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Via Email and Hand Delivery

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Re: **Agenda Item 1: Ardenwood at Paseo Project – 6200 Paseo Padre Parkway (PLN2022-00466)**

Dear Mr. Nguyen and Mr Cleveland:

On behalf of **East Bay Residents for Responsible Development** (“East Bay Residents” or “EBRRD”), we submit these comments on the Agenda,¹ Staff Report,² and CEQA Environmental Consistency Checklist (“CEQA Checklist”)³ prepared for the Ardenwood at Paseo Project (PLN2022-00466) (“Project”) proposed by Gavin Christenson, H&R Ardenwood and Evan Sockalosky, Arc Tec, Inc (collectively the “Applicant”) for the October 15, 2024 Zoning Administrator Public Hearing to consider a Discretionary Design Review and a Modification to the Zoning Standards and to consider an exemption from the requirements of the California Environmental Quality Act (“CEQA”)⁴ per CEQA Guidelines Section 15183.⁵

¹ City of Fremont, Agenda, Zoning Administrator Public Hearing, City of Fremont California, 39550 Liberty Street, 3:00 P.M. (Oct. 15, 2024).

² City of Fremont, Zoning Administrator Permit Staff Report (Oct. 15, 2024) (hereinafter “Staff Report”).

³ City of Fremont, Zoning Administrator Agenda Item 1. Ardenwood at Paseo – Informational Item No. 1 – CEQA Determination (Oct. 15, 2024) (hereinafter “CEQA Checklist”).

⁴ Pub. Res. Code (“PRC”) §§ 21000 et seq.; 14 Cal. Code Regs. (“CCR”).

⁵ 14 CCR § 15183.
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The Project site is located at 6100 Paseo Padre Parkway and 6200 Paseo Padre Parkway in Fremont, California. The Project proposes to develop a total of approximately 450,420 square feet of industrial space in six individual buildings, of which five of them (Buildings 2 through 6) would be new buildings. The existing building (Building 1) would be renovated and incorporated into the proposed site layout with the other buildings onsite. The Project site is zoned P-81-15 (Ardenwood Planned District). Once operational, the Project would generate approximately 4,512 average daily trips. The CEQA Checklist provides that the Project would not include any diesel emergency generators or diesel fire pumps.⁶ Construction activities for the project would occur over 24 to 28 months.⁷ The proposed Project would include the demolition of 77,363 square feet of asphalt and the export of 2,472 cubic yards of soil.⁸ The Project is located approximately 738 feet away from the nearest sensitive receptors, children and staff at Happy Memories Shri's Licensed Daycare and residences across the street. The CEQA Checklist makes no mention of the Daycare located within 1000 feet of the Project.

The Project does not meet the criteria for a streamlining exemption pursuant to CEQA Guidelines Section 15183 (“Community Plan Exemption”). The Zoning Administrator does not have substantial evidence to make the proposed finding that the Project “is exempt from further environmental review pursuant to CEQA Guidelines Section 15183, as the project is consistent with the General Plan for which an Environmental Impact Report (EIR) (SCH#2010082060) was previously prepared and certified” because the Project would result in environmental effects that are peculiar to the Project, were not analyzed at a project-level in the General Plan EIR, and would not be fully mitigated by uniform policies and procedures.

As detailed herein, and in the expert consultant reports attached hereto⁹, the Project was not contemplated in the 2011 General Plan EIR, and has new or more severe significant impacts than previously analyzed in the 2011 General Plan EIR which are peculiar to the Project site, were not analyzed at a project-level, 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 General Plan EIR was certified. For example, air quality consultant SWAPE’s modeling demonstrates that the Project will have significant site-specific health risk impacts from exposure of local residents, workers, and children to toxic diesel particulate matter (“DPM”) emissions which will result in a cancer risk more severe than analyzed in the 2011

⁶ CEQA Checklist, p. 16.

⁷ *Id.*

⁸ *Id.*

⁹ See **Exhibit A**, SWAPE Comments on the Ardenwood Warehouse Project (Oct. 14, 2024) (“SWAPE Comments”).

General Plan EIR and require additional mitigation. Moreover, the record before the Zoning Administrator does not contain substantial evidence demonstrating that the Project will “not be detrimental to the public health or safety [or] unreasonably interfere with the use and enjoyment of adjacent development nor be detrimental to the public health, safety, or welfare” as required by the Municipal Code¹⁰ for approval of the Discretionary Design Review Permit.

As a result, the Zoning Administrator lacks substantial evidence to approve the Project, the CEQA Checklist, or the Discretionary Design Review Permit at this time because the City has not complied with CEQA or the Municipal Code.

East Bay Residents respectfully requests that the Zoning Administrator continue today’s hearing and fulfill its responsibilities under CEQA and the Fremont Municipal Code by withdrawing the CEQA Checklist and preparing a project-level EIR to address the project-specific impacts identified in these comments. We reserve the right to supplement these comments with additional comments, issues, and evidence at later hearings and proceedings related to the Project.¹¹

I. STATEMENT OF INTEREST

East Bay Residents is an unincorporated association of individuals and labor organizations that may be adversely affected by the potential impacts associated with Project development. The association includes 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.

The individual members of EBRRD live, work, and raise their families in the City and in Alameda County. They 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.

¹⁰ Fremont Municipal Code § 18.235.060(c).

¹¹ 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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The organizational members of EBRRD also have an interest in enforcing the City's planning and zoning laws and the State's environmental laws that encourage sustainable development and ensure a safe working environment for its members. Environmentally detrimental projects can jeopardize future jobs by making it more difficult and more expensive for business and industry to expand in the region, and by making it less desirable for businesses to locate and people to live there. Indeed, continued degradation can, and has, caused restrictions on growth that reduce future employment opportunities. Finally, Residents' members are concerned about projects that are built without providing opportunities to improve local recruitment, apprenticeship training, and retention of skilled construction workforces.

II. LEGAL BACKGROUND

CEQA has two basic purposes, neither of which the City has satisfied in this case. 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.¹² The EIR is the "heart" of this requirement,¹³ and has been described as "an environmental 'alarm bell' whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return."¹⁴ To fulfill this purpose, the discussion of impacts in an EIR must be detailed, complete, and "reflect a good faith effort at full disclosure."¹⁵ An adequate EIR must contain facts and analysis, not just an agency's conclusions.¹⁶

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.¹⁷ CEQA imposes an affirmative obligation on agencies to avoid or reduce environmental harm by adopting feasible project alternatives or mitigation measures to address all potentially significant impacts identified in the agency's CEQA analysis.¹⁸ Without an adequate analysis and description of feasible mitigation measures, it would be

¹² Cal. Code Regs., tit. 14, § 15002, subd. (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.

¹³ *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 84.

¹⁴ *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

¹⁵ CEQA Guidelines, § 15151; *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 721-722.

¹⁶ *See Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 568.

¹⁷ CEQA Guidelines, § 15002, subd. (a)(2) and (3); *Berkeley Jets*, 91 Cal.App.4th, at p. 1354; *Laurel Heights Improvement Ass'n v. Regents of the University of Cal.* (1998) 47 Cal.3d 376, 400.

¹⁸ Pub. Resources Code, §§ 21002-21002.1.

impossible for agencies relying upon an EIR or other environmental document to meet this obligation.

Under CEQA, mitigation measures must be fully enforceable through permit conditions, agreements or other legally binding instruments.¹⁹ A CEQA lead agency is precluded from making the required CEQA findings to approve a project unless the record shows that all uncertainties regarding the mitigation of impacts have been resolved. For this reason, an agency may not rely on mitigation measures of uncertain efficacy or feasibility.²⁰ This approach helps “insure the integrity of the process of decision by precluding stubborn problems or serious criticism from being swept under the rug.”²¹

The CEQA Guidelines explain that when an EIR has been for a project, no subsequent EIR shall be prepared for that project unless the lead agency determines, ***on the basis of substantial evidence in the light of the whole record***, one or more of the following:

- (1) Substantial changes are proposed in the project which will require major revisions of the previous EIR due to the involvement of new significant effects or a substantial increase in the severity of previously identified effects;
- (2) Substantial changes occur with respect to the circumstances under which the project is undertaken which will require major revisions of the previous EIR due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects; or
- (3) New information of substantial importance, which was not known and could not have been known with the exercise of reasonable diligence at the time the previous EIR was certified as complete or the negative declaration was adopted, shows any of the following:
 - (A) The project will have one or more significant effects not discussed in the previous EIR or negative declaration;
 - (B) Significant effects previously examined will be substantially more severe than shown in the previous EIR;

¹⁹ CEQA Guidelines, § 15126.4, subd. (a)(2).

²⁰ *Kings County Farm Bureau 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).

²¹ *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 935. 7507-

- (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.²²

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.²³

CEQA Guidelines Section 15183 (“Community Plan Exemption”) provides streamlined review for projects that are consistent with the development density established by an existing zoning, community plan, or general plan policies for which an EIR was certified.²⁴ In those instances, the examination of environmental effects of subsequent buildout projects which were analyzed in the prior EIR may be limited to impacts which:

- (1) Are peculiar to the project or the parcel on which the project would be located;
- (2) Were not analyzed as significant effects in a prior EIR on the zoning action, general plan or community plan with which the project is consistent;
- (3) Are potentially significant off-site impacts and cumulative impacts which were not discussed in the prior EIR prepared for the general plan, community plan or zoning action; or
- (4) Are previously identified significant effects which, as a result of substantial new information which was not known at the time the EIR was certified, are determined to have a more severe adverse impact than discussed in the prior EIR.²⁵

The CEQA Checklist relies on both exemptions.

²² CEQA Guidelines § 15162(a)(1)-(3).

²³ CEQA Guidelines § 15162(b).

²⁴ CEQA Guidelines § 15183(a).

²⁵ CEQA Guidelines § 15183(b).

III. THE CITY LACKS SUBSTANTIAL EVIDENCE TO SUPPORT APPROVAL OF THE PROJECT UNDER A COMMUNITY PLAN EXEMPTION OR ADDENDUM

CEQA Guidelines Section 15183 (Community Plan Exemption) may only be relied on if a Project is consistent with a previously approved land use plan for which an EIR was prepared, and where the project does not have any 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.²⁶ Similarly, CEQA Guidelines Section 15162 (Addendum) prohibits an agency from foregoing preparation of a subsequent or supplemental EIR if there are substantial changes to a project, changed circumstances, or new information about project impacts that are more severe than previously analyzed.²⁷

The City's reliance on a CEQA Checklist to exempt the Project from further CEQA review under CEQA Guidelines 15183 and 15162 is improper and not supported by substantial evidence because the Project has significant project-specific impacts that are peculiar to the Project, were not analyzed in the General Plan EIR, were not known and could not have been known when the 2011 General Plan EIR was certified, and are more severe than previously analyzed. These impacts are not fully mitigated by the General Plan EIR mitigation measures or the City's Standard Development Requirements ("SDRs") and therefore require disclosure and additional mitigation in a project-level EIR.

A. The City Cannot Rely on a Community Plan Exemption or Addendum to Approve the Project Because the Project May Result in Significant Health Risk Impacts that are Peculiar to the Project and More Severe than Previously Analyzed

The CEQA Checklist states that the risk associated with project construction at the maximally exposed individual (MEI) would be 12.44 in one million, which would exceed the BAAQMD cancer risk of 10 in one million resulting in an admittedly significant impact which was not disclosed in the General Plan EIR.²⁸ The CEQA Checklist attempts to dismiss the impact by stating that "all health risks would be reduced with implementation of FCM Section 18.218.050(a)(2), and the reduced cancer risk at the MEI would be 2.17 in one million, which would not

²⁶ 14 CCR § 15183(a)-(c).

²⁷ 14 CCR § 15162.

²⁸ CEQA Checklist, p. 24.
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exceed the BAAQMD cancer risk of 10 in one million. Therefore, with implementation of the supplemental construction measures identified in FMC Section 18.218.050(a), construction of the proposed project would not exceed BAAQMD thresholds and would not expose nearby sensitive receptors to substantial pollutant concentrations.”²⁹ However, this statement is not supported by substantial evidence because the City did not quantify the health risk from all Project emissions, including DPM exposure during Project operation, and SWAPE determined that reliance on FMC mitigation does not support the conclusion that the health risk impacts would be reduced below the level of significance.³⁰ In particular, SWAPE found that construction emissions may be more severe than analyzed in the 2011 General Plan EIR because the 2011 General Plan EIR did not contemplate the Project within 1000 feet of a daycare facility.

SWAPE conducted a quantified health risk analysis (“HRA”) of the Project’s toxic air contaminant (“TAC”) emissions, including DPM, and identified health risk impacts which are more severe than analyzed in the 2011 General Plan EIR and in the CEQA Checklist. **SWAPE identified the Child (2-6 years) excess cancer risk factor, over the course of the Project’s operation as 14.5 in one million.**³¹ **The total excess cancer risk for all populations, including 3rd Trimester pregnant individuals, Infants (0-2), Child (2-16), Adults (16-30) over the lifetime of the Project is 54.3 in one million excess cancer risk.**³² The cancer risk associated with development of the Project so close to nearby sensitive receptors ***results in a significant cancer risk exceeding BAAQMD thresholds of 10 in one million.***³³

The impact of Project operation on sensitive receptors, including those at the daycare were not known at the time the 2011 General Plan EIR was certified and are determined to have more severe adverse impacts than discussed in the prior EIR. The 2011 General Plan EIR makes no mention of analysis of impacts of development under the General Plan on daycares within the Project vicinity. Therefore, SWAPE’s health risk calculations constitute significant new information demonstrating a health risk impact which is more severe than analyzed in the 2011 General Plan EIR. Reliance on a Community Plan Exemption or Addendum is therefore misplaced, and the Zoning Administrator lacks substantial evidence to approve the Project, absent preparation of a project-level EIR.

²⁹ *Id.*

³⁰ SWAPE Comments, p. 2.

³¹ SWAPE Comments, p. 7.

³² *Id.*

³³ Bay Area Air Quality Management District 2022 CEQA Guidelines, Thresholds of Significance, p. 3-4.
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The CEQA Checklist also fails to support a CEQA exemption because it does not contain an HRA to adequately analyze impacts to nearby sensitive receptors within 1000 feet of the Project site. CEQA requires analysis of human health impacts. CEQA Guidelines Section 15065(a)(4) provides that the City is required to find a project will have a significant impact on the environment and prepare an EIR if the environmental effects of a project will cause a substantial adverse effect on human beings.³⁴ The Supreme Court has also explained that CEQA requires the lead agency to disclose the health consequences that result from exposure to a project's air emissions.³⁵ Courts have held that an environmental review document must disclose a project's potential health risks to a degree of specificity that would allow the public to make the correlation between the project's impacts and adverse effects to human health.³⁶

The Bay Area Air Quality Management District's ("BAAQMD") 2022 CEQA Guidelines specifically recommends that a quantified HRA be prepared for projects within 1000 feet of a school:

For proposed projects within 1000 feet of a school, the Air District recommends that a student analysis is included in the Health Risk Assessment (see Appendix E, Recommended Methods for Screening and Modeling Local Risks and Hazards). Additionally, for any project located within one-quarter mile of a school that involves the construction or alteration of a facility that might reasonably be anticipated to emit hazardous air emissions, or the handling of an extremely hazardous substance or mixture containing extremely hazardous substances in a quantity equal to or greater than the state threshold quantity specified in Health and Safety Code Section 25532(j), and that may impose a health or safety hazard to persons who would attend or would be employed at the school, the lead agency must consult with the affected school district or districts regarding the potential impact of the project on the school and notify the affected school district(s) of the project in writing, not less than 30 days before approval or certification of the negative declaration or EIR per State CEQA Guidelines Section 15186(b)(1)(2).³⁷

The Project is within 738 feet of the Happy Memories Shri's Licensed Daycare, an early learning school and daycare. An HRA with a student analysis

³⁴ PRC § 21083(b)(3), (d).

³⁵ *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 516, 523.

³⁶ *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184.

³⁷ Bay Area Air Quality Management District, 2022 CEQA Guidelines, Section 5 Project-Level Air Quality Impacts, p. 5-1.
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should therefore be prepared to comply with CEQA and to accurately disclose and mitigate the Project's significant health risk impacts.

1. Health Risk is Not Fully Mitigated by Uniformly Applied Development Policies, Standards, and Mitigation

SWAPE found that the SDRs under the Fremont Municipal Code and the General Plan EIR Mitigation Measures do not sufficiently mitigate health risk impacts to less than significant levels.³⁸ SWAPE found that additional mitigation is required to reduce the Project's significant health risk impacts. In particular, SWAPE recommends the following:

Require projects to use Tier 4 Final equipment or better for all engines above 50 horsepower (hp). In the event that construction equipment cannot meet to Tier 4 Final engine certification, the Project representative or contractor must demonstrate through future study with written findings supported by substantial evidence that is approved by SCAG before using other technologies/strategies. Alternative applicable strategies may include, but would not be limited to, construction equipment with Tier 4 Interim or reduction in the number and/or horsepower rating of construction equipment and/or limiting the number of construction equipment operating at the same time. All equipment must be tuned and maintained in compliance with the manufacturer's recommended maintenance schedule and specifications. All maintenance records for each equipment and their contractor(s) should make available for inspection and remain on-site for a period of at least two years from completion of construction, unless the individual project can demonstrate that Tier 4 engines would not be required to mitigate emissions below significance thresholds. Project sponsors should also consider including ZE/ZNE technologies where appropriate and feasible.

B. The City Cannot Rely on a Community Plan Exemption or Addendum to Approve the Project Because the Project May Result in Significant Air Quality Impacts that Are More Severe than Previously Analyzed and Require Additional Mitigation

The CEQA Checklist states that "During construction, short-term degradation of air quality may occur due to the release of particulate emissions generated by demolition, grading, paving, building, and other activities. Emissions from construction equipment are also anticipated and would include CO, NOx,

³⁸ SWAPE Comments, p. 2.
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ROG, directly emitted particulate matter (PM_{2.5} and PM₁₀), and TACs such as diesel exhaust particulate matter.”³⁹ The CEQA Checklist incorrectly concludes that construction emissions associated with the Project would not exceed the BAAQMD’s thresholds for ROG, NOX, exhaust PM₁₀, and exhaust PM_{2.5} emissions.”⁴⁰ This statement is not supported by substantial evidence. SWAPE calculated that Project construction DPM emissions may exceed BAAQMD thresholds and result in significant environmental impacts and public health impacts.⁴¹ SWAPE found that construction emissions would therefore result in significant, unmitigated impacts on the nearby daycare, and that, when combined with operational emissions, result in significant unmitigated impacts that are not fully reduced by reliance on the SDR’s or General Plan mitigation measures.

The General Plan EIR concluded that air quality impacts would be significant and unavoidable, even with implementation of General Plan MM AIR-3.⁴² The City therefore has a duty to consider and implement additional feasible mitigation to further reduce significant air quality impacts from the Project.⁴³ Moreover, SWAPE concludes that the combination of MM AIR-3 and Fremont Municipal Code Section 18.218.050 does not fully mitigate the Project’s air quality and health risk impacts. The City therefore cannot rely on CEQA exemptions and must prepare a project-level EIR to disclose and further mitigate these impacts.

The CEQA Checklist provides that “FMC Section 18.218.050(a) (which supersedes General Plan EIR Mitigation Measure AIR-3) would require the implementation of the BAAQMD’s Basic Construction Mitigation Measures to incorporate best management practices (BMPs) in order to ensure construction fugitive dust impacts would be at a less-than-significant level. Therefore, additional project-specific mitigation is not required. As such, construction of the proposed project would not result in a cumulatively considerable net increase of any criteria pollutant for which the project region is in nonattainment under an applicable federal or State AAQS.”⁴⁴

However, the City’s exclusive reliance on Fremont Municipal Code Section 18.218.050(a) does not result in fully mitigated impacts. The City must therefore implement additional measures from General Plan EIR Mitigation Measure

³⁹ CEQA Checklist, p. 22.

⁴⁰ *Id.*

⁴¹ SWAPE Comments, p. 3.

⁴² CEQA Checklist, p. 16.

⁴³ *Covington v. Great Basin Unified Air Pollution Control Dist.* (2019) 43 Cal.App.5th 867, 883.

⁴⁴ *Id.*

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Mitigation AIR-3 as part of the Project's Conditions of Approval, and must consider additional feasible mitigation.

Mitigation Measure AIR-3 requires applicants to "Implement BAAQMD-Recommended Measures to Control Particulate Matter Emissions during Construction. Measures to reduce diesel particulate matter and PM10 from construction are recommended to ensure that short-term health impacts to nearby sensitive receptors are avoided. Dust (PM10) Control Measures:

- Water all active construction areas at least twice daily and more often during windy periods. Active areas adjacent to residences should be kept damp at all times.
- Cover all hauling trucks or maintain at least two feet of freeboard.
- Pave, apply water at least twice daily, or apply (non-toxic) soil stabilizers on all unpaved access roads, parking areas, and staging areas.
- Sweep daily (with water sweepers) all paved access roads, parking areas, and staging areas and sweep streets daily (with water sweepers) if visible soil material is deposited onto the adjacent roads.
- Hydroseed or apply (non-toxic) soil stabilizers to inactive construction areas (i.e., previously-graded areas that are inactive for 10 days or more).
- Enclose, cover, water twice daily, or apply (non-toxic) soil binders to exposed stockpiles.
- Limit traffic speeds on any unpaved roads to 15 mph.
- Replant vegetation in disturbed areas as quickly as possible.
- Suspend construction activities that cause visible dust plumes to extend beyond the construction site.
- Post a publicly-visible sign(s) with the telephone number and person to contact at the Lead Agency regarding dust complaints. This person shall respond and take corrective action within 48 hours. The Air District's phone number shall also be visible to ensure compliance with applicable regulations.

Additional Measures to Reduce Diesel Particulate Matter and PM2.5 and other construction emissions:

- The developer or contractor shall provide a plan for approval by the City or BAAQMD demonstrating that the heavy-duty (>50 horsepower) off-road vehicles to be used in the construction project, including owned, leased and subcontractor vehicles, will achieve a project wide fleet average 20 percent NOx reduction and 45 percent particulate

reduction compared to the most recent CARB fleet average for the year 2011 .

- The contractor shall install temporary electrical service whenever possible to avoid the need for independently powered equipment (e.g. compressors).
- Properly tune and maintain equipment for low emissions.⁴⁵

Mitigation Measure AIR-3 adds additional community public health and air quality protections above and beyond what Fremont Municipal Code Section 18.218.050(a). Fremont Municipal Code Section 18.218.050(a) requires only the following:

- (A) All exposed surfaces (e.g., parking areas, staging areas, soil piles, graded areas, and unpaved access roads) shall be watered two times daily.
- (B) All haul trucks transporting soil, sand, or other loose material off site shall be covered.
- (C) All visible mud or dirt track-out onto adjacent public roads shall be removed using wet power vacuum street sweepers at least once per day. The use of dry power sweeping is prohibited.
- (D) All vehicle speeds on unpaved roads shall be limited to 15 miles per hour.
- (E) All roadways, driveways, and sidewalks to be paved shall be completed as soon as possible. Building pads shall be laid as soon as possible after grading, unless seeding or soil binders are used.
- (F) Idling times shall be minimized either by shutting equipment off when not in use or by reducing the maximum idling time to 5 minutes (as required by California airborne toxics control measure 22 City of Fremont Title 13, Section 2485 of the California Code of Regulations). Clear signage shall be provided for construction workers at all access points.
- (G) All construction equipment shall be maintained and properly tuned in accordance with manufacturer's specifications. All equipment shall be checked by a certified mechanic and determined to be running in proper condition prior to operation.
- (H) A publicly visible sign shall be posted with the telephone number and person to contact regarding dust complaints. This person shall respond and take corrective action within 48 hours. BAAQMD's phone number also shall be visible to ensure compliance with applicable regulations.

⁴⁵ GP MM AIR-3 also contains a signage and 5-minute idling restriction which would not apply here since Municipal Code Section 18.218.050(a)(2)(I) replaced this less stringent measure with a 2-minute idling requirement.

- (I) Idling time of diesel-powered construction equipment shall be limited to two minutes.
- (J) The project shall develop a plan demonstrating that the off-road equipment (more than 50 horsepower) to be used in the construction project (i.e., owned, leased, and subcontractor vehicles) would achieve a project-wide fleet-average 20 percent nitrogen oxide (NO_x) reduction and 45 percent particulate matter (PM) reduction compared to the most recent Air Resources Board fleet average. Acceptable options for reducing emissions include the use of late model engines, low-emission diesel products, alternative fuels, engine retrofit technology, after-treatment products, add-on devices such as particulate filters, and/or other options as such become available.
- (K) Low volatile organic compound (i.e., reactive organic gas) coatings beyond the local requirements (i.e., BAAQMD Regulation 8, Rule 3: Architectural Coatings) shall be used.
- (L) All construction equipment, diesel trucks, and generators shall be equipped with best available control technology for emission reductions of NO_x and PM.
- (M) All contractors shall use equipment that meets the Air Resources Board's most recent certification standard for off-road heavy-duty diesel engines.⁴⁶

Beyond these measures, the City must identify and implement additional mitigation to reduce the Project's significant air quality and health risk impacts to the greatest extent feasible.

EBRRD recommends the Zoning Administrator revise the Conditions of Approval to add Mitigation Measure AIR-3 to adequately address the Project's potentially significant construction air quality impacts.

C. The City Cannot Rely on a Community Plan Exemption or Addendum to Approve the Project Because the Project May Result in Significant Noise Impacts that are Peculiar to the Project and More Severe than Previously Analyzed

An EIR must be prepared because the Project results in potentially significant noise impacts, precluding reliance on a CEQA exemption. The CEQA Checklist provides that noise and vibration impacts from Project construction will

⁴⁶ Fremont Municipal Code § 18.218.050(a).
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be less than significant.⁴⁷ But, the General Plan provides that “[d]ue to the density of development anticipated in Fremont, notably in the Downtown of City Center and PDAs, some of these activities may take place near sensitive areas. In these cases, the mitigation measures listed above may not be sufficient to reduce groundborne vibrations below to a level considered less than significant. Therefore, this impact would be significant and unavoidable.”⁴⁸

Given the General Plan’s determination that noise and vibration impacts associated with development under the General Plan will be significant and unavoidable,⁴⁹ the City must disclose this as a significant Project impact in a project-level EIR and must implement all feasible mitigation to reduce the impact to the greatest extent feasible.⁵⁰⁵¹ This will necessarily require implementation of General Plan Mitigation Measure NOI-1 through NOI-5 to reduce the Project’s potentially significant construction noise and vibration impacts, as well as consideration of additional mitigation to reduce noise and vibration impacts to the greatest extent feasible.

General Plan Mitigation Measure Impact NOI-2 provides that “[m]ethods available to mitigate project-generated noise level increases would need to be studied on a case-by-case basis. Noise reduction methods could include the following: • New or larger noise barriers or other noise reduction techniques could be constructed to protect sensitive outdoor use areas and existing residential land uses where reasonable and feasible. Final design of such barriers should be completed during project level review.”⁵² This demonstrates that noise impacts under the General Plan EIR were not analyzed on a project level. Such analysis must be included in an EIR before the Project can lawfully be approved.

A. The City Cannot Rely on A CEQA Exemption to Approve the Project Because the Project Has Significant Cumulative GHG Impacts

An EIR must be prepared and an exemption is improper, where, as here, the Project and successive projects of the same type in the same place will result in

⁴⁷ CEQA Checklist, p. 67.

⁴⁸ Fremont Draft General Plan Update EIR State Clearinghouse Number: 2010082060 (July 2011), p. 2-26.

⁴⁹ *Id.*

⁵⁰ *Covington* 43 Cal.App.5th at 883.

⁵¹ The City’s failure to implement Mitigation Measures NOI-1 through NOI-5 also results in nonconformance with the General Plan.

⁵² Fremont Draft General Plan Update EIR State Clearinghouse Number: 2010082060 (July 2011), p. 6-19.
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cumulative impacts.⁵³ SWAPE concludes that the Project may result in significant greenhouse gas (“GHG”) impacts and that the CEQA Checklist does not provide substantial evidence that the Project is consistent with the Climate Action Plan.⁵⁴ SWAPE confirmed that the Project Design Features would not adequately reduce the Project’s greenhouse gas emissions impacts to less than significant levels.⁵⁵ Project GHG impacts may therefore be more severe than analyzed in the 2011 General Plan EIR and require analysis and mitigation in an EIR before the Project can lawfully be approved.

The 2011 General Plan EIR identifies potentially significant environmental impacts in the topics of Transportation and Circulation, Cultural and Archaeological Resources, Air Quality, Agricultural Resources, Noise, Utilities and Service Systems, Hydrology and Water Quality, and Global Climate Change. Mitigation were identified to reduce all potentially significant effects to a less-than-significant level, except for the following:

- Unacceptable levels of service at specified intersections and on specified roadway segments
- Air quality emissions and Clean Air Plan consistency
- Noise increases related to traffic, and noise conflicts of incompatible uses and construction noise
- Potential demolition of cultural and historic resources
- Loss or conversion of prime or unique farmland to urban uses, and
- Cumulative greenhouse gas emissions⁵⁶

As demonstrated in SWAPE’s comments, absent additional mitigation, the Project will contribute to and exacerbate impacts from cumulative greenhouse gas emissions. The 2011 General Plan concluded that development under the General Plan will result in potentially significant, unmitigated cumulative greenhouse gas emissions, for which no mitigation would fully reduce the significant impacts.⁵⁷ Here, the Project’s increased contribution to the General Plan’s significant exceedances of cumulative greenhouse gas emissions is a project-level impact that is peculiar to the Project site, was not analyzed in the General Plan EIR, and will result in more severe GHG impacts than previously contemplated. These project-specific impacts must be analyzed in a project-level EIR.

⁵³ 14 CCR § 15300.2.

⁵⁴ SWAPE Comments, p. 8.

⁵⁵ *Id.*

⁵⁶ Fremont, Resolution 2011-68 – CEQA Findings, Statement of Overriding Considerations & Mitigation Monitoring and Reporting Program Adoption, (Dec. 2011).

⁵⁷ *Id.* at 13.

IV. 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.⁵⁸

As detailed herein, and in the expert consultant reports attached, the Project will result in a detriment to the public health and safety, due to the Project's significant, unmitigated health risk and cancer risk impacts to nearby sensitive receptors including residences and a daycare within 738 feet of the Project site. The Zoning Administrator cannot make the necessary findings to approve the Project given the Project's significant detriment to the public health and safety and welfare.

Further, the Project is zoned P-81-15 and P-81-15B within the Ardenwood Planned District. But the CEQA Checklist includes no analysis of the Project's conformity with the Ardenwood Planned District zoning requirements. The CEQA Checklist does not provide clarification whether the Project is required to conform with the Ardenwood Technology Park Planned District Rezoning Environmental Impact Report (SCH No. 2015052052) nor the Ardenwood Technology Park Planned District Amendment Environmental Impact Report (SCH No. 2015052052). The Zoning Administrator must determine the Project substantially complies with these zoning requirements and community plans before the Project can lawfully be approved.

V. CONCLUSION

⁵⁸ Fremont Municipal Code § 18.235.060 (emphasis added).
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The Zoning Administrator lacks substantial evidence to rely on a CEQA exemption for Project approval. The Project results in potentially significant impacts which are peculiar to the Project and not fully mitigated by mitigation measures under the General Plan EIR or FMC SDR's. The Project cannot be approved until the City complies with CEQA and prepares an Initial Study and an EIR for the Project.

Sincerely,



Kelilah D. Federman

:kdf