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December 4, 2023

Via Email and U.S. Mail

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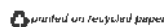
Re: FOLLOW-UP Request for Immediate Access to All Documents Referenced in the DEIR – Mission Point Project (PLN2017-12924, PLN2018-13400, PLN21-15386, PLN21-15387, PLN22-00635, CEQ2018-01054; SCH No. 2018072068)

Dear Mr. Crabtree, Mr. Haggag and Ms. Bustos:

We are writing on behalf of **Silicon Valley Residents for Responsible Development** (“Silicon Valley Residents”) to follow up on our November 20, 2023 request for *immediate access* to any and all documents referenced or relied upon in the Draft Environmental Impact Report (“DEIR”) for the Mission Point Project, PLN2017-12924, PLN2018-13400, PLN21-15386, PLN21-15387, PLN22-00635, CEQ2018-01054; SCH No. 2018072068, (“Project”) proposed by Kylli Inc. (“Applicant”). This request *excluded* the DEIR and any appendices made available on the City’s website.

Our review of the DEIR is ongoing, but we have identified a number of documents referenced in the DEIR and that provide a portion of the DEIR’s overall analysis, but which have not been included in the DEIR’s appendices or otherwise made available for public review. We therefore request that the City provide immediate access to the following documents.

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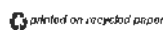
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- Reports for the site visits conducted in 2019 and 2022 and database reviews for presence of special status species supporting the biological resources impacts analysis.
- Reports of the hazardous materials surveys that were conducted for the four existing buildings on the project site in June 2021 by Terracon Consultants, Inc.
- Phase I Environmental Site Assessment (ESA) prepared for the Project by Cornerstone Earth Group on July 25, 2022.
- Preliminary Geotechnical Evaluation prepared by Langan on May 25, 2022, titled "Updated Preliminary Geotechnical Evaluation, 3005 Democracy Way, Santa Clara, California" including the previous reports referred to in the Evaluation:
 - Geotechnical Investigation, Yahoo!, Santa Clara, California, by Treadwell & Rollo, January 9, 2009
 - Preliminary Geotechnical Investigation, Yahoo Parcels, Tasman Drive and Patrick Henry Drive, Santa Clara, California, by Cornerstone Earth Group, May 20, 2016.
- Study completed by Keyser Marston Associates on September 9, 2022, titled "Memorandum: Projected Population and Employment, Mission Point Project."
- "3005 Democracy Way, Existing Site Boundary and Easement Plan" by BKF Engineers on July 25, 2018.
- "Existing Stormwater Plan and Proposed Stormwater Plan, Mission Point" by BKF Engineers on December 16, 2022.
- Study completed by Roux Associates, Inc on August 30, 2022, titled "Additional Subsurface Environmental Investigation, 3000 Patrick Henry Drive, Santa Clara, California."

Our November 20, 2023 request for all documents referenced or relied upon in the DEIR, and this follow-up request, are made pursuant to the California Environmental Quality Act ("CEQA"), which requires that all documents referenced, incorporated by reference, and relied upon in an environmental review document be made available to the public for the entire comment period.¹ Access to all of the documents referenced in the DEIR is necessary to conduct a meaningful review of its analyses, conclusions, and mitigation measures, and to assess the Project's potential environmental impacts. CEQA requires that "all documents

¹ See Pub. Resources Code, § 21092 (b)(1); 14 Cal. Code Reg. § 15087(e)(5).

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referenced” and “incorporated by reference” in the draft environmental impact report be available for review and “readily accessible” during the entire comment period.² The courts have held that the failure to provide even a few pages of a CEQA document for a portion of the review and comment period invalidates the entire CEQA process, and that such a failure must be remedied by permitting additional public comment.³ It is also well-settled that a CEQA document may not rely on hidden studies or documents that are not provided to the public.⁴

I understand that the City has previously taken the position that the CEQA Guidelines only require it to make available documents explicitly “incorporated by reference” in the DEIR, but this interpretation is not well-founded. Though Section 15087 of the CEQA Guidelines was indeed amended to include documents “incorporated by reference” in its description of the required contents of a notice of availability of a draft EIR, Section 21092 of the Act continues to require that notice of preparation of a CEQA document include “the address where copies of the draft environmental impact report or negative declaration, and all documents referenced in the draft environmental impact report or negative declaration, are available for review.”

Additionally, the California Natural Resources Agency’s (“Agency”) November 2018 “Final Statement of Reasons for Regulatory Action” has addressed this issue:

Stakeholders have noted that there is some confusion about the word “referenced” as used in that section and in the CEQA Guidelines. (CEQA Guidelines §§ 15072, 15087.) Some agencies interpret “referenced” to mean every document that is cited in the environmental document, where others interpret it to mean every document that is incorporated by reference into the document pursuant to Section 15150.

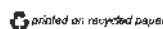
Documents that are “incorporated by reference” provide a portion of the document’s overall analysis, and because the final initial study must reflect the independent judgment of the lead agency, one would expect a copy of the incorporated document to actually be among the lead agency’s files. Other referenced documents may only provide supplementary information, and may

² Pub. Resources Code, § 21092(b)(1).

³ See *Ultramar v. South Coast Air Quality Man. Dist.* (1993) 17 Cal.App.4th 689, 699.

⁴ *Santiago County Water Dist. V. County of Orange* (1981) 118 Cal.App.3d 818, 831 (“Whatever is required to be considered in an EIR must be in that formal report; what any official might have known from other writings or oral presentations cannot supply what is lacking in the report.”).

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be contained in a consultant's files or research libraries. While still valid sources of information, it is less important for such documents to actually be in the lead agency's possession. The Natural Resources Agency, therefore, finds that the latter interpretation to be a more practical interpretation of CEQA.

The City's interpretation of the term "documents incorporated by reference" is inconsistent with the Agency's explanation that documents that provide a portion of the document's overall analysis are documents incorporated by reference. And case law provides that "[w]hatever is required to be considered in an EIR must be in that formal report."⁵ The requested documents include critical studies completed for the Project, such as the Preliminary Geotechnical Evaluation and Phase I ESA, which provide a portion of the document's overall analysis. These analyses are not supplemental – they are required by CEQA.

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For instance, in *Cal. Building Industry Ass'n v. Bay Area Air Quality Mgmt. Dist.* ("*CBIA v. BAAQMD*")⁶, the California Supreme Court held that the disturbance of contaminated soil is a potentially significant impact which requires disclosure and analysis of health and safety impacts in an EIR.⁷ Without a Phase I and II Environmental Site Assessment, the City would be violation of this requirement. Here, the DEIR's Hazards analysis explicitly hinges on the Phase I ESA, stating: "The 2022 Phase I ESA prepared for the Project site provides information regarding known and potential subsurface contamination at the Project site . . . *This information is used as the basis for the analysis of potential impacts related to the accidental release of hazardous materials due to soil and groundwater contamination.*"⁸ Because the Phase I ESA provides a portion of the DEIR's overall hazards analysis, it is incorporated by reference and is required to be made available to the public pursuant to CEQA.

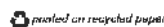
⁵ *Santiago County, supra*, 118 Cal.App.3d at 831.

⁶ (2015) 62 Cal.4th 369.

⁷ *Id.* at 388-90; 14 CCR § 15126.2(a).

⁸ DEIR, pg. 3.11-15 (emphasis added).

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The biological resources site visits and database reviews,⁹ Terracon Consultants, Inc. hazardous materials reports,¹⁰ Keyser Marston Associates study,¹¹ '3005 Democracy Way, Existing Site Boundary and Easement Plan' by BKF Engineers,¹² 'Existing Stormwater Plan and Proposed Stormwater Plan' by BKF Engineers,¹³ Roux Associates, Inc. Subsurface Environmental Investigation study,¹⁴ and Preliminary Geotechnical Evaluation¹⁵ and its incorporated studies¹⁶ are incorporated by reference in the DEIR for the same reason.

In short, the 2018 update to the CEQA Guidelines cannot reasonably be read as allowing a lead agency to withhold access to main components of the environmental analysis. We therefore request immediate access to the referenced documents.

⁹ DEIR, pg. 3.8-1 ("The information in this section is *based on* site visits from May 31 and July 25, 2019, and August 17, 2022, as well as a review of the California Department of Fish and Wildlife (CDFW) California Natural Diversity Database (CNDDDB)¹, U.S. Fish and Wildlife Service (USFWS)² Information for Planning and Consultation (IPaC), and California Native Plant Society (CNPS) Online Inventory of Rare and Endangered Plants (Online Inventory).") (emphasis added)

¹⁰ DEIR, pg. 3.11-17 (relying on the hazardous materials survey reports to conclude that "comprehensive building surveys, including destructive sampling, must be conducted prior to building demolition.")

¹¹ DEIR, pg. 2-24 ["...in order to provide an accurate estimate of the anticipated persons per household, the City commissioned a study from Keyser Marston Associates, which estimated that the persons-per-household average for multifamily units for this Project would be 2.15." This estimate is used in other parts of the analysis, such as the urban decay analysis. See DEIR, pg. 4-7 ("The urban decay analysis assumes an average of 2.15 persons per unit, as estimated by Keyser Marston Associates...")]

¹² DEIR, pg. 3.10-10 & 3.10-24 (relying on the BKF Engineers estimates in calculating the Project's local drainage and estimating operational groundwater impacts).

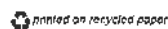
¹³ DEIR, pg. 3.11-21 (relying on BKF's elevation estimate in analyzing aviation hazard impacts from construction).

¹⁴ DEIR, pg. 3.11-25 (relying on the Subsurface Environmental Investigation in analyzing cumulative accidental releases of hazardous materials, stating that "[a] subsurface investigation for this property indicates that the likely source for the soil vapor detections may be the migration of contamination from neighboring properties through storm drains or sewer lines.")

¹⁵ DEIR, pp. 3.9-1–21 (listing the Preliminary Geotechnical Evaluation as a Method for Analysis for the Geology and Soils impact analysis as well as heavily referencing and incorporating findings from the Evaluation throughout the impact analysis).

¹⁶ See DEIR, pg. 3.9-1 & pg. 3.9-6 (noting that the Preliminary Geotechnical Evaluation included a review of two geotechnical investigations that were previously performed for the Project site and that the results of the previous investigations are discussed in the analysis of site topography and subsurface conditions).

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If you have any questions, please email me at aabedifard@adamsbroadwell.com or call me at (650) 589-1660. Thank you for your prompt assistance with this matter.

Sincerely,



Ariana Abedifard

AA:acp

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