may show evidence (1) the project is unusual because it ‘has some feature that distinguishes it from others in the exempt class, such as its size or location;’ and (2) there is ‘a reasonable possibility of a significant effect due to that unusual circumstance.’”<sup>100</sup>

As to the first test, the Conditions of Approval requiring construction noise mitigation provide concrete evidence demonstrating that the Project *will* have significant noise impacts. The construction noise mitigation measure is designed to reduce the Project’s significant noise impacts that would otherwise result from the Project. Thus, there is substantial evidence in the record that the Project *will* have a significant effect on the environment.

The Project also presents circumstances that are unusual for projects in the exempt classes. The Supreme Court in *Berkeley Hillside Pres.* clearly established that “[a] party invoking the exception may establish an unusual circumstance without evidence of an environmental effect, by showing that the project has some feature that distinguishes it from others in the exempt class, such as its size or location.”<sup>101</sup> Here, the Project is sited within the City’s GC Zoning District, which “allows for a variety of commercial uses and service-oriented businesses at scales ranging from large retail stores serving the community and region to smaller businesses oriented towards neighborhood activity.”<sup>102</sup> The Project, however, proposes to construct and operate new BESS facilities, fencing, and landscaping as well as a new point of interconnection at the existing Hollister Substation to store and deliver electricity from the grid.<sup>103</sup> This energy storage system is nothing like the commercial development described in the City’s General Plan for the General Commercial designation, which focuses on development like retail or a hotel. The BESS is also not typical of the existing development surrounding the Project site, which includes hotels, residences, and a daycare.

The Project’s BESS components will also present new and unique environmental impacts and hazards, particularly from fires and risk of upset, that are unlike the other developments in the area, including the existing Hollister substation. The International Fire Chiefs Association explained that “[e]vents

---

<sup>99</sup> *Berkeley Hillside Pres.*, 60 Cal. 4th at 1105.

<sup>100</sup> *Protect Tustin Ranch v. City of Tustin* (2021) 2021 WL 4962754, at \*5.

<sup>101</sup> *Berkeley Hillside Pres.*, 60 Cal. 4th at 1105.

<sup>102</sup> City of Hollister, *General Plan; Land Use and Community Design Element* at 2.10, available at: [https://hollister.ca.gov/wp-content/uploads/2014/12/06\\_Open-Space.pdf](https://hollister.ca.gov/wp-content/uploads/2014/12/06_Open-Space.pdf).

<sup>103</sup> City of Hollister, *Planning Commission Staff Report May 25, 2023 Item 2* at 1 (May 25, 2023), available at: [https://hollister.ca.gov/wp-content/uploads/2023/05/May-25-2023\\_PC-Agenda-Packet\\_For-Website.pdf](https://hollister.ca.gov/wp-content/uploads/2023/05/May-25-2023_PC-Agenda-Packet_For-Website.pdf).

involving ESS Systems with Lithium-ion batteries can be extremely dangerous. All fire crews must follow department policy, and train all staff on response to incidents involving ESS. Compromised lithium-ion batteries can produce significant amounts of flammable gases with potential risk of deflagration and fire. ... Lithium-ion batteries that are in thermal runaway or off gassing [sic] create hazardous atmospheres. Firefighters must stay out of the vapor cloud...."<sup>104</sup>

Impacts from a BESS fire or other hazardous condition may include, but are not limited to:

- Thermal runaway (rapid uncontrolled release of heat energy, resulting in a battery fire or explosion);
- Shock hazard from stranded energy;
- Toxic and flammable gases are released when batteries undergo thermal runaway;
- Deep-seated fires within metal or plastic casing, blocking firefighting agents;
- Batteries can fail, leading to thermal runaway and subsequent fires or explosions;
- Electrical abuse if the battery is overcharged, charged too rapidly, or at high voltage, or discharged too rapidly;
- Mechanical abuse by either being dropped, crushed, or penetrated;
- Thermal abuse from exposure to external heat sources;
- Electrical abuse from overcharging; and
- Environmental impacts including seismic activity, rodent damage to wiring, extreme heat, and floods.

---

<sup>104</sup> International Fire Chiefs Association, *IAFC Bulletin; Recommended Fire Department Response to Energy Storage System (ESS) Part 1* (August 1, 2022).

BESS facilities pose the potential for a serious accident leading to fire and/or explosion, particularly here given that there are residences and hotels less than a mile from the Project site as well as a childcare center that is located approximately 417 feet from the Project site. Moreover, the Project is within close proximity of a gas station, which could make any fire or risk of upset event substantially more dangerous. BESS accidents in the U.S. have increased over time, more often occur during the initial three years of operation, and many have occurred along the west coast. SWAPE's comments identified two recent lithium-ion battery fires: (1) a September 2022 fire in Monterey, California at a Tesla Megapack battery storage facility which caused road closures and shelter-in-place orders for residents nearby; and (2) an August 2021 fire at a Tesla Megapack facility in Australia.<sup>105</sup>

Regarding the fire incident at the battery storage facility in Monterey, California, "residents were advised to shelter in place for more than 24 hours, keeping windows and ventilation systems closed, due to emissions after the fire," and a MBARD air pollution control officer explained that "lithium ion battery fires can emit toxic constituents, including hydrochloric and hydrofluoric acid."<sup>106</sup> Concerning the incident at the battery storage facility in Australia, SWAPE's comments referred to statements by Paul Christensen, an expert on lithium-ion battery fires, who stated that "fire and rescue teams need to be involved in the design and installation of energy storage systems," "systems should be designed to allow space for first responders to maneuver around and aim a hose with an abundant supply of water available on site, with enough hydrants installed," and "developers of utility-scale batteries need to offer a means of monitoring the system that would allow owners, operators and fire crews to observe the system at any time."<sup>107</sup> There record lacks evidence demonstrating that the BESS meets these standards.

The BESS Failure Event Database shows that approximately fifty (50) BESS accidents have occurred from 2018 to January 30, 2023, resulting in significant worker and public health impacts from hazardous air pollutants ("HAPs") and damage to adjacent facilities.<sup>108</sup>

For example, on April 19, 2019, an explosion occurred at the McMicken Energy Storage Facility in Surprise, Arizona that resulted in an extensive cascading thermal runaway event initiated by an internal cell failure within one

---

<sup>105</sup> SWAPE Comments at 2.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> EPRI, *BESS Failure Database, Stationary Energy Storage Failure Events*, available at: [https://storagewiki.epri.com/index.php/BESS\\_Failure\\_Event\\_Database](https://storagewiki.epri.com/index.php/BESS_Failure_Event_Database)

battery cell.<sup>109</sup> The investigation of the accident found the Arizona fire suppression system, designed to extinguish developing fires in ordinary combustibles, was ineffective against cascading thermal runaway events.<sup>110</sup> In 2021, there was an incident at the 300-MW Vistra Energy Storage Facility at Moss Landing.<sup>111</sup> A battery overheated and caused three quarters of the station to be shut off.<sup>112</sup> Shortly after, a fire occurred at the facility and melted ten battery racks.<sup>113</sup>

For the foregoing reasons, the Project's BESS is unusual for the purpose of CEQA Guidelines Section 15300.2.

Given an adequate demonstration of unusual circumstances, the next question identified in *Berkeley Hillside Pres.* is whether there is a fair argument of a reasonable possibility of a significant environmental effect.<sup>114</sup> As demonstrated herein and in the attached comment letters, there is substantial evidence supporting a fair argument that the Project will result in significant and unmitigated impacts to air quality, public health and safety, noise, and, combined with other projects in the vicinity, will have cumulatively significant impacts on the environment.

Additionally, as supported by substantial evidence in SWAPE's comments, there is a fair argument that the risk of hazards from the Project's battery storage facility may result in significant impacts.<sup>115</sup> Based on a scientific report by the National Renewable Energy Laboratory ("NREL"), SWAPE commented that the Project's batteries may need to be replaced every few years and once replaced, the degraded batteries, which constitute hazardous waste, will need to be discarded.<sup>116</sup> The disposal of the used batteries as hazardous waste may result in a significant impact that was not considered or mitigated by the Planning Commission prior to approving the Project and adopting the Class 32 exemption.<sup>117</sup>

---

<sup>109</sup> APS, *McMicken investigation* (July 27, 2020), available at: <https://www.aps.com/en/About/Our-Company/Newsroom/Articles/Equipment-failure-at-McMicken-Battery-Facility>.

<sup>110</sup> *Id.*

<sup>111</sup> Power Engineering, *Vistra releases Moss Landing energy storage incident findings* (January 25, 2022), available at: <https://www.power-eng.com/energy-storage/vistra-releases-moss-landing-incident-findings/>.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Berkeley Hillside Pres.*, 60 Cal. 4th at 1105.

<sup>115</sup> SWAPE Comments at 2-3.

<sup>116</sup> *Id.* at 3.

<sup>117</sup> *Id.*

Furthermore, SWAPE's comments provide substantial evidence supporting a fair argument that the Project may have significant impacts from fires and other accidents if the following mitigation measures are not adopted to reduce these impacts:

1. "An estimate of the amount of water, the source of the water, and the water supply network (including hydrants) that would be necessary to fight a reasonable worst-case fire scenario;
2. A list of all chemical components in the batteries including chemicals in the electrolyte, and a list of chemicals that would be released during a fire;
3. Plans to show that secondary containment would be adequate to handle the volume of chemicals and any water required to fight a worst-case scenario fire;
4. Plans for a 24/7 fire monitoring system;
5. An Emergency Action Plan to include ability of local resources to fight a lithium-ion battery fires, including ingress and egress of response vehicles, and an evaluation of response times; and
6. Emergency notification and evacuation measures for the residents located directly west of the Project."<sup>118</sup>

For the foregoing reasons, there is a reasonable possibility that the Project will have a significant effect on the environment due to unusual circumstances such that an exception to the Class 32 exemption applies.

**IX. THE PLANNING COMMISSION LACKED SUBSTANTIAL EVIDENCE TO APPROVE THE PROJECT'S REQUESTED SITE AND ARCHITECTURAL REVIEW 2023-1**

The Planning Commission lacked substantial evidence to approve the Project's Site and Architectural Review 2023-1 because the requisite finding that the proposed Project would not be detrimental to the health, safety, and welfare of persons residing or working in the neighborhood or to the general welfare of the City is not supported by substantial evidence.

---

<sup>118</sup> *Id.*




For the reasons set forth herein and in the attached expert comments, approval of the Project would result in significant effects relating to air quality, public health, and noise. Additionally, the impacts on health and the environment from fires or other serious accidents caused by the Project's BESS may be significant for the reasons set forth above and in SWAPE's comments. These risks to health and safety from this Project are especially significant here because the Project is surrounded by residences where people live, hotels where people work and visit, and a daycare that works to provide a healthy environment for hundreds of children. Thus, the Planning Commission abused its discretion in making the finding that the proposed Project would not be detrimental to the health, safety, and welfare of persons residing or working in the neighborhood or to the general welfare and cannot approve the Project's Site and Architectural Review 2023-1.

## **X. CONCLUSION**

As discussed herein, the Planning Commission lacked substantial evidence to rely on a Class 32 Infill Exemption, or any other CEQA exemption, for Project approval. Citizens respectfully requests that the City Council uphold this appeal, vacate the Planning Commission's approval of the Project, and direct staff to prepare an EIR for the Project.

Thank you for your attention to these comments.

Sincerely,



Tara C. Rengifo

Attachments  
TCR:acp



Received

JUN 07 2023

By: JW

Receive Stamp and Return

**DEVELOPMENT PROJECT APPLICATION**

**PLEASE READ AND COMPLETE THIS APPLICATION FORM CAREFULLY**

**THIS APPLICATION IS FOR (CHECK THE APPROPRIATE BOX):**

Appeal to Planning Commission

Appeal to City Council

- Appellant
- Applicant(s):** Citizens for Responsible Industry c/o Tara Rengifo  
**Address:** Adams Broadwell Joseph & Cardozo, 601 Gateway Blvd, Suite 1000  
**City:** South San Francisco **State:** CA **Zip Code:** 94080  
**Phone #:** 650-589-1660 **FAX:** 650-589-5062 **E-Mail:** trenrifo@adamsbroadwell.com  
**Project Applicant**
  - Property Owner(s):** RWE Solar Development, LLC (Nicholas Gruzdownich)  
**Address:** 20 California Street, Floor 5  
**City:** San Francisco **State:** CA **Zip Code:** 94111  
**Phone #:** \_\_\_\_\_ **FAX:** \_\_\_\_\_ **E-Mail:** \_\_\_\_\_
  - Property Location:** 431 Gateway Drive, Hollister, CA 95023
  - Assessor Parcel Number(s):** 053-410-006
  - Size of Property (acres or square feet):** 1.66 acres
  - Zoning District: Present:** General Proposed (if applicable): \_\_\_\_\_  
Commercial
  - General Plan Designation:** General Commercial

8. Describe the proposed project: Please see attached letter for description of project.

Lined area for describing the proposed project.

9. Describe the basis for the appeal: Please see attached letter for basis for the appeal.

Lined area for describing the basis for the appeal.

10. Certification: The application is correct and accurate to the best of my knowledge. If the request is granted, I (we) agree that the provisions of City and State Law will be complied with and the conditions, if any, upon which the permit is granted will be carefully observed.

6/6/2023  
Date

Teresa C. Rengifo  
~~Owner's Signature~~  
Appellant's

\_\_\_\_\_  
Date

\_\_\_\_\_  
Applicant's Signature

Staff Use Only  
Received by: \_\_\_\_\_ Date: \_\_\_\_\_  
Application Number \_\_\_\_\_

The Development Services Department staff appreciates your effort to complete this application. If you have questions or comments, please contact our staff at (831) 636-4360.