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May 6, 2024

**Via Hand Delivery**

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**Re: Appeal of the Environmental Clearance Determination -- Initial Study/Mitigated Negative Declaration for 865 Embedded Way Industrial Project (H22-022, ER22-113)**

We are writing on behalf of **Silicon Valley Residents for Responsible Development ("Silicon Valley Residents")** to appeal the San Jose Planning Director's May 1, 2024 environmental clearance determination for the 865 Embedded Way Industrial Project ("Project") (H22-022, ER22-113) ("Project") proposed by Oppidan, Inc. ("Applicant"), based on the Initial Study/Mitigated Negative Declaration ("MND") prepared by the City of San Jose ("City") pursuant to the California Environmental Quality Act ("CEQA").<sup>1</sup> This appeal is filed pursuant to Title 21 of the San Jose Municipal Code (Environmental Clearance).

The Project consists of a Site Development Permit to allow the construction of a one-story, 121,400-square foot industrial/manufacturing warehouse on a vacant 10.17-acre project site. The Project would include a connection to an existing 26-

<sup>1</sup> Pub. Resources Code ("PRC") §§ 21000 et seq.; 14 Cal. Code Regs. ("CCR" or "CEQA Guidelines") §§ 15000 et seq.

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foot-wide drive aisle that extends from the eastern Embedded Way driveway through the adjacent eastern industrial property and currently terminates at the southeastern boundary of the project site. A total of 300 parking spaces would be provided in the surface parking lot surrounding the proposed building. The project would include the removal of 11 trees on-site, 2 of which are ordinance-size.

This Appeal letter, and Silicon Valley Residents' attached April 30, 2024 comments to the Planning Director,<sup>2</sup> demonstrate that the Planning Director's decision to approve the Project violated CEQA as there is more than a fair argument that the Project will result in potentially significant (1) air quality and public health impacts from construction and operational emissions and (2) transportation impacts. Our prior comments, and the accompanying comments of our expert consultants James Clark, PhD and Norman Marshall, identified several flaws in the City's environmental analysis, and provided new information and substantial evidence demonstrating that the MND fails as an informational document under CEQA.

Title 21 of the San Jose Municipal Code ("SJMC") sets forth the procedures for appeals of environmental determinations. Any person may file a written appeal to the City Council of a decision maker's decision to adopt an MND.<sup>3</sup> Appeals must be submitted on the designated form no later than 5:00 p.m. on the third business day of the Planning Director's decision.<sup>4</sup> The Appeal must state with specificity the reasons that the MND should be found not to have been adequate or not to have been prepared in compliance with the requirements of CEQA.<sup>5</sup> Appeals are limited to issues that were raised previously either orally or in writing to the Planning Director prior to approval of the Project.<sup>6</sup>

Pursuant to these appeals procedures, Silicon Valley Residents hereby appeals the Planning Director's May 1, 2024 approval of the MND for the Project. This appeal includes a copy of the required Appeal Form and the required appeal fee of \$250. This Appeal is based on the issues raised in Silicon Valley Residents'

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<sup>2</sup> Silicon Valley Residents for Responsible Development's April 30, 2024 written comments to the Planning Director are attached hereto as **Exhibit A**.

<sup>3</sup> SJMC, § 21.06.020(A).

<sup>4</sup> SJMC, § 21.06.020(B).

<sup>5</sup> SJMC, § 21.06.020(C).

<sup>6</sup> SJMC § 21.06.020(D) (providing that "[n]o appeal shall be considered unless it is based upon issues that were raised previously either orally or in writing to an advisory body or a decision-making body at or prior to a public hearing whenever the negative declaration or mitigated negative declaration or underlying project is considered at a public hearing.").

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April 30, 2024 written comments and in oral comments at the May 1, 2024 Planning Director Hearing, as summarized below.

Silicon Valley Residents urges the City Council to grant this Appeal and remand the Project to City Staff to prepare an Environmental Impact Report (“EIR”) for the Project. Silicon Valley Residents reserves the right to submit supplemental comments and evidence at any later hearings and proceedings related to the Project, in accordance with State law.<sup>7</sup>

## I. APPELLANTS

Appellant Silicon Valley Residents is an unincorporated association of individuals and labor organizations that may be adversely affected by the potential public health and environmental impacts of the Project. The association includes: the **International Brotherhood of Electrical Workers Local 332, Plumbers & Steamfitters Local 393, Sheet Metal Workers Local 104, Sprinkler Fitters Local 483, and District Council of Ironworkers** and their members and their families; and other individuals that live and/or work in the City of San Jose and Santa Clara County. Accordingly, they would 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 first in line to be exposed to any health and safety hazards that exist onsite.

In addition, Silicon Valley Residents has an interest in enforcing 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 the area less desirable for new businesses and new residents. Indeed, continued environmental degradation can, and has, caused construction moratoriums and other restrictions on growth that, in turn, reduce future employment opportunities.

## II. BASIS FOR APPEAL

Based on our review of the MND and available supporting documents, we conclude that the MND fails to comply with the requirements of CEQA. The MND

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<sup>7</sup> Gov. Code § 65009(b); PRC § 21177(a); *Bakersfield Citizens for Local Control v. Bakersfield (“Bakersfield”)* (2004) 124 Cal. App. 4th 1184, 1199-1203; see *Galante Vineyards v. Monterey Water Dist.* (1997) 60 Cal. App. 4th 1109, 1121.

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lacks a clear project description, fails to disclose and analyze the Project's potentially significant environmental impacts, and fails to identify enforceable measures that can reduce those impacts to a less than significant level. As explained in our April 30, 2024 comments, there is more than a fair argument that the Project will result in potentially significant air quality and public health impacts from construction and operational emissions and transportation impacts.

First, regarding the project description, the MND describes the project as an industrial/manufacturing warehouse but analyzes the Project as designed for research and development (R&D). Without a designated end user, this ambiguity leads to uncertainties about the project's future use and potential impacts, particularly concerning differences in impacts between a warehouse and an R&D facility.

Second, as Dr. Clark explained, in estimating the Project's expected construction emissions the MND's air quality analysis assumed that all Project construction equipment would include Tier 4 Interim emission controls.<sup>8</sup> However, the MND does not include such emission controls as a mitigation measure, nor is there any other enforceable mechanism requiring the use of such controls. Without such controls, the Project's construction emissions will be higher than disclosed, and, as demonstrated by Dr. Clark, these emissions will exceed the air district's significance thresholds.<sup>9</sup> Furthermore, the MND fails to address other potential sources of emissions, such as the backup generator required for the Project which will emit toxic diesel particulate matter. Consequently, the MND's assessment of construction and operational emissions is flawed and underestimates the true impact of emissions on air quality and public health.

Third, the transportation analysis, as analyzed by Mr. Marshall, reveals significant deficiencies in the identification of transportation impacts and the MND's proposed mitigation measures. Specifically, the MND provides unsubstantiated assumptions regarding vehicle miles traveled ("VMT") impacts, including unsupported assumptions regarding vanpool participation rates.<sup>10</sup> In addition, as explained by Mr. Marshall, the proposed monitoring approach for transportation mitigation measures is inadequate.<sup>11</sup>

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<sup>8</sup> Clark Comments, pp. 3-4.

<sup>9</sup> *Id.* at pg. 6.

<sup>10</sup> Marshall Comments, pg. 5.

<sup>11</sup> *Id.* at pp. 5-7.

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Accordingly, the City must remand the Project to City Staff to prepare an EIR for the Project that adequately analyzes all of the Project's potentially significant direct, indirect and cumulative impacts, and incorporates all feasible mitigation measures to avoid or minimize these impacts.

### III. CONCLUSION

For the reasons stated herein, and as will be presented to the City Council on appeal, Silicon Valley Residents urges the City Council to reverse the Planning Director's approval of the Project, and require staff to prepare an EIR. Thank you for your consideration.

Sincerely,

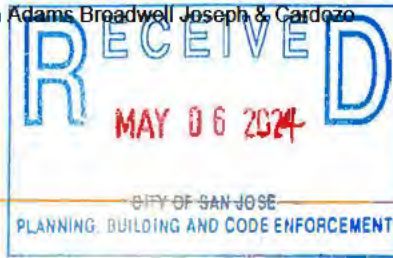


Ariana Abedifard

Attachments

AA:acp

6679-007acp



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## NOTICE OF ENVIRONMENTAL APPEAL

TO BE COMPLETED BY PLANNING STAFF			
FILE NUMBER	RECEIPT # _____		
TYPE OF ENVIRONMENTAL DETERMINATION (EIR, MND, EX)	AMOUNT _____		
	DATE _____		
	BY _____		
TO BE COMPLETED BY PERSON FILING APPEAL			
PLEASE REFER TO ENVIRONMENTAL APPEAL INSTRUCTIONS BEFORE COMPLETING THIS PAGE.			
THE UNDERSIGNED RESPECTFULLY REQUESTS AN APPEAL FOR THE FOLLOWING ENVIRONMENTAL DETERMINATION: Initial Study/Mitigated Negative Declaration ("MND") for the 865 Embedded Way Industrial Project (H22-022, ER22-113)			
REASON(S) FOR APPEAL (For additional comments, please attach a separate sheet.): <u>The Planning Director's decision to approve the Project violated CEQA as there is more than a fair argument that the Project will result in potentially significant air quality and public health impacts from construction and operational emissions and transportation impacts. See Attached Comment Letter for additional comments.</u>			
PERSON FILING APPEAL			
NAME Silicon Valley Residents for Responsible Development, c/o Ariana Abedifard, Adams Broadwell Joseph & Cardozo		DAYTIME TELEPHONE ( 650 ) 589-1660	
ADDRESS 601 Gateway Boulevard, Suite 1000	CITY South San Francisco	STATE CA	ZIP CODE 94080
SIGNATURE 		DATE May 6, 2024	
CONTACT PERSON (IF DIFFERENT FROM PERSON FILING APPEAL)			
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**PLEASE CALL THE APPOINTMENT DESK AT (408) 535-3555 FOR AN APPLICATION APPOINTMENT.**